In The

Supreme Court of Virginia

Record No. 200195

HISTORIC ALEXANDRIA FOUNDATION,

***Appellant*,**

v.

CITY OF ALEXANDRIA and VOWELL, LLC,

***Appellees*.**

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

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INTEREST OF THE *AMICI*

A. E. Dick Howard is the Warner-Booker Distinguished Professor of Law at the University of Virginia. He was Executive Director of the commission that drafted Virginia's Constitution, has served as counsel to the General Assembly and adviser to Governors of Virginia, and is the author of the two-volume *Commentaries on the Constitution of Virginia* (1974).

George L. Saunders, Jr., a native of Alabama, practiced law for many years with the firm of Sidley & Austin in Chicago, Illinois. In 1972 he was chosen to

represent Justice Black's former law clerks at a special session of the Bar in the courtroom of the United State Supreme Court to honor the memory of the late Associate Justice Hugo L. Black.[1]

John G. Kester practiced law with the firm of Williams & Connolly LLP in Washington, D.C. After Justice Black introduced him to the Old and Historic District of Alexandria, he purchased a house there where he has resided for more than fifty years. He has served on that city's Board of Zoning Appeals and its Commission on Growth and Development, as well as on the boards of the Old Town Civic Association and the Historic Alexandria Foundation.

Amici all were law clerks to the late Justice Black in the early 1960s. Each of us vividly recalls the formative experience of working on opinions with "the Judge" at his home in his study. We also remember the delight he took in his house, garden and tennis court, and also his concern for the preservation of historic Alexandria. We have no doubt that, if he were here, he would urge this Court to prevent destruction of his legacy in Alexandria from a decision taken in disregard of Virginia law. His memory obliges us to assist this Court, as best we can, and to remind, as the Judge would have, of the potentially devastating impact of failure to obey guarantees enacted in law.

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[1] *In Memoriam: Honorable Hugo Lafayette Black,* PROCEEDINGS OF THE BAR AND OFFICERS OF THE SUPREME COURT OF THE UNITED STATES 62-66 (1972).

We feel a debt also to the memory of our colleague the late George C. Freeman, Jr., a fellow Justice Black law clerk and for many years a distinguished member of the Richmond bar. Were he still living, he would certainly join us here. George was proud to have been draftsman and a leader in obtaining the General Assembly's enactment in 1966 of two pioneer historic-preservation laws, the Virginia Historic Resources Act, 1966 Va. Acts ch. 632, as amended, Va. Code §§ 10.1-2200 *et seq*., and the Open-Space Land Act, 1966 Va. Acts ch. 461, Va. Code §§ 10.1-1700 to 10.1-1705. It was George also, acting as the Judge's attorney, who drafted the conveyance that brought the Judge's beloved Alexandria property under the protection of the Open-Space Land Act.

STATEMENT OF THE CASE

A. Facts

This case concerns the Eighteenth-Century Hugo L. Black house and garden in Alexandria, and a proposal irrevocably to change it. This was the Justice's home from 1939 until his death in 1971. Built about 1790, the house is one of the oldest and best known in Alexandria's Old and Historic District. Along with its large garden, it was designated in 1969 by the Virginia Historic Landmarks Commission as a Virginia Historic Landmark. J.A. 91. That same year Justice Black acted to protect this unique site by executing the second historic-preservation conveyance (and the first in Alexandria) granted under Virginia's

then-new Open- Space Land Act, Va. Code §§ 10.1-1700 to 10.1-1705. Finding that the property qualified under the new statutes, the state authorities expressed their "unanimous and unreserved opinion" that the house manifested not only "architectural distinction" but also "ample historical quality," and also that "the space around the house is an essential element in a neighborhood." J.A. 57. The house is described and pictured in leading works on Alexandria architecture, see illustrations at J.A. 82-83, and by itself has been the subject of an entire book.[2]

The house is historically significant not only for its own antiquity and place in Alexandria's history, but even more so as the residence of one of the dozen most notable Justices in the history of the United States Supreme Court, a Justice who wrote opinions there, played tennis with his clerks, and met there with colleagues and Presidents. In 1986 he was commemorated on a U.S. postage stamp as part of its "Great Americans" series. His life has been the subject of several biographies, and his jurisprudence is analyzed in countless books and law review articles. After his passing, an extraordinary gathering of the Supreme Court Bar, assembled at the Court, declared in a resolution that "This man is meant for the ages," and that "No

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[2] RUTH LINCOLN KAYE, THE HISTORY OF 619 SOUTH LEE STREET (1987). See also, *e.g.*, DEERING DAVIS, *et al.*, ALEXANDRIA HOUSES 1750-1830, 112-114 (1946); WILLIAM FRANCIS SMITH AND T. MICHAEL MILLER, A SEAPORT SAGA, 87, 186 (1987); GAY MONTAGUE MOORE, SEAPORT IN VIRGINIA 222-24 (1949); KAREN G. HARVEY AND ROSS STANSFIELD, ALEXANDRIA: A PICTORIAL HISTORY 40 (1977).

future Supreme Court Justice" would be able to ignore Justice Black's "myriad brilliant insights, learned analyses, yes, and fervent faiths . . . ."[3]

In 1969 the Justice conveyed an easement to the Commonwealth under the Open-Space Land Act, making the garden "open-space land" under Va. Code § 10.1-1704. J.A. 17. The Justice's family sold the property in 1973. Until now, subsequent owners have continued to honor the restrictions of the Old and Historic District and the building prohibition of the Open-Space statute.

More recently, the Black property was acquired by Nigel and Laura Morris through their personal company Vowell, LLC, which along with the City Council is appellee here. The new owners proposed to demolish one particularly rare curved wall of the house, J.A. 10-11, 36, 60, 72, and to cover the garden lot with three multi-story structures, of modern design, to attach to the 1790 residence. This would nearly double the house's size from 8,156 square feet to 14,371, and cover much of the protected open space. J.A. 69.

Such alterations, both the demolition and the construction, required approval of the Board of Architectural Review of the Old and Historic District (BAR), which was established with detailed mandated duties and criteria in Alexandria City Code § 10-105(A)(2). The new owners' corporation applied to the Board,

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[3] IN MEMORIAM, *supra* n. 1.

which, overruling the contrary recommendation of its staff and objections from HAF and many others, approved the proposal by a vote of 4-2.

