IN THE
Supreme Court of Virginia

RECORD NO. 200195

HISTORIC ALEXANDRIA FOUNDATION,

Appellant,

v.

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

Appellees.

BRIEF OF APPELLEES CITY OF ALEXANDRIA AND CITY COUNCIL OF THE CITY OF ALEXANDRIA AND ALEXANDRIA BOARD OF ARCHITECTURAL REVIEW

From the Circuit Court for the City of Alexandria, Virginia
No. CL19002249

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STATEMENT OF THE CASE

This case concerns an appeal by the Historic Alexandria Foundation (the "HAF"), of a decision by the Circuit Court for the City of Alexandria (the "Circuit Court") sustaining the demurrers of Vowell, LLC ("Vowell"), the City of Alexandria, the City Council of the City of Alexandria (the "City Council"), and the Alexandria Board of Architectural Review (the "BAR"). The demurrers were filed in response to HAF's Petition challenging the legislative decisions of the City Council to uphold the BAR's approvals of Vowell's applications for a certificate of appropriateness and a permit to demolish. These applications proposed changes to 619 South Lee Street in the City's Old and Historic Alexandria District.

STATEMENT OF FACTS

Vowell owns the property located at 619 South Lee Street (the "Vowell Property") in the City of Alexandria's Old and Historic District (the "District"). Joint Appendix ("JA") 2, 4. Because the Vowell Property is in the District, Vowell is prohibited from making certain alterations or demolitions to it without first obtaining a certificate of appropriateness or a permit to demolish from the BAR. The requirements for the issuance of a certificate of appropriateness and a permit to demolish are codified in

Alexandria Zoning Ordinance ("Zoning Ordinance") Sections 10-103(A) and 10-103(B), respectively.

In 2018, Vowell applied to the BAR for the issuance of a certificate of appropriateness and a permit to demolish. Vowell's certificate of appropriateness application sought permission to construct, among other things, additions to the main home on the Vowell Property. JA 33 – 34. Vowell's permit to demolish application requested, in relevant part, permission to demolish a curved hyphen wall on the west end of the home. *Id.*

On December 19, 2018 the BAR held a public hearing on Vowell's applications. JA 7. HAF and others raised arguments in opposition to the applications.[1] *Id*. During this hearing, the BAR noted that the home on the Vowell Property was being beautifully restored and preserved, that any additions were subservient to the home and easily removable, and that while there were some concerns with demolishing the curved wall, it was generally supported by the BAR. JA 33. The BAR ultimately decided, however, to defer the case for restudy. JA 7.

[1] HAF is a not-for-profit corporation located approximately 1,500 feet from the Vowell Property. JA 3. HAF has no legal or equitable interest in the Vowell Property.

The BAR held a second hearing on February 6, 2019. At this hearing the BAR reviewed Vowell's applications in accordance with the approval factors listed in Sections 10-105(A) and 10-105(B) of the Zoning Ordinance. The BAR also considered an analysis of these criteria as contained in a City Staff Report. The BAR ultimately approved the issuance of both the certificate of appropriateness and the permit to demolish. JA 7. After the hearing, HAF and others appealed to the City Council pursuant to Section 10-107(A) of the Zoning Ordinance. JA 7.

On May 14, 2019 the City Council held a public hearing on HAF's appeal. JA 7 – 8. During this hearing, the City Council reviewed a new City Staff Report which incorporated by reference the original Staff Report from the BAR hearings. JA 7 - 8, 30 – 48, 103 - 111. When combined, these Staff Reports contained extensive analyses of Vowell's applications in light of the approval factors listed in Sections 10-105(A) and 10-105(B) of the Zoning Ordinance. *Id.* After a lengthy public hearing, the City Council voted to affirm the BAR's approvals for the reasons stated in the City's Staff Reports. JA 7 – 8.

HAF appealed the City Council's decisions to the Circuit Court. This was done pursuant to Section 10-107(B) of the Zoning Ordinance. JA 4. HAF alleged that the City Council's approvals were contrary to law, abuses

of discretion, and arbitrary. JA 8. Specifically, HAF argued that the City Council erred by failing to consider the existence of an open-space easement on the Vowell Property, and by taking the position that only the standards contained within Article X of the Zoning Ordinance controlled its decisions regarding the issuance of certificates of appropriateness and permits to demolish. JA 14.

The City Council, the City of Alexandria, the BAR, and Vowell all filed demurrers to HAF's Petition. These demurrers argued: (1) that the HAF lacked standing to appeal the City Council's decisions because it was not an "aggrieved" party pursuant to Section 10-107(B) of the Zoning Ordinance, and (2) that the City Council correctly decided to not analyze the Open Space Land Act (the "OSLA") (Code of Virginia §10.1-1700 et seq.) when approving Vowell's applications.

On October 23, 2019 the Circuit Court sustained the demurrers. JA 258. The Circuit Court first established that the Section 10-107(B) of the Zoning Ordinance required HAF to show that it was aggrieved by the City Council's decisions to have standing to appeal. JA 258. Using this analytical framework, the Court ruled that the Petition failed to plead facts showing that HAF was "aggrieved", and therefore it lacked standing to challenge the City Council's decisions. *Id.* The Circuit Court further held

that Sections 10-105(A) and 10-105(B) of the Zoning Ordinance did not require the City Council to consider the OSLA when evaluating applications for a certificate of appropriateness or a permit to demolish. JA 259. Finally, the Circuit Court held that the legislative decisions of the City Council were, at the very least, "fairly debatable". JA 260. Given this final ruling, the Circuit Court denied HAF's *ore tenus* request for leave to amend. JA 260 – 261.

