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.

BRIEF OF APPELLANT

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This case arises from the decision by the City of Alexandria to proceed with the demolition/renovation of an historic property in Old Town Alexandria in violation of the Open Space Land Act, Va. Code Ann. § 10.1-1704 (2012 Repl. Vol.), and the provisions of its Historic Zoning Ordinance. Alex. Zon. Ord., Art. X.

In November 2018, landowner Vowell, LLC ("Vowell") filed an application with the City of Alexandria Board of Architectural Review ("BAR") to make significant changes to its property at 619 South Lee, Alexandria, Virginia 22314 (the "Black Property").[1] Joint Appendix ("JA") 6-7. This historic property, the home of Justice Hugo Black from 1939 until his death in 1971, is located within the Old and Historic District in Alexandria. JA 2.

On December 19, 2018 and February 6, 2019, the BAR held hearings on Vowell's applications for (i) a permit for partial demolition and capsulation of the Black Property's brick walls (BAR2018-00410) ("the Demolition Application") and (ii) the certificate of appropriateness for construction of additions and alterations in the gardens at the side and behind the house (BAR2018-00411) ("the Addition Application") (collectively, the "Applications"). JA 6-7. At the BAR hearings, the

[1] In order to undertake demolition and construction projects in the Old and Historic District of Alexandria, property owners in the District must seek the prior approval of the BAR.

Historic Alexandria Foundation ("HAF"), appeared and opposed the applications. JA 7. A divided BAR approved the applications. JA 7, 110.

After the BAR's approval, HAF and 125 other owners of property within the Old & Historic District appealed the decision to the City Council per Alex. Zon. Ord. § 10-107(A)(2). JA 7. The City Council held a hearing on the appeal on May 14-15, 2019. JA 7. At the hearing, the Council approved the BAR's decision. JA 7-8. Following the appeals procedure provided in the Alex. Zon. Ord. § 10-107(B), HAF — as owners of property in the Old and Historic District and active opponents before the BAR and Council — filed an appeal with the Circuit Court for the City of Alexandria. JA 1-112.

On July 16, 2019, Vowell and the City Council filed demurrers with the court which was heard on October 23, 2019. JA 139-43, 186-263. The trial court held *inter alia* that the City was not required to consider the criteria and burdens imposed on the Black Property — or any other similarly encumbered property — by the Virginia Open Space Land Act. JA 259-60. In doing so, the court granted the defendants' demurrers and dismissed the action without leave to amend. JA 274.

Following a timely notice, this appeal follows.

STATEMENT OF FACTS

Background of the Black Property

Justice Hugo Black resided at 619 South Lee, Alexandria, Virginia 22314 (the "the Black Property") from 1939 until his death in 1971. JA 2. The Black Property is located in the heart of the Old and Historic Alexandria District, JA 32 & 104, the first such special zoning district for purposes of historic preservation in Virginia. An avid gardener, Justice Black maintained on his property what is now the largest undeveloped garden in Old Town Alexandria. JA 55-58. According to the Historic American Buildings Survey — in a report funded in part by HAF in 1966 — the Justice Black Property was described as:

> [c]ertainly one of the outstanding examples of the Federal "row" type buildings in Alexandria, [which] has fortunately been spared the fact of suffocation. By precept and example it stands flush with the street, but with its extensive grounds and breathing space preserved to this day.[2]

In October of 1965, while the property was still owned by Justice and Mrs. Black, the property was awarded plaque 35-E-619 as part of HAF's Early Building Survey plaque program. JA 4-5, 53.

[2] JA 2, 54; *see* HABS No. VA-709 (available at https://tile.loc.gov/storage-services/master/pnp/habshaer/va/va0200/va0223/data/va0223data.pdf).

In 1969, not long before he died, and 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[3] easement on the property. JA 2, 5, 17-21.

When it accepted the easement on behalf of the people of the Commonwealth, the newly created Virginia Historic Landmarks Commission ("VHLC") certified the entire property — house and gardens — as an Historic Landmark because of its association with Justice Black. JA 6, 20-21, 56-58.[4]

Background of Open Space Land Act

The General Assembly enacted the Open Space Land Act in 1966 "to preserve permanent open-space land in urban areas." 1966 Va. Acts, Ch. 461, § 2. The Act provided that: "'[o]pen-space land' means any land in an urban area which is

[3] 1966 Va. Acts Ch. 461, codified as amended at Va. Code Ann. §§ 10.1-1700-1705 (2012 Repl. Vol.).

