VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

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

VOWELL, LLC'S BRIEF IN SUPPORT OF DEMURRER

Defendant Vowell, LLC ("Vowell"), by counsel, pursuant to Rule 4:15(c) of the Rules of the Supreme Court of Virginia, submits this Brief in Support of its Demurrer to the Petition filed by Historic Alexandria Foundation ("HAF"), Yvonne Weight Callahan ("Ms. Callahan"), and Gail C. Rothrock ("Ms. Rothrock") (collectively, "Petitioners"). Vowell also relies upon and incorporates the arguments made by Defendants, the City of Alexandria (the "City"), the City Council of the City of Alexandria (the "City Council"), and the Alexandria Board of Architectural Review ("BAR"), in their Brief in Support of Demurrer.

I. FACTS, AS ALLEGED IN THE PETITION

This action launched by HAF, a non-profit corporation interested in historic properties, and Ms. Callahan and Ms. Rothrock, two individuals who live more than the length of a football field away from the subject property[1], seeks to overturn a decision of the City Council to approve Vowell's Demolition Application and Addition Application (collectively, the "Applications").

[1] Ms. Rothrock is actually located a distance of approximately five football fields away from the subject property.

(Petition ¶¶ 1 and 3-5). Vowell is the owner of the subject property and the applicant for the Applications which obtained approval to make certain demolitions, alterations, and additions at 619 South Lee Street, Alexandria, Virginia 22314 (the "Property"). (Petition ¶¶ 1 and 9). The Property is located in the City's Old and Historic District. (Petition ¶ 19).

On December 19, 2018, the BAR conducted a public hearing on the Applications, which resulted in a vote to defer the mater for restudy. (Petition ¶¶ 20-21). On February 6, 2019, the BAR took up the Applications again and this time approved them. (Petition ¶ 22). HAF and other property owners subsequently filed an appeal of the BAR's decision to the City Council. (Petition ¶ 23). The City Council then upheld the BAR's decision based on the reasons laid out in the City Staff Report. (Petition ¶ 24). Petitioners filed the instant action on June 13, 2019, seeking to overturn the City Council's decision.

II. ARGUMENT

"A demurrer accepts as true all facts properly pled, as well as reasonable inferences from those facts." *Steward v. Holland Family Props., LLC*, 284 Va. 282, 286 (2012). It does "not admit the correctness of the conclusions of law stated by the pleader" or "inferences or conclusions from facts not stated." *Arlington Yellow Cab Co. v. Transp., Inc.*, 207 Va. 313, 318-19 (1966) (internal quotation marks and citation omitted). To survive demurrer, a pleading must be made with "sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." *Eagle Harbor, L.L.C. v. Isle of Wight County*, 271 Va. 603, 611 (2006) (internal quotation marks omitted). Furthermore, a court considering a demurrer may consider documents attached to a complaint, *Eagle Harbor*, 271 Va. At 620, and it may ignore a party's factual allegations contradicted by the terms of documents that are a part of the pleadings. *See Fun v. Virginia Military Institute*, 245 Va. 249, 253 (1993). Significant to this demurrer is that, through the exhibits attached

to the Petition, the record of the BAR and City Council deliberations have been incorporated into the Petition, thereby allowing the Court to consider those materials and to ignore factual allegations in the Petition that are contradicted by them.

A. Petitioners fail to allege sufficient facts to demonstrate that they have standing to challenge the legislative decision made by the City Council.

Petitioners lack standing to bring an action challenging the approval of the Applications by the City Council. Petitioners allege that each of them is located in close proximity to the Property. *See* ¶ 3 (HAF owns real property under 1,500 feet away), ¶ 4 (Ms. Callahan owns real property less than 550 feet away), and ¶ 5 (Ms. Rothrock owns real property less than 1,550 feet away). Petitioners' allegations that they are located in close proximity to the Property are insufficient, however, to establish standing, even if the distances alleged constitute "close proximity" (which Vowell does not concede).

In *Friends of Rappahannock v. Caroline County Board of* Supervisors, 286 Va. 38, 48 (2013), the Virginia Supreme Court set forth a two-step test to establish standing for neighbors. First, plaintiffs must own or occupy real property within or in close proximity to the property that is the subject of the land use decision. *Id.* Second, and most relevant to this case, plaintiffs must "allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, or imposition of a burden or obligation upon the Plaintiffs different from that suffered by the public generally." *Id.* Even if the Petitioners can meet the first prong of this test – which Vowell does not concede – they certainly cannot satisfy the second prong of the test.

In *Friends of the Rappahannock*, complainants owned property close to a sand and gravel mining operation approved by the County Board of Supervisors. Complainants brought a declaratory judgment action against the County, alleging that the operation would increase noise, dust, and traffic in a manner that would alter their quiet enjoyment of the area; industrial use of

the property would harm their recreational use of the river for wading and observing wildlife; and dust and particulate pollution from the proposed operation would impact the long term health and well-being of their children, one of whom is asthmatic. *Id.* at 43. The circuit court dismissed the complaint for lack of standing, finding that the complainants were not aggrieved parties.

