VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

HISTORIC ALEXANDRIA FOUNDATION, *et al.*,	:	
Petitioners,	:	
v.	:	**Case No.: CL19002249**
CITY OF ALEXANDRIA, *et al.*,	:	
Respondents.	:	

BRIEF IN SUPPORT OF MOTION CRAVING OYER BY RESPONDENTS THE CITY OF ALEXANDRIA, THE CITY COUNCIL OF THE CITY OF ALEXANDRIA, AND THE ALEXANDRIA BOARD OF ARCHITECTURAL REVIEW

The City of Alexandria, the City Council of the City of Alexandria, and the Alexandria Board of Architectural Review (collectively "Respondents"), by and through undersigned counsel, and pursuant to Rule 4:15 of the Rules of Supreme Court of Virginia, hereby submit this brief in support of its filed Motion Craving Oyer to the Petition filed by the Historic Alexandria Foundation, Yvonne Weight Callahan, and Gail C. Rothrock (collectively "Petitioners"), and state as follows:

BACKGROUND

On June 13, 2019 Petitioners filed the instant Petition with this Court. Specifically, Petitioners request that the City Council's May 14 - 15, 2019 decisions to issue a certificate of appropriateness and a permit to demolish to Vowell, LLC as the owners of 619 South Lee Street be reversed. Petitioners contend that the decisions of the City Council were arbitrary, capricious, contrary to law, and constitute an abuse of discretion. While Petitioners' allegations are directly refuted by the publicly available legislative record that was before the City Council

when it rendered its decisions, as well as by the record that was created by the City Council during the May 14 - 15 public hearing, Petitioners have only attached portions of this record to their Petition. Even those portions that Petitioners did "attach" were not physically provided to the Court or to Respondents. In the event that the portions of the legislative record that were incorporated into the Petition are insufficient in and of themselves to demonstrate that the appeal lacks merit as a matter of law (Respondents have filed a separate Demurrer on this particular issue), the full record will enable the Court to make a proper decision in this case. Accordingly, the Court should allow Respondents to crave oyer of the entire legislative record that the City Council had before it when it affirmed the issuance of the certificate of appropriateness and the permit to demolish.

ARGUMENT

"A motion craving oyer is a request to require that a document sued upon, or a collateral document which is necessary to the plaintiff's claims be treated as though it were part of the plaintiff's pleadings." *Resk v. Roanoke Cty.*, 73 Va. Cir. 272, 273 (Roanoke 2007) (citation omitted). "One purpose of granting oyer is to allow the Court to view all material parts of a record so that an objective, intelligent construction of the record can be made without being limited by the subjective interpretations of the parties." *Id.*; *see also Culpeper Nat'l Bank v. Morris,* 168 Va. 379, 382-83 (1937) (upholding a trial court's decision to grant motion craving oyer of the entire record from a prior judicial proceeding).

A motion craving oyer is particularly appropriate when a municipality's land use decision is challenged on appeal. For example, in *Resk*, the plaintiffs challenged a zoning ordinance passed by the Roanoke County Board of Supervisors ("the Board") as "arbitrary, capricious, irrational, and unreasonable." *Resk,* 73 Va. Cir. at 272. Specifically, the plaintiffs alleged that

the Board "failed to get an adequate study and did not properly consider the impact of the traffic on the proposed development." *Id.* The *Resk* court explained that its role was to decide whether the defendant complied with the law when it passed the ordinance. *See id.* at 273. To do so, the court was "required to review how the Board went about making its decision, not the wisdom or appropriateness of that decision." *Id.* The court found that "the plaintiffs' claims depend upon the legislative record that shows what the Board considered and the process that the Board went through in making its decision . . . ." *Id.* at 274. As such, the *Resk* court granted the plaintiffs' motion craving oyer as to the zoning application, the traffic impact analysis, the design guidelines, the Roanoke County Community Plan, the minutes of the Planning Commission's meeting, the minutes of the Board's meeting, a staff report, a transmittal report, and a report by the Deputy Director of Planning. *See id.*