[4] Justice Black's place in the history of Virginia and the nation cannot be overstated. Not only was he the author to the opinion in *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

provided or preserved for … (3) historic or scenic purposes…." *Id.* § 7(c).[5] As part of its charitable mission, HAF has both granted an Open Space Land Act easement on property it owns and is a co-grantee of easements given pursuant to the Open Space Land Act. JA 3.

In order to accomplish its avowed purpose "to preserve permanent open-space land," the Open Space Land Act provides that

> **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).

That same year, the Commonwealth also created the Virginia Historic Landmarks Commission, 1966 Va. Acts Ch. 632, which was empowered to:

> designate as an historic landmark, the buildings, structures and sites which constitute the principal historical … ***sites which are of State-wide or national significance***. No structure or site shall be deemed to be an historic one unless it has been prominently identified with, or best

[5] The Act was later amended to remove the restriction to urban land, *see* Va. Code § 10.1700, and now protects open space throughout the Commonwealth.

> represents, some major aspect of the cultural, political, economic, military, or social history of the State or nation, or has had a major relationship with the life of an historic personage or event representing some major aspect of, or ideals related to, the history of the State or nation."

Id. § 4(a) (emphasis added). This legislation authorized the VHLC to acquire easements on landmark property. *Id.* §§ 4(e) & 8. By law, VHLC was only authorized to acquire an Open Space Land Act easement over property it had certified as an Historic Landmark of statewide or national significance.

On December 30, 1969, the VHLC accepted the Deed of Easement from Justice Black and his wife covering the entire Black Property, which met all the above criteria. JA 17-21. In the Deed, it is expressly recited that the Black Property was given under "Chapter 13 of Title 10 of the Code of Virginia entitled "Open Space Land Act," JA 17, and that "[a]cceptance by the Virginia Historic Landmarks Commission of this conveyance is authorized by Sections 10-138 and 10-142 of the Code of Virginia, and by such acceptance below the Commission designates the property described above as a certified landmark." JA 20.

As a result of VHLC's acceptance of the Open Space Land Act easement on this historic property, the citizens of the Commonwealth and the City of Alexandria have subsidized the preservation of the open space through substantial reductions in property tax assessments reflecting the permanent loss of development rights. 1966

Va. Acts Ch. 632 § 5 (codified as amended at Va. Code §§ 10.1-2207 & 58.1-3205); *see* JA 6, 58-59.

2019: Attempt to "Renovate" the Black Property

The Black Property is currently owned by Vowell, LLC, which purchased it subject to the Open Space Land Act easement. JA 4. In 2018, Vowell applied to BAR for the issuance of a certificate of appropriateness and a permit in order to demolish parts of the house, specifically the distinctive "hyphen" curved brick wall,[6] as well as to permit construction of "additions and alterations to the property." JA 6-7. These additions included three new large structures, so-called "pavilions," *see* JA 67-72, on the protected open space — precisely the type of infill of urban open space that Justice Black and the General Assembly sought to prevent.

BAR Hearing: On December 19, 2018 and February 6, 2019, the BAR held hearings on Vowell's application. JA 6-7. At the BAR hearings, HAF opposed the applications, providing extensive documentation concerning (i) the certification of the House and Garden as an Historic Landmark, and (ii) the requirements of the Open Space Land Act. *E.g.* JA 89, 90-98. Regardless, the BAR was instructed by its staff that they were required to disregard the Open Space Land Act easement

[6] One of the noted features of the House is an unusual "curve" allowing the rear "ell" to join the main block of the house without blocking the dining room window. This feature has been the subject of prominent treatment in the literature of Alexandria architecture. *See* D. Davis, S. Dorsey, & R. Hall, Alexandria Houses: 1750-1830; JA 60-62, 80-83

entirely. JA 14, 34. The staff also instructed the BAR that the Landmark designation of the property was "honorific" with "no regulatory bearing." JA 9, 34, 107.

