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 DEMURRER 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 the "Respondents"), by and through undersigned counsel, hereby submit this brief in support of their Demurrer to the Petition filed by the Historic Alexandria Foundation, Yvonne Weight Callahan, and Gail C. Rothrock (collectively the "Petitioners").

INTRODUCTION

In this appeal, Petitioners claim that the Alexandria City Council's decisions to issue a certificate of appropriateness and a permit to demolish to Vowell, LLC, for changes to its property at 619 South Lee Street, were contrary to law, arbitrary, and constituted an abuse of discretion. A review of the Petition, however, shows that Petitioners have failed to plead facts sufficient to show that the City Council acted in such a manner; that Petitioners have actually plead facts sufficient to show that the City Council's decisions were fairly debatable; that Petitioners' reliance on the impact of an alleged landmark status of the property is incorrect as a

2019 JUL 15 AM 11: 15
CLERK OF COURTS
CITY OF ALEXANDRIA

matter of law; that Petitioners' reliance on the impact of an open-space easement on the property is incorrect as a matter of law; that all Petitioners lack standing to bring this appeal; and that the City of Alexandria and the Alexandria Board of Architectural Review are improper parties to this appeal. As a result, Petitioners' appeal lacks merit and must be dismissed with prejudice.

BACKGROUND

Vowell, LLC ("Vowell"), is the owner of the property located at 619 South Lee Street (the "Property") in the City of Alexandria. The Property is located in the City's Old and Historic Alexandria District. In 2018, Vowell applied to the City's Board of Architectural Review (the "BAR") for the issuance of a certificate of appropriateness and a permit to demolish. The former was sought in order to authorize additions and alterations to the Property, while the latter was sought in order to authorize the demolition of certain structures at the Property, to include a curved brick wall.

On December 19, 2018, the BAR held a public hearing on Vowell's applications. At the conclusion of the hearing, the BAR voted to defer the matter for restudy. The matter was taken up a second time on February 6, 2019. This time, the BAR voted to approve both applications.

Acting pursuant to Section 10-107(A) of the Alexandria Zoning Ordinance, the Petitioners, along with a number of other Alexandria citizens, appealed the BAR's decision to the City Council. The City Council held a public hearing on this appeal on May 14, 2019. For the reasons that were stated in the City Staff Report (which is incorporated into the Petition as Exhibit 6), the City Council voted to affirm the decisions of the BAR and to authorize the issuance of a certificate of appropriateness and a permit to demolish. The City Staff Report (which itself incorporated an earlier City Staff Report to the BAR) contained an extensive amount of analysis that ultimately concluded that Vowell's applications should be approved.

Included in this analysis were discussions concerning the impact of an open-space easement on the Property, the impact of an alleged landmark designation of the Property, the risks and maintenance problems associated with preserving the curved brick wall, and the appropriateness of the applications in light of the controlling factors contained within Sections 10-105(A) and 10-105(B) of the Zoning Ordinance.

Thereafter, on June 13, 2019, Petitioners filed the instant Petition with this Court. In the Petition, Petitioners allege that the decisions of both the BAR and the City Council were arbitrary, capricious, contrary to law, and constitute an abuse of discretion. Specifically, Petitioners assert that the City Council's decisions should be reversed because they failed to consider the landmark designation of the property, because they failed to consider the presence of an open-space easement on the Property, and because the BAR considered factors outside of Section 10-105(B) of the Zoning Ordinance. As explained below, Petitioners' contentions lack merit, Petitioners lack standing to bring this matter, and Petitioners have included improper parties in their appeal. As a result, the Petition must be dismissed with prejudice.

ARGUMENT

I. Standard of Review.

A demurrer tests the legal sufficiency of a pleading. *See Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 131 (2003). When ruling on a demurrer, the court accepts the truth of all properly pleaded material facts and construes all reasonable factual inferences in favor of the nonmoving party. *See id.* at 131-32 (citing *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382 (1997)). "However, a demurrer does not admit the correctness of the conclusions of law found in the challenged pleading." *Fuste*, 265 Va. at 132. Indeed, the court does not consider "inferences or conclusions from facts not stated." *Friends of the Rappahannock v.*

Caroline Cty. Bd. of Supervisors, 286 Va. 38, 44 (2013). To withstand a demurrer, "a pleading must be made with 'sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.'" *Id.* (quoting *Eagle Harbor, LLC v. Isle of Wight Cty.,* 271 Va. 603, 611 (2006)).

