In The

Supreme Court of Virginia

RECORD NO. 200195

HISTORIC ALEXANDRIA FOUNDATION,

***Appellant*,**

v.

CITY OF ALEXANDRIA, CITY COUNCIL OF THE CITY OF ALEXANDRIA, ALEXANDRIA BOARD OF ARCHITECTURAL REVIEW, VOWELL, LLC.,

Appellees.

REPLY BRIEF OF APPELLANT

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I. Introduction

Like the Board of Architectural Review ("BAR") and City Council, the Appellees ignore the historical importance of the property under review as the home of Justice Hugo Black, a certified Landmark "of statewide and national importance." In doing so, they ignore that the donor of the Open Space Land Act easement was one of the foremost jurists in the nation's history fully conscious that the Statute he referenced in his Deed of Easement would prevent the type of development now under review. Contrary to the Appellees' arguments, Justice Black did not sign an illusory easement where the promise of perpetual open space can be negated without any compliance with the requirements of Va. Code § 10.1-1704, or by ignoring the historic importance of the property. The Appellees seek to avoid the legal errors that infected the City's approval process by claiming that Historic Alexandria Foundation ("HAF") lacks standing. But in advancing their standing arguments the Appellees ignore the substantive rights of participation and review conferred by the Alexandria Zoning Ordinance, as well as long-standing precedential case law.

II. Appellants Do Have Standing

Appellees deny that HAF has standing to obtain judicial review of the City Council's action denying its BAR appeal. In doing so, the Appellees ignore the unique legal right given to property owners in the Old and Historic District to a "full and impartial public hearing" applying correct legal standards. Alex. Zon. Ord.

§§ 10-107(A)(2)-(3) & (B). At the most basic level, it is this unique legal right — mandated by both Statute, Va. Code § 15.2-2306(A)(3), and the municipal ordinance, Alex. Zon. Ord. § 10-107 — that HAF seeks to vindicate in pursuing this appeal.

A. HAF has a statutory right of appeal under the Zoning Ordinance

On appeal from the BAR, the Alexandria City Council ignored the requirements of law, which deprived HAF of a hearing based on correct legal principles and triggered the specific right of appeal under the Zoning Ordinance:

> *Appeal from city council to court*: 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 that such appeal is filed within a period of 30 days after the rendering of the final decision by the city council…. 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***….

Id. at § 10-107(B)(*emphasis added*).

In plain English, there is a limited class of persons who can utilize 10-107(B) to appeal the Council's decision of a BAR appeal to the Circuit Court — i.e. the applicant or "any of the petitioners aforesaid." *See id.* That legal right, shared in this matter only by the other 125 property owners who joined the appeal to City Council, is the "personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally." *Friends of the Rappahannock v. Caroline County Bd. of Sup'rs*, 286 Va.

38, 48, 743 S.E.2d 132, 137 (2013). Under the plain text of the Zoning Ordinance, Petitioner HAF has a right of appeal to the Circuit Court, if only for the reason that it appealed the BAR decision and lost before the Council.

Significantly, no case cited by the Appellees was decided in a BAR appeal or similar situation, where the ordinance grants a right to a limited group of property owners. *See infra*. Instead, the Appellees' standing argument is based on decisions involving declaratory judgment actions where there is no statutory requirement that the complaining party must first participate in the municipal deliberations as a condition to filing suit. *See* Va. Code § 15.2-2285; *see also* Va. Code § 15.2-2314 (BZA appeals). Here, there are parties who hold an undisputed right under the Zoning Ordinance to petition an adverse BAR ruling to the City Council; thereafter, the plain text of the Ordinance confers standing to appeal the same issue from an adverse decision by the Council.[1] In that context, the statutory word "aggrieved" must be viewed within its ordinary meaning of one "having suffered loss or injury,"[2] i.e. referring back to landowner/petitioners whose lost their appeal before the City Council, and not within the context of Supreme Court jurisprudence which occurred after the Ordinance was drafted.

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[1] The City parades before the court a number of fanciful "floodgates" arguments that ignore the obvious limitations on the pool of appellants to BAR decisions. *Compare* City Br. at 13-14 *with* Alex. Zon. Ord. §§ 10-107(A)(2) & (B).

[2] BLACK's LAW DICTIONARY (1950 ed.), page 87 defining "aggrieved."

B. <u>HAF Is Distinguishable from Appellees' Cases</u>

In denigrating HAF's interest and standing in this case, the Appellees place great reliance on *Virginia Beach Beautification Comm'n v. Bd. of Zoning Appeals of City of Virginia Beach*, 231 Va. 415, 420, 344 S.E.2d 899, 903 (1986). *See* City Br. at 7-9, 12-15; Vowell Br. at 13. But unlike the Virginia Beach Beautification Commission, HAF does own property, and that property is located in the special Historic Overlay District, which was established to protect, among other things "familiar landmarks." Alex. Zon. Ord. § 10-101(A). That fact, in and of itself distinguishes the decision in *Beautification* from this case.

