In The

Supreme Court of Virginia

Record No. 200195

HISTORIC ALEXANDRIA FOUNDATION,

***Appellant*,**

v.

CITY OF ALEXANDRIA and VOWELL, LLC,

***Appellees*.**

REPLY BRIEF *AMICI CURIAE* OF HUGO L. BLACK LAW CLERKS IN SUPPORT OF APPELLANT

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REPLY BRIEF *AMICI CURIAE* OF HUGO L. BLACK LAW CLERKS IN SUPPORT OF APPELLANT

I. Standing

A. HAF's Statutory Standing

1. Appellees recognize that, pursuant to authority conferred in Va. Code § 15.2-2306(A)(3), the Alexandria Code in § 10-107 defines a small category of persons who can challenge in court decisions of the City Council appealed from the Board of Architectural Review (BAR). To seek review, a party must:

—Own property in the City's Old and Historic District.

—Have joined with at least 24 other such property owners to appeal within 14 days the BAR decision to the Council.

—Within 30 days filed a petition in the Circuit Court to review the Council decision.

—Be aggrieved by the Council decision.

HAF methodically satisfied every one of those requirements, which establish an eligibility unlike ordinary declaratory-judgment actions.

Appellees contend, however, that "aggrieved" (a requirement not listed in the enabling statute, Va. Code § 15.2-2306(A)(3)) does not carry the ordinary meaning of simply a party who lost in the Council, but instead imposes additional requirements beyond ordinary standing. City Br. 7, 9, 11; Vowell Br. 5, 9, 10. They cite decisions under various statutes that included the word "aggrieved."

E.g., Vowell Br. 13, citing *Virginia Beach Beautification Comm'n* v. *Board of Zoning Appeals*, 231 Va. 415, 344 S.E.2d 899 (1986) (non-property-owner).

2. But this Court earlier in this decade explained that the word "aggrieved" adds nothing to the ordinarily rules of standing. In *Friends of the Rappahannock* v. *Caroline County Bd.*, 286 Va. 38, 45, 743 S.E.2d 132, 135 (2013), this Court addressed once and for all "the contention that an 'aggrieved person' standard provides for a more restrictive basis for standing than the requirement of a justiciable interest." To that proposition it concluded, "We disagree." The touchstone for standing, a justiciable interest, this Court explained, was stated in *Cupp* v. *Board of Supervisors*, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984): "whether he has a sufficient interest in the subject matter of the case so that the parties will be actual adversaries and the issues will be fully and faithfully developed." To that inquiry, *Friends* held, the word "aggrieved" neither added nor subtracted—"a distinction without a difference." 286 Va. at 48, 743 S.E.2d at 137.

3. On its facts, as the City acknowledges, City Br. 10, the heart of the *Friends* ruling was that the harm alleged by the plaintiffs there was entirely speculative, because any harm from a proposed gravel operation could be mitigated or eliminated by enforcement of existing regulatory requirements. See 286 Va. at 49-50, 743 S.E.2d at 137-38. There is nothing speculative here. Once the wall of the Hugo Black house is torn down, it is gone. Once the super-sized

modern additions are built covering the garden, the destruction is permanent. For the City to suggest that these massive buildings once constructed would be "easily removable," City Br. 3, is risible.

4. Appellees nowhere address the obvious question: if as they contend HAF—a nearby property-owner with directly-affected core functions, in the protected district, having fully complied with the Code's requirements—cannot obtain judicial review, then who can? Virginia law directs that "parties shall have the right to appeal to the circuit court for review." Va. Code § 15.2-2306(A)(3). The City Code implements that direction by specifying requirements that HAF plainly met. Appellees' contortion of "aggrieved" in City Code § 10-107(B) would leave no one ever able to challenge a ruling of the City Council in court except, presumably, an owner who did not succeed in obtaining permission to build or demolish. That would leave § 10-107(B) in nearly every imaginable case a meaningless provision. Surely that was not what its authors intended.