Here, the Court is tasked with reviewing the decision of the City Council to affirm the decision of the BAR to grant a certificate of appropriateness and a permit to demolish. As such, the standard of review set forth in Section 10-107(B) of the Alexandria Zoning Ordinance must guide the Court's decision. Section 10-107(B) of the Zoning Ordinance provides that the Court:

> [M]ay 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). Section 10-107(B) further provides that the "[f]indings of fact by the council are conclusive on the court in any such appeal." *Id.*

In *Norton v. City of Danville*, 268 Va. 402 (2004), the governing body of the City of Danville, just like the Alexandria City Council at present, faced a challenge to its decision to affirm a ruling of its Commission of Architectural Review. The standard of review applied in *Norton* was identical to the standard identified above. *See id.* at 407 (explaining that that "[t]he court may reverse or modify the decision of the governing body...if it finds upon review that the decision...is contrary to law or...arbitrary and constitutes an abuse of discretion...). In applying this deferential standard, the Supreme Court of Virginia noted that: (1) "[w]hen a governing body of any locality reserves unto itself the right to issue special exceptions, the grant or denial of such exceptions is a legislative function" (citing *Board of Supervisors v. McDonald's Corp.* 261 Va. 583, 589 (2001)), (2) that "[s]uch legislative actions are presumptively correct (*Id.*), (3) that "[l]egislative action is reasonable if the matter in issue is fairly debatable" (citing *Board of*

Supervisors v. Lerner, 221 Va. 30, 34, (1980)), (4) that "[a]n issue may be said to be 'fairly debatable when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions" (citing *Board of Supervisors v. Williams*, 216 Va. 49, 58, (1975)), and (5) that "[t]he burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare" (citing to *Turner v. Board of Supervisors*, 263 Va. 283, 288 (2002)). *Norton*, 268 Va. at 408 – 409. Given the identical language of the two standards of review, as well as the identical nature of the procedural posture in these two cases, the principles annunciated in *Norton* apply equally in the present case.

II. The Petitioners have failed to plead facts sufficient to show that the City Council acted in a fashion that was contrary to law, that was arbitrary, or that constituted an abuse of discretion when it issued the certificate of appropriateness.

Even accepting Petitioners' allegations as true, as the Court must for purposes of the demurrer, Petitioners have failed to plead facts sufficient to demonstrate that the City Council acted in a fashion that was contrary to law, that was arbitrary, or that constituted an abuse of discretion when it issued the certificate of appropriateness.

A. The Petitioners do not dispute the fact that the City Council considered the factors established by Section 10-105(A) of the Alexandria Zoning Ordinance when it issued the certificate of appropriateness.

The Petition alleges that the City Council erred when it issued a certificate of appropriateness to the owners of the Property. The facts and arguments that are presented in support of this allegation, however, are unpersuasive.

Certificates of appropriateness are governed by Section 10-105(A) of the Alexandria Zoning Ordinance. Section 10-105(A)(1) states, in pertinent part, that when reviewing a certificate of appropriateness "the city council on appeal *shall limit its review. . .* to the

building's or structure's exterior architectural features specified in Sections 10-105(A)(2)(a) through (2)(d). . . and to the factors specified in sections 10-105(A)(2)(e) through (2)(j). . ." ALEX. ZONING ORD. § 10-105(A)(1) (emphasis added). Tellingly, the Petition is devoid of any allegation that either the City Council or the BAR somehow failed to apply these criteria when considering the certificate of appropriateness. The absence of such allegations is fatal to the Petitioners' claim.

Indeed, Petitioners actually concede that the City Council considered and applied the controlling factors from Section 10-105(A). For example, in Paragraph 24 of the Petition, Petitioners admit that "the City Council affirmed the decision of the BAR vis-à-vis the Applications for the reasons stated in the City Staff Report", and even attach the City Staff Report as Exhibit 6.[1] A review of the City Staff Report conclusively establishes that City staff provided a thorough analysis of each of the ten factors enumerated in Section 10-105(A). *See* Ex. A at 25 (addressing Section 10-105(A)(2)(a)), 25-26 (addressing Section 10-105(A)(2)(b)), 26-27 addressing Section 10-105(A)(2)(c)), 27 (addressing Section 10-105(A)(2)(d)-(h)), and 28 (addressing Section 10-105(A)(2)(i)-(j)). As Section 10-107(B) of the Zoning Ordinance provides that the "[f]indings of fact by the council are conclusive on the court in any such appeal," and because Petitioners have conceded that "the City Council affirmed the decision. . . for the reasons stated in the City Staff Report," it necessarily follows that the factual determinations made by the City Council may not be disturbed on appeal. Further, because the City Council's decision is reviewed under the "fairly debatable" standard, the decision must be

[1] Despite stating that the City Staff Report was attached as Exhibit 6, the Petitioners, perhaps as an oversight, failed to supply any exhibits with their filing. Still, because the Petitioners have mentioned the City Staff Report expressly, it has become a part of the Petition and it is therefore subject to consideration for purposes of this demurrer. This is necessarily true because Rule 1:4(i) of the Rules of Supreme Court of Virginia states "The mention in a pleading of an accompanying exhibit shall, of itself and without more, make such exhibit a part of the pleading."

affirmed if "there [was] *any* evidence in the record sufficiently probative to make a fairly debatable issue. . . ." *Board of Sup'rs of Fairfax County v. Robertson*, 266 Va. 525, 537 (Va. 2003) (emphasis in original). It is clear that the record voluntarily supplied by the Petitioners in the Petition (i.e., the City Staff Report) contains sufficient evidence to make the City Council's decision fairly debatable. For this reason alone, the Petition must be dismissed as a matter of law.

