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April 25, 2023

VIA FEDERAL EXPRESS AND
ELECTRONIC MAIL (mstiles@vbgov.com)

Mark D. Stiles, Esquire
Office of the City Attorney
Municipal Center – Building 1
2401 Courthouse Drive, Room 260
Virginia Beach, VA 23456

RE: City of Virginia Beach v. WC Capital, LLC
Civil Action No. 2:21-cv-00372

Dear Mark:

I hope and trust this letter finds you well.

As you know, this firm serves as counsel to JBWK, LLC (“JBWK”), successor in interest to WC Capital, LLC (“WCC”), in relation to the above referenced matter. On or about April 6, 2022, WC Capital, LLC (“WCC”) and the City of Virginia Beach (the “City”) entered into a Settlement Agreement resolving the matters at issue in the above-referenced proceeding, which included both the affirmative claims asserted by the City and the counterclaim advanced by WCC. On that same day, the parties filed with the Court a Joint Notice of Settlement [ECF 15], followed by a Joint Motion to Dismiss and accompanying Agreed Order [ECF 17 and 18]. The Agreed Order was entered by the Court on April 14, 2022 [ECF 19]. While the pleadings were “joint”, the City was the actual filing party.

The Settlement Agreement provided the parties with various rights, not the least of which was the establishment of a 50’ vegetative buffer to deter trespassing. As stated in the Agreement: “The Farm Plots exclude a vegetated buffer of varying widths, but not less than 50’ in width in any given location, between the Farm Plots and the adjoining properties to discourage trespass and other activities on the Property.” *Settlement Agreement*, p.1, paragraph 1.¹ On

¹ As you are aware, trespass from neighboring property owners has been a problem for some time. Indeed, at the time of the above-referenced case, WCC had hired off-duty police officers to patrol the Property in the hopes of deterring trespass given the difficulty which WCC had in obtaining a satisfactory resolution to the trespass complaints it was lodging with the City (and indeed the City’s apparent fostering of trespass by neighboring property owners).

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March 7, 2023, one or more as yet unidentified individuals entered onto JBWK's Property without permission and set it on fire. (Although perhaps a coincidence, it bears noting that the fire was started directly upwind of a portion of the Property which was, at the time, at issue in certain litigation between JBWK and the West Neck Community Association). To the best of JBWK's knowledge, the City has done little if anything to either (i) determine who started the fire; or (ii) deter further trespass at the Property to ensure that no further fires are set.² Instead, as noted by Barbara Henley at an informal City Council session on March 21, the City seems to have spent its time trying to figure out how to invalidate or otherwise circumvent the Settlement Agreement.

Last week, JBWK was provided with a copy of an email dated April 6, 2023 from Jonathan Torres, Assistant to the City Manager, to Tom Luckman, a member of the Board of West Neck Community Association, copied to various third parties, including the Indian River Plantation homeowner's association, members of City Council and other City officials, and your office. In that email, Mr. Torres advises Mr. Luckman that pursuant to Va. Code §48-1, five (5) citizens of the City can petition the Circuit Court to convene a grand jury to have JBWK indicted for maintaining a public "nuisance" (interestingly, the same term utilized by Ms. Henley in her remarks on March 21).

As you are likely aware given the research your office presumably conducted prior to giving that advice, the current condition of the Property does not constitute a public nuisance since it is neither "public" nor a "nuisance" as the law defines those terms. For a nuisance to be "public" it must impact the community as a whole, not just a select group of adjoining property owners. Likewise, under the common law, maintaining property in its natural state does not constitute a "nuisance" and Virginia has not enacted any statute to the contrary. Otherwise, it would be difficult if not impossible to understand the City's so-called "Meadows Program" and other state and local programs and areas designed to preserve property in its natural state.³ Finally, vegetation is only categorized as a nuisance in Virginia where it is both encroaching upon neighboring property and causing physical damage to that property.

The fact that a third party illegally trespasses onto the property of another and sets it on fire does not, of course, convert that property into a nuisance. (I also note that the areas which are being cut by JBWK in accordance with the Settlement Agreement burned just as quickly as

² In fact, the copy of the Fire Marshall's report which JBWK received, while placing a value on the limited areas of adjoining property that were apparently impacted by the fire, completely ignored the damage to JBWK's property – strongly suggesting that the City was looking to de-emphasize the impact of the apparent arsonist on JBWK, and instead focus on surrounding properties.

³ Were that not the case, every state park which abuts private property would constitute a public nuisance.

