In the

Supreme Court of Virginia

At Richmond

Record No. 121526

H. CURTISS MARTIN, et al.,

Appellants,

– v. –

CITY OF ALEXANDRIA, et al.,

Appellees.

BRIEF OF APPELLEES

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Contrary to the questions presented by Martin/Drewry, this is a case where the Alexandria Board of Zoning Appeals (the "BZA") adhered to the City's Charter and Zoning Ordinance requirements for the consideration of a variance, and where the record from the BZA proceedings left the trial court with no choice but to uphold the BZA's decision to grant variances to the Appellees James and Christine Garner (the "Garners"). This appeal arises out of the July 28, 2011 decision of the BZA to approve two variances for the Garners who own 122 Prince Street in the Old and Historic District (a.k.a Old Town) in the City of Alexandria, Virginia (the "City"). Martin/Drewry appealed the BZA's approval of these variances to the Circuit Court for the City of Alexandria pursuant to the City's Charter § 9.21.

The appeal before this Court is based largely on the record before the BZA, and the provisions of the City's Charter and Zoning Ordinance sections related to variances, all of which were submitted to the trial court in a Trial Notebook. (JA[1] 92-365).

As to the recitation of the procedural events below, Martin/Drewry's Statement of the Case is generally accurate except in its assertion that the

[1] "JA" refers to the Joint Appendix.

BZA did not make any findings as a part of its deliberation and action on the Garners' variance application. The Appendix to this Brief sets out the City Charter and Zoning Ordinance provisions that control the BZA's deliberations of variances, with annotations citing the location in the transcript of the July 28, 2011 hearing where each of the factors the BZA must consider was either discussed by a representative of the applicant, the City's staff, citizens, or the members of the BZA.

In addition, in making his motion to approve the variances, BZA member Koenig stated that "I would take some of what I said and move to approve", referring to his earlier findings set out on pages JA 351-56. Furthermore, the approved minutes from the July 28, 2011 hearing state that "On a motion to approve by Mr. Koenig, seconded by Mr. Lantzy the variance was approved by a vote of 7 to 0. Reason: The applicant demonstrated hardship that met the standards for a variance as outlined in the staff report." (JA 246).

To assert that the BZA failed to make necessary findings is inconsistent with the record below. Furthermore, Martin/Drewry did not suggest in their Trial Brief or at the hearing before the trial court on June 7, 2012, that the BZA failed to make any findings at all and that somehow this was a procedural defect that invalidated the BZA's decision.

STATEMENT OF FACTS

The Garners are the owners of 122 Prince Street, "the only vacant building site on the 100 block of Prince Street." (JA 122). Martin/Drewry own 118 Prince Street which is the property to the east and which is improved with a three-story townhouse that abuts an alley known as the Gilpin Alley. This block of Prince Street is known as "Captain's Row." (JA 124). These same parties have been engaged in a dispute over the ownership of the fee simple title to the alley since 2003, and title to the Gilpin Alley is the subject of a separate Appeal filed by Martin/Drewry pending before this Court, Record No. 121540. The Garners prevailed at trial in that separate case and established that they own the western 4 feet of the Gilpin Alley for the depth of their lot.

Since the Garners purchased 122 Prince Street in 2002, they have been attempting to obtain approval from the City of Alexandria for a single family home. In 2003, the Garners applied for a variance requesting a rear yard variance of 16 feet and a side yard variance of 5 feet; the City deferred action on the application pursuant to the Garners' request because of a claim made by Martin/Drewry that title to an alley adjoining 122 Prince Street precluded the approval of the requested variance. (JA

122). In 2005, the Garners again applied for a variance, this time requesting a rear yard variance of 14 feet and a side yard variance of 5 feet; this application was also deferred because of the unresolved title issue involving the Gilpin Alley. Id. These variance requests were reviewed by City staff before the General Assembly amended the City's Charter to remove the phrase "approaching confiscation" following the term "clearly demonstrable hardship", which is a permitted basis for granting a variance.

After retaining new counsel, the Garners sought a determination from the Zoning Administrator that they could utilize the portion of the Gilpin Alley within their lot for the purposes of calculating their eastern side yard setback. On February 19, 2010, the Zoning Administrator determined the alley could not be counted toward the side yard setback; the Garners appealed this decision to the BZA and the BZA affirmed the Zoning Administrator. (JA 123). The Garners appealed the BZA's decision to the Circuit Court, and ultimately the City and the Garners entered into a "Stay of Litigation Agreement" dated January 18, 2011, found at JA 168-171. The Stay of Litigation Agreement provided that the Department of Planning and Zoning "will support the Garners' application for a three (3) foot variance from the side yard setback requirement for the Property, zoned to

the RM district, to be measured from the western edge of the [Gilpin] Alley…." (JA 168). The Stay of Litigation Agreement did not reflect support for or against the rear yard setback ultimately approved by the BZA. If the Department of Planning and Zoning and the Garners failed to agree to a design for a home at 122 Prince Street, or if the BZA denied the variance, the Garners' only remedy was to reinstitute the litigation related to the Zoning Determination. (JA 169).

In June of 2011, the Garners submitted their third variance application (the "Variance Application") for a new home on 122 Prince Street. (JA 140-149). The Variance Application requested a 3 foot side yard variance for the eastern portion of their property as opposed to a 5 foot side yard required by the RM Zoning District Zoning Ordinance § 3-1108(C)(1). (JA 143). The Variance Application also requested a 13 foot rear yard variance as opposed to the 16 foot rear yard required by Zoning Ordinance § 3-1106(A)(3)(a). Id. The design details of the proposed home are found at JA 228-240 and at JA 249. Because of the small size of the lot and the inability to use the Gilpin Alley to calculate open space, the Garners exceeded the open space requirements by only 20 feet. (JA 228).