B. Petitioners' allegations that the certificate of appropriateness was improperly issued because the City Council (1) failed to consider the alleged designation of the property as a certified landmark, and (2) failed to consider the presence of an open-space easement on the property, lack any legal basis.

Petitioners' challenge the issuance of the certificate of appropriateness on the premises that the City Council erred (1) when it allegedly failed to consider the alleged designation of the Property as a certified landmark, and (2) when it allegedly failed to consider the presence of an open-space easement on the Property.

First and foremost, as has been detailed above, the complete criteria that the City Council is required to consider when issuing a certificate of appropriateness is set forth in Section 10-105(A) of the Zoning Ordinance. Significantly absent from these factors is any requirement that the City Council consider either the presence of a landmark designation or the presence of an open-space easement. These facts alone are fatal to the Petitioners' arguments. A review of the law applicable to landmark designations and open-space easements further reveals that neither was relevant to the City Council's decision as a matter of law.

1. The City Council was not required to consider the Property's alleged landmark status.

Looking specifically at the Petitioners' argument concerning the significance of the alleged landmark status of the property, it is of primary importance that the legislation governing

landmark certifications in Virginia expressly states that such designations have no bearing on the decisions of local governing bodies. Specifically, Code of Virginia §10.1-2204, which authorizes the Board of Historic Resources to designate historic landmarks provides, that the designation of an area as a historic landmark "*shall not regulate the action of local governments. . . with regard to the designated property.*" VA. CODE § 10.1-2204(B) (emphasis added). This non-regulating nature of a landmark designation makes sense, given that the express goal of the program is a permissive one which seeks only to "*encourage* local governments...to take the designated property's historic...significance into account in their...decision making." *Id.* (emphasis added). Accordingly, there is no merit to Petitioners' allegation that "it is clearly erroneous **as a matter of law** to state that such a designation has no bearing on the decision-making process." Petition ¶ 32. To the contrary, a review of the plain language of Code of Virginia §10.1-2204(B) reveals that the converse is true.

The Supreme Court of Virginia has previously affirmed the proposition that landmark designations do not have a bearing on local land use decisions. In *Virginia Historic Landmarks Commission v. Board of Sup'rs of Louisa County*, 217 Va. 468 (1976), the Supreme Court of Virginia, while analyzing the impact of a landmark designation, held:

> The Commission's identification of an area of land in Louisa County as a historical district was a hortatory act, and was not couched in terms of command. It did not determine any property rights of the landowners in the district.

Id. at 452. Significantly, the Court further held:

> [A]t most the resolution of the Commission does no more than *encourage* the county to adopt rules and regulations which the Commission might recommend. These [sic] is no compulsion upon the Board of Supervisors of Louisa to enact any regulation respecting the identified Green Springs Historic District. *Neither is there any compulsion upon the Board to give the resolution any weight in its consideration of zoning, rezoning or other matters affecting the land in the district.*

Id. at 453 (emphasis added).

In light of the foregoing, it is clear from the language of both Code of Virginia §10.1-2204(B) and the *Louisa County* decision that there is no legal basis for Petitioners' argument that the City Council was required to consider the Property's alleged landmark designation as part of its review of the certificate of appropriateness.

2. The Open-Space Land Act does not apply in this appeal.

The significance ascribed by the Petitioners to the existence of an open-space easement on the Property is similarly incorrect. Again, it is of primary importance to note that the existence of such an easement is not a factor enumerated in Section 10-105(A) of the Zoning Ordinance.

In a futile effort to make the open-space easement relevant to this appeal, Petitioners offer the following argument: (1) since Section 1-200(F) of the Zoning Ordinance provides that "[w]henever 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 shall govern" (Petition at ¶ 49) (emphasis omitted), and (2) since "[i]t 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" (Petition at ¶ 50), (3) it therefore follows that the City Council should have considered the "higher standards" imposed by the open-space easement. *See* Petition at ¶ 52.

