VIRGINIA:

IN THE CIRCUIT COURT OF CITY OF ALEXANDRIA

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

Petitioner's Brief in Opposition to Respondent's Demurrer

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Petitioners Historical Alexandria ("HAF"), Yvonne Wright Callahan ("Callahan"), and Gail Rothrock ("Rothrock") (collectively "Petitioners"), by and through undersigned counsel, hereby submits this brief opposing the Demurrer filed by Respondents City of Alexandria, et al, and the Demurrer filed by Vowell, LLC.

FACTUAL BACKGROUND

This appeal arises from Alexandria City Council's (the "City Council") decision to affirm a ruling by the Alexandria Board of Architectural Review ("BAR") with respect to certain demolitions, alterations, and additions at the historic residence of the late Justice Hugo Black at 619 South Lee, Alexandria, Virginia 22314 (the "Black Property"). Petition at ¶ 3.

The Black Property lies squarely in the City's historic district, near the intersection of Lee and Franklin Streets, and it contains the largest undeveloped garden in Old Town. *Id.* at ¶ 3. The residence was built in the 18th century and in 1965 HAF awarded Justice and Mrs. Black one of its first plaques given to a property as part of its Early Buildings Survey.[1] In 1969, the Black Property was officially designated as an "Historic Landmark" by the Virginia Historic Landmarks Commission. *Id.* at ¶ 17-18.

In 1969, Justice Black and his wife placed an Open Space Land Act easement under Va. Code § 10.1-1700 on the underlying property, recorded in the City's land records, in order to preserve the historic character of the house and the adjoining gardens which preserve the unique nature of the residence. Petition at ¶ 12. That easement, which required that the "manor house [be] maintained and preserved in its present state as nearly as practical" has been applied to the Black Property since that date. *Id.* It has also been relied upon by the homeowners in avoiding a significant property tax burden. Petition at ¶ 16.

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[1] The Black residence is also included in the Historic American Buildings Survey, thanks to research and efforts undertaken by the HAF. *Id.* at ¶ 11.

The Black Home is currently owned by Vowell, LLC ("Vowell"), which purchased it subject to the easement. *Id.* at ¶ 8. In 2018, Vowell applied to BAR for the issuance of a certificate of appropriateness and a permit in order to demolish parts of the home, specifically the demolition of a distinctive "hyphen" curved brick wall, as well as to permit construction of "additions and alterations to the property." *Id.* at ¶¶ 23 and 36. The project would add two new "pavilions" on the protected open pace and demolish one of the architectural features that distinguish the house and which has been noted in the relevant architectural literature. Petition Exhibit 4 at 3.

BAR Hearing: On December 19, 2018 and February 6, 2019, the BAR held hearings pursuant to Vowell's application to renovate the Black Property. The petitioners *inter alia* appeared and opposed the application. *Id.* at ¶¶ 21-22. At the February meeting, BAR approved the proposed construction and granted a permit to demolish the unique "hyphen" wall, despite the fact that the BAR Staff report admitted that the wall feature is "over 150 years old and is an example of an unusual wall treatment" and it had twice recommended that it not be demolished. *Id.* at ¶ 33. In justifying its decision to reject the previous staff analysis, a majority of the BAR members asserted that the hyphen was "not well considered when originally constructed" and presents maintenance issues for the home itself. *Id.* at ¶ 38.

The BAR did not address the landmark status of the Black residence itself under Virginia Code Section 10.1-2204, since it found that listing as "honorific" and thus irrelevant -- a curious position for a community board charged with historic preservation. *Id.* at ¶ 28. It further failed to recognize (and thus address) the Open Space easement on the erroneous presumption that the Open Space mandate was not enforceable, much like the Black Property's landmark status.[2] *Id.* at ¶¶

[2] In fact, the City staff report would refer to them both as "honorific designations that have no regulatory bearing." Petition *Id.* at ¶ 28.