B. Particularized Harm

1. Under *Friends*, by being a nearby property owner, HAF has "thus establish[ed] that it has a direct, immediate, pecuniary, and substantial interest in the decision." 286 Va. at 48, 743 S.E.2d at 137, quoting *Virginia Beach*, 231 Va. at 420, 344 S.E. 2d at 902-03. Additionally, *Friends* requires "facts demonstrating 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." 286 Va. at 48, 743 S.E.2d at 137 (emphases supplied; internal quotation marks omitted).

Ignoring the multiple harms that HAF plainly and abundantly alleged, Appellees instead scatter wild hyperbole, such as that to allow HAF to sue "would be to confer standing upon every person in the Commonwealth." City Br. 12. They pretend that HAF is merely a bystander, a member of the general public. *Cf.* City Br. 12 ("not a burden or obligation that is different from that shared by the public generally"). But HAF is anything but that. HAF is both a nearby property owner in Alexandria's Old and Historic District; a participant who complied with all the prerequisites to appeal designated in Alexandria Code § 10-107; a participant in the program of the Open-Space Land Act, Va. Code § 10.1-1700 to -1705; and a body incorporated and recognized with the sole purpose to represent Old Town residents and safeguard preservation of landmark historic structures like the Hugo L. Black house.

2. It is the blackest of black-letter law that on demurrer a pleading is to be read expansively to give the benefit of every doubt to the pleader, recognizing all that is alleged explicitly or implicitly. Appellees acknowledge that a complaint avers "those facts that are expressly alleged, impliedly alleged, and which can be inferred from the facts alleged." Vowell Br. 6, quoting *Harris* v. *Kreutzer*, 271 Va.

188, 196, 624 S.E.2d 24, 28 (2006). "The court accepts the truth of all properly pleaded material facts and construes all reasonable factual inferences in favor of the nonmoving party." City Br. 6, citing *Fuste* v. *Riverside Healthcare Ass'n*, 265 Va. 127, 131, 575 S.E.2d 858, 861 (2003) ("All reasonable factual inferences fairly and justly drawn from the facts alleged must be considered in aid of the pleading" (internal quotation marks omitted)).

Having acknowledged the law, however, Appellees then ignore nearly every one of HAF's explicit allegations that establish standing, and eschew all favorable inferences. Yet the record shows that HAF alleged not just one but multiple facts that have been recognized singly or collectively as sufficient, *e.g.*:

—That it owns historic property in a protected historic zone. J.A. 3.

—That it stands to suffer diminution of its own property values if prime historic buildings and spaces are not preserved. J.A. 3-4, 166.

—That it participates in OSLA to ensure the preservation of strict architectural criteria and rare open space in the protected zone. J.A. 3, 232, 239.

—That failure to preserve a historic building and open space will harm the investment of it and other nearby property owners who purchased in reliance on preservation. J.A. 3-4, 166.

—That it is a quasi-official body, uniquely authorized to set criteria for and award designations of qualifying historic properties. J.A. 3-5, 7, 49.

—That its entire reason for existence is confined to preservation of historic sites in the Old and Historic District, promoting interest in Alexandria's history, educating as to the character of the Old and Historic District, and preserving the District's open space. J.A. 49, 232-33, 239.

3. The situation of HAF is even farther removed from that of the general public in that HAF resembles a quasi-official body that exists to maintain the regime of historic preservation that Alexandria and Virginia established in the 1960s in order to arrest the destruction of Alexandria's uniquely historic early town. HAF, for example, sets standards and controls the criteria for marking of very old houses like the Hugo L. Black house and also holds historic-preservation easements on many Old Town properties. In such respects it can claim the same standing that this Court recognized in *Board of Supervisors of Fairfax County* v. *Board of Zoning Appeals*, 268 Va. 441, 604 S.E.2d 7 (2004), cited City Br. 16, as a body one of whose functions is to go to court where necessary to safeguard the legally established preservation zone.

