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June 1, 2021

By Email and Mail

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Board of Historic Resources

c/o Julie V. Langan, Director

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2801 Kensington Avenue

Richmond, Virginia 23221

Re: 2021 Va. Acts Ch. 274 and Request for Review of Hugo Black House Easement Determination and Administration of Open Space Land Act Easement Program at June 17, 2021 Board Meeting.

Dear Chair Fairfax and Members of the Board of Historic Resources:

On March 18, 2021, Governor Northam approved an important amendment to the Open Space Land Act that overruled the standards of easement interpretation espoused by *Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 291 Va. 153 (2016). See 2021 Va. Acts Ch. 274 (enacting Va. Code § 10.1-1705.1). We believe this new legislation requires a full review of the approvals granted for demolition and construction on the Justice Hugo Black property in Old Town Alexandria before that project is allowed to proceed. The Justice Black house **and garden** were certified as an Historic Landmark in 1969 when your predecessor, the Virginia Historic Landmark Commission (“VHLC”), was granted the second ever Open Space Land Act Easement in Virginia.

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Because the Virginia Supreme Court has just ruled that we lack standing to obtain judicial review of the building approvals granted by the City of Alexandria, see *Historic Alexandria Foundation v. City Council of Alexandria*, Record No. 200195 (May 27, 2021), your review and reversal of the Staff approvals is a matter of the utmost urgency.

Historic Alexandria Foundation (“HAF”) was formed in 1954 “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.” In furtherance of its charitable mission, HAF is both a grantor as well as a co-grantee of several easements that have been given under the Open Space Land Act to your predecessors — the VHLC, and the Virginia Historic Landmarks Board (“VHLB”) — as well as to the Virginia Department of Historic Resources (“VDHR”). HAF has long been an ardent supporter of the preservation easement program, and has provided legal assistance to property owners considering granting Open Space Land Act Easements to VDHR and other public bodies. For years we have actively promoted the easement program in our publications and our website. <http://www.historicalexandriafoundation.org/>. Our members have been generous donors of easements both in the City of Alexandria and elsewhere in the Commonwealth.

In 2017 the VDHR Staff granted preliminary concept approval of an extensive development project for the Hugo Black property — the site of the largest undeveloped garden in Old Town Alexandria. The proposed construction adds three large new structures on protected urban open space and demolishes a noted and distinctive architectural feature of the House. (See *Attached Graphic Presented by HAF at your December 2019 Meeting*). HAF did not learn of this proposal until the fall of 2018 when the matter finally came to public attention. Shocked at the approval, we promptly wrote the DHR staff to note our objections. See *HAF Letter* (10/1/2018); see also *HAF Letter* (1/17/2019); *HAF Letter* (4/15/2019); *HAF Letter* (8/1/2019) and accompanying materials.

Our objections have been joined by the likes of Preservation Virginia; W. Brown Morton III (original co-author to the Secretary of Interior Standards); UVA Law Professor A.E. Dick Howard; Former Board of Historic Resources Chair, Tad Thompson; the Historic Alexandria Resources Commission; and former Virginia Secretaries of Natural Resources John W. Daniel II, W. Tayloe Murphy, Jr., L. Preston Bryant, Jr. and Molly J. Ward; among others. (See <http://www.historicalexandriafoundation.org/>).

Shortly before her death, Josephine Black Pesaresi — the daughter of Justice Hugo Black, and one of the grantors of the easement held by you — wrote you directly to express her “strong objection” to the proposed construction as an obvious violation of the intent of the grantors who gave the Open Space Land Act easement to the Commonwealth. See *Pesaresi Letter* (4/15/2019), attached. Justice Black’s granddaughter Josephine P. Hallam has repeatedly reiterated her mother’s and her own opposition to the construction project at the Justice Black property.

