VIRGINIA: IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

SEQUEL INVESTORS LIMITED PARTNERSHIP and PEPSI COLA BOTTLING COMPANY OF CENTRAL VIRGINIA, INC.,

Civil Action No._____

Plaintiffs

v.

ALBEMARLE PLACE EAAP, LLC
Serve: CT Corporation System
4701 Cox Rd. Suite 301
Glen Allen, Virginia 23060-3802

CITY OF CHARLOTTESVILLE, VIRGINIA and
CITY OF CHARLOTTESVILLE CITY COUNCIL
Serve: S. Craig Brown, Esquire
City Attorney
605 East Main Street
Charlottesville, Virginia 22902

and
ALBEMARLE COUNTY, VIRGINIA,
and the ALBEMARLE COUNTY BOARD OF SUPERVISORS
Serve: Larry W. Davis, Esquire
County Attorney
401 McIntireRoad, Suite 325
Charlottesville, Virginia 22902

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COME NOW the Plaintiffs, by counsel, and for their Complaint allege as follows:

This case concerns the intentional and unlawful discharge of large amounts of stormwater onto the Plaintiffs' unencumbered private property. Defendant Albemarle Place EAAP, LLC, a commercial developer, has knowingly constructed a stormwater system that collects and diverts millions of gallons of stormwater onto the Plaintiffs' property, where the Plaintiffs' existing facilities will be overwhelmed by the additional surge of stormwater. The Defendant government subdivisions, although charged by law with a duty to protect downstream property owners, have allowed the new stormwater system to be

constructed. Collectively, the Defendants seek to saddle the Plaintiffs with all of the cost, risk and damage caused solely by the Defendants' own new stormwater system.

The Parties

1. The Plaintiffs each have valuable property interests in and adjacent to a commercial development in the City of Charlottesville, Virginia known as the Pepsi/Sequel properties, such properties hereinafter collectively referred to as "Pepsi/Sequel properties" or "Plaintiffs' properties."

   a. Plaintiff Sequel Investors Limited Partnership ("Sequel"), a Virginia limited partnership, holds a 99-year leasehold interest in a portion of the Pepsi/Sequel properties.

   b. Plaintiff Pepsi Cola Bottling Company of Central Virginia, Inc. ("Pepsi"), a Virginia corporation, owns a portion of the Pepsi/Sequel properties.

2. Defendant Albemarle Place EAAP, LLC ("E&A") is a Delaware corporation. It is the owner of Albemarle County land immediately west of Plaintiffs' properties and separated from Plaintiffs' properties only by U.S. Route 29. E&A is currently constructing a 1,000,000-plus square foot commercial and residential development known as "Stonefield". The development is occurring within both Albemarle County and the City of Charlottesville.

3. The Defendant City of Charlottesville is a municipality of the Commonwealth of Virginia. Pursuant to the Virginia Code and the City of Charlottesville Code, the City is obligated to regulate certain aspects of the Stonefield development, including erosion and sediment control and stormwater management. The Defendant City of Charlottesville City Council is the governing body of the City.

4. The Defendant Albemarle County is a county of the Commonwealth of Virginia. Pursuant to the Virginia Code and the Albemarle County Code, the County is obligated to regulate certain aspects of the Stonefield development, including erosion and sediment control and stormwater management. The Defendant Albemarle County Board of Supervisors is the governing body of the County.

Venue and Jurisdiction

5. This action is brought pursuant to the Virginia Constitution, the common law of Virginia, § 10-43 of the City of Charlottesville Code and the Virginia Declaratory Judgment Act, Va. Code Ann. §§ 8.01-184 through 191. The action centers upon E&A's intentional and unlawful discharge of surface water onto Plaintiffs' properties, which will cause flooding and property damage. Plaintiffs seek declaratory and permanent injunctive relief to remedy E&A's unlawful acts and omissions. The Defendant City and County have committed an unconstitutional taking of Plaintiffs' private property by purporting to take private property for private use; the Defendant City and County purport to allow and require the use and occupation of Plaintiffs' private property by E&A without Plaintiffs' permission. Jurisdiction is proper pursuant to Va. Code Ann. § 15.2-1404 as to the Government Defendants, as each locality is being sued in its own name in relation to matters connected with their respective duties.

6. Venue is proper pursuant to Va. Code Ann. § 8.01-262 as part of the events and omissions giving rise to the cause of action arose in Albemarle County and Defendant E&A regularly conducts substantial business activity in Albemarle County, and/or venue is proper pursuant to Va. Code Ann. § 8.01-261(15) as a Category A or preferred venue as this is an action for an injunction brought in the county in which the act is to be done or is being done.

