IN THE

Supreme Court of Virginia

RECORD NO. 121526

H. CURTISS MARTIN, *et al.*,

Appellants,

v.

THE CITY OF ALEXANDRIA, *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF

Gifford R. Hampshire (VSB #28954)
Petula C. Metzler (VSB #70202)
BLANKINGSHIP & KEITH, P.C.
9300 West Courthouse Road, Suite 201
Manassas, Virginia 20110
Tel.: (703) 365-9945
Fax: (703) 365-2203
ghampshire@bklawva.com
pmetzler@bklawva.com
Counsel for Appellants

Peter A. Dingman, VSB #14378
Anne M. Heishman, VSB #65540
DINGMAN & LABOWITZ, P.C.
526 King Street, Suite 423
Alexandria, Virginia 22314
Telephone: (703) 519-0999
Facsimile: (703) 519-1511
pad@dingmanlabowitz.com
Counsel for Appellants

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE GARNERS' ENTIRE ARGUMENT RESTS UPON THE BASELESS ASSUMPTION THAT THE BAR WOULD NOT APPROVE A BY-RIGHT HOUSE DESIGN 1

II. THE BZA IMPROPERLY APPLIED THE STANDARDS FOR GRANTING A VARIANCE RESULTING IN A DECISION THAT 3

A. The Garners Lot Is Not Extraordinary or Exceptional & Absent Such a Finding the BZA Could Not Find That the Property Was Eligible for a Variance 3

B. The Recommendation of City Staff Was Bartered Away in the Litigation Stay Agreement 5

CONCLUSION 7

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Page

Other Authorities

City Charter Section 9.18 ..... 4, 7

City of Alexandria Zoning Ordinance §10-100 1

City of Alexandria Zoning Ordinance §11-1103 ..... 4, 7

ARGUMENT

I. THE GARNERS' ENTIRE ARGUMENT RESTS UPON THE BASELESS ASSUMPTION THAT THE BAR WOULD NOT APPROVE A BY-RIGHT HOUSE DESIGN.

The Garners want this Court to believe that they find themselves caught between a rock (the Zoning Ordinance Historic District Regulations[1]) and a hard place (the RM Zoning District Regulations) and but for the granting of the variances their lot would be unbuildable. Nothing could be further from the truth. The Garners have always had the ability to build a house without a variance—just not the house they prefer—and they have never submitted anything other than a variance-dependent design to the BAR.

The Garners claim that it is "effectively impossible" for them to satisfy the Historic District regulations and the RM Zoning District regulations[2] and that they "cannot build a by-right home" because to do so would require BAR approval.[3] They have never tried to get BAR approval for a by-right home. They claim that in order for them "to build the home that the BAR found appropriate," the BAR "required the side and rear yard variances

---

[1] Zoning Ordinance §10-100, et seq. (JA 100-113). These regulations were not presented to the BZA and City Staff statements at the hearing about historic interests were made without reference to these regulations. (JA 186-89).

[2] Garner Brief at 11.

[3] Id. at 15.

from the BZA."[4] The BAR never required side and rear yard variances. The design submitted by the Garners for BAR consideration presupposed those types of variances and the BAR's issuance of a Certificate of Appropriateness was conditioned of the BZA later granting those variances. (JA 184).

The Garners further claim that their property faces "a clearly demonstrable hardship" and is "undevelopable because alternative designs and house locations would not . . . satisfy the BAR."[5] The Garners have never submitted an alternative house design or house location to the BAR so they cannot know—and the record certainly does not show—that an alternative design or house location would not satisfy the BAR. The Garners, therefore, cannot claim that their property is undevelopable or faces a clearly demonstrable hardship because the house design has to pass muster with the BAR.

Notwithstanding the fact that the Garners have never sought BAR approval of a by-right, no-variance-required house, the Garners somehow conclude that "[w]hen 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

---

[4] Id.
[5] Garner Brief at 17.

properly approved the Variance Application."[6] There is absolutely no basis for this conclusion other than convenient speculation.