This argument is unpersuasive for a number of reasons. First, it is axiomatic in Virginia that "[w]hen the language of a statute is unambiguous, [courts] are bound by its plain meaning." *JSR Mechanical, Inc. v. Aireco Supply, Inc.*, 291 Va. 377, 383 (2016) (citing *Baker v. Commonwealth*, 284 Va. 572, 576 (2012)). Additionally, in cases of statutory interpretation,

"courts apply the plain meaning. . . unless the terms are ambiguous or applying the plain language would lead to an absurd result." *Id.* Section 1-200(F), the section of the Zoning Ordinance cited by the Petitioners provides that:

> [w]henever 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.

ALEX. ZONING ORD. § 1-200(F) (emphasis added). An open-space easement is not a statute, an ordinance, or a regulation. Instead, it is, by definition "a nonpossessory interest of a public body in real property". Code of Virginia §10.1-1700.

Second, the Petitioners' argument that the Open-Space Land Act represents a "higher standard" which displaces the City's historic district ordinance is without merit because the two bodies of law serve entirely different functions. The Open-Space Land Act merely authorizes public bodies to accept open-space easements. *See* Code of Virginia §10.1-1701. Unlike Section 10-105(A) of the Zoning Ordinance, it does not purport to establish standards for the issuance of certificates of appropriateness in a historic district. If this case turned on the issue of whether the City could accept an open-space easement, Petitioners' argument might have some merit. Since it does not, however, Petitioners' argument, at the risk of sounding cliché, fails on the basis that it compares apples to oranges.

Petitioners' argument is also unpersuasive because it is premised upon a conflation of the Open-Space Land Act with the terms of an easement that was adopted pursuant to the Open-Space Land Act. In their argument, Petitioners posit that the restrictions of the open-space easement on the Property operate to displace the City's ordinances because the easement was adopted pursuant the Open-Space Land Act. This argument fails to recognize the important distinction between the Act (which under principles of statutory interpretation could be supreme

to a conflicting local ordinance)[2] and an easement that was adopted *pursuant to the Act* (which is nothing more than a nonpossessory interest in land). The latter does not take on the supremacy of the former simply by virtue of its existence.

The Petition is replete with a number of other unpersuasive arguments stemming from Petitioners' misplaced reliance on the Open-Space Land Act. In particular, Petitioners argue that the City Council erred by failing to make findings that changes to the property were "essential to the orderly development and growth of the locality", and "in accordance with the official comprehensive plan", and by failing to insure that "alternative real property" was made subject to the Open-Space Land Act. *See* Petition at ¶ 51. In support of this argument, Petitioners rely on Code of Virginia §10.1-1704(A) which states:

> No open-space land. . . shall be converted or diverted from open-space land unless (i) the conversion or diversion is determined by the *public body* to be (a) essential to the orderly development and growth of the locality and (b) in accordance with the official comprehensive plan for the locality in effect at the time of conversion or diversion and (ii) there is substituted other real property which is (a) of at least equal fair market value, (b) of 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 is the land converted or diverted. The *public body* shall assure that the property substituted will be subject to the provisions of this chapter.

(Emphasis added).

There are two fundamental flaws with the Petitioners' argument. First, as was discussed at-length above, the Open-Space Land Act does not apply in this case. Second, this argument presumes that the "public body" that is tasked with making the required findings is the City Council. While the City Council can be a "public body" under the definition of the Open-Space Land Act, it is only logical that the public body that is actually tasked with safeguarding an open-space easement under Code of Virginia §10.1-1704(A) is the public body that holds an interest in that easement. In the present case, that public body would be the Commonwealth of Virginia,

[2] Again, there is no conflict here because the laws regulate different things.

not the City. Support for the notion that the City is not automatically the gatekeeper for all open-space easements in its jurisdiction can be found in the fact that the terms "public body" and "locality" are deliberately used in different ways throughout Code of Virginia §10.1-1704(A). If the General Assembly had wanted the City to always be the entity tasked with making the required Code of Virginia §10.1-1704(A) findings, it would have said that the "locality" has to determine compliance with subsections (i) and (ii), as opposed to the "public body". Additionally, if the City was automatically the party responsible for ensuring compliance with Code of Virginia §10.1-1704(A), it would find itself evaluating the acceptability and value of "substituted other real property" under subsection (ii), even in cases where it had no interest in the easement. Certainly the public body who actually held an interest in the easement would prefer to make such a determination.

III. The Petitioners have failed to plead facts sufficient to show that the City Council acted in a fashion that was contrary to law, that was arbitrary, or that constituted an abuse of discretion when it issued the permit to demolish.

The Petition alleges that the City Council erred by granting a permit to demolish to the owners of the Property. None of the arguments that are offered in support of this position are persuasive.

Permits to demolish are governed by Section 10-105(B) of the Zoning Ordinance which provides:

> (B) Permit to move, remove, capsulate or demolish in whole or in part buildings or structures. The board of architectural review or the city council on appeal shall consider any or all of the following criteria in determining whether or not to grant a permit to move, remove, capsulate or demolish in whole or in part a building or structure within the Old and Historic Alexandria District.
>
> (1) Is the building or structure of such architectural or historical interest that its moving, removing, capsulating or razing would be to the detriment of the public interest?

