In The

Supreme Court of Virginia

RECORD NO. _____

HISTORIC ALEXANDRIA FOUNDATION,

***Petitioner – Appellant*,**

v.

CITY OF ALEXANDRIA, *et al.*,

Respondents – Appellees.

PETITION FOR APPEAL

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INTRODUCTION

Justice Hugo Black resided at 619 South Lee, Alexandria, Virginia 22314 (the "Justice Black Property") from 1939 until his death in 1971. The Justice Black Property is located in the heart of the Old and Historic Alexandria District, the first such special zoning district for purposes of historic preservation in Virginia. In 1969 as an act of preservation leadership, Justice Black sought to protect his historic house and beloved garden by placing the second ever Open Space Land Act[1] easement on the property. At the same time as it accepted the easement on behalf of the people of the Commonwealth, the newly created Virginia Historic Landmarks Commission certified the entire property—house and gardens—as an Historic Landmark because of its association with Justice Black. Petition for Appeal from City Council was filed in the Circuit Court of Alexandria on June 13, 2019 (hereinafter "Petition"), ¶ 17.[2]

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[1] 1966 VA Acts Ch. 461, codified as amended at Va. Code Ann. §§ 10.1-1700-1705 (2012 Repl. Vol.).

[2] Justice Black's place in the history of Virginia and the nation cannot be overstated. Not only was he the author of *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 234 (1964) that held that "the time for mere 'deliberate speed'" had run out on the segregation of Virginia's public schools, but his opinions on the Supreme Court established "the fundamental right of the accused to the aid of counsel in a criminal prosecution," and required court appointed counsel in all criminal cases brought in state court. *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See generally* William J. Brennan, Jr., *Foreword* to *Mr. Justice and Mrs. Justice Black* (1986); Earl Warren, *A Tribute to Hugo L. Black*, 85 Harv. L. Rev. 1 (1971); A.E. Dick Howard, Letter to City Council, available at http://www.historicalexandriafoundation.org/downloads/aed_howard.pdf

In 2018, the present owners of the Justice Black Property, Vowell, LLC ("Vowell"), applied for permits from the City of Alexandria for the partial demolition of a historic architectural feature at the Justice Black Property, as well as for the construction of three large new "pavilions" in the garden protected by the Open Space Land Act Easement. *Id*., ¶¶ 19-20.

The Open Space Land Act provides that "***No open-space land*****,** the title or interest 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 unless***" certain specified conditions have been met. Va. Code § 10.1-1704 (emphasis added). It is undisputed none of the provisions of Va. Code § 10.1-1704 were complied with before the City of Alexandria approved the planned construction project. Nor did the City of Alexandria even consider the requirements of the Open Space Land Act or the protections of the easement when it approved the construction.

The trial court held, on demurrer, that the City was not required to consider the criteria and burdens imposed on the Justice Black Property—or any other similarly encumbered property—by the Virginia Open Space Land Act. Transcript of Hearing Held on October 23, 2019 ("Dem. Tr.") at 74:19-75:1.

This leaves an important question open then: If local zoning bodies are not required to consider the Virginia Open Space Land Act, then who is?

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Demolition and construction projects in the Old and Historic District of Alexandria require prior approval of the Alexandria Board of Architectural Review ("BAR"). In November 2018, Vowell brought an application before the Alexandria BAR to make dramatic structural alternations to the Landmark Justice Black Property and gardens. Petition, ¶ 19. The BAR held hearings on December 19, 2018 and February 6, 2019 regarding Vowell's applications for: 1) a permit for partial demolition and capsulation (BAR2018-00410) ("Demolition Application") and 2) certificate of appropriateness for additions and alterations (BAR2018-00411) ("Addition Application") (collectively, the "Applications"). *Id*., at ¶ 20.

At the BAR hearings, Historic Alexandria Foundation ("HAF"), and each of the other petitioners, *inter alia*, opposed the applications. Despite their objections, a divided BAR approved the applications. *Id*., at ¶ 21. After BAR's approval of the certificate of appropriateness and the demolition permit for the Justice Black Property, HAF and 125 other owners of property within the Old & Historic District appealed the decision to the City Council in accordance with Alex. Zon. Ord. § 10-107(A)(2) (allowing appeal upon "a petition in writing signed by … at least 25 persons owning real estate within the Old and Historic District"). *Id*., at ¶ 23. The City Council held a hearing on the appeal on May 14, 2019. At the hearing, the Council approved the certificate of appropriateness and the demolition permit over

intense neighborhood opposition and specifically disavowing any responsibility to consider the Open Space Land Act Easement or to comply with the requirements of the statute. *Id*., at ¶¶ 26-27.