None of the standing cases relied on by Appellees involved historic overlay districts, which is telling as such districts perforce rely on neighboring landowners to protect their essential function. "An allegation that the development of property threatens the aesthetic or cultural value of a historic district is sufficient to confer standing if the plaintiff (or at least one member of a plaintiff-citizen group) resides or owns property in the district." 4 Rathkopf's The Law of Zoning and Planning § 63:22 (4th ed. Nov. 2020).[3]

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[3] As pointed out in the brief of *amici* Preservation Virginia, et. al., the policy of preserving the Commonwealth's historic sites is enshrined in the Virginia Constitution, Preservation Br. at 15, *citing* Va. Const. Art. XI Sec. 1 ("it shall be the policy of the Commonwealth to conserve, develop and utilize its natural resources …and its historical sites and buildings.") as well as Article X of the Alexandria Zoning Ordinance.

In this case, HAF is not only a non-profit corporation formed in 1954 "to preserve, protect and restore structures and sites of historic or architectural interest in and associated with the City of Alexandria, e.g., JA. 49[4], it is a property owner in the Old and Historic District which has both given an Open Space Land Act easement on its property and is a co-grantee of easements under the Act. JA. 3. As to the subject property, it has made individualized investments in the Hugo Black property by (i) providing the financial support for the Historic American Building Survey documentation of the property and (ii) placing one of its Early Building Survey plaques on the property. JA 4-5. It is subject to the unique maintenance and regulatory burdens of property owners in the Old and Historic District of Alexandria, JA 3; Alex. Zon. Ord. §§ 10-103, 10-110. And it is given the right of City Council and Judicial review of BAR decisions — rights not given to the general public or the majority of the citizens in Alexandria. Alex Zon. Ord. §§ 10-107(A)(2) & (B).

HAF is not a newcomer to the dispute. It actively participated in and expended substantial resources at each and every step of the review process prior to the City Council's final approval of the construction project. JA 7. It submitted extensive written comments with materials from archival research. *E.g.,* JA 49-102. It objected as the BAR level and led the appeal to City Council, paying the fee to perfect an

[4] Contrary to the City's claim, City. Br. at 12, HAF has always asserted a particularized interest in this case based on its charitable purpose. *E.g.* JA 7, 49.

appeal and being joined by 125 other property owners. JA 7. This court should evaluate HAF's interest in this case *in toto* when considering if it "has a sufficient interest in the subject matter of the case so that the parties will be actual adversaries and the issues will be fully and faithfully developed." *Westlake Properties, Inc. v. Westlake Pointe Prop. Owners Ass'n, Inc*., 273 Va. 107, 120, 639 S.E.2d 257, 265 (2007).

Appellees' respond to the Zoning Ordinance by stating that it only conveys ordinary standing per Virginia case law. But Vowell's argument that "[t]he legislative choice of the word "aggrieved" [is] based on jurisprudence of this Court, most recently applied by this Court in *Friends of the Rappahannock*," is an exercise in anachronism. Vowell Br. at 10. Neither Vowell nor the City — which has at its disposal all the legislative history of the Ordinance — has put forth any legislative history regarding the Ordinance to support its assumption about ordinary standing. And the City Council was certainly not relying on *Friends* when it adopted the most recent version of the Ordinance in 1992. Indeed, that would require a time machine. Nor has the City or Vowell cited any instance before *Friends* where the City even advanced, much less triumphed upon, its current standing argument. The Court should therefore recognize the Appellees' standing argument for what is: an attempt to create (via *Friends*) a legal regime in local government law which limits the ability

of citizens to protest land use decisions, even if they have been given standing under their own zoning ordinance.

III. Open Space Land Act

A. Justice Black's Deed of Gift Incorporates Va. Code § 10.1-1704

Recognizing that no one has satisfied any of the requirements of Va. Code § 10.1-1704 regarding the property, the City denies that anything was "converted" or "diverted" as a matter of law "when the deed creating the open-space land in question expressly allowed for 'changes, alterations, additions, or improvements' with the prior written approval of [the VDHR]." City Br. at 26 Vowell goes even further and argues that the following provision of the Open Space Land Act easement granted by Justice Black serves to negate any requirement to follow the statute:

> "no building or structure … shall be altered, restored, renovated or extended and not structure … constructed except in a way that would in the opinion of the Grantee be in keeping with the historic character of the house, and provided that the prior written approval of the Grantee to such action shall have been obtained,…"

JA 19; *see* Vowell Br. at 20. This provision, Vowell argues, gives the Virginia Historic Landmarks Commission (now the Board of Historic Resources) the unfettered right to authorize any new construction it feels appropriate without consideration of Va. Code § 10.1-1704. Vowell Br. at 20 (citing JA 19).