Accordingly, at the February 6, 2019 meeting, a divided BAR approved the applications. JA 110. The BAR 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.[7] JA 38. The BAR also approved the construction of the three new structures in what has hitherto been the open space gardens of the Black Property, notwithstanding the protections of the Open Space Land Act. JA 110-111.

Appeal to City Council: After the BAR's approval of the certificate of appropriateness and the demolition permit for the Black Property, HAF and 125 other owners of property within the Old & Historic District appealed the decision to the City Council per 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"). JA 7. It is undisputed that the HAF owns property in the Old and Historic District and was a proper petitioner to the City Council. JA 3. The City Council held a hearing on the appeal on May 14-15, 2019. JA 7. Again, following

[7] 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 house. JA 107, 110.

the advice of its staff, the City Council ignored the Landmark designation in the easement and the requirements of the Open Space Land Act, and approved the certificate of appropriateness and the demolition permit over intense neighborhood opposition. JA 7-11, 13-14, 34-35.

Appeal to Circuit Court: Having led the appeal from the BAR to City Council, which included paying the appeals fee, submitting extensive written materials and objections, JA 49-102, and appearing at the Council hearing, HAF appealed the adverse decision from the City Council to court. JA 1-12. It did so following the procedure provided in the Alex. Zon. Ord. § 10-107(B), which provides: "*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….”*** *Id.* (emphasis added).

On July 16, 2019, the City Council and Vowell filed demurrers with the Circuit Court seeking the dismissal of the action on the grounds:

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 do not apply to the City, and

3) that the Petitioners lacked standing to bring this appeal.

See JA 139-142.[8]

The Court heard argument on the demurrer on October 23, 2019,[9] and ruled that (i) the petitioners lacked standing to bring the appeal, JA 258-59, (ii) that neither the Landmark Designation nor the Open Space Land Act, as a matter of law, were necessary criteria for the City to consider in reaching its decisions, JA 359-60, and (iii) 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," JA 260 — even though that record was not yet before the court. JA 261-62.

The Court made no finding that the Open Space Land Act had been complied with by the BAR or City Council; nor did it take any testimony from the petitioners regarding their interest in the case or proximity to the Black Property. JA 271. Instead, it dismissed the case without leave to amend. JA 274.

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[8] The City Respondents also filed a motion craving *oyer* arguing that the entire record of the proceedings before the City needed to be included in the Circuit Court record. R. 60

[9] The respondents asked the court to refrain from addressing their motion craving oyer until after ruling on the demurrer. JA 200. 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. JA 260-62.

An order was entered on November 7, 2019 stating the ruling of the court. JA 274-277. HAF objected to the order and has brought this appeal on the basis of the following objections. JA 274-277. A writ has been granted and the matter is now before the Court.

GRANTED ASSIGNMENTS OF ERROR

1. The Circuit Court erred in holding that the Petitioners lacked standing to bring the action. Issue preserved: JA.165-169 (Petitioner's Opposition to Respondent's Demurrer at 13-17); JA at 232:5-236:4; 236:13-239:14; 240:9-242:1; 274-277 (Final Order at 1-4).

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.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).

STANDARD OF REVIEW

Whether the HAF has 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. Lamar Co. v. City of Richmond,* 287 Va. 322, 325 (2014)

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 Circuit Court's dismissal of the Petition of Appeal on demurrer is a question of law that is reviewed *de novo. Harris v. Kreutzer,* 271 Va. 188, 196 (2006).

The Circuit Court's dismissal without leave to amend is reviewed for abuse of discretion. *AGCS Marine Ins. Co. v. Arlington Cty.*, 293 Va. 469, 487 (2017); *Kole* v. *City of Chesapeake*, 247 Va. 51, 57 (1994).

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 ruled that the HAF lacked standing to appeal the City Council's decision. JA 258-59. In so holding, the trial court relied upon *Friends of the Rappahannock v. Caroline Cty. Bd. of Supervisors*, 286 Va. 38 (2013) (also referred to as "*Friends*"). Specifically, the Circuit Court ruled that HAF did not meet the "aggrieved person" standard discussed in *Friends.* JA 258-59. The Court's ruling, however, ignores the critical fact that HAF sought judicial review under a different basis, i.e. the Alexandria Zoning Ordinance, and that standing is granted ***by-right*** under the provision for persons within the affected class. Further, standing exists under the "aggrieved person" standard in *Friends*, as HAF had both (i) proximity to the Black Property as well as (ii) a unique and discrete injury not suffered by the general public.

