

PETITION

**A PETITION TO THE FAUQUIER COUNTY BOARD OF SUPERVISORS,
PLANNING COMMISSION, DIRECTOR OF COMMUNITY DEVELOPMENT, AND
ZONING ADMINISTRATOR**

TO VACATE ILLEGAL SUBDIVISIONS

AND

**DENY INFRASTRUCTURE PLANS,
WAIVER APPLICATIONS, OR BOUNDARY LINE ADJUSTMENTS**

September 15, 2016

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I. INTRODUCTION

This petition is filed on behalf of property owners in the Apple Manor Subdivision in Fauquier County and other concerned citizens (the “Petitioners”) who have signed a petition urging the Board of Supervisors, Zoning Administrator, and Director of Community Development to:

- (i) deny any applications by ZAND 78 LLC and DEMAVAND 9 LLC for infrastructure plans, waivers of County ordinance requirements, or boundary line adjustments with respect to eight lots that were unlawfully created in the Apple Manor Subdivision on the Goose Creek (Brushy) Mountains, and (ii) vacate these unlawfully created lots from the land records.

The Virginia Supreme Court on July 31, 2015 ruled that the eight lots were unlawfully created by Mehrmah Payandeh in 2007 in violation of the Fauquier County Subdivision Ordinance and the Apple Manor Restrictive Covenants (“Covenants”). The unlawful lots currently are owned by ZAND 78 LLC and DEMAVAND 9 LLC (the “LLCs”) which are limited liability companies created by Mehrmah Payandeh and now under the control of a New York company, Payanco LLC, engaged in the business of owning and developing real estate through limited liability companies.

The Petitioners are interested persons by virtue of being property owners in the Apple Manor Subdivision whose property interests have been injured by the unlawful Payandeh lots and who will be further harmed if these unlawful subdivisions are not vacated. The Petitioners also include taxpaying citizens of Fauquier County who seek to ensure that the County’s ordinances are enforced in this case and to ensure that the County’s natural resources are preserved and its rural roads remain safe and accessible.

Development of the unlawfully created lots would cause the permanent loss of some of the County’s most valuable environmental resources. The illegal lots total more than 450 acres and are located in the Goose Creek (also called Brushy) Mountains west of route 17 north of Delaplane. The development of these lots would result in clearing and destruction of hundreds of mature trees and construction of houses and other buildings on the mountains.

The illegal lots have no direct access to any public road. Use of existing roads in the Apple Manor Subdivision to access the illegal lots would impair the safety and use of those roads by the property owners who own the roads and would impose an undue maintenance burden not fairly borne by the Payandeh lots. The entrance to the public street—Leeds Manor Road (Rte. 688)—does not meet VDOT or County standards and is inadequate to accommodate the additional daily traffic that would be generated. Construction of any type street to safely access the Payandeh lots would require major disturbance of environmentally sensitive areas and adversely affect neighboring properties. The amount of cutting and filling required to create functional access streets for the Payandeh lots would require hundreds of trips by trucks and heavy construction equipment that would destroy the existing roads used by existing properties.

The subject property is located in the County's sensitive rural conservation district and is under a conservation easement by which significant public tax benefits were given in exchange for protecting the property for posterity. The County should not weaken its commitment to the preservation of its unique environmental assets or allow its ordinances to be undermined.

The Board of Supervisors has authority to vacate the unlawful lots pursuant to Virginia Code § 15.2-2272 and has procedures for vacating lots.

II. BACKGROUND

The eight unlawful Payandeh lots were approved by the County's subdivision agent in 2007, notwithstanding Payandeh's failure to meet the ordinance requirements. Among other violations, Payandeh failed to meet the requirements governing private streets.¹

The ordinance requires that private streets connect directly to a publicly maintained street, among other requirements.² The Payandeh lots are accessed by streets that do not connect directly to a publicly maintained street. In her three initial subdivision applications in 2006, Payandeh requested a waiver to enable her proposed lots to access the public street indirectly by means of a private street in excess of 10,000 feet long. The Planning Commission on June 29, 2006, voted unanimously to recommend denial of such waiver request based on its findings that:

“the proposed access streets connect to a private street (Apple Manor Road) rather than a public road;”

“the length of the streets that are proposed to serve these lots is in excess of 10,000 feet;”

“the use of these existing streets to serve an additional eight (8) homes will be of significant impact to property owners who use these streets and would afford inadequate access for emergency vehicles and owners of the proposed lots;” and

“the denial of this request will not place an unreasonable restriction on the use of the property.”

Anticipating that the Board of Supervisors would deny her waiver request, Payandeh proposed a text amendment to change the criteria for waivers. The Planning Commission on January 25, 2007, voted unanimously to recommend denial of the Payandeh text amendment. Nevertheless, the Board of Supervisors adopted the text amendment, and then approved a waiver allowing Payandeh to have a private street in excess of 10,000 feet that does not connect to a public street, despite the Planning Commission's unanimous recommendation of denial.

¹ Payandeh also failed to establish a homeowners association, as required by the ordinance, and failed to comply with the final plat requirements. She also failed to obtain VDOT approval of the highway entrance used by her lots, as required by the ordinance.

² This requirement avoids overburdening existing streets, ensures safe access for existing lot owners and emergency vehicles, and prevents labyrinthine street networks from developing.

Payandeh also needed a waiver of the ordinance provision requiring that private streets in large lot subdivisions meet the standards for Type I or II streets. She requested a waiver to allow access to her lots using Type III streets, which have no standards. The Board of Supervisors did not grant this waiver. However, Payandeh asked County staff to approve the waiver, which staff did, even though there was no authority for such a waiver. Based on the staff waiver, the County subdivision agent approved the Payandeh resubdivisions, thereby allowing Payandeh to unlawfully create eight lots out of three lots.

Melanie L. Fein, a property owner in the Apple Manor Subdivision, filed a lawsuit seeking to vacate the Payandeh subdivisions. She challenged the subdivisions as unlawful under the Apple Manor Covenants, which prohibited any resubdivision of the Payandeh lots except in compliance with the provisions of the 1997 Fauquier County Subdivision Ordinance.

The Virginia Supreme Court on July 31, 2015 ruled that the Payandeh lots were created in violation of the Fauquier County ordinances and the Apple Manor Covenants. The Court ruled that the ordinance language requires compliance with the requirements for Type I or II private streets and that “Type III roads do not fulfill the requirements of the FCSO.” The Supreme Court remanded the case to Judge Parker to enjoin the violation.

On February 1, 2016, Judge Parker enjoined the Payandeh LLCs from treating the eight unlawfully created lots as a lawful subdivision and on August 18, 2016 issued the following Decree under which the LLCs will be required to vacate the lots resulting from the unlawful subdivisions if certain conditions are not met:

The injunction imposed by the Court’s February 1, 2016 Order remains in effect, and the lots resulting from the unlawful re-subdivision, to wit: Lots 7R-1A, 7R-1B, 7R-1C, 8A, 8B, 8C, 9R-1A and 9R-1B, **shall be promptly vacated** by Defendants, unless Defendants by December 9, 2016 or such date as the court sets, present County-approved, recordable plats and plans necessary to construct the Type I or Type II street as proposed in the June 9, 2016 plats and plans and otherwise comply with the ordinance requirements as incorporated into the covenants for streets in a proposed subdivision as required by the Supreme Court’s Order dated July 31, 2015....

The decree enumerates, without limitation, the following requirements:

- i. The Type I or II private streets must connect directly to a state-maintained street and meet the Type I or II requirements.
- ii. The private streets shall be limited to those streets which are not required or designed to provide access to adjacent properties or the remainder of the tract being developed, or other streets.
- iii. No private street shall traverse a lot except along the boundaries of such lot or except where the portions of the lot on either side of the new street satisfy the minimum requirements of the ordinance for the creation of lots.

iv. The currently vacated portion of Apple Manor Road shall be properly rededicated as part of Apple Manor Road and meet the appropriate street requirements.

v. Orchard Hill Lane and the portions of Audubon Trail that border lots 9R-1A and 9R-1B must comply with the Fauquier County subdivision ordinance as incorporated into the Covenants.

The LLCs' have admitted that they cannot comply with the ordinance without a waiver of the ordinance requirements. However, waivers of the ordinance do not constitute compliance with the ordinance. The subdivision ordinance requires, in the case of a large lot subdivision such as here, that the standards for a Type I or II street be "met"—not waived. As the Virginia Supreme Court ruled in its July 31, 2015 Order in *Fein v. Payandeh*, "[w]hen a statute or ordinance is unambiguous, courts will interpret it to mean what it says.... A legislative body is presumed to choose the words it uses in an enactment with care." The Court ruled that "Type III roads do not fulfill the requirements of the FCSO" and that "By incorporating FCZO Article 7-303.1 into FCSO § 2-39(3)(C)(3) by reference, the FCSO essentially is re-imposing the Type I and Type II road requirements upon large lot subdivisions."

Moreover, the Payandeh LLCs not only are requesting waivers of the ordinance requirements but are seeking approval for boundary line adjustments for seven of the eight Payandeh lots. The County cannot approve boundary line adjustments for lots that the Supreme Court has declared were unlawfully created and which, by judicial decree, the LLCs are prohibited from treating as a lawful subdivision.