Here, like the plaintiffs in *Resk*, Petitioners are challenging the City Council's decisions to issue a certificate of appropriateness and a permit to demolish on the grounds that the decisions were arbitrary, capricious, contrary to law, and an abuse of discretion. Petitioners specifically allege, among other things, that (1) the City Council issued the certificate of appropriateness and the permit to demolish for the reasons stated in the City Staff Report (Petition ¶ 24), (2) the City Council erred by disregarding the alleged landmark certification of the property (Petition ¶¶ 24, 27 - 32), (3) the City Council erred by disregarding the impact of an open-space easement on the property (Petition ¶¶ 47 - 53) and (4) the Board of Architectural Review made inappropriate findings and considered factors outside of Section 10-105(B) of the Alexandria Zoning Ordinance (Petition ¶¶ 35 - 36). In order to determine whether the City Council's decisions were arbitrary, capricious, contrary to law, or an abuse of discretion in these and other respects, the Court must be able to consider the documents and testimony that were

before the City Council when it made its decisions, as well as the processes and procedures that the City Council followed in making its determinations. Indeed, this approach is consistent with the precedent of this Court, as it routinely grants motions craving oyer in land use cases. *See, e.g., Hardaway v. City Council,* No. CL16001064 (Alex. Cir. Ct. Apr. 29, 2016) (sustaining demurrer to Va. Code Ann. § 15.2-2285 appeal because evidence in the legislative record before the Court rendered the decision fairly debatable); *Peck v. City Council,* No. CL2012-001560, 2012 WL 655414, at *1 (Alex. Cir. Ct. Sept. 4, 2012) (same); and, most recently, *Thomas Byrne v. City of Alexandria, et al.*, No. CL18001734 (Alex. Cir. Ct. Dec. 12, 2018) (sustaining a demurrer to an appeal under Section 10-107(B) on the basis that the legislative record demonstrated that the City Council's decision was fairly debatable, not contrary to reason, not arbitrary, and not an abuse of discretion).[1]

In addition, the provision of the Zoning Ordinance that is at issue in this appeal further supports that the Court should grant Respondents' Motion Craving Oyer. Section 10-107(B) of the Zoning Ordinance provides, in pertinent part:

> *[f]indings of fact by the council shall be conclusive on the court in any such appeal.* The court may reverse or modify the decision of the council, in whole or in part, if it finds upon review that the decision of the council is contrary to law or that its decision is arbitrary and constitutes an abuse of discretion, or it may affirm the decision of council.

ALEX. ZONING ORD. § 10-107(B) (emphasis added). Because the Court is bound by the City Council's findings of fact, the Court must consider the legislative record that was before the City Council when it rendered its decision, as it is precluded from making its own factual determinations.

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[1] The orders in *Hardaway*, *Peck*, and *Byrne* are attached hereto as Exhibit A. Exhibit A also includes the December 10, 2018 letter opinion in *Byrne* from the Honorable Judge Lisa B. Kemler.

In accordance with *Resk*, *Hardaway*, *Peck*, and *Byrne*, Respondents ask the Court to grant their Motion Craving Oyer and make the following documents comprising the legislative record part of the pleadings in this appeal:[2]

1. **December 19, 2018 Board of Architectural Review Public Hearing**

   (a) December 29, 2019 Board of Architectural Review Docket (HAF000001 - 000006);

   (b) Staff Report (HAF000007 - 000173);

   (c) Additional Materials (HAF000174 – 000240);

   (d) Meeting Minutes from December 19, 2018 Public Hearing (HAF000241 - 000257); and

   (e) A video recording of the December 19, 2018 Public Hearing which can be found at the following link: http://alexandria.granicus.com/MediaPlayer.php?view_id=57&clip_id=4173.[3]

2. **February 6, 2019 Board of Architectural Review Public Hearing**

   (a) February 24, 2018 Board of Architectural Review Docket (HAF000258 - 000261);

   (b) Staff Report (HAF000262 – 000499);

   (c) Additional Materials (HAF000500 – 000507);

   (d) Meeting Minutes from February 6, 2019 Public Hearing (HAF000508 - 000516); and

   (e) A video recording of the February 6, 2019 Public Hearing which can be found at the following link: http://alexandria.granicus.com/MediaPlayer.php?view_id=57&clip_id=4200.[4]

3. **May 14, 2019 City Council Public Hearing**

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[2] A CD containing a Bates numbered copy of the entire legislative record is attached hereto as Exhibit B.

