



# County of Fairfax, Virginia

To protect and enrich the quality of life for the people, neighborhoods and diverse communities of Fairfax County

December 9, 2009

Mr. Stephen K. Fox, Esquire  
10511 Judicial Drive, Suite 112  
Fairfax, VA 22030

Re: Interpretation for RZ/FDP 2005-MV-001, Tax Map 89-4 ((1)) 56, 57a and 69, Brookfield Ridge Road, LLC: Right-of-Way

Dear Mr. Fox:

This is in response to your letter of September 10, 2009 (copy attached), requesting a clarification of the proffers and the Conceptual Development Plan (CDP) accepted by the Board of Supervisors in conjunction with RZ 2005-MV-001, and the Final Development Plan (FDP) approved by the Planning Commission with FDP 2005-MV-001. As I understand it, the question is whether the public street shown on the proffered CDP/FDP and the Applicants' commitment to construct a public street constitute an irrevocable dedication of right-of-way to the Board of Supervisors. This determination is based upon your letter, the proffers, and the approved plan entitled "Renfro Property," Conceptual Development Plan/Final Development Plan, which was prepared by Land Design Consultants and is dated June 2, 2005, as revised through July 5, 2006.

On July 31, 2006, the Board of Supervisors approved RZ 2005-MV-001 and the CDP in the name of Brookfield Ridge Road, LLC, rezoning 11.08 acres from the R-1 District to the PDH-2 District, subject to proffers dated July 30, 2006. The Planning Commission approved FDP 2005-MV-001 on September 13, 2006. The parcels of land included with the rezoning were Tax Map No. 89-4 ((1)) parcels 56, 57A, and 69. The CDP/FDP shows access to Ridge Creek Way through Lot 69.

You have indicated that the owners of Lots 56 and 57A want to develop the site; however the owner of Lot 69 has not agreed to pursue development at the present time. You assert that Lot 69 is shown on the proffered CDP/FDP to provide public street access to the approved development and, further, that the acceptance of the rezoning proffers by the Board of Supervisors completed the dedication and made dedication of public right-of-way on and through Lot 69 binding on the owners of Lot 69 and the owners of Lots 56 and 57A.

You cite rezoning proffers 1.a. and 2.a. in support of your argument. These proffers provide as follows:

1. CONCEPTUAL/FINAL DEVELOPMENT PLAN (CDP/FDP)

- a. Subject to the provisions of Section 16-401 and 16-402 of the Fairfax County Zoning Ordinance (hereafter referred to as the "Zoning Ordinance"), development of the Application Property shall be in substantial conformance with option A of the CDP/FDP entitled "Renfro Property," containing eleven (11) sheets prepared by Land Design Consultants, dated January 26, 2005, as revised through July 5, 2006.

2. TRANSPORTATION

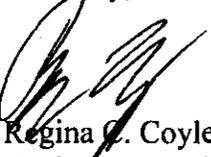
- a. The applicant shall construct a public street with curb and gutter within the residential community as shown on the CDP/FDP.

You also cite Virginia case law in *Barter Foundation, Inc. V Widener*, 267 Va. 80; 592 S.E. 2d 56 (2004).

It is my determination that, although the proffers accepted by the Board of Supervisors require the developer to construct a public road across Lot 69 at his expense as part of the approved development if and when it occurs, the proffers themselves, standing alone, do not constitute a dedication of part of Lot 69 to the Board of Supervisors for public street purposes. Rather, the plain and unambiguous language of the proffers provides only that such a dedication must be made in the future at the time the development occurs.

This determination has been coordinated with the County Attorney and made in my capacity as the duly authorized agent of the Zoning Administrator. If you have any questions regarding this interpretation, please feel free to call Kevin Guinaw at (703) 324-1290.

Sincerely,



Regina C. Coyle, Director  
Zoning Evaluation Division, DPZ

O:\feibe\Interpretations\Rezoning - RZ\RZ-FDP 2005-MV-001 Brookfield Ridge Rd Right-of-way.doc

Attachments: A/S

cc: Gerald W. Hyland, Supervisor, Mount Vernon District  
Earl Flanagan, Planning Commissioner, Mount Vernon District  
R. Scott Wynn, Deputy County Attorney  
Diane Johnson-Quinn, Deputy Zoning Administrator, Permit Review Branch, ZAD, DPZ  
Ken Williams, Plan Control, Land Development Services, DPWES  
Angela Rodeheaver, Section Chief for Site Analysis, DOT  
Jack Weyant, Director, Environmental and Facilities Inspection Division, DPWES  
Kevin Guinaw, Chief, Special Projects/Applications Management Branch, ZED, DPZ  
File: RZ/FDP 2005-MV-001, PI 0909 098, Reading File, Imaging

STEPHEN K. FOX  
A PROFESSIONAL CORPORATION  
ATTORNEY AT LAW  
10511 JUDICIAL DRIVE  
SUITE 112  
FAIRFAX, VIRGINIA 22030