As authorized by the City Code, an unprecedented 125 property owners of the Old and Historic District appealed the BAR's decision to the City Council for review, which the Code required be conducted *de novo* applying the same standards as the BAR. Code § 10-107(A).

One of those appellant property owners was Historic Alexandria Foundation (HAF), appellant in this Court. HAF was incorporated in 1954 "to preserve, protect and restore structures and sites of historic and 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." J.A. 49. In performing its mission to protect and promote historic preservation in Alexandria, HAF has awarded grants of thousands of dollars to researchers and celebrated excellence in historic preservation. HAF is the owner of a nearby Old Town property, the 1785 school endowed by George Washington. It is also the holder of historic-preservation easements on several other houses in Old Town. HAF's perhaps best known function is to supervise and award the coveted individually-numbered brass plaques that attest to the authenticity of Alexandria's oldest houses. J.A. 53. The Hugo L. Black house, as the Justice restored it, was

one of the first to be awarded such a plaque, and has displayed it for many decades. J.A. 4-5.

At a public hearing of the Council, HAF and dozens of others objected to the proposal, as well as to the Council's reliance on submissions that had been withheld from the public docket. The Council, however, affirmed the BAR's ruling. It relied on a staff report that concededly "did not perform extensive work on the life and work of Justice Black." J.A. 41. The report also reasoned that the destruction of the garden was not irrevocable because the multi-story additions to be built there could always be torn down some day to allow the garden to be recreated. J.A. 38, 108.[4] Dismissing objections that the modern-style new construction would not match the 1790 house's federal design, and would be scattered across the garden like buildings on a campus, contrary to the arrangement of Lee Street and the rest of Old Town, the report was satisfied that '[t]he siting and design of the proposed additions will physically and visually distinguish themselves from the original structure." J.A. 43.

The Council explicitly prohibited any reference to, or consideration of, the property's longstanding status as a Historic Landmark under Virginia Code § 10.1-

[4] All parties agree that the City Council adopted as its reasons the conclusions in the May 14, 2019, report of its staff, which mostly updated and summarized an earlier staff report to the BAR. See HAF petition, J.A. 7-8; City Br. Opp. 2-3; Vowell Br. Opp. 5.

2204. It also refused to consider the Virginia Open-Space Land Act, which prohibits the "conversion or diversion" of "open-space land . . . interest or right in which has been acquired under this chapter"—a description precisely fitting the Black property. Va. Code §10.1-1704.

B. Proceedings Below

Pursuant to Alexandria City Code §10-107(B), HAF and two other nearby property owners who had been appellants in the City Council appealed to the Circuit Court of the City of Alexandria. HAF alleged that the action of the City Council violated both the Alexandria City Code and Virginia statutes and that it also was arbitrary and denied due process of law. J.A. 1-112. The City and the new owners of the Black house demurred, arguing that HAF and the other property owners had not sufficiently alleged standing to complain and that the allegations were insufficient to establish any violation of law. They asked that the court dismiss the case. J.A. 139-42.

The Circuit Court granted both demurrers. In an oral ruling, it held that based on the allegations of the petition, HAF and the two other nearby property owners lacked standing to complain of the City Council action because they were not "aggrieved" persons under City Code § 10-107(B). The court reasoned that "I don't see anything that's alleged . . . particularized in such a way that the harm

they allege that they will sustain . . . is different than what would be suffered by other people who live in the historic district and the public at large." J.A. 231-32.

Counsel for HAF offered to amend the complaint if necessary to allege specifically, *e.g.*, the harm to unique values of property of owners in the neighborhood who had relied on and submitted to enforcement of the standards of Alexandria's Old and Historic District, and who also had relied on and participated in the programs established by the Virginia Open Space Land Act, Va. Code §10.1-1704. J.A. 238-41. But the court announced that

> This court finds that the term "aggrieved" requires that they suffer a harm that is particularized to them and different than that which would be suffered by the public at large, and in this case, based on the allegations in the complaint as set forth in paragraphs three, four, and five, accepting that they have met the first prong of what it is to be aggrieved, that is, . . . proximate location to the property[,] that they have failed to allege harm that would fit within the meaning of aggrieved,

J.A. 258-59, citing *Friends of the Rappahannock* v. *Caroline County Bd.*, 286 Va. 38, 743 S.E.2d 132 (2013), and *Virginia Beach Beautification Comm'n* v. *Board of Zoning Appeals*, 231 Va. 415, 344 S.E.2d 899 (1986).

Turning to the merits, the court acknowledged that HAF had alleged failure by the City Council meaningfully to apply specific criteria mandated in the City Code; that the Council had relied on unauthorized criteria instead; that it had based its ruling on evidence that had been withheld from the public; and that it had

explicitly refused to consider in any way the Virginia Historic Landmarks statute, Va. Code §10.1-2204, and the Virginia Open-Space Land Act, J.A. 259-60. Putting all that aside, the court held that the Virginia statutes were wholly irrelevant, and that all that mattered was whether the ultimate dispute was "fairly debatable." As to that, it noted that "we're talking hundreds of pages," J.A. 217, but instead of analyzing them, it ruled in a single sentence that

> clearly, based on the volume of information that was before the city council when it made its decision that it can't seriously be argued that this matter was not fairly debatable.

J.A. 260. Declaring its oral ruling to be its opinion in the case, the Circuit Court sustained the demurrers, denied leave to amend, and dismissed the case with prejudice. J.A. 259-60, 274. This Court awarded HAF this appeal.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in holding that the appellants lacked standing to bring this action. Preserved as stated in appellant's brief.

2. The Circuit Court erred in finding that the City Council did not have to consider the Open-Space Land Act in its review of the BAR's decision and properly applied Alexandria Code § 10-105. Preserved per appellant's brief.

STANDARDS OF REVIEW

Dismissal of a complaint on demurrer is reviewed *de novo* as a question of law. *Pendleton* v. *Newsome*, 290 Va. 162, 171, 772 S.E.2d 759, 763 (2016); *Dunn, McCormack, & MacPherson* v. *Connolly*, 281 Va. 553, 557, 708 S.E.2d 867, 869 (2011); *Friends of the Rappahannock* v. *Caroline County Board of Supervisors*,

286 Va. 38, 44, 743 S.E.2d 132, 135 (2013); *Harris* v. *Kreuzer*, 271 Va. 188, 196, 624 S.E.2d 24, 28 (2006). Denial of leave to amend is reviewed for abuse of discretion. *Kole* v. *City of Chesapeake*, 247 Va. 51, 57, 439 S.E.2d 405, 409 (1994).