Following the appeals procedure provided in the Alex. Zon. Ord. § 10-107(B), HAF and other petitioners—all owners of property in the Old and Historic District, who had signed the Record of Appeal to bring the matter before the City Council, and appeared in opposition to the project—filed an appeal with the Circuit Court for the City of Alexandria. *See* Petition. On July 15-16, 2019, Vowell and the City Council filed demurrers with the court seeking the dismissal of the action which was heard on October 23, 2019. R. 35-59; R. 86-87; R. 89-91. The court granted the defendants' demurrers over HAF's objections and dismissed the action with prejudice without leave to amend. An order was entered to that effect on November 7, 2019. R. 161-65.

Following a timely notice, this appeal follows. R. 166.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in holding that the Petitioners lacked standing to bring the action. Issue preserved: R.119-123 (Petitioner's Opposition to Respondent's Demurrer at 13-17); Dem. Tr. at 47:5-51:4; 51:13-54:14; 55:9-57:1; R. 161-65 (Final Order at 1-5).

2. 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.112-119 (Opposition to demurrer at 6-13); Dem. Tr. at 59:10-60:20; 72:6-73:3; R. 161-65 (Final Order at 1-5).

STATEMENT OF FACTS

This appeal arises from the Circuit Court for the City of Alexandria's review of the 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. *See Generally* Petition.

The Justice 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. Petition, ¶ 17. 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.[3] *Id.*, at ¶ 11. In 1969, the Justice Black Property and grounds was officially certified as an "Historic Landmark" by the Virginia Historic Landmarks Commission. *Id*., at ¶ 18.

In 1969, Justice Black and his wife placed an Open Space Land Act easement under Va. Code § 10.1-1700 et seq. 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. *Id.*, at ¶ 12. That easement, which required that the "manor house [be] maintained and preserved

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

in its present state as nearly as practical" has been applied to the Justice Black Home since that date. Petition, Exhibit 1 at 3, ¶ 1. It has also been relied upon by the homeowners in avoiding a significant property tax burden.

The Justice Black Property is currently owned by Vowell, which purchased it subject to the easement. Petition, ¶ 9. 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* ¶¶ 19-20; *See* Petition, Exhibit 2 at 4. The project would add three 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 Justice Black Property. Petition, ¶¶ 21-22. The petitioners *inter alia* appeared and opposed the application. 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. *See* Petition, Exhibit 3 at 9. 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.*

The BAR did not address the landmark status of the Justice Black Property 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. Petition, Exhibit 6 at 5. 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 Justice Black Property's landmark status.[4] *Id.*, at 4. Indeed, the BAR staff report noted the Open Space easement but stated that it lacked the ability to enforce it. Petition, Exhibit 3 at 5.

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. Petition, ¶ 35. 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

[4] In fact, the City staff report would refer to them both as "honorific designations that have no regulatory bearing."

difficulty." (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.

City Council Decision: After BAR's approval of the certificate of appropriateness and the demolition permit for the Justice Black Property, HAF and 125 other owners of property located in the Old and Historic District appealed the decision to the City Council in accordance with Alex. Zon. Ord. § 10-107(A)(2).

The City Council held a hearing on the matter on May 14, 2019. Petition, ¶ 24. At the hearing, Council approved the certificate of appropriateness and the demolition permit, as recommended by the BAR, over significant neighborhood opposition. *Id.* 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.* 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 Justice Black Property'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").

Nor did the City Council make any of the necessary findings in order to allow construction on the Open Space protected by Justice Black's easement and the Open Space Land Act. Petition, ¶ 52. 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 ¶¶ 41-42; Petition, Exhibit 7. 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. Petition, ¶ 46. The failure of the BAR and the City Council to properly consider required factors caused the Petitioners—all owners of property in the Old and Historic District, who signed the Record of Appeal to City Counsel and appeared and contested the decision at all of the hearings—to appeal to the Circuit Court of Alexandria in accordance with Alex. Zon. Ord. § 10-107(B).