Facts

Defendant E&A's Unlawful Stormwater Discharge

7. In constructing its development, Defendant E&A has intentionally, knowingly and unlawfully enlarged the watershed at its development and constructed stormwater facilities that will overwhelm and flood Plaintiffs' property. E&A's acts will drastically increase the volume, rate and velocity of stormwater on Plaintiffs' properties. E&A's land development, by its own engineering calculations, will flood and damage Plaintiffs' private, developable property at fifty times the frequency of current conditions. The current maximum limit of floodwater within Plaintiffs' existing stormwater detention facility during a rare 100-year storm event would be rendered the limit of a frequent two-year

storm event as a direct result of E&A's acts. See Exhibit A (map showing flood levels currently and with drastically multiplied flow rates caused by E&A).[1]

8. As a direct result of E&A's acts, flooding that currently only has a 1 percent chance of occurring would be rendered a 50 percent probability. In addition, in a relatively frequent 10-year storm event, as a direct result of E&A's acts, existing property will be damaged, causing flooding on Plaintiffs' properties, and private, developable land will be rendered useless, unfit for development and unsafe. As opposed to retaining its stormwater on site, as required by statute, ordinance and common law, E&A is attempting to unilaterally dedicate Plaintiffs' private property to the sole use of E&A for stormwater retention and management.

9. Stormwater drains through existing natural and manmade channels on Plaintiffs' properties before exiting into Meadow Creek, a tributary of the Rivanna River. The Plaintiffs' properties contain engineered stormwater control facilities that can, without the additional stormwater caused by E&A, withstand and safely handle large, extremely rare storm events. Significant flooding has not occurred on Plaintiffs' properties since construction of those facilities, despite many severe storms.

10. The rate at which stormwater drains from the lands west of U.S. Route 29 onto the Plaintiffs' properties has historically been limited as the stormwater was being detained on Defendant E&A's Stonefield property. This had been the case for many decades. Upon information and belief, stormwater had been detained in this manner since the construction of U.S. Route 29. There is an existing 42-inch pipe that runs underneath U.S. Route 29 and transports water and sediment from a tributary of Meadow Creek running through Defendant E&A's Stonefield property onto Pepsi/Sequel properties. The existing drainage system at the Pepsi/Sequel properties was designed to capture and divert stormwater and sediment only from the 42-inch pipe, and the system has done so without incident for years.

11. As part of its Stonefield development project, E&A has "jack-bored" a steel casing across U.S. Route 29 and has placed an additional new 72-inch drainage pipe beneath the roadway. Due solely

[1] Plaintiffs' Exhibit A is based in part upon a document created by agents of Defendant E&A. Plaintiffs have added the color portions of the exhibit to demonstrate and illustrate Plaintiffs' claims.

to E&A's construction activities, this new pipe collects stormwater from many acres that never previously drained into Plaintiffs' stormwater facilities. The existing facilities were not designed to accommodate the stormwater from this expanded acreage and the accelerated flow. The new pipe discharges at a separate location just downstream from the smaller, pre-existing 42-inch pipe. Rather than store stormwater passing through the Stonefield development site on E&A's own property, or seek offsite easements or other permission that would allow for adequate engineering and facilities to accommodate that stormwater, E&A has intentionally designed the new pipe to direct large amounts of excess stormwater onto Plaintiffs' properties. The increased stormwater flows travel through the additional new 72-inch pipe under U.S. Route 29, through the corner of a parcel owned by the U.S. Postal Service, and then into the Plaintiffs' drainage system. Plaintiffs' existing drainage system was not designed to accommodate the flows caused by the additional new 72-inch pipe and by the enlarged watershed.

12. Defendant E&A's own engineering calculations demonstrate that the expanded watershed and the additional new and larger 72-inch pipe will dramatically increase the velocity and volume of water, sediment and debris on the Plaintiffs' properties. These calculations demonstrate that even relatively common storm events, known as two-year storm events, will cause erosion damage. In a larger 10-year storm event, these calculations demonstrate that the stormwater flow from the additional new and larger 72-pipe will flow well outside and above the banks of the existing channel within Plaintiffs' drainage facilities and, in a 100-year or greater storm event, this excess stormwater will inundate Plaintiffs' developable, unencumbered private property. Defendant E&A, by its own calculations, is diverting stormwater into a system that cannot safely manage the new rate, frequency or volume of flow. In a large storm event, the new additional and larger 72-inch pipe will discharge approximately 251,326 gallons of stormwater per minute in addition to the current approximately 89,760 gallons per minute flowing through the existing 42-inch pipe.

13. E&A does not have Plaintiffs' permission, whether by easement or other agreement, to divert new and excess stormwater onto Plaintiffs' properties. E&A does not have Plaintiffs' permission to use or occupy their property in any manner.