AUTHORITIES AND ARGUMENT

A. The Standard of Review is *De Novo*.

This matter comes before this Court on HAF's appeal of the Circuit Court's decision to sustain the demurrers. Because these issues involve questions of law, this Court reviews the Circuit Court's decisions *de novo*. *See Glazebrook v. Bd. of Supervisors*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003).

A demurrer tests the legal sufficiency of a pleading. *See Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 131, 575 S.E.2d 858, 861 (2003). When ruling on a demurrer, the court accepts the truth of all properly pleaded material facts and construes all reasonable factual inferences in favor of the nonmoving party. *See id.* 265 Va. at 131-32, 575

S.E.2d at 861. To withstand a demurrer, "a pleading must be made with 'sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.'" *Hubbard v. Dresser, Inc.*, 271 Va. 117, 123, 624 S.E.2d 1, 4, (2006).

B. The Circuit Court Correctly Held that HAF Lacked Standing to Appeal the City Council's Decisions.

i. HAF is not "Aggrieved".

A plaintiff must have a legal interest in a controversy in order to bring a lawsuit. *See e.g. Howell v. McAuliffe*, 292 Va. 320, 353-54, 788 S.E.2d 706, 725 – 726 (2016) (Mims, J., dissenting). Standing ensures that, "the person who asserts a position has a substantial legal right to do so and that his rights will be affected by the disposition of the case." *Cupp v. Board of Supr's of Fairfax County*, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984).

A third-party that challenges a land use decision must be "aggrieved" in order to have standing. *Virginia Beach Beautification Com'n v. Board of Zoning Appeals of Virginia Beach*, 231 Va. 415, 419 – 20, 344 S.E.2d 899, 902 – 903 (1986); *Friends of the Rappahannock v. Caroline County Bd. of Sup'rs*, 286 Va. 38, 48 - 49, 743 S.E.2d 132, 137 (2013). In *Virginia Beach Beautification Commission*, this Court discussed the circumstances that must be present for a third-party to be aggrieved by a land use decision.

Beautification Com'n, 231 Va. at 419 - 20, 344 S.E.2d at 902 - 903. That case involved a non-stock corporation, the Beautification Commission, formed for the purpose of keeping Virginia Beach "beautiful." *Id.* at 418, 344 S.E.2d at 902. The Commission did not own property in Virginia Beach, nor did it pay taxes to the City. *Id.* Despite seemingly having a mere subjective interest in Virginia Beach, the Beautification Commission appealed the Board of Zoning Appeals' decision to grant a setback variance to the circuit court. *Id.* at 415, 344 S.E.2d at 900. The circuit court eventually determined that the Beautification Commission lacked standing because it was not "aggrieved" by the Board's decision.

On appeal to this Court, the question presented was whether the Beautification Commission, as a third-party who did not own land or pay taxes in the City, was an "aggrieved" person who could appeal the Board's land use decision to the local trial court. *Id.* at 415, 344 S.E.2d at 900. The answer to that question was no. This Court held that a third-party is aggrieved if it has an, "immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest." *Id*. at 419, 344 S.E.2d at 902. Moreover, a third-party is not aggrieved if it is merely advancing a "perceived public right" that is shared by those who are "similarly situated." *Id*. As applied to the Beautification Commission, this Court concluded that

it was not aggrieved because no substantial property interest was damaged by the variance in question, and because it neither "own[ed] nor occup[ied] real property within or in close proximity" to the subject property. *Id.* at 420, 344 S.E.2d at 903. Thus, the Beautification Commission's purported mission of keeping Virginia Beach "beautiful" was not a sufficient interest to give it legal standing to challenge the Board's decision.

This Court revisited the aggrieved person standard in *Friends of the Rappahannock v. Caroline County Board of Supervisors*, 286 Va. 38, 743 S.E.2d 132 (2013). There, a conservation group and neighboring landowners challenged Caroline County's issuance of a special use permit for the development of a sand and gravel mining operation bordering the Rappahannock River. *Friends*, 286 Va. at 42 - 43, 743 S.E.2d at 133 - 134. The complainants advanced a number of perceived interests that would be affected by the issuance of a permit. *Id.* at 42-43, 743 S.E.2d at 133 – 134. These interests included the inability to hunt, aesthetic and environmental concerns like dust, recreational use of the river, and the general loss of quiet enjoyment of their properties. *Id.* Like *Beautification Commission*, the primary question presented was whether the individual complainants were "aggrieved" and had standing to challenge the special use permit. *Id.* at 44.

This Court took the opportunity to clarify that the aggrieved person standard is a two-step framework. *Id.* at 48-49, 743 S.E.2d at 137. First, the complainant must show that he owns or occupies, "'real property within or in close proximity to the property that is the subject of' the land use determination, thus establishing…'a direct, immediate, pecuniary, and substantial interest in the decision.'" *Id.* at 48 (citing to *Beautification Commission*, 231 Va. at 420, 344 S.E.2d at 902 - 903). Second, the complainant must allege a "particularized harm to '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 – 49, 743 S.E.2d at 137 (citation omitted). Applying this to the complainants in *Friends*, this Court held that they lacked standing under the second step of the framework. *Friends*, 286 Va. at 49, 743 S.E.2d at 137. This Court explained that the complainants' allegations were conclusory and speculative as to how the gravel extraction site would cause an imposition or burden on a personal or real property right different from the general public. *Id.*, 743 S.E.2d at 138. Consequently, this Court affirmed the trial court's decision to dismiss the complainants' lawsuit for a failure to establish standing.