III. THE UNLAWFUL SUBDIVISIONS MUST BE TREATED AS VOID

A. The Illegal Subdivisions are Void Ab Initio

The Virginia Supreme Court by Order dated July 31, 2015 ruled that Payandeh was not entitled to have Type III streets and that the Payandeh subdivisions therefore were unlawfully subdivided in violation of the subdivision ordinance:

Type III roads do not fulfill the requirements of the FCSO.... The subdivision agent cannot simply decide that Payandeh need not comply with a requirement imposed by the FCSO... By incorporating FCZO Article 7-303.1 into FCSO § 2-39(3)(C)(3) by reference, the FCSO essentially is re-imposing the Type I and Type II road requirements upon large lot subdivisions.... Thus, Payandeh has failed to satisfy FCSO § 2-39(3)(C)(3)....

Longstanding Supreme Court precedents hold that permits issued by County officials without proper authority are null and void. In *Hurt v. Caldwell*, 222 Va. 91 (1981), the Supreme Court ruled that an official "was without authority to issue a building permit... unless and until the County Code provisions had been met. Accordingly, the permit that he did issue was void and of no effect... and was, in effect, a nullity." In *Segaloff v. City of Newport News*, 209 Va. 259, 163 S.E.2d 135 (1968), the Court ruled, "If a building permit is issued in violation of law... [i]ts issuance by such a municipal officer is unauthorized and void."

Thus, the approval permit for the Payandeh subdivisions issued by County officials in 2007, based on the unauthorized waiver, was a nullity and void ab initio. The Payandeh subdivisions do not lawfully exist as far as the County is concerned under longstanding Supreme Court rulings. The County lacks authority to grant waivers or boundary line adjustments for subdivisions that do not legally exist.

B. The Illegal Subdivisions are Ipso Facto Void

Moreover, the County's approval of the unlawful Payandeh subdivisions in 2007 was ipso facto void under the County's own Zoning Ordinance. The Zoning Ordinance specifically limits the authority of County officials to issue waivers and variances and provides that:

Neither the Zoning Administrator, BZA nor the Board shall have the authority to vary, modify or waive any of the regulations or standards prescribed for any use or purpose for which an administrative, special permit or special exception is required, and any such modification, variance or waiver shall **ipso facto nullify** the action of the BZA or Board in issuing, respectively, any special permit or special exception hereunder.³

By granting an unauthorized waiver to Mehrmah Payandeh and approving the Payandeh subdivisions on that basis, County officials, acting as agents of the Board varied, modified, and waived the standards prescribed by the ordinance. Approval of the Payandeh subdivisions also violated section 10 of the Subdivision Ordinance which prohibits the subdivision agent from approving final plats until the developer has complied with all ordinance requirements.⁴ The approval of the subdivisions thus was ipso facto a nullity.

The County cannot approve any infrastructure plans or applications for waivers or boundary line adjustments for the illegal Payandeh lots because the 2007 approval of the lots was void ab initio and ipso facto void, and the lots do not legally exist. The County should not expend County resources to process any such plans or applications.

C. The Illegal Subdivisions Violate the Virginia Code

The Payandeh subdivisions also violate Virginia Code § 15.2-2254 which provides that "No person shall subdivide land without...fully complying with the provisions of this article and of the subdivision ordinance" and "No person shall sell or transfer any land of a subdivision, before a plat has been duly approved and recorded as provided herein."

D. Approval of the Applications Would Violate the Dillon Rule

Any action by the County to approve infrastructure plans, waivers or boundary line adjustments for the Payandeh lots would violate the Dillon Rule. Because the lots were not

³ Zoning Ordinance Section 5-003.1.

⁴ In addition to not meeting the ordinance requirements for streets, Judge Parker found that Payandeh had violated the requirement that a homeowners association be established to maintain her streets.

lawfully created, were void ab initio, and are ipso facto void, the County lacks authority to even process the applications.

The Dillon Rule requires an analysis of whether a local governing body is enabled under any State law to take a particular act. If the General Assembly has not authorized a particular act, it is void. *Sinclair v. New Cingular Wireless*, 283 Va. 198, 204, 720 S.E.2d 543, 546 (2012). “If there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body.” *Board of Supervisors v Reed’s Landing Corp.*, 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995); see also *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010).

The Dillon rule requires a determination “in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end.” *Commonwealth v. County Board of Arlington County*, 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

There is no power for a county to approve infrastructure plans, boundary line adjustments or waivers with respect to lots that have been unlawfully created and are void.

Moreover, a county has no authority to waive ordinance provisions without authority granted by the General Assembly and, as discussed below, Fauquier County lacks such authority with respect to the Payandeh subdivisions.

E. The Board Cannot Waive a Provision of the Subdivision Ordinance

The Payandeh LLCs in effect are asking the Board of Supervisors to waive the provision in the Subdivision Ordinance that the requirements for a Type I or II private street be “met.” However, the Virginia Supreme Court has ruled that a board of supervisors “cannot waive a provision of a subdivision ordinance.” *Board of Supervisors of Culpeper County v. Greengael, LLC*, 271 Va. 266, 626 S.E.2d 357 (2006) (“The Board cannot waive a provision of a subdivision ordinance. Code § 15.2-2254 provides that a developer cannot subdivide land ‘without fully complying with the provisions’ of the subdivision ordinance. See *Parker v. County of Madison*, 244 Va. 39, 42, 418 S.E.2d 855, 856 (1992).”) And in *Fein v. Payandeh*, the Virginia Supreme Court ruled:

“The subdivision agent cannot simply decide that Payandeh need not comply with a requirement imposed by the FCSO. The General Assembly does not even permit a governing body to do so.” Order of July 31, 2015 (emphasis added)

In a footnote, the Court added, “The General Assembly has permitted subdivision ordinances to provide for variances or special exceptions from the general requirements imposed by the FCSO ‘in cases of unusual situations or when strict adherence to the general regulations would result in substantial injustice or hardship.’ Code § 15.2-2242(1).” Under Fauquier County’s subdivision ordinance, however, only the Planning Commission—not the Board of Supervisors—is authorized to grant variances or special exceptions from the subdivision ordinance.

F. The Board Cannot Modify the Street Standards under the Zoning Ordinance

No authority exists for the Board of Supervisors to modify the street standards for the Payandeh LLCs under FCZO § 7-302.2. That section provides that the Board may modify the limitations on private streets only “in conjunction with a request for a special exception permit, site plan approval or subdivision plan approval,” none of which apply to the Payandeh street proposal. The Payandeh LLCs have not filed an application for a special exception permit. They have not filed for site plan approval⁵ or subdivision plan approval. The Payandeh LLCs have filed infrastructure plans, which are not eligible for a waiver under FCZO § 7-302.2. Any approval by the Board would be ipso facto void under FCZO § 5-003.1.

Moreover, as discussed in the Petitioners’ letter opposing the LLCs’ Waiver Request (WAIV-16-005690), the Virginia Code does not authorize the Board of Supervisors to grant “modifications” of the zoning ordinance in the manner prescribed in FCZO § 7-302. The Code authorizes a zoning administrator to grant “modifications” but Fauquier County has not invested its zoning administrator with such authority.

Furthermore, to the extent the requirement to meet the Type I or II standards is imposed by the subdivision ordinance, only the Planning Commission can waive the requirement.

G. The Planning Commission Cannot Grant a Waiver Either

The Planning Commission’s waiver authority applies only in conjunction with approving a preliminary subdivision plat.⁶ The Payandeh LLCs have filed no such plat. Thus, the Planning Commission can grant no variance.

Moreover, a variance may be granted only to a “developer.” The term “developer” is defined to mean “An owner of property being subdivided...” FCSO § 2-7. The Payandeh LLCs are not the owner of “property being subdivided” and thus are not a “developer.” The property is not being subdivided. The term “subdivide” means “The process of dividing land to establish a subdivision.” FCSO § 2-37. The Payandeh LLC applications do not involve the process of dividing land to “establish a subdivision.” A boundary line adjustment is not a subdivision. Rather, it is “the sale or exchange of parcels between adjoining lot owners.” See FCSO § 3-2(C). Thus, no variance can be granted by the Planning Commission.

Moreover, the Planning Commission cannot modify the private street requirements that apply under the zoning ordinance. The Virginia Supreme Court recently ruled that local planning commissions are not empowered with legislative authority to vary zoning ordinance

⁵ Site plans require that “The applicant shall provide, at the time of submission, proof that all owners of property adjacent to the real property, upon which the site plan has been submitted, have been notified that a site plan has been submitted. Said notice shall include a description of the property covered by the site plan, the proposed use to be made of the property under the site plan, a statement that a copy of the proposed plan can be reviewed at the Department of Community Development, and that comments on the proposed site plan can be made to the Director of Community Development or his designee.” FCZO § 12-502.2. No such notice has been provided to adjacent property owners.

⁶ Subdivision Ordinance § 4-27.

requirements.⁷ Thus, the Planning Commission cannot vary the Type I or II requirements in the zoning ordinance that apply to large lot subdivisions, which the Subdivision Ordinance says must be “met.” And, as just noted, the Planning Commission has no authority to vary the Type I or II requirements under the Subdivision Ordinance other than for a preliminary subdivision plat, which the Payandeh LLCs have not filed.

