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June 18, 2024

By U.S Mail and Email

Kelly J. Lackey
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Re: Mary's Landing, Fall Hill Avenue, City of Fredericksburg, Project No. SPMAJ2401-0002

Dear Kelly:

I am writing in further reference to my 29 May 2024 email to Marne Sherman, your 7 June 2024 response to me and my 10 June 2024 email to you regarding the proposed Mary's Landing project on Fall Hill Avenue (Project).

Please allow me to summarize these email exchanges. I first wrote on 29 May indicating that our firm represents James Pates, Alma Withers and Ann Little, who belong to a local community organization, the Fredericksburg Neighborhoods Coalition (Coalition), in opposing the pending site plan application filed by Mary's Landing, LLC (Developer). The Developer is seeking approval to construct 63 townhouses on two separate parcels of land across Fall Hill Avenue from the former Mary Washington Hospital¹ in Fredericksburg.

In that initial email, I indicated that my clients had expressed concerns that "this project may be on its way to being approved in violation of the City Zoning Ordinance." Specifically, my clients contended that while the Developer owns 63 recorded lots dating back to an 1891 Fredericksburg Development Company plat, this does not mean that the Developer has the right to develop these lots at a density far in excess of what is allowed by right in the Creative Maker Zoning District limit, which is eight dwelling units per acre. My clients correctly believe that in

¹ The first parcel consists of the entire City block bounded by Fall Hill Avenue, Hunter Street, Charles Street, and Elm Street. The second consists of roughly half of the City block located on the east side of Germania Street between Fall Hill Avenue and Charles Street, adjacent to the Medical Arts Building.

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order for the Project to exceed a density level of 8 units per acre (for a total of 30 units on this 3.86-acre tract), they would need to secure a special use permit from the City after public hearings held by both the Planning Commission and City Council.

In that email to Ms. Sherman, I respectfully requested that the City Attorney review the matter carefully before the City staff approve the pending site plan. As I pointed out:

The Supreme Court of Virginia has long drawn a distinction between lots that are in contradiction to a subdivision ordinance and whether those lots can be used in contradiction to the zoning ordinance. See Leake v. Casati, 234 Va. 646 (1988). In Leake, the Court held that while a court can partition lots in violation of the subdivision ordinance, that does not mean they can later be used in violation of the zoning ordinance. Consistent with this law, I have not found any provision in the City zoning ordinance that states the nonconforming undeveloped lots can be built upon in violation of the current zoning ordinance. Section 6-110 allows the continuance of a nonconforming use, as opposed to a brand new use on a nonconforming lot. Further, I am not yet aware of any facts that would entitle the owner to vesting protection under Virginia Code § 15.2-2307. Your memorandum does not indicate, for example, that the City approved a subdivision plan that validated the lots but only that the lots have existed in the land records.

After you and I were unable to connect with each other by phone over the following week, you responded to my email on 7 June 2024, conceding that recorded lots may not always be “buildable” lots, but City Code §72-61.2(E) nevertheless provides that “[v]acant nonconforming lots may be used, subject to the provisions of §72-65.”² You further indicated that “[t]he validity of subdivision lots created prior to most modern subdivision provisions is

² Section 72-65 states:

72-65.1 Use of undeveloped nonconforming lots. A lawful, nonconforming lot may be used, provided that:
A. The proposed use is a permitted use under this chapter.

- B. Requirements for minimum yard setbacks and maximum height are met.
- C. Wherever possible, the consolidation of adjacent nonconforming lots is encouraged to meet the minimum lot size requirements.
- D. If minimum yard setbacks and maximum height requirements cannot be met, variances may be available in accordance with this chapter

consistent with Virginia Code Sections 15.2-2266 and 15.2-2261 and distinguishable from *Leake*.”²

I responded to your email on June 10, 2024, respectfully submitting that the City Code sections you had cited are not applicable to the Project. First City Code §72-61.2(E) only allows nonconforming lots to be “used” if they are “vacant” nonconforming lots and meet the provisions of §72-65.” The lots at Mary’s Landing do not meet either requirement.

I noted that I had recently become aware of certain facts that deemed the Code sections you cited as irrelevant:

Specifically, I did not know that the lots have structures and a parking lot on them that have long been used as parking for the 2300 Fall Hill Avenue property – formerly Mary Washington Hospital and now for the businesses at that address. In addition, there are two structures on the project site that are slated for demolition. One is the former Health Department (more recently, the EMS offices) and was constructed in the 1960s. The other is a brick residence that, until recently, was occupied and was constructed in the 1930s or ‘40s. Thus, the lots are not “vacant” or “undeveloped”, rendering §§ 72-6, 72-61.2(E), inapplicable for this reason alone.