Construction of constitutional and statutory provisions is reviewed *de novo*, *CVAS 2, LLC* v. *City of Fredericksburg*, 289 Va. 100, 108, 755 S.E.2d 912, 914 (2015), including mixed questions of law and fact. *Westgate at Williamsburg Condo. Ass'n* v. *Philip Richardson Co.*, 270 Va. 566, 574, 621 S.E. 2d 114, 118 (2005).

SUMMARY OF ARGUMENT

The heart of this case is revealed in what the appellees have strained not to mention. In its submission to this Court, the City Council fourteen times has referred to the house and garden at issue as "the SL Property," an antiseptic term it invented for this Court and is nowhere found in the record below. See City Br. Opp. 1-4, 7, 14. The owners have avoided naming the site at all. Vowell Br. Opp., *passim*. Similarly, both appellees have omitted any mention of the unique history of this house and garden. And they devote not a word to the famous Alexandria citizen whose ownership and imprint upon it for more than three decades made it an anchor of Alexandria's Old and Historic District, as well as an officially recognized Virginia Landmark.

That famous American and revered judge was of course the late Hugo L. Black, for thirty-four years Associate Justice of the Supreme Court of the United States. The new owners purchased his home with full notice of—and a price presumably reflecting—its landmark status and many statutory restrictions. Yet they have proposed to tear down part of his beloved Eighteenth-Century home, and with massive modern-style construction incongruous to the neighborhood, to obliterate its adjacent garden —the largest private garden remaining in Old Town Alexandria. Unprecedented opposition from Old Town's residents, many of them members of HAF, and protests from concerned individuals and historic-preservation organizations spanning Alexandria and Virginia, ultimately led to this litigation.

The Alexandria City Council, disregarding several provisions of the City's Code and rejecting Virginia statutes, authorized the demolition of part of one of the most historic homes in Alexandria, its defacement by enormous incompatible additions, and the permanent ruination of its legally-protected adjacent garden. The current City authorities failed to honor the legal protections for history that their predecessors had adopted in the Alexandria City Code to protect a unique property like the Hugo L. Black house and garden. And calling it none of their business, see J.A. 34, 107, they rebuked the additional protections mandated in Virginia statutes (which are also incorporated by reference into Alexandria Code

§ 1-200(F)), protections which Justice Black personally was one of the first in Virginia to embrace.

Facing this Court is not only the unfortunate failure of the Circuit Court seriously to examine and reverse those errors. Of even wider concern is its inexplicable departure from this Court's well-established jurisprudence that rejects attempts to choke off serious litigation in the cradle, denying litigants a day in court to present their evidence.

ARGUMENT

I. THE CIRCUIT COURT IMPROPERLY DISMISSED ON DEMURRER FOR LACK OF STANDING.

In dismissing with prejudice for lack of standing, and further denying leave to amend, the Circuit Court ignored multiple allegations of HAF as if they were not there, misapplying decisions of this Court.

A. The Circuit Court Misunderstood This Court's Standing Decisions.

1. "Particularized Harm" Was Overwhelmingly Alleged.

HAF, as authorized by the Alexandria Code, § 10-107(A), appealed the BAR ruling to the City Council, and from there to the Circuit Court as an "aggrieved" property owner authorized to sue by Code § 10-107(B). HAF's petition alleged that HAF was owner of nearby property in the Old and Historic District—the Alexandria Academy, endowed by George Washington in 1785 as a school for poor children. HAF further alleged that it was founded in 1954 with the

express purpose "to preserve, protect and restore structures and sites of historic or architectural interest in" Alexandria; "to preserve antiquities" there; "to foster and promote interest in Alexandria's historic heritage;" and to preserve "the dwindling amount of open space remaining in Old Town;" and that HAF was both the grantor and the holder of historic-protection easements authorized under the Open-Space Land Act. J.A. 3, 49-50. HAF conducts educational programs and devotes some of its endowment to grants for preservation of historic structures in Old Town Alexandria, and each year it makes awards to individuals who have particularly promoted those objectives. HAF is recognized by the city as the sole organization authorized to establish the criteria for, and to award, the coveted brass plaques displayed on the selected and limited portion of the houses in Alexandria that it judges to qualify for the designation as authentically antique and faithfully preserved. That designation has been displayed on the Eighteenth-Century Hugo L. Black house for many years. J.A. 4-5, 53. If the house were to be marred by the demolition and modern additions to double the size of the structure, it would no longer qualify as one of HAF's showcase authentic historic homes.

In short, for HAF the preservation of historic places of Old Town is not some hobby or sideline. It is the mission that brought HAF into being, what HAF is entirely about. Yet, remarkably, the Circuit Court commented as to HAF that "I don't see anything that's alleged . . . different than that what would be suffered by

other people who live in the historic district and the public at large." J.A. 231-32. And HAF is within the narrowly defined category that is statutorily granted the right to sue in Alexandria Code § 10-107(B).

The Court ruled that because the code provision used the word "aggrieved"—obviously meant to identify a person unhappy with the BAR decision—it excluded everyone who was not grievously personally harmed. That, presumably, would leave the appeal provision a dead letter for nearly anyone except an applicant who applied for a permit and lost.

Moreover, even under that unlikely construction, HAF was aggrieved even outside the specific authorization of the City Code. The court cited *Friends of the Rappahannock* v. *Caroline County Bd.*, 286 Va. 38, 743 S.E.2d 132 (2013), and *Virginia Beach Beautification Comm'n* v. *Board of Zoning Appeals*, 231 Va. 415, 344 S.E.2d 899 (1986). But the parties in those cases in no way resembled the situation of HAF.

Friends summarized a two-step general test to establish standing. First, a party that is a property owner, like HAF here, must establish close proximity to the property at issue, thereby establishing a substantial interest in the decision. 286 Va. at 48, 743 S.E.2d at 137. The Circuit Court acknowledged that HAF had satisfied that requirement, being in "a proximate location." J.A. 259.