46-47. Indeed, the BAR staff report noted the Open Space easement but stated that it lacked the ability to enforce it. *Id.*

To compound these errors, BAR's justification for approving the wall demolition relied exclusively on factors not enumerated by Alex. Zon. Ord. § 10-105, i.e. the zoning provision specifically applied to new construction/demolition in the City's Old and Historic District. *Id.* at ¶ 38. Specifically, BAR failed to consider 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." *Id.* at ¶ 42 (citing Alex. Zon. Ord. at § 10-105(B)(3)). In doing so, the BAR overruled its Staff recommendation that the historic curve should be preserved. *Id.* at ¶ 38.

City Council Decision: After BAR's approval of the certificate of appropriateness and the demolition permit for the Black Property, HAF and 125 other petitioners appealed the decision to the City Council in accordance with Alex. Zon. Ord. § 10-107(A)(2). *Id.* at ¶¶ 23. 27.

The City Council held a hearing on the matter on May 14, 2019. At the hearing, Council approved the certificate of appropriateness and the demolition permit, as recommended by the BAR, over significant neighborhood opposition. *Id.* at ¶¶ 22-24. In approving the application, the Council failed to properly consider certain statutory limitations under Virginia law, namely the Open Space Land Act as well as the landmark status of the property. *Id.* at ¶ 48. Rather it merely considered its own zoning ordinance in isolation.

To be precise, neither BAR nor the Council considered the "higher standards" imposed by the Virginia Open Space Land Act and the Black Home's landmark status when making their decisions to permit demolition and construction, a standard duly incorporated into the City's zoning ordinance at § 1-200(F) ("whenever any provision of any state or federal statute ... imposes

a greater requirement or higher standard than is required by this ordinance, the provision of such state or federal statute … shall govern"). *Id.* at ¶ 49.

Nor did the City Council make any of the necessary findings in order to undo Open Space easement placed on the property by Justice Black and accepted by the City for years. *Id.* Rather, the City Council relied only on a laconic letter—provided only to the City Council—from Vowell's own mason stating there would be difficulties in repairing the home. *Id.* at ¶ 41. There is no indication that the City Council considered any of the mandatory factors listed by Alex. Zon. Ord. § 10-105(B)—instead it relied on legally irrelevant factors not listed in the Ordinance, while ignoring the controlling state authority.[3] *Id.* at ¶¶ 35-36. The failure of the BAR and the City Council to properly consider required factors caused the Petitioners to appeal to this Court in accordance with Alex. Zon. Ord. § 10-107(B). *Id.* at ¶10.

On July 15, 2019, upon service of the appeal to the Circuit Court, the City, the City Council and BAR filed a memorandum in support of their earlier filed Demurrer. These respondents base their Demurrer on the following: 1) that HAF failed to show facts that the City Council acted in a manner that was arbitrary, contrary to law or abused its discretion when approving BAR's earlier decision, 2) that the Open Space Land Act and Landmark Designation law does not apply to the City, and 3) that the Petitioners lacked standing to bring this appeal (or are suing the wrong parties). *See generally* City of Alexandria *et al.*'s Demurrer.

On October 9, 2019, Vowell filed a memorandum in support of their earlier filed demurrer. Vowell based their demurrer on the following: 1) that the Petitioners lack standing to bring the

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[3] Ironically, the staff reports contained factors which militated AGAINST awarding the certificate, namely the age and unique nature of the "hyphen wall" but those comments were ignored. *Id.* at ¶ 33. The report was later changed before the City Council to fit the BAR's recommendation.

appeal, and 2) that the Petition does not overcome the "fairly debatable" standard for overturning zoning decisions. *See* Vowell LLC's Demurrer.

The Defendants' briefs all ignore the central point of petitioners' case: the Black Property was (and is) protected by Virginia law via the accepted easement and landmark status, and the City failed to comply with that law in permitting this project to go forward.

LEGAL STANDARD

"The purpose of a demurrer is to determine whether a complaint states a cause of action upon which relief can be granted." *Kellermann v. McDonough*, 278 Va. 478, 483 (2009). Under well settled principles of Virginia law, a demurrer "admits the truth of all material facts that are properly pled, facts which are impliedly alleged, and facts which may be fairly and justly inferred." *Thompson v. Skate America*, 261 Va. 121 (2001). *See also West Alexandria Properties, Inc. v. First Va. Mtg. & Real Estate Inv. Trust*, 221 Va. 134 (1980).