[3] The City of Alexandria does not typically create transcripts of public hearings, but reserves the right to submit one at a later point in this appeal.

[4] Same as above.

(a) May 14, 2019 City Council Docket (HAF000517 – 000524);

(b) Staff Report (HAF000525 –000800);

(c) Presentation (HAF000801 – 000810);

(d) VDHR Letter (HAF000811 – 000812);

(e) 619 South Lee Street Letters (part 1) (HAF000813 – 000902);

(f) 619 South Lee Street Letters (part 2) (HAF000903 – 000937);

(g) 619 South Lee Street Letters (part 3) (HAF000938 – 000985);

(h) 619 South Lee Street Letters (part 4) (HAF000986 – 001021);

(i) 619 South Lee Street Letters (part 5) (HAF001022 – 001045);

(j) 619 South Lee Street Letters (part 6) (HAF001046 - 001269);

(k) After Items (HAF001270 – 001415);

(l) Meeting Minutes from May 14, 2019 Public Hearing (HAF001416 – 001432);

(m) A video recording of the May 14, 2019 Public Hearing which can be found at the following link: http://alexandria.granicus.com/MediaPlayer.php?view_id=57&clip_id=4274.[5]

CONCLUSION

For the foregoing reasons, Respondents the City of Alexandria, the City Council of the City of Alexandria, and the Alexandria Board of Architectural Review respectfully crave oyer of the legislative record upon which this appeal depends, and respectfully request that the Court deem the documents enumerated herein part of the record in the above-captioned appeal.

[5] Same as above.

Dated: July 15, 2019

Respectfully submitted,

THE CITY OF ALEXANDRIA ,
THE ALEXANDRIA CITY COUNCIL,
THE ALEXANDRIA
BOARD OF ARCHITECTURAL REVIEW

By Counsel,

[redacted]

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 2019, a true and correct copy of the foregoing was served and First Class U.S. Mail upon:

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Travis S. MacRae

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

JAMES H. HARDAWAY Petitioner. v. CITY COUNCIL OF ALEXANDRIA, Respondent.	)	Civil Action No. CL 16001064

ORDER GRANTING MOTION CRAVING OYER

THIS MATTER came before the Court on the Motion Craving Oyer filed by the City Council for the City of Alexandria; and

IT APPEARING to the Court that all parties consent to the relief requested in the Motion Craving Oyer; and

IT FURTHER APPEARING to the Court that the relief requested in the Motion Craving Oyer is proper; it is therefore

ORDERED that the City Council of Alexandria's Motion Craving Oyer is GRANTED; and it is

FURTHER ORDERED that the record of the City Council's December 12, 2015 public hearing, a certified copy of which is enclosed herewith, shall be deemed part of the pleadings in this case.

ENTERED this 24th day of February, 2016.

[redacted]
Judge, Alexandria Circuit Court

EXHIBIT A

WE ASK FOR THIS

[redacted]

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and

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SEEN AND AGREED:

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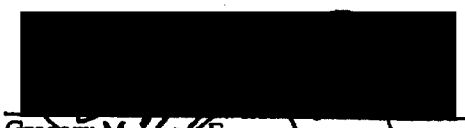
SEEN AND AGREED:



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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

MICHAEL PECK, ET AL.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. CL 2012-001560
	)	
CITY COUNCIL FOR THE CITY OF ALEXANDRIA, ET AL.	)	
	)	
Defendants.	)	

ORDER

THIS MATTER CAME before the Court on Notice of Entry of Nonsuit filed by Plaintiffs Michael Peck and Elizabeth Baldwin ("Plaintiffs") and Demurrer filed by Defendants City Council for the City of Alexandria and the City of Alexandria ("Defendants").