The Virginia Supreme Court, on appeal, evaluated the facts pled by the complainants against the requirement of the second prong, and concluded that "conclusory allegations as to possible harms" and the "general objections pled by the individual complainants present no factual background upon which an inference can be drawn that [the permit holder]'s particular use of the property would produce such harms and thus impact the complainants." *Id.* at 49. (Emphasis in original). Indeed, the Court noted that there were conditions associated with the permit that were designed to mitigate the impacts of the use, and the "individual complainants do not allege any facts to indicate that the conditions imposed by the permit would be inadequate to protect their property rights." *Id.* at 50. (emphasis added). The Court found that it was insufficient to simply speculate that a harm will manifest, without pleading specific facts to support that claim. The Court affirmed the dismissal of the complaint for lack of standing, holding that the complainants had "failed to meet their burden of alleging the particularized harms required to survive a demurrer." Petitioners' allegations that they are located near the Property are insufficient to demonstrate standing because they do not also allege particularized harms.

Petitioners allege that HAF is "vitally interested in the proper administration of the Open Space Land Act and the protections for historic properties provided by the Alexandria Zoning Ordinance." (Petition ¶ 3). HAF's allegation is no different those that the Supreme Court of Virginia found to be deficient in *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 344 S.E. 899 (1986). The Court there held that "it is not sufficient that the

sole interest of the petitioner is to advance some perceived public right or to redress some anticipated public injury when the only wrong he has suffered is in common with other persons similarly situated." *Id.* at 419-20, 344 S.E. 2d at 902-03. Continuing in language that would guide the Court in its subsequent decision in *Friends of the Rappahannock*, the Court held that "[t]he word 'aggrieved" in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon petitioner different from that suffered by the public generally." Allegations about HAF's interests in the proper administration of the Open Space Land Act and the Zoning Ordinance protections for historic properties are, thus, insufficient to establish standing, as are the allegations that Ms. Callahan and Ms. Rothrock purchased their homes because of the historic nature of the city and their neighborhood and pay property taxes to the City. (Petition ¶¶ 4-5). The absence of allegations of particularized harms, thus, requires the Court to dismiss the Petition because of lack of standing.

B. <u>The Petition does not allege sufficient facts to overcome the fairly debatable standard, and the legislative record itself demonstrates that the reasonableness of the City Council's action was fairly debatable</u>.

The City Council's legislative zoning decisions are entitled to a presumption of reasonableness. *Eagle Harbor LLC v. Isle of Wight County*, 271 Va. 603, 616 (2006). When presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must then be met by some evidence of reasonableness. *Id.* If facts demonstrating reasonableness are sufficient to make the question fairly debatable, the legislative action must be sustained. *Id.* An issue is fairly debatable when "evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." *Id.* If there is "*any* evidence in the record sufficiently probative to make a fairly debatable issue", the City Council's legislative decision must be upheld. *Bd. of Supervisors v. Stickley*, 263 Va. 1, 11, 556 S.E.2d 748,

754 (2002) (emphasis added).[2]

In *Eagle Harbor*, the plaintiffs were two developers who challenged a county ordinance passed to increase water and sewer connection fees. The plaintiffs incorporated the county's internal study, as well as an independent study conducted by their own expert, as a part of their complaint. 271 Va. at 609. The county filed a demurrer, which the trial court sustained. *Id.* On review, the Supreme Court found that the plaintiffs' complaint, along with the independent study appended thereto, had alleged sufficient facts to constitute probative evidence of unreasonableness for purposes of a demurrer. *Id.* at 618. By incorporating the county's report in their pleadings, however, the Plaintiffs had also presented facts showing the reasonableness of the County's decision to the Court. *Id.* Thus, there was sufficient evidence in the pleadings to show that the question before the county was fairly debatable, and thus had to be sustained. *Id.*

The same scenario is present here. The record in this case, consisting of Exhibits 2-7, provides ample evidence that the reasonableness of the City Council's decision to approve the Applications was fairly debatable. The City Council Staff Report contained the staff's thorough analysis showing that it applied the factors contained in Section 10-105(A) of the Alexandria Zoning Ordinance. Additionally, the Petitioners do not allege that the City Council or Bar did not apply these factors when making their respective decisions on the certificate of appropriateness. Therefore, not only do Petitioners fail to rebut the presumption of reasonableness, but their allegations actually support that the City Council's decision was, at a minimum, fairly debatable because they concede that the City Council's decision was based on the staff report, which

[2] In *Stickley*, the Court stated that the "[t]he question in this case is not who presented the greatest number of expert witnesses or even who won the battle of the experts. Rather, the question is whether there is any evidence in the record sufficiently probative to make a fairly debatable issue" of the decision. 263 Va. at 18-19.

contained a thorough analysis of all relevant factors. (*See* Petition ¶¶ 24 and 35).

Thus, under *Stickley*, the City Council's decision must be affirmed because the record includes much more than the required the standard of "any evidence" such that the decision must be deemed to meet the low bar of being fairly debatable.

III. CONCLUSION

For the foregoing reasons, and those advanced in oral argument, Defendant Vowell, LLC, requests that this Court sustain its Demurrer, dismiss the Petition with prejudice, and for any and such further relief as the court may deem proper.

VOWELL, LLC
By Counsel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of October, 2019, a true copy of the foregoing Vowell, LLC's Brief in Support of Demurrer was mailed, first class, postage prepaid, and sent by email to:

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