The Appellees' argument necessarily implies that "changes, alterations, additions, or improvements" referenced in the easement will consist of new

construction on open space. But there are plenty of "changes, alterations, additions, or improvements" that can be made to a house without adding a new structure. Conversely, it would nullify the entire grant of the easement to adopt an interpretation that the "additions" contemplated by the easement would be built on the very open space that is set aside. *See* JA 63.

More to point, the Deed granting the easement expressly invokes the Open Space Land Act, including what is now Va. Code § 10.1-1704. JA 17-18. Certainly, Justice Black had every right to expect the Deed to be construed in accordance with the well-settled principle that — even without such an express incorporation — the full terms of the Open Space Land Act are incorporated into his Deed of Easement.[5] Thus, any proper interpretation of the Deed of Easement must be read in conjunction with Section 1704. In other words, to the extent the Deed can be read to authorize construction on open space, it first requires observation of the requirements of Section 1704 before that open space can be diverted.

B. The Open Space Land Act Did Apply and Was Ignored

In addition to trying to avoid the requirements of the Open Space Land Act by arguing that Justice Black did not incorporate its strictures into his easement, the

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[5] *See, e.g., Smith v. Commonwealth*, 286 Va. 52, 58, 743 S.E.2d 146, 150 (2013)("contracts are deemed to implicitly incorporate the existing law"); *Wood v. Lovett*, 313 U.S. 362, 370, (1941)("This court has held that the terms of a statute … are a part of the obligation of the deed made pursuant to it."); 11 Williston on Contracts § 30:19 (4th ed., Nov. 2020)(collecting cases).

City attempts to avoid the explicit incorporation of that law into its own Zoning Ordinance. Understanding that the requirements of Va. Code § 10.1-1704 have not and cannot be met, the City argues that the statute and its actions are "not inconsistent." City Br. at 19-23. In other words, the Appellees find it "not inconsistent" to authorize construction on protected open space when the requirements of Va. Code § 10.1-1704 — e.g., identifying substitute open space — have never been observed. But if the City's actions would allow what the Open Space Land Act expressly prohibits, they are obviously "inconsistent."

The City's "not inconsistent" argument is even shallower when held up to the text of the Zoning Ordinance which incorporates the higher standards of State law:

> *Conflicting provisions*. In interpreting and applying the provisions of this ordinance, they shall be held to be the minimum requirements …. ***Whenever 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. Zon. Ord. § 1-200(F)(emphasis added). This provision expressly incorporates the "greater requirement[s] or … higher standard[s]" of state law in the application of the entire Alexandria Zoning Ordinance — including Article XI, Section 1 of the State Constitution. It is most telling that when it argues the Ordinance is "not inconsistent" with the Open Space Land Act, the City never denies that the Act imposes a "greater requirement or a higher standard" of protection for open-space

than the Zoning Ordinance. *See* City Br. at 19-23 (Vowell's Brief does not even cite Section 1-200(F)). Putting all other considerations aside, the failure of the BAR and the City Council to follow the requirements of Alex. Zon. Ord. § 1-200(F) in applying Alex. Zon. Ord. § 10-105 is plain legal error.

C. No One Has Complied with Any Requirement of Va. Code § 10.1-1704

Because no one — not the City, not VDHR, and not Vowell — has made the slightest attempt to comply with the dictates of Va. Code § 10.1-1704, the argument about who is the "public body" referenced by the Statute makes little ultimate difference. The statute has been completely ignored. And for all the talk in the Appellees' briefs about the VDHR approval of the project, no one has suggested that VDHR made the findings or secured the replacement open space required by Va. Code § 10.1-1704. JA 62.

In defense of its own refusal to make the required findings or secure the required substitute space, the City makes the self-contradictory argument that "it must be remembered that this matter was initiated at the BAR level, and that the City Council's involvement was purely as a body of review." City Br. at 25; *see also id.* at 26 ("the City Council was not sitting as a "municipality"). At the same time, it asserts that, "A city council acting on a certificate of appropriateness performs a legislative function." City Br. at 27 (citing *Byrne v. City of Alexandria*, 298 Va. 694, 842 S.E.2d 409, 413 (2020). Surely the City cannot have it both ways. In fact, the

City Council was acting in its legislative capacity. *Id.* No matter who was required to make the findings (and procure the substitute land) required by Va. Code § 10.1-1704, it is undisputed that no one has ever done so here, and the City Council is not permitted to disregard the provisions of the Open Space Land Act when it issues its certificates of appropriateness. Va. Code § 10.1-1705; Alex. Zon. Ord. 1-200(F).