RECEIVED  
Department of Planning & Zoning

SEP 14 2009

Zoning Evaluation Division

FAX (703) 273-7225

(703) 273-7220  
skfox@stephenkfoxpc.com

September 10, 2009

Eileen McLane, Zoning Administrator  
ATTN: Regina M. Coyle, Director  
Zoning Evaluation Division  
Department of Planning and Zoning  
County of Fairfax  
12055 Government Center Parkway, 8<sup>th</sup> Floor  
Fairfax, Virginia 22035

Re: Request for Zoning Interpretation; RZ/FDP 2005-MV-001; Tax Map Nos. 89-4 ((1))  
56, 57A and 69

Dear Mrs. Coyle:

This office represents the owners of Parcels 56 and 57A which were consolidated with Parcel 69 in the above rezoning application. On behalf of the owners, we submit this request for a zoning interpretation relating to the above zoning application as it pertains to these properties, along with the fee of \$500.00, as now required.

**BACKGROUND:**

On or about October, 2005, the referenced parcels were the subject of a zoning amendment, changing the zoning from R-1 to PDH-2, with proffers for twenty (20) single family detached residences. The area of the three (3) parcels is 11.04 acres. Parcels 56 and 57A totaled 10.3143 of that total acreage. Parcel 69, containing an old family burial ground on a portion of the lot, was joined for purposes of improved street access to an existing public street known as "Ridge Creek Way", and for its contribution to land area for density calculations. Parcel 69 is owned by Brookfield Washington, LLC, an entity related to the then putative Applicant and assumed developer.

The owners of parcels 56 and 57A, on one hand, and the owner of Parcel 69 are no longer associated for purposes of the development.

**ISSUES AND DISCUSSION RELATING TO INTERPRETATION REQUEST:**

The owners of parcels 56 and 57A desire to pursue development consistent with the rezoning granted by the Board of Supervisors. The owner of Parcel 69 does not desire to develop

- or to sell Parcel 69, ostensibly attempting to hold Parcel 69 as a sort of “spite strip”, the effect of which would be to effectively block the development of Parcels 56 and 57A. The owners of Parcels 56 and 57A believe that the zoning process committed parcel 69 to a dedication for public street purposes across parcel 69, an act that may not be withheld or withdrawn on a whim.

The bases for this position are:

1. Parcel 69 was consolidated into the rezoning amendment for all purposes, including the density it added to the application.

2. Parcel 69 is proffered *via* the GDP and FDP for a dedicated public use, i.e., for a public street connecting to Ridge Creek Way. (See also; Proffer No. 1. a.; 2.a.

3. The Owners/Applicants proffered to vacate and abandon the outlet road which provided the properties’ existing access to the public street known as Ridge Creek Way in view of the dedication commitment referenced in Paragraph 2, above. (See; Proffer 2.g.)

4. The proffers “...bind and inure to the benefit of the Applicant and his /her successors and assigns”.

5. The Board of Supervisors **accepted** the offer of dedication as noted above, amending the zoning of the property from R-1 to PDH-2 in reliance on the Proffers. This acceptance of the offer of dedication, we submit, completed the dedication and made the dedication of public right of way on and through Parcel 69 binding upon the owners of Parcel 69, as well as upon the owners of Parcels 56 and 57A.

#### QUESTIONS PRESENTED:

I. Did the proffer (offer) of dedication of public street right of way on and through Parcel 69 constitute an irrevocable dedication by the Board’s acceptance of the proffer (offer)?

II. If the answer to No. I, above, is in the affirmative, may the Board of Supervisors demand the referenced dedication at the time an application is made (site or subdivision plan filed) for development of the Parcels 56 and 57A consistent with the zoning amendment granted in RZ/FDP 2005-MV-001? Stated otherwise, may the Lot 69 owner unilaterally withhold what we believe is a completed dedication?

#### ARGUMENT:

It is submitted that the foregoing constitutes an express dedication of the public right of way through parcel 69. The Applicant, then contract owner of Parcels 56 and 57A and the owner of Parcel 69 sought a benefit through the zoning amendment process. That benefit was granted based upon the Applicants and Owners’ several promises, among which was the offer to dedicate public street right of way through Parcel 69. The Board of Supervisors’ grant of the zoning amendment request constituted its acceptance of the offer of dedication on behalf of the public

body. The Virginia Courts have recognized this principle, noting:

“Dedication, at common law, was a grant to the public, by a landowner, of a limited right of use in his land. No writing or other special form of conveyance was required; unequivocal evidence of an intention to dedicate was sufficient. Until the public accepted the dedication, it was a mere offer to dedicate.” *Barter Foundation, Inc. V Widener*, 267 Va. 80; 592 S.E.2d 56 (2004). Citations omitted.