A demurrer, however, does not admit inferences or conclusions from facts not stated." *Friends of the Rappahannock v. Caroline Cnty. Bd. of Supervisors*, 286 Va. 38, 44 (2013) (quotation omitted). A demurrer is a drastic remedy which forecloses to the plaintiff its day in court, and the bar defendants must meet to obtain it is high, as the Supreme Court has repeatedly and quite recently underscored. *See e.g., Check Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 747 S.E.2d 804 (2013).

ARGUMENT

I. THE CITY'S DECISION VIOLATES THE LETTER AND INTENT OF CONTROLLING STATE LAW

a. The Open Space Land Act Does Apply to this Matter

In its memorandum in support of demurrer, the City of Alexandria relies on the unique concept that the Open Space easement on the Black Home is irrelevant to the matter at hand. *See*

City of Alexandria *et al.*'s Brief in Support of its Demurrer at 9 ("The Open Space Land Act does not apply in this appeal"). While the Open Space easement is not a separately listed item to be considered under Alex. Zon. Ord. § 10-105(A), it is still state law – and it is binding upon the City, as a Virginia municipality. Moreover, as stated *infra*, Alex. Zon. Ord. § 1-200(F) states that any provision or law imposing a higher standard than the ordinance governs over it. The Open Space Land Act is not only a "higher standard," it is also binding upon the City as a state law, which supersedes local ordinance.[4]

In Virginia "[w]hen the language of a statue is unambiguous, [courts] are bound by its plain meaning." *JSR Mechanical, Inc v. Alreco Supply, Inc.*, 291 Va. 377, 383 (2016) (citing *Baker v. Commonwealth*, 284 Va. 572, 576 (2012). Considering *only* the fact of the Open Space Easement and the plain text of the relevant state statutes, the City has acted wrongly.

Va. Code § 10.1-1704(A) states as follows:

> **No open-space land,** the title to or interest or right in which has been acquired under this chapter and which has been designated as open-space land under the authority of this chapter, **shall be converted or diverted from open-space land use 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.

4 *See* Va. Code 10.1-1705 regarding the application of the Open Space Land Act and its interaction with other statutes ("Insofar as the provisions of this chapter 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.").

In plain English, the Black Property – as an example of land subject to an Open Space Easement in Virginia – cannot be "converted or diverted" from its open space status unless the "public body" permitting the conversion makes the following findings:

1. The conversion is essential to "orderly development"
2. Is in accordance with the Comprehensive Plan
3. There is substitute "other real property" which is sufficiently similar.

None of these findings have been made by the BAR or City Council. Nor did either body even consider these factors. Therefore, the City's decision to approve the Vowell proposal while ignoring these factors, by definition, is arbitrary and capricious and contrary to Virginia law. Petition at ¶¶ 50-52.

In its Demurrer, the City comes up with several creative arguments to cover this omission. First, it implies that it is not a "public body" (or not the responsible "public body") under the Open Space Land Act. Brief in support of City's Demurrer ("City Brief") at p. 11. That argument makes no sense under the plain meaning and context of the law.

The Open Space Land Act defines "public body" as including all local governments. See Va. Code § 10.1-1700 ("Public body means ... any county or municipality"). The City of Alexandria's charter admits that it is "subject to all the duties and obligations ... as a *municipal* corporation." City of Alexandria Charter § 1.02. Therefore, under *the plain meaning* of the Act, the City and its administrative agencies are bound.

Moreover, a local government is the only "public body" – among the categories enumerated in Section 1700 – which can meet the test of Section 1704. To wit:

(i) Determining the orderly development "of the locality"
(ii) According with the "official comprehensive plan of the locality"
(iii) Identifying commensurate property to "substitute" for the converted open space.

