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September 14, 2020

Virginia Beach City Council
2401 Courthouse Drive
Building 1
Virginia Beach, Virginia 23456

The Honorable Mark D. Stiles
Office of the City Attorney
2401 Courthouse Drive
Building 1, Room 260
Virginia Beach, VA 23456

RE: Westminster Canterbury Opposition
City Council Meeting September 22, 2019

Dear Council Members:

Although we have not been fortunate enough to get the ear of many of the Council Members with regard to the application of Westminster Canterbury, Mr Stiles has been kind enough to reach out regarding the debacle(s) related to the notices of hearing and it would appear this matter will be heard on September 22 unless withdrawn by the applicant.

The sole purpose for communication on this occasion is to permit the Council and City Attorney's office (and RJ Nutter when this letter is forwarded to him) an opportunity to thoughtfully render an opinion on an issue that has simply not been framed well enough on our part or suitably addressed on anyone else's. The City Council, and indeed the Planning Commission and Director, are not lawfully permitted to approve a 22-story building pursuant the pending application for Westminster Canterbury.

The Virginia Beach zoning laws are contained in Appendix A of the Ordinances. Article 1 describes the basis for the City's Zoning Laws, Article 2 describes generally the

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procedure and process to address zoning issues while Articles 3-22 predominantly identify the various Districts, like Industrial, Residential, Agricultural and in this case, Business Districts, which are in Article 9. Most of the Articles follow a common pattern of enactment. For example, the first section of each Article is numbered _00 and is entitled "Legislative Intent." The next Section _01 is "Use Regulations," Section _02 is "Dimensional Requirements," Section _03 is "Landscaping" and Section _04 is "Height Regulations," and so on.

The Legislative Intent section is intended to provide an overview of the particular district and how it fits into the comprehensive plan as a guidance tool for decision-making related to that particular district. Section _01 "Use Regulations" identify the various types of activities and structures which are permitted as a matter of right or which may be permitted on a conditional basis. If the use is not listed as permitted or conditional then it's prohibited and that's the specific language that you will find in Paragraph (a) of the _01 portion of every Use Regulation section. Because it will become incredibly important later on, I have set out the specific language which is contained in Business Districts, Section 901(a):

NO USES OR *STRUCTURES* OTHER THAN AS SPECIFIED SHALL BE PERMITTED.

In Section 901, there are more than 70 permitted or conditional uses listed and while many uses are fairly straightforward like "Public Utility Office," "Personal Watercraft Rentals," and "Open Air Markets," there are a number of other uses which have detailed provisions. For example, "*Bulk storage yards and building contractors yards; provided that no sale or processing of scrap, salvage or secondhand material shall be permitted in such yards; and, provided further that such storage yard shall be completely enclosed except for necessary openings in ingress and egress by a fence or wall not less than 6 feet in height*" or "*Animal hospitals, veterinary establishments, pounds, shelters, commercial kennels, provided all animals shall be kept in soundproofed, air-conditioned buildings.*" The Use Regulation for which Westminster Canterbury seeks a conditional use permit is entitled "*Housing for seniors and disabled persons or handicapped… provided that the maximum height shall not exceed 165 feet;*

provided, however, that no structure shall exceed the height limit established by section 202B regarding navigation." You will note that use of the word "provided" is a flag that the terms that follow are an essential aspect and requirement of the use in question.

When first enacted in 1988, Section 901's "Housing for Seniors and Disabled Persons" was a Use Regulation that contained the 165-foot limitation together with several other requirements including density calculations. In the ensuing 32 years, all of the other requirements have been stripped off or relocated to the more general subsections of the Articles, but in spite of having a separate section entitled "Height Regulations" during that same 32 years, the 165-foot limit has remained unchanged as being an integral part of "the Use." There should be no doubt that this was a limitation which was actively perpetuated since its inception, having had the section revised on numerous occasions and having never failed to maintain the limitation. Interestingly, the Business District's "Housing for Seniors and Disabled Persons" is the only one which specifies any height limitation, or any express limitation at all, within the Use Regulations. That is how special and immutable the 165-foot requirement is when requesting a conditional use permit in the B-4 district. It bears repeating that Section 901(a) commands:

NO USES OR *STRUCTURES* OTHER THAN AS SPECIFIED SHALL BE PERMITTED

That means that in a B-4 District, regardless of any other aspect of its size or density, you cannot have a veterinary office without air-conditioned kennels, you cannot have a beverage manufacturing shop which is larger than 3000 ft. in floor area, and you cannot have a home for seniors or the disabled which is greater than 165 feet in height. This is not a height regulation, this is a "Use Regulation" and its application is mandatory because "no structures other than as specified shall be permitted."

As Westminster Canterbury and Mr. Landfair of the Planning Department have pointed out, the Height Regulations found in section 904 do not prescribe a maximum height for buildings in B-4 mixed use districts for senior and disabled housing. They also correctly point out that pursuant to section 221(i) of the Zoning Code, which is the

general statement on CUP procedures, the City Council has been given the authority to deviate from certain features which are provided for in the various articles for different districts. Those deviations may include (1) required setbacks, (2) required landscaping (3) height restrictions (4) minimum lot area and (5) required lot coverage. It is important to note that each of these permitted deviations corresponds to each of the districts statutory scheme as required setbacks are found in section 02 of each Article, landscaping is found in section 03 of each Article, and height restrictions are found in section 04 of each Article. It's a particularly tidy way to approach each of these issues. But the one thing that 221(i) does not allow is deviation from the Use Regulations of each District and that is because each Use Regulation section in each Article for each District provides:

NO USES OR *STRUCTURES* OTHER THAN AS SPECIFIED SHALL BE PERMITTED

There is a rule of statutory interpretation which says that the specific clause governs the general proposition in the event of a potential conflict. That rule of interpretation requires the City Council to look at the specific term of Article 901(a) and its prohibition on any use or structure other than as is provided in the table and honor it. If, as Messrs. Nutter and Landfair have proclaimed, everything is subject to modification at will then why bother to include language in Use Regulations which have setbacks, landscaping provisions, heights and minimum lot areas. If Section 221(i) were used as a rationale for deviating in those cases than the language is no more effective than trying to provide air-conditioning for dog kennels. Nothing is sacred or predictable; this is the antithesis of modern property use and zoning.

Pursuant to Section 221(a) entitled "*Application for conditional use permit*" "Any property owner… may file with the planning director an application for a conditional use permit, provided that the conditional use sought is permitted in the particular district." In, Residential Districts (§501), Apartment Districts (§601) and Office Districts (§801), the Use is described as "Housing for Seniors and Disabled persons" with no other words of limitation or qualification. The planning director is permitted to consider any application for senior and disabled housing in these districts but the conditional use in B-4 is housing for seniors and the disabled which is no

greater than 165 ft. Again, the height is an integral part of the Use, not a waivable height regulation.

None of this analysis is a revelation to Westminster Canterbury or its counsel. It was pointed out to me by a local architect that the façade changes on the tower above the height of 165 feet. Upon inquiring why that was done, and assuming that the 165 feet was probably somehow safety related, it was a little surprising to discover that the WC plans allowed for the floors above 165 feet to essentially be lopped off without any substantial alteration or expense. Westminster Canterbury has known from the beginning that it was facing a cap on the height related to the Use Regulation as it always has before. (A review of the FOIA documents for prior applications shows that the City and WC were acutely aware of the 165 ft. limit as part of the Conditional Use with handwritten notes making this explicitly clear.) But on the theory that you can't get what you don't ask for, they have decided to roll the dice and see if promises to generate substantial tax revenue was enough to allow the new Wild West approach to zoning law. Having made the argument that, it should be able to build as high as possible, if WC was then forced to comply with the mandatory "Use Regulations" to not exceed 165 ft., the loss of building height could appear to be a concession. A concession that would allow the right to keep the building in its current location, to avoid having to flip the towers in a way that was more accommodating to adjoining property owners or really to concede much at all because they were already giving up eight floors and how much more could you possibly ask of them?