The second step of *Friends* looked to a "particularized harm . . . different from that suffered by the public generally." 286 Va. at 49, 743 S.E.2d at 137, quoting in part *Virginia Marine Res. Comm'n* v. *Clark*, 281 Va. 679, 687, 709 S.E.2d 150, 155 (2013). In *Virginia Beach*, for example, the plaintiff was not a property owner, and could show no interest other than as a member of the general public. See 231 Va. at 418-20, 344 S.E.2d at 902-03.

The Circuit Court paid no attention to the responsibilities and activities of HAF as a principal guardian and promoter of Alexandria's historic sites, instead concluding without elaboration that "they have failed to allege harm that would fit within the meaning of aggrieved . . . discussed in the *Friends* decision . . . ." J.A. 259. But in addition to owning nearby historic property, HAF exists for the sole purpose of protecting historic sites in Old Town, and was authorized by the City Code to appeal to the City Council, Code § 10-107(A). If HAF could not as "aggrieved" exercise its right to appeal to the Circuit Court, Code § 10-107(B) would have little purpose.

This case profoundly differs from *Friends*. *Friends* concerned a proposed sand-and-gravel operation. This Court held that, because of the many regulations with which the operator would have to comply, any allegation of harm disruptive to others would be entirely speculative. See 286 Va. at 49, 743 S.E2d at 138 ("Although the individual complainants presented conclusory allegations as to

possible harms, the general objections pled by the individual complainants present no factual background upon which an inference can be drawn that Black Marsh's *particular* use of the property would produce such harms . . . .") (emphasis in original).

Here, by contrast, the harm to HAF if the demolition of the house and obliteration of the garden occur is incontrovertible. The "particularized harm" to HAF does not rest on speculation. The harm is imminent and would be irrevocable. See *Riverview Farm Assocs. Va. Gen. Pshp.* v. *Board of Supervisors*, 259 Va. 419, 427, 528 S.E.2d 99, 103-04 (2000).

The Circuit Court did not mention this Court's more recent standing decision in *Howell* v. *McAuliffe*, 292 Va. 320, 788 S.E.2d 706 (2016), in which this Court explained that "a litigant has standing if 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.'" 292 Va. at 332, 788 S.E.2d at 713, quoting in part *Cupp* v. *Board of Supervisors*, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984). HAF surely has more than demonstrated that it can be trusted to act as an "actual adversar[y]."

This Court also has recognized on several occasions that if an association owns property threatened by a proposed violation, it can also have enhanced standing based on the interest of its members. *Westlake Properties, Inc.* v.

Westlake Pointe Property Owners Ass'n, 273 Va. 107, 119-21, 639 S.E.2d 257, 264-65 (2007). Many members of HAF also are nearby property owners in the Old and Historic District, were objectors in the BAR, and were appellants to the City Council. See also *Friends of the Earth, Inc.* v. *Gaston Copper Recycling Co.*, 204 F.3d 149, 155-56 (4th Cir. 2000) (federal standing).

HAF speaks both for itself and as a voice for those other property owners in Old Town Alexandria. If HAF were held to lack a "particularized" concern in preserving this unique Alexandria landmark, historic house and garden, it would be difficult to imagine any other objector who would.

2. <u>The Circuit Court's Dismissal Conflicts With Rulings of Other Courts.</u>

The Circuit Court's inattention to the record and its incomplete analysis of this Court's standing law are entirely contrary to the holdings of other Circuit Courts, including recently the Circuit Court of the City of Richmond in *Taylor* v. *Northam*, No. CL 20-3339 (Aug. 3, 2020). That case like this one was brought by nearby property owners in a protected historic district to contest the proposed demolition of a legally protected landmark recognized under the Virginia Landmarks Act. In a carefully reasoned opinion overruling demurrers, the Richmond Circuit Court examined this Court's opinions, including *Cupp* and *Goldman* v. *Landsidle*, 262 Va. 364, 552 S.E.2d 67 (2001), and explained

> 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 those of the general public. Additionally, in *Philip Morris USA Inc.* v. *Chesapeake Bay Found., Inc*., 273 Va. 564, 643 S.E.2d 219 (2007), the Supreme Court found that plaintiffs adequately allege injury in fact when they aver that they used the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity. [Quotation marks omitted.]

Other Virginia courts have been no less emphatic. "[A]esthetic, artistic, recreational, historical, or similar losses constitute harm that is relevant in determining standing." *Payne* v. *City of Charlottesville*, 97 Va. Cir. 51, 61, (2017). "[A]esthetic and environmental well-being . . . are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection . . . ." *Chesapeake Bay Foundation, Inc.* v. *Commonwealth ex rel. Va. State Water Control Bd.*, 52 Va. App. 807, 822, 667 S.E.2d 844, 852 (2008), quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972).

B. The Circuit Court Erroneously Dismissed on Demurrer Without Leave To Amend.

1. Dismissal on Demurrer Based on Standing Allegations Is Not Favored.

"[I]t is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer," and "when it is drafted so that the defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer." *CaterCorp, Inc.* v. *Catering Concepts, Inc.*, 246 Va. 22,

24, 431 S.E.2d 277, 279 (1993), quoting in part *Alexander* v. *Kuykendall*, 192 Va. 8, 14-15, 63 S.E.2d 746, 749-50 (1951), and *Hunter* v. *Burroughs*, 123 Va. 113, 129, 96 S.E. 360, 365 (1918). "[T]he trial court errs in sustaining a demurrer if a bill of complaint, considered in the light most favorable to the plaintiff, states a cause of action." *W.S. Carnes, Inc.* v. *Board of Supervisors*, 252 Va. 377, 384, 478 S.E.2d 295, 300 (1996). *Cf.* also *Howell* v. *McAuliffe*, 292 Va. 320, 361, 788 S.E.2d 706, 730 (Mims, J. dissenting) ("It is Conceivable that Standing Could be Established upon a More Developed Record.").

2. <u>The Circuit Court Abused Its Discretion in Denying Leave To Amend.</u>

After the Circuit Court held the allegations of standing insufficient as a matter of law, HAF moved for leave to amend, J.A. 260, which the court denied summarily, J.A. 261, 274. HAF then further objected in writing "that the Court dismissed this matter with prejudice which denied the Plaintiffs the chance to cure any defects in alleging standing," which the court again denied. J.A. 277.