Circuit Court Appeal: On June 13, 2019, HAF and other petitioners filed an appeal with the Circuit Court for the City of Alexandria. *See Generally* Petition. On July 16, 2019, upon service of the appeal to the Circuit Court, the City Council and Vowell filed demurrers with the court seeking the dismissal of the action arguing:

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 R. 86-87 (Demurrer of Respondents the City of Alexandria, the City Council of the City of Alexandria, and the Alexandria Board of Architectural Review); *see also* 89-91 (Demurrer of Vowel, LLC). The respondents also filed a motion craving oyer arguing that the entire record of the proceedings before the City needed to be included in the record. R. 60-62 (Motion Craving Oyer by Respondents the City of Alexandria, the City Council of the City of Alexandria, and the Alexandria Board of Architectural Review).

The Court held a hearing on the demurrer on October 23, 2019, and the respondents asked the court to refrain from addressing their motion craving oyer until after ruling on the demurrer. Dem. Tr. at 6:5-10. For that reason, the court did not have the record of proceedings in the City before it when the court granted the respondents' demurrers and dismissed the action with prejudice. Dem. Tr. at 76:10-15. The court ruled that the petitioners lacked standing to bring the appeal, that neither the Landmark Designation nor the Open Space Land Act were criteria for the City to consider in reaching its decisions as a matter of law, and that "clearly, based on the volume of information that was before city council when it made its

decision that it can't be seriously argued that this matter was not fairly debatable," (Dem. Tr. 75:1-6) — even though that record was not yet before the court. Dem. Tr. at 73:10-75:6. An order was entered on November 7, 2019 stating the ruling of the court. R. 161-65. HAF objected to the order and has brought this appeal on the basis of these objections. *Id*.

STANDARD OF REVIEW

Whether the Petitioners have standing to appeal the decision of the City Council to Circuit Court under the provisions of Alex. Zon. Ord. § 10-107(B), is a question of law which is reviewed *de novo. Braddock, L.C. v. Board of Supervisors of Loudoun County,* 268 Va. 420, (2004).

The proper interpretation and application of the Open Space Land Act is an issue of statutory interpretation which is reviewed *de novo*. *CVAS 2, LLC v. City of Fredericksburg*, 289 Va. 100, 108, (2015).

The dismissal of the Petition of Appeal on demurrer without leave to amend is a question of law which is reviewed *de novo. Harris v. Kreutzer,* 271 Va. 188, 196, 624 S.E.2d 24, 28 (2006).

ARGUMENT

I. The Circuit Court Erred in Holding That the Petitioners Lacked Standing to Bring the Action (Assignment of Error No. 1).

The Circuit Court granted the demurrer in part because it found that the Petitioners lacked standing to appeal the City Council's decision. Dem. Tr. 73:10-

73:13. In holding so, the trial court relied upon *Friends of the Rappahannock v. Caroline Cty. Bd. of Supervisors*, 286 Va. 38 (2013) (hereinafter "*Friends*"). Specifically, the Circuit Court found that the Petitioners did not meet the "aggrieved person" standard discussed in *Friends*. Dem. Tr. 73:12-74:10. This ruling ignores the determinative fact that Petitioners sought judicial review under a different provision. Further, standing exists even under the "aggrieved person" standard in *Friends*.

1. *Standing Exists Under Alexandria Zoning Ordinances*

The Alexandria Zoning Ordinance places far more stringent restrictions of on the use of property in the designated Old and Historic District than those imposed on other property in the City. S*ee* Alex. Zon. Ord. Art. X. In exchange for being asked to submit to the extra burdens of the regulation of their property, the owners of property in the Old and Historic District are granted extra rights of participation in the permitting process that affects the protected character of the district. Petition, ¶ 12. Thus, only a sufficient number of owners of property in the Old and Historic District can appeal the decisions of the BAR to City Council. Alex. Zon. Ord. § 10-107(A)(2). And the owners who unsuccessfully appealed to City Council are expressly given the right to further appeal the decision to court. Alex. Zon. Ord. § 10-107(B). Such appeal rights are an inherent and necessary part of the City's bargain with the property owners in the Old and Historic District whereby they can

participate in the enforcement of the regulations they are uniquely called upon to live by.

The foregoing considered; the Alexandria Zoning Ordinances provide:

> 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.

Alex. Zon. Ord. § 10-107(B) (emphasis added). This is further supported 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."