C. Parallel Cases

Allegations in almost identical words were held sufficient to establish standing of property owners in a historic district of Richmond in *Taylor* v. *Northam*. No. CL 20-3339 (Aug. 3, 2020), holding that "Plaintiffs' interest in their property values and the structuring of their neighborhood provide them direct and

pecuniary interests in the outcome of this litigation, separate from that of the general public." The court cited in particular this Court's holding in *Philip Morris USA Inc.* v. *Chesapeake Bay Found., Inc.*, 273 Va. 564, 643 S.E.2d 219 (2007), that even for persons who merely use an affected area, it is sufficient for standing that "the aesthetic and recreational values of the area will be affected by the challenged activity." For another example, *Payne* v. *City of Charlottesville*, 97 Va. Cir. 51, 61 (2017), recognized that "historical, or similar losses constitute harm that is relevant in determining standing."

The City ignores all these decisions. Vowell concedes that "aesthetic or recreational values" can confer standing, but mistakenly argues that HAF "fails to allege impact upon a property right owned by it, or even how its heightened historical interest will be harmed by approval of the applications," Vowell Br. 16—even though HAF plainly stated that it was a property owner seeking to protect "aesthetic and economic benefit." J.A. 166; see also J.A. 7, 49-51.

D. Leave To Amend

Appellees want to ignore the Circuit Court's reversible denial of leave to amend as insufficiently embraced in the assignments of error to this Court. Yet the first assignment of error, complaining of the Circuit Court's decision on standing, specifically assigns the record page where HAF complained "that the Court dismissed this matter with prejudice which denied the Plaintiffs the chance to cure

any defects in alleging standing." J.A. 277. See Petition for Appeal at 4. HAF further cited in its petition "dismissal of the Petition of Appeal on demurrer without leave to amend." *Id.* at 11. There is not the slightest doubt that HAF assigned as error the Circuit Court's entire ruling on standing, which was: "I'm going to sustain the demurrer without leave to amend." J.A. 271.

Nothing in precedent or common sense—only their reluctance to have to defend an indefensible ruling—supports Appellees' argument that that comprehensive single sentence should have been broken apart and numbered as multiple assignments of error. Even if that were so, in recognition of Rule 1:8 this Court certainly is empowered to ignore such an imaginary defect.

II. Open-Space Land Act

A. Noncompliance With Section 1704

The City tries to shrink the Open-Space Land Act, an Act of the General Assembly, as if it concerned only an easement between private parties that the City can ignore. But the OSLA is a statute of the Commonwealth, with detailed provisions as to land use, not some private arrangement. By its statutory terms, the OSLA removed the property interest granted by Justice Black in 1969 from the power of Alexandria to "convert[] or divert[] from open-space land use" except under specified conditions (such as substitution of equivalent land) that obviously are not present here. Va. Code § 10.1-1704. Section 1704 also requires a finding

that "the conversion or diversion is . . . (a) essential to the orderly development and growth of the locality and (b) in accordance with the official comprehensive plan for the locality." It is undisputed that no such finding was (or could have been) made.

Appellees decline to address this dispositive failure head-on. Instead, the City tries to excuse it by arguing that the City Council was not a body empowered to make such an offer and findings. City Br. 23-27. But whether it was or not, the undisputed and controlling fact is that these requirements of § 1704 were never met—not by the City, not by anyone else. Therefore the statutory bar to "conver[sion] or diver[sion] from open-space land use" is plainly in effect.

B. Contorting Dillon's Rule

The new owners try to escape the clear terms of the OSLA statute by revising Dillon's Rule of statutory construction—which of course *limits* the discretion of local governments—instead to give a locality free rein to ignore a governing state statute. Vowell Br. 21-22. They argue that "[u]nder Dillon's Rule of strict construction, BAR and City Council were not empowered to consider the Open-Space Land Act." Vowell Br. 21.

That is preposterous. State law is supreme. Va. Code § 1-248. It is "fundamental that local ordinances must conform to and not be in conflict with the public policy of the State as embodied in its statutes." *Blanton* v. *Amelia County*,

261 Va. 55, 63, 540 S.E.2d 869, 873 (2001) (internal quotation marks omitted). And Virginia has a strong "public policy favoring land conservation and preservation of historic sites and buildings in the Commonwealth as expressed in the Constitution of Virginia." *United States* v. *Blackman*, 270 Va. 68, 81, 613 S.E.2d 442, 448 (2005)—a case that repeatedly cites, as a leading example, the Open-Space Land Act. See 270 Va. at 78-81, 613 S.E.2d at 447-48.