This Court's Rule 1:8 admonishes that "Leave to amend shall be liberally granted in furtherance of the ends of justice." This Court has held on many occasions that denial of leave to amend after dismissal on demurrer can be reversible abuse of discretion.

That is particularly pertinent when, as here, "nothing in the record suggests that the defendants would have been prejudiced" by allowing the

amendment. *Mortarino* v. *Consultant Engrg. Svces,. Inc.*, 251 Va. 289, 295-96, 467 S.E.2d 778, 782 (1996), quoting *Kole* v. C*ity of Chesapeake*, 247 Va. 51, 57, 439 S.E.2d 405, 409 (1994). *Accord*, *Peterson* v. *Castano*, 260 Va. 299, 302-03, 534 S.E.2d 736, 738-39 (2000) (abuse of discretion to deny leave to amend when required by justice and no prejudice to other party). See also *XL Specialty Ins. Co.* v. *Commonwealth Dept. of Treas.*, 47 Va. App. 424, 427, 624 S.E.2d 658, 664 (2006)("Where granting a motion for leave to amend would not prejudice the other party, an amendment should be allowed.").

Indeed, in *Friends*, in affirming dismissal, this Court took pains twice to point out that the plaintiffs there had "declined the opportunity to amend their pleadings," and "were given leave to amend but decided against amendment." 286 Va. at 44, 50, 743 S.E.2d at 134, 138.

Here the Circuit Court gave no explanation for its ruling, throwing HAF out of court with prejudice and no opportunity to cure. Exactly to the contrary is *Payne*, *supra*, which held, relying on this Court's precedents, that although property owners in one of their counts inadequately described a monument, nevertheless they would be allowed to amend "since it is a matter of pleading and notice, and the defect is one that is amenable to being cured" and it "does not prejudice the defendants to allow Plaintiffs to file an amended complaint." 97 Va. Cir. at *10.

II. THE CIRCUIT COURT ALLOWED NONCOMPLIANCE WITH STATUTORY MANDATES.

The Circuit Court allowed the local authorities to run roughshod over explicit requirements and prohibitions enacted in Virginia law and the City's own Code.

A. The Circuit Court Disregarded Requirements of the Alexandria Code.

The same chapter of the Alexandria Code that establishes the Old and Historic District also provides that permits to demolish or for construction may be granted only if they satisfy precisely enumerated criteria. Section 10-105 of the Code lists ten of these, and no others. This Court has explained in many decisions that in granting exceptions to land-use restrictions, city or county bodies must adhere to the standards enumerated in the authority granted them, or their actions become arbitrary, capricious and contrary to law. *Newberry Station Homeowners Ass'n* v. *Board of Supervisors*, 285 Va. 604, 621, 740 S.E.2d 548, 557 (2013).

The Circuit Court recognized that HAF had alleged that the City Council, like the BAR, had approved demolition of part of the house, and new construction obliterating the garden, without meaningfully considering some of the factors mandated in § 10-105 of the Code, and also had looked to other factors that the Code did not authorize, J.A. 214, including reliance on evidence improperly withheld from HAF and other objectors in violation of fundamental due

process. Yet the Circuit Court ruled that such specific requirements and violations did not matter. It ruled that for its review the only test to be applied was whether the City's action appeared "fairly debatable"—a measure that it considered satisfied by the large volume of the record, a record it made no attempt to analyze. J.A. 260. Moreover, rather than the customary practice of hearing evidence in order to decide such a question, the court instead dismissed HAF's complaint on demurrer.

1. <u>Failure To Apply Mandatory Factors</u>.

This Court has explained that in deciding applications for exceptions to zoning and similar laws, when a city or county body has been delegated legislative authority, that delegation comes accompanied by standards by which the authority must be exercised. Thus, for example, "when a legislative act is undertaken in violation of an existing ordinance, the board's action is arbitrary and capricious, and not fairly debatable, thereby rendering the legislative act void and of no effect." *Newberry Station,* 285 Va. at 621, 740 S.E.2d at 557, quoting in part *Renkey* v. *County Bd.*, 272 Va. 369, 376, 634 S.E.2d 352, 356 (2006) (quotation marks and brackets omitted). They must act "in accordance with the policies and standards specified in the legislative delegation of power." If they do not, then "the official, agency, or board has acted arbitrarily or capriciously." *Ames* v. *Town of Painter*, 239 Va. 343, 349, 389 S.E.2d 702, 705 (1990).

Section 10-105 directs that "the city council on appeal shall consider the following features and factors," specifying ten of them. The court recognized that, although the prescribed factors were recited in a staff report, HAF "are trying to say that they did it in a cursory fashion or just sort of the bare requirements." J.A. 203. The City responded that "if that's their allegation, a cursory review might be all that you need." J.A. 215. And indeed a cursory review—for example, of the historic significance of the house and its owner—was all that it got.

2. <u>Reliance on Impermissible Factors</u>.

The Alexandria Code directs that the city "shall limit its review" of applications to ten factors it enumerates. Code § 10-105(A)(1). The Circuit Court recognized "that the BAR and then the city council, when it affirmed, expressly relied upon factors not contained within the zoning ordinance. I mean, that's what the complaint alleges." J.A. 214; see J.A. 11.

For a glaring example, the Council approved tearing down the house's rare curved wall because it was difficult to maintain. Initially the staff had advised that "the form is very unusual in Alexandria," and had recommended that "this early feature can be maintained albeit with some difficulty, and that it is such a unique and character defining historic form that it should not be removed." J.A. 36; J.A. 10. But in its later report to the Council, the staff abruptly reversed its own recommendation, concluding that because, *inter alia*, "it has caused and will

continue to create maintenance issues," therefore "removal of this element will not be detrimental to the public interest." J.A. 107. The Council agreed.

"Maintenance issues" of old houses, however, are distinctly *not* an allowable factor for demolition under § 10-105 of the Code. J.A. 11. If they were, as many property owners pointed out at the hearing, half the remaining old houses in Alexandria would have been torn down long ago. On the contrary, Alexandria by a law titled "Required Maintenance" commands that "[a]ll buildings and structures within the Old and Historic Alexandria District shall be maintained in good repair, structurally sound . . . ." Code § 10-110(A). See also Code § 10-103(B).

