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In The

SUPREME COURT OF VIRGINIA

Record No. 190449

THOMAS BYRNE,

Appellant,

v.

CITY OF ALEXANDRIA AND
CITY COUNCIL OF THE CITY OF ALEXANDRIA,

Appellees.

BRIEF OF APPELLEES CITY OF ALEXANDRIA AND CITY COUNCIL OF THE CITY OF ALEXANDRIA

On Appeal from
The Circuit Court for the City of Alexandria, Virginia
No. CL18001734

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January 2, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

APPELLANT'S ASSIGNMENTS OF ERROR 1

NATURE OF THE CASE AND MATERIAL PROCEEDINGS 1

STATEMENT OF THE FACTS 3

STANDARDS OF REVIEW 7

A. Motion Craving Oyer 7

B. Demurrer 8

ARGUMENT 10

I. The Trial Court Correctly Granted the City's Motion Craving Oyer 10

A. The Use of Oyer Is Not Limited To Deeds and Letters of Probate. 10

B. The Legislative Record Forms The Basis Of Byrne's Appeal to The Trial Court 13

C. The Authorities Cited By Byrne Are Unpersuasive 17

II. The Trial Court Correctly Sustained The City's Demurrer. 22

A. The Trial Court Was Also Entitled To Take Judicial Notice Of The Legislative Record 22

B. The Decision To Approve The Certificate Of Appropriateness Was Not Arbitrary and Capricious 25

1. Byrne, Not The City, Suggested the Gate Would Be For Pedestrian Use. 25

2. The Curb Cut In Front Of The Byrne Property Was Not Relevant To City Staff's Analysis Of The Proposal 28

3. The Gates Reviewed By The BAR And The City Council Were Proper Comparators 30

4. Both The BAR And The City Council Considered The Undated Photograph Of The Byrne Property 31

5. The BAR And The City Council Properly Considered Only Those Factors In Section 10-105 Of The Zoning Ordinance 32

CONCLUSION 38

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES

Alex. Coalition of Resp. Stewardship, et al. v. City of Alexandria,
No. CL18001681 (Alex. Cir. Ct. Feb. 19, 2019) 16

Antigone v. Taustin,
98 Va. Cir. 213 (2018) 17, 18

Assurance Data, Inc. v. Malyevac,
286 Va. 137 (2013) 20

Breeding v. Hensley,
258 Va. 207 (1999) 19

Burton v. F.A. Seifert & Co.,
108 Va. 338 (1908) 8

Catercorp, Inc. v. Catering Concepts, Inc.,
246 Va. 22 (1993) 19

Culpeper Nat'l Bank v. Morris,
168 Va. 379 (1937) ..... *passim*

Eagle Harbor, LLC v. Isle of Wight Cty.,
271 Va. 603 (2006) 9

EMAC, LLC v. Cty. of Hanover,
291 Va. 13 (2016) 8, 14, 15

Fielder's Choice Enter. v. Augusta Cty.,
92 Va. Cir. 66 (Augusta Cir. Ct. 2015) 12-13

Fleming v. Anderson,
187 Va. 788 (1948) 23

Fultz v. Delhaize America, Inc.,
278 Va. 84 (2009) 20

Fuste v. Riverside Healthcare Ass'n, Inc.,
265 Va. 127 (2003) 8

Gazette, Inc. v. Harris,
229 Va. 1 (1985) 25

Glass v. Trafalgar House Prop.,
58 Va. Cir. 437 (Loudoun Cir. Ct. 2002) 18

Glazebrook v. Bd. of Supervisors,
266 Va. 550 (2003) 7

Hardaway v. City Council,
No. CL16001064 (Alex. Cir. Ct. Apr. 29, 2016) 16

Marios v. Va. Elec. & Power Co., No. CL-2019-1068,
2019 Va. Cir. LEXIS 453 (Fairfax Cir. Ct. Sept. 16, 2019) 12

Martone v. Martone,
257 Va. 199 (1999) 23

MM v. Sch. Dist. of Greenville Cty.,
303 F.3d 523 (4th Cir. 2002) 24

Peck v. City Council,
2012 WL 655414 (Alex. Cir. Ct. Sept. 4, 2012) 16

Perry v. Commonwealth,
280 Va. 572 (2010) 24

Ragone v. Waldvogel,
54 Va. Cir. 581 (Roanoke Cir. Ct. 2001) 7, 13

Renner v. Stafford,
245 Va. 351 (1993) 19

Resk v. Roanoke Cty.,
73 Va. Cir. 272 (Roanoke Cir. Ct. 2007) 7, 8, 15

Rosen v. Smith,
254 Va. 99 (1997) 20

Rosenruist-Gestao E. Servicos LDA v. Virgin Enters. Ltd.,
511 F.3d 437 (4th Cir. 2007) 24