C. Contradictory Representations

Although they do not deny the noncompliance with the requirements of Va. Code § 10-1704, the owners in their brief inject an irrelevant and incorrect factual assertion—one contrary to their prior representations and the record, and not endorsed by the City—concerning terms of the easement. They assert that "VDHR [Virginia Department of Historic Resources], the grantee, provided its approval of the same work proposed in the Applications prior to the BAR hearing." Vowell Br. 20; see also *id.* 3, 4, 6, 18, 19, 22.

Such a statement is surprising, because their attorney last year emphatically told the Circuit Court just the opposite. Indeed, he complained about the continuing difficulty of obtaining approval:

> [T]hey have worked very closely with the easement holder, the VDHR, for the past five years to come up with a plan that satisfies all easement requirements and widely accepted preservation standards while still allowing them to bring their property to life as a family house. Working with the VDHR has not been an easy

> process and the project as proposed in the application is a long way off.

J.A. 255. They reiterated that same acknowledgment to this Court earlier this year, referring to "*Vowell's ongoing efforts* to secure the separate permission needed from DHR." Vowell Br. in Opp., Feb. 23, 2020, at 13-14 (emphasis supplied).

The City, by contrast, repeatedly disowns this new, albeit irrelevant, representation, and points out that references to correspondence with the state authorities, see J.A. 34-35, 87, 106, are "*not to show that VDHR had issued an approval*, but only to illustrate that the easement approval process is distinct from the certificate of appropriateness and permit to demolish approval process." City Br. 23 (emphasis supplied). The City explains that they simply "show that Vowell was actively seeking this separate approval." *Id.* at 22.

What matters of course, is not easement terms, but that the findings and offer mandated by § 1704 were never made. Yet for the owners now suddenly and misleadingly to represent that they had some sort of approval is troubling.

III. Adjudication on Demurrer

1. "The trial court is not permitted on demurrer to evaluate and decide the merits of the allegations set forth . . . , but only may determine whether the factual allegations . . . are sufficient to state a cause of action." *Harris* v. *Kreutzer*, 271 Va. at 196, 624 S.E.2d at 28, quoting *Riverview Farm Assocs. Va. Gen. Pshp.* v. *Board of Supervisors*, 259 Va. 419, 528 S.E.2d 99 (2000). Appellees are unable

to avoid the glaring problem that here the Circuit Court did precisely what was not permitted. They argue that the holding was correct on the merits. But the merits were not before the court to decide on demurrer. See cases at *Amici* Br. 31-33.

2. Moreover, even if a merits decision were permissible, the Circuit Court got it wrong. Appellees argue that the issues were "fairly debatable," pointing to what the court called "the volume of information that was before the city council when it made its decision." J.A. 260. That is not the test. Over and over again this Court has held that "fairly debatable" cannot save a ruling that disregarded applicable statutory provisions, and therefore was arbitrary and unlawful. Decisions that ignore applicable statutes are not "fairly debatable." They are contrary to law. *E.g.*, Va. Code § 15.2-2306(A)(3); *Newberry Station Homeowners Ass'n* v. *Board of Supervisors*, 285 Va. 604, 621, 740 S.E.2d 548, 557 (2013); cases discussed at *Amici* Br. 22-25.

In this case HAF alleged plain violations of Alexandria Code § 10-105, both as to the enumerated factors that the City Council failed to consider, including statutory requirements, and the unauthorized factors on which it relied. J.A. 9-14, 277. These errors include some that on their face are indefensible. For example, the Council concluded that a rare historic curved wall should be torn down because allegedly it was not "well considered" when erected two centuries ago. But second-guessing the taste or skill of ancient architects is not a factor embraced

in § 10-105. The City's half-hearted excuse is that it seems somehow "relevant." City Br. 36.