This Court long has held that reliance on factors unauthorized by the applicable zoning law renders a decision arbitrary, capricious and contrary to law. *E.g.*, *Board of County Supervisors* v. *Davis*, 200 Va. 316, 323, 106 S.E.2d 152, 157-58 (1958) (zoning decision "was based upon improper factors . . . and was therefore arbitrary, unreasonable and invalid"). "[A] local governing body acts arbitrarily and capriciously when it acts outside the scope of the authority conferred by the zoning ordinance, and the resulting action is void . . . ." *Newberry Station*, 285 Va. at 622-23, 740 S.E.2d at 558, citing *Renkey*, *supra*. See also *Board of Supervisors* v. *McDonald's Corp.*, 261 Va. 583, 591, 544 S.E.2d 334, 339 (2001) (decision is arbitrary if it considers improper factors).

A fortiori is that so when, as here, it was alleged that the improper factors were adopted by a procedure inconsistent with due process of law. J.A. 11-13. During the hearing the City Council, over objection, gave much attention and extended discussion to a letter the new owners had provided *ex parte* to all the Council members, but not to HAF or any of the other opponents of the proposal. That one-page letter, from the owner of a local masonry company, asserted that the curved wall impeded access, and that the proposed demolition would ease future maintenance. J.A. 112. The letter made no mention of a substantial expert opinion filed more than a month before—but excluded from the staff report to the Council—from a licensed professional engineer specializing in old houses, with extensive documentary references. That submission opined that access was quite feasible, and that continued reasonable repairs would "preserve this significant and rare historic addition to the main house for future generations" —as it had been already for at least 150 years. See J.A. 88.

HAF complained in the Circuit Court that the masonry company's

> letter was discussed at length by the City Council and was expressly relied upon as justification for demolishing the curved hyphen. This letter was not made available to the public until after the hearing was concluded and the Council's vote was taken—despite repeated requests by HAF that all materials submitted to the council for consideration be made publicly available.

J.A. 12. HAF alleged that "Permitting expert testimony from only one party—while intentionally keeping the contents of the expert's testimony hidden—violates" both "Procedural due process" and "Virginia law as well as rendering the decision arbitrary." J.A. 13. In other respects as well, it alleged, ordinary procedures were altered to benefit the applicants. *E.g.*, J.A. 12-13.

The Circuit Court acknowledged that HAF raised a "perhaps, procedural due process concern," but "There's no specific due process claim, I don't think." J.A. 216. Somehow the Circuit Court believed it could finesse the issue even though HAF had expressly alleged that the action was not only "arbitrary," J.A. 12, but specifically violated "[p]rocedural due process," J.A. 13. The court explained that such a violation could be ignored because "we're talking hundreds of pages versus potentially one thing." J.A. 217.

And it was not just "one thing." Irregularities and departures from normal Council procedure were rampant. At the last minute the public hearing was rescheduled from its usual Saturday morning, when more citizens can attend, to a Tuesday evening. The case was not called until 9:00 p.m., lasting until after 1:00 a.m. The staff report included letters filed in support of the applicants, but omitted the vast bulk of written testimony from persons opposed to the proposal, although these had been filed well in advance of the report, most of them more than a month before. Those submissions included a dozen of the most substantive, documented

with multiple exhibits. See J.A. 88-89. A Council member stated that Council members themselves had been provided this excluded material only a few hours before the late-night hearing. At that hearing the same objectors whose extensive written testimony had been omitted were nevertheless strictly limited to three minutes each for oral presentation.

3. Refusal To Consider Landmark Designation.

The Historic Landmark section of the Virginia Historic Resources Act, Va. Code § 10.1-2204, directs the Commonwealth to "[d]esignate historic landmarks, including buildings, structures, districts, objects and sites," according to detailed criteria. The Hugo L. Black house and garden was one of the first to receive such a Landmark designation, with the enthusiastic endorsement of the Historic Resources staff, the Attorney General, and Governor Mills E. Godwin, Jr. The statute provides that, although Landmark designation by "itself shall not regulate the action of local governments," nevertheless such "an act of official recognition [is] designed"

> to encourage local governments and property owners to take the designated property's historic, architectural, archaeological, and cultural significance into account in their planning . . . and their decision making.

Va. Code § 10.1-2204(B). And the Alexandria City Code itself mandates among the factors to be given weight "[t]he extent to which the building or structure will

preserve or protect historic places and areas of historic interest in the city." Code § 10-105(g).

This Court, specifically discussing the Landmark statute and also the Open-Space Land Act, has emphasized that "These statutes evince a strong public policy in favor of land conservation and preservation of historic sites and buildings." *United States* v. *Blackman*, 270 Va. 68, 79, 613 S.E.2d, 442, 447 (2005) (citing also Virginia Constitution, art. 11).

For all that those statutory provisions meant to the Alexandria decision-makers, those words might as well never have been written. Not only did the Council explicitly refuse to take the Virginia statutes into account; they even went out of their way to emphasize on the record that they rejected giving Va. Code § 10.1-2204 a particle of consideration, stating that it had "no regulatory bearing." J.A. 107. And on appeal, the Circuit Court never acknowledged the Alexandria Code's own provision, § 1-200(F), that requires respect to such Virginia law. See p. 36, *infra*. The court simply ruled that "the landmark historic designation is not a factor that the City was required at all to consider." J.A. 230. The more faithful reconciliation of the Virginia law is that local jurisdictions are to consider the Landmark designation, even though they are not bound by it (unless required by their own ordinances). Particularly because it tracks so closely with the City Code

provision, designation under § 2204 must be given attention. It cannot be contemptuously tossed aside as the City officials did here.

4. Misunderstanding of "Fairly Debatable."

Brushing aside all the statutory violations listed above, the Circuit Court mistakenly believed that all it needed to terminate the case was to rule that the City's action was "fairly debatable." J.A. 260. That is incorrect. If local authorities fail to comply with requirements of the zoning law, or state law, or due process, then for any of those reasons standing alone it is arbitrary and unlawful and cannot stand. See, e.g., *Renkey*, 285 Va. at 376, 634 S.E.2d at 356.