Quite simply, there is no "state agency" which can make these determinations. (Indeed, which state agency is even aware of the City's Comprehensive Plan?). Rather, these determinations of local zoning needs, Comprehensive Plan requirements and the availability of replacement land can only vest with one public body—the local government which must approve the "conversion" of the dedicated land. *See* Va. Code § 10.1-1704.

The City's second argument is that the Open-Space Land Act "merely authorizes public bodies to accept open-space easements." Demurrer Brief at 10. That is demonstrably untrue. As a public body under the Act, the City—having "accepted" the easement and adopted its own real estate assessments accordingly—is restricted in its future actions by Va. Code § 10.1-1704(A), when it is formally asked about "converting" or "diverting" the use. Having benefitted from the donation, it carries the obligations of those same law, especially when it is faced with the "conversion" or "diversion" application.

Finally, the City argues that it has no interest in conserving the easement and thus enforcement of the Act should be left to the Commonwealth. *See* City's Brief at 11. Again, that argument falls flat. Nothing in Open Space Land Act states (or implies) that the City has the option of abdicating its protective role over the Black Property easement, particularly in light of the particularized requirements of Va. Code § 10.1-1704(A). (Notably, the City does not attempt to argue that a state agency has made any of the requisite findings required for "conversion" or "diversion" under the Open-Space Land Act. In fact, nobody has).

In sum, the Open Space Land Act governs the actions of the City (and by extension the City Council and BAR). The plain meaning of the Act defines the City as a public body that is restricted in removing the open space from the Black Home. Va. Code §§ 10.1-1700 and -1704(A). As such, the award of the certificate of appropriateness infringing on the open-space easement was

arbitrary, contrary to law and an abuse of discretion. The City Council excluded the easement from the factors laid out by Alex. Zon. Ord. § 10-105(A) in deciding the future of the Black Property. *See Generally* Petition, Exhibit 6. That decision directly contradicts the Open Space Land Act and it cannot be cured *post hoc*. It alone renders the City's decisions herein to be erroneous as a matter of law.

b. The Landmark Designation is "Relevant" to the City's Decision

1. The Black Property is a Certified Landmark.

The Staff Report adopted by City Council as the basis for its decision refused to acknowledge that the Black Property was a certified Landmark entitled to unique status or legal protections. Petition Exhibit 6 at 5. But the fact that the Virginia Historic Landmarks Commission officially certified the Black Property, both house and grounds, as an Historic Landmark is a matter of public record set forth in this court's Land Records. Deed Book 705, Page 491, at 494-95, and subject to judicial notice. Va. R. Evid. 2:201. The certification was performed by the VHLC pursuant to former Va. Code § 10-138(a) (1973 Repl.). Therefore, in adopting the City Staff's assertion that the property is not a Landmark, the Council infected its decision making with a plain legal error.

2. Landmark Status has "Regulatory Bearing."

Contrary to the insistence of the City Staff – which was accepted by the Council and incorporated as its decision -- the City is not free to ignore the historic status of a property being demolished or renovated, when the state law requests the City "take the designated property's historic, architectural, archaeological and cultural significance into account .... in their decision-making." *See* Va. Code § 10.1-2204(B). Indeed, to do so is to nullify the entire premise of Code Section 2204(B).

Notably, the City has already created an "old and historic district" and zoning regulations to preserve same, which are accepted by all parties. *See* City of Alexandria Charter § 9.09(i) Va. Code § 10.1-2204(A) (authorizing the creation of historic zoning districts). Therefore, the situation is qualitatively different than the petitioners in Louisa County, cited in the City's brief,[5] who challenged the ability of the County to create a "historic district." Here, the regulations for historic preservation were created under the statute and existed as of the Vowell application – yet were not enforced when the City approved the certificate of demolition for the Black Property, as a recognized historic property under Section 10.1-2204(B), as discussed *infra.*

In light of the City's existing historic ordinance and the plain language of the Code, it was arbitrary and capricious and contrary to law for the BAR and City Council to simply treat the historic designation as an "irrelevant" factor.