H. No Authority Exists to Waive the Type I or II Requirements

Because the Board of Supervisors cannot waive the subdivision ordinance requirement that the street standards be “met” and cannot waive the street requirements in conjunction with an infrastructure plan or “modify” the street requirements in any case under the Virginia Code, and because the Planning Commission cannot waive the ordinance requirements without a preliminary subdivision plat and cannot waive the zoning ordinance street requirements, no Fauquier County governing entity has authority relieve the unlawful Payandeh lots of the Type I or II street requirements or approve the LLCs’ infrastructure plans.⁸

IV. THE PROPOSED STREET DOES NOT COMPLY WITH THE ORDINANCE

The Payandeh LLCs on June 8, 2016, filed an infrastructure plan seeking approval to construct a Type I street pursuant to section 10 of the Subdivision Ordinance. The plan, which was submitted to Judge Parker on June 9 and is the plan that must be approved per his August 18, 2016 Decree, does not meet the ordinance requirements.

A. The Ordinance Does Not Authorize Processing of the Infrastructure Plan

The subdivision ordinance does not authorize processing of the Payandeh LLC infrastructure plan. Section 10 of the subdivision ordinance provides:

“Any owner or proprietor of any tract of land located wholly or partially within the boundaries of Fauquier County seeking to subdivide the same shall submit a final plat of the proposed subdivision to the governing body or its designated agent for such purposes. Such final plats shall comply with the requirements set forth herein, unless different requirements are specifically set forth in Section 3 for such Subdivision. Any owner or proprietor of any tract of land who wishes to construct improvements in association with a subdivision that would meet the bonding requirements of Section 4-16 of this Ordinance shall submit construction/infrastructure plans and profiles of those improvements.” (emphasis added)

The Payandeh LLCs are not “seeking to subdivide.” Nor are they seeking to “construct improvements in association with a subdivision.” The Virginia Supreme Court has ruled that the Payandeh subdivisions were not lawfully approved and instructed the Fauquier County Circuit

⁷ *Sinclair v. New Cingular Wireless, supra.*

⁸ In any event, the proposed waivers do not meet the definition of a “special exception” or “variance” under Virginia Code § 15.2-2201.

Court to enjoin the LLCs from treating the subdivisions as lawful, which the Circuit Court has done. There is no lawful subdivision.

Moreover, the illegal subdivisions do not “meet the bonding requirements of Section 4-16” which deals with public use facilities. The plan does not include a certified check or cash escrow in the amount of the estimated costs of construction or a personal, corporate or property bond in the amount sufficient for and conditioned upon the construction of the proposed Type I street.⁹

Thus, the LLCs are not entitled to submit an infrastructure plan and the County is not authorized to consider it.

B. The Infrastructure Plan Does Not Meet the Ordinance Requirements

The County cannot officially process an application unless and until the application and all required accompanying submissions are submitted, including the construction bond which has not been submitted.¹⁰ Furthermore, the plan submitted by the LLCs does not meet the ordinance’s information requirements and is informationally incomplete.¹¹ Among other things:

- The plan does not identify the legal owners of the existing and proposed easements and rights-of-way on which the proposed street will be located. All of the lot owners own an easement right-of-way on all of the streets in Apple Manor under the Apple Manor Covenants. Any alteration of the existing easements and rights-of-way, addition of lots entitled to use the easement, or waiver of applicable ordinance requirements, requires consent of all easement owners. See VA. Code § 15.2-2275 (“No easements or utility rights-of-way shall be relocated or altered without the express consent of all persons holding any interest therein.”); see also VA. Code § 55-50. Consequently, Fauquier County requires a written agreement showing the consent of all persons affected by a relocated or altered ingress/egress easement, including when the easement is extended or new lots are added along the easement, which is the case here. See <http://www.fauquiercounty.gov/home/showdocument?id=8311> and <http://www.fauquiercounty.gov/home/showdocument?id=8327>.
- A portion of the proposed roadway would be located on a right-of-way on Apple Manor Road that was illegally vacated in 2010 without the consent of the lot owners under the Apple Manor Covenants. The easement cannot be recreated other than pursuant to a covenant amendment or court order rescinding the unlawful vacation and properly rededicating the easement as

⁹ See Subdivision Ordinance § 4-16.

¹⁰ See Zoning Ordinance § 13-106 (“No application shall be officially on file with the County unless and until the application and all required accompanying submissions are submitted to the Zoning Administrator.”); and § 5-009.2 (“No application shall be deemed to be on file with the County until all required submissions and payments have been presented.”).

¹¹ See Subdivision Ordinance § 10-6.

part of Apple Manor Road. The easement is the subject of pending litigation to enforce the Apple Manor Covenants in this regard. See *Fein v. Payandeh*, CL10-801. The County cannot approve the proposed roadway without a resolution of this litigation and proper restoration of the easement to the lawful dominant easement owners. Even after the easement is legally restored, the dominant easement owners must consent to the connection of the easement to another private street and use of the easement by the additional Payandeh lots, which the Virginia Supreme Court by order dated July 31, 2015 has ruled violate the Apple Manor Covenants. Virginia Code § 15.2-2275 provides that “No easements or utility rights-of-way shall be...altered without the express consent of all persons holding any interest therein.” In addition, the Apple Manor lot owners, who are the lawful easement owners, must consent to any waiver of the ordinance requirements applicable to the easement.

- The plan does not identify private restrictions that exist, as required. Such restrictions include the Apple Manor Covenants which, in addition to prohibiting the illegal Payandeh lots, expressly exclude the streets serving the Payandeh lots from any maintenance obligations and require any resubdivision of the Payandeh lots to comply with the requirements of the 1997 Fauquier County ordinance.
- The plan does not include homeowners’ association documents, as required. The only HOA that exists for the proposed street is one created by the Payandeh LLCs in 2013 to remedy the violation of this requirement in Payandeh’s original subdivision application in 2007, and that HOA does not include any road maintenance responsibility for the proposed street. Moreover, the LLCs’ Type I street does not meet the requirement in FCZO § 4-306 that “the required right-of-way to an existing state maintained street shall be owned in fee simple by the homeowners association.” This requirement is non-waivable.
- The plan does not include a valid deed of subdivision, as required. The Supreme Court has ruled that the Payandeh lots were created in violation of the Fauquier County Subdivision Ordinance and the Apple Manor Covenants, and the deed of subdivision therefore was improperly recorded and is invalid. Moreover, the Payandeh LLCs are under a judicial order enjoining them from treating the Payandeh lots as a lawful subdivision.
- Finally, the infrastructure plan requires boundary line adjustments, which must meet the final plat requirements of section 10. As discussed below, the proposed boundary line adjustments do not meet the final plat requirements.

C. The Proposal Does Not Meet the 10 Percent Limit on Street Grade

FCSO § 5-6 limits the grade of private streets to a maximum of 10 percent. The LLCs are proposing to provide access to the Payandeh lots using private streets with grades in excess of

this limit, including Apple Manor Road, Orchard Hill Lane, and Audubon Trail, which also do not meet other requirements for a Type I or II street. The LLCs argued to Judge Parker that Orchard Hill Lane and portions of Audubon Trail are “not needed” to access the lots but the Judge ruled that these streets must meet the Type I or II standards because one or more of the lots border on them, the LLCs cannot control how future lot owners will choose to access their lots, and the lot owners have the right under the Apple Manor covenants to use these streets.

Moreover, the LLCs need to use approximately 10,000 feet of the existing streets to access the Payandeh lots. The existing streets are Type III streets no more than 12-feet wide in most places and have grades in excess of 10 percent. The Payandeh LLCs have provided no plans to comply with the 10 percent grade requirement on any of these street segments.

D. The Proposal Creates Dead End Streets that Violate the Ordinance

The ordinance provisions with which the Payandeh LLCs must comply provide that “No public or private dead-end street shall extend to a length greater than 700 feet within Service Districts or 1,320 feet outside of Service Districts exclusive of a turnaround.”¹² The Payandeh street plan includes three dead-end streets that vastly exceed this limit.

Orchard Hill Lane, which borders Payandeh lot 9R-1B, is a dead-end street of approximately 1,500 feet. In addition, the plan creates two additional dead end streets with lengths of 8,725 feet and 13,489 feet, respectively. The plan shows these dead-end streets as connecting the ends of Apple Manor Road and Audubon Trail. However, the “connection” does not exist. Approximately two thousand feet of the “connection” was vacated in 2010, a fact well known to the engineers who designed the plan but which was concealed in the infrastructure plans filed with the County. The connection is located within an easement belonging to all of the Apple Manor lot owners under the Apple Manor Covenants. The easement was unlawfully vacated and can only be restored by properly rededicating it as part of Apple Manor Road. The easement is the subject of pending litigation. Even after the easement is legally restored, it cannot be altered without the consent of the lot owners. Any waiver of ordinance requirements applicable to the easement also would require consent of the lawful easement owners.

Even if the ends of the dead-end streets are connected, they would form one big cul-de-sac with only one outlet to the through-street (Leeds Manor Road) which vastly exceeds the 700 foot length limit on cul-de-sacs in the 1997 subdivision ordinance.

E. The Street Does Not Connect Directly to a Publicly Maintained Street

The ordinance requires that private streets “must connect directly to a state maintained street.”¹³ The proposed street obviously does not connect directly to a publicly maintained street. The LLCs have filed a request for a waiver of this requirement (WAIV-16-005690). By separate letter, we provide reasons why this waiver request cannot be approved.