14. Several drainage easements exist in and near the Pepsi/Sequel properties: a 1973 easement allowing a U.S. Postal Service drainage channel on Plaintiffs' property and an easement from Plaintiffs' predecessors in interest to the City of Charlottesville for public-only drainage to a fixed surface water elevation of 416' that also provides for the City to perform maintenance within the drainage impoundment area. None of the easements purport to allow inundation of the Plaintiffs' properties. None of the easements allow trespass to Plaintiffs' properties. None of the easements allow the Defendants to cause or contribute to flooding on Plaintiffs' property. None of the easements allow inundation above the 416' elevation. E&A is not a party to any easement on the Pepsi/Sequel properties. Nonetheless, the added stormwater flows through the additional new 72-inch pipe will cause and contribute to erosion, flooding and attendant property damage on Plaintiffs' property.

15. All of the existing stormwater facilities on Plaintiffs' properties were designed to fully and safely accommodate a 100-year flood. Without the new additional 72-inch pipe, a 100-year flood would extend floodwater to an elevation of 416 feet above sea level, the extent of the City's aforementioned easement. Any flood higher than 416 feet above sea level would flow onto Plaintiffs' developable and unencumbered property. The additional new 72-inch pipe will drastically change the 100-year flood projections. Even a two-year rain event, according to E&A's own engineers, will extend the water pool to the level of the pre-existing 100-year flood: 416 feet. Put another way, Plaintiffs' current drainage system was designed to handle, and did handle prior to the installation of the 72-inch pipe, storms expected to happen once each century. As a direct result of E&A's action, that same amount of inundation will be expected to occur every two years. A relatively common 10-year storm event will cause flood waters, according to E&A's own engineers, to rise to an elevation of 421 feet: five vertical feet above the present 100-year flood limit. A 100-year or more storm event will cause flood water to an elevation of 429 feet (+/- 1 foot), threatening and overflowing Plaintiffs' current dam. See Exhibit A (map showing flood levels currently and with drastically multiplied flow rates caused by E&A).

16. As a result of E&A's violation of the City E&S permit, as described in more detail below, E&A was ordered by the City to cap the additional, new 72-inch pipe on its own property on the west side

of Route 29. The cap effectively prevented the flow of stormwater through the new pipe and prevented the inundation of Plaintiffs' properties, with such stormwater being retained on the Stonefield site as it has been for decades. E&A, and in violation of the City's order, failed to plug the additional, new 72-inch pipe. That pipe is now open and stormwater is flowing through it.

Series of Unlawful and Improper Acts by the City and County

17. Both of the Defendant government subdivisions are obligated to regulate stormwater and erosion and sediment control pursuant to a state statutory and regulatory system known commonly as "Minimum Standards 19" or "MS-19." The regulatory system is administered by the Virginia Department of Conservation and Recreation and requires that, at a minimum, (1) "[p]roperties and receiving waterways downstream of any land development project shall be protected from erosion and damage due to increases in volume, velocity and peak flow rate of stormwater runoff …", 4 VAC 50-60-97 (stormwater management regulations); and (2) "[p]roperties and waterways downstream from development sites shall be protected from sediment deposition, erosion and damage due to increases in volume, velocity and peak flow rate of stormwater runoff," 4 VAC 50-30-40.19 (erosion and sediment control regulations).

18. Counties and cities may administer their own local soil and erosion control permitting program by becoming a "program authority" pursuant to Va. Code Ann. § 10.1-560. The respective Defendant government subdivisions administer their own "MS-19" programs as program authorities and pursuant to the City of Charlottesville Code and the Albemarle County Code, respectively. These local programs must be consistent with and satisfy the "minimum standards of effectiveness" of the state erosion and sediment control program. Va. Code Ann. § 10.1-562(D), (E). The state erosion and sediment control program includes MS-19. 4 VAC 50-30-40 (Erosion and Sediment Control Standards, Minimum Standards).

19. The state and county ordinances specifically incorporate MS-19. Albemarle County Code § 17-203; Charlottesville City Code § 10-33. Similarly, each government administers its own local stormwater management program permitting program (known as a Virginia Stormwater Management Program or "VSMP"), pursuant to Virginia Code § 10.1-603.3. As to both erosion and sediment control and stormwater management, local programs must be consistent with and no less stringent than statewide regulatory standards. Va. Code § 10.1-562 (erosion and sediment control); Va. Code § 10.1-603.3(E) (stormwater).

20. E&A's land development fails to meet MS-19 requirements in several respects, fails to meet VSMP requirements, violates the Charlottesville City Code and violates the Albemarle County Code and other Virginia law as well. The series of regulatory failures by the government officials and the respective subdivisions has culminated in an unconstitutional taking of private property for private use: the forced use of Plaintiffs' property for the management of stormwater from E&A's facility.