As in *Beautification Commission* and *Friends*, Section 10-107(B) of the Zoning Ordinance only grants third parties the right to appeal to the Circuit Court if they are "aggrieved" by the City Council's decision. *See* ALEX. ZONING ORD. §10-107(B). Specifically, the ordinance provides that "[a]ny 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)

The Circuit Court was correct in sustaining the demurrers because HAF cannot demonstrate that it was aggrieved by the City Council's decisions to approve the certificate of appropriateness and the permit to demolish. Assuming without conceding that HAF satisfies the proximity step of the *Friends* framework, HAF cannot show that the City Council's decisions caused it to suffer some particularized harm to a personal or property right, or that the City Council's decisions imposed some burden or obligation upon it that is different than those shared by the public generally.

The basis upon which HAF asserted standing in its Petition to the Circuit Court was that it is "vitally interested in the proper administration of the OSLA". JA 3. This "vital interest" purportedly stems from the fact that HAF has "granted an easement on its property pursuant to the provisions of the OSLA." JA 3. Significantly, HAF is not alleging that it holds an interest

in the open-space easement on the Vowell Property, but that it holds an interest in another, unrelated, open-space easement. As in *Beautification Commission* where the Beautification Commission's desire to keep Virginia Beach "beautiful" was not a burden or obligation different from that shared by the public, HAF's purported desire for the City Council to apply the OSLA correctly is not a burden or obligation that is different from that shared by the public generally. All residents of Alexandria, as well as all residents of the Commonwealth of Virginia for that matter, share an interest in the proper application of a duly enacted law like the OSLA. To accept HAF's argument would be to confer standing upon every person in the Commonwealth, or at the very least, upon every person holding an interest in an open-space easement.[2] Such a drastic expansion of standing would nullify the requirements that have been carefully constructed by this Court.

Next, HAF argues (for the very first time in its Opening Brief) that it has a particularized harm because its primary purpose is to preserve, protect and restore structures and sites of historic or architectural interest in the City of Alexandria. Opening Brief 19. This mission is similar to that of the Friends of the Rappahannock organization, which this Court described

[2] Amici Preservation Virginia, et al., indicate in their Brief that in 2016 the Virginia Outdoors Foundation alone reported that it "had reached nearly 800,000 easement protected areas." Preservation Virginia et al. Brief at 12.

as being a "non-profit organization committed to the preservation of the Rappahannock River." *Friends*, 286 Va. at 42, 743 S.E.2d at 133. Likewise, HAF's mission is similar to that of the Beautification Commission, whose stated goal was "to help make and keep Virginia Beach one of the most beautiful cities in the state.'" *Virginia Beach Beautification Com'n*, 231 Va. at 418, 344 S.E.2d at 902. The significance of these similarities, of course, is that this Court declined to find that either the Friends of the Rappahannock or the Beautification Commission had standing in their cases. This Court must find the same for HAF.

This Court must also decline to extend standing to HAF based purely upon its mission because to do so would be to arguably grant HAF automatic standing in every land use case involving the District. This would expand standing dramatically and effectively negate this Court's requirement that appellants demonstrate a "particularized harm." Such a decision might even arguably extend standing to national organizations with no presence or interest in Virginia, other than general concerns about public issues like scenic and historical preservation. Such an extension would be in direct contravention of this Court's holdings in *Beautification Commission* and *Friends*.

Finally, HAF argues that it is aggrieved because the District imposes different burdens and confers different rights to those who reside inside the District. Indeed, HAF explains that it is aggrieved because the District imposes "strict architectural controls" on its property. Since it is subject to those controls, HAF asserts that it has rights different from the general public; namely, the right to appeal decisions of the City Council. *See* Opening Brief 18.

This argument has no basis in law. Zoning regulations by their very nature impose burdens, with every zoning district in the City of Alexandria featuring some degree of restriction on the use of real property. Zoning restrictions vary from zone to zone. HAF's logic, if accepted, would dictate that every property owner in the City of Alexandria would have automatic standing to appeal any land use decision within that person's zone, so long as the regulatory burdens were different from other zones. To extend standing to general regulatory burdens would render the concept of standing meaningless.

HAF's argument is also deficient because it assumes, without supporting that assumption, that the many residents of the District are somehow distinct from the "general public". While this Court has not defined the term "general public," it did hold in *Beautification Commission*

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*.” *Virginia Beach Beautification Com'n*, 231 Va. at 419, 344 S.E.2d at 902 (emphasis added). Here, the many residents of the District are “similarly situated” to HAF.

ii. Section 10-107(B) of the Zoning Ordinance does not Afford “By-Right” Circuit Court Standing to Those that Appealed from the BAR to the City Council.

In an effort to avoid an aggrieved standard that it cannot meet, HAF argues that Section 10-107(B) of the Zoning Ordinance confers “by-right” circuit court standing to anyone that participated in the first level of appeal from the BAR to the City Council. Opening Brief 12 – 16. The language governing these distinct levels of appeal shows that HAF’s position is incorrect.

Section 10-107(A)(2) of the Zoning Ordinance authorizes appeals from the BAR to the City Council. It requires only the submission of a petition signed by the City Manager, or by at least twenty-five persons owning real estate in the District, to perfect an appeal. In contrast, Section 10-107(B) of the Zoning Ordinance, which authorizes appeals from the City Council to the Circuit Court, requires that a person seeking review must be

"*aggrieved* by a final decision of the city council" (emphasis added). These two standards are intentionally very different.