¹² Zoning Ordinance § 7-450.

¹³ FCZO § 7-302.1.A.2.

F. The Existing Street Connections Do Not Meet the Ordinance Requirements

The connecting streets that provide the Payandeh lots with access to the publicly maintained street do not meet the ordinance standards. The ordinance requires that, for large lot subdivisions, the standards of Article 7-303.1 of the Zoning Ordinance be “met.”¹⁴ As the Virginia Supreme Court held in *Fein v. Payandeh*, the large lot provision “imposes the design requirements for Type I or Type II roads” and “Type III roads do not fulfill the requirements of the FCSO.” The subdivision agent, Kimberly Johnson, testified that, when a Type I or II street is required, the County requires that the streets providing access to a publicly maintained street must meet the Type I or II requirements. This position comports with the literal requirement of the ordinance and ensures that safe and adequate access will be provided.

The existing streets in the Apple Manor Subdivision are Type III streets, as attorneys for the Payandeh LLCs have previously acknowledged: “The existing roads in Apple Manor are all built to what must be considered Type III, for they were not built to VDOT or County standards.”¹⁵ Type III streets have no standards, and cannot be used by the LLCs to meet the requirement that the Payandeh lots be served by Type I or II streets.

The County staff comment letter to the applicants stated: “Staff would advise that if the intent is to meet all requirements for a Type I street for a new subdivision, then the existing private street connections between the proposed Type I street and the public street would need to be upgraded to meet all Type I street requirements.”¹⁶ The Payandeh LLCs have presented no plans for any upgrades to the existing access streets. Any waiver of the direct public street connection requirement does not constitute a waiver of the requirement that the Payandeh lots be served by Type I or II streets.

G. The Street is Designed to Impermissibly Access Other Properties and Streets

The Zoning Ordinance provides that “Private streets within a development shall be limited to those streets which are not required or designed to provide access to adjacent properties or the remainder of the tract being developed, or other streets, as determined by the Commission.”¹⁷ The proposed streets do not comply with this restriction.

The proposed streets are required and designed to provide access to adjacent properties and the remainder of the tract developed, as well as other streets. Each of Payandeh’s three subdivisions is a separate development originating from three separate parcels. The Payandeh lots resulted from three separate subdivision applications. The proposed street is designed and required to provide access from one subdivision to the next, and to adjacent properties and the remainder of the tract developed. Moreover, the proposed street is designed and required to provide access to other streets (Apple Manor Road, Audubon Trail, and Orchard Hill Lane). Thus, the ordinance requirement is not met.

¹⁴ See FCSO § 3-2(D), formerly FCSO § 2-39(3)(C)(3).

¹⁵ Letter dated Aug. 20, 2007, to Rick Carr, Director, Community Development, from John H. Foote, attorney for Mehrmah Payandeh.

¹⁶ Letter dated July 25, 2016, from Heather Jenkins, L.A., Senior Planner.

¹⁷ Zoning Ordinance § 7-302.1.A.1.

H. The Proposed Street is Designed to Never be Built and Cannot Be Built

The Zoning Ordinance requires that both Type I and II private streets “shall be constructed.”¹⁸ A performance bond “will be required to ensure proper and complete construction.” (emphasis added)

It is clear that the street proposed by the Payandeh LLCs will never be built. It has been designed to never be built. The nature and amount of cutting and filling required for the proposed street is prohibitive and the cost would make the lots unmarketable. Payandeh and her counsel previously represented to the County that “no road of any kind will be constructed in the foreseeable future” and “it is entirely unlikely...that a Type I road would ever be constructed.”¹⁹

The County should not devote any resources to approving a phantom street that clearly is not designed to be built, leaving lots to be served by nonexistent or substandard streets.

The proposed street cannot be built because, as noted above, it relies on a right-of-way easement that has been vacated and which cannot be properly rededicated except with the consent of the Apple Manor lot owners who are the lawful easement owners. Nor can any waiver respecting the easement be granted without their consent.

In addition, the proposed street cannot be constructed without substantial grading to comply with the 10 percent grade limit along the vacated segment of Apple Manor Road as well as Orchard Hill Lane and Audubon Trail. This grading is not shown on the plans submitted by the Payandeh LLCs.

The proposed street cannot be constructed without substantial grading on property that is not owned by the LLCs. The required grading will necessitate substantial land disturbance on property of others. Other lot owners are the dominant easement holders whose consent to altering the street grade is required.

I. The Ordinance Does Not Authorize Approval of Phantom Streets

The County should not approve any street that cannot be built. The ordinance requires that both Type I and II streets “shall be constructed in accordance with approved plans and profiles.”²⁰ Approval of a street that cannot be built would be contrary to the ordinance and encourage evasions. Approval of a street the County knows cannot be built in compliance with the ordinance would be an abuse of the ordinance and violate the Dillon Rule.

Even assuming the Zoning Ordinance allows Payandeh’s proposed street (which it does not), the ordinance does not authorize the County to approve phantom streets that, by the applicant’s admission, will not be constructed. The ordinance requires that construction be “diligently pursued”:

¹⁸ Zoning Ordinance § 7-304.

¹⁹ Statements of Justification dated April 20, 2006 and May 1, 2007, submitted to the Board of Supervisors on behalf of Mehrmah Payandeh by her attorney John Foote.

²⁰ Zoning Ordinance § 7-304.

Expiration of Permit if Use or Construction Not Commenced

1. With the exception of public uses, whenever an administrative permit, special permit or special exception is issued, the activity authorized thereby shall be established or construction authorized shall be diligently pursued within one (1) year after the effective date of such permit or exception unless a longer period of time to establish the use has been approved as a condition of the permit. If the use or construction has not commenced within the required period, such administrative permit, special permit or special exception shall automatically expire without notice....

2. Once an activity authorized by an administrative permit, special permit or special exception has commenced, the permit shall expire at the date specified in the permit. If no date is specified in the permit, it shall expire only if the activity authorized by the permit ceases for a period of two (2) or more years. This expiration provision shall apply automatically without notice to all special permits and special exceptions, including those approved prior to adoption of this provision.²¹

An extension of time may be granted only because of “the occurrence of conditions unforeseen at the time of granting the special permit or special exception.”²²

Here, Payandeh and her attorney have made written representations to the County that “no road of any kind will be constructed in the foreseeable future” and “it is entirely unlikely...that a Type I road would ever be constructed.”²³ The proposed street does not meet the ordinance requirements.

J. The Proposed Street Violates the Seven-Lot Limit on Type II Streets

The Zoning Ordinance requires that a Type II street may not serve more than seven lots. The purpose of this requirement is obvious—to limit vehicle traffic and development where substandard streets are used.

The streets the LLCs propose to use to access to their lots would serve 23 lots. These streets include Apple Manor Road, Audubon Trail, and Orchard Hill Lane. These streets do not meet the standards for a Type II street, include steep slopes with grades substantially in excess of 10 percent, and are owned by other property owners. These streets were not meant to handle the traffic that would be generated by the unlawful Payandeh lots, which Payandeh and her counsel have said will be 80 vehicle trips per day using standards published by the Institute of Transportation Engineers employed by Fauquier County.²⁴ The entrance to the public road—

²¹ Zoning Ordinance § 5-014.

²² Id.

²³ Statements of Justification dated April 20, 2006 and May 1, 2007, submitted to the Board of Supervisors on behalf of Mehrmah Payandeh by her attorney John Foote.

²⁴ Statement of Justification dated May 1, 2007, submitted to the Board of Supervisors on behalf of Mehrmah Payandeh by her attorney John Foote.

Leeds Manor Road—is inadequate for this additional daily traffic. The safety of other vehicles on the public road would be impacted. The Payandeh LLCs should not be permitted to evade the seven lot limit. Substantial upgrades are required to make these roads safe for the traffic that would be generated by the Payandeh lots.

K. The Street Cannot Be Built Without Destroying the Existing Roads

The massive amount of grading and cutting and filling required to construct any kind of a functional street to provide safe access to the Payandeh lots will require hundreds of truckloads of heavy stone, dirt, gravel, concrete, and asphalt and travel by heavy equipment up and down the existing roads in the Apple Manor Subdivision. The roads are composed of dirt and gravel and were not designed for the kind of construction traffic required to build serviceable streets for the Payandeh lots. The roadbed would be destroyed in the process, which would take months and cause major disruption to the property owners who use the existing roads and major expense to repair.

L. The Street Cannot Be Built Without the Consent of Other Lot Owners

Under Virginia law, the easement may not be altered or relocated without the written consent of the easement owners. See VA. Code § 15.2-2275 (“No easements or utility rights-of-way shall be relocated or altered without the express consent of all persons holding any interest therein.”); see also VA. Code § 55-50. Accordingly, Fauquier County requires a written agreement showing the consent of all persons affected by a relocated or altered ingress/egress easement, including when the easement is extended or new lots are added along the easement:

The Code of Virginia (§ 55-50) requires written agreement showing the consent of all persons affected by a relocated or altered ingress/egress easement. This includes 1) all private roads and 2) extending the easement and/or **adding a new lot(s) along the easement.**²⁵

The proposed roadway will result in alteration of the easement by: (i) addition of lots that will have access to the easement, (ii) extension of the easement to include a part of Apple Manor Road that was vacated in 2010 and which Judge Parker has decreed must properly rededicated (decree issued August 18, 2016 in *Fein v. Payandeh*), (iii) relocation of a portion of the easement, (iv) physical alteration of the easement, and/or (v) rededication by the LLCs of a portion of the easement for the exclusive use of the lots owned by the LLCs. The lot owners have not consented to any such alteration of the easement in connection with the proposed roadway.