122 Prince Street is not only zoned RM, but is also subject to the Zoning Ordinance requirements for the Old and Historic Alexandria District (the "Historic District"), which provisions are found at JA 100-113. Section 10-103 of the Historic District Ordinance requires the issuance of a certificate of appropriateness from the Old and Historic District board of architectural review (the "BAR"). The BAR is required to consider numerous factors and features before approving a certificate of appropriateness, as set out in Section 10-105(A)(2) of the Historic District Ordinance, including "the height, mass and scale of buildings or structures", "the impact upon the historic setting, streetscape or environs", the relation between the design of the proposed building with preexisting buildings, and "the extent to which the building or structure will preserve or protect historic places and areas of historic interests in the city."

While the City processed the Variance Application, the Garners applied for a certificate of appropriateness to the BAR, and on July 20, 2011, the BAR approved the same house design and siting proposed in the Variance Application. (JA 184). The Historic Preservation Manager, Al Cox, submitted a memo to the BZA relaying the BAR's decision and stated that the BAR "found the height, mass, scale and architectural style to be appropriate for the historic character of the block and further believed the

general design and arrangement of the building on the east side of the site adjacent the alley was consistent with the historic setting, streetscape, and environs and that it followed the historic development patterns in the [Historic District]." Id.

The BAR, its staff and the BZA considered the Variance Application's impact on the lot immediately to the west of 122 Prince Street, on which stood "a very simple, two-story frame house with one of the City's only remaining examples of late 18th century rough sawn wood siding." (JA 188). BAR staff indicated that "[t]he new house at 122 Prince Street is placed 11.00 feet from the east elevation of the house at 126 Prince Street in order to provide the greatest reasonable view of the historic adjacent building wall." (JA 125).

The staff report for the BZA hearing considered whether the Variance Application would diminish the light and air available to Martin/Drewry's property and found that "its impact will not, in staff's judgment, be detrimental." (JA 131) The BZA also heard testimony regarding the impact of the Variance Application on the Martin/Drewry property. Additionally, BZA Member Koenig discussed at length the potential impact immediately before making his motion to approve the application. (JA 351-355). Mr.

Koenig found that the Variance Application "is really quite a restrained and, to my mind, rather sophisticated design solution actually." (JA 354).

122 Prince Street has 36 feet of frontage on Prince Street that it may use to calculate compliance with the Zoning Ordinance and it is 44.33 feet deep, (JA 122), making it wider than other lots on the 100 block of Prince Street, and shallower than the other lots on the block. BZA Record, pg. 11. Therefore, to provide a new house that meets the RM zone regulations with two side yards and rear yard setbacks would "create a footprint different from most houses in the RM zone and in the Old and Historic District particularly along the 100 block of Prince Street." (JA 127); see also JA 128. A graphic comparing the scale of a house at 122 Prince Street that complies with the RM district regulations and the one proposed in the Variance Application is found at JA 249. The RM district compliant home was not favored by staff and was not "by-right" because it would "fail to respect the historic buildings and development pattern on the block, would be out of character, and a serious determinant to the important historic context…it is likely the proposal would not be approved by the BAR." (JA 132).

The City staff prepared a staff report for the BZA hearing which articulated staff's support for the Variance Application "not only because

the result is a good development compatible with its historic context, but also because the applicant's case meets the legal standards for the grant of a variance." (JA 127). Staff pointed out that

> it is not true that the BAR issues are irrelevant to the BZA question. [Zoning Ordinance] [s]ection 11-1103(f) specifically requires that the BZA determine whether "the essential character of the area," will be negatively affected if variances are granted. Section 11-1103(d) requires a finding that the new house will not diminish the public welfare, property values or the neighborhood generally before granting a variance.

(JA 128).

On July 28, 2011, the BZA held a public hearing on the Variance Application. Each of the factors set out in the City's Charter and Zoning Ordinance that the BZA must consider were in fact considered, and as stated above, the Appendix to this Brief cites the location in the transcript of the July 28, 2011 hearing where each of the factors the BZA must consider was either discussed by a representative of the applicant, the City's staff, citizens, or the members of the BZA. On BZA member Koenig's motion, the BZA approved the Variance Application by a 7-0 vote. (JA 246).

STANDARD OF REVIEW

The Garners agree with Martin/Drewry that this Court's standard of review of the trial court's decision is *de novo*. However, the trial court's

review of the BZA's decision, and therefore this Court's review, is constrained by City Charter Section 9.21 which sets out the following "Powers and Duties" of the Circuit Court when a party appeals a decision of the Board of Zoning Appeals:

> The circuit court shall review the record documents and actions taken by the board and may receive evidence. The court may reverse or modify the decision reviewed, in whole or in part, when it is satisfied that the decision of the board is contrary to law or that its decision is arbitrary and constitutes an abuse of discretion.

The parties stipulated at the trial court that this is the controlling standard of review. (JA 45-46).

In reviewing a trial court's decision to uphold a BZA's variance decision under a standard of review similar to that set out in the City's Charter, this Court has said that

> the decision of the board is presumed to be correct, it is evident that the trial before the court is not a *de novo* trial in the strict sense of the term but a trial wherein the court should give consideration to the fact that the board is empowered to exercise a reasonable discretion in determining whether or not a variance should be granted or denied.

