

CITY OF STAUNTON

VIRGINIA

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The Honorable G. John Avoli, Delegate-Elect
114 Bowie Street
Staunton, VA 24401

Dear John,

I didn't get to see you when you and Emmett met with the Staunton City Council last month. Let me, however, take this opportunity to wish you well in your latest public service, now at the statewide level. You deserve tremendous credit for being willing to make this commitment. Moreover, your experience at the local level, including service as Mayor of the City, should serve you well and help you and others understand even better the challenges that face local government bodies and their leaders.

I also write to you to be sure that you're aware of an experience from last year's General Assembly session that was very surprising and disappointing. It's connected to the City's efforts to uphold the rule of law and even-handed regard for the Staunton City Code's clear zoning requirements—regardless of whether a property is located in the north end or another part of the City and regardless of whether someone has raw political muscle at disposal. I expect you already are aware of the underlying matter, given your own connections, but it seems constructive to share these thoughts with you.

The City unfortunately has had to deal over the last 10 years or so with what, in my view, amounts to a rogue board of zoning appeals (BZA), which now has been reversed by the Staunton Circuit Court in four separate cases—and for the second time as to the very same wall and the same Staunton City Code zoning requirements. The three reversals are highlighted in Judge Irvine's January 4, 2009 letter opinion and the fourth reversal, just last month, in Judge Ricketts' December 2, 2019 letter opinion. Again, the Circuit Court has agreed with the City each and all of the four times that the City has had to challenge the BZA's actions in unlawfully granting variances.

Let me offer some more historical context. Not too long after I began service as City Attorney, my view was—and has been—that the then-constituted Staunton BZA appeared not to follow the applicable provisions of the Virginia Code, as required by the oaths of the members. Instead, its members left the impression that personal political orientation and philosophical preferences colored their official decision-making on issues

that came before the Staunton BZA. As you know, BZA members are appointed by the Circuit Court, not by City Council. My concern was—and has been—not whether the BZA might disagree with the City zoning staff on occasion but that the BZA had developed a culture of doing what its members personally preferred rather than what the law required. At one or more meetings, BZA members openly showed disdain for clearly controlling law. That is tantamount to lawlessness, in my view, and evidences a disregard for the rule of law, as established not only by the elected General Assembly but also by the elected City Council. As I recall sharing with the BZA when I appeared before it to represent the City, if its members personally didn't like a particular zoning law, they should seek outside the BZA proceedings to argue to Council to change the law or seek through election to change those who make the law—or even run for City Council. Most of those same BZA members, despite the City's multiple offers to pay for the cost of continuing education, even refused to take the certification training offered statewide for BZA members.

With the fully informed support of City Council, the City has had to devote the resources to get four BZA variance decisions judicially reviewed—and reversed, as I mentioned. The first one involved three property owners, two with vinyl fences and another with the masonry block wall on Augusta Street. In the first appeal to the Circuit Court, the Court (Judge Irvine) agreed with the City's position and reversed the BZA in all three cases. Afterwards, with City staff repeatedly offering to work with the property owners, to transition into compliance, the property owners of the two fences were cooperative; the property owner with the masonry wall, however, stalled and stalled and refused to comply or compromise, requiring the City to institute further judicial proceedings in the Circuit Court. The Supreme Court of Virginia found that the Augusta Street property owner should get yet a second opportunity to argue before the BZA under a new application for a variance because the general variance law had changed; but the Supreme Court did not rule or comment on whether a variance should be granted.

After the Supreme Court decision, the property owner was given that very chance to make a new case for a variance from the BZA under the general variance law that the General Assembly had changed in the meantime. So, in 2018, the Augusta Street wall owner was afforded yet another BZA hearing, and two members of the same previously reversed BZA and one other, with two members dissenting, voted 3-2 to grant a variance—again—from the City's zoning restrictions. The City appealed that decision to the Circuit Court in 2018. The City and the Circuit Court, however, repeatedly were delayed until Fall 2019 from having a hearing on the variance because the property owner's lawyer invoked his special legislative privilege as a General Assembly member. The General Assembly member employed the tactic of a legislative-privilege continuance not less than 12 times to stall related proceedings. It's fair to infer that the stonewalling allowed time for uniquely special interest—and I still believe unconstitutional—legislation to be ushered through the General Assembly to try to rob Staunton citizens of the right—through their City representatives—to appeal the BZA's procedurally and substantively unlawful variance decision.

Rather than go into more detail, I refer you to the City Council's webpage which provides a City perspective using a format of Q's and A's. I enclose a copy for your ease of reference.