IT APPEARING TO THE COURT that the case before the Court is a proceeding under Va. Code Ann. § 15.2-2285; and

IT FURTHER APPEARING TO THE COURT that the case that is before the Court is not an appropriate matter for which a nonsuit can be taken; and

IT FURTHER APPEARING TO THE COURT, upon consideration of the pleadings, oral argument, and the relevant legal authority, that Plaintiffs' Notice of Entry of Nonsuit should be denied; and

IT FUTHER APPEARING TO THE COURT that the Plaintiffs' complaint fails to state a cause of action for illegal spot zoning, or that the action taken by the City Council was arbitrary and capricious; and

IT FURTHER APPEARING TO THE COURT that the evidence in the record before the Court supports the City Council's decision to adopt the Master Plan Amendment # 2011-

0001 to the City's Master Plan to include the Waterfront Small Area Plan and Text Amendment # 2011-0005 to § 5-500 of the Zoning Ordinance for the W-1/Waterfront mixed use zone; and

IT FURTHER APPEARING TO THE COURT that the evidence in the record before the Court renders the City Council's decision fairly debatable; and

IT FURTHER APPEARING TO THE COURT, upon consideration of the pleadings, the record the City Council had before it, oral argument, and the relevant legal authority, that Defendants' Demurrer should be sustained without leave to amend; it is therefore

ORDERED that Plaintiffs' Notice of Entry of Nonsuit is **DENIED**; and it is further

ORDERED that Defendants' Demurrer is **SUSTAINED** without leave to amend; and it is further

ORDERED that Plaintiffs' Complaint for Declaratory Judgment and Other Relief is dismissed with prejudice.

THIS ORDER IS FINAL.

ENTERED this 4th day of September, 2012.

[redacted]
The Honorable Lisa B. Kemler, Alexandria Circuit Court

WE ASK FOR THIS:

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SEEN AND OBJECTED TO FOR THE REASONS STATED AT THE ORAL HEARING IN THIS CASE ON AUGUST 17, 2012 ON PLAINTIFFS' NOTICE OF ENTRY OF NONSUIT FILED ON AUGUST 9, 2012, A TRANSCRIPT OF WHICH WAS FILED WITH THE CLERK'S OFFICE ON AUGUST 22, 2012 (THE "TRANSCRIPT"). AS STATED BY PLAINTIFFS IN THE TRANSCRIPT, THE COURT SHOULD HAVE ENTERED PLAINTIFFS' NONSUIT FORTHWITH PURSUANT TO VA CODE § 8.01—830 BECAUSE ALL LEGAL CRITERIA WERE MET. PLAINTIFFS NOTICED THEIR NONSUIT BEFORE THE MATTER WAS SUBMITTED TO THE COURT FOR DECISION AND EVEN BEFORE THE DEADLINE FOR SUBMITTING THEIR BRIEF IN OPPOSITION TO DEFENDANTS' DEMURRER. MOREOVER, PLAINTIFFS' COMPLAINT WAS A CIVIL ACTION FOR DECLARATORY JUDGMENT UNDER VA CODE § 8.01-8.01-184, NOT AN APPEAL OR PROCEEDING UNDER VA CODE § 15.2-2285, NOWHERE REFERENCED IN PLAINTIFFS' COMPLAINT. IN ANY EVENT, THE TEXT OF §15.2-2285 USES THE WORD "ACTION," NOT "APPEAL," EXCEPT IN THE CAPTION, WHICH IS NOT PART OF THE STATUTE. IN NO SENSE WAS THIS CASE AN APPEAL. ACCORDINGLY, THE COURT SHOULD HAVE ENTERED THE NONSUIT FORTHWITH AND NOT CONSIDERED, OR RULED ON, DEFENDANTS' DEMURRER WHICH PLAINTIFFS, HAVING TIMELY FILED FOR NONSUIT PRIOR TO THE MATTER BEING SUBMITTED TO THE COURT FOR DECISION, WERE NOT OBLIGED TO, AND PROPERLY CHOSE NOT TO, OPPOSE. ALSO, FOR THE REASONS STATED IN THE TRANSCRIPT, THE COURT'S RULING ON WHETHER PLAINTIFFS CAN RE-FILE THEIR COMPLAINT WAS PREMATURE AND THE COURT SHOULD NOT HAVE DENIED PLAINTIFFS THEIR STATUTORY RIGHT TO NONSUIT. THE ISSUE ON DEMURRER WAS NEVER JOINED AND SHOULD NOT HAVE BEEN ADJUDICATED ABSENT FULL BRIEFING ON THE MERITS.