It is fundamental in the law that effect should be given to a legislative body's intent as evidenced by the plain meaning of its statutory language. *David v. David*, 287 Va. 231, 237, 754 S.E.2d 285, 289 (2014). Moreover, courts are required to "presume that the legislature chose, with care, the specific words of [a] statute". *Wal-Mart Stores East, LP v. State Corporation Commission*, 844 S.E.2d 676, 683 (Va., 2020). It is further widely recognized that the "term 'aggrieved' has settled meaning in Virginia when it becomes necessary to determine who is a proper party to seek relief from an adverse decision." *Board of Sup'rs of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 268 Va. 441, 449 - 450, 604 S.E.2d 7, 11 (2004) (citing to *Beautification Comm'n*, 231 Va. at 419 – 420, 344 S.E.2d at 902 – 03). As discussed above, this "settled meaning" requires:

> The petitioner 'must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest.' ... [I]t 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. The 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 the petitioner different from that suffered by the public generally.

Board of Sup'rs of Fairfax, 268 Va. at 449–50, 604 S.E.2d at 11.

Given these precepts, it is clear that the City Council deliberately chose to include the term "aggrieved", as well as its "settled meaning", in Section 10-107(B) of the Zoning Ordinance. In doing so, the City Council did not furnish "by-right" standing to any resident of the District that appealed from the BAR to the City Council. Instead, the City Council established a procedure whereby any group of individuals from the District could appeal to the City Council, but only those individuals who were truly aggrieved could appeal to the Circuit Court. This procedure is consistent with this Court's precedent in *Friends* and *Beautification Commission* which requires litigants to have a particularized harm or a burden different from the general public in order to have standing in the trial court.

Finally, it is well-established that a statute should not be read in such a manner that will make a portion of it useless, repetitious, or absurd. *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984). On the contrary, a statute should be read so as to give reasonable effect to every word. *Id.* HAF's argument concerning by-right standing improperly invites this Court to ignore the existence of the word "aggrieved" in Section 10-107(B) of the Zoning Ordinance. This is perhaps best seen in HAF's Opening Brief when it quotes the statute at length, emphasizes the phrases

"any of the petitioners" and "shall have the right to appeal", but then conspicuously fails to emphasize the word "aggrieved". Opening Brief 14. Given that every word must be given meaning, the Circuit Court properly rejected a similar invitation from the HAF to ignore the word "aggrieved", pointing out that the word "has to have some significance." JA 236.

Because HAF lacks standing in this case, the judgment of the Circuit Court must be upheld.

C. The Circuit Court Correctly Ruled that the City Council did not have to Apply the OSLA when Evaluating Vowell's Applications for a Certificate of Appropriateness and a Permit to Demolish.

i. The OSLA is not Listed as a Factor to be Considered in Sections 10-105(A) or 10-105(B) of the Zoning Ordinance.

HAF alleges that the City Council's approvals of the certificate of appropriateness and the permit to demolish were contrary to law because the City Council failed to apply the OSLA when approving them. Opening Brief 22. HAF's argument lacks merit.

The factors that the City Council is required to consider when reviewing applications for a certificate of appropriateness and a permit to demolish are enumerated in Sections 10-105(A) and 10-105(B) of the Zoning Ordinance, respectively. Indeed, these are the only factors that the

City Council is authorized to consider when reviewing such applications. *See* Section 10-105(A) of the Zoning Ordinance ("the board of architectural review or the city council on appeal shall consider the following features and factors in passing upon the appropriateness of the proposed construction, reconstruction, alteration or restoration of buildings or structures"); *see* Section 10-105(B) of the Zoning Ordinance ("The board of architectural review or the city council on appeal shall consider any or all of the following criteria in determining whether or not to grant a permit to move, remove, capsulate or demolish in whole or in part a building or structure within the [District].").

Critically absent from these factors is any requirement that the City Council consider the existence of an open-space easement or otherwise apply the OSLA. On this basis alone it is clear that the City Council's decision was correct.

ii. Supremacy of Law Principles are Inapplicable because the OSLA and Sections 10-105(A) and 10-105(B) of the Zoning Ordinance are not Inconsistent with Each Other.

In the absence of an express requirement, HAF asserts that supremacy of law principles required the City Council to apply the OSLA. In support of this position, HAF cites to Code of Virginia §§1-248 and 10.1-1705, as well as to Section 1-200(F) of the Zoning Ordinance. Opening

Brief 21 – 22. According to HAF, the pertinent language of Code of Virginia §1-248 is: "[a]ny ordinance, resolution, bylaw, rule, regulation, or order of any governing body…*shall not be inconsistent with* the Constitution and laws of the United States or of the Commonwealth." (Emphasis added). Opening Brief 21. From Code of Virginia §10.1-1705 (the OSLA) HAF cites to the following language: "Insofar as the provisions of this chapter *are inconsistent with the provisions of any other law*, the provisions of this chapter shall be controlling." (Emphasis added). Opening Brief 21. Finally, from Section 1-200(F) of the Zoning Ordinance, HAF highlights:

> 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 [the zoning] ordinance, the provision of such state or federal statute or other city ordinance or regulation shall govern.

Opening Brief 21 (emphasis added).

HAF's supremacy of law argument is flawed because the OSLA and Sections 10-105(A) and 10-105(B) of the Zoning Ordinance are not inconsistent with each other. These two distinct bodies of law serve entirely different functions, and a person can simultaneously meet the requirements of both.