Board of Zoning Appeals v. Combs, 200 Va. 471, 477 (1959). The Court in Combs went on to say that "the court should not substitute its discretion for that of the board [of zoning appeals]." Id.

Martin/Drewry bear the burden of "show[ing] to the satisfaction of the court that the action of the board was contrary to law." Id. at 476. An "illegal action" is "any arbitrary or unreasonable action, contrary to the terms or spirit of the zoning law, or contrary to or unsupported by facts." Hopkins v. O'Meara, 197 Va. 202, 205 (1955). However, "if on the facts the reasonableness of the board's action was open to fair difference of opinion, then there would be as to that no illegality." Id.

ARGUMENT

Summary

Unlike all other variance cases that have come before this Court in the last 60 years, the Garners' Variance Application involves a truly extraordinary situation. 122 Prince Street is the only vacant lot on a historic street that is atypical in shape because it is shallow and wide, as opposed to narrow and deep like most other "row-house" lots on Captain's Row. 122 Prince Street is also subject to typical Zoning Ordinance requirements like setbacks and open space, and Zoning Ordinance requirements found in the City's Historic District regulations. It is these Historic District regulations, and the lot's location next to a historic building façade made of rough sawn wood siding, that make it effectively impossible for the Garners to satisfy the Historic District regulations and the RM Zoning District

regulations. Confronted with the option of honoring the BAR's issuance of a certificate of appropriateness, or turning down the Garners' Variance Application and leaving them with an unbuildable lot, the BZA properly approved the Variance Application.

The BZA's decision to grant the Garners' rear and side yard variances must stand because, when the standard of review applicable in this case is juxtaposed against the record, the Court would not only have to substitute its judgment for the BZA to overturn the variance approval, but it would also have to disregard the fact that the BZA had before it ample evidence to grant the variances. The BZA clearly applied the correct variance standards; it did not act contrary to law. Additionally, its decision was not arbitrary and an abuse of discretion. The Garners and the City therefore request that this Court affirm the judgment of the trial court upholding the decision of the BZA approving the Variance Application.

I. THE GARNERS' VARIANCE APPLICATION MEETS THE CURRENT DEFINITION OF A CLEARLY DEMONSTRABLE HARDSHIP.

This the first variance case on appeal to this Court following the General Assembly's amendment of § 9.18 of the City's Charter, set out in Chapter 221 of the Acts of Assembly, 2010, and a similar amendment to Va. Code Ann § 15.2-2309, which removed the words "approaching

confiscation" following the term "clearly demonstrable hardship." Following this amendment, the BZA may grant a variance when it "is satisfied, upon the evidence heard by it, that the granting of such variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or conveyance sought by the application, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance." City Charter § 9.18 found at JA 92. However, the BZA is not constrained to grant variances only when this criterion is met, but also under certain other circumstances as set out in the language of the Charter preceding the quoted passage. Nonetheless, a review of the staff report prepared for the BZA (JA 121-182) and the transcript from the public hearing before the BZA (JA 250-358) reveals that there was ample support for the finding of a hardship, namely the shallowness of the Garners' lot which impacted the Garners' ability to comply with the rear yard requirement, the difficulty in complying with open space requirements unless the side yard variance was granted,[2] and the constraints imposed by the Old and Historic District

[2] Barbara Ross, Deputy Zoning Administrator, articulated in the BZA public hearing the challenge of complying with both the open space requirement and the eastern side yard requirement when she stated that "[i]f you move the house to the west even one foot…you lose compliance with the open space on this lot." (JA 272, Tr. pg. 23, lines 6-9). The reference of "Tr." is to the transcript from the BZA public hearing held on July 28, 2011.

Zoning Ordinance provisions, making the BZA's decision to grant the variances, at the very least, "open to a fair difference of opinion." Hopkins v. O'Meara, 197 Va. 202, 205 (1955).

Prior to the General Assembly's amendment to the City's Charter and § 15.2-2309, the Court in Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756 (2004), stated that "the language used in Code § 15.1-495(b) [now § 15.2-2309(2)] to define "unnecessary hardship" clearly indicates that the General Assembly intended that variances be granted *only in cases where application of zoning restrictions would appear to be constitutionally impermissible."* 267 Va. at 764 (insertion and emphasis in original). The Court went on to say that "the BZA has authority to grant variances only to avoid an unconstitutional result." Id.

But the Court also said in Cochran, that "[a] statute may, of course, authorize variances in cases where an ordinance's application to particular property is not unconstitutional." Id. By removing the words "approaching confiscation" from the City's Charter, the General Assembly has specifically authorized variances in instances that previously were not authorized. A variance may now be approved even when the Zoning Ordinance regulation at issue does not "interfere with all reasonable and beneficial uses of the property, taken as a whole." Id. at 766.

Not only is the Garners' Variance Application subject to a different legal standard than the prior cases this Court has reviewed, but factually the Garners' Variance Application is unlike any prior case. The Garners cannot submit a building permit application and build a "by-right" home because the City's Zoning Ordinance § 10-100 et seq. (JA 100-113) requires that they obtain a certificate of appropriateness for their new house, which is in the Historic District, and this certificate is a predicate to the house becoming "by-right." The City's BAR, prior to the BZA's approval of the Variance Application

> found the proposed height, mass, scale and architectural style to be appropriate for the historic character of the block and further believed that the general design and arrangement of the building on the east side of the site adjacent to the alley was consistent with the historic setting, streetscape, and environs and that it followed the historic development patterns in the Old and Historic Alexandria District.

