

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA
Civil Division

HISTORIC ALEXANDRIA FOUNDATION)
YVONNE WEIGHT CALLAHAN)
and GAIL C. ROTHROCK)

Petitioners,)

v.)

CITY OF ALEXANDRIA)
SERVE:)

Joanna Anderson)
City Attorney)
301 King Street, Room 1300)
Alexandria, VA 22314)

ALEXANDRIA CITY COUNCIL)
SERVE:)

Joanna Anderson)
City Attorney)
301 King Street, Room 2300)
Alexandria, VA 22314)

VOWELL, LLC)
SERVE:)

Corporation Service Company)
Registered Agent)
100 Shockoe Slip, 2nd Floor)
Richmond, Virginia 23219)

&)

BOARD OF ARCHITECTURAL REVIEW,)
CITY OF ALEXANDRIA)
SERVE:)

Joanna Anderson)
City Attorney)
301 King Street, Room 2300)
Alexandria, VA 22314)

Defendants.)

Case No. CL19002249

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CLERK OF COURT'S
CITY OF ALEXANDRIA

PETITION

COMES NOW the Petitioners, HISTORIC ALEXANDRIA FOUNDATION (“HAF”), YVONNE WEIGHT CALLAHAN (“Ms. Callahan”), and GAIL C. ROTHROCK (“Ms. Rothrock”), by counsel, and hereby petitions this honorable Court to review the decision of the Alexandria City Council (“City Council”) and states as follows in support.

INTRODUCTION

1. This appeal concerns an affirmation by the City Council of a decision of the Alexandria Board of Architectural Review (“BAR”) with respect to certain demolitions, alterations, and additions at 619 South Lee, Alexandria, Virginia 22314 (the “Black Home”). The Black Home was the long-time residence of United State Supreme Court Justice Hugo Black and his family from shortly after his appointment to the bench by President Franklin Roosevelt in 1939 until his death in 1971. According to the Historic American Buildings Survey, the Black Home is “certainly one of the outstanding examples of the Federal ‘row’ type buildings in Alexandria, has fortunately been spared the fate of suffocation. By precept and example it stands flush with the street, but with its extensive grounds and breathing space preserved to this day.”

2. The Black Home is subject to an easement per the Virginia Open Space Land Act; a certified Virginia historic landmark; and is within the City of Alexandria’s Historic District. The easement and Landmark designation included the open space around the house because, according to the Virginia Historic Landmark Commission “the space around the house is an essential element in a neighborhood where every

scrap of available land supports a new townhouse, some only eighteen feet wide, with a garden to match.”

PARTIES AND JURISDICTION

3. Petitioner HAF is a 501(c)(3) non-profit corporation founded in 1954 to advocate for the preservation of Alexandria’s historic buildings, districts, and neighborhoods. HAF was a petitioner on the appeal to City Council from the BAR decision and is the owner of real property located within the Old and Historic District of the City of Alexandria—under 1,500 feet away from the Black Home. In furtherance of its mission, HAF has both granted an easement on its property pursuant to the provisions of the Open Space Land Act and is a co-grantee of easements that have been given pursuant to the Open Space Land Act, and is therefore vitally interested in the proper administration of the Open Space Land Act and the protections for historic properties provided by the Alexandria Zoning Ordinance.

4. Petitioner Ms. Callahan was a petitioner on the appeal to City Council from the BAR decision and is the owner of real property located at 735 S. Lee Street, Alexandria, Virginia 22314—which is less than 550 feet from the Black Home. Ms. Callahan first moved to Alexandria in 1964 and has lived at her present residence since 1998. She moved to the City of Alexandria, and purchased her home, in large part because of the historic nature of the city and the specific neighborhood in which she resides—which includes the Black Home. Ms. Callahan pays property taxes to the City of Alexandria.

5. Petitioner Ms. Rothrock was a petitioner on the appeal to City Council from the BAR decision and is the owner of real property located at 209 Duke Street, Alexandria, Virginia 22314—which is less than 1,550 feet from the Black Home. Ms. Rothrock moved to the City of Alexandria, and purchased her home, in large part because of the historic nature of the city and the specific neighborhood in which she resides—which includes the Black Home. Ms. Rothrock pays property taxes to the City of Alexandria.