In ruling that these property owners in the Old & Historic District do not have standing, the Circuit Court has fundamentally misapplied the decision in *Friends of the Rappahannock v. Caroline County Bd. of Sup'rs*, 286 Va. 38 (2013) to make the right of judicial review provided in the Alexandria Zoning Ordinance illusory. Properly read and understood, it is clear that the ordinance itself establishes that these petitioners satisfy the two-part test in *Rappahannock.*

The first part of the *Rappahannock* test is that the "complainant must own … 'real property within or in close proximity to the property that is the subject of' the land use determination." *Id.*, 236 Va. at 48. In this case that proximity has been established by the Ordinance itself, which expressly provides that only those who own property within the geographical limits of the Old and Historic District may

appeal a BAR decision – first the City Council and then to court. Nothing in *Rappahannock* suggests that the circuit court is entitled to substitute its judgment for "proximity" for that established in the Zoning Ordinance.

The second prong of the test set for in *Rappahannock* "some 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,***" *Id.,* is also established by the Ordinance. As property owners in the Old and Historic District the petitioners had a right—not shared by the general public—to appeal to the City Council a BAR decision affecting the historic character of the district and the fair and proper administration of their unique regulatory burdens. And as disappointed appellants to the City Council, the Petitioners had the right—not shared by the general public or even by property owners in the district who had not signed the appeal to City Council—to seek judicial review.

The ruling of the Circuit Court simply eviscerates all the rights of property owners in the Old and Historic District to obtain judicial review of even the most egregious failures of the City management to follow the law.

2. *Petitioners Are "Aggrieved Party"*

The Circuit Court found that the Petitioners did not fit what it believed to be aggrieved under the *Friends* standard because it believed the Petitioners did not "allege harm that would fit within the meaning of aggrieved." Dem. Tr. at 73:13-

74:10. Even assuming that the Ordinance by itself does not sufficiently establish standing, the Petition in this case sufficiently alleged facts establishing standing. All of the Petitioners "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.'" *Id.*, 286 Va. at 48 (quoting *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 420 (1986)). For purposes of the Demurrer—and given the extreme proximity of the Petitioners—this element was assumed. Dem. Tr. at 74:1-74:4 Petition, ¶ 3-5.

The complainant needs to 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." *Friends*, 286 Va. at 48 (quoting *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 420 (1986)). Each of the Petitioners owns property in Old Town Alexandria and are governed by the restrictive zoning regulations covering real properties in Alexandria's Old and Historic district. Petition, ¶ 3-5. Moreover, like Justice Black, and unlike the public generally, HAF is a grantor of Open Space Land Act easements in the Old and Historic district and, therefore, has an individualized interest in ensuring that the provisions of the act are properly enforced in the City of Alexandria. *Id*., at ¶ 3. This means denying applications which fail to comply with

the mandates of Virginia Code § 1704(A). Here, the City Council's failure to properly consider the Act or enforce it nullifies the decision of the petitioners to have dedicated their land for posterity. After all, such a dedication bears no weight when there is no body to enforce it — particularly where the City itself asks a circuit court to uphold its failure to consider the easement.

II. The Circuit Court erred in Holding the City Council Need Not Consider the Open Space Land Act (Assignment of Error No. 2)

The trial court granted the Demurrer in part because it believed that the Open Space Land Act was inapplicable in its review of the City Council's decision. Dem. Tr. at 74:19-75:1. Therefore, as the City Council considered the factors listed in Alex. Zon. Ord. § 10-105, the decision was "fairly debatable." Dem. Tr. at 74:11-75:4. This ignores a longstanding principle in Virginia law: The Supremacy Clause. The Open Space Land Act is a Virginia State Law that controls over all local ordinances. "***Insofar as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling.***" 1966 Va. Acts Ch. 461, § 8 (emphasis added); Va. Code § 10.1-1705. In failing to apply the Open Space Land Act, the City Council made a decision that is arbitrary on its face and an abuse of discretion.

The Virginia Supremacy Clause is codified in Virginia Code Section § 1-248 and explicitly states that:

> The Constitution and laws of the United States and ***of the Commonwealth*** shall be supreme**.** ***Any ordinance***, resolution, bylaw, rule, regulation, **or** ***order of any governing body*** or any corporation, board, or number of persons shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth.