1. *Statutory Standing Exists Under Alexandria Zoning Ordinance*

HAF has standing to appeal to the Circuit Court from the BAR's decision under the unique ordinances governing the Alexandria's Old and Historic District. To wit, the Alexandria Zoning Ordinances place far more stringent restrictions on the use, modification and maintaining of property in the designated Old and Historic District. S*ee* Alex. Zon. Ord. Art. X.

In exchange for bearing extra burdens and the restriction of their property, the owners of property in the Old and Historic District are granted additional rights of participation in the permitting process that affects the protected character of the district. For example, in order to appeal the decisions of the BAR to City Council, there must be a requisite number of owners of property **in the Old and Historic District** seeking to appeal the ruling. Alex. Zon. Ord. § 10-107(A)(2) (emphasis added). And if the same owners who appealed to the City Council are unsuccessful in that appeal, they are each ***expressly*** given the right to further appeal the decision to the Circuit 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.

In its text, the Alexandria Zoning Ordinance states the following in regard to standing for a Circuit Court appeal:

> 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 grant of right is enabled 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 other words, HAF possesses ***by-right*** standing granted by the Alexandra Zoning Ordinance to bring its appeal to the Circuit Court. This concept is recognized by the Virginia Supreme Court as "statutory standing." *See Small v. Fannie Mae*, 286 Va. 119, 125 (2013) ("Sometimes called 'statutory standing,' this inquiry asks 'whether the plaintiff 'is a member of the class given authority by a statute to bring suit.'"); *Goldman v. Landsidle*, 262 Va. 364, 371 (2001) ("The purpose of requiring standing is to make certain that a party who asserts a particular position has the legal right to do so and that his rights will be affected by the disposition of the case."). Statutory standing "applies only to legislatively-created causes of action" and concerns "whether a statute creating a private right of action authorizes a particular plaintiff to avail herself of that right of action." *CGM, LLC v. BellSouth Telcoms*., *Inc*., 664 F.3d 46, 52 (4th Cir. 2011) (citing Radha A. Pathak, Statutory Standing, and the Tyranny of Labels, 62 Okla. L. Rev. 89, 91 (2009)).

Finding statutory standing, as here, is a matter of statutory interpretation: i.e., "whether [the legislative branch] has accorded this injured plaintiff the right to sue to redress his injury." *CGM*, 664 F.3d at 52. When a plaintiff files an action based on a statutory right, the inquiry on whether the plaintiff has standing is not based on whether the plaintiff has a "personal stake in the outcome." *Small,* 286 Va. at 126 (quoting *Goldman*, 262 Va. at 371). Rather, the plaintiff must possess the "legal right" to bring the action, which depends on the provisions of the relevant statute. *Small*, 286 Va. at 125-26.[10]

From the words of the Ordinance, it is plain that the "legislature," i.e. the Alexandria City Council, intended for parties that brought an appeal before the City Council under Alex. Zon. Ord. § 10-107(A)(2) should have an equivalent redress in case of an ensuing defeat. Under Alex. Zon. Ord. § 10-107(B), all parties "aggrieved" by the decision of the City Council have the right of appeal to Circuit Court. There is no basis to narrow the right by reading in the limitations of *Friends*.

In the case of *Small v. Fannie Mae*, this Court found that a personal grievance is irrelevant to the issue of statutory standing — the only question to be decided is whether HAF is a member of the class in possession of the "legal right" authorized to bring an appeal. *Small,* 286 Va. at 126. Here, as (i) the owner of property in the

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[10] When a statute creates a remedy from government action, that remedy is exclusive unless indicated elsewhere in the statute. *Concerned Taxpayers of Brunswick Cty. v. County of Brunswick*, 249 Va. 320, 330 (1995).

Old and Historic District (and holder of multiple historic easements), (ii) the preserver of the Black Property and similar historic properties, and (iii) a petitioner in the appeal to the City Council, HAF is part of the class vested with standing under the Zoning Ordinance and thus holds the "legal right."