(JA 184). But in order for the Garners to build the home that the BAR found appropriate, they required the side and rear yard variances from the BZA.

Prior to the amendment to the City's Charter and to the Code, this Court has consistently found that variances are not justified where the owner can develop essentially the same house or project simply by

complying with the applicable zoning ordinances. See Bd. of Zoning Appeals v. Combs, 200 Va. 471 (1959) (involving a self-inflicted hardship where the owner illegally built a second story apartment); Packer v. Hornsby, 221 Va. 117 (1980) (involving an expansion to an existing house where the expansion could take place, in a different location, without the variance); Hendrix v. Bd. of Zoning Appeals, 222 Va. 57 (1981) (involving an existing lawfully non-conforming restaurant and the desire to convert the use to an amusement park); Bd. of Zoning Appeals v. Nowak, 227 Va. 201 (1984) (involving a required siting of a house that did "not suit Nowak"); Bd. of Supervisors of Fairfax County v. Bd. of Zoning Appeals, 268 Va. 441 (2004) (involving an existing home where the owner wanted to demolish it to build two new homes on two new lots, with one home on a lot that would not comply with the minimum lot width requirement).

But unlike the parties in these prior cases, a house on the long-vacant 122 Prince Street that would comply with the City's RM Zoning District regulations would be actually larger than the one proposed in the Variance Application, BZA Record, pg. 132, illustrating the shoving match between the competing RM and Historic District Zoning Ordinance provisions. The Garners' earlier proposals in the Variance Application were for larger homes, BZA Record, pg. 21, indicating they were not the ones

volunteering, in the Variance Application the BZA approved, to build a smaller home. Instead, it was the City's Historic District regulations, City staff, the BAR and the BZA that required the smaller house design ultimately approved by the BAR and BZA.

This appears to be the first variance case that this Court has reviewed involving new construction on a vacant lot that is subject to historic district zoning ordinance regulations authorized by Va. Code Ann. § 15.2-2306. The Court has reviewed variance requests involving vacant lots before, and in Burkhardt v. Board of Zoning Appeals, 192 Va. 606 (1951), the Court upheld the approval of the City of Richmond's BZA of a variance reducing a rear yard setback from 25 feet to 15 feet. The Court's review was subject to the City of Richmond's Charter, which contains a nearly identical standard of review as the one found in the City of Alexandria, and in upholding the trial court's decision to uphold the variances, the Court agreed that "an additional 10' for the rear yard would serve no useful purpose." Id. at 617.

Without the rear and side yard variances, the Garners' property faces a clearly demonstrable hardship—it is undevelopable because alternative designs and house locations would not comply with open space requirements or satisfy the BAR and BZA concerns regarding developing

122 Prince Street in keeping with the historical constraints imposed by its location next to an historical building façade on Captain's Row. The trial court was therefore correct in upholding the BZA's finding that the Variance Application met the definition of hardship.

II. THE TRIAL COURT WAS CORRECT IN RULING THAT THE BZA'S DECISION WAS NOT CONTRARY TO LAW OR ARBITRARY AND AN ABUSE OF DISCRETION.

A. The BZA is explicitly required to consider the Variance Application's proposed home design and location on the lot.

Martin/Drewry would have this Court ignore the fact that 122 Prince Street is within the Historic District, and the Zoning Ordinance provisions for variances by themselves require consideration of the larger impact of the variance approval on the environs of the Property. Zoning Ordinance § 11-1103(A) requires that the BZA find that

> The <u>particular physical surroundings</u>, shape, topographical condition or <u>other extraordinary situation or condition of the specific property</u> involved would effectively prohibit or unreasonably restrict the utilization of the property or would constitute a clearly demonstrable hardship, as distinguished from a mere inconvenience, if the strict letter of the regulations were carried out[.]

Emphasis supplied.

The BZA must also find that

> (D) The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood in which the property is located, or diminish or impair the values thereof;
>
> ***
>
> (F) The variance, if granted, will not alter the essential character of the area or be a substantial detriment to adjacent property[.]

Zoning Ordinance § 11-1103. These quoted provisions of the Zoning Ordinance explicitly require the BZA to consider the design and siting of the home when deciding whether to grant a variance.

Furthermore, the home proposed in the Variance Application had to obtain BAR approval because it is within the Historic District, and therefore it is the City's ordinances and the standards for variances that make the design and siting of the house on the lot relevant, not the preferences of the City staff or the Garners as suggested by Martin/Drewry. What makes the Variance Application unique is that it involved a home "on one of the most historic streets in Old Town," (JA 131), next to a house with a historic wall, and on "the only vacant building site on the 100 block of Prince Street." (JA 122). We know that the BAR found the Garners' proposed house appropriate, which decision was not appealed, thereby establishing that the house conformed to the City's Historic District regulations of the

Zoning Ordinance. But the Garners could not build the house the BAR found appropriate without approval of the Variance Application, which approval was the only way to resolve the conflicting considerations of the BAR and Historic District regulations with the requirements of the RM district regulations.

B. The BZA properly applied the standards for granting a variance set out in the City Charter and in Zoning Ordinance § 11-1103, and its decision was therefore not contrary to law.

The record of the BZA proceedings does not support the suggestion in Martin/Drewry's Opening Brief that the BZA made no findings or "sought to fashion an ad hoc change to the Zoning Ordinance based on concerns about aesthetic design in a historic district." Opening Brief, pg. 15. Instead, the BZA's decision to approve the Variance Application is not contrary to law, as the BZA was properly informed of the applicable standards, and its deliberations at the July 28, 2011 hearing reveal that it considered each and every factor that must be weighed in deciding whether a variance should be granted.