Article X of the Zoning Ordinance seeks to preserve the historical quality of the District through the adoption of standards that are applied any

time certain changes are proposed to a property. *See* ALEX. ZONING ORD. § 10-101 *et seq*. The OSLA, on the other hand, is a statewide statute that authorizes public bodies to acquire interests in real property in order to preserve open-space land. VA. CODE §10.1-1701. When the BAR or the City Council issues a certificate of appropriateness or a permit to demolish, it is not stating that an applicant now has permission to violate an open-space easement that might exist on the applicant's property. Instead, the BAR or the City Council is merely stating that the proposed construction, reconstruction, alteration, demolition, or restoration is compatible with the District and with the District's adopted standards. Any approval to make changes to the open-space easement would still have to come from the easement holder. The converse is also true. If the holder of an open-space easement approves changes to that open-space easement, it does not mean that the proposed changes comply with the historical standards of the District. Such a finding would still need to come from the BAR or the City Council in accordance with Sections 10-105(A) and 10-105(B) of the Zoning Ordinance. Because the two bodies of law are not inconsistent, supremacy of law principles do not apply.

Importantly, HAF's voluntarily attached exhibits to the Petition demonstrate not only that there is a separate process for making changes

to an open-space easement, but that Vowell was actively engaged in that process.[3] First, the deed establishing the open-space easement on the Vowell Property expressly states that the prior written approval of the Historic Landmarks Commission (now the Virginia Department of Historic Resources or "VDHR") must be obtained in order to make alterations to the Vowell Property. JA 19. Second, a series of letters from HAF itself to the City Council show that Vowell was actively seeking this separate approval. Specifically, in an April 2, 2019 letter, HAF wrote, "it appears that *in their effort to secure approval for their development plans from the VDHR* [Vowell] has agreed with that agency to impose upon the property three modern 'Pavilions'". JA 64. Similarly, in a May 10, 2019 letter, HAF wrote "[a]t the December 19, 2019 BAR hearing, several members of the BAR…explained that their positive views were based in part *on the fact that VDHR had approved the plans*." JA 87 (emphasis added). HAF further acknowledged VDHR's role in handling the easement review process by adding, "[b]oth HAF and Preservation Virginia directly challenged the

[3] The Circuit Court and this Honorable Court can consider these exhibits pursuant to this Court's precedent in *Eagle Harbor, L.L.C. v. Isle of Wight County*, 271 Va. 603, 620, 628 S.E.2d 298, 307 (2006) ("the [Appellants] not only made allegations of fact in their pleading, but enlarged the scope of facts before the trial court by incorporation of the Dolecki Report and the County Report. As noted earlier, the trial court was entitled to consider these documents in its determination of the demurrer. *See City of Chesapeake*, 268 Va. at 633, 604 S.E.2d. at 426").

propriety of relying [on] a *VDHR easement approval* as the basis for a BAR decision". JA 87 (emphasis added). Finally, HAF expressly acknowledged that the BAR's and VDHR's processes were mutually exclusive when it wrote:

> The letter from VDHR to [City Manager] Mark Jinks confirms the accuracy of the statements made by HAF and Preservation Virginia and expressly advise you that the *VDHR's easement review is based on different considerations. It should not be taken as opinion or endorsement that the plans they have approved under the easement review meet the City standards.* "Any approvals or disapprovals made by DHR…should have no determinative bearing on decisions made by the BAR…"

JA 87 (emphasis added). These passages are highlighted not to show that VDHR had issued an approval, but only to illustrate that the open-space easement approval process is distinct from the certificate of appropriateness and permit to demolish approval process, and that there is no conflict between the two bodies of law such that supremacy of law arguments become applicable.

iii. The City Council was not Required to Make the Findings Described in Code of Virginia §10.1-1704.

HAF further alleges error on the basis that the City Council failed to make certain findings as required by the OSLA. Opening Brief 22 - 25. Specifically, HAF alleges that the City Council was required to make the following findings as described in Code of Virginia §10.1-1704: (1) that the

conversion or diversion of open-space land is essential to the orderly development of the City, (2) that this conversion or diversion is in accordance with the comprehensive plan of the City, and (3) that there is substitute "other real property" which is sufficiently similar. Opening Brief 23.

Despite not holding any interest in the open-space easement in question, HAF incorrectly assumes that the City Council was required to make these findings. HAF assumes this because the City Council is the governing body of the locality where the open-space easement is located. It cannot be true, however, that the locality where an open-space easement is located is automatically the entity responsible for making the findings described in Code of Virginia §10.1-1704. This is because Code of Virginia §10.1-1704 assigns such obligations to the "public body", but then intentionally, and repeatedly, alternates between the terms "public body" and "locality" throughout the statute. If the General Assembly had wanted the locality to automatically make the findings, it would have said so. Additionally, if localities are automatically the entities that are required to make these findings, they would routinely find themselves evaluating the acceptability and value of "substituted other real property" in situations in which they held no interest in a given open-space easement. Certainly, the

public body holding that interest would prefer to make such a determination. In the present case that public body would be the VDHR.

The BAR and the City Council were also not required to make these findings because they do not satisfy the definition of a "public body" under the OSLA. According to Code of Virginia §10.1-1700, "public body" means:

> [A]ny state agency having authority to acquire land for a public use, or any county or municipality, any park authority, any public recreational facilities authority, any soil and water conservation district, any community development authority…or the Virginia Recreational Facilities Authority.

