

Mr. Chairman and Commission members,

Homebuilders of Vienna object to the taking of land and or construction of public improvements where the need was not substantially generated by the new development. The proposed change to Town of Vienna Code Section 17-267.2 is a result of House Bill # 413 that amends Virginia Code Section 15.2-2242 allowing the town to require, by ordinance, the dedication of property and installation of sidewalks where none exist. While we understand the desire for new sidewalks in Town, we strongly believe a property owner has the right to a building permit without undue burden. Additionally, the proposed Vienna code section 17-67.2 raises the following concerns:

1. Dedication- Dedication of property reduces the size of a lot. A property owner has the right to understand that this ordinance may reduce their buildable area due to lot coverage requirements and building restriction lines. Implementation of this ordinance should consider public use easements in lieu of dedication. It is imperative that a map showing the existing and required right-of-way for every street in Vienna be created so that homeowners and land purchasers can determine if their property or the property they intend to purchase will be impacted by this ordinance.

2. Scope of Improvements- The language that is proposed specifically identifies sidewalks, but Staff has indicated that they would also require frontage improvements through related existing code. We find the inclusion of frontage improvement requirements such as curb and gutter to be excessive and presents a potential legal problem.

3. Escrow Funds- We understand that the Town could accept escrowed funds in the situation where improvements are infeasible. This is a Council process. We believe this authority should lie with the Director of Public Works versus the Town Council. Further, any ordinance should specify the time period in which the escrow funds will be used, and if not used within the identified time period, what is the process for returning funds to the applicant.

4. Effective Date- We suggest if adopted, this ordinance should not take effect until 90 days after approval by Town Council and should only impact new submissions vs submissions currently in the review process.

5. Title Issues- any deviations in setbacks or the creation of nonconforming lot sizes will produce title exceptions. Title exceptions require agents, homeowners, lenders, and town staff to document these exceptions. Please consider public use easements.

6. Taking- Dedication of property that decreases the usability of a property owner's land is a "taking". Does the town propose to compensate the property owners for this taking? When a "taking" of property is determined to be appropriate, the pre-take area should be used for all lot coverage calculations, this should apply for the subject property in perpetuity. This should be documented in a zoning determination letter provided to the property owner. State code section 15.2-2208.1 addresses the damages a jurisdiction could face for unconstitutional grant or denial by locality of certain permits and approvals. See Exhibit A for State Code Language.

We respectfully request that you consider the following options to the code so that the Town's objective can be met while protecting the property owners' ability to use their land.

Exhibit A

Virginia State Code Reference

§ 15.2-2208.1. Damages for unconstitutional grant or denial by locality of certain permits and approvals.

A. Notwithstanding any other provision of law, general or special, any applicant aggrieved by the grant or denial by a locality of any approval or permit, however described or delineated, including a special exception, special use permit, conditional use permit, rezoning, site plan, plan of development, and subdivision plan, where such grant included, or denial was based upon, an unconstitutional condition pursuant to the United States Constitution or the Constitution of Virginia, shall be entitled to an award of compensatory damages and to an order remanding the matter to the locality with a direction to grant or issue such permits or approvals without the unconstitutional condition and may be entitled to reasonable attorney fees and court costs.

B. In any proceeding, once an unconstitutional condition has been proven by the aggrieved applicant to have been a factor in the grant or denial of the approval or permit, the court shall presume, absent clear and convincing evidence to the contrary, that such applicant's acceptance of or refusal to accept the unconstitutional condition was the controlling basis for such impermissible grant or denial provided only that the applicant objected to the condition in writing prior to such grant or denial.

C. Any action brought pursuant to this section shall be filed with the circuit court having jurisdiction of the land affected or the greater part thereof, and the court shall hear and determine the case as soon as practical, provided that such action is filed within the time limit set forth in subsection C or D of § [15.2-2259](#), subsection D or E of § [15.2-2260](#), or subsection F of § [15.2-2285](#), as may be applicable.

2014, cc. [671](#), [717](#).

Exhibit B.

Vienna Builders suggested edits in blue

PROPOSED ORDINANCE

Proposed by the Town Attorney (*Revisions in bold, italic, deletions are strikethroughs*)

The following is a proposed ordinance to amend the Code of the Town of Vienna, Chapter 17, Subdivisions, Article 5, Improvements, Section 17-67.2 Completion of Sidewalks for single-Lot Development.

BE IT ORDAINED BY THE COUNCIL OF THE TOWN OF VIENNA, VIRGINIA THAT:

Section 1: The Town Code, Chapter 17- Subdivisions, Article 5, Improvements, Section 17-67.2 Completions of sidewalks for single-lot development, is amended to read as follows:

Sec. 17-67.2. - Completion ***and construction*** of sidewalks for single-lot development.

- a) The developer of any lot that fronts an existing street ~~and where adjacent property on either side has an existing sidewalk,~~ shall dedicate land, construct a sidewalk and connect such new sidewalk to the existing adjacent sidewalks, ***if any***. Such new sidewalk shall be constructed in accordance with the standards set forth in this Code.
- b) ***In the event no curb and gutter exist, or a planned Town Construction Improvement Project has been approved, the Director of Public Works may waive the construction of such new sidewalk and permit the deposit of designated funds for such construction in accordance with sections 17-65 and 17-65.1.***
- c) Upon application by the developer to the Town Council, the Town Council may, in its discretion, waive the construction of such new sidewalk and permit the deposit of designated funds for such construction in accordance with sections 17-65 and 17-65.1.

Other notes to implementation of Ordinance to be included in Town's Public Improvements Manual:

- 1. A map showing the existing and required right-of-way for every street in Vienna be created so that homeowners and land purchasers can determine if their property or the property they intend to purchase will be impacted by this ordinance
- 2. If a dedication is required, the pre-dedication lot area shall be used for purposes of lot coverage calculations. This shall apply to subject property in perpetuity.
- 3. Any recordation of required dedication shall be completed prior to the issuance of a Town of Vienna Certificate of Occupancy.
- 4. The Town of Vienna shall provide standard verbiage for dedications to ensure clarity and compliance with all required deeds.
- 5. A written plan to manage escrowed funds to comply with the Virginia code.