The staff report contains the nine factors, lettered a) through i), found in Zoning Ordinance § 11-1103 that the BZA must consider when granting a variance. (JA 126-127). The staff report addresses each of factors attentively and articulately, and the BZA determined that "[t]he applicant

demonstrated hardship that met the standards for a variance as outlined in the staff report." (JA 246). The Court has concluded that "the General Assembly intended that the record transmitted on certiorari reflect the findings underlying the board's decision." Packer v. Hornsby, 221 Va. 117, 121 (1980). Clearly, the minutes reflecting the BZA's action, by referencing the thorough staff report for the BZA's hearing, apprised the parties of the reasoning behind the BZA's decision to approve the Variance Application, therefore affording the Circuit Court and this Court the opportunity to decide whether the BZA's action was contrary to law or arbitrary.

The transcript also reveals that BZA member Koenig made the motion to approve the Variance Application and stated "I would take some of what I said and move to approve." (JA 356). What preceded his motion was several minutes of discussion by him, where he finds that "this is an appropriately scaled piece of architecture in a very and in an admittedly complex, highly differentiated and well-established neighborhood." (JA 353). He also finds that in terms of the impact on light and air to the Martin/Drewry property "this is really quite a restrained and, to my mind, rather sophisticated design solution actually." (JA 354). He also states that "one of the fundamental reasons that I accept the logic of this hardship is the overall proportion and the distinct shallowness of this lot." (JA 355).

Mr. Koenig's motion based on these findings, which was seconded and unanimously approved by the BZA, certainly meets the requirements that the record contain the reasoning of the BZA.

Additionally, the Garners refer the Court to the Appendix to this Brief, where the City's Charter and Zoning Ordinance provisions related to variances are annotated to cite to places in the transcript from the BZA hearing where each of the factors the BZA must consider was addressed through testimony made to the BZA members, or in findings of particular members. The Court would have to completely disregard the record before the BZA in order to accept Martin/Drewry's argument that the BZA made no findings or based its decision on improper aesthetic concerns.

The Court must also recognize that there is no one particular set of property conditions that justifies a variance. Instead, the City's Charter states:

> Alexandria City Charter § 9.18 Powers of board of zoning appeals.
>
> The board shall have the following powers and it shall be its duty
>
> * * *
>
> (b) To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship;

> provided that the spirit of the ordinance shall be observed and substantial justice done, as follows:
>
> When a property owner can show that his property was acquired in good faith and **[Property Condition 1]** where by reason of the exceptional narrowness, shallowness, size <u>or</u> shape of a specific piece of property at the time of the effective date of the ordinance, <u>or</u> **[Property Condition 2]** where by reason of the exceptional topographical condition <u>or</u> **[Property Condition 3]** other extraordinary situation, <u>or</u> **[Property Condition 4]** condition of such piece of property, <u>or</u> **[Property Condition 5]** of the use <u>or</u> development of property immediately adjacent thereto, **[Justification 1]** the strict application of the terms of the ordinance would effectively prohibit <u>or</u> **[Justification 2]** unreasonably restrict the use of property <u>or</u> **[Justification 3]** where the board is satisfied, upon the evidence heard by it, that the granting of such variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.

Emphasis supplied by underlying the word "or" and inserting the bracketed text.

This section has been modified as noted in part to highlight the fact that the word "or" appears in the section eight times. Consequently, the BZA is afforded five different property conditions (identified as Property Condition 1, Condition 2, etc. within the annotated text), any of which are sufficient to support a variance, and a variance may be granted pursuant to

any one of three different justifications. The Appendix includes references to the transcript where each of these conditions, justifications and other required findings were addressed.

A review of the BZA record reveals that the BZA was informed of its duties under the City's Charter and Zoning Ordinance, and adhered to those duties by approving the Variance Application. The BZA did not "legislate" as suggested by Martin/Drewry. Instead, the BZA properly found that the Garners' application met the standard for the approval of a variance under the City's Charter and Zoning Ordinance because i) they own the only vacant lot on one of the most historic blocks in Alexandria, ii) the lot is unusually shallow and wide, iii) the lot is subject to the RM Zoning District <u>and</u> the Historic District regulations, iv) development of the lot requires BAR approval, v) the City staff and BAR desired to preserve the view of the wall on the property to the west, and vi) the City staff and BZA desired a sufficient separation from Martin/Drewry's house and 10 feet was provided. Considering these factors, and others set out in the BZA record, the trial court was correct in determining that the BZA's decision was not contrary to law because the Garners' property situation was extraordinary.

C. The trial court was correct in ruling that the BZA's decision was not arbitrary and an abuse of discretion.

The Court would have a difficult time overturning the decision of the trial court upon a finding that the BZA's decision is "arbitrary and constitutes an abuse of discretion." Note that this standard of review is drafted in the conjunctive, requiring the Court to not only find that the BZA acted arbitrarily, but that its actions constituted an abuse of discretion. This is a very high standard for Martin/Drewry to overcome.

The Court has stated that a decision is arbitrary and capricious "when it is willful and unreasonable and taken without consideration or in disregard of facts or law or without determining principle, or when the deciding body departed from the appropriate standard in making its decision." James v. City of Falls Church, 280 Va. 31, 42 (2010) (internal quotations and citations omitted). Again, a review of the record reveals that the BZA had before it testimony and facts to support a finding that the variance met the applicable standards, and it cannot be said to have acted arbitrarily.