It is undisputed that without any variance at all, the Garners can build a reasonably-sized house on their lot. (JA 248-249). In fact, without a variance, the Garners can build a bigger house than they can build with a variance.[7] The BAR has never told them otherwise. Because the house they want requires variances, the Garners have never submitted anything other than a variance-dependent house design to the BAR. The Garners' entire hardship argument rests on having this Court believe that there is no house design in compliance with existing zoning that the BAR would approve. There is simply no evidence that this is true and no such evidence was presented to the BZA.

II. THE BZA IMPROPERLY APPLIED THE STANDARDS FOR GRANTING A VARIANCE RESULTING IN A DECISION THAT WAS CONTRARY TO LAW.

A. The Garners' Lot Is Not Extraordinary or Exceptional and Absent Such a Finding the BZA Could Not Find That the Property Was Eligible for a Variance.

The Garners claim that the BZA made the correct decision in granting the variances because the Garners' lot represents a "truly extraordinary

---

[6] Id. at 12.

[7] Garner Brief at 16; JA 248-249. Although the Garners can build a larger house, they are not required to do so. If they prefer, they can build a smaller house by-right.

situation."[8] The Garners also claim that their lot is "atypical in shape."[9] The Garners' lot is not extraordinary. It is not atypical. It is not exceptional. At most, it is different, as is every piece of property, and merely being different is not enough to justify a variance.

City Charter Section 9.18 allows for the granting of a variance "where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance . . . the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the use of the property."[10] (JA 92). The Garners' lot is none of these things. The Garners' lot is wider than the other lots in the 100 block of Prince Street. (JA 128). The Garners' lot is not exceptionally shallow. The Garners' lot is only shallower than two-thirds of the lots in the 100 block of Prince Street[11] which means that the Garners' lot is deeper (a good characteristic from a construction perspective) than one-third of the lots in their neighborhood. The Garners lament the fact that their lot is subject to both the Zoning Ordinance requirements and the Historic District regulations, but so is every other

---

[8] Id. at 11.
[9] Id.
[10] Zoning Ordinance § 11-1103 sets forth a nearly identical standard, but requires that the property bear "extraordinary" as opposed to "exceptional" conditions in order to be eligible for a variance (JA 98).
[11] JA 128.

property in the 100 block of Prince Street and the surrounding area. There is nothing extraordinary or exceptional about the Garners' lot and no basis whatsoever for the BZA to determine that it is therefore eligible for a variance.

B. The Recommendation of City Staff Was Bartered Away in the Litigation Stay Agreement.

In their Brief, the Garners make much of the fact that the "staff report addresses each of the 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."[12] As support for the finding of undue hardship, the Garners reference the part of the BZA hearing transcript where City staffer, Barbara Ross, opines that "the strict application of the RM requirements, as well as the historic district considerations would result in an unreasonable restriction and undue hardship on this property." (JA 268). The problem with the BZA relying on the staff report to establish anything, much less a requirement as significant as undue hardship, is that the recommendation of City Staff had been procured long before the Garners submitted their variance.

In exchange for the Garners' promise to stay their litigation with the City, the City traded its discretion in reviewing the Garners next variance

[12] Garner Brief at 20-21.

application by promising, in advance of receiving that application, that the "Department of Planning and Zoning (the "Department") will support the Garners' application for a three (3) foot variance from the side yard setback requirement." (JA 196; emphasis added). Twice before, City Staff had recommended denial of the Garners' variance applications,[13] but this time, City Staff recommended approval. (JA 132). To cover for the fact that the City had no discretion with regard to this most recent application and was obligated to support it, City Staff attempted to distinguish their previous denials by stating that "[b]ecause a reasonably sized house could be built without a variance, and based on the prior hardship standard of 'approaching confiscation,' staff was unable to find the requisite hardship." (JA 122). Notwithstanding the change in the law, the Garners still must show hardship, a requirement missing in this case.