II. THE CITY COUNCIL'S APPROVAL OF THE DEMOLITION PERMIT FAILS TO MEET THE "FAIRLY DEBATABLE" STANDARD

On Demurrer, the City states that it considered all the factors laid out by Alex. Zon. Ord. § 10-105(B) in deciding to issue the demolition permit for the Black Property wall, so that the decision is at least "fairly debatable." City's Brief at 6. However, as articulated in the petition, the City's analysis turned on external factors, which are not relevant to the inquiry. Petition at ¶ 36. That is the essence of an arbitrary and capricious decision.

Under Virginia case law, legislative action of a local board is reasonable in these circumstances if it is "fairly debatable." *The Board of Supervisors v. Lerner*, 221 Va. 30, 34-35 (1980). However, the Virginia Supreme Court has held that when the determination of an application is made "based upon improper factors which [bear] no substantial relation to the public

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5 *See Virginia Historic Landmarks Commission v. Bd. of Supervisors of Louisa Cty.*, 217 Va. 468 (1976).

health, safety, morals or welfare of the community" the decision is "arbitrary, unreasonable and invalid." *Bd. of Cty. Supervisors v. Davis,* 200 Va. 316, 323(1958).

Moreover, the actions of the City Council lose any presumption of regularity when, as here, the decision is not "based upon correct principles of law." *Nat'l Mem'l Park, Inc. v. Bd. of Zoning Appeals of Fairfax Cty.*, 232 Va. 89, 92, 348 S.E.2d 248, 250 (1986); *see also Newberry Station Homeowners Ass'n, Inc. v. Bd. of Sup'rs of Fairfax Cty.,* 285 Va. 604, 621, 740 S.E.2d 548, 557 (2013)("Nevertheless, when a legislative act is undertaken in violation of an existing ordinance, the board's "action [i]s arbitrary and capricious, and not fairly debatable, thereby rendering the [legislative act] void and of no effect." Quoting *Renkey v. County Bd. of Arlington County,* 272 Va. 369, 376, 634 S.E.2d 352, 356 (2006)).

Here, the Zoning Ordinance requires that a body reviewing an application for demolition consider 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." Alex. Zon. Ord. § 10-105(B)(3). The BAR staff reports provided to the City Council demonstrated that the hyphen wall on the Black Property as the feature was "over 150 years old and is an example of an unusual wall treatment." Petition Exhibit 6 at 5. Yet, this factor was not addressed by the City Council.

Instead of focusing on the factors in Alex. Zon. Ord. § 10-105(B), the City Council admitted that that the justification for approving the demolition of the "hyphen wall" was a letter from a mason employed by Vowell. Petition at ¶ 48. This letter was not provided to any other party before the hearing and only made public in the aftermath of the hearing. *Id.* at ¶ 42. Nor did it reflect on any of the discrete factors articulated in Section 10-105(B) of the Zoning Ordinance. In

relying on this letter rather than the zoning ordinance in making their decision, the City Council acted in an arbitrary manner which is *per se* unlawful.[6]

According to Alex. Zon. Ord. § 10-107(B), on an appeal to the circuit court, the court may reverse the decision of the council if "that the decision of the council is contrary to law or that its decision is arbitrary and constitutes an abuse of discretion." By using improper factors outside of the scope of Alex. Zon. Ord. § 10-105(B) to approve the demolition permit, the City Council made a decision that was presumptively arbitrary, unreasonable and invalid. This overrides the "fairly debatable" standard, as a decision contrary to law is not a debatable one.

III. THE PETITIONERS HAVE STANDING

The City's next argument is that the Petitioners have not sufficiently alleged standing. (City Brief at page 15). In particular, the Respondents state that the Petitioners do not possess a right that is different from the general public. See page 18 of the City's Brief.

As an initial matter, Alex. Zon. Ord. § 10-107 (B) tees up the issue of standing by asserting the standard for appealing to the Circuit Court. To wit, it states that

> 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.