The Court has recently adopted the following definition of "abuse of discretion" when reviewing a decision falling under that standard by a lower court:

> An abuse of discretion…can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.

Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352 (2011).

The BZA's decision to grant the variances should survive this Court's scrutiny under the Landrum definition of "abuse of discretion". Again, the Appendix, as annotated with the locations within the transcript where each required factor was addressed, reveals that the BZA considered each required factor and none were ignored. In fact, pages 102 through 106 of the BZA transcript are principally devoted to the primary concern of Martin/Drewry—their claim that light and air will be diminished with the home proposed by the Garners. The trial court was correct in determining that the BZA record does not support a finding that the BZA acted arbitrarily and abused its discretion in granting the variances.

III. THERE IS NO PROVISION OF LAW THAT REQUIRES THE GARNERS TO SEEK A ZONING TEXT AMENDMENT IN ORDER TO DEVELOP THEIR PROPERTY.

On the one hand, Martin/Drewry acknowledge that a variance "allows a property owner to do what is otherwise not allowed under the zoning

ordinance", quoting from Sinclair v. New Cingular Wireless, PCS, LLC, 283 Va. 567, 577 (2012), while on the other, suggesting that the Garners should have requested an amendment to the Zoning Ordinance. See Section B. of the Opening Brief. There is no provision of Virginia law that requires a property owner to petition their local governing body to amend the text of an ordinance when the ordinance precludes reasonable development of the property. Instead, to paraphrase the City's Charter and Zoning Ordinance, the point of a variance is to obtain property-specific relief from a Zoning Ordinance regulation.

Martin/Drewry correctly point out that the City's Charter requires the BZA to find that "the condition or situation of the property concerned or the intended use of the property is not so general or recurring in nature as to make reasonably practical the formulation of a general regulation to be adopted as an amendment to the Ordinance." City Charter § 9.18. It should be clear by now that the Garners' ownership of the only vacant lot on one of the most historic blocks in Alexandria, which is shallow and wide, surrounded by historic homes with one home having a historic wall, makes their property unique when combined with the need to comply with the RM and Historic District requirements. Additionally, BZA Member Koenig stated that "I'm not worried that, from the mandate of our board or from my

perspective and my freedom to judge future cases, that we're establishing any particularly dangerous precedent here with this approval…." (JA 356).

The requirements of the Historic District regulations make the staff and BAR evaluation of a new house necessarily property specific, and there is no other vacant lot on this block of Prince Street that is shallow and wide, with a home next to it that has a historic wooden wall. It would be futile for the Garners to pursue ordinance amendments—the City will never repeal the Historic District regulations or amend the RM district to solve the problem of one unique lot. There is also no "development application" that the Garners can submit that would allow them to build a by-right house, as suggested by Martin/Drewry. Opening Brief at 2. If it were that simple, the Garners would not have spent nine years meandering through the City's development process to no avail, until finally the BAR issued the certificate of appropriateness and the BZA approved the variances necessary to build a house on 122 Prince Street that complied with all Zoning Ordinance requirements except the rear yard requirement and the side yard requirement on the east side of the lot.

CONCLUSION

For the reasons stated herein, James and Christine Garner, and the City, pray that this Court affirm the Final Order entered by the trial court.

Respectfully Submitted,

JAMES AND CHRISTINE GARNER

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing were sent to the following counsel of record on this the 15th day of February, 2013:

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This same date, fifteen copies of the same, along with a copy on CD, were hand delivered to the clerk's office.

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APPENDIX TO APPELLEES BRIEF

Board of Zoning Appeals ("BZA") Duties Annotated with Testimony and Findings in the Transcript of the July 28, 2011 BZA Hearing[1]

Alexandria City Charter § 9.18 Powers of board of zoning appeals.

The board shall have the following powers and it shall be its duty

* * *

> (b) To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship; provided that the spirit of the ordinance shall be observed and substantial justice done, as follows:
>
> When a property owner can show that his property was acquired in good faith and **[Property Condition 1]**[2] where by reason of the exceptional narrowness, shallowness, size <u>or</u> shape of a specific piece of property at the time of the effective date of the ordinance, <u>or</u> **[Property Condition 2]** where by reason of the exceptional topographical condition <u>or</u> **[Property Condition 3]** other extraordinary situation, <u>or</u> **[Property Condition 4]** condition of such piece of property, <u>or</u> **[Property**

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[1] The unmodified text is the actual text of the Charter and Zoning Ordinance. The text in italics are the references to the Transcript of the hearing of the BZA held on July 28, 2011 with the parenthetical summarizing the subject of the testimony. This annotation exercise is intended to be illustrative, and does not include other areas within the record where the elements of the Charter and Zoning Ordinance were addressed.

[2] Emphasis supplied by underlying the word "or"; bracketed text inserted.

Condition 5] of the use <u>or</u> development of property immediately adjacent thereto, **[Justification 1]** the strict application of the terms of the ordinance would effectively prohibit <u>or</u> **[Justification 2]** unreasonably restrict the use of property <u>or</u> **[Justification 3]** where the board is satisfied, upon the evidence heard by it, that the granting of such variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.

<u>Conditions and Justifications addressed:</u>

<u>Good faith</u>: JA 257-58, Tr. pg. 8 line 14 through pg. 9 line 18.

<u>Condition 1</u>: JA 337-338, Tr. pg. 88 line 17 through pg. 89 line 14 (shape of lot).

