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October 3, 2019

Mr. Nathan Macek
Chairman, Alexandria Planning Commission
301 King Street
Alexandria, Virginia 22314

Re: Docket Item Number 10 – Subdivision #2019-0005 – 502 North Quaker Lane

Dear Mr. Chairman and Members of the Commission:

We are in receipt of the Staff's memorandum – dated today – recommending that the Planning Commission incorporate conditions of approval of SUBDIVISION #2019-0005 – 502 North Quaker Lane that certain specific trees be preserved in perpetuity (with certain exceptions and limitations). We respectfully suggest that this is beyond the authority granted to the Commission under Virginia Law and the City's Ordinance.

As the Planning Commission is well aware, the approval of a subdivision is not a legislative or discretionary act. It is a ministerial process performed by the Planning Commission, and is required to be an objective, not a subjective review. The landowner is entitled to that approval if the requirements of the applicable Ordinance are satisfied. Town of Occoquan v. Elm St. Dev., Inc., No. 110075, 2012 Va. LEXIS 104 (Apr. 6, 2012). Were approval discretionary, the Planning Commission would make a recommendation to the City Council, which would have ultimate approval authority.

Moreover, in approving a subdivision the Planning Commission has only those powers conferred on it by lawful provisions of the City's Zoning Ordinance as authorized by the City Charter or state law. Sinclair v. New Cingular Wireless PCS, LLC, 283 Va. 567 (2012). Section 9.24 of Charter allows the Planning Commission to "prescribe standards and requirements for the subdivision of land" including for the "planting of shade trees and shrubs," and then, pursuant to § 9.27, to require that the applicant "cause plats of such subdivisions, in the form prescribed by the regulations and restrictions" to be prepared and submitted to the Planning Commission, which then has the duty to review the subdivision "in light of the regulations and restrictions applicable to the same." There is no regulation or restriction in the Subdivision Ordinance requiring the preservation of trees.

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Indeed, there is no Charter provision authorizing such preservation. There is a distinction between the authority to provide standards for the planting of shade trees and shrubs, and the mandatory preservation of existing trees on private property. Even if there were such authority, there would need to be objective criteria set forth in the Subdivision Ordinance as to which trees need to be preserved. In fact, the memo regarding the City's desire to preserve certain trees and not others has been based on subjective analyses and criteria that cannot be found in the Ordinance.

Section 11-1711 of the Ordinance is entitled "Required Improvements" and says that "[i]mprovements required in conjunction with subdivision approval shall be the same as those required for site plans under section 11-412 and the cost of those improvements shall be established under section 11-413." Section 11-412 speaks to private improvements that may be required to be included such as landscaping, which would be consistent with the foregoing Charter authority for the requirement for "the planting of shade trees and shrubs." But it goes no further.

Nor is there a health, safety, or welfare consideration associated with the preservation of trees on private property. If there were, the City would have a tree preservation ordinance restricting the removal of trees on private property.¹ Today, a landowner may remove those trees on his or her property without restriction. When a property owner, as here, simply adds a line on a piece of paper to create two lots instead of one in accordance with the requirements of the Subdivision Ordinance, it does not confer authority on the City to require the preservation of trees on that property.

That the City has included tree preservation conditions in the past, and applicants have chosen to acquiesce in those conditions and have decided not to challenge them, does not establish their legality. For years, the City included conditions in subdivisions cases controlling certain aspects of development of houses on property and property owners accepted those conditions, until one pushed back - hence *Seymour v. City of Alexandria*, 273 Va. 661 (2007) in which a property owner prevailed when the city attempted to apply unlawful provisions beyond those powers conferred under the Charter. That case did not address the validity of any tree preservation condition as that was not the subject of the litigation. But, the Court observed that "the words of the ordinance are to be given their plain and natural meaning" and that a locality does not have the discretion to ignore the plain meaning of its subdivision ordinance when determining whether a proposed subdivision satisfies the applicable criteria of the that ordinance.

We respectfully submit that the Planning Commission cannot require the conditions set forth in the October 3rd staff memorandum to the Commission with respect to proposed Conditions 2-5.