A key purpose of the consent requirement is to avoid imposing additional maintenance costs on other property owners without their consent. It would be unfair to impose on the other Apple Manor lot owners the enormous expense of the improvements necessary to make the existing streets serviceable for the Payandeh lots.

²⁵ FAUQUIER COUNTY PRIVATE STREET INFORMATION SHEET, <http://www.fauquiercounty.gov/home/showdocument?id=8311> and <http://www.fauquiercounty.gov/home/showdocument?id=8327>.

Once the streets are constructed, maintaining them to Type I or II standards also will be costly, but the Payandeh lots will not bear their fair share of maintenance costs. In 2010, Mehrmah Payandeh, using votes gained by unlawfully subdividing her lots, adopted covenants exempting her lots from paying road maintenance fees for the upkeep of Apple Manor Road, Orchard Hill Lane, and Audubon Trail before Orchard Hill Lane. The Payandeh LLCs are proposing to add 80 vehicle trips per day on the Apple Manor Subdivision roads without paying their share of maintenance costs.

M. No HOA Exists to Ensure Maintenance of the Private Street

The large lot provision of the Subdivision Ordinance, § 3-2(D)(4), provides that the following condition, among others, must be met: “The homeowners association is established with covenants which provide for the maintenance and upkeep of the private street.”

First of all, there is no homeowners association governing the Apple Manor Subdivision.

Secondly, there is no provision in the Apple Manor Covenants that provides for the maintenance and upkeep of the street segments that would serve the Payandeh lots on Orchard Hill Lane, Audubon Trail beyond Orchard Hill Lane, or Apple Manor Road past the intersection of lot 4-R and 3. As noted, under the 2010 covenants adopted by Payandeh, these street segments are expressly excluded from maintenance by the Apple Manor Road Committee. These street segments are many thousands of feet in length. The Payandeh LLCs have not established an HOA to maintain these street segments. The HOA they established in 2013 has no responsibility to maintain these segments.

Moreover, these street segments are owned by other property owners who would not agree to subject their property to a homeowners association or to any requirement that they maintain the private streets to serve the Payandeh lots.

Without an HOA to ensure proper maintenance of the streets, any type of street would be vulnerable to neglect, erosion and rapid deterioration. Judge Parker ruled in *Fein v. Payandeh* ruled that a road maintenance agreement is not a substitute for an HOA, and this ruling was upheld by the Virginia Supreme Court by Order of July 31, 2015.

Finally, it should be noted that there is no road maintenance agreement governing the existing streets in the Apple Manor Subdivision that would be used to access the Payandeh lots. A road maintenance committee exists, but there is no road maintenance agreement ensuring proper maintenance of the existing streets.

N. No HOA Owns the Street in Fee Simple—A Non-Waivable Requirement

The proposed street does not, and cannot, comply with section 7-306 of the Zoning Ordinance which provides: “In the case of Type I private streets the required right-of-way to an existing state maintained street shall be owned in fee simple by the homeowners association.”

As noted, no homeowners association exists for the Apple Manor Subdivision. Moreover, the only right-of-way to the state maintained street is owned by each individual property owner on whose property the right-of-way traverses. Thus, the proposed street does not, and cannot,

comply with this requirement. The street simply cannot meet the requirement that it be “owned in fee simple” by a homeowners association all the way to the state maintained street. There is no provision for a waiver of this section.

Moreover, even the street segments that exist solely on property owned by the Payandeh LLCs are not “owned in fee simple” by any HOA.

V. BOUNDARY LINE ADJUSTMENTS DO NOT MEET THE CODE OR ORDINANCE

The Payandeh LLCs are proposing boundary line adjustments for seven of the eight Payandeh lots. This proposal does not meet the ordinance or Code requirements for boundary line adjustments.

A. A County Cannot Adjust Boundaries of Unlawful Subdivision Lots

The Payandeh lots do not legally exist because, as the Virginia Supreme Court found, they were unlawfully created in violation of the Subdivision Ordinance and Apple Manor Covenants. Thus, under Supreme Court precedents, the lots were void ab initio and, under the County’s own ordinance, the lots are ipso facto void. Moreover, the Payandeh LLCs are under an outstanding court injunction prohibiting them from treating the lots as a lawful subdivision. Decree dated February 1, 2016, by Judge Parker, *Fein v. Payandeh*, CL 2007-622-01. The County cannot approve a boundary line adjustment for lots that do not legally exist.

B. The Boundary Line Adjustments Are Not Authorized by the Code

The County is not authorized to consider or approve the proposed boundary line adjustments. Code § 15.2-2275 provides as follows:

Relocation or vacation of boundary lines. Any locality may provide, as a part of its subdivision ordinance, that the boundary lines of any lot or parcel of land may be vacated, relocated or otherwise altered as a part of an otherwise valid and properly recorded plat of subdivision or resubdivision (i) approved as provided in the subdivision ordinance or (ii) properly recorded prior to the applicability of a subdivision ordinance, and executed by the owner or owners of the land as provided in § 15.2-2264. The action shall not involve the relocation or alteration of streets, alleys, easements for public passage, or other public areas. No easements or utility rights-of-way shall be relocated or altered without the express consent of all persons holding any interest therein.

Alternatively, a locality may allow the vacating of lot lines by recordation of a deed providing that no easements or utility rights-of-way located along any lot lines to be vacated shall be extinguished or altered without the express consent of all persons holding any interest therein... (emphasis added)

The proposed boundary line adjustments are not “part of an otherwise valid and properly recorded” plat of subdivision or resubdivision, as required by the Code. The Virginia Supreme Court has ruled that the Payandeh subdivisions were created in violation of the Fauquier County subdivision ordinance. The subdivisions thus are neither legally valid nor properly recorded.

Moreover, as discussed above, the Payandeh proposal involves the relocation and/or alteration of an easement without the express consent of all persons holding an interest therein, contrary to the Code. The Payandeh proposal relies on the alteration of an easement of which all of the Apple Manor lot owners are the lawful dominant easement owners and whose express consent is required.

C. The Boundary Line Adjustments Do Not Satisfy the Ordinance

The Subdivision Ordinance requires that, as a condition to obtaining approval for a boundary line adjustment, “The Final Plat requirements of Chapter 10 of this Ordinance are met.”²⁶ The Payandeh LLCs do not meet the final plat requirements of Chapter 10. Those requirements provide:

“The final plat shall not be approved for recordation unless the plat is ... in full compliance with all applicable ordinances and regulations....” § 10-8.

“...The final plat shall not be approved for recordation until the subdivider has complied with the requirements and standards of design in accordance with this Ordinance and other applicable Ordinances....” § 10-8.

The final plat is not “in full compliance all applicable ordinances” or standards of design. The LLCs thus do not meet the final plat requirements of Chapter 10 and their boundary line adjustment plats cannot be lawfully be approved.

D. The Ordinance Does Not Authorize Processing of the Applications

The Subdivision Ordinance does not authorize processing of the LLCs’ applications. Section 10-1 of the Subdivision Ordinance, which deals with final plats and construction infrastructure plans, authorizes a property owner who is “seeking to subdivide” to file a final plat. The Payandeh LLCs are not “seeking to subdivide.” “Subdivide” is a defined term in § 2 of the Subdivision Ordinance, and what the LLCs are proposing is not subdividing.²⁷ There thus is no provision authorizing them to file a final plat.

Section 10 also authorizes a property owner “who wishes to construct improvements in association with a subdivision that would meet the bonding requirements of Section 4-16 of this Ordinance” to submit construction/infrastructure plans and profiles of those improvements. As noted above, the improvements proposed by the Payandeh LLCs are not “in association with a subdivision that would meet the bonding requirements of Section 4-16” of the ordinance. The LLCs do not meet the bonding requirements of Section 4-16. The subdivisions are not lawful.

²⁶ Subdivision Ordinance § 3-2(C).

²⁷ § 2-39 defines “subdivision” to mean, in pertinent part: “The division of a lot, tract or parcel of land into two or more lots, tracts or parcels for the purpose of transfer of ownership or building development or for the division or allocation of land as open space for the common use by owners, occupants, or leaseholders. The term includes resubdivision.”

E. Approval Would Violate the Dillon Rule

The County would be acting outside the scope of its authority were it to approve boundary line adjustments for the illegal Payandeh lots, which were unlawfully created and fail to meet the final plat or bonding requirements. Any such approval would violate the Dillon Rule, which prohibits the County from acting outside the limits of its authority as prescribed in its own ordinances or the Virginia Code.

VI. CONDITIONS FOR A VARIANCE ARE NOT MET

As discussed above, no authority exists for the County to waive the ordinance requirements for the illegal Payandeh subdivisions. Even if such authority did exist, the Payandeh subdivisions do not qualify.