6. Defendant City Council is a body established by Chapter 3 of the City Charter of Alexandria pursuant to the authority vested by Virginia Code § 15.2-1400.

7. Defendant BAR is a zoning ordinance board for the City of Alexandria created by the Zoning Ordinance of the City of Alexandria, Virginia (“Alex. Zon. Ord.”) § 10-105 and organized pursuant to Virginia Code § 15.2-2306.

8. Defendant City of Alexandria is an incorporated municipality within the Commonwealth of Virginia and organized under Virginia Code § 15.2-200, *et seq.*

9. Defendant Vowell, LLC (“Vowell”) is a Virginia limited liability company and is the owner of the Black Home and the applicant as described *infra*.

10. This petition is made pursuant to Alex. Zon. Ord. § 10-107(B) by aggrieved petitioners. Therefore jurisdiction, both personal and subject matter, exists and venue is proper.

STATEMENT OF FACTS
HISTORY OF THE PROPERTY AND EASEMENTS

11. In October of 1965, while still owned by Justice and Mrs. Black, the Back Home was awarded plaque 35-E-619 as part of the HAF’s Early Building Survey plaque

program. It was one of the first private residences to receive that important designation. It was included in the Historic American Buildings Survey (HABS No. VA-709), first through photographic documentation and later in written form in 1966 based on work that was funded, in part, by the HAF.

12. Further, the Black Home and gardens is subject to an easement pursuant to the Virginia Open Space Land Act. See Va. Code §§ 10.1-1700, et seq. This easement was made on December 26, 1969 and is recorded in Book 705, Page 491 of the Land Records of the City of Alexandria (the “Open Space Easement”). A copy of the Open Space Easement is attached hereto as Exhibit 1. A “Deed of Correction” was subsequently filed in 1973 and recorded at Book 757, Page 867 which provided that all provisions of the original easement with the exception of paragraph 2 “shall remain in full force and effect and are hereby ratified and confirmed.”

13. The Open Space Easement specifically recognizes that “the Grantors are the owners of a tract of land . . . on which there is situated a house constructed in the late Eighteenth Century and of architectural significance and historic value.” Exh. 1 at 1.

14. The Open Space Easement expressly encompassed the entire property and was intended to preserve and maintain the unusual open space surrounding the House and other historic structures existing on the property. *See generally* Exh. 1.

15. The Open Space Easement additionally limited the owner’s rights with respect to the property. Specifically stating that the “manor house will be maintained and preserved in its present state as nearly as practical” and that “[n]o building or

structure shall be built or maintained on the property other than” the existing structures and a garage. Exh. 1 at 3.

16. Pursuant to this Open Space Easement, the owners of the Black Home have received significant reductions in their property taxes from the time of granting to the present.

17. Additionally, on December 30, 1969, the Black Home, and all of the undeveloped open space included in the Deed of Easement, was designated as a certified historic landmark by the Virginia Historic Landmarks Commission as reflected in the Land Records for the City of Alexandria at Book 704, Pages 494-95. The certification of the property as a Landmark was made because of its association with Justice Black.

18. This designation was in furtherance of the Virginia Historic Landmarks Commission’s mandate to “designate as an historic landmark, the buildings, structures and sites which constitute the principal historical, architectural and archaeological sites which are of State-wide or national significance.” 1966 Va. Acts Ch. 632 § 4(a). *See Va. Code Ann. § 10-138 (1973 Repl. Vol.). Accord Va. Code § 10.1-2204(A)(1).*

2018 APPLICATIONS RELATING TO BLACK HOME

19. The Black Home is currently owned by Vowell, which seeks to make major structural alterations to the residence and, therefore, sought approval of the BAR, due to its location in the City’s Old and Historic District.

20. On December 19, 2018, the BAR held a public hearing regarding applications for: 1) a permit for partial demolition and capsulation (BAR2018-00410)

(“Demolition Application”) and 2) certificate of appropriateness for additions and alterations (BAR2018-00411) (“Addition Application”) (collectively, the “Applications”).