> (2) Is the building or structure of such interest that it could be made into an historic shrine?
>
> (3) Is the building or structure of such old and unusual or uncommon design, texture and material that it could not be reproduced or be reproduced only with great difficulty?
>
> (4) Would retention of the building or structure help preserve the memorial character of the George Washington Memorial Parkway?
>
> (5) Would retention of the building or structure help preserve and protect an historic place or area of historic interest in the city?
>
> (6) Would retention of the building or structure 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?
>
> (7) In the instance of a building or structure owned by the city or the redevelopment and housing authority, such building or structure having been acquired pursuant to a duly approved urban renewal (redevelopment) plan, would retention of the building or structure promote the general welfare in view of needs of the city for an urban renewal (redevelopment) project?

Alex. Zoning Ord. § 10-105(B).

The first argument that Petitioners offer in opposition to the issuance of the permit to demolish is a familiar one. Specifically, Petitioners posit that the City Council erred by failing to take into consideration the alleged certified landmark status of the Property. *See* Petition at ¶¶ 27-32. As fully explained above, the existence or non-existence of such a designation is legally irrelevant to the issuance of a permit to demolish.

Next, Petitioners argue that the *City Council's* issuance of the permit to demolish was done in error because the *BAR* considered factors that were outside of those enumerated in Section 10-105(B) of the Zoning Ordinance. Petitioners take specific umbrage with the BAR's findings (1) that "the existing curved hyphen...was not well considered when it was originally constructed," (2) that the hyphen "has caused and will continue to create maintenance issues. . .

that will harm the primary historic resource," and (3) that "there are other better examples of curved hyphens in the district." Petition at ¶¶ 34-36.

Petitioners' argument lacks merit for two reasons. First, it is essential to remember that the appeal before this Court is an appeal of a decision that was made by the *City Council*, not the *BAR*. *See* ALEX. ZONING ORD. § 10-107(B) ("Any applicant or any of the petitioners aforesaid aggrieved by a final decision *of the city council* shall have the right to appeal *such decision* to the circuit court for review.") (emphasis added). When the Petitioners appealed the decision of the BAR to the City Council, Section 10-107(A)(3) of the Zoning Ordinance required the City Council to "conduct a full and impartial public hearing on the matter." Furthermore, it required the City Council to apply the "same standards. . . as are established for the board of architectural review." In essence, then, the City Council held a *de novo* hearing on the issuance of the permit to demolish. Given that fact, the findings of the BAR, whatever they may have been, cannot now be used by Petitioners to overturn the City Council's decision.

Second, even assuming that the BAR's findings could be used in such a manner, a review of the BAR's findings shows that they do fall squarely within the criteria contained in Section 10-105(B) of the Zoning Ordinance. The first two challenged findings of the BAR are that the "existing curved hyphen. . . was not well considered when it was originally constructed" and that as a result, it "has caused and will continue to create maintenance issues. . . that will harm the primary historic resource." Such considerations are certainly relevant to the portion of Section 10-105(B) which queries, "[w]ould retention of the building or structure help preserve and protect an historic place or area of historic interest in the city?" The third challenged finding is the BAR's finding that "there are other better examples of curved hyphens in the district." Such a finding is not inappropriate. This is because it informs the criteria listed in Section 10-105(B)

which asks, "[i]s the building or structure of such old and unusual or uncommon design, texture and material that it could not be reproduced or be reproduced only with great difficulty?" and "[i]s the building or structure of such architectural or historical interest that its moving, removing, capsulating or razing would be to the detriment of the public interest?"

Finally, as with the certificate of appropriateness, Petitioners have conceded that the City Council considered and applied the factors from Section 10-105(B) when it issued the permit to demolish. In Paragraph 24 of the Petition, Petitioners admit that "the City Council affirmed the decision of the BAR vis-à-vis the Applications for the reasons stated in the City Staff Report". A review of the City Staff Report conclusively establishes that City staff provided a thorough analysis of the factors enumerated in Section 10-105(B). *See* Ex. A at 22 (addressing Sections 10-105(B)(1)-(3)), and 23 (addressing Sections 10-105(B)(4) – (6)). As Section 10-107(B) of the Zoning Ordinance provides that the "[f]indings of fact by the council are conclusive on the court in any such appeal," and because Petitioners have conceded that "the City Council affirmed the decision. . . for the reasons stated in the City Staff Report," it necessarily follows that the factual determinations made by the City Council may not be disturbed on appeal. Further, because the City Council's decision is reviewed under the "fairly debatable" standard, the decision must be affirmed if "there [was] *any* evidence in the record sufficiently probative to make a fairly debatable issue. . . ." *Robertson*, 266 Va. at 537 (emphasis in original). It is clear that the record voluntarily supplied by the Petitioners in the Petition (i.e., the City Staff Report) contains sufficient evidence to make the City Council's decision regarding the permit to demolish fairly debatable.