A. Only the Planning Commission Can Vary the Street Requirements

The Subdivision Ordinance authorizes only the Planning Commission, and not the Board of Supervisors, to vary the Subdivision Ordinance requirements for a large lot subdivision. Here, the requirements that Payandeh is requesting to be waived are contained in the large lot provision of the subdivision ordinance which, as the Virginia Supreme Court has ruled, requires that the Type I or II street standards be “met”—not waived. See FCSO § 3-2(D). A waiver of the Type I or II requirements by the Board of Supervisors under the zoning ordinance does not satisfy the subdivision ordinance requirement that the requirements be “met.”

B. The Planning Commission Already Has Voted for Denial

The Planning Commission already has determined that the Payandeh subdivisions do not meet the conditions for a variance. As noted, when Payandeh’s waiver request came before the Planning Commission on June 29, 2006, the Commission determined that: “the proposed access streets connect to a private street (Apple Manor Road) rather than a public road...the length of the streets that are proposed to serve these lots is in excess of 10,000 feet...the use of these existing streets to serve an additional eight (8) homes will be of significant impact to property owners who use these streets and would afford inadequate access for emergency vehicles and owners of the proposed lots;” and “denial of this request will not place an unreasonable restriction on the use of the property.” Nothing has changed to make this determination any less true.

C. Standards under the Subdivision Ordinance are Not Met

Section 4-27 of the Subdivision Ordinance is entitled “Variations and Exceptions” and provides, in pertinent part:

Whenever because of unequal size, topography, or shape of the property or other unusual condition, a strict compliance with the requirements of this Ordinance would result in extraordinary hardship to the developer...the Planning Commission may vary, modify or waive the requirements so that substantial justice may be done and the public interest secured; provided that such variance, modification, or waiver will not have the effect of nullifying

the intent and purpose of these regulations or interfering with implementing the Comprehensive Plan of Fauquier County. The procedure for requesting such variation or modification shall be as follows:

A) At the filing of the preliminary plat of subdivision, the subdivider shall submit a list of all waivers requested and a detailed justification statement demonstrating that all requirements of this section and any applicable waiver standards are met.

B) The request for waivers will be presented to the Planning Commission at the same public meeting at which the preliminary plat is considered by the Planning Commission, and public comment will be permitted at the meeting.

C) The waiver requests and action of the Planning Commission with respect to the waivers will be transmitted to the Board of Supervisors in accordance with Section 9-7 of this Ordinance.

1. There is No “Preliminary Plat of Subdivision”

A variance of the subdivision ordinance may be granted only in connection with a preliminary plat of subdivision. The Payandeh LLCs have not filed any preliminary plat of subdivision. Thus, no variance can be granted.

2. There is No “Developer”

A variance of the subdivision ordinance may be granted only to a “developer.” The term “developer” is defined to mean “An owner of property being subdivided whether or not represented by an agent.” FCSO § 2-7. The Payandeh LLCs are not the owner of “property being subdivided” and thus are not a “developer.” The property is not being subdivided. The term “subdivide” means “The process of dividing land to establish a subdivision.” FCSO § 2-37. The Payandeh LLC applications do not involve the process of dividing land to “establish a subdivision.” A boundary line adjustment is not a subdivision. Rather, it is “the sale or exchange of parcels between adjoining lot owners.” See FCSO § 3-2(C). Thus, no variance can be granted.

3. There is No “Unusual Condition”

There is no “unusual condition” not resulting from the developer’s deliberate act. The developer was Mehrmah Payandeh. The condition of owning mountainous property is not “unusual” in Fauquier County. The condition of owning property that does not have direct access to a public street is not “unusual” in Fauquier County.

4. There is No Condition Not from Payandeh’s “Deliberate Act”

Mehrmah Payandeh chose to purchase her mountain property far from the public street with full knowledge that if she resubdivided she would be required to comply with the requirements of the subdivision ordinance. She knew that the topography and existing roads are steep. She agreed to the provision in the Apple Manor Covenants requiring compliance with the

provisions of the 1997 ordinance when she purchased her property. The Covenant requirement does not give rise to an “unusual condition not resulting from the developers deliberate act.”

Correspondence between Mehrmah Payandeh and the original developer in 1997 reveals that she requested the developer to amend the Apple Manor Covenants to remove the 50-acre limit on any resubdivision of the lots she purchased. She wrote:

“Covenant #15 should be amended to remove the 50 acre lot size restriction on the Subdivision of Lots 4, 7, 8, and 9. Obviously, any subdivision of these lots would be **subject to the County’s already strict requirements**, which should provide sufficient protection for the development.”

The developer agreed to make the change, but only subject to the condition:

“...that Mrs. Payandeh will place property in 50+ acre scenic easements with the VOF and that she will provide adequate assurance that she or her assigns will not pursue any subdivision of the subject parcels until such easements are in place. We are concerned that for a period of time the owner of parcels 4, 7, 8, and 9 could sell the property and that the new owner could divide these parcels into small lots which would violate our commitment to existing owners of property in Apple Manor....we would not want to change the covenants...until Mrs. Payandeh was prepared to go forward with these purchases and to place restrictive scenic easements on them.”

The resulting covenant change provided that:

“Lot numbers 4R, 7R, 8 and 9R may be resubdivided subject to the provisions of the Fauquier county subdivision ordinance in effect as of the date of execution of this Deed of Modification of covenants [which was May 28, 1997].”

Thus, there is no “unusual condition” not resulting from Payandeh’s deliberate act. The LLCs, which were created and controlled by Payandeh, acquired the Payandeh lots in 2013 and they knew at that time that the streets serving the lots were steep and did not comply with the ordinance requirements or the Covenants.

5. No “Strict Compliance” or “Extraordinary” Hardship is Imposed

Moreover, even if the Payandeh LLCs were a “developer” eligible for a variance (which they are not), the LLCs are not being subjected to “strict compliance” under the ordinance but only to normal compliance. Any “hardship” is not “extraordinary” and was due to Payandeh’s own deliberate act of agreeing to comply with the ordinance requirements when she purchased her property and failing to do so. She knowingly agreed to the Apple Manor Covenants, which require compliance with the ordinance.

6. “Substantial Justice” and the “Public Interest” Require Denial

“Substantial justice” requires that waivers be denied. The public interest can best be secured if the County abides by its ordinance and avoids routinely granting waivers and establishing precedents that have the effect of nullifying the intent and purpose of the ordinance.

Substantial justice and the public interest are served when the County respects private covenants that parties enter into when they purchase land. Substantial justice and the public interest are served when the County avoids granting waivers that undermine the efficacy and enforceability of private covenants, especially when those covenants serve the principles and policies of the County’s Comprehensive Plan (see discussion below).

7. A Waiver Would Nullify the Intent and Purpose of the Ordinance

Approval of the Payandeh waiver request would “have the effect of nullifying the intent and purpose of these [ordinance] regulations” contrary to the ordinance. Approval of the Payandeh waiver request would sanction gross deviations from the ordinance requirements and subvert the ordinances by establishing far-reaching precedents for other waiver requests. The County thus would have nullified the meaning of its written ordinances and elected to conduct its subdivision and land use functions by waiver. It is doubtful that a county can “rule by waiver” and ignore its written ordinances to such a degree consistent with the Dillon Rule.

8. A Waiver Would Interfere with the Comprehensive Plan

A variance cannot be granted if it would “interfere[] with implementing the County’s Comprehensive Plan.” As required by the Virginia Code, the County has adopted a Comprehensive Plan to establish guiding principles and policies for the County. The Payandeh waiver proposal is contrary to a number of the principles and policies stated in the Comprehensive Plan, including the following:

Preserve the County’s cultural, ecological and environmental resources to ensure the continued quality of life within the County for its residents and visitors.

Identify and protect productive agricultural and silvicultural lands.

Safeguard the environment with water and air quality and natural resource management.

Continue to promote a vibrant and robust farming and agricultural sector of the economy.

Diversify and enhance tourism in the County.

As the Comprehensive Plan states, “Fauquier County has a long history of preserving its rural landscape, and recognizing the importance of its agricultural uses.” The county should not abandon that history by abusing its ordinances to approve the Payandeh street plans.

The Apple Manor Covenants help to promote the policies of the Comprehensive Plan by limiting development of the Payandeh property and encouraging the farming and agriculture sector within the Apple Manor. The County should not interfere with the enforcement of these Covenants.

D. Standards under the Zoning Ordinance Are Not Met

In addition to failing to meet the conditions for a variance in the Subdivision Ordinance, the proposed Payandeh waiver does not meet the waiver standards of the Zoning Ordinance. Section 7-302.2 of the Zoning Ordinance provides that the Board may modify the limitations on private streets only “in conjunction with a request for a special exception permit, site plan approval or subdivision plan approval,” none of which apply to the Payandeh street proposal. The Payandeh LLCs have not filed an application for a special exception permit. They have not filed for a site plan approval²⁸ or for subdivision plan approval. Rather, the Payandeh LLCs have filed infrastructure plans, which are not eligible for a waiver under FCZO § 7-302.2.