[redacted]

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

THOMAS BYRNE,	:	
Petitioner,	:	**Case No.: CL18001734**
v.	:	
CITY OF ALEXANDRIA, *et al.*,	:	
Respondents.	:	

ORDER

THIS MATTER CAME before the Court on the Motion Craving Oyer filed by Respondents City of Alexandria and City Council of the City of Alexandria (collectively "Respondents").

IT APPEARING TO THE COURT, that the relief requested in Respondents' Motion Craving Oyer is proper; it is hereby

ORDERED, that for the reasons stated by the Court on the record, Respondents' Motion Craving Oyer is **GRANTED**; and it is further

ORDERED, that the record of the City Council's January 20, 2018 public hearing, a certified copy of which is enclosed herewith, shall be deemed part of the pleadings in the above-captioned appeal.

ENTERED this 17th **day of** December **, 2018.**

[redacted]

Judge, Alexandria Circuit Court

WE ASK FOR THIS:

[redacted]

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Circuit Court of Alexandria, Virginia

Judges
LISA BONDAREFF KEMLER
NOLAN B. DAWKINS
JAMES C. CLARK

Alexandria Circuit Court
520 King Street
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December 10, 2018

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Amy Miller, Esquire
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Re: Thomas Byrne v. City of Alexandria, *et al*
Case No. CL18001734

Dear Counsel:

The Court has considered the City of Alexandria and City Council of the City of Alexandria's (the "City") Demurrer to Thomas Byrne's ("Petitioner Byrne") Petition for Appeal of Decision of City Council ("Petition for Appeal"), the City's Supplemental Brief in Support of Demurrer, Petitioner Byrne's Opposition to the City's Demurrer, the City's Reply in Support of Demurrer, the City's Supplemental Brief in Support of Demurrer, and oral arguments made at the hearing on November 14, 2018. At that hearing, the Court granted the City's Motion Craving Oyer for the official record of the City Council's and Architectural Review Board's proceedings. For the reasons stated below, the Court sustains the City's Demurrer to Petitioner Byrne's Petition for Appeal of Decision of City Council.

I. Background

Petitioner Byrne brought his Petition for Appeal for an allegedly improper action taken by the City Council regarding the architectural merits of a proposed fence and gate at his property, located at 420 South Lee Street within the City of Alexandria. Specifically, Petitioner Byrne filed his appeal pursuant to the City of Alexandria Zoning Ordinance § 10-107(B), which was enacted to effectuate the requirements of Va. Code § 15.2-2306(A)(3).

On December 20, 2017, the Old & Historic Alexandria District Board of Architectural Review (the "BAR") considered Petitioner Byrne's application to make alterations to the west, street-facing property line of his home at 420 South Lee Street. (Byrne000014). Specifically, Petitioner Byrne sought a Certificate of Appropriateness for the installation of a "wicket and spear"-style fence and gate, similar in appearance to a fence and gate that appeared in an undated photograph of the property (likely from the 1930s or 40s). (Byrne 000014, 000077, 000081, Fig. 4).[1] Petitioner Byrne's application materials indicated that the proposed fence would have an eight to10-foot-wide double gate at the south end of the Lee Street frontage. (Byrne 000014-17, 000077). The double gate would be aligned with a curb cut from Lee Street and open up onto an anticipated four-foot-wide "walk," which would orient visitors toward a historically significant part of the home. (Byrne 000014, 16). After a public hearing with comments, including Petitioner Byrne's representative, the BAR unanimously approved Petitioner Byrne's application with the condition that the width of the double gate be reduced to no wider than six feet in total. (Byrne 000082).