Standing granted by the ordinance is further authorized by Alexandria City Charter § 9.09(j), which states that "the city council shall determine, by ordinance, the parties entitled to appeal decisions of the city council." The word "petitioners" in this section specifically references those persons who initially appealed the matter to the City Council under Section 10-107(A)(2) of

[6] Section 10-105(B) does not grant the City Council discretion to consider outside factors like whether the feature was "well considered" upon its construction or whether "better examples of curved hyphens" exist, two justifications relied upon by the City Council in making its decision.

the Zoning Ordinance. Here, each of the Petitioners (i) owns property near the Black Property, (ii) was a party to the appeal from the BAR to the City Council, and (iii) was "aggrieved" by the City Council's subsequent decision. Petition at ¶¶ 3-5. Therefore, under the Zoning Ordinance, they are presumptively eligible to file this appeal to the Circuit Court. Regardless, the petitioners have sufficiently alleged a right to appeal under Virginia law.

Friends of the Rappahannock v. Caroline Cty. Bd. of Supervisors, 286 Va. 38 (2013) [hereinafter *Friends*] states generally that for standing to be present the petitioners "must own or occupy 'real property within or in close proximity to the property that is the subject of' the land use determination, thus establishing that it has 'a direct, immediate, pecuniary, and substantial interest in the decision.'"[7] *Id.*, 286 Va. at 48 (quoting *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 420 (1986)). Furthermore, the complainant must allege a "particularized harm to 'some personal or property right, legal or equitable, or in the imposition of a burden or obligation upon the petitioner different than that suffered by the public generally." *Id.*

Here, each of the Petitioners owns property in Old Town Alexandria in sufficient proximity to the Black Property to be interested in its preservation; all are governed by the same zoning regulations, specifically section 10 of the Alexandria Zoning Ordinance, covering real properties in the Old and Historic district.[8] *See generally* Petition. They are neighbors to the Black Property. They were also aggrieved by the series of incorrect zoning decisions, which they have timely appealed at every level. Notably, the City has not – at any point – challenged their collective right to pursue this appeal from the BAR to the City Council.

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[7] This standard would apply where the ordinance at issue does not already identify parties as having sufficient interest to challenge a land use action

[8] In its brief in support of the Demurrer, Vowell argues that the petitioners live "a football field" from the Black Property. Brief in Support of Demurrer of Vowell at page 1. Notably, Vowell does not draw any conclusions from that – is a football field too far a distance? Is a tennis court a better measure? Either way, it is uncontested that all the petitioners own land in the same historic neighborhood as Vowell and have been pursuing this issue since the initial application.

In defining a party as "aggrieved," the Supreme Court of Virginia stated in *Friends* that "any distinction between an 'aggrieved party' and 'justiciable interest' is a distinction without a difference in declaratory judgment actions challenging land use decisions." *Friends*, 286 Va. at 48. The existence of a "justiciable interest," which means a party has "rights" at issue in the outcome of the case,[9] is therefore enough to fulfill the standard under Alex. Zon. Ord. § 10-107 (B) and any applicable state law. Here, the justiciable interest of the Petitioners in the Hugo Black Property is two-fold: (i) the aesthetic and economic benefit of living in a unique neighborhood which preserves open spaces as well as old and historic properties, and (ii) the tax consequences that accompanies the open space easement.

In regard to the first factor, the City has authorized an "Old and Historic" district with a set of strictly enforced zoning laws. *See e.g.*, Alex. Zon. Ord § 10.101, *et seq*. The purpose of this ordinance is to "enrich the quality of life," "protect historical and cultural resources" and "to maintain and preserve property values" *inter alia* for those persons living within the district. *See id.* The petitioners are all residents within this unique district. As such, they have a vested interest in making sure that the ordinances are applied fairly and uniformly, such that their own quality of life and property values are preserved, particularly in light of their own decision to donate easements which enhance the value of the neighborhood.

In regard to the latter factor, both HAF and Petitioner Ms. Callahan are grantors of Open Space Act easements in the Old and Historic district and, therefore, have a justiciable interest in ensuring that the Act is enforced appropriately. This means denying applications which fail to comply with the mandates of Virginia Code § 1704(a), e.g. by proffering other "open space" so there is no net loss of open land within the effected neighborhood. Here, the City Council's failure

[9] See *Friends of the Rappahannock* at 286 Va. at 86.

to properly consider the Act or enforce it basically nullifies the decision of the petitioners to have dedicated their land for posterity – when such a decision can be so easily ignored by the City. That factor alone justifies their objection to the Black Property application.