1. The Hardship was Created by Payandeh, Not the Ordinance

Even if the Payandeh LLCs were eligible for a waiver under FCZO § 7-302.2, a waiver can be granted only if the hardship imposed by the ordinance was not created by the applicant. See FCZO § 13-404. The Payandeh LLCs, which were created by Payandeh, do not meet this requirement inasmuch as Payandeh herself negotiated and agreed to (as a condition to her purchase of her lots) the specific provision in the Apple Manor Covenants that requires compliance with the ordinance. The LLCs knew that the streets serving the Payandeh lots did not comply with the ordinance when they acquired the lots in 2013. See above discussion.

2. Substantial Detriment to Adjacent Properties Will Occur

A variance can be granted only if it will not be of substantial detriment to adjacent and nearby properties. Here, a variance would be of substantial detriment to adjacent and nearby properties.

The Planning Commission found, when it recommended denial of Payandeh’s waiver proposal in 2006, that “the length of the streets that are proposed to serve these lots is in excess of 10,000 feet; the use of these existing streets to serve an additional eight (8) homes will be of significant impact to property owners who use these streets and would afford inadequate access for emergency vehicles and owners of the proposed lots.” The Planning Commission also found that “the denial of this request will not place an unreasonable restriction on the use of the property.” Nothing has changed to make these findings less true.

²⁸ Site plans require that “The applicant shall provide, at the time of submission, proof that all owners of property adjacent to the real property, upon which the site plan has been submitted, have been notified that a site plan has been submitted. Said notice shall include a description of the property covered by the site plan, the proposed use to be made of the property under the site plan, a statement that a copy of the proposed plan can be reviewed at the Department of Community Development, and that comments on the proposed site plan can be made to the Director of Community Development or his designee.” FCZO § 12-502.2. No such notice has been provided to adjacent property owners.

The granting of a waiver also would be of substantial detriment to adjacent and nearby properties by allowing major cutting and filling on right-of-way easements owned by adjacent and nearby properties, despoiling of the surrounding environment, allowing of clear-cutting and development on mountains within the public viewshed, and permanent loss of hundreds of trees and valuable ecological resources in the Apple Manor Subdivision.

The Zoning Ordinance provides that a proposed use for which a special permit or exception is requested must satisfy certain requirements. The LLCs do not meet the following requirement:

“The proposed use shall be such that pedestrian and vehicular traffic generated will not be hazardous or conflict with the existing and anticipated traffic in the neighborhood and on the streets serving the site.”²⁹

The existing streets in Apple Manor were not designed for the additional traffic that would be generated by the Payandeh lots and, as the Planning Commission found, would afford inadequate access for homeowners and emergency vehicles. In addition, the Apple Manor Subdivision has only one entrance to the public highway—Leeds Manor Road (Rte. 688)—that does meet VDOT standards. The eight Payandeh lots would generate 80 vehicles trips per day at this entrance, posing potential safety issues for users of the public road. Section 3-2(D) of the current ordinance requires that “The highway entrance is approved by the Virginia Department of Transportation.” The entrance has never been approved by VDOT, and not for the daily traffic that would be generated by the Payandeh lots.

3. Other Properties Would be Unreasonably Affected

Modification of the street limitations is not permitted unless the Board finds that “properties through which access is planned will not be unreasonably affected.” As noted above, the Planning Commission already has found that waiver of the requirement to connect directly to the public street “will be of significant impact to property owners who use these streets and would afford inadequate access for emergency vehicles and owners of the proposed lots.”

Mehrmah Payandeh and her counsel have previously represented to the Board of Supervisors that her eight lots would result in 80 vehicle trips per day on the private roads within Apple Manor.³⁰ In order to access the public street, these vehicle trips will need to traverse more than 10,000 feet of the existing roads that provide access for existing lot owners and emergency vehicles. These roads are nonconforming Type III roads—they are one-lane gravel roads with steep slopes in excess of 10 percent. They are all less than 15 feet wide and less than 12 feet wide in most places. Parts of the road have no shoulders and drop off perilously and it is impossible for two cars to pass. Some of the existing lot owners have horse trailers, utility trailers, tractors, bush hogs, and other farm vehicles that cannot back up or down the narrow, steep parts of the road. These roads were not designed for additional traffic.

²⁹ Zoning Ordinance § 5-006.2.

³⁰ Statement of Justification dated April 20, 2006, submitted to the Board of Supervisors on behalf of Mehrmah Payandeh by her attorney John Foote.

4. Other Lot Owners Would Bear the Maintenance Burden

Without major conforming alterations to the existing connecting streets, the additional traffic generated by the illegal Payandeh lots would unreasonably affect the use of the existing roads by other property owners and afford inadequate access for emergency vehicles. Moreover, the extension of the existing roads to access the Payandeh lots would require major grading, cutting and filling on rights-of-way that are owned by other property owners.

Wear and tear on the existing roads by the additional traffic generated by the Payandeh lots would increase road maintenance costs for the lot owners. Upgrading would add significant construction costs and increased maintenance burdens. These costs would be borne by the existing lot owners, not the Payandeh LLCs. Mehrmah Payandeh caused new covenants to be adopted in 2010 under which the Payandeh lots are exempt from paying road maintenance fees for the upkeep of the existing roads.³¹

It would be fundamentally unfair to the other lot owners to allow the Payandeh LLCs to access the public street using the existing roads without requiring that they upgrade the roads to accommodate the additional traffic and without requiring that they pay their fair share of maintenance costs and upgrading of the existing roads.

5. The Proposal Would Violate a Private Easement

In order to connect the two dead end streets in the Payandeh subdivision, the Payandeh LLCs would need to rededicate a vacated easement on Apple Manor Road linking the two streets and substantially alter it to conform to the requirements for a Type I or II street.

The easement was created by the Apple Manor Covenants and by deeds for the benefit of all of the Apple Manor lot owners who, by court decree, have the right to use the easement to its full extent in its entirety. The easement was unlawfully vacated by Payandeh in 2010 and is the subject of pending litigation. Ms. Fein and other lot owners will not consent to any rededication of their easement for the exclusive use of the Payandeh lots. The easement cannot be properly rededicated except as part of Apple Manor Road. As noted above, any relocation or alteration of the easement, including the addition of lots or rededication of the easement, or waiver of ordinance requirements applicable to the easement, requires approval of the lawful easement owners under Virginia law and Fauquier County's policies and procedures.³²

The County should not approve a street, or waivers of ordinance requirements pertaining to streets, that will negate or interfere with the easement rights of the dominant owners of the street or easement. The Zoning Ordinance provides that "it is not the intent of this Ordinance to interfere with or abrogate or annul any easements, covenants or other agreements between parties."³³

³¹ See "Amended and Restated Declaration of Covenants, Conditions and Restrictions for Apple Manor Subdivision," recorded in Deed Book 1351, Pages 2119-2154, September 2010.

³² See <http://www.fauquiercounty.gov/home/showdocument?id=8311> and <http://www.fauquiercounty.gov/home/showdocument?id=8327>.

³³ Zoning Ordinance § 1-500.

6. Denial of the Waiver Would Not Restrict Use of the Property

In addition, section 7-302.2 provides that the Board may modify the limitations on private streets only “provided the applicant can show that no other remedy is realistically feasible, that plausible alternatives have been exhausted, that to not so modify the applicable limitation(s) would place an unreasonable restriction on the use of the property and that properties through which access is planned will not be unreasonably affected.” The Payandeh waiver request does not meet these requirements.

Denial of the waiver would not “place an unreasonable restriction on the use of the property.” The property still can be used for the purposes that are permitted under the ordinance and the Apple Manor Covenants—namely, residential, recreational, and agricultural uses, which are the current uses. Indeed, the property is located in the rural conservation district where agriculture is the “preferred use.”³⁴ The Planning Commission, in its recommendation of denial of the same waiver request in 2006, found that “the denial of this request will not place an unreasonable restriction on the use of the property.”

Moreover, denial of a waiver would not “place” a restriction on the use of property—it is the ordinance that “places” the restriction, and in this case the restriction also is placed by the Apple Manor Covenants.

County staff previously have determined that this standard is not met in the context of a waiver of the requirement that a private street connect directly to a public street:

Staff’s opinion is that this standard cannot be met with this application as to not allow the subdivision would not place an unreasonable restriction on the use of the property. In fact, the denial of this request does not impact the use of the property at all. All it impacts is the ability to subdivide the property.³⁵

The staff said “this would be ... the case with all private street limitation waivers that are requested in conjunction with a subdivision application.”³⁶ As noted above, Judge Parker’s decree requires that the LLCs’ street plans comply with the ordinance requirements applicable to a subdivision application.

7. The Proposal Would Result in Significant Loss of Natural Resources

The Zoning Ordinance provides that land shall not be used or arranged to be used in any manner contrary to the requirements of the Ordinance.³⁷ The Zoning Ordinance further provides that a proposed land development shall:

³⁴ Zoning Ordinance § 3-503.

³⁵ Department of Community Development Staff Report, Zoning Ordinance Waiver (WAIV-15-003336), July 15, 2015. See also Department of Community Development Staff Report, Zoning Ordinance Waiver (WAVR13-CR-011), Sept. 11, 2014.

³⁶ Id.