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the other areas of the Property). While I realize that it is more politically expedient for the City to expend its resources vilifying JBWK and attempting to circumvent the Settlement Agreement, I respectfully suggest that my client and the neighboring property owners would be better served if the City instead spent its resources trying to find out who trespassed on the Property and started the fire – and providing some level of policing against continuing trespass going forward to insure that it does not happen again.

Finally, according to the City's own website there have been numerous brush fires since the one which was set by an as-yet unidentified third party at Signature, including (i) Bayville Golf Course; (ii) Lisa Square; (iii) the intersection of Virginia Beach Boulevard and Bloom Parkway; (iv) Munden Point Park, which is maintained by the City; (v) the Virginia Beach School Administration Building, also maintained by the City; and (v) a City-maintained park on Hubble Drive. Given that the City may too be liable for a public nuisance, I would be interested to know whether the City provided the same advice to residents who live in homes surrounding those City maintained properties, or whether there is some difference between those neighborhoods and Indian River Plantation and West Neck which entitle the latter to such deferential treatment.

Regardless, in light of the above only one of two conclusions are possible. Either (i) the City asserts that the condition of the Property is a public nuisance, as indicated by both Ms. Henley in her March 21 remarks and Mr. Torres in his April 6 email; or (ii) the City is attempting to enlist the assistance of Mr. Luckman and others in circumventing the Settlement Agreement through meritless litigation. If the former, then the City has, in effect, raised a question as to the validity of the Settlement Agreement, since a municipality lacks the capacity to contract for a public nuisance. If the latter, then the City and any third parties who seek to advance that spurious petition would be guilty of business conspiracy, entitling JBWK to recover treble damages and attorney's fees.⁴

If the Settlement Agreement is deemed to create a public nuisance (despite controlling precedent to the contrary) and is thus void, then JBWK will return to farming the entire Property, thereby eliminating by statute any future nuisance claims, and will seek to have the federal case reinstated. If the Settlement Agreement is not deemed to be void, then JBWK will pursue all of its available legal rights and remedies as noted above – including claims for conspiracy and breach of contract.

In the interim, based upon Mr. Torres' April 6 email, we intend to apply to the District Court for a determination as to whether or not the Settlement Agreement is valid and enforceable

⁴ Because it is also a breach for one party to a contract to actively take steps to hinder the other party in its attempt to perform, or to take actions designed to increase the cost of performance, JBWK intends to pursue a claim for breach of contract as well.

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unless the City is willing to stipulate in writing that the Settlement Agreement does not create a public nuisance. Given the time sensitive nature of this matter, I ask that the City do so within seven (7) days from the date of this letter. If we do not hear from you within that time, we will assume that the City is unwilling to do so and thus takes a contrary position.

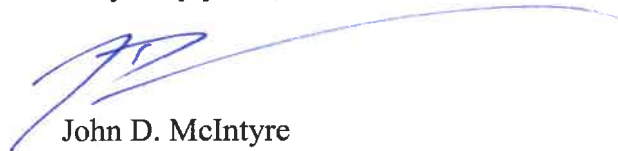
Finally, I note that earlier this year, JBWK offered to fence in the Property in order to resolve the complaints being raised by adjoining property owners provided that the City share in the cost of doing so. I have not received a response to that proposal. Nevertheless, and in light of the above, if the adjoining landowners believe that there is a substantial likelihood of a third party once again illegally trespassing on the Property and starting a fire, then JBWK will simply continue with construction of the fence around the remainder of the Property until such time as the trespass issues are resolved.

JBWK regrets that it has come to this. We had hoped that while not an ideal solution for anyone, the Settlement Agreement would allow all parties to go their separate ways. Mr. Torres' email of April 6 makes clear that the City does not intend to honor its agreement or take steps to remedy the ongoing trespass at the Property (which is the root cause of both the recent damage to the Property and the risk to the surrounding lots) – and instead will follow the politically expedient route of attempting to void the Settlement Agreement to win the favor of a select group of individuals in the adjoining neighborhood. Indeed, at this juncture continuing with the fence appears to be the only viable solution given the apparent coordinated actions of the City and a small segment of the surrounding property owners. Whether this will ultimately prove more beneficial to the majority of adjoining property owners remains to be seen.

Please do not hesitate to contact me should you have any questions. I look forward to your response as to whether the City believes that the Settlement Agreement creates a public nuisance in order to determine whether additional filings with the Court are necessary.

As always, I remain

Very truly yours,



John D. McIntyre

JDM:we