Petitioner Byrne appealed the BAR's decision on January 3, 2018, to reconsider the issue of the width of the double gate in light of the undated photograph. (Byrne 000131). The City Council considered Petitioner Byrne's appeal at a public hearing on Saturday, February 24, 2018. After hearing comments from City staff, Petitioner Byrne and his wife, local interest groups, and neighbors, the City Council unanimously affirmed the BAR's decision. (Byrne 000223). Petitioner Byrne filed his appeal to this Court on March 26, 2018, alleging that both the BAR and City Council erred by considering the possible uses for the gate (in particular, vehicular access), rather than merely its architectural merits.[2]

II. The City's Demurrer

The City demurs to the Petition for Appeal on the ground that the legislative record conclusively establishes that the City Council properly considered the applicable factors for a Certificate of Appropriateness under the Alexandria Zoning Ordinance.

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[1] This undated photograph was mentioned in Petitioner Byrne's application (Byrne 000014), but does not appear to have been given to the City staff or the BAR until the day of the BAR hearing (Byrne 000081, 131). Another photograph of the neighboring property presented to the BAR at the hearing showed a smaller single gate at the north end of the Lee Street frontage, which Petitioner Byrne agreed to install as part of the new fence. (Byrne 000041, 80).

[2] The use of the gate and property for vehicular parking was the subject of another appeal to this Court that was fully addressed at the November 14, 2018 hearing, and has other history with the City that is not detailed in this opinion.

Legal Standard

i. Demurrer

On demurrer, this Court is required to view the facts in the light most favorable to Petitioner Byrne to determine whether his pleading states a valid cause of action. *W. S. Carnes, Inc. v. Bd. of Supervisors of Chesterfield County*, 252 Va. 377, 384 (1996). However, "a court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings." *Schaecher v. Bouffalt*, 290 Va. 83, 107 (2015). Exhibits attached to a complaint or granted in a motion craving oyer are deemed to be part of that pleading. Rule 1:4(i); *Ward's Equip. v. New Holland N.Am.*, 254 Va. 379, 382 (1997).

ii. Appeal Pursuant to Va. Code § 15.2-2306(A)(3)

This Court's standard of review for this Petition for Appeal is whether the governing body's decision is contrary to law or is arbitrary and constitutes an abuse of discretion. Va. Code § 15.2-2306(A)(3). This is essentially the same "fairly debatable" standard as is applied to zoning decisions. *Norton v. City of Danville*, 268 Va. 402, 407 (2004). However, it is important to note that the Court only reviews the particular action concerning the instant approval/denial of the certificate of appropriateness, not the validity of the underlying ordinance. *Id.* at 408.

Legislative actions are reasonable if the matter in issue is "fairly debatable". *Fairfax County v. Jackson*, 221 Va. 328, 333 (1980) (quoting *County of Fairfax v. Parker*, 186 Va. 675, 680 (1947)). An issue may be said to be fairly debatable when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions. *Jackson*, 221 Va. at 333 (citing *Fairfax County v. Williams*, 216 Va. 49, 58 (1975)).

The challenger of a legislative action has the burden to prove that the decision is "clearly unreasonable, arbitrary, or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare". *Norton*, 268 Va. at 409 (citing *Turner v. Board of Supervisors*, 263 Va. 282, 288 (2002)). If the challenger is able to show "probative evidence of unreasonableness," then the burden shifts to the local governing body to show that there is some evidence of reasonableness and is therefore "fairly debatable".

iii. Certificate of Appropriateness Factors

Alexandria Zoning Ordinance § 10-105(A) delineates the scope of review for the BAR and City Council in considering a certificate of appropriateness, and enumerates 10 factors that must be addressed. In general, the City:

shall limit its review of the proposed construction, reconstruction, alteration or restoration of a building or structure to the building's or structure's exterior architectural features specified in sections 10-105(A)(2)(a) through (2)(d) below which are subject to view from a public street . . . and to the factors specified in sections 10-105(A)(2)(e) through (2)(j) below; shall review such features and factors for the purpose of determining the compatibility of the proposed construction, reconstruction, alteration or restoration with the existing building or structure itself, if any, and with the Old and Historic Alexandria District area surroundings.