³⁷ Zoning Ordinance § 2-102 (“...nor shall any land or structure be used, or arranged to be used for any purpose other than the permitted uses listed in the following Articles for the zoning district in which

“...not result in loss of natural resources, including prime agricultural and forestal lands; environmentally sensitive areas such as floodplains, steep slopes, rock outcrops and seasonally wet areas; predominant or unusual geologic features such as mountain peaks, caverns, gorges; and areas critical to the existence of important types of flora and/or fauna.”³⁸

Payandeh’s proposal for a Type I or II proposed street violates this provision. Any type of functional street would result in significant loss of natural resources, including forestal lands and environmentally sensitive areas such as steep slopes, rock outcrops, and seasonally wet areas. Any functional street would traverse steep slopes, require massive cutting and filling, leave highly erodible slopes, traverse a stream, and necessitate removal of hundreds of mature hardwood trees. The Payandeh street proposal would enable development on the scenic Goose Creek and Brushy Mountains that overlook the northern Piedmont plain in Fauquier County.

The Payandeh property is contained in the Rural Conservation District and contains springs and tributaries of Kettle Run and Crooked Run which flow into Goose Creek, which is a public water supply source that has been designated as a State Scenic River by the General Assembly. The entire property is located in the Goose Creek Watershed, an area of special environmental protection. The property is within the viewshed of Routes 17, 50, 55, 66, 724, and 688 and the G. Richard Thompson Wildlife Management Area and Appalachian National Scenic Trail. The property also is adjacent to or between two historic districts—the Crooked Run Historic District and John Marshall Leeds Manor Historic District.

8. The Proposal Would Violate a VOF Easement

Section 7-302.1.A.2 of the Zoning Ordinance provides that, in considering whether to waive the requirement that a private street must connect directly to a state maintained street, the Board may consider as an “additional” factor development limitations imposed on the subject property by a conservation easement. This additional factor does not obviate the need to meet each of the other factors, all of which must be met.

This factor strongly weighs against granting the waiver. As discussed below, the proposed street would violate a conservation easement held on the property by the Virginia Outdoors Foundation. In 2007, County staff concluded, after a site visit to the Payandeh property, that:

“Properties that are zoned Rural Conservation (RC) are typically properties that contain environmentally sensitive features, such as mountains and timber resources. The regulations of this zoning district were designed with those factors in mind in order to conserve these areas to the maximum extent possible....To design a private road in accordance with the standards for large lot subdivisions would be counterintuitive to the intent behind the Rural

the structure or land is located, nor shall any land or structure be used in any manner contrary to any other requirements specified in this Ordinance.”).

³⁸ Zoning Ordinance § 2-406.4.

Conservation Zoning District and the terms of the Virginia Outdoors Foundation Easement.”³⁹

As noted, the original developer of the Apple Manor Subdivision required Payandeh to grant a conservation easement on her property as a condition of relieving her lots of certain restrictions on resubdivision. Payandeh granted a conservation easement to the Virginia Outdoors Foundation.⁴⁰ She received significant financial benefits in the form of tax relief in exchange for the easement. Payandeh and her counsel have said:

“The VOF Easement is very restrictive, and is intended to assure the retention of the land in its current character, even though it provides for limited use of the farm.”⁴¹

“The VOF Easement is very restrictive, and is intended to assure the retention of the land in its current character, even in the face of limited use of the land.”⁴²

“Section 7-303.1 effectively mandates a Type I or II private street in connection with the subdivision of the Property” and “the VOF easement simply precludes this road from ever being built to the Zoning/Subdivision Ordinance Type I or II standards.”⁴³

“[T]he destruction of the landscape needed to construct a higher standard road is completely inconsistent with [the VOF easement].”

“The reason that the County requires that roads be designed at this stage of large lot subdivision is to assure that they can be built, if needed. In this case, the VOF easement simply precludes this road from ever being built to the Zoning/Subdivision Ordinance Type I or II standards. The VOF will have to concur that the construction of any road would not violate the terms and conditions of its easement, and it could not do so.”⁴⁴

³⁹ Memorandum dated October 15, 2007, from Bonnie Bogert, Planner, to Frederick P.D. Carr, Director of Community Development, Fauquier County.

⁴⁰ The VOF was established by the Virginia Assembly “to promote the preservation of open-space lands and to encourage private gifts of money, securities, land or other property to preserve the natural, scenic, historic, scientific, open-space and recreational areas of the Commonwealth.” Virginia Code § 10.1-1800.

⁴¹ Statement of Justification dated April 20, 2006, submitted to the Board of Supervisors on behalf of Mehrmah Payandeh by her attorney John Foote.

⁴² Statement of Justification dated May 1, 2007, submitted to the Board of Supervisors on behalf of Mehrmah Payandeh by her attorney John Foote.

⁴³ Statement of Justification dated April 20, 2006, submitted to the Fauquier County Board of Supervisors on behalf of Mehrmah Payandeh by her attorney John Foote.

⁴⁴ Statement of Justification dated April 20, 2006, submitted to the Fauquier County Board of Supervisors on behalf of Mehrmah Payandeh by her attorney John Foote. See also Payandeh Statement of Justification dated May 1, 2007.

Even though the VOF easement allows Payandeh to re-subdivide her lots, the easement does not permit her to do so in a way that would materially alter the topography of the property, even in the construction of private roads. The easement allows roads to be built, but only if they do not involve grading, blasting or earth removal that do not material alter the topography.

The relevant provisions of the VOF easement are contained in paragraphs 5 and 6 of the easement, which provide as follows:

5. Grading, blasting or earth removal shall not materially alter the topography of the Property except for dam construction to create private conservation ponds, or as required in construction of permitted buildings and connecting private roads described in paragraph 6, below. Mining on the Property is prohibited.

Thus, grading and earth removal that “materially alter the topography” are prohibited except as described in paragraph 6 of the easement. Paragraph 6, however, does not describe any permitted construction of connecting private roads:

6. No permanent or temporary building or structure shall be built or maintained on any parcel on the property other than (i) one (1) single family dwelling and one (1) secondary dwelling, (ii) non-residential outbuildings or structures commonly and appropriately incidental to such dwellings, and (iii) farm buildings or structures. Farm buildings or structures exceeding 4,500 square feet in ground area may not be constructed on the Property unless prior written permission for said building or structure is obtained in writing from Grantee. Any building or structure, dwellings included, to harmonize or be complementary with the existing landscape, shall not diminish the scenic views enjoyed by the public, and shall minimize impact on the natural, scenic, and open space qualities of the property.

Nothing in paragraph 6 allows grading or earth removal for connecting roads on the Payandeh property. The Easement therefore must be read to prohibit any grading or earth removal that materially alters the topography in conjunction with the construction of connecting private roads. Construction of any type of street to access the illegal Payandeh lots would require material alteration of the topography.

In addition, paragraph 4 of the easement provides that “The naturally occurring vegetation within one hundred (100) feet of all stream corridors must be left substantially in its natural state....” Payandeh’s proposed street would violate this provision also.

By letter dated July 18, 2016 to counsel for the Payandeh LLCs, Erika Richardson of the VOF wrote that construction of a Type I street to serve the Payandeh lots would be “consistent with the conservation values and restrictions” in the VOF’s easement. While this letter may suggest that the VOF is granting significant tax concessions to property owners without enforcing strict conservation values and restrictions, this letter is not binding on Fauquier County as to its conservation values and restrictions under the County’s ordinances.

9. The VOF Easement Will Not Prevent Unsightly Development

The VOF has demonstrated that it will not strictly enforce its conservation easement on the Payandeh property. The VOF has approved a Type I street for the Payandeh property which would inflict massive damage to the environment and is wholly inappropriate for the mountainous Payandeh property. The VOF already has permitted Payandeh to build a barn and tenant house on the visible eastern slope of the mountains. The VOF easement will not ensure against unsightly development of the Payandeh lots on the mountain slopes visible from routes 17, 50, 55, 66, 688, and 724.

VII. THE VIOLATIONS ARE A CRIMINAL OFFENSE

The ordinance violations by the Payandeh lots are not minor infractions or insignificant offenses. They constitute serious ongoing misdemeanors subject to fines of up to \$1,000 for each day of violation.⁴⁵ The County is entitled to collect substantial penalties for these violations. In prioritizing its enforcement activities, the County should pursue action to do so.

The Zoning Ordinance requires the Zoning Administrator to serve notice on the Payandeh LLCs of the ordinance violations and to require the violations to cease within a specified time:

Upon becoming aware of any violation of any provisions of this Ordinance, the Zoning Administrator or any other employee of the Department of Community Development designated with such authority in writing by the Zoning Administrator, **shall** serve a notice of such violation on the person committing or permitting the same. The notice of violation shall require such violation to cease within such reasonable time as specified therein....⁴⁶

VIII. THE UNLAWFUL SUBDIVISIONS SHOULD BE VACATED

The Board of Supervisors has authority to vacate the unlawful Payandeh lots pursuant to section 15.2-2272 of the Virginia Code. The Petitioners urge the County to commence proceedings to vacate the unlawful Payandeh lots.

Submitted by Melanie L. Fein on behalf of owners of seven of the legal lots the Apple Manor Subdivision and other concerned citizens of Fauquier County who have signed the petition urging that the unlawfully Payandeh subdivision be vacated and any waivers, infrastructure plans, or boundary line adjustments be denied.

⁴⁵ Subdivision Ordinance § 12-1. See also See Zoning Ordinance § 13-602.

⁴⁶ Zoning Ordinance § 13-601.3.