School Board v. Wescott,
254 Va. 218 (1997) 9, 37

Schur v. Sprenkle,
86 Va. Cir. 455 (Richmond Cir. Ct. 2013) 13

Seyfarth, Shaw, Fairweather, & Geraldson v. Lake Fairfax Seven Ltd. P'ship, 253 Va. 93 (1997) 19

Sjolinder v. Am. Enter. Sols., Inc.,
51 Va. Cir. 436 (Charlottesville Cir. Ct. 2000) 20-21

Slone v. General Motors Corp.,
249 Va. 520 (1995) 20

Spiller v. James River Corp.,
32 Va. Cir. 300 (Richmond Cir. Ct. 1993) 13

Stumpf v. Brown Distrib. Co.,
79 Va. Cir. 284 (Richmond Cir. Ct. 2009) 13

Titan Am. v. Riverton Inv. Corp.,
264 Va. 292 (2002) 22, 24

Walsh v. Bennett,
260 Va. 171 (2000) 20

Ward's Equip., Inc. v. New Holland N. Am., Inc.,
254 Va. 379 (1997) 8, 9, 20

STATUTES

ALEX. ZONING ORD. § 10-103(A) 33
ALEX. ZONING ORD. § 10-105(A) 33

ALEX. ZONING ORD. § 10-105(A)(2)(a)-(b) 37
ALEX. ZONING ORD. § 10-107(B)..... 9, 13-14

APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the Circuit Court for the City of Alexandria correctly granted the Motion Craving Oyer filed by the City of Alexandria and the City Council of the City of Alexandria.

2. Whether the Circuit Court for the City of Alexandria correctly sustained the Demurrer filed by the City of Alexandria and the City Council of the City of Alexandria.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This appeal involves the decision by the City Council of the City of Alexandria ("City Council") decision to affirm the Alexandria Board of Architectural Review's ("BAR") approval of a Certificate of Appropriateness, with conditions, for the construction of a fence at 420 South Lee Street in Alexandria, Virginia (the "Property"). The Property is owned by Appellant Thomas Byrne ("Appellant" or "Byrne"), and is located in the Old and Historic Alexandria District.

On December 20, 2017, prior to issuing the Certificate of Appropriateness, the BAR held a public hearing on Byrne's application to construct the fence. Until recently, a brick wall with a single pedestrian gate existed along the entire length of the front of the property. Byrne demolished the brick wall without obtaining the proper permits, and

subsequently sought approval for construction of the fence currently at issue. The BAR approved the application, but conditioned approval on construction of a double gate that was smaller in width than the one proposed by Byrne. Byrne appealed the BAR's decision to the City Council, which held a public hearing on February 24, 2018. The City Council unanimously affirmed the BAR's decision.

Thereafter, pursuant to Section 10-107(B) of the Alexandria Zoning Ordinance, Byrne appealed the City Council's decision to the Circuit Court for the City of Alexandria, claiming that the BAR and City Council allegedly considered an inappropriate factor – parking – when analyzing the application. In response, the City of Alexandria and City Council for the City of Alexandria (collectively "Appellees" or "the City") filed a Demurrer and Motion Craving Oyer of the complete legislative record that was before the City Council at the time it rendered its decision. Byrne opposed both motions. After oral argument, the Honorable Lisa B. Kemler, chief judge of the Circuit Court for the City of Alexandria, granted the Motion Craving Oyer from the bench and took the Demurrer under advisement. Judge Kemler invited the parties to submit additional briefing on the Demurrer, and the City filed a supplemental brief on November 28, 2018. On December 12, 2018, Judge Kemler issued a written opinion sustaining the

City's Demurrer. As such, the Petition for Appeal was dismissed with prejudice. This appeal followed.

STATEMENT OF THE FACTS

Byrne is the owner of real property located at 420 South Lee Street (the "Property"), which is located in the "Old and Historic Alexandria District" of Alexandria, Virginia. *See* JA at 2. On or about November 20, 2017, Byrne submitted an application to the BAR in which he proposed to construct a reproduction Victorian period wicket and spear fence along the front of the Property (the "Application"). Byrne's proposal included a double gate, measuring approximately eight (8) feet in width that would open onto a "walk." *See* JA at 12, 52, 134.