¹ The Staff Report makes no contention that the City has enacted any tree preservation ordinance under the authority of general law.

Very truly yours,

WALSH, COLUCCI, LUBELEY & WALSH, P.C.


M. Catharine Puskar

MCP/jf

City of Alexandria, Virginia

MEMORANDUM

DATE: OCTOBER 3, 2019

TO: CHAIRMAN NATE MACEK AND MEMBERS OF THE PLANNING COMMISSION

FROM: KARL MORITZ, DIRECTOR, DEPARTMENT OF PLANNING & ZONING

SUBJECT: DOCKET ITEM #10 - SUBDIVISION #2019-0005 – 502 North Quaker Lane

This memorandum contains information relating to Commissioner David Brown's suggestion to consider the preservation of trees #2, #6 and #8 on the preliminary plat for the subdivision request at 502 North Quaker Lane. In response, City staff revisited the site on October 1 to view Mr. Brown's preservation recommendations and to possibly identify other trees worthy of preservation.

Although City staff agreed with Commissioner Brown's assessment that trees #2 (28" Oak) and #8 (40' White Oak) are exceptional specimens, construction activity on Lot 801 would threaten the longevity of tree #8 due to its location in the center of the lot. In addition, the preservation of tree #8 would guarantee the removal of tree #11, a 24" healthy Sycamore which contributes to the site's tree diversity and canopy coverage. Acknowledging the likelihood of construction on Lot 801, staff concluded that tree #11 would have a better chance of survival than tree #8, even with protection measures in place. City staff also evaluated tree #6 (30" Black Walnut) and, unfortunately, found evidence of poor health.

Additionally, staff identified two noteworthy mature shade trees on Lot 800 which are candidates for preservation: tree #56 (70" Osage Orange) and tree #60 (48" Tulip Poplar). It is important to note that the City lists tree #56 as a City Champion Tree, describing it as a "... very large Osage orange [that] is growing among other large trees on [an] historic estate."

Based upon Commissioner Brown's recommendation and City staff's evaluation, staff recommends that the Planning Commission consider the following four conditions in its review of the subdivision:

2. Trees identified as #56 and #60 as identified on the September 4, 2019 plat submitted with this subdivision application shall be preserved and maintained in perpetuity unless an Arborist professionally certified by the International Society of Arboriculture certifies in writing to the Director of Planning & Zoning that the trees are irreparably damaged, dying or diseased due to natural causes. (P&Z)

3. On Lot 801, the applicant shall maintain and preserve trees #2 and #11 as identified on the September 4, 2019 plat submitted with this subdivision application. At a minimum, the applicants shall implement tree protection measures pursuant to the 2019 Landscape Guidelines for trees #2 and #11. The trees and necessary protection areas around the trees shall be depicted on any future grading plan pursuant to the 2019 Landscape Guidelines. If the approved tree protection methods have not been followed, an in-kind replacement of the damaged or destroyed trees shall be provided pursuant to the replacement of damaged vegetation standards on page 17 of the 2019 Landscape Guidelines. The in-kind replacement shall be provided by the applicant prior to the issuance of the Certificate of Occupancy permit. (P&Z)
4. The Director of Planning and Zoning may waive the requirements in Condition #3 if the trees are determined to be severely and irreparably damaged, dying or diseased by way of natural causes as determined by an Arborist professionally certified by the International Society of Arboriculture. The Arborist shall submit an assessment to the Department of Planning & Zoning that certifies the trees are irreparably damaged, dying or diseased due to natural causes for the Director's consideration. (P&Z)
5. If any land disturbance is proposed on Lot 800 or Lot 801 that requires Grading Plan approval by the City, the Grading Plan shall be prepared pursuant to the standards of the 2019 Landscape Guidelines. Priority shall be given to preservation of existing healthy, non-invasive trees to meet the minimum canopy coverage. The applicant shall work with staff during the Grading Plan review process to preserve such trees to the satisfaction of the Director of Planning & Zoning.

Staff would continue to recommend approval of SUB #2019-0005 should the Planning Commission decide to include Conditions 2-5 in the staff report.