For another example, the City incorrectly says that "this Court has affirmed that landmark designations do not have a bearing in local land use decisions." City Br. 34. But the Virginia Code says otherwise. In § 10.1-2204 it provides that in applying provisions like Alexandria Code § 10-105 local governments should "take . . . into account in their . . . decision making" the designation of an official landmark, even if that fact alone may not be dispositive. The early case on which the City relies construed a wholly different provision, since superseded, in a previous version of the statute, and held that the state Commission was not empowered to order a county to establish a historic district. *Virginia Historic Landmarks Comm'n* v. *Board of Supervisors*, 217 Va. 468, 230 S.E.2d 449 (1976). In the present century, this Court has emphasized that local decisions must conform to "public policy of the State" including Virginia's "public policy favoring land conservation and preservation of historic sites and buildings." *Blanton*, 261 Va. at 63, 540 S.E. 2d at 873; *United States* v. *Blackman*, 270 Va. at 81, 613 S.E.2d at 448.

3. Nor, as HAF pointed out, did the court have before it anything resembling the entire record. See J.A. 88-89 (complaining in Circuit Court of extensive unexplained "Missing Materials" in the staff report). Hence, cases in

which no violations of Virginia and City statutes were alleged and "fairly debatable" was the only issue, and in which there was a complete record, are inapplicable. *E.g.*, *Eagle Harbor, L.L.C.* v. *Isle of Wight County*, 271 Va. 603, 628 S.E.2d 298 (2006) (declaratory judgment on water and sewer fees); *Byrne* v. *City of Alexandria*, 298 Va. 694, 842 S.E.2d 409 (2020) (grant of oyer—concededly never entered here, Vowell Br. 5—had produced entire legislative record).

4. Appellees do not deny that these issues, all of them arising under § 10-105 of the Alexandria Code, were preserved. Nevertheless they pretend that these were not included in the assignments of error in this Court. City Br. 30-38; Vowell Br. 7-8. But the second assignment of error specifically recites:

> The Circuit Court erred in . . . finding that the City Council properly applied Alexandria Zoning Ordinance 10-105 in making its decision.

Petition for Appeal 4; J.A. 278. Moreover, that assignment included citation to specific pages of the trial record in which HAF complained that the Council had "relied upon factors not contained within the Alex. Zon. Ord. § 10-105(B)," and had in rejecting landmark status "refused to consider anything outside the bare standards enumerated in Alex. Zon. Ord. § 10-105(A)(2)," J.A. 10-11. See also Petition for Appeal at 19 ("City Council acted in a manner inconsistent with the requirements of Virginia State Law *and failed to appropriately apply Alexandria Zoning Ordinance 10-105"*) (emphasis supplied).

IV. "The Rest Is Silence."

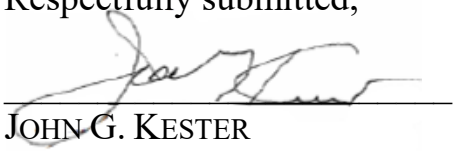
—*Hamlet*, act V, scene 2

Appellees continue, as the cliché has it, to play *Hamlet* while omitting the Prince of Denmark. Not once do they acknowledge that the officially designated Alexandria landmark hanging in the balance is the history-laden Justice Hugo L. Black house and garden. And they have no response to the several briefs filed in this Court explaining why in particular Justice Black's gift to history obviously meets the core criteria of Alexandria Code § 10-105 and the historic-preservation guarantees of the Virginia Code and Constitution. No doubt the Judge would chuckle that his adversaries dare not speak his name.

CONCLUSION

For the reasons stated, the judgment of the Circuit Court should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE AND COMPLIANCE

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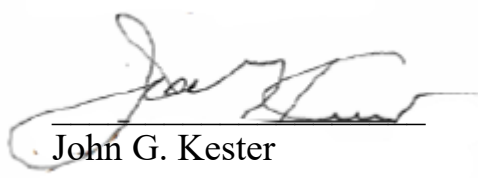
I further certify that I have caused an electronic copy of the foregoing amicus reply brief to be filed with the Clerk of this Court via VACES. I also certify that the foregoing reply brief does not exceed fifteen pages in length and that it complies with Rules 5:6, 5:26 and 5:30 of the Rules of this Court.



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