I attached two photos to my email, showing the house at 2215 Fall Hill Avenue and the two parking lots on the site. I continued by stating:

I also learned that the existing lots are proposed to be re-subdivided; therefore, they are not going to be “used.” Rather, new lots would be created. It is those new lots that will be “used” not the lots of record per the 1891 plat. The proposed new lots are thus outside the protection of §§ 72-6(E) [and] 72-65.1.

² Virginia Code Section 15.2-2266 only provides that a subdivision plat recorded before 1975 is valid while Virginia Code Section 15.2-2261 only provides that an approved subdivision plat that has been recorded shall be valid for no less than 5 years from the date of approval.

Finally, I noted that even if these Code sections did apply to Mary's Landing, the Project still would not meet the requirement in §72-65.1(A) that the proposed use must be "a permitted use under this chapter." The term "permitted use" includes both the type of dwelling unit and also the density at which dwelling units can be built in a particular zoning district. As

we have shown, the Creative Maker District (T4-M Transect)³ only allows 8 dwelling units per acre by right, not the 16 units proposed by the Developer. It is these new lots that will be "used," not the lots of record per the 1891 plat.

My clients have never contended that the 1891 lots are invalid or that they cannot be used for residential purposes. Rather, they contend that the proposed site plan—that proposes new re-subdivided lots on developed land—is invalid and must be rejected by the City because it violates the density limits under the Creative Maker Zoning District.

There is a separate and distinct reason why my clients believe the site plan must be rejected in its current form. That is because it constitutes a major subdivision that must go through the full public hearing process before both the Planning Commission and City Council and cannot be approved administratively by City staff. This is a major subdivision since it is "a subdivision of land involving more than 50 lots."⁴

In the Developer's 29 April 2024 letter posted to the City's FTP site, the Developer's agent states the oxymoron that "Mary's landing is not creating new building lots within the City. There are currently platted lots on the property that are being adjusted to provide a better development proposal than simply building on the existing lots." If the currently platted lots are being "adjusted," then they are, by definition, "new" lots. For anyone familiar with the landuse process in Virginia, the pending site plan reflects a classic example of a "resubdivision" where existing lot lines are being re-arranged in order to develop land in the most profitable or convenient way. The City should not endorse this doublespeak because the Developer is creating new lots through resubdivision pursuant to Virginia Code §15.2-2275 and UDO §72-8 (Definitions). The City cannot claim that Mary's Landing qualifies as an "administrative subdivision" that only needs staff approval since 63 newly-configured lots are being created and must therefore conform to UDO/Zoning Ordinance Requirements.

³ City Code Appendix 72-A (Chapter 2 Form-Based Zoning Districts).

⁴ City Code §72-84 (Definitions).

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In addition to the clear legal reasons why both the special use permit needed to build 63 townhouses on the property and City Council approval of the Project as a major subdivision are needed, there are important public policy reasons by this Project needs a broader public process and Council involvement. My clients are members of the Fredericksburg Neighborhood Coalition, which consists of many residents throughout the City. They have raised these concerns about Mary's Landing for the past five months because they truly want to assist the City in applying and enforcing the City's own ordinances. That's why I am sharing this letter with the City Manager, the City Council, and the Planning Commission because they need to be

aware that City staff is on the verge of exceeding their authority by approving a major residential project in the City without the required public notice and participation through the required special use permit process for the increased density in the Creative Maker District (T4M Transect. My clients expect that the density limitations of that district be applied to all developers.

Finally, I would stress that my clients do not want to fight with the City. On the contrary, they stand ready and willing to meet with you and other City officials to reach an amicable accord on a fair and legally sound process for approving or disapproving this Project. This developer needs to abide by the same rules and ordinances that other developers must follow. We therefore respectfully request that the City reject the pending site plan application and insist that the Developer seek a special permit to secure the additional density for the Project and submit a major subdivision plat to the Planning Commission and City Council for their review and approval.

Sincerely



Gifford R. Hampshire

Cc (all by email only):

James Pates
Alma Withers
Anne Little
City Council
City Manager

Planning Commission.

Marne Sherman, Development Administrator