The BAR is none of these things. Instead, it is precisely what its title says it is – a board of review. Additionally, the BAR is "a creature of statute possessing only those powers expressly conferred upon it", *Norton v. City of Danville*, 268 Va. 402, 407, 602 S.E.2d 126, 129 (2004). Pursuant to Section 10-104 of the Zoning Ordinance, these powers are limited to "administer[ing] the Old and Historic Alexandria District".

As to the City Council, it must be remembered that this matter was initiated at the BAR level, and that the City Council's involvement was purely as a body of review. *See* Section 10-107(A)(3) of the Zoning Ordinance ("The same standards shall be applied by the council as are established for the board of architectural review. The council may affirm, reverse or modify the decision of the board, in whole or in part."). As such,

the City Council was not sitting as a "municipality" as envisioned by Code of Virginia §10.1-1700. It would simply not make sense for the OSLA to be inapplicable at the BAR stage (because the BAR is not a public body), but then for it to instantly apply the moment that the matter was appealed to the City Council. Thus, because the BAR is not a "public body" required to make the findings described in Code of Virginia § 10.1-1704(A), the City Council was also not required to make them when acting in its reviewing or appellate role.

Finally, the City Council was not required to make the findings described in Code of Virginia §10.1-1704(A) because land was not being "converted" or "diverted" so as to trigger its requirements. By approving Vowell's applications for a certificate of appropriateness and a permit to demolish, the City Council was merely stating that Vowell's proposed changes complied with the District's adopted standards. Doing so does not constitute a conversion or a diversion of land. HAF has also not explained how land was being "converted" or "diverted" when the deed creating the open-space land in question expressly allowed for "changes, alterations, additions, or improvements" with the "prior written approval of [the VDHR]". JA 19.

For the reasons stated above, the City Council was not required to consider the OSLA when evaluating Vowell's applications for a certificate of appropriateness and a permit to demolish.

D. If this Court Finds that HAF has Standing, but that the OSLA does not Apply, the Demurrers Must be Sustained because the Circuit Court Found that the City Council's Legislative Decisions were "Fairly Debatable".

A city council acting on a certificate of appropriateness performs a legislative function. *Byrne v. City of Alexandria*, 842 S.E.2d 409, 413 (Va., 2020) (citation omitted). Such actions are presumed correct. *Byrne*, 842 S.E.2d at 413. A legislative action is reasonable if the matter in issue is "fairly debatable." *Id.* An issue is fairly debatable "when the 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 legislative decision must be upheld. *Bd. of Supervisors v. Stickley*, 263 Va. 1, 11, 556 S.E.2d 748, 754 (2002) (emphasis added).

In *Eagle Harbor*, *L.L.C. v. Isle of Wight County*, 271 Va. 603, 628 S.E.2d 298 (2006), two developers challenged a County ordinance that was passed in order to increase water and sewer connection fees. As part of their complaint, the developers incorporated a study that was conducted

by the County, as well as a study that was conducted by their own expert. *Id.* at 609, 628 S.E2d at 301. The County filed a demurrer to the complaint, which the trial court sustained. *Id.* On review, this Court held that the complaint, along with the developers' report, alleged sufficient facts to constitute probative evidence of unreasonableness for purposes of a demurrer. *Id.* at 618, 628 S.E2d at 306. By incorporating the County's report into their pleadings, however, the developers had also presented facts showing the reasonableness of the County's decision. *Id.* Given these circumstances, this Court found that there was sufficient evidence in the pleadings to demonstrate to the circuit court that the County's legislative decision was fairly debatable in nature, and therefore had to be sustained. *Id.* In reaching this conclusion, this Court noted that the developers "chose to put these facts before the trial court through the structure of their filing and cannot now complain regarding the trial court's consideration of them." *Id.* at 620, 628 S.E2d at 307. Furthermore, this Court held that "the [d]evelopers presented both sides of the evidentiary issue through their filing which was adequate for the trial court to determine the 2001 ordinances were "fairly debatable" and resolve the issue on demurrer." *Id.*

The procedural posture before the Court at present is similar to that of *Eagle Harbor*. In its Petition to the Circuit Court, HAF voluntarily attached the following documents as exhibits: (1) the open-space easement, (2) the December 19, 2018 Action Docket for the BAR, (3) the February 6, 2019 BAR Staff Report, (4) a letter from HAF to the City Council dated April 2, 2019, (5) a letter from HAF to the City Council dated May 10, 2019, (6) the May 14, 2019 City Council Staff Report, and (7) a May 10, 2019 letter from Vaughn Restoration Masonry, Inc. to the City Council. JA 5, 7, 8, 12. Additionally, HAF conceded in its Petition that "the City Council affirmed the decision of the BAR vis-à-vis the Applications for the reasons stated in the City Staff Report." JA 8. By voluntary attaching these exhibits, and by conceding that the City Council relied on the City Staff Report when reaching its decisions, HAF, like the developers in *Eagle Harbor*, presented both sides of the evidentiary issue for the Circuit Court to consider when ruling on the demurrers. The Circuit Court took advantage of this opportunity and found that it could not be "seriously argued that this matter was not fairly debatable." JA 260.[4]

[4] Amici A.E. Dick Howard et al. assign error to the Circuit Court on the basis that a court should not "choke off serious litigation in the cradle, denying litigants a day in court to present their evidence." Brief of A.E. Dick Howard et al. at 13. They further argue that a court cannot consider the merits of the case at the demurrer stage. *Id.* at 32. Neither position is

It is extremely significant that in its Petition for Appeal to this Court, HAF assigned error to the Circuit Court's "fairly debatable" finding only on the basis that the Circuit Court failed to find that the OSLA applied to the City Council's decisions. HAF did not assign error to the Circuit Court's holding on any other basis, including its evaluation of the attached exhibits. Therefore, if this Court holds that HAF has standing, but that the OSLA does not apply, this case should not be remanded for further proceedings. This is because the Circuit Court has already ruled upon the ultimate issue in the case, namely that the City Council's legislative decisions were fairly debatable, and HAF has not otherwise challenged that decision. Any erroneous decision as to standing, then, would constitute harmless error.