21. The Albemarle County Board of Supervisors is the legislative body of the Defendant County. On October 22, 2003, the Board of Supervisors approved a rezoning Application Plan (ZMA 2001-07), which included a proffered Code of Development that specified E&A would retain stormwater on its own property, if feasible. The exhibits and drawings submitted with ZMA 2001-07 depict facilities designed to retain the stormwater on E&A's own property. No alternative to on-site stormwater retention was considered or approved by the Board of Supervisors as part of ZMA 2001-07.

22. After this legislative determination to retain water on site if feasible, Albemarle County staff administratively approved a plan by which E&A would deviate from its approved rezoning Application Plan and instead shunt stormwater onto Plaintiffs' properties. As an administrative and not legislative body, the County staff did not have the lawful authority to make this legislative departure from the Board of Supervisors-approved proffered rezoning Application Plan. Such action is therefore void. This was the first of several unlawful irregularities in the permitting process.

23. By shunting water through the additional new 72-inch pipe, away from its own property, E&A is attempting to shift its costs of handling stormwater on its own site pursuant to MS-19 and VSMP

requirements onto the Plaintiffs. This action would give E&A the benefit of being able to avoid having to use valuable U.S. Route 29 frontage or out parcel land to construct the detention basin shown on its rezoning Application Plan, or having to build expensive underground stormwater sediment and detention systems and facilities. Instead, by shunting water through the additional new 72-inch pipe, E&A is attempting to create as much two or more acres of readily marketable frontage or out parcel land, having a value of as much as several million dollars or more. In essence, E&A is purporting to take Plaintiffs' own valuable land in order that E&A can reap the benefits of not having to use its own land or having to bear the cost of retaining its own stormwater on its own site. Thereby, E&A would benefit unjustly, in the amount of several million dollars or more by turning what should have been onsite water detention and which was shown on its legislatively approved rezoning plans and drawings as a retention pond into a highly marketable and valuable frontage parcel or outparcel land, to the detriment of the Plaintiffs.

24. Notwithstanding the unlawful County staff decision to the contrary, it is demonstrably feasible for E&A to retain its stormwater on its own property and in accordance with MS-19 and VSMP regulations. This is shown by the fact that E&A developed and received approval from Albemarle County for revised erosion and sediment control plan that, while labeled "temporary," includes a detention facility that did, in fact, retain stormwater on its own site for many months. Nonetheless, E&A has instead shunted the excess water onto Plaintiffs' property in an attempt to avoid the costs of the facilities which it had planned to build and which are required by MS-19 and VSMP. Thus, the Defendant County has (1) unlawfully attempted to exercise legislative power through an administrative body that has no legislative power; and (2) has determined that on-site stormwater retention is not feasible, even though such retention is demonstrably feasible because it was temporarily carried out in accordance with an Albemarle County reviewed and approved plan.

25. Plaintiffs have advised E&A and the Defendant government subdivisions that, according to E&A's own engineering calculations, E&A's increase of stormwater discharge will create significant erosion and will inundate Plaintiffs' properties. Despite the Plaintiffs' warnings and attempts to amicably

resolve the dispute, E&A has insisted on expanding the watershed and constructing the additional new 72-inch pipe. E&A refuses to alter the design to prevent inundation and damages to the Plaintiffs.

26. Because the Stonefield development is occurring on property within Albemarle County, E&A, in accordance with MS-19, is required to obtain an Albemarle County land disturbance permit. In permitting E&A's activities, and in accordance with MS-19, Albemarle County is obligated to protect downstream properties, even if those properties lie downstream of the County's boundary. The County has issued E&A a permit, but has unlawfully failed to protect Plaintiffs' downstream properties.

27. Because the additional new 72-inch pipe encroaches upon property within the City of Charlottesville, and because Defendant E&A would disturb more than 10,000 square feet of land, E&A, in accordance with MS-19, was also required to obtain a City of Charlottesville land disturbance permit.

28. MS-19 requires that permit applicants "shall provide evidence of permission to make the improvements." 4 VAC 50-30-40.19(d). For the Stonefield development, such improvements include riprap on Plaintiffs' property. The applicant (E&A in this instance) never provided the Government subdivisions evidence of such permission with its land disturbance permit applications, nor did such Government subdivisions require evidence of E&A's needed permission to conduct such activities on Plaintiffs' property before issuing the respective land disturbing activity permits. E&A does not have such permission. This is a clear MS-19 violation by both Government subdivisions.

29. MS-19 requires that "[a]ll previously constructed man-made channels shall be analyzed by the use of a 10-year storm to verify that stormwater will not overtop its banks and by the use of a 2-year storm to demonstrate that stormwater will not cause erosion of channel bed or banks." 4 VAC 50-30-40.19(b)(2)(b). The Stonefield development fails both requirements. Defendant E&A's own engineering analysis of a 10-year storm verifies that stormwater will overtop channel banks on Plaintiffs' properties. Its own engineering analysis of a 2-year storm verifies that stormwater will cause erosion of channel bed and banks on Plaintiffs' properties. If analysis shows these results, channel improvements must be made to prevent erosion. 4 VAC 50-30-40.19(c). E&A has not received or requested the

required permission to make such improvements. In short, E&A's acts will dramatically increase rather than prevent erosion. This is a clear MS-19 violation by both Government subdivisions.

