

# City of Norfolk

Department of Law

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**Re: 532 Mowbray Arch – proposed development of single-family home**

Dear Dan:

Thank you for your letter dated February 8, 2013 and which you hand-delivered to the City Attorney's office last week. You raise a number of issues which understandably present concerns for your client. Upon review, however, it does not appear that the City of Norfolk is the appropriate organization or forum in which to seek their resolution. Allow me to elaborate.

A number of the concerns are derived from an assumption that the location of any crane that may be used during construction and any lay down area for equipment and materials will need to be located on the site. After discussing the proposal with City staff members who are familiar with these sorts of projects, it is very likely that some of the construction work will be staged from Mill Street, after securing a temporary, partial closure of that right-of-way. This approach is not uncommon in a city like Norfolk, which is developed with many properties where the building envelope projects near or even up against a property line.

Furthermore, it is possible (albeit perhaps unlikely) that your client might be willing to grant or sell a temporary construction easement to the owners of 532 Mowbray Arch which could facilitate installation of improvements along the eastern edge of the site. Of course such permission is not required in order for this sort of construction to be accomplished, but the City would not prohibit such an arrangement.

With regard to silt fences, we are aware of regulations requiring the installation and maintenance of these fences. In the event there is noncompliance with the regulations, the City has enforcement tools available to try to compel adherence to the requirements. However, as with the behavior of any third-party, the City cannot guarantee that it will be lawful at all times. It certainly cannot *prohibit* the owners of 532 Mowbray Arch or their contractor from endeavoring to install and maintain the required silt fences.

Unlike the silt fencing, however, the City does *not* regulate the type of pilings used in residential construction. So long as the construction complies with the provisions of the Uniform Statewide Building Code, the City does not have discretion to disapprove of the pilings either because they are wooden or because they need to be driven into the ground.

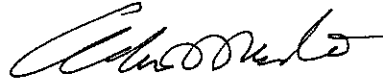
The remaining complaints, involving the possible torts of trespass and nuisance, relate to private property rights in which the City has no justiciable interest. And while all of the foregoing discussion is offered by way of explanation, I understand that your client has but one request of the City: to reconsider the grant of the approval which allows for the construction of this home.

The approval at issue is a Certificate of Appropriateness and was granted by the City's Planning Commission on December 13, 2012. In performing its review and grant of the approval, the Planning Commission was acting as the Norfolk City Council's designee under the authority of Virginia Code § 15.2-2306(A)(1). As such, its grant of approval is a legislative act. Norton v. City of Danville, 268 Va. 402, 408, 602 S.E.2d 126, 129-30 (2004).

Because this is a decision of a commission appointed by the City Council that was exercising its discretionary authority regarding the construction of a new home in a local historic district, the *City* does not have the capacity to compel the Planning Commission to reconsider its decision. See, Miller v. Highland County, 274 Va. 355, 367, 650 S.E.2d 532, 537 (2007) (stating that a locality and its governing body are not interchangeable). Under the Planning Commission's rules, any reconsideration of the approval would need to have been initiated before the close of its meeting on December 13, 2012, upon a motion made by one of the Commissioners who had voted for approval. That motion would need to be approved by a majority of the commissions attending in order to carry. Obviously, it is now too late for such a reconsideration to be undertaken.

For these reasons, we conclude that your request cannot be granted, since the City cannot cause the Planning Commission to reconsider the approval it granted approximately three months ago for the construction of a single-family home at 532 Mowbray Arch.

Sincerely,



Adam D. Melita  
Deputy City Attorney

cc: Bernard Pishko, City Attorney  
Frank Duke, Director, Department of Planning  
Lynn Underwood, Code Official, Department of Planning  
Leonard Newcomb, Land Use Services Manager, Department of Planning  
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