E. HAF's Arguments Concerning the Landmark Status of the Vowell Property are Outside of the Assignments of Error and Must not be Considered.

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correct in this case. Through the structuring of their filing, and through their concession that the City Council approved the applications for the reasons stated in the City's Staff Report, HAF presented both sides of the evidentiary issue for the Circuit Court to rule on at the demurrer stage.

These amici also unfairly accuse the Circuit Court of not examining the pertinent documents. *Id.* at 30. This assumption is improperly based solely on the Circuit Court's use of the word "volume" at one point; an assumption that is directly contradicted by the Circuit Court when it says "A lot has been filed and so I've read it…" JA 209.

It is fundamental that "[o]nly assignments of error assigned in the petition for appeal will be noticed by [this] Court." Rules of Supreme Court of Virginia Rule 5:17(C)(1)(i). In *Forest Lakes Community Association, Inc. v. United Land Corporation of America*, 293 Va. 113, 122–23, 795 S.E.2d 875, 880 (2017), this Court held that an assignment of error is not a mere procedural hurdle that an appellant must clear in order to proceed with the merits of an appeal. Instead, it held that assignments of error are the core of an appeal and that with an assignment of error, "an appellant should 'lay his finger' on the alleged misjudgment of the court below." *Id.* (citations omitted). Indeed, a properly aimed assignment of error must "point out" the targeted error, and not simply take "a shot into the flock" of issues that cluster around the litigation. *Id.* (citations omitted). Like a well-crafted pleading, assignments of error set the analytical boundaries for the arguments on appeal. *Id.*

This Court has further held that assignments of error serve the important function of identifying "those errors made by a circuit court with reasonable certainty so that [this] Court and opposing counsel can consider the points on which an appellant seeks a reversal of a judgment." *Friedline v. Commonwealth*, 265 Va. 273, 278, 576 S.E.2d 491, 494 (2003) (citations omitted). Assignments of error further "enable an appellee to prepare an

effective brief in opposition to the granting of an appeal, to determine which portions of the trial record should be included in the parties' joint appendix, and to determine whether any cross-error should be assigned." *Id.*

Despite the circumscribing effect of assignments of error, HAF repeatedly argues beyond them in its Opening Brief. For example, when the Circuit Court sustained the demurrers in this case, it expressly held that a landmark designation of the Vowell Property, whether one existed or not, was not a factor that the City Council had to consider when evaluating Vowell's applications. JA 259. Despite being aware of this holding, HAF chose not to specify it the "Assignments of Error" section of its Petition for Appeal to this Court. HAF further chose not to address the ruling in any way in the "Argument" section of its Petition for Appeal. This is in stark contrast, of course, to HAF's objection to the Circuit Court's rulings on the OSLA, which HAF identified with specificity in the "Assignments of Error" section and discussed at length under the "Argument" heading. Now, despite not mentioning the landmark designation issue at all it in its Petition for Appeal to this Court, HAF argues in its Opening Brief that the City and the Circuit Court were "equally in error" by not considering it. Opening Brief 28. Because HAF's arguments extend beyond the assignments of error, they must not be considered.

Assuming this Court considers HAF's argument concerning landmark designation, though, HAF's challenge to the Circuit Court's ruling on the role of a landmark designation must fail. In fact, HAF's challenge to the Circuit Court's ruling is surprising given its own concessions on the point during oral argument. Specifically, HAF, through its counsel, stated that, "in terms of the Landmarks Act, I'll agree with my colleague, the language on the Landmarks Act is not stated as a mandate, it is stated as cities are encouraged to do this." JA 227. And, when the Circuit Court asked whether the "… body of the act itself say[s] that it does not have a bearing on the decisions of the local governing bodies?", HAF responded, "Judge, I'm agreeing with you." JA 229 – 230. Finally, when the Circuit Court stated "[t]o me that seems like it's in black and white that the landmark historic designation is not a factor that the City was required at all to consider", HAF responded "I agree it's not the same as the [OSLA] which has specific mandates."

The law is clear that a landmark designation is not a factor that the City Council had to consider when approving Vowell's applications. This is because Code of Virginia §10.1-2204 – the statute authorizing the designations of historic landmarks – expressly provides that the designation of an area as a historic landmark "*shall not regulate the action*

of local governments… with regard to the designated property." Code of Virginia §10.1-2204(B) (emphasis added). This non-regulating nature of a landmark designation makes sense, given that the express goal of the program is a permissive one that seeks only to "*encourage local governments…*to take the designated property's historic…significance into account in their…decision making." *Id.* (emphasis added).

This Court has affirmed that landmark designations do not have a bearing on local land use decisions. In *Virginia Historic Landmarks Commission v. Board of Sup'rs of Louisa County*, 217 Va. 468, 230 S.E.2d 449 (1976), this Court held: "The [Virginia Historic Landmarks] Commission's identification of an area of land…as a historical district was a hortatory act, and was not couched in terms of command. It did not determine any property rights of the landowners in the district". *Id.* at 473, 230 S.E.2d at 452. Critically, this Court further held that:

> [A]t most the resolution of the Commission does no more than *encourage* the county to adopt rules and regulations which the Commission might recommend. These [sic] is no compulsion upon the Board of Supervisors of Louisa to enact any regulation respecting the identified Green Springs Historic District. *Neither is there any compulsion upon the Board to give the resolution any weight in its consideration of zoning, rezoning or other matters affecting the land in the district.*

Id. at 474, 230 S.E.2d at 453 (emphasis added).