IV. The City Had a Duty to Consider Landmark Certification

The Appellees seek to avoid the City's error in the application of Section 10-105 when it chose to ignore the Landmark Certification of the Hugo Black Property. Having no argument to offer on the text of the Ordinance which was enacted with the express purpose of protecting "familiar landmarks," Alex. Zon. Ord. § 10-101(A), *see also id.*§ 10-105, they argue that the court did not grant an assignment of error on those issues. But the assignment of error plainly challenges the application of Section 10-105 of the Ordinance:

> The Circuit Court erred in finding that the City Council did not have to consider the Open Space Land Act in its review of the BAR's decision ***and finding that the City Council properly applied Alexandria Zoning Ordinance 10-105 in making its decision***. Issue preserved: R.158-165 (Opposition to demurrer at 6-13); JA at 244:10-245:20; 257:6-258:3; JA274-277 (Final Order at 1-4).

HAF Petition at 4. In fact, HAF set forth its Landmark argument in its opposition to demurrer at pages 10-11. JA 162-63; *see also* JA 13 (Pet. ¶¶ 45-46); *see generally* K. Sinclair & L. Middleditch, Virginia Procedure § 17.9[J] at 1340-41 (7th ed. 2020).

The City in its Brief attempts to transform the statements of HAF's counsel before the Circuit Court as either a waiver or concession of the argument. City Br. at 33. But that is a misinterpretation of the colloquy.

The argument before the trial court concerned the interaction of Va. Code § 10.1-2204 and Section 10-105 of the Alexandria Zoning Code. In his colloquy with the Circuit Court, counsel did nothing more than agree with the plain language of the statute that a landmark certification does not "***itself***" regulate the action of local governments. Va. Code § 10.1-2204(B). But since the City of Alexandria has enacted an historic district ordinance to protect "***familiar landmarks***," Alex. Zon. Ord. § 10-101(A), the certification does have regulatory effect.

The City persists in its effort to excise the word "***itself***" from Va. Code § 10.1-2204(B). It actually omits the word when it quotes the statute in its brief. City Br. at 33. But as it states elsewhere in its brief, "it is well-established that a statute should not be read in such a manner that will make a portion of it useless, repetitious, or absurd." City Br. at 17 (citing *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984)); *see also Cook v. Commonwealth*, 268 Va. 111, 114, 597 S.E.2d 84, 86 (2004)("Words in a statute should be interpreted, if possible, to avoid rendering words superfluous."). By arguing that the Landmark certification has "no regulatory effect," the City, its Staff, and the Circuit Court have read the statute as if the word "***itself***" is mere surplusage — contradicting its plain meaning.

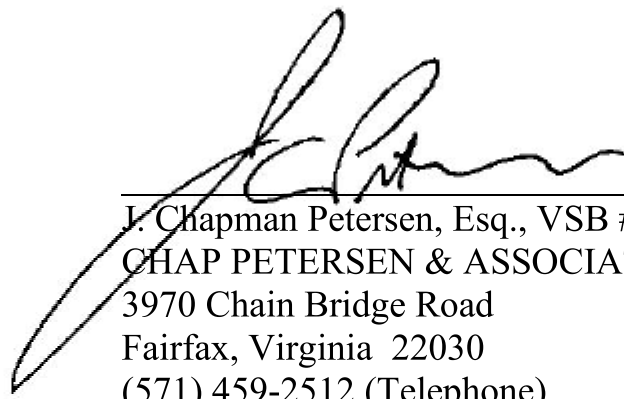
Unlike *Virginia Historic Landmarks Commission v. Board of Sup'rs of Louisa County*, 217 Va. 468, 230 S.E.2d 449 (1976), no one has suggested that the Landmark certification required Alexandria to enact an historic district ordinance. Here, the City did have one — and disregarding the Landmark certification was plain legal error. HAF Br. at 25-28; JA 84-85.

V. The Decision is not Fairly Debatable

HAF comes to this court challenging the decision of the City Council because it was fatally infected with plain legal error. Such basic legal errors deprive the City Council's decision of any presumption of validity and the application of a "fairly debatable" analysis is inappropriate. *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).

VI. Conclusion

The Circuit Court erred in granting a demurrer when the HAF had standing under the Ordinance, and the City Council failed to apply the correct legal standards, avoiding the restrictions of the Open Space Land Act and failing in its duty to protect a Landmark of statewide and national importance. The Judgment of the Circuit Court should be reversed.



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Certificate

I hereby certify that on this 28th day of December, 2020, pursuant to Rule 5:26, an electronic copy of the Reply Brief of Appellant has been filed with the Clerk of the Supreme Court of Virginia, via VACES. On this same day, an electronic copy of the Reply Brief of Appellant was served, via email, upon:

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