Accordingly, Alex. Zon. Ord. § 10-107(B) extends a ***right*** to appeal for any petitioners — there is no discretion laid out in the statute. Therefore, the Circuit Court should have recognized that express grant of statutory standing, and it is error for it to find otherwise. *See Va. Emp't Com. v. Va. Beach,* 222 Va. 728, 731 (1981).

In sum, HAF had a statutory right to bring the decision before the City Council, and it had an equivalent right to pursue a further appeal to the Circuit Court. There is no meaningful distinction in the grant under Section 10-107 of the Zoning Ordinance, nor does logic compel creating such a distinction.

2. *Standing Exists under Friends of the Rappahannock*

HAF also possesses standing to bring its appeal to the Circuit Court under traditional common law principles recognized by this Court. In ruling that HAF does not have standing, the Circuit Court misapplied the common-law standard from *Friends of the Rappahannock*, in addition to ignoring the statutory grant under the Alexandria Zoning Ordinance.

Friends provides a two part-test providing for "standing in the context of a challenge to a land use decision by a board of zoning appeals." *Id.* at 46, and HAF satisfies that test.

The first part of the *Friends* 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." *Friends,* 286 Va. at 48. In this case that proximity has been established by the Alexandria Zoning Ordinance § 10-107(A)(2) itself, which provides that only those "owning real estate within the Old and Historic Alexandria District" may appeal a BAR decision. Nothing in *Friends* suggests that the circuit court is entitled to substitute its judgment for "proximity" for that standard established in the Zoning Ordinance. Notwithstanding that fact, HAF alleged and the circuit court accepted that HAF met the proximity requirement for standing. JA 258-59; s*ee Friends*, 286 Va. at 48; *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 420 (1986).

The second prong of *Friends* is that there must exist "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,***" *Friends,* 286 Va. at 48 (emphasis added). On this prong, the Circuit Court found that HAF and the other petitioners did not show they were "aggrieved," because they had not adequately

alleged "that they suffer a harm that is particularized to them and different than that which would be suffered by the public at large." JA 258. That was error.

Here, the "burden … different from that suffered by the public generally" is established by the Zoning Ordinance itself, which grants unique petition rights to persons subject to the unique burdens imposed on property owners within the Old and Historic District. Property owners in the Old and Historic District are subject to unique burdens not shared by members of the general public or even other residents of Alexandria. They hold their property subject to strict architectural controls. JA. 3; Alex. Zon. Ord., Art. X. They are required to seek and obtain prior approval from the City before they can either demolish existing structures or alter their property with new construction. Alex. Zon. Ord. § 10-103. They must perform required maintenance to prevent demolition by neglect. Alex. Zon. Ord. § 10-110.

In exchange for these extra burdens, owners of property in the Old and Historic District have express rights — 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. *See* Alex. Zon. Ord. § 10-107(A)(2). And as a disappointed petitioner to the City Council, HAF also 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. *See* Alex. Zon. Ord. § 10-107(B).

In the case of HAF, it has an even greater particularized interest in the subject matter of this suit. Its entire charitable purpose is to "to preserve, protect and restore structures and sites of historic or architectural interest in and associated with the City of Alexandria, Virginia, to preserve antiquities, and generally to foster and promote interest in Alexandria's historic heritage." JA 49. As part of that mission it is both a grantor and co-grantee Open Space Land Act easements and regularly promotes participation in the Open Space easement program. HAF therefor has a heightened interest in ensuring that the provisions of the Act are properly enforced. And HAF has made a direct investment in the preservation of the Black Property by sponsoring authoritative research and recognition of the historic importance of the property through an HABS study and its Early Building Survey plaque program. JA 2, 4-5, 53-54.

In sum, the complaint alleged 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*, 231 Va. at 420). HAF owns property in the Old and Historic District and is governed by its strictures. JA. 3-4. Moreover, like Justice Black, and unlike the public generally, the HAF is both a grantor (and holder) of Open Space Land Act easements and, therefore, has an

interest in ensuring that the provisions of the act are properly enforced under §1704(a), so that the integrity of the historic district is preserved. JA 49.

II. The Circuit Court Erred in Holding the City Council Could Ignore the Open Space Land Act (Assignment of Error No. 2)

The trial court granted the Demurrer in part because it erroneously believed that the Open Space Land Act was inapplicable to the City Council's decision to authorize construction on the protected open space. JA. 259. Contrary to the Circuit Court's holding, however, the Open Space Land Act controls over all local ordinances and the City is required to abide by its terms.