> *JA 355, Tr. pg. 106 lines 14-17 (overall proportion and distinct shallowness of lot).*

<u>Conditions 1, 3 and 4</u>: JA 338-39, Tr. pg. 89 line 12 through pg. 90 line 5 (development of block and historic considerations).

<u>Conditions 1, 3, 4 and 5</u>: JA 261-62, Tr. pg. 12 line 17 through pg. 13 line 4 (vacant, shallow lot with adjacent original unpainted wood wall).

> *JA 310, Tr. pg. 61, lines 13-21 (house width to be in-keeping with others on block).*
>
> *JA 327-28, Tr. pg. 78 lines 11 through pg. 79 line 17 (shallow, wide and vacant lot in RM Zone next to historic wooden wall).*
>
> *JA 348, Tr. pg. 99 lines 14-19 (lot very shallow and very wide, and need to protect adjacent wall).*

<u>Condition 3, 4, and 5</u>: JA 270-71, Tr. pg. 21, line 15 through pg. 22 line 20 (physical surroundings and condition of the property: development pattern on block and wall at 126 Prince Street).

> *JA 311-14, Tr. pg. 62 line 17 through pg. 65 line 16 (importance of eastern wall of adjacent 126 Prince Street).*
>
> *JA 315, Tr. pg. 66 lines 11-16 (by-right house not supported by BAR staff).*
>
> *JA 343-44, Tr. pg. 94 line 12 through pg. 95 line 2 (BAR wanted to preserve wall and approved this design, not another).*

<u>Condition 1 and 4</u>: JA 272, Tr. pg. 23, lines 2-21 (open space requirements restrict house location).

> *JA 340-41, Tr. pg. 91 line 9 through pg. 92 line 6 (open space requirements facing property).*

<u>Justification 2</u>: JA 335-36, Tr. pg. 86 line 22 through pg. 87 line 4 (unreasonable restrictions).

<u>Justification 2 and 3</u>: JA 338-39, Tr. pg. 89 line 12 through pg. 90 line 17 (lot size combined with surroundings and historic overlay pose unreasonable restriction and hardship).

<u>Justification 3</u>:

> *JA 262, Tr. pg. 13 lines 5-9 (RM Zoning plus historic district regulations).*

JA 268-69, Tr. pg. 19 lines 18 through pg. 20 line 2 (RM Zone and historic district requirements result in an unreasonable restriction and undue hardship).

JA 270, Tr. pg. 21 lines 9-14 (unreasonable restriction and hardship).

JA 345, Tr. pg. 96 lines 5-10 (hardship to impose full rear yard setback when 50 percent of lots within block have no rear yard).

No such variance shall be authorized by the board unless it finds:

(1) That the strict application of the ordinance would produce undue hardship.

Requirement addressed:

JA 262, Tr. pg. 13 lines 5-9 (RM Zoning plus historic district regulations).

JA 268-69, Tr. pg. 19 line 18 through pg. 20 line 2 (RM Zone and historic district requirements result in an unreasonable restriction and undue hardship).

JA 270, Tr. pg. 21 lines 9-14 (unreasonable restriction and hardship).

JA 338-39, Tr. pg. 89 line 12 through pg. 90 line 17 (lot size combined with surroundings and historic overlay pose unreasonable restriction and hardship).

JA 345, Tr. pg. 96 lines 5-10 (hardship to impose full rear yard setback when 50 percent of lots within block have no rear yard).

(2) That such hardship is not shared generally by other properties in the same zone and the same vicinity and is not created by the owner of such property.

<u>*Requirement addressed:*</u>

JA 261-62, Tr. pg. 12, line 17 through pg. 13 line 14.

JA 327-28, Tr. pg. 78 line 11 through pg. 79 line 17 (shallow, wide and vacant lot in RM Zone next to historic wooden wall.

(3) That the authorization of such variance will not be of substantial detriment to adjacent property and that the character of the zone will not be changed by the granting of the variance.

<u>*Requirements addressed:*</u>

JA 263, Tr. pg. 14 lines 7-17 (light and air not impacted).

JA 268, Tr. pg. 19 lines 4-16 (house will not alter essential character or impact adjacent properties more than by-right house would).

JA 286-91, Tr. pg. 37 line 17 through pg. 42 line 7 (position of H. Curtis Martin on light and air).

JA 351-55, Tr. pg. 102 line 17 through pg. 106 line 4 (light and air impact considered).

No variance shall be authorized unless the board finds that the condition or situation of the property concerned or the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.

Requirement addressed:

JA 311-14, Tr. pg. 62 line 17 through pg. 65 line 16 (importance of eastern wall of adjacent 126 Prince Street).

JA 327-28, Tr. pg. 78 lines 11 through pg. 79 line 17 (shallow, wide and vacant lot in RM Zone next to historic wooden wall.

In authorizing a variance the board may impose such reasonable conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary in the interest of public health, safety or welfare and to assure that the variance authorized shall be in harmony with the intended spirit and purpose of this chapter and the ordinance.

Zoning Ordinance

11-1103 – Standards for variances.

The board of zoning appeals shall not vary the regulations of this ordinance as authorized above unless it finds that:

(A) The particular physical surroundings, shape, topographical condition or other extraordinary situation or condition of the specific property involved would effectively prohibit or unreasonably restrict the utilization of the property or would constitute a clearly demonstrable hardship, as distinguished from a mere inconvenience, if the strict letter of the regulations were carried out;

Requirement addressed:

JA 268-69, Tr. pg. 19 line 18 through pg. 20 line 2 (RM Zone and historic district requirements result in an unreasonable restriction and undue hardship).