Just as mistakenly, the Circuit Court entirely misconceived what review for "fairly debatable," even if it were applicable, means. Having observed that "we're talking hundreds of pages," J.A. 217, the court simply ruled as a matter of law that:

> clearly, based on the volume of information that was before the city council when it made its decision . . . it can't seriously be argued that this matter was not fairly debatable.

J.A. 260. Without even a semblance of analysis, the court thereupon decided the merits and ended the case.

Surely it is not the law of Virginia that pointing to a large and unexamined pile of paper can satisfy the requirement of judicial review. In the first place, "fairly debatable" is not a merely quantitative test, to be satisfied simply by

volume. Not surprisingly, the decisions of this Court do not allow such casual rejection of an important claim. Evidence to counter an allegation of arbitrary decision-making "must meet not only a quantitative but also a qualitative test; it must be evidence which is not only substantial but relevant and material as well." *Board of Supervisors* v. *Williams*, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975). To make such an evaluation of the evidence is not accomplished by a hasty glance on demurrer. A demurrer "tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." *Abi-Najm* v. *Concord Condominium, LLC*, 280 Va. 350, 357, 699 S.E.2d 483, 486 (2010), quoting *Glazebrook* v. *Board of Supervisors*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003); *accord*, *e.g.*, *Hubbard* v. *Dresser, Inc.*, 271 Va. 117, 119, 624 S.E.2d 1, 2 (2006); *Lewis* v. *Kei*, 281 Va. 715, 719, 708 S.E.2d 884, 887 (2011); *Schilling* v. *Schilling*, 280 Va. 146, 148, 695 S.E.2d 181, 183 (2010).

"A demurrer does not permit the trial court to evaluate and decide the merits . . . ." *Concerned Taxpayers* v. *County of Brunswick*, 249 Va. 320, 327, 455 S.E.2d 712, 716 (1995). "The trial court is not permitted on demurrer to evaluate and decide the merits of the allegations set forth in a bill of complaint, but only may determine whether the factual allegations of the bill of complaint are sufficient to state a cause of action." *Riverview Farm Assocs. Va. Gen. Pshp.* v.

Board of Supervisors, 259 Va. 419, 427, 528 S.E.2d 99, 103 (2000). Yet here the trial court did exactly that, deciding the merits without even a pretense of analysis.

"At the demurrer stage, it is not the function of the trial court to decide the merits of the allegations, but only to determine whether the factual allegations pled and the reasonable inferences drawn therefrom are sufficient to state a cause of action." *Anthony* v. *Verizon Va., Inc.*, 288 Va. 20, 29, 758 S.E.2d 527, 531 (2014), quoting *Friends*, 286 Va. at 44, 743 S.E.2d at 135. "A demurrer cannot be used to decide on the merits." *Assurance Data, Inc.* v. *Malyevac*, 286 Va. 139, 145, 747 S.E. 2d 804, 806 (2013) (emphasis in original). Parties objecting to the action of a local body

> are entitled to present such evidence to challenge the presumptive reasonableness of the legislative action. Until it has heard evidence in this case, the trial court cannot determine whether the Board's decision is "fairly debatable."

Id., 249 Va. at 328, 455 S.E.2d at 716. "A demurrer, unlike a motion for summary judgment, does not allow the court to evaluate and decide the merits of a claim; it only tests the sufficiency of factual allegations . . . ." *Fun* v. *Virginia Military Institute*, 245 Va. 249, 252, 427 S.E.2d 181, 183 (1993). *Id.*, 286 Va. at 139, 747 S.E.2d at 806. Moreover, allegations are to be interpreted, along with all facts and inferences fairly drawn from them, in the light most favorable to the pleader. *Coutlakis* v. *CSX Transp., Inc.*, 293 Va. 212, 216, 796 S.E.2d 556, 559 (2017). To

successfully rebut a grant of demurrer, an appellant "need show only that the court erred, not that the plaintiff would have prevailed on the merits of the case." *Tronfeld* v. *Nationwide Mut. Ins. Co.*, 272 Va. 709, 713, 636 S.E.2d 447, 449 (2006).

And the result of hearing the evidence as to "fairly debatable" would by no means be a foregone conclusion. *Cf.*, *e.g.*, *City of Richmond* v. *Randall*, 215 Va. 506, 512, 211 S.E.2d 56, 60 (1975) ("City's evidence was insufficient to make the reasonableness of that denial fairly debatable"); *Ames* v. *Town of Painter*, 239 Va. at 350, 389 S.E.2d 705-06 (same); *Board of County Supervisors* v. *Carper*, 200 Va. 553, 107 S.E.2d 390 (1959) (same). The party challenging dismissal on demurrer "need show only that the trial court erred in finding that the pleading failed to state a cause of action, and not that the plaintiff would have prevailed on the merits of the issue." *Thompson ex rel. Thompson* v. *Skate America, Inc.*, 261 Va. 121, 128, 540 S.E.2d 123, 127 (2001).

The swift dismissal of this case in spite of the violations alleged, and without meaningful examination of the record, stands in glaring contrast to the manner in which such challenges to deviations from land-use laws normally are decided. In such situations, the trial court tests such allegations by hearing evidence. *E.g.*, *Covel* v. *Town of Vienna*, 280 Va. 151, 156, 694 S.E.2d 609, 613 (three-day bench trial); *Board of Supervisors* v. *Southland Corp.*, 224 Va. 514, 297 S.E. 2d 718

(1982) (bench trial); *Board of Supervisors* v. *Fralin and Waldron, Inc.*, 222 Va. 218, 278 S.E.2d 859 (1981) (same); *Williams*, *supra* (same). Cases in which an evidentiary hearing was forgone typically were decided by consent and, even then, not as a simple pleading matter. *E.g.*, *Newberry Station*, 285 Va. at 611, 740 S.E.2d at 55l (cross-motions for summary judgment); *Renkey*, 272 Va. at 372, 634 S.E.2d at 354 (same).

In instances when, as here, a circuit court has departed from normal practice and attempted to cut off a complaint at the opening gun, this Court more than once has disapproved and cautioned against prematurely "short-circuiting" the process of judicial review. The extinction of the present case at the threshold is a classic example "in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits." *Renner* v. *Stafford*, 245 Va. 351, 352, 429 S.E.2d 218, 219 (1993). See also *Dodge* v. *Trustees*, 276 Va. 1, 6-7, 661 S.E.2d 801, 804 (2008) (Lemons, J., dissenting) (collecting cases in which "we have often warned our trial courts about granting motions that 'short-circuit' the legal process").