1. The Open Space Land Act Supersedes Local Ordinance

As a state law, the Open Space Land Act is supreme over all local ordinances.[11] "When a conflict exists between state law and municipal law, state law must prevail." *City Council of Alexandria v. Potomac Greens Assocs. P'ship*, 245 Va. 371, 378 (Va. 1993) (citing *City of Norfolk v. Tiny House*, 222 Va. 414, 421

[11] 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. Under Dillon's Rule, municipal corporations only have the powers expressly granted by the state legislature. *City of Va. Beach v. Hay*, 258 Va. 217, 221 (1999) (citing *Commonwealth v. County Board of Arlington County*, 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977)) ("Under Dillon's Rule, municipal governments have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable").

(1981). 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. 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) ("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.").

The Open Space Land Act also has its own special legislative override, expressly providing that "***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. The General

Assembly included this provision to ensure the durability and permanence of the protections afforded by the Open Space Land Act.

In failing to apply the provisions of the Open Space Land Act, the City Council made a decision that was contrary to law. In finding the Council's decision as "fairly debatable," the Circuit Court compounded that error, because there is no presumption of regularity when a 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.").

2. The City of Alexandria Failed to Address the Requisite Elements of the Open Space Land Act

Here, the Black Property is subject to an Open Space Land Act easement, and any property holding such an easement is governed by Virginia state law. JA. 2-3, 5, 17-21. Therefore, any modifications of the property must fulfill the requirements of the Open Space Land Act, first and foremost. To wit, 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 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" of the City;

2. Is in accordance with the Comprehensive Plan of the City; and

3. There is substitute "other real property" which is sufficiently similar.

See Va. Code § 10.1-1704(a).

It is undisputed that no public body has made the finding required by the statute, and certainly no substitute property has been provided to make up for the perpetual open space that will be built over by Vowell's plans.

The Appellees argued, and the trial court held, that the City Council is not the "public body" referred to under the Open Space Land Act, perhaps because the City itself did not hold the easement. JA. 246. That is not what the law states, however; nor is it logical in the context of the findings required. In its text, 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"). Therefore, under its plain meaning, the City of Alexandria is the "public body" making the necessary determination of the "conversion or diversion of the open space" as referenced in the easement. *See* Va. Code § 10.1-1704(a). Indeed, that is exactly what happened with the Black Property.

Furthermore, the very nature of the findings required by subpart (a) of the Open Space Land Act presume that a local government under Section 25.1 of the Virginia, e.g. a municipal corporation like the City of Alexandria, would be making these determinations, e.g. that conversion is necessary for "orderly development" and is consistent with the Comprehensive Plan and that substitute open space of equivalent value exists and can be provided within the community. *See* Va. Code § 10.1-1704(a). No state agency would be in a position to even consider these issues.

But no matter which "public body" is required to make the determinations required by the Act in this case, no such determinations have been made regarding the Black Property. Nor could they. Indeed, it would be absurd for anyone to suggest that it is essential to the orderly development of Alexandria that the owners of the Black property be allowed to build two new house sized additions to the "mansion" covering 3,174 square feet of land and doubling the footprint of the existing House, along with a 26 x 26 foot "Bicycle Workshop" on the perpetual open-space of this

landmark property. JA 70-72. Nor has anyone ever suggested that Va. Code Ann. § 10.1-1704(ii) has been complied with and that adequate replacement open-space has been put forth. JA 62.

The City of Alexandria Zoning Ordinance does not override the specific requirements of the Open Space Land Act. In fact, it does just the opposite; the Ordinance must incorporate the higher standards of state law. See Alex. Zon. Ord. § 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"). Thus, the City is required to enforce the Open Space Land Act and fulfill its particular requirements; it cannot avoid or derogate that responsibility. By not making — or even considering — the findings required by the Open Space Land Act, the City Council violated its own Ordinance. Alex. Zon. Ord. § 10-105; JA. 11. And by providing building permission without the required findings and actions by any public body, the City Council has violated the Open Space Land Act. Va. Code Ann. § 10.1-1704.

