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**confidential legal advice re: advertisement notices for the 3 DG rezoning public hearings on December 12th**

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**From** Robl, Michelle R. <mrobl@pwgov.org>

**Date** Thu 11/30/2023 6:13 PM

**To** BOCS <BOCS@pwgov.org>

**Cc** BOCS COS <BOCS-COS@pwgov.org>; Smith, Alan <ASmith4@pwgov.org>; Spear, Curt G. <cspear@pwgov.org>; Reigle, Derek <DReigle@pwgov.org>; Shorter, Christopher <CShorter@pwgov.org>; Hugh, Wade <whugh@pwgov.org>; McGettigan, David <dmgettigan@pwgov.org>; Vanegas, Alexander I. <AVanegas@pwgov.org>; Clerk to BOCS <ClerktoBOCS@pwgov.org>

2 attachments (333 KB)

Letter to M. Robl re\_hearing notice.pdf; Letter to County Attorney Re December 12, 2023, Public Hearings.pdf;

**CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGE. THIS MESSAGE SHALL NOT BE FORWARDED, COPIED OR RELEASED WITHOUT CONSULTING THE COUNTY ATTORNEY.**

Good afternoon members of the Board

As the Board is aware and as we've advised the Board in the past, one of the legal requirements for the Board to hold a public hearing and act on a land use application is the published advertisements in a newspaper.

Earlier today County staff received an inquiry from one of the legal counsel for the Digital Gateway rezoning applicants regarding whether the legal advertisement for the Board's December 12th public hearings was published in the November 28th edition of The Washington Post. The applicant's legal counsel did not see the ad in their copy of November 28th edition of The Washington Post. The Clerk to the Board immediately contacted The Washington Post to determine if The Washington Post published the ads as requested and paid for by the County. The Clerk to the Board and other County staff did everything properly, however, due to the error solely attributed to The Washington Post, the newspaper advertisement did not appear in the November 28th edition of The Washington Post. The Washington Post staff have confirmed that (i) the November 28th advertisement was not published, and (ii) the earliest the first advertisement could be published would be Saturday, December 2nd. In response to repeated requests to publish the advertisement tomorrow, December 1st, The Washington Post staff has responded that the earliest available date they could publish the advertisement will be Saturday, December 2nd. We are attempting to have The Washington Post staff sign an affidavit that they failed to publish the advertisement as correctly submitted and the next available edition for the publication of the

advertisement is December 2nd. If The Washington Post staff is willing to sign this affidavit, it would help support the legal argument that the legal advertisement requirements were met.

If the Board proceeds with the December 12 public hearings on these rezoning applications and the Board's action on the applications is challenged, there will likely be a legal argument that the legally required advertisement requirements were not met, and thus the Board's action would be invalid. There are legal arguments that can be made that the Board satisfied the legal advertisement requirements to proceed with the public hearings on December 12th, and therefore the Board's action is valid. However, as we've advised the Board, "procedural challenges, including challenges to the advertisement, are generally the most serious legal issues localities face regarding land use applications. . . . Virginia courts have not been deferential to localities regarding procedural issues, particularly recently." There is significant risk when dealing with a procedural/advertisement issue and there are no guarantees with litigation. Through their legal counsel, the applicants have stated that they are willing to accept the legal risk involved and proceed with the December 12th public hearings.

Legal counsel representing the Digital Gateway rezoning applicants had a phone conference with me, Chief Deputy Alan Smith, and the Clerk to the Board to discuss the advertisements as their clients are the ones exercising their legal right to have their land use applications heard by the Board. We discussed whether their clients would request that the Board hear the applications on December 12th or a later date given these issues. We also discussed whether they would request the Board to take action to schedule a special meeting after December 19th to hold the public hearings and act on the rezoning applications. As you can see from the attached letters from counsel for the applicants, even given the potential legal issues regarding the legal advertisements and the significant risk involved, the applicants are proceeding with their request to have their applications heard and acted on at the December 12th Board meeting. Until/unless the Board takes further action, as a body in a public meeting, the County Executive has indicated that County staff will continue to proceed with the Board's current direction to hold the December 12th public hearings for these applications.

Please contact me directly if you have any questions or if you would like to discuss it further. Please do not reply all. Thank you. Michelle