The relevant factors to be considered under § 10-105(A)(2) are:

(a) Overall architectural design, form, style and structure, including, but not limited to, the height, mass and scale of buildings or structures;

(b) Architectural details including, but not limited to, original materials and methods of construction, the pattern, design and style of fenestration, ornamentation, lighting, signage and like decorative or functional fixtures of buildings or structures; the degree to which the distinguishing original qualities or character of a building, structure or site (including historic materials) are retained;

(c) Design and arrangement of buildings and structures on the site; and the impact upon the historic setting, streetscape or environs;

(d) Texture, material and color, and the extent to which any new architectural features are historically appropriate to the existing structure and adjacent existing structures;

(e) The relation of the features in sections 10-105(A)(2)(a) through (d) to similar features of the preexisting building or structure, if any, and to buildings and structures in the immediate surroundings; . . .

(g) The extent to which the building or structure will preserve or protect historic places and areas of historic interest in the city; . . . and

(j) The extent to which such preservation and protection will promote the general welfare by maintaining and increasing real estate values, generating business, creating new positions, attracting tourists, students, writers, historians, artists and artisans, attracting new residents, encouraging study and interest in American history, stimulating interest and study in architecture and design, educating citizens in American culture and heritage and making the city a more attractive and desirable place in which to live.

Alexandria Zoning Ordinance § 10-105(A)(2).

b. Analysis

The sole ground for appeal in the Petition for Appeal that is appropriate for consideration is the final decision of the governing body—here, the Alexandria City Council. Petitioner Byrne's contention is that the City Council improperly relied on the potential use that the proposed double gate would allow (e.g. vehicular access), which is not within the proper scope of review under Alexandria Zoning Ordinance § 10-105(A). In opposition, the City contends that the potential use of the gate was considered only in relation to the surrounding environment and area, which is highly pedestrian-oriented.

The record itself indicates that the anticipated use of the gate for access to the property was raised at the hearing and even considered by the City Council, (Byrne 000196, 203, 206-07, 219-20), despite the Byrnes correctly noting that that issue was for a different forum. (Byrne 000191, 206). It is noteworthy that Petitioner Byrne's application specifies that the gate will open to a four-foot "walk," and that his representative raised the issue of the potential uses that the gate would allow when he appeared before the BAR. Ultimately, at the demurrer stage, this Court is obliged to accept the Petition for Appeal's assertion that when potential use of the gate itself was discussed, it was outside of the proper scope of review permitted by the Zoning Ordinance. (See Byrne 000196, 206-207).

However, this Court is not required to limit itself to the Petition for Appeal's allegation that the City Council made its decision *solely* on this improper issue, given the entire legislative record before the Court. The City Council, with the materials and testimony provided by city staff and community representatives, had ample evidence to support its decision within the scope of Zoning Ordinance § 10-105(A). Among the evidence before the City Council favoring a six-foot width restriction was the overall scale of the South Lee Street block face/streetscape, both as it currently appears and historically (Byrne 000083-84, 201, 215-17), the house's character and design during its period of architectural significance, the year 1871, (Byrne 000093, 195-97), the house's current configuration and scale (Byrne 000084), and the cohesiveness of the overall Historic District (Byrne 000085). Conversely, the most significant evidence in favor of the Byrnes' proposal was a photograph possibly dated from the 1930s or 1940s, showing what they estimated to be an eight-foot wide double gate at the curb cut with a vehicle parked inside the gate. (Byrne 000081, Fig. 1, 190-91). However, the probative value of this photograph is undermined by the angle at which it was taken and the city staff's estimate that the gate did not exist during the time of architectural significance (Byrne 000040, 195-96). As such, the City's decision was fairly debatable, and not contrary to reason, nor arbitrary and an abuse of discretion.

For the reasons stated above, the Court sustains the Demurrer with prejudice. Counsel for the City is directed to prepare an order consistent with the rulings in this letter, and submit it to the Court with the endorsement of both counsel and any objections thereto, within 14 days hereof.

Very truly yours,

[redacted]

Lisa B. Kemler