21. At the December 19, 2018 hearing before the BAR, the Applications were opposed by the Historic Alexandria Resource Commission, HAF, the Northern Virginia Conservation Council, the Alexandria Association, and the Old Town Civic Association, among others. A copy of the December 19, 2018 Action Docket for the Board of Architectural Review is attached hereto as Exhibit 2. The result of the December 19, 2018 hearing was a vote to defer the matter for restudy. Exh. 2 at 5.

22. At the second hearing on February 6, 2019, the Applications were approved over the objections of the Historic Alexandria Resource Commission, HAF, the Northern Virginia Conservation Council, the Alexandria Association, and the Old Town Civic Association, among others. A copy of the BAR Staff Report is attached hereto as Exhibit 3.

23. Following the BAR approval, HAF and 125 other owners of property located in the Old and Historic District timely filed an appeal to the City Council pursuant to Alexandria Alex. Zon. Ord. § 10-107(A). HAF supported its appeal with a letter filed with the City Clerk on April 2, 2019 and a letter filed with the City Clerk on May 10, 2019. Copies of these letters are attached hereto as Exhibits 4 and 5, respectively. Numerous other members of the public submitted written statements in opposition to the proposal

24. At a hearing that began on May 14—but did not conclude until the City Council voted after 1:00 am on May 15, 2019—the City Council affirmed the decision of

the BAR vis-à-vis the Applications for the reasons stated in the City Staff Report. The City Council Staff Report is attached hereto as Exhibit 6.¹ In affirming the BAR decision based on the City Staff Report, the City Council expressly disregarded the Landmark certification of the property which established the principal period of historical significance of the property to be protected as the years when Justice Black lived and worked at the Black Home.

25. The original approval of the applications—as well as the affirmation on appeal before the City Council—are contrary to the law, abuses of discretion, and were granted arbitrarily. Each of the Applications will be discussed in turn.

**APPROVAL OF
DEMOLITION APPLICATION**

26. The City's approval of the Demolition Permit was granted arbitrarily and counter to Virginia law, specifically the law governing the BAR.

27. The City Staff Report that was adopted by the City Council as the basis for its decision approving the demolition failed to acknowledge that the Black House and property had all been certified as an Historic Landmark by the Virginia Historic Landmark Commission.

¹ With respect to both Exhibits 3 and 6, only the body of the reports are attached. The full reports with their various attachments are available at:
http://alexandria.granicus.com/ViewPublisher.php?view_id=57

28. The staff reports state that any designations² as a Virginia (or national) historic landmark are “honorific designations that have no regulatory bearing” on the decision of the BAR. *See* Exh. 6 at 5.

29. This statement is counter to the express “Purpose and Intent” of Alexandria City’s zoning regulations, which, most relevantly, were “designed to:”

- i. “To protect against destruction of, or encroachment upon, historic areas”;
- ii. “Protect the established character of existing residential neighborhoods”;
- iii. “Promote, in the public interest, the utilization of land for the purposes for which it is best adapted in harmony with the established character of the city.”

See Alex. Zon. Ord. § 1-102.

30. The Staff Report’s assertion that a Landmark certification is not relevant, which was adopted by the City Council, is also directly contradicted by the “Purpose” of the Old and Historic District which expressly provides that by establishing the district “the City of Alexandria seeks to pursue the following specific purposes: (A) To enrich the

² The most recent staff report notes that the Black Home is not “individually listed on the Virginia Landmarks Register” before stating that even were it so designated, the designation is irrelevant. Exh. 6 at 5. This is a reversal of the BAR staff report which acknowledge that research by the HAF “has determined that this property is listed as a Virginia Landmark.” Exh. 3 at 6. Likewise, this factual assertion in the most recent staff report expressly runs counter to the Land Records of Alexandria City as described *supra*. This further shows how capricious and arbitrary the decision-making process of the City Council was—going so far as to reverse an open and obvious fact that is a matter of public record.

qualify of life for city residents by protecting the unique resource that is the historic district, **including familiar landmarks** and other treasured elements of the area.”

Alex. Zon. Ord. § 10-101(A)(emphasis added). *See also* Alex. Zon. Ord. § 10-101(C), (G).