A cast iron fence and brick knee wall with a single pedestrian gate was previously located along the length of the Property's front property line. *See* JA at 46-47. Without prior approval from the Board of Architectural Review ("BAR"), Byrne unilaterally demolished that wall and fence to provide temporary construction access to the property during a renovation of the Property. *See* JA at 46, 223. Because Byrne failed to reconstruct the brick wall and fence after the renovation was complete, the BAR issued a violation to Byrne because the demolition occurred without an appropriate permit. *See* JA at 223. The BAR denied Byrne's request for an after-the-

fact demolition permit, and instead provided guidance on how the violation could be remedied. *See* JA at 223. Specifically, the BAR suggested that Byrne either reinstall the previous wall with its single pedestrian gate, or submit a proposal for a new fence that was historically appropriate with both the Property and the surrounding neighborhood. *See* JA at 223. The BAR ultimately agreed that a historically appropriate double gate could be installed, provided that Byrne install a single gate that directly aligned with the front door. *See* JA at 61. It is in this context that Byrne submitted the application at issue.

The BAR reviewed the Application and determined that Byrne's proposal to construct a metal wicket and spear fence was both historically and architecturally appropriate. *See* JA at 2, 12. The BAR further determined that a pair of matching gates was also appropriate, provided that the gates were consistent with historical examples of other pedestrian gates in the surrounding area. *See* JA at 49. After a thorough review of other historic double gates in the district, City staff concluded that "the proposed gate['s] opening width . . . would be entirely out of scale with the pedestrian sidewalk, the historic house and the historic streetscape." JA at 49. City staff further concluded that "an appropriate gate size would be 2.5' or 3' wide for each gate, for a total opening of no more than six feet." JA at

49. On December 20, 2017, the BAR, in a vote of 5-0, unanimously approved a Certificate of Appropriateness as to the materials and design of the fence, with the condition that the width of the double gate not exceed six (6) feet in total. *See* JA at 59-60. Approval was further conditioned on "the reduced width double gate align[ing] with the street facing front door or that a second gate be added that would align with the front door." JA at 120.

On January 3, 2018, Byrne appealed the BAR's decision to the City Council, asserting that the BAR did not have "evidence of [a] larger gate" that previously existed on the Property when it conditioned the new fence's approval on the construction of a six (6) foot double gate. *See* JA at 167. Byrne stated that he would present photographic evidence of the previous gate (which was demolished decades earlier) in his appeal to the City Council. *See* JA at 167.

Prior to the City Council hearing, City staff reviewed the BAR's actions, as well as the applicable sections of the Alexandria Zoning Ordinance, and recommended that the City Council affirm the Certificate of Appropriateness with conditions. *See* JA at 123. On February 24, 2018, the City Council held a public hearing on Byrne's appeal. *See* JA at 174. During the hearing, the City Council heard testimony from the BAR, the

Department of Planning and Zoning, the Historic Alexandria Foundation, the Historic Alexandria Resources Commission, the Old Town Civic Association, Byrne, and members of the public.

During the City Council hearing, Byrne presented the City Council with photographic evidence of a gate that briefly existed on the Property in the 1930s, and represented, without supporting measurements, that it was eight feet wide. *See* JA at 226-27. Byrne also presented photographs of other double gates in the Old and Historic District that he claimed were proper comparators. *See* Consent Motion, Ex. A, B. John Goebel, on behalf of the BAR, explained that the BAR was aware of this photograph but did not find it persuasive because, *inter alia*, it "showed only half of the gate sitting at an angle away from the street, making it difficult to determine its width." JA at 230. Mr. Goebel further explained that, while some eight foot gates may exist in the Old and Historic District, most lead to driveways or alleyways and are clearly meant to accommodate vehicular access. *See* JA at 231. Here, however, Byrne represented in the Application that the double gate would be for pedestrian use as it opened onto a "walk." *See* JA at 231. Accordingly, Mr. Goebel explained to the City Council that these wider gates were not proper comparators. *See* JA at 231.

After considering the extensive testimony and the memoranda prepared by City staff, the City Council unanimously affirmed the decision of the BAR for the reasons stated in the staff report. *See* JA at 174-75. Byrne appealed the City Council's decision to the Circuit Court for the City of Alexandria on March 26, 2019. *See* JA at 1. The City filed a Motion Craving Oyer and Demurrer in response, which the court granted on December 12, 2018 and January 9, 2019, respectively. *See* JA at 329-32. This appeal followed.

STANDARDS OF REVIEW

This matter is before the Court on Byrne's appeal of the trial court's decision to grant Respondents' Motion Craving Oyer and Demurrer. The issues to be resolved by this Court are therefore pure questions of law, which are reviewed *de novo*. *See Glazebrook v. Bd. of Supv'rs,* 266 Va. 550, 554 (2003) ("Because appellate review of the sustaining of a demurrer involves a matter of law, we review the trial court's judgment *de novo*.").