Finally, even under a Section 221(i) determination, the City has done little to address the significant detrimental effects on surrounding properties which cannot begin to be stated strongly enough. Why did Planning not get a fully developed SHAC recommendation? Why is the shade study intentionally flawed? Why, does WC get to go to Planning and Council with incomplete applications, or new designs which have not been subject to public scrutiny and to do so on its own calendar? A pessimist would say that the health and well-being of the adjoining property owners are nothing in comparison to the anticipated revenues generated by the monstrosity currently proposed by Westminster Canterbury. A pessimist might also observe that while

Westminster Canterbury refuses to even consider altering the placement of its two buildings because apparently the Westminster Canterbury residents in the shorter building are more deserving of their view than the occupants of Ocean Shore Condominiums and Ships Watch Condominiums and any other residents living and paying taxes in the Shore Drive corridor. Still my clients believe that even without the legal admonition that the WC Application cannot be permitted to go forward as above, the City Council will make the right decision and reject the Westminster Canterbury plans for a 22 story tower because it cares about the citizens that it has now and cannot be bought with shiny buildings and promises of swelling coffers.

A final legal argument is also incumbent upon this body to consider. Article VII, Sec. 9. of the Virginia Constitution provides in pertinent part:

> *No rights of a city or town in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, or other public places, or its gas, water, or electric works shall be sold except by an ordinance or resolution passed by a recorded affirmative vote of three-fourths of all members elected to the governing body.*
>
> *No franchise, lease, or right of any kind to use any such public property or any other public property or easement of any description in a manner not permitted to the general public shall be granted for a longer period than forty years, except for air rights together with easements for columns of support, which may be granted for a period not exceeding sixty years. Before granting any such franchise or privilege for a term in excess of five years, except for a trunk railway, the city or town shall, after due advertisement, publicly receive bids therefor. Such grant, and any contract in pursuance thereof, may provide that upon the termination of the grant, the plant as well as the property, if any, of the grantee in the streets, avenues, and other public places shall thereupon, without compensation to the grantee, or upon the payment of a fair valuation therefor, become the property of the said city or town; but the grantee shall be entitled to no payment by reason of the value of the franchise.*

The proposed easement for the air bridge connection does not appear to have been fully fleshed out but there are serious and substantial limitations which can and must be met

and do not appear to be part of the specifics required by the City of Virginia Beach to date.

What is undoubtedly legally impossible is for the City to approve a plan which includes relocation of the public easement without a supermajority of 75% of the Council, or nine members. Given that there are not even 9 members left who have not recused themselves (and would not be permitted to vote on relocation even after approval of the current plan) it is not legally possible for the City to approve the existing plans of Westminster Canterbury. Enclosed you will find an opinion of the Virginia Attorney General construing the easement relocation issue as one requiring a supermajority. The legal research also makes it clear that abstention does not reduce the supermajority to one of "eligible votes." Both the Virginia Constitution and § 15.2-2100 of the Virginia Code refer to "a recorded affirmative vote of three-fourths of all the members elected…" So unless the abstainers want to resign, there are not sufficient votes to approve the application. All of this information is readily available to both Westminster's counsel and the City Attorney. Putting aside all of the questionable ways this application has been treated, including the inexplicable lack of effort to hold Westminster Canterbury to the existing ordinances and processes for approval, the legal issues are not fuzzy and should have been the basis for denial before now. It would be tragically unfair if the citizens who oppose the construction were forced to litigate a Council approval based not only on preferential treatment, but in specific derogation of the law. But as their efforts to date must surely demonstrate, litigate they will if an approval is forthcoming.

Thank you for your time and consideration.

Sincerely,

Jeanne S. Lauer

Enc.