31. Indeed, the Virginia Code expressly states that such a designation “**shall mean** an act of official recognition **designed . . . to encourage local governments** and property owners **to take the designated property's historic**, architectural, archaeological, **and cultural significance into account in their planning**, the local government comprehensive plan, **and their decision making.**” Va. Code § 10.1-2204(B) (emphasis added).

32. Thus, it is clearly erroneous **as a matter of law** to state that such a designation has no bearing on the decision-making process. *See* Exh. 6 at 4. The failure to acknowledge it likewise makes any decisions arbitrary. It is also clearly erroneous **as a matter of law** to deny the landmark status of the property.

33. Additionally, the BAR staff report twice recommended that the permit of demolition regarding the Black Home be denied with respect to a certain “hyphen” curved brick wall. *See* Exh. 6 at 5 (“Staff recommended denial of the request to demolish this curved wall feature because it is over 150 years old and is an example of an unusual wall treatment.”).

34. Nonetheless, the BAR approved demolition because:

the existing curved hyphen was a later feature that was not well considered when it was originally constructed; that it has caused and will continue to create maintenance issues inherent in its design that will harm the primary historic resource; that there are other better examples of curved hyphens in the district; and that removal of this element will

not be detrimental to the public interest and removal will, in fact, help preserve the west wall of this important historic house.

Exh. 6 at 8.

35. Put simply, as described *infra*, the BAR refused to consider anything outside of the bare standards enunciated in Alex. Zon. Ord. § 10-105(A)(2)³ when it decided to approve the Addition Application. But when faced with the Demolition Application, the BAR (and subsequently the City Council) expressly relied upon factors *not* contained within Alex. Zon. Ord. § 10-105(B).⁴

36. Specifically, the following factors are not listed and, therefore, should not be considered:

- i. Whether or not the feature was “well considered when it was originally constructed”;
- ii. Whether or not retention of the feature will create maintenance issues;
- iii. Whether or not there are better examples of the feature;

Cf. Exh. 6 at 8 *with* Alex. Zon. Ord. § 10-105(B).

37. This inherent contradiction makes the decision of the BAR regarding demolition (and the City Council’s affirmation) arbitrary and contrary to law on its face.

38. Ironically, the same staff report outlined recommended findings **consistent** with the standards of Alex. Zon. Ord. § 10-105(B), which were apparently

³ The Zoning Ordinance listing the standards to be considered when approving a ‘certificate of appropriateness’ vis-à-vis additions and alterations.

⁴ The Zoning Ordinance listing the standards to be considered when approving a permit to demolish or capulate.

not relied upon. Specifically, the staff report found that the wall feature was “over 150 years old and is an example of an unusual wall treatment.” Exh. 6 at 5.

39. The Zoning Ordinance specifically states that whether the structure is “of such old and unusual or uncommon design, texture and material that it could not be reproduced or reproduced only with great difficulty” is a standard to be considered. Alex. Zon. Ord. § 10-105(B)(3). Further, such an unusual and old structure would axiomatically be of “such architectural or historical interest that its [removal] would be to the detriment of the public interest.” Alex. Zon. Ord. § 10-105(B)(1).

40. These factors were considered, and listed, in two staff reports recommending the denial of the Demolition Application. The failure of the BAR to address or consider these factors as required by the Alexandria zoning ordinances makes the decision both arbitrary and counter to the law.

41. Additionally, the procedure applied by the City Council in affirming the decision was arbitrary and contrary to law. Days before the hearing before the City Council, on or about May 10, 2019, Vowell submitted to the City Council a letter from its mason, Vaughan Restoration Masonry, without providing it to any of the appellants or making the letter publicly available. A copy of this letter is attached hereto as Exhibit 7.

42. This letter was discussed at length by the City Council and was expressly relied upon as justification for demolishing the curved hyphen. This letter was not made available to the public until after the hearing was concluded and the Council’s vote was taken—despite repeated requests by HAF that all materials submitted to the council for consideration be made publicly available for review and comment by interested parties.

Consideration and reliance upon materials that are not made publicly available is inconsistent with the public hearing required for the issuance of the permits to Vowell.