A. Motion Craving Oyer

A motion craving oyer is a request to treat a document sued upon, or a collateral document which is necessary to the claims raised in the complaint as part of the plaintiff's pleadings. *See Resk v. Roanoke Cty.,* 73 Va. Cir. 272, 273-74 (Roanoke Cir. Ct. 2007); *see also Ragone v.*

Waldvogel, 54 Va. Cir. 581, 582 (Roanoke Cir. Ct. 2001) (citing *Burton v. F.A. Seifert & Co.,* 108 Va. 338, 350 (1908)). "One purpose of granting oyer is to allow the Court to view all material parts of a record so that an objective, intelligent construction of the record can be made without being limited by the subjective interpretations of the parties." *Resk, 73 Va.* at 274. When a motion craving oyer is granted, the documents of which oyer is craved become part of the pleadings, and the court "may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings." *EMAC, LLC v. Cty. of Hanover,* 291 Va. 13, 21 (2016) (citation omitted); *see also Ward's Equip., Inc. v. New Holland N. Am., Inc.,* 254 Va. 379, 382 (1997).

Because the legislative record formed the basis of Byrne's Petition for Appeal to the circuit court, the trial court correctly granted the City's Motion Craving Oyer. *See Culpeper Nat'l Bank v. Morris,* 168 Va. 379, 382-83 (1937) (explaining that when a court is asked to make a ruling on a record it has a duty to require the pleader to produce all material parts).

B. Demurrer

A demurrer tests the legal sufficiency of a pleading. *See Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 131 (2003). When ruling on a demurrer, the court accepts the truth of all properly pleaded material facts

and construes all reasonable factual inferences in favor of the nonmoving party. *See id.* at 131-32 (citing *Ward's Equip.,* 254 Va. at 382). To withstand a demurrer, "a pleading must be made with 'sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.'" *Eagle Harbor, LLC v. Isle of Wight Cty.,* 271 Va. 603, 611 (2006).

Here, the trial court was tasked with reviewing the City Council's decision to affirm the approval of the Certificate of Appropriateness with conditions. As such, it was bound by the standard of review prescribed in the Alexandria Zoning Ordinance. Section 10-107 of the Zoning Ordinance provides that "[f]indings of fact by the council are conclusive on the [trial] court in any such appeal." ALEX. ZONING ORD. § 10-107(B). The trial court "may reverse or modify the decision of the council, in whole or in part, if it finds upon review that the decision of the council is contrary to law or that its decision is arbitrary and constitutes an abuse of discretion, or it may affirm the decision of council." *Id.* "Actions are defined as arbitrary and capricious when they are 'willful and unreasonable' and taken 'without consideration or in disregard of facts or law or without determining principle.'" *School Board v. Wescott,* 254 Va. 218, 224 (1997).

Because the trial court properly applied this standard and concluded that the City Council's decision was not arbitrary or an abuse of discretion, this Court should affirm the trial court's dismissal of Byrne's Petition for Appeal.

ARGUMENT

I. The Trial Court Correctly Granted The City's Motion Craving Oyer.

A. The Use Of Oyer Is Not Limited To Deeds And Letters Of Probate.

Byrne asks the Court to reverse the trial court's decision to grant the Motion Craving Oyer because the use of oyer is purportedly limited to deeds or letters of probate and administration. *See* Byrne Op. Brief at 8. This Court has never limited oyer in the manner advocated by Byrne, and Byrne's argument is contradictory to the modern – and majority – view of oyer in Virginia.

Contrary to Byrne's contentions, this Court has never held that the use of oyer was strictly limited to deeds and letters of probate. In *Culpeper National Bank*, 168 Va. 379 (1937), the plaintiffs asked that the trial court declare an order entered in a previous lawsuit to be null and void. *See id.* at 382. In their complaint, the plaintiffs described the proceedings in the previous suit, the purpose for which it was brought, the evidence

introduced, the issues submitted, the verdict of the jury, the motion to set aside the verdict, and the order of the court admitting the will to probate. *See id.* While the plaintiffs attached only a small part of the record to their complaint, they nonetheless asked the court to construe the complete record of the other suit. *See id.* The trial court granted the defendant's request to crave oyer of the entire record of the previous suit. *See id*. This Court affirmed the trial court's decision to grant the motion craving oyer, explaining:

> No intelligent construction of any writing or record can be made unless all of the essential parts of such paper or record are produced. A litigant has no right to put blinkers on the court and attempt to restrict its vision to only such parts of the record as the litigant thinks tends to support his view. ***When the court is asked to make a ruling upon any paper or record, it is its duty to require the pleader to produce all material parts.***

Id. at 382-83 (emphasis added). While the issue in *Culpeper National Bank* involved a will contest, the specific use of oyer was not related to any deed or letter of probate as argued by Byrne. Rather, oyer was used as a vehicle to permit the trial court to consider the