IV. Each of the Petitioners lacks standing as a matter of law to appeal the City Council's decision.

In order to sue in land use cases, Virginia law demands that plaintiffs satisfy a high bar in alleging and demonstrating their standing. Petitioners in the present case have neither alleged, nor can they demonstrate, their standing to maintain this action. As a result, the Court must dismiss this appeal with prejudice.

Section 10-107(B) of the Alexandria Zoning Ordinance states, in pertinent part, that, "[a]ny applicant or any of the petitioners aforesaid *aggrieved* by a final decision of the city council shall have the right to appeal such decision to the circuit court for a review..." ALEX. ZONING ORD. § 10-107(B) (emphasis added). The Supreme Court of Virginia interpreted the term "aggrieved" and clarified the essential requirements for third party standing in land use cases in *Friends of the Rappahannock v. Caroline County Bd. of Supervisors*, 286 Va. 38, 48 (2013). In *Friends*, the Court sustained a demurrer to a suit brought pursuant to Code of Virginia §15.2-2285(F) by neighbors of a proposed sand and gravel mining operation, and by a conservation group, challenging the issuance of a special use permit for that operation. The Court sustained the demurrer because the plaintiffs could not demonstrate a sufficient personal interest that would entitle them to challenge the County's decision. For these same reasons, Petitioners' Petition is fatally flawed.

In *Friends*, the plaintiffs alleged the following injuries upon which they sought to establish that each had standing to contest the issuance of the special use permit:

- One of the individual plaintiffs owned farmland immediately adjacent to the subject property and claimed that mining activities would interfere with her right-of-way to the river, make it more difficult to find tenants for her farmhouse, and create problematic noise and airborne particulate conditions. *Id.* at 42.

- One of the individual plaintiffs held a leasehold interest and a right of first refusal in a property immediately adjacent to the subject property and claimed that the land disturbance, noise, and industrial activity at the site would frighten away wildlife, prevent or deter new wildlife from entering the area, and render the property useless for hunting, causing him harm. *Id.*

• The other four individual plaintiffs owned property directly across the Rappahannock River approximately 1,500 feet from the subject property. Each alleged that the industrial activities on the site would destroy the scenic beauty of the location, that the activities would increase noise, dust, and traffic from barges and commercial boats in a manner that would alter their quiet enjoyment of the area, and harm their recreational use of the river for wading and observing wildlife. One of those families alleged that the long term health and well-being of its children, one of whom is asthmatic, would be placed in danger because of the dust and particulate pollution from the proposed operation. *Id.* at 43.

• The conservation group alleged that the developer's use of the river for product transport would interfere with and harm its interests in water quality protection, preservation of the river's scenic beauty, and public education efforts in land use and resource conservation advocacy. *Id.* at 42.

The applicant and the Board of Supervisors demurred on the grounds that each of the plaintiffs lacked standing, and the circuit court sustained that demurrer. *Id.* at 43. The Supreme Court affirmed, and set forth third party standing requirements. Specifically, the Supreme Court held that a party with *no ownership interest* in the subject property has standing *only* if he or she: (1) occupies real property within or in close proximity to the subject property; *and* (2) alleges facts "demonstrating a particularized harm to 'some personal or property right, legal or equitable, or imposition of a burden or obligation . . . different from that suffered by the public generally." *Id.* at 48.

In *Friends*, the Court assumed without deciding that the individual plaintiffs' properties were sufficiently proximate to the use. *Id.* at 49. Nonetheless, the Court found that these close neighbors failed to allege facts sufficient to establish the second prong of the third party standing test—the existence of particularized harm that is not shared by the general public. *Id.* To that end, the Court stated that:

> [a]lthough the individual complainants presented conclusory allegations as to possible harms, the general objections pled by the individual complainants present no factual background upon which an inference can be drawn that [the developer's] particular use of the property would produce such harms and thus

> impact the complainants. Thus, the individual complainants have not met their burden to provide sufficient facts in their complaint to allege how this particular use, [the developer's] sand and gravel extraction site, causes the loss of some personal or property right belonging to the individual complainants different from the public in general. *Id.*

Friends is controlling in the present appeal. As with the plaintiffs in *Friends*, Petitioners do not have an ownership interest in the property in question and they have failed to plead or otherwise identify facts sufficient to establish a particularized harm that is not shared by the public in general. In fact, a review of the Petition shows that Petitioners have plead far less in the way particularized harms than were plead by the unsuccessful plaintiffs in *Friends*.