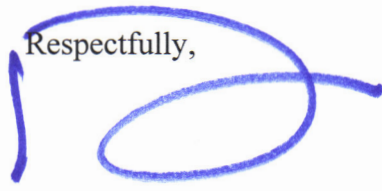
At this point, as City Attorney, I write to highlight this history so you might be better informed and to ask that you decline to be part of repeating the misguided favoritism of special, uncodified legislation that, in all truthfulness and reality, benefitted only the Augusta Street property owner, as intended. I also ask you to inform City Council itself sufficiently in advance of any legislative effort by anyone who would seek, again, to interfere with pending judicial proceedings involving this matter. As I'm sure you'll agree, it's vital that the judiciary be able to perform, without undue deference to special interests, its important role in our system of government and that legislation not be geared to benefit (or punish) one specific party in ongoing litigation. To do otherwise is to send a message to citizens that our judiciary—and the judges who serve it—are merely part of the political playing field, not removed from partisan actions.

I understand that there may be individuals, aside from the property owner, who don't agree with the position of the City. I respect the right or privilege of anyone to have divergent views from those of the City. At the same time, I believe it's not right for another legislative body to try to trump the elected City Council by interfering with pending judicial proceedings and, most fundamentally, is contrary to the rule of law—in a word, wrong. It also is an affront to the judiciary and to Staunton citizens who expect the zoning laws to be followed as written.

I'm glad to share with you that the City of Staunton's newest BZA members take their duties to follow and apply the law with a sincere commitment to the rule of law, not the rule of personal philosophical or political preference. And they have all gladly taken and completed the statewide training for BZA members. Even when they disagree with City staff, those standing before them and all Staunton citizens will have the reassurance that they diligently sought to discharge their oath of office—and there should be much less need or impetus to appeal the BZA's decisions.

Thanks for your time. I'm always glad to talk with you. Again, best wishes for your service in the General Assembly. I know your family, including grandchildren, must be proud. I'm sure Ken ("Coach") is smiling, too.

Respectfully,



Douglas L. Guynn

Enclosures

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FAQS: ILLEGAL WALL

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FAQS

When did this issue begin?

In 2008, the Staunton Board of Zoning Appeals (BZA) erroneously and unlawfully granted variances, or special treatment, from longstanding provisions and interpretation of the City Code that reasonably limit the height of fences and walls and restrict the construction of fences and walls at the intersection of two streets.

There are valid and obvious public safety reasons for those restrictions, such as safe sight distance for motorists, the safety of police and other first responders when approaching property hidden behind a wall, and preservation of the open residential character of the neighborhood. No other property owner in the neighborhood has a similar wall.

Three Staunton property owners were granted variances by the BZA in 2008 – two were issued variances for illegal fences, and one variance was issued for an illegal wall. As a result of the BZA's unlawful decisions, the City sought judicial review and intervention by the Staunton Circuit Court to correct and reverse the decisions of the BZA to grant special treatment in those cases.

The Circuit Court invalidated the BZA's actions in all three cases, concluding in its June 17, 2009 Final Order "that the decisions of the Staunton Board of Zoning Appeals to grant each of the three variances are REVERSED; and that the three variance applications are hereby denied."

City staff endeavored to work cooperatively with the owners of the illegal wall and the two other property owners of illegal fences after the 2009 circuit court ruling. The owners of the illegal fences worked cooperatively with City zoning staff and voluntarily undertook to bring their fences into compliance with the City's zoning law.

The owners of the illegal wall, however, ultimately did not cooperate, despite repeated communications through letters and other efforts over the years by City staff to get cooperation in accord with the circuit court's original ruling that reversed the BZA. The wall has remained in violation of the City's zoning restrictions on the location and height of walls and fences in residential areas since it was built 10 years ago.

Why has the City continued to pursue legal action about the illegal wall over the last 10 years?

The City actually has repeatedly tried to reach a conclusion long before now, as City Council's most recently

adopted resolution reflects. Following some further judicial proceedings in the Circuit Court, the Supreme Court of Virginia issued a decision that authorized the property owner to have yet another hearing before the BZA despite the extensive prior proceedings and the Circuit Court's reversal of the BZA unlawful variance actions in 2009.

The zoning administrator, the City of Staunton, and the Council of the City of Staunton believe that once again the BZA's action to grant a variance on June 12, 2018, was unlawful—and once again, the BZA's action merits judicial review, as recommended by the City's legal counsel.

Uniform enforcement of the zoning provisions of the Staunton City Code is important. It is the City's obligation and firm conviction that zoning laws should be applied consistently to all citizens of the City, regardless of where the property may be located, regardless of the standing or identity of the property owner, and regardless of who may represent the property owner. The City's commitment to the consistent application of the law has not changed.