JA. 270, Tr. pg. 21 lines 9-14 (unreasonable restriction and hardship).

JA 270-71, Tr. pg. 21, line 15 through pg. 22 line 20 (physical surroundings and condition of the property: development pattern on block and wall at 126 Prince Street).

JA 272, Tr. pg. 23, lines 2-21 (open space requirements restrict house).

JA 310, Tr. pg. 61, lines 13-21 (house width to be in-keeping with others on block).

JA 311-14, Tr. pg. 62 line 17 through pg. 65 line 16 (importance of eastern wall of adjacent 126 Prince Street).

JA 315, Tr. pg. 66 lines 11-16 (by-right house not supported by BAR staff).

JA 327-28, Tr. pg. 78 line 11 through pg. 79 line 17 (shallow, wide and vacant lot in RM Zone next to historic wooden wall.

JA 337-338, Tr. pg. 88 line 17 through pg. 89 line 14 (shape of lot).

JA 338-39, Tr. pg. 89 line 12 through pg. 90 line 17 (lot size combined with surroundings and historic overlay pose unreasonable restriction and hardship).

JA 340-41, Tr. pg. 91 line 9 through pg. 92 line 6 (open space requirements facing property).

JA 343-44, Tr. pg. 94 line 12 through pg. 95 line 2 (BAR wanted to preserve wall and approved this design, not another).

JA 345, Tr. pg. 96 lines 5-10 (hardship to impose full rear yard setback when 50 percent of lots within block have no rear yard).

JA 351, Tr. pg. 102 lines 6-11 ("property is unique and an extraordinary situation has been created, and therefore a hardship has been determined").

JA 355, Tr. pg. 106 lines 14-17 (overall proportion and distinct shallowness of lot).

(B) The conditions upon which the petition for a variance is based are not applicable generally to other property within the same zoning classification;

Requirement addressed:

JA 270-71, Tr. pg. 21, line 15 through pg. 22 line 20 (development pattern on block and wall at 126 Prince Street).

JA 327-28, Tr. pg. 78 line 11 through pg. 79 line 17 (shallow, wide and vacant lot in RM Zone next to historic wooden wall.

(C) The property was acquired in good faith and any hardship produced by the ordinance was not created by the owner of such property;

Requirement addressed:

JA 257-58, Tr. pg. 8 line 8 through pg. 9 line 18.

(D) The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood in which the property is located, or diminish or impair the values thereof;

Requirement addressed:

JA 268, Tr. pg. 19 lines 4-16 (house will not alter essential character or impact adjacent properties more than by-right house would).

JA 286-91, Tr. pg. 37 line 17 through pg. 42 line 7 (position of H. Curtis Martin on light and air).

JA 318-19, Tr. pg. 69 line 16 through pg. 70 line 21 (support of application by owner of 130 Prince Street).

JA 324, Tr. pg. 75 lines 1-21 (support of application by owner of 206 South Lee Street).

JA 351-55, Tr. pg. 102 line 17 through pg. 106 line 4 (light and air impact considered).

(E) The proposed variance will not impair an adequate supply of light and air to adjacent property, or cause or substantially increase congestion in the public streets, or increase the danger of fire or the spread of fire, or endanger the public safety;

Requirement addressed:

JA 263, Tr. pg. 14 lines 7-17 (light and air not impacted).

JA 265-66, Tr. pg. 16, line 1 through pg. 17, line 13 (by-right house larger than what is proposed).

JA 286-91, Tr. pg. 37 line 17 through pg. 42 line 7 (position of H. Curtis Martin on light and air).

JA 351-55, Tr. pg. 102 line 17 through pg. 106 line 4 (light and air impact considered).

(F) The variance, if granted, will not alter the essential character of the area or be a substantial detriment to adjacent property;

Requirement addressed:

JA 263-65, Tr. pg. 14 line 18 through pg. 15 line 22 (house smaller or similar in size to other homes on block).

JA 265-66, Tr. pg. 16, line 1 through pg. 17, line 13 (by-right house larger than what is proposed).

JA 268, Tr. pg. 19 lines 4-16 (house will not impair or impact negatively on adjacent owners any more than by-right house).

JA 310, Tr. pg. 61, lines 13-21 (house width to be in-keeping with others on block).

JA 318-19, Tr. pg. 69 line 16 through pg. 70 line 21 (support of application by owner of 130 Prince Street).

JA 324, Tr. pg. 75 lines 1-21 (support of application by owner of 206 South Lee Street).

(G) The strict application of this ordinance would produce undue hardship;

Requirement addressed:

JA 262-63, Tr. pg. 13 line 5 through pg. 14 line 6.

JA 270, Tr. pg. 21 lines 9-14.

JA 272, Tr. pg. 23 lines 2-21.

(H) Such undue hardship is not shared generally by other properties in the same zone and vicinity; and

Requirement addressed:

JA 261-62, Tr. pg. 12 line 17 through pg. 13 line 4 (vacant, shallow lot with adjacent original unpainted wood wall).

JA 327-28, Tr. pg. 78 line 11 through pg. 79 line 17 (shallow, wide and vacant lot in RM Zone next to historic wooden wall.

(I) No other remedy exists whereby the same relief was, is or may be available from another approval body of the city as part of its review of a site plan or other development application.

Requirement addressed:

JA 315, Tr. pg. 66 lines 11-16 (by-right house not supported by BAR staff).