The first Petitioner that is identified in the Petition is the Historic Alexandria Foundation (the "HAF"). In order to demonstrate its standing, the HAF offers the following support: (1) that it is the owner of real property within the Old and Historic District of the City of Alexandria – under 1,500 feet away from the property in question; (2) that it has granted open-space easements on its property and therefore has an interest in the proper administration of the Open-Space Land Act; and (3) that it has an interest in protecting historic properties in the City of Alexandria. *See* Petition at ¶ 3.

Even if one concedes that the proximity requirement of *Friends* is met by the HAF (which the City does not), the HAF has still failed to show "some personal or property right, legal or equitable, or imposition of a burden or obligation . . . different from that suffered by the public generally". The HAF's proposition relating to the enforcement of the Open-Space Land Act is unavailing in light of this requirement. All citizens of Alexandria, as well as all citizens of the Commonwealth of Virginia, for that matter, have an interest in seeing the Open-Space Land Act applied correctly. This is because it is the duly-adopted law of the land. If such was enough to grant standing, any citizen in Virginia could have challenged the City Council's decision.

This simply cannot be the case. Additionally, it must be remembered from the discussion above that the Open-Space Land Act, as a matter of law, has no bearing on the appeal presently before the Court.

The HAF's argument that it has standing due to its interest in protecting historic properties is similarly unavailing. This is because the espoused interest is not one that is unique to the HAF or to any property that the HAF owns. Since the preservation of historic properties is a laudable goal that benefits all citizens of Virginia by providing educational, financial, cultural, aesthetic, and other benefits, everyone has an interest in seeing historic properties protected, not just the HAF. As was stated in *Virginia Beach Beautification Com'n v. Board of Zoning Appeals of City of Virginia Beach*:

> [I]t is not sufficient that the sole interest of the petitioner is to advance some perceived public right or to redress some anticipated public injury when the only wrong he has suffered is in common with other persons similarly situated.

231 Va. 415, 419 (Va. 1986). The HAF's general historic interest argument is similar to one that was unsuccessfully made by the National Trust for Historic Preservation in the United States in its case against the Board of Supervisors of Orange County. In *National Trust for Historic Preservation in U.S. v. Board of Supervisors of Orange County*, 80 Va. Cir. 321, 2010 WL 7375614, at *1 (Va. Cir. Ct. 2010), the National Trust sued Orange County to prevent the construction of a Walmart near the Wilderness Battlefield. In granting the County's demurrer, the circuit court held:

> National Trust has no direct, specific interest in the Wilderness Battlefield property and no pecuniary or financial obligations that will be directly affected by the issuance of the SUP. Therefore, to find that standing has been established here would essentially mean that the National Trust has standing in any case where it unilaterally decides that it must participate in litigation to preserve or protect some historic or public interest in federal property. On this point, [National Trust] conceded at oral argument that to prevail on this issue, the court would almost have to accept an "automatic standing" rule for

> the National Trust. The court respectfully declines to do this because it can find no decided case in which this rationale was successfully applied.

Id. The court went on to note that "The Virginia Supreme Court has concluded that general concerns about a public or community issue are not sufficient to allow a party or person to claim standing." *Id.*

Finally, the overall lack of factual information that is provided in the Petition belies the HAF's assertion of standing. It is dispositive of this case that the Petition does not contain any factual allegation as to how the City Council's decision will specifically cause harm to the HAF's property. Even in *Friends*, the plaintiffs at least provided some speculative examples of harms that might befall their property in the future. Given that the Supreme Court of Virginia found the allegations in *Friends* to be too tenuous to furnish standing, the HAF, which has offered nothing on the subject, cannot survive demurrer.

The remaining Petitioners, Yvonne Weight Callahan, and Gail C. Rothrock, offer even less in the way of demonstrating a particularized harm from the City Council's decision. These Petitioners assert standing on the following bases: (1) they live less than 550 and 1,550 feet away from the property in question, respectively, (2) they each moved to the City of Alexandria "in large part" because of the historic nature of the city, and (3) they each pay property taxes to the City of Alexandria. *See* Petition at ¶¶ 4-5. Neither of these individual Petitioners has alleged any particularized harm to 'some personal or property right, legal or equitable, or [the] imposition of a burden or obligation . . . [that is] different from that suffered by the public generally," which is required under *Friends*. Again, conspicuously absent from the Petition is any explanation of how the City Council's decision will specifically harm their property, such as economic burdens, quality of life impacts, or other actual harms. Instead, in an attempt to establish standing, the Petitioners rely solely on their general interests in the historic nature of

their neighborhood and their payment of Alexandria property taxes. Such interests and obligations are shared by the public generally and fall well short of the particularity required to create legally-sufficient standing.

Because the Petitioners have failed to demonstrate a particularized harm to some personal or property right, legal or equitable, or the imposition of some burden or obligation that is different from that suffered by the public generally, they lack standing to proceed in this appeal and their case must be dismissed.