43. Procedural due process is at the foundation of the American legal system. Permitting expert testimony from only one party—while intentionally keeping the contents of the expert’s testimony hidden—violates that notion so much so that it constitutes both a violation of Virginia law as well as rendering the decision arbitrary.

**APPROVAL
OF ADDITION APPLICATION**

44. The City’s approval of the Addition Application was an arbitrary and capricious act which is contrary to Virginia law.

45. In considering the Addition Application the City Council failed to recognize that the open space included in the Black Home property had all been certified as an Historic Landmark because of its association with Justice Hugo Black. Because the City Council adopted the legally erroneous position set forth in the City Staff Report that Black Home and open space was not a Landmark, its consideration of the Addition Application was arbitrary, capricious and contrary to law, and is entitled to no deference or presumption of regularity.

46. Further, in considering the Addition Application the City Council adopted the legally erroneous position set forth in the BAR and City Staff Reports that the Landmark certification of the open space had no regulatory impact. Because the City Council considered the Addition Application under an incorrect view of the legal implications of the Landmark designation, its decision was arbitrary, capricious and contrary to law, and is entitled to no deference or presumption of regularity. Any proper

consideration of the Addition Application under the legal standards required by the Alexandria Zoning Ordinance taking into proper account the Landmark status of the open space would necessarily result in a denial of the application.

47. Both staff reports acknowledge the existence of the Open Space Easement and expressly stated that they would not consider it. *See* Exh. 6 at 4. This purportedly is because “[t]he scope of the BAR’s review of the demolition/capsulation and the new construction is limited to the standards and criteria listed in Section 10 of the Alexandria Zoning Ordinance and the BAR does not have the authority to hold, interpret or enforce an easement.” *Id.*

48. Whether or not City of Alexandria has the authority to initiate a law suit to enforce the Open Space Easement, it is objectively counter to Virginia law that the restrictions imposed by the Open Space Land Act should not be considered by the very body charged with protecting the structural integrity of the Historic District. Nor is it permissible for the City of Alexandria to authorize construction on land that has been designated as open space under the authority of the Open Space Land Act without compliance with Va. Code § 10.1-1704.

49. Alex. Zon. Ord. § 1-200(F) states that “[w]henver any provision of any state or federal statute or other city ordinance or regulation imposes a greater requirement or a higher standard than is required by this ordinance, the provision of such state or federal statute or other city ordinance or regulation **shall govern.**” (emphasis added). Va. Code § 10.1-1705 provides that “Insofar as the provisions of this chapter [the Open Space Land Act] are inconsistent with the provisions of any other law,

the provisions of this chapter shall be controlling. The powers conferred by this chapter shall be in addition and supplemental to the powers conferred by any other law.”

50. It is uncontested that the Open Space Easement, and consequentially Virginia Code § 10.1-1704, impose a “greater requirement” and/or “higher standard” than what was considered. *Cf. Va. Code § 10.1-1704 with Alex. Zon. Ord. § 10-105.*

51. Virginia Code § 10.1-1704 mandates that no land acquired under the Open Space Land Act, as the Black Home was, may be diverted from such use unless such use:

- i. Is determined by a public body to be “essential to the orderly development and growth of the locality” and “in accordance with the official comprehensive plan; and
- ii. There is alternative real property substituted, i.e. made subject to the Open Space Land Act, of:
 - a. Equal fair market value;
 - b. Greater value as permanent open-space land than the land converted or diverted; and
 - c. Of as nearly as feasible equivalent usefulness and location for use as permanent open-space land as the land converted or diverted.

52. It is uncontested that neither the BAR nor the City Council even considered those “higher standards” imposed by the Open Space Land Act. Axiomatically, they made no findings that the requirements of Virginia Code § 10.1-1704 or its local equivalent had been complied with.

53. Therefore, the approval of the Addition Application expressly runs counter to the law and was decided arbitrarily and contrary to law on the basis of an incomplete record.

PRAYER FOR RELIEF

WHEREFORE, the Petitioners respectfully requests that this Court fully overturn the decisions of the Alexandria City Council and the City of Alexandria Board of Architectural Review with respect to BAR Case Numbers 2018-00410 and BAR2018-00411, and for such other relief as this Court deems necessary and proper.

HISTORIC ALEXANDRIA FOUNDATION

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