It stands for the common-sense notion that the Virginia Code is controlling vis-à-vis any actions taken by any other governing body in the state. *See Blanton v. Amelia County*, 261 Va. 55 (2001) ("It is, of course, fundamental that local ordinances must conform to and not be in conflict with the public policy of the state as embodied in its statutes."). The Open Space Land Act is such a Virginia law that takes precedence over any Alexandria City Ordinance — or any decision by the City Council. Indeed, Alexandria's own ordinances state that any provision or law imposing a higher standard than the ordinance governs over it. Alex. Zon. Ord. § 1-200(F). The Open Space Land Act is controlling over the zoning ordinance and decisions made pursuant to said ordinance cannot conflict with the act.

The Justice Black Property is subject to an easement enacted pursuant to the Open Space Land Act; an any action taken to modify the property that is subject to the easement is governed primarily by Virginia State Law rather than an Alexandria Zoning Ordinance. Petition, ¶ 2; Dem. Tr. at 40:17-40:19. Therefore, any changes made to the property must be pursuant to the Open Space Land Act, first and foremost. That Statute provides:

> ***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. The public body shall assure that the property substituted will be subject to the provisions of this chapter***.

Va. Code Ann. § 10.1-1704 (emphasis added).

Thus, under the plain terms of the Open Space Land Act, the Justice Black Property can only be "diverted" from open space status if the "public body" makes the following findings:

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

See Virginia Code § 10.1-1704(A).

The Respondents argued, and the trial court held, that the City Council is not the public body that needs make those determinations under the Open Space Land Act. Dem. Tr. at 33:1-33:7. However, 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. The City of Alexandria as a municipality is a public body that is governed by the act and any of its operative bodies (such as the City Council) are also bound to act within the limits of the act.

Without making—or even considering—the findings required by the Open Space Land Act, the City Council acted in a manner inconsistent with the requirements of Virginia State Law and failed to appropriately apply Alexandria Zoning Ordinance 10-105. Petition, ¶ 35-36.

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.").

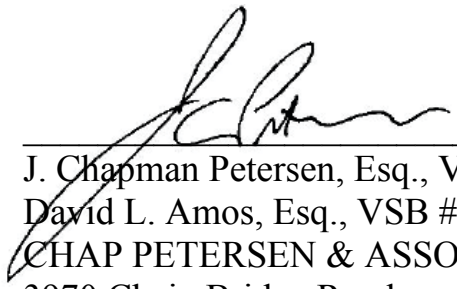
As the Open Space Land Act was not even considered—despite being the controlling law—this Court should find that the Petitioners did state a claim on

which relief could be granted. The City's decision is arbitrary, capricious and contrary to law because of its failure to properly apply the Open Space Land Act.

CONCLUSION

The Court's Order dismissing the Petition for appeal on demurrer is contrary to established statutory and precedential standard. Based on the applicability of the Open Space Land Act and the Virginia Supremacy Clause the Circuit Court's dismissal was in error. The petitioners possess both standing to bring the appeal to the Circuit Court and have stated a claim for which relief can be granted. For all these reasons, the court should grant this petition for appeal on both assignments of error. Upon granting the appeal the court should reverse the Circuit Court's judgment and remand the case for further proceedings.

Dated: February 5, 2020



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CERTIFICATE

Pursuant to Rule 5:17(i) of the Supreme Court of Virginia, I hereby certify the following:

1. The appellant is Historic Alexandria Foundation.

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3. The appellees are City of Alexandria, City Council of the City of Alexandria, and Alexandria Board of Architectural Review, and Vowell, LLC.

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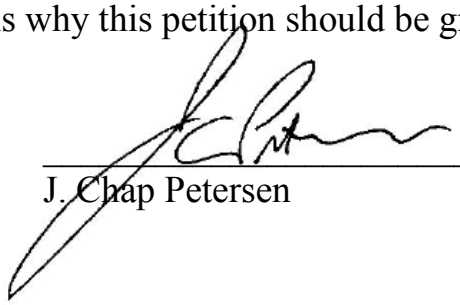
5. Seven copies of the foregoing Petition for Appeal were hand-filed with the Clerk of the Supreme Court of Virginia and one copy was served, via UPS Ground Transportation and email, upon counsel for the appellee this 5th day of February, 2020.

6. Counsel for the appellant desire to state orally and in person to a panel of this court the reasons why this petition should be granted.



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