In sum, the petitioners have a justiciable interest in the matter at hand. "To demonstrate standing, a complaint must also allege sufficient facts showing harm to some personal or proprietary right different than that suffered by the public generally." *Friends*, 286 Va. at. 50. Here, each of the Petitioners fulfills the requirements of standing as (i) owners of property in proximity to the property in question who were aggrieved by the City Council's decision, (ii) with a vested interest in the Old and Historic District and its easements, and (iii) parties to the original appeal from BAR to the City Council.

To the extent that this issue is not already decided by Section 10-107(B) of the Zoning Ordinance, which incorporates the City's threshold for Circuit Court appeals, the petitioners have sufficiently alleged standing under Virginia law.

IV. ALL THE PARTIES TO THIS APPEAL ARE PROPER.

The City states in its memorandum that neither the City nor the BAR are proper parties to this appeal. (The Respondents do not contest that Vowell and the City Council are proper parties). *See Generally* City's Brief; Vowell LLC's Brief in Support of its Demurrer. In fact, all these parties are properly before the Court.

The City is a municipal corporation under Virginia law. As such, it can be sued in its own name for failing to follow state law or its own ordinances, just as the City Council or City agency can be a named party *See e.g. Laird v. Danville*, 225 Va. 256 (1983).

In their memorandum, the Respondents misstate the holding of *Norton v. Danville*, 268 Va. 402 (2004). *See* page 22 of the City's Brief. The holding in *Norton* stands for the proposition that

"judicial review of a decision of a board of zoning appeals is limited to the issues delineated in the statute governing the appeal to a circuit court.." *Id.* at 407. *Norton* limits the scope of the Court's review rather than the proposition that BAR or the City cannot be parties to judicial actions. *Id.* A historical preservation statue can grant standing for the circuit court to review actions under the ordinance and the City Council is a necessary party. *Id.* at 408. The City Council is the governing body of the City, employing the powers of the City in its legislative action. *Id.*

Norton is a case where a City is a named party in an appeal to circuit court authorized by statue to review an action by the City Council regarding a zoning ordinance aimed to preserving a historic district. *Norton,* at 406-407. This appeal under Alex. Zon. Ord. §10-107 reviews the decision of the City Council regarding the certificate of appropriateness and the demolition permit. Similarly to *Norton,* the City in a named party in an appeal according to a statue. Nothing in prior case law prevents the City from being a named party in a similar appeal.

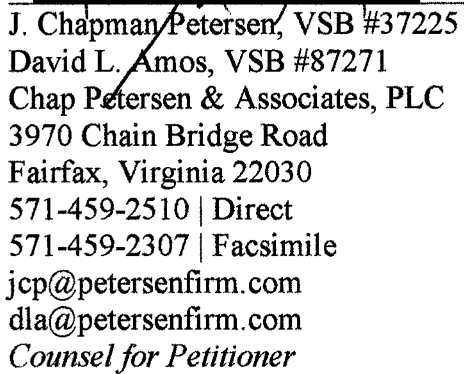
The City argues in its memorandum that because the ordinance only mentions the council that the City is not a necessary or proper party. *See* page 22 of City's Brief. Traditionally, when a decision of the city council reviewing the action of an administrative board is brought to a circuit court, the city (as a municipal corporation) is added as a party. *See Generally* Hoy v. City of Alexandria, 70 Va. Cir. 79 (Cir. Ct. 2005); Bell v. City Council of Charlottesville, 224 Va. 490 (1982). Cities are consistently parties to reviews of City Council decisions throughout Virginia and the City is a proper party here.

CONCLUSION

For the foregoing reason, the petitioners respectfully requests that the Court deny the Demurrer filed by the City of Alexandria and the Demurrer filed by Vowell LLC.

HISTORIC ALEXANDRIA FOUNDATION

BY COUNSEL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October 2019, a true and correct copy was served through First Class U.S. Mail and email upon:

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