V. Neither the City of Alexandria nor the Board of Architectural Review is a proper party to this appeal.

The Petitioners have filed their appeal against the following parties: the City of Alexandria, the Alexandria City Council, Vowell, LLC, and the Board of Architectural Review, City of Alexandria. Neither the City of Alexandria, nor the BAR is a proper party to this appeal and each must each be dismissed from the case.

This appeal is governed by Section 10-107 of the Alexandria Zoning Ordinance which states:

> Any applicant or any of the petitioners aforesaid aggrieved by a final decision *of the city council* shall have the right to appeal such decision to the circuit court for a review; provided, such appeal is filed within a period of 30 days after the rendering of the final decision *by the city council.* Such appeal shall be taken by filing a petition, at law, to review *the decision of council*, and the filing of such petition shall stay the *council's decision* pending the outcome of the appeal to the court. Findings 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 (emphasis added). As was stated above, "[w]hen the language of a statute is unambiguous, [courts] are bound by its plain meaning." *JSR Mechanical, Inc.*, 291 Va. at 383. Additionally, in interpreting a statute, "courts apply the plain meaning... unless the

terms are ambiguous or applying the plain language would lead to an absurd result." It is clear from the language of Section 10-107 of the Zoning Ordinance that the decisions of the City Council are the decisions that are being appealed. As such, there is no need for this appeal to include the City of Alexandria as a municipal corporation, or the BAR.

Additionally, the BAR must be dismissed from this case on the basis that it is not an entity that can sue or be sued. In *Norton*, the Supreme Court of Virginia recognized that "[s]imilar to a board of zoning appeals, an architectural review commission 'is a creature of statute possessing only those powers expressly conferred upon it.'" *Norton*, 268 Va. at 407 (citing *Lake George Corp. v. Standing*, 211 Va. 733, 735 (1971)). The BAR has been established pursuant to City Charter § 9.09 and Section 10-400 et seq. of the Zoning Ordinance. Neither body of law authorizes the BAR to sue or be sued in its own capacity. That the BAR must be dismissed from this case is supported by a persuasive ruling of a United States District Court in the case of *Davis v. City of Portsmouth, Va.*, 579 F. Supp. 1205, 1210 (E.D. Va. 1983). In *Davis*, the court dismissed the Portsmouth Planning Commission from a lawsuit on the basis that the Commission had not been given the capacity to be sued by either state or local mandate.

Finally, the BAR is not an appropriate party in this appeal because its decisions became moot once the Petitioners appealed to the City Council. As was discussed above, the instant that the BAR's decision was appealed to the City Council, Section 10-107(A)(3) of the Zoning Ordinance required the City Council to "conduct a full and impartial public hearing on the matter…" and to apply the "same standards…as are established for the board of architectural review." As a result of this mootness, the BAR's participation in this case is both unnecessary and inappropriate.

CONCLUSION

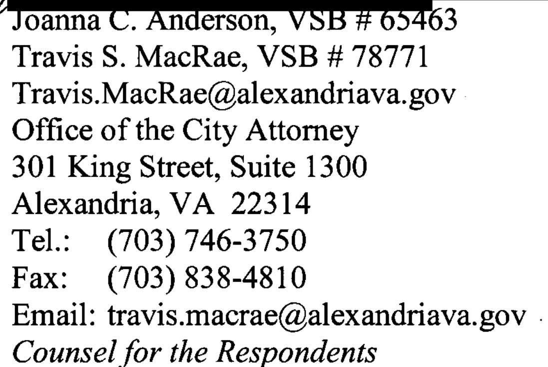
For the foregoing reasons, the Respondents, the City of Alexandria, the Alexandria City Council, and the City of Alexandria Board of Architectural Review, respectfully request that the Court sustain their Demurrer and dismiss the Petition filed by the Petitioners the Historic Alexandria Foundation, Yvonne Weight Callahan, and Gail C. Rothrock, with prejudice.

Dated: July 15, 2019

Respectfully submitted,

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

By Counsel,



Joanna C. Anderson, VSB # 65463
Travis S. MacRae, VSB # 78771
Travis.MacRae@alexandriava.gov
Office of the City Attorney
301 King Street, Suite 1300
Alexandria, VA 22314
Tel.: (703) 746-3750
Fax: (703) 838-4810
Email: travis.macrae@alexandriava.gov
Counsel for the Respondents

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:

J. Chapman Petersen
Chap Petersen & Associates, PLC
3970 Chain Bridge Road
Fairfax, Virginia 22030
Counsel for the Petitioners

Gifford R. Hampshire
Blankingship & Keith, PC.
4020 University Drive, Suite 300
Fairfax, Virginia 22030
Counsel for Vowell, LLC

Travis S. MacRae