The lot has not changed since the two earlier variance applications that City Staff denied. A reasonably-sized house can still be built on the Garners' lot without a variance. (JA 248-249). Although the requirement is no longer hardship approaching confiscation, the applicant still must show the requisite hardship. City Charter Section 9.18 and Section 11-1103 of the Zoning Ordinance both require a "clearly demonstrable hardship" in

[13] JA 172, 173.

order to grant a variance.[14] City Staff claims this requirement has been met because "zoning constraints limits severely the placement of a house on the lot,"[15] but even if true, the property suffered from the same zoning constraints at the time of the two earlier, but denied, variance applications. Staff speculation that, with regard to a by-right design, "it is likely the proposal would not be approved by the BAR" (which curiously parrots the Garners' hardship justification that circumstances "potentially prevent BAR approval"[16]) does not establish a clearly demonstrable hardship especially considering that no one has ever bothered to ask for BAR approval of a by-right design. This inconsistent staff "analysis" exists only because City Staff had no choice but to make the facts fit its obligation to support the Garners' variance application. The BZA's reliance on this tainted staff report in reaching their decision—as duly noted by the Garners' in their brief—resulted in a BZA decision that was contrary to law.

CONCLUSION

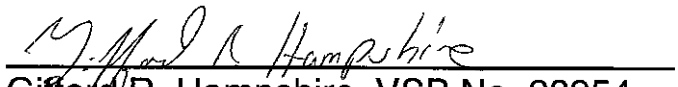
For the reasons stated herein, Martin & Drewry pray this Honorable Court reverse the rulings of the BZA and the trial court and enter judgment in their favor.

---

[14] JA 92, 98.
[15] JA 131.
[16] JA 127.

Respectfully submitted,

H. CURTISS MARTIN and
VIRGINIA W. DREWRY,
By Counsel



Gifford R. Hampshire, VSB No. 28954
Petula C. Metzler, VSB No. 70202
BLANKINGSHIP & KEITH, P.C.
9300 West Courthouse Road, Suite 201
Manassas, VA 20110
Tel: (703) 365-9945
Fax (703) 365-2203
ghampshire@bklawva.com
pmetzler@bklawva.com

Peter A. Dingman, VSB #14378
Anne M. Heishman, VSB #65540
DINGMAN & LABOWITZ, P.C.
526 King Street, Suite 423
Alexandria, VA 22314
Tel: (703) 519-0999
Fax: (703) 519-1511
pad@dingmanlabowitz.com

Counsel for Appellants

CERTIFICATE OF SERVICE

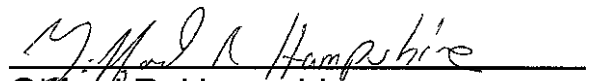
I have complied with Virginia Supreme Court Rule 5:26(h) by filing fifteen (15) copies of this Reply Brief in the Office of the Clerk of the Supreme Court of Virginia and by mailing three (3) copies of same to:

James L. Banks, Jr., VSB #28052,
james.banks@alexandriava.gov
Christopher P. Spera, VSB #27904
christopher.spera@alexandriava.gov
Joanna C. Anderson, VSB #65463
joanna.anderson@alexandriava.gov
OFFICE OF THE CITY ATTORNEY
301 King Street, Suite 1300
Alexandria, VA 22314
Tel: (703)746-3750
Fax: (703) 838-4810
Counsel for the City of Alexandria

Michael J. Coughlin, VSB #70915
mcoughlin@pw.thelandlawyers.com
WALSH, COLUCCI, LUBELEY, EMRICH & WALSH, P.C.
4310 Prince William Parkway, Suite 300
Woodbridge, VA 22192
Tel: (703) 680-4664
Fax: (703) 680-2161
Counsel for James and Christine Garner

on this 1st day of March, 2013. On the same date, I have filed an electronic copy of the brief with the Clerk via email.

Counsel for Appellants respectfully requests oral argument.



Gifford R. Hampshire