30. The City of Charlottesville has issued a land disturbance permit to E&A, despite knowing that the plan violates MS-19 requirements and will cause inundation of private, unencumbered property. Likewise, Albemarle County has approved the Stonefield development plan, despite knowing that the plan violates MS-19 requirements and will cause inundation of private, unencumbered property.

31. Chapter 17 ("Water Protection"), Article III ("Stormwater Management and Water Quality") of the Albemarle County Code provides that each property owner must comply with the ordinance prior to commencing any land development and at all times thereafter. Albemarle County Code § 17-300.

32. Such property owners must submit and obtain approval of a "stormwater/BMP [Best Management Practices] plan" prior to construction. Id., § 17-303. The code further provides:

> Each stormwater management/BMP plan shall require that land and receiving waterways which are downstream from the land development be protected from stormwater runoff damage, as provided herein:
>
> A. To protect downstream properties and receiving waterways from flooding, the ten (10) year post-development peak rate of runoff from the land development shall not exceed the ten (10) year pre-development peak rate of runoff.
>
> B. To protect downstream properties and receiving waterways from channel erosion, the two (2) year post-development peak rate and velocity of runoff from the land development shall not exceed the two (2) year pre-development peak rate and velocity of runoff.

Id., § 17-314. Compliance with this section must be verified by calculations that are consistent with accepted engineering practices. Id.

33. As a direct result of E&A's unwillingness to retain stormwater on its own property and instead constructing the additional new 72-inch pipe, by E&A's own engineering analysis, the ten year post-development peak rate of runoff from the Stonefield site will drastically exceed the ten year pre-development peak rate of runoff now flowing through the existing 42-inch pipe under U.S. Route 29. Additionally, also by E&A's own engineering analysis, the two year post-development peak rate and velocity of runoff from the Stonefield development will drastically exceed the two year pre-development

peak rate and velocity of runoff now flowing through the existing 42-inch pipe. E&A has no exemption from this requirement of the Albemarle County Code.

34. Despite the failure to meet these VSMP requirements, which were codified by Albemarle County in § 17-303, the County nonetheless issued a land disturbance permit to E&A. The permit expressly contemplates and requires facilities that will cause the drastic increase of floodwater on Plaintiffs' private, unencumbered properties.

35. Likewise, the City of Charlottesville has permitted the E&A development, even though the permit will violate the City's parallel provisions of MS-19 and VSMP requirements.

36. The state regulations governing stormwater control require that "properties and receiving waterways downstream of any land-disturbing activity shall be protected from erosion and damage due to changes in runoff rate of flow and hydrologic characteristics, including but not limited to, changes in volume, velocity, frequency, duration, and peak flow rate of stormwater runoff in accordance with the minimum design standards set out in this section." 4 VAC 50-60-1186. The regulations also require that "[d]ownstream properties and waterways shall be protected from damages from localized flooding due to changes in runoff rate of flow and hydrologic characteristics, including but not limited to, changes in volume, velocity, frequency, duration, and peak flow rate of stormwater runoff in accordance with the minimum design standards set out in this section." 4 VAC 50-60-1188. Both Defendant Government subdivisions are bound by these regulations, and both subdivisions have failed to meet its requirements. E&A's land-disturbing activity will cause flooding, erosion and damage on Plaintiffs' properties and in Plaintiffs' receiving waterways downstream.

37. Further, both Government subdivisions based their permitting decisions on information which was false and which both subdivisions knew to be false. For example, the land disturbance permit applications submitted by E&A to both Government subdivisions depict, as "existing conditions", extensive erosion control "riprap" in the stream channel on Plaintiffs' properties. Such extensive riprap does not exist. E&A's depiction showed channel banks, in some areas on Plaintiffs' properties, up to

eighteen inches higher elevation than actual conditions. Upon information and belief, both Government subdivisions, through site visits, knew that the E&A's depictions of "existing conditions" were false.

38. Both Government subdivisions have disregarded applicable erosion and sediment control and stormwater ordinances in issuing permits to E&A. The unlawful permitting will directly cause the frequent, destructive inundation and occupation of Plaintiffs' properties.

39. The wrongful conduct of the Defendants will cause irreparable harm to the Plaintiffs, as the damage will be severe and perpetually recurring. Plaintiffs have no adequate remedy at law for the injuries Plaintiffs have suffered and will suffer unless the Defendants are enjoined, because no amount of monetary relief can compensate for the inundation that will repeatedly damage, physically occupy and render useless the Plaintiffs' property.