B. The Court Ignored the Plain Command of the Open-Space Land Act.

The proposal to expand the Hugo L. Black house with three modern buildings covering the garden was contrary to law for all the reasons summarized in the previous section. That garden, because it is covered by a statutorily

recognized easement, is protected also by the Virginia Open-Space Land Act, enacted by the General Assembly in 1966, and withdrawn thereby from City control as to protected urban land. The Act, Va. Code § 10.1-1704, enacted "to preserve permanent open-space land in urban areas," 1966 Acts ch. 461, § 1, unequivocally states that

> *No open-space land* . . .which has been *designated as open-space land under the authority of this chapter, shall be converted or diverted* from open-space land use unless . . . determined by the public body to be (a) essential to the orderly development and growth of the locality and (b) in accordance with the official comprehensive plan for the locality . . . and there is substituted other real property . . . . of at least equal fair market value . . . . of greater value as permanent open-space land . . . . and of equivalent usefulness and location.

(Emphasis supplied.) The Act defines "Public body" to include "any county or municipality." Sec. 10.1-1700. It further commands that in the face of any other law, the provisions of this chapter shall be controlling." Sec. 10-1705.

There is no question that the garden, since the 1969 determination of the Commonwealth, J.A. 17, 57, has been "designated as open-space land under the authority of this chapter." Sec. 10.1-1704. It also is undisputed that none of the findings to permit it to be "converted or diverted from open-space land use" was (or indeed could have been) made here. There also is no question that three levels of Virginia law confirm that the Open-Space Land Act governs:

1. Virginia's Supremacy Clause, Va. Code § 1-248, provides that:

> The Constitution and laws of the United States and of the Commonwealth shall be supreme. Any ordinance, resolution bylaw, rule, regulation, or order of any governing body or any corporation, board, or number of persons shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth.

2. The Open-Space Land Act itself in Va. Code § 10.1-1705 unequivocally directs that:

> Insofar as the provisions of this chapter are inconsistent with the provisions of any other law, the provisions of this chapter shall be controlling.

3. And the Alexandria Code in § 1-200 (F) leaves no doubt that

> Whenever any provision of any state or federal statute or other city ordinance or regulation imposes a greater requirement or a higher standard than is required by this ordinance, the provision of such state or federal statute or other city ordinance or regulation shall govern.

The City Council acted under a stunning misapprehension of the law. The Council members apparently believed that they were being asked by HAF to enforce an easement. But HAF sought nothing of the kind. HAF urged, rather, that they simply obey the plain command of Va. Code § 10.1-1704, which prohibits any "conversion or diversion" of land that has become "open-space land" upon being tendered and accepted by the Commonwealth, as occurred here in 1969. The City is not allowed to authorize a "conversion or diversion" of land that has been removed from the City's power by the Act. It was the 1969

transformation into "open-space land" that permanently altered the Black garden's status and brought it under § 1704. At issue is not enforcement of an easement. It is obedience to plain state law.

In the face of the clear Virginia statutory directive, as well as the implementing provision of the Alexandria Code, the Circuit Court nevertheless ruled that "the Open Space Land Act are not criteria the City was required to consider." J.A. 259.

To any reader who believes that enacted text has force, that simply cannot be so. And nothing in this Court's decisions lends support. On the contrary, this Court had explained that "[t]hese statutes evince a strong public policy in favor of land conservation and preservation of historic sites and buildings" and "this public policy was expressly embodied in Article XI of the Constitution of Virginia." *United States* v. *Blackman*, 270 Va. 68, 79, 613 S.E.2d 442, 447 (2005). The flouting here of plain statutory language is irreconcilable with Virginia's constitutional injunction that "it shall be the policy of the Commonwealth to conserve . . . its historic sites and buildings," Va. Const., art. 11, § 1, and its confirmation that in statutes like the Open-Space Land Act "the General Assembly

may undertake . . . the acquisition and protection of historical sites and buildings." *Id.*, art. 11, § 2.[5]

That clear directive also means that at the very least, in matters of statutory interpretation, if meaning is in doubt, it should be resolved to favor preservation. Moreover, Virginia traditionally has been a Dillon Rule state: it does not allow localities free rein to operate without clear authorization in state policy—much less in defiance of it. *City of Virginia Beach* v. *Hay*, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999).

III. THE DISMISSAL WOULD END MEANINGFUL REVIEW UNDER HISTORIC-PRESERVATION STATUTES.

Allowing plaintiffs their day in court is particularly essential when the issue is enforcement of historic-preservation laws, in which the consequences often are irrevocable. A Virginia historic resource, once altered or destroyed, is gone forever.

Not only would the Circuit Court's standing ruling render "particularized harm" an insuperable barrier to judicial review of land-use decisions. Besides that, if the destruction of the Hugo L. Black house and garden were to be simply

[5] The General Assembly has implemented Article 11's constitutional policy in other statutes as well. *E.g.*, Virginia Conservation Easement Act, Va. Code §§ 10.1-1009 to -1016; Virginia Outdoors Foundation, Va. Code §§ 10.1-1800 to 1804; Virginia Land Conservation Incentives Act, Va. Code §§ 58.1-510 to -513.

shrugged off on a pleading, without taking evidence, and in spite of all the legal red lights that the court ran through here, then the future of historic preservation and conservation in Virginia—in spite of the admonition of the Constitution—would be bleak, indeed.

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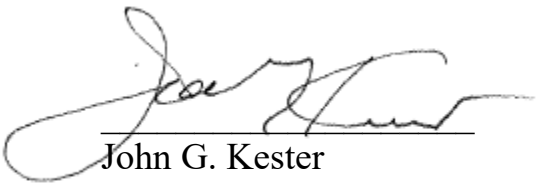
I further certify that I have caused an electronic copy of the foregoing brief to be filed with the Clerk of this Court via VACES. I also certify that the foregoing brief does not exceed fifty pages in length and that it complies with Rules 5:6, 5:26 and 5:30 of the Rules of this Court.



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