How much has the City spent on legal fees in court? >

The City has had to expend substantial resources in seeking judicial review and intervention by the Staunton Circuit Court to correct and reverse the unlawful decisions of the BZA and to seek enforcement. So far, in this matter which has been ongoing for 10 years, paid legal fees for the law firm's services taking the lead on the court and more recent BZA proceedings amount to \$86,328.92 since 2014.

The BZA's actions on June 12, 2018 will cause the City to incur further expense to defend the City's zoning laws and uphold what are believed to be the reasonable provisions of the City Code that a BZA is not allowed, in effect, to amend by the vote of three people who gave no reasons and analysis for the quick vote and allowed no discussion among the BZA members. Two of the BZA members voted against the variance, and the City believes these two members honored and applied the law.

Has the City tried to resolve this issue outside of court? >

Yes. Since the Circuit Court's 2009 ruling that reversed the BZA's unlawful decisions, the City has sought voluntary compliance by the property owner numerous times. The City has repeatedly expressed a desire to work cooperatively with the property owner to achieve substantial compliance and has continued to seek compliance by communications through at least 10 letters over an extended period of years to no avail.

The City also offered a compromise: the property owner could lower the hollow cinderblock wall at the mortar joint just above the maximum height of 3 ½ feet, and the City would have its employees load the pieces removed with City equipment and dispose of the pieces and other debris at no charge.

It appeared beyond a reasonable doubt to City staff that despite efforts to get voluntary compliance, the property owner ultimately would not comply with the City Code and would continue to seek further delay. Consequently, the zoning administrator and the City had no choice but to pursue Council-authorized formal civil injunctive enforcement proceedings through the Circuit Court to assure substantial compliance. Even then, again, the City offered the compromise, which the property owner refused to accept and, in effect, then chose to continue the dispute.

Has the property owner of the illegal wall made any efforts to come into compliance with the City's zoning laws? >

No. The property owner has continued in violation of the City's zoning laws for approximately 10 years, despite the City's efforts to achieve compliance, and has repeatedly sought special treatment, despite the City's clearly written zoning laws.

The property owner also sought to have the zoning administrator, in effect, modify the law under the City Code so that the property owner would not be required to comply with provisions that generally have applied to other properties in the City of Staunton in similar situations. The zoning administrator properly declined, concluding that he had no authority to override laws enacted by the City Council and so notified the property owner's legal counsel.

The property owner says a member of the City's staff gave her permission to build the wall. Didn't the City make a mistake?

[Read an excerpt from the June 12, 2018 BZA hearing](#) regarding what the property owners were told by the City.

The City's restrictions on walls and fences are clearly stated in the City Code, readily accessible and understandable by anyone reading the Code online. The City believes the property owners were initially provided with accurate information—that the City Code clearly prohibited the high wall; however, for some reason, they later approached a different member of the city's staff who provided inconsistent information about the City's zoning laws.

The City recognizes that there was one City employee who apparently failed to reinforce accurately the obligation to follow the plainly written City zoning laws, while, at the same time, another employee originally provided them with accurate information on the matter. Still, no different than someone who might ask the City's Chief of Police for permission to violate a posted City speed limit, no City employee—not the Chief of Police, the City Manager, or the Mayor—can authorize violation of City laws.

Furthermore, in September of 2007, while the wall was under construction, City staff visited the property owner at the property to issue a notice of violation and a stop-work order. At that time, the wall was not complete; in fact, City staff testified to stepping over a portion of the wall to walk to the front door of the home to issue the stop-work order. Nevertheless, the property owner continued with the construction of the wall.

Why wouldn't City Council just drop it all and avoid incurring any further expense?

City Council's resolution summarizes its reasons for adopting the resolution to seek judicial review. While the City could avoid spending any more resources at this time by not pursuing the appeal to the Staunton Circuit Court, the City believes that the BZA's decision—yet once more—was unlawful, and the zoning laws deserve to be defended and it is only the means of judicial review that provides that opportunity.

Importantly, others have to respect the City's zoning laws. There is a larger cost to Staunton citizens, who rely on those zoning laws to protect their neighborhoods, if there is no judicial review of a bare majority 3-2 vote of the BZA that with a quick vote essentially writes an exception into those laws.

[More FAQs](#) ►



COUNCIL NEWS

Circuit Court Judge Supports City's Appeal in Illegal Wall Case

DECEMBER 5, 2019 — Finally this week—after the political ploys for the property owner's advantage—the Circuit Court ruled, again, in favor of the City. [Read the Circuit Court's nine-page letter opinion.](#) It is unfortunate that, now, for a second time, the Circuit Court has had to intervene to correct the BZA's unlawful decision that has cost the City in time and other resources.

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[Return to full list >>](#)