3. The City of Alexandria Refused to Acknowledge that the Black Property Is a Certified Landmark and the Legal Consequences of that Designation.

So intent was the City Staff to approve the construction project on the Black Property, that they turned a blind eye to the Landmark certification for the property, vacillating between denying it is a Landmark, and pronouncing that even it if is, the

designation is only "honorific" with "no regulatory bearing." JA 9, 34, 84-85, 107. But it was only by denying the landmark designation that the staff was able to advise the BAR and City Council that they could safely ignore the need to preserve the property as it was in Hugo Black's day because the "period of historic significance" was the same as the entire Old and Historic District — a period before Justice Black took residence on the property. JA 8, 39, 40-41, 62, 64-66. But the advice provide by the staff to the BAR and City Council was erroneous as a matter of law. The property is unquestionably an historic landmark of ***state-wide or national significance***. JA 20; 1966 Va. Acts Ch. 632, § 4 (codified as amended at Va. Code Ann. § 10.1-2204(A)(1)).

The same statute that granted the VHLC (now the Board of Historic Resources), the authority to certify historic landmarks provides in its current form states as follows:

> B. For the purposes of this chapter, ***designation by the Board of Historic Resources*** shall mean an act of official recognition designed (i) to educate the public to the significance of the designated resource and (***ii) to encourage local governments and property owners to take the designated property's historic, architectural, archaeological, and cultural significance into account in their planning***, the local government comprehensive plan, ***and their decision making***. Such designation, ***itself***, shall not regulate the action of local governments or property owners with regard to the designated property.

Va. Code Ann. § 10.1-2204 (emphasis added). The City Staff, City Council, and Circuit Court have read the last sentence as if the word "itself" was not included in

the statute so that it entirely negates the rest of that section. Thus, instead of encouraging the City to take the Landmark certification into account in their decision making, the BAR and Council were told to ignore it.

If, like the notable case of *Virginia Historic Landmarks Commission v. Board of Sup'rs of Louisa County*, 217 Va. 468 (1976), Alexandria did not have a zoning ordinance for the protection of historic property, it might be true that a Landmark certification would have "no regulatory bearing," for the simple reason that there would be no regulations to enforce. But Alexandria has a robust set of historic preservation regulations which are specifically enacted to protect "***familiar landmarks***." Alex. Zon. Ord. § 10-101(A) (emphasis added); *see also id*. § 10-101(B) ("To protect historical and cultural resources"); *id.* § 101(C) ("conservation and improvement of the city's historic recourses in their setting"); *id.* § 10-101(E) ("To promote local historic preservation efforts through the identification and protection of historic resources throughout the city"); *id.* § 1-102(G) ("To protect against destruction of, or encroachment upon, historic areas and archeological sites.).

Under those regulations, the BAR is "responsible for making effective the provisions of Article X." Alex. Zon. Ord. § 10-104(B)(4). It was required to consider, "The extent to which the building or structure will preserve or protect historic places and areas of historic interest in the city." *Id.* § 10-105(A)(2)(g); *see also id.* § 10-105(A)(2)(a)-(c). It was therefore plain legal error for the staff to advise

the BAR and the City Council that the Landmark certification as only "honorific" with "no regulatory bearing." JA 9, 35, 84-86, 107. And the Circuit Court was equally in error when it endorsed such a limited reading of the statute and City Ordinances. JA 259-60.

4. The Circuit Court Allowed Demolition of a Unique Historical Feature of the Black Property Based on Criteria Not Allowed Under the City Ordinance.

The members of the BAR and City Council have authorized the demolition of the historically significant and distinctive "curve" at the Black Property based on a finding that "the existing curved hyphen was a later feature that was not well considered when it was originally constructed." JA 110. In doing so they employed a consideration for demolition that is not authorized by the Zoning Ordinance. Alex. Zon. Ord. § 10-105(B). Simply put, the owner of an historic property in the Old & Historic District cannot simply let their property deteriorate and be allowed to bypass their obligations to maintain the historic property on the plea that modern construction standards would have built the structure differently. If that were the case, then every property owner in Old Town would be able to avoid the substantial burdens of preserving and maintaining their historic houses. *See* JA 72-74. Because the BAR and City Council employed a consideration that was not authorized by the Zoning Ordinance or any other law, their decision was necessarily arbitrary,

capricious and contrary to law, and not entitled to a presumption of correctness as being "fairly debatable." *Nat'l Mem'l Park*, 232 Va. at 92; *Newberry,* 285 Va. at 621.