COUNT I: NUISANCE AND PROSPECTIVE NUISANCE

40. The preceding paragraphs are incorporated herein by reference.

41. It is beyond a reasonable certainty that the acts and omissions of E&A near and upon the Plaintiffs' properties will unreasonably interfere with and prevent Plaintiffs' use and enjoyment of their private property; such acts and omissions disturb the Plaintiffs' free use of their property and render ordinary use and physical occupation impossible and unsafe.

42. The acts and omissions of E&A will injure and continue to injure the Plaintiffs. Such acts and omissions will injure the Plaintiffs directly, uniquely and specially. The substantial and unreasonable interferences will and do constitute a nuisance.

43. Plaintiffs are entitled to a declaration that Defendant E&A's additional new 72-inch pipe constitutes a nuisance and a prospective nuisance, and a permanent injunction barring E&A's use of Plaintiffs' property in conjunction with its stormwater discharge and such other relief as the Court deems proper.

COUNT II: INTENTIONAL TRESPASS

44. The preceding paragraphs are incorporated herein by reference.

45. By failing to retain E&A's stormwater on its own site, by expanding the watershed and by constructing the additional new 72-inch pipe, E&A will cause and continue to cause a wrongful interference with Plaintiffs' possessory rights in their property. Plaintiffs' cannot predict the date on which inundation will occur. However, E&A's own engineering calculations demonstrate that relatively frequent storm events will flood Plaintiffs' properties. Some damaging flooding has already occurred, destroying vegetation on Plaintiffs' property. The resulting intrusion of water, mud, waste, sediment and other material is direct and physical and constitutes trespass. Further, E&A has intentionally trespassed onto Plaintiffs' land to destroy property and make unpermitted alterations to the landscape.

46. As a result of the intentional and ongoing trespass, Plaintiffs are entitled to a declaration that inundation caused by Defendants E&A constitutes intentional trespass and an injunction barring E&A's use of Plaintiffs' property in conjunction with its stormwater discharge and such other relief as the Court deems proper.

COUNT III: VIOLATION OF RIPARIAN RIGHTS

47. The preceding paragraphs are incorporated herein by reference.

48. Under Virginia law, Defendants may not exercise their own surface water rights in such a way that they injure the rights of others. Specifically, and inter alia, landowners cannot collect water, place it into an artificial channel and pour it onto the neighboring property and thereby cause injury. McCauley v. Philips, 219 S.E.2d 854, 216 Va. 450 (Va. 1975).

49. E&A's construction of the additional new 72-inch pipe creates an artificial channel. The channel is designed specifically to collect and divert surface water so that it will inundate the Plaintiffs' properties, causing clear injury. E&A has enlarged the watershed, has collected surface water into an artificial channel and is discharging it in concentrated form on Plaintiffs' properties to their injury. The acts and omissions of E&A are negligent, careless, malicious, willful, reckless, unreasonable and in excess of their own surface water rights.

50. Plaintiffs are entitled to a declaration that E&A's additional new 72-inch pipe constitutes a violation of Plaintiffs' property rights, and to a permanent injunction barring use of the pipe and barring

E&A's discharge of stormwater onto Plaintiffs' private property and such other relief as the Court deems proper.

COUNT IV: UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY

51. Article I, section 11, of the Virginia Constitution, provides in part:

"That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly;".

52. Pursuant to this section of the Constitution, private property may be taken by the Commonwealth, under certain procedures and only upon just compensation, for "public uses." However, the Commonwealth is not permitted to take private property for private uses. This section, under Virginia law, is self-executing and permits a property owner to enforce his constitutional right in a common law action.

53. By expressly allowing the inundation of unencumbered private property through official action, the Defendant City and County have undertaken governmental action that purports to take Plaintiffs' property and dedicate it to the sole, private use of Defendant E&A. Both the City and County have issued permits, each of which was an absolute prerequisite to construction. Each permit purports to allow the expanded watershed and the additional new 72-inch pipe, even though the larger watershed and the construction of the pipe will cause inundation of private property. Pursuant to the permits, developable, unencumbered private property has been unconstitutionally converted to the private use of E&A for its stormwater management.

54. The Defendant government subdivisions have not initiated condemnation proceeding to transfer Plaintiffs' property to any public use. All actions have been taken with the knowledge that Plaintiffs' property is private, subject to the easements described above.

55. The permitting actions of the City of Charlottesville and Albemarle County were taken with full knowledge that, through the permits, the Plaintiffs' property would be transferred to E&A's

private use. By issuing the permits in direct contravention of Plaintiffs' property rights, the City of Charlottesville and Albemarle County have taken Plaintiffs' property for private use in violation of the Virginia Constitution. The issuance of the permits constitutes an unconstitutional application of the Virginia Code, the City of Charlottesville Code and the Albemarle County Code.