Considering the foregoing, there is no legal basis for Petitioners' argument that the City Council was required to consider the Property's alleged landmark designation as part of its review.

F. HAF's Argument that the City Council Considered Criteria Outside of the City's Ordinances when Issuing the Permit to Demolish is Outside of the Assignments of Error and Must not be Considered.

HAF contends that the City Council's issuance of the permit to demolish was improper because it "employed a consideration for demolition that is not authorized by the Zoning Ordinance." Opening Brief 28. Specifically, HAF objects to the City Council's finding that "the existing curved hyphen was a later feature that was not well considered when it was originally constructed." Opening Brief 28.

As with the landmark designation issue, this matter was not raised in HAF's Petition for Appeal to this Court. Consequently, it has not been identified as an assignment of error and it must not be considered.

To the extent that a response is required, though, HAF's argument should be rejected because the Zoning Ordinance clearly allows the City Council to consider whether a given feature was "well considered when it was originally constructed". In the present case, the BAR found that the hyphen wall was not "well considered", partially because it created

maintenance issues that were harming the dwelling (the "primary historic resource") on the Vowell Property. JA 11, 110. Certainly such a consideration is relevant to the following inquiries posed by Section 10-105(B) of the Zoning Ordinance: (1) "Is the…structure of such architectural or historical interest that its moving, removing, capsulating or razing would be to the detriment of the public interest?", and (2) "Would retention of the…structure help preserve and protect an historic place or area of historic interest in the city?".

For the foregoing reasons, HAF's argument that the City Council considered criteria that were not permitted under the Zoning Ordinance lacks merit.

G. The Issue of Whether the City Council Relied on Non-Public Material as Part of its Public Hearing is Outside of the Assignments of Error and Must not be Considered.

HAF alleges that the Circuit Court erred by not addressing its claim that the City Council considered a document that was not part of the public record during its May 14, 2019 public hearing. JA 29. Once again, this argument did not appear anywhere in HAF's Petition for Appeal to this Court, and it has not been identified as an assignment of error. Consequently, it must not be considered. This is especially true given that

Rule 5:17(C)(1) of the Rules of Supreme Court of Virginia expressly requires that:

> If [an] error relates to failure of the tribunal or count below to rule on any issue, error must be assigned to such failure to rule, providing an exact reference to the page(s) of the record where the issue was preserved in the tribunal below, and specifying the opportunity that was provided to the tribunal or court to rule on the issue(s).

To the extent that a response is required, though, the record makes it clear that the Circuit Court did consider HAF's claim. First, during oral argument, the Circuit Court asked counsel for the City Council to address HAF's "procedural due process concern in that the [C]ity [C]ouncil considered a letter that was submitted close in time to when the hearing was that wasn't provided to the [P]etitioners." JA 216. Second, the document in question – a letter from Vaughan Restoration Masonry, Inc. to the City Council – was voluntarily attached to HAF's original filing as Exhibit 7. JA 12, 116. Because it was so attached, the Circuit Court had both HAF's allegation of a process violation, as well as the document forming the basis for that alleged process violation, before it when ruling on the demurrers. That the Circuit Court still held that the City Council's decisions were "fairly debatable" shows that the Circuit Court did not find HAF's argument persuasive. Finally, if HAF had wanted an express ruling on this issue, it had both ample opportunity and an obligation to request one.

H. The Issue of Whether the Circuit Court Abused its Discretion in Dismissing the Petition without Leave to Amend is Outside of the Assignments of Error and Must not be Considered.

Finally, HAF alleges that the Circuit Court abused its discretion by dismissing its Petition without providing leave to amend. Opening Brief 29. Once again, this argument did not appear anywhere in HAF's Petition for Appeal to this Court, and it has not been identified as an assignment of error. Consequently, it must not be considered.

To the extent that a response is required, though, HAF's argument lacks merit. As primary support for its argument, HAF cites to *Friends* and posits that "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.'" Opening Brief 28. HAF's use of *Friends* is unavailing, however. This is because in *Friends*, unlike in the present case, there had not been a finding by the trial court that the legislative decision being challenged was "fairly debatable". JA 271. Once a circuit court makes such a determination, any attempt at amendment becomes futile. Given the Circuit Court's fairly debatable finding, the Circuit Court's denial of HAF's request for leave to amend was appropriate.

CONCLUSION

For the foregoing reasons, the City of Alexandria, the City Council of the City of Alexandria, and the Alexandria Board of Architectural Review respectfully request that this Court affirm the orders of the Circuit Court sustaining the demurrers and dismissing the case with prejudice.

Respectfully Submitted,

CITY OF ALEXANDRIA,

CITY COUNCIL OF THE CITY OF ALEXANDRIA, ALEXANDRIA BOARD OF ARCHITECTURAL REVIEW

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CERTIFICATE

I hereby certify that on the 10th day of December 2020, pursuant to Rules 5:26, electronic copies of the Brief of Appellee 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 Appellees was served, via email upon:

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I further certify that the foregoing does not exceed 50 pages or 8,750 words and that I have otherwise complied with Rule 5:26 of the Rules of Supreme Court of Virginia.

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