Prior to the now overruled decision in the *Wetlands* case, in 2014 DHR had denied similar requests to demolish portions of the Hugo Black House and build on the gardens protected by the Open Space Land Act Easement that Justice Black placed on the property. See M. Melinat Letter (8/5/2014).

Apparently, the concept approval that was given to Vowell LLC in 2017 and subsequent approvals was influenced by the *Wetlands* decision and its holding that conservation easements are to be strictly construed in favor of the landowner. (In dissent Justices Roush and Lacy advocated honoring donor intent and the purpose of the conservation easement.)

The General Assembly has now authoritatively repudiated the rule announced in the *Wetlands* case. The new law amends the Open Space Land Act and now requires:

§ 10.1-1705.1. Construction.

Notwithstanding any provision of law to the contrary, an easement held pursuant to this chapter shall be construed in favor of achieving the conservation purposes for which it was created.

2021 Va. Acts Ch. 274. For that reason, any approval of construction on property protected by an Open Space Land Act Easement must be reviewed to ensure it complies with the required construction of the new law that becomes effective July 1, 2021.

This new statutory enactment fosters the same important purposes in honoring donor intent described in the April 15, 2021, decision of the Virginia Supreme Court in *Canova Land & Inv. Co. v. Lynn*, 856 S.E.2d 581 (Va. 2021). There the Court stressed that charitable gift restrictions are “favored creatures of the law” benefiting from a “longstanding policy preference” and entitled to “a liberal interpretation to uphold” “very severe restraints.” *Id.* at 586. The Court concluded its opinion by stating that “upholding the deed’s use restriction is most consistent with our preference for such gifts, as well as our overarching policy preference to allow the land to continue to be used according to the [donors’] stated desire.”

The Hugo Black House and its garden was certified as an Historic Landmark by your predecessor the Virginia Historic Landmark Commission in 1969, when Justice Black and his wife donated the Open Space Land Act Easement on the property. As amply documented in the Deed of Easement, the archives of the VHLC, and the letter addressed to you by Justice Black’s daughter shortly before her own death, the gift intent underlying the easement was to prevent the exact type of development of the Hugo Black property that has been approved by the City of Alexandria in express reliance on the approval by DHR.

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Allowing the project to proceed when you have the unmistakable authority to prevent it will be viewed as a clear breach of trust by VDHR and the Board of Historic Resources.

Since we first learned of the proposed construction on this treasured landmark, we at HAF have done our utmost to prevent the destruction of this important historic resource. We have done so by both appealing to your staff, opposing the project during the City of Alexandria review process, and seeking judicial review of the City's approval. Unfortunately, the Virginia Supreme Court ruled on May 27, 2021, that HAF lacks standing to obtain judicial review. The court did so without addressing the serious legal and policy issues raised by this major preservation case.

We have exhausted every effort in our power to prevent the preservation disaster that will occur if this construction project goes forward. It is now up to you to prevent the permanent destruction of this landmark resource.

The urgency of action by the Board of Historic Resources cannot be overstated. The easement approvals given by VDHR Staff in the Hugo Black House case and that of the Weblin House in Virginia Beach have caused extensive damage to the reputation of the Board of Historic Resources as an easement holder.

We at HAF are aware that potential donors of extremely important Conservation and Open Space Land Act easements are now rejecting outright the very thought of giving easements to VDHR. Instead, they are looking to other easement holders as being more dependable stewards of their gifts to the people of Virginia.

If the Board is to reclaim its reputation as a reliable partner, trustee, and steward of the easement program, dramatic action is needed on your part. No better opportunity will ever present itself than by your review and reversal of the approvals given to Vowell LLC under the new standards mandated by 2021 Va. Acts Ch. 274 (enacting Va. Code § 10.1-1705.1).

We therefore request you place this matter on your agenda for June 17, 2021, to take immediate corrective action.

Respectfully submitted,

Historic Alexandria Foundation

By: *Morgan D. Delaney*

Morgan D. Delaney
President

Attachments as stated