56. Therefore, Plaintiffs are entitled to a declaration that the City of Charlottesville and Albemarle County have unconstitutionally taken Plaintiffs' private property for the private use of E&A. Plaintiffs are also entitled, upon such declaration, to an injunction voiding the applicable permits. Plaintiffs are not seeking a condemnation award, and deny that a condemnation award would afford the proper remedy. Plaintiffs seek a voiding of the government actions that unconstitutionally take Plaintiffs' properties for private use.

COUNT V: INJUNCTION FOR VIOLATION OF EROSION AND SEDIMENT CONTROL PROVISIONS OF THE CITY OF CHARLOTTESVILLE CODE

57. The City of Charlottesville has enacted comprehensive erosion and sediment control provisions. City of Charlottesville Code §§ 10-31 et seq. E&A's activities are subject to those provisions.

58. As part of the permitting process, and as required by the statewide minimum standards (MS-19), the City of Charlottesville directed E&A to obtain easements or other permission from Plaintiffs. E&A has failed to do so. This is a violation of E&A's permit and of the erosion and sediment control provisions of the City of Charlottesville Code.

59. In assessing E&A's land disturbance, the City of Charlottesville has established that E&A's project will cause inundation beyond the boundaries of the present drainage easements. All inundation beyond the boundaries of the present drainage easements is a physical intrusion onto Plaintiffs' property. The City has therefore directed Defendant E&A, as part of its land disturbance permit, to obtain easements or other permission from Plaintiff Pepsi and from Sequel, among other downstream property owners. See Exhibit B (July 1, 2011 Letter from the City of Charlottesville to E&A; August 15, 2011 Letter from the City of Charlottesville to E&A; December 20, 2011 Memorandum

from the City of Charlottesville to E&A; January 6, 2012 Memorandum from the City of Charlottesville regarding the January 4, 2012 Stonefield preconstruction meeting; June 1, 2012 letter from the City of Charlottesville to E&A regarding permit violations and order to plug the 72-inch pipe; July 20, 2012 letter from Neighborhood Service Director Jim Tolbert to Defendant E&A regarding Charlottesville City Council determination that E&A is in violation of its permit). E&A has failed to obtain the necessary easements or other permission which would allow the existing stormwater detention facility to be modified to accommodate all or part of the offsite stormwater that would flow through the additional new 72" pipe. The City of Charlottesville has recognized that E&A's failure is a violation of its E&S permit, and has ordered E&S to come into compliance. The City Council has legislatively affirmed the City's staff's determination that E&A is in violation of its E&S permit.

60. The City Code provides that "an owner of property . . . that is in imminent danger of being damaged" may apply "to the circuit court for injunctive relief to enjoin a violation or a threatened violation of this article, without the necessity of showing that an adequate remedy at law does not exist." Id., § 10-43. Such owner must give written notice and allow fifteen days for the elimination of the conditions creating the probability of damage. Id. Plaintiffs have satisfied these conditions. See Exhibit C (violation notice letter to E&A).

61. Therefore, Plaintiffs are entitled to a declaration of E&A's City of Charlottesville Code violations and to injunctive relief (1) barring Defendant E&A from discharging excess water in any manner onto Plaintiffs' property and (2) requiring abatement of the conditions threatening the Plaintiffs. The conditions threatening Plaintiffs can only be abated by a voiding of the current City of Charlottesville permit and by a submission by Defendant E&A of a land disturbance permit application that includes evidence of permission to discharge stormwater onto downstream property owners, as required by MS-19 (4 VAC 50-30-40.19(d)).

COUNT VI: VOID AND UNLAWFUL ADMINISTRATIVE REZONING OF PRIVATE PROPERTY

62. As explained in Paragraphs 17 and 18, above, the Albemarle County Board of Supervisors undertook legislative zoning action that specifically approved of the Stonefield development as set forth and under the proffered conditions of ZMA 2001-07. Such approval specifically included E&A's retention of stormwater onsite, if feasible. No alternative to onsite retention was legislatively specified, considered, or approved.

63. Albemarle County administrative staff later substantially varied, modified and departed from the legislatively approved plan by accepting a development alternative that was (1) never considered by the Board of Supervisors and (2) was not specified by the Board of Supervisors as an acceptable alternative. The administrative deviation and departure is not authorized by law, as the County staff is not vested with legislative powers. The deviation and departure is therefore void.

64. Plaintiffs are entitled to a declaration that Albemarle County's administrative zoning action supplanting the legislatively approved E&A plans was beyond its lawful authority, and to an order voiding the administrative action and remanding the proceeding to the County.