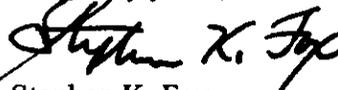
The Court, in *Barter Foundation, Inc., supra*, notes that before the offer to dedicate is accepted, no responsibilities are imposed upon either party. The offer could be unilaterally withdrawn by the owner. Commenting on what constitutes acceptance, the Court notes:

“...Acceptance could be formal and express, as by the enactment of a resolution by the appropriate governing body, or by implication arising from an exercise of dominion by the governing authority or from long continued use of requisite character.” 592 S.E.2d 56, 59.

Though the Court found that the Town of Abingdon had not taken unequivocal action which could be characterized as acceptance of the offer of dedication, the case is nevertheless instructive and furnishes a basis for analyzing the situation posed by this request. In this instance, the offer of dedication is clear; as is the acceptance of that offer by the Board of Supervisors in its adoption of a zoning ordinance accepting the offer.

On the basis of the foregoing, it is submitted that the right of way offered to be dedicated through Lot 69 was accepted; became final upon the Board's acceptance; and may not be withdrawn or withheld from the public. We appreciate your attention to this request, and would be pleased to furnish any additional information as required.

Very truly yours,



Stephen K. Fox

INC.

SPACE

RIDGE CREEK WAY  
52' R/W

EXISTING TURNAROUND  
(T.B.R.)

30A  
N/F  
WAINLESS  
D.B.7944 PG. 396

89A  
N/F  
MASTERTSON  
D.B.7909 PG. 101

POTENTIAL ENTRANCE  
FEATURE LOCATION

APPROX. LOC. OF  
EX. BURIAL SITES  
VA. ARCHAEOLOGICAL SITE # 44FX1163  
S52°44'15"E 650.34'

PORTION OF  
EX. OUTLET ROAD  
D.B. 713 PG. 567

CEL 'E'  
400'  
SPACE  
PROP. 10' DIA  
APPROX.

SEE NOTE  
38  
EX. EYE OF  
PY

PARCEL 'D'  
±13,600'  
OPEN SPACE

PROP.  
(TTP.)

1  
8,900'

20  
±9,000'  
PROP. 6'  
ASPH. TRAIL

17  
±10,400'

2  
900'

19  
±10,000'

APPROX. LOCATION  
PROP. RETAINING WALL  
APPROX. HEIGHT 4'-6"

3  
7,300'

PROP. WATERLINE  
(TTP.)

18  
±12,100'

PROP. DRY EXTER  
SPRINKLER FACILITY  
FRONT ST

4  
12,000'

BRL (TTP.)

PUBLIC STREET  
CAT. II, 260 VPD, 4'

5  
±10,700'

±10,500'

Renfro Property  
R2/FDP 2005.MU.001  
Conceptual Dev.  
Plan / Final Dev.  
Plan  
Land Design  
Consultants  
6/2/05 - 7/5/2006

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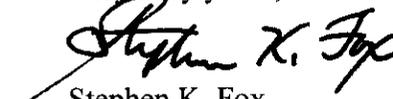
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Stephen K. Fox

INC.

SPACE

BRIDGE CREEK WAY  
52' R/W

EXISTING TURNAROUND  
(T.B.R.)

804  
N/F

WAINLESS  
D.B. 7944 PG. 396

89A  
N/F  
MASTERTSON  
D.B. 7909 PG. 1097

APPROX. LOC. OF  
EX. BURIAL SITES  
VA. ARCHAEOLOGICAL SITE # 44FX163  
552°44'15"E 650.34'

PORTION OF  
EX. OUTLET ROAD  
D.B. 7-8 PG. 567

POTENTIAL ENTRANCE  
FEATURE LOCATION

SEE NOTE  
33

PROP  
BENCH

PROP.  
(TYP.)

PARCEL 'D'  
±73,600#  
OPEN SPACE

TREELINE

CEL 'E'  
400#  
SPACE  
PROP. 10' D/W  
APRON

1  
8,900#

20  
±9,000#

PROP. 6'  
ASPH. TRAIL

16  
±9,500#

17  
±10,400#

2  
900#

19  
±10,000#

APPROX. LOCATION  
PROP. RETAINING WALLS  
APPROX. HEIGHT (4'-5')

3  
7,300#

PROP.  
WATERLINE  
(TYP.)

18  
±12,100#

RMP N.S.F.  
2-YEAR N.S.F.  
10-YEAR N.S.F.  
PROP. DRY, EXTEN  
SMIT. FACILITY  
(1000) 17

BRL (TYP.)

PUBLIC STREET  
CAT. II, 260 VPD, 4'

5  
±10,700#

±10,500#

Renfro Property  
R2/FDP 2005.mv. 001  
Conceptual Dev.  
Plan / Final Dev.  
Plan  
Land Design  
Consultants  
6/2/05 - 7/5/2006