5. The Circuit Court Failed to Address the City Council's Reliance on Non-Public Material in Violation of its Requirement to Conduct a Public Hearing.

In its Petition to the Circuit Court, HAF complained about the fundamental lack of due process before the City Council which relied on information and documents that were not part of the public record. JA 12-13. The Circuit Court did not address these procedural failings before dismissing the Petition with prejudice. But the consideration of the City Council and reliance on materials that are not made public is a serious violation of the requirement of a public hearing on appeals from the board of architectural review, Alex. Zon. Ord. § 107(A)(2) (requiring a "public hearing before the city council"), and a deprivation of the process provided in the City ordinance.

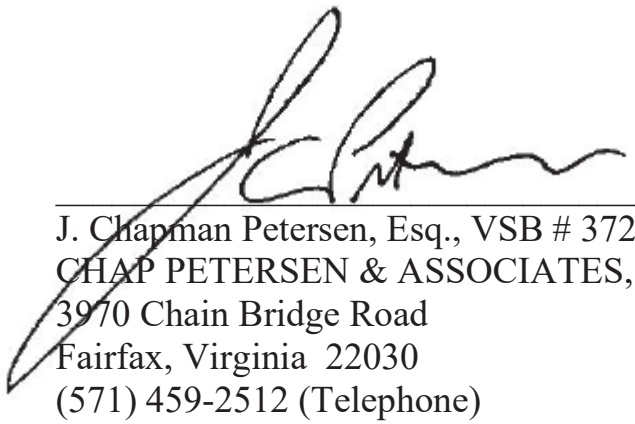
6. The Circuit Court Abused Its Discretion in Dismissing the Petition Without Leave to Amend.

One of the defining features of *Friends*, 286 Va. 38 (2013), is the pointed observation by this court that the complainants "were given leave to amend but decided against amendment." *Id.* at 50. Here, the court granted the demurrers with prejudice and without leave to amend over HAF's objection. J.A. 261, 274, 277. That was an abuse of discretion. Va. Sup. Ct. R. 1:8; *Mortarino v. Consultant Eng'g Servs., Inc.*, 251 Va. 289, 296 (1996); *Kole*, 247 Va. at 57.

CONCLUSION

Based on the applicability of the Open Space Land Act and other law cited herein, the Circuit Court's decision to dismiss the Complaint with prejudice was in error. HAF possessed both standing to bring the appeal to the Circuit Court and stated a legal position which should have been resolved in its favor as a matter of law. For all these reasons, the court should reverse the Circuit Court's decision in this matter and remand the case for further proceedings.

Dated: November 16, 2020



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CERTIFICATE

I hereby certify that on this 16th day of November, 2020, pursuant to Rules 5:26 and 5:32(a)(3)(i), electronic copies of the Brief of Appellant and the Appendix have been filed with the Clerk of the Supreme Court of Virginia, via VACES. On this same day, an electronic copy of the Brief of Appellant was served, via email, and electronic copies on CD of the Brief and Appendix were served, via UPS Ground Transportation, upon:

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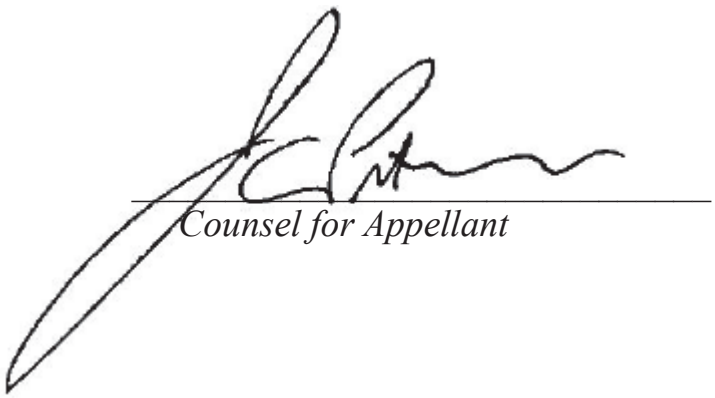

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