COUNT VII: UNLAWFUL NONDELEGABLE LEGISLATIVE ACTION

65. Albemarle County Code § 32.7.4.1 was amended in 2013. An earlier version of that code section was applicable at the time of the acts alleged. The then-applicable code section provided: "Except as the commission or the agent may otherwise require in a particular case, or as expressly provided herein, such facilities shall be so designed and installed that the rate of surface water runoff from the site, due to a rainfall of a ten-year return period intensity as shown on the frequency analysis curve for Charlottesville, Virginia, shall be no greater after the proposed development than before; provided, that the same may be accomplished without unreasonable adverse impact on the environment of the site. This subsection shall apply only within the geographic limits as hereinafter described: the drainage basins of Moores Creek, Meadows Creek ..."

66. As to E&A, Albemarle County purports to "otherwise require" within the meaning of this then-applicable provision. In other words, the County agent allowed surface water runoff to exceed the specified intensity. Such action may be facially compliant with the Albemarle County Code. However,

the commission and the agent only have such power as is conferred by the Virginia Code. A County has no power, by ordinance alone, to delegate decision-making power. Such authority must be vested by the Virginia Constitution or the Virginia Code, or the power does not exist.

67. With respect to the then-applicable Albemarle County Code § 32.7.4.1, it purported to grant legislative authority that has no statutory source. Under Virginia law, the approval of a departure from substantive laws such as zoning laws is a legislative act. It may not be delegated from the Board of Supervisors without express statutory authority. No such statutory authority exists here. Therefore, the County's administrative action departing from the requirements of Albemarle County Code § 32.7.4.1 is unlawful and void.

68. Plaintiffs are entitled to a declaration that the then-applicable version of Albemarle County Code § 32.7.4.1 lacks statutory or constitutional authority to delegate power from the County legislative body to the commission or the agent, to a declaration that the County's approval of a departure from the surface water requirements of the then-applicable version of § 32.7.4.1 is void, and to an injunction nullifying the County's unlawful action.

WHEREFORE, Plaintiffs seek the following relief:

(1) A permanent injunction barring Defendant E&A from allowing water to pass onto Plaintiffs' property from the additional new 72-inch pipe under U.S. Route 29;

(2) a permanent injunction barring Defendant E&A from discharging excess water in any manner onto Plaintiffs' property;

(3) a declaration that Defendant E&A's construction of the additional new 72-inch pipe is a nuisance, will cause a trespass, and violates Plaintiffs' riparian rights;

(4) a declaration of Defendant E&A's violations of the MS-19 mandatory soil and water conservation provisions of the Virginia Code, City of Charlottesville Code and County of Albemarle Code;

(5) a declaration of Defendant E&A's violations of the Albemarle County Code stormwater provisions, the Albemarle County site plan provisions, and the City of Charlottesville Code

erosion and sediment provisions, as well as a declaration of the County's violation and failure to enforce its own code Section 17 of the Albemarle County Code;

(6) an order requiring Defendant E&A to compensate Plaintiffs for all damages incurred prior to the implementation of a permanent injunction;

(7) a declaration that the Defendants City of Charlottesville and Albemarle County have unconstitutionally taken Plaintiffs' property for private use in violation of Article I, Section 11 of the Virginia Constitution, and a permanent injunction voiding such action, including voiding the issuance of the land disturbance permits;

(8) a declaration that Defendant E&A is in violation of its City of Charlottesville permit and an injunction, pursuant to City of Charlottesville Code § 10-43, barring Defendant E&A's discharge of stormwater until E&A obtains easements or other permission from Plaintiffs; further, a voiding of the City land disturbance permit and an injunction requiring Defendant E&A to resubmit a land disturbance permit application that includes evidence of permission for its stormwater discharge onto downstream properties, as required by MS-19 (4 VAC 50-30-40.19(d));

(9) a declaration that Albemarle County administrative staff lacked the authority to supplant the E&A legislatively approved rezoning Application Plan, and an injunction voiding such administrative action, and a declaration that the then-applicable version of Albemarle County Code § 32.7.4.1 lacked statutory authority to supplant the legislatively approved Application plan, voiding such administrative action, and that the County lacked the authority to delegate power from the County legislative body to the commission or the agent; to a declaration that the County's approval of a departure from the surface water requirements of the then-applicable version of § 32.7.4.1 is void, and to an injunction nullifying the County's unlawful action; and

(10) any further relief this Court deems just and proper.

RESPECTFULLY SUBMITTED,

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Isak Howell, Esq. VBN 75011
117 E. Washington St. Suite 1
Lewisburg, WV 24901
(540) 998-7744

Brian Glasser, Esq. WVBN6597
(Pro Hac Vice Admission Pending)
209 Capitol Street
(304) 345-6555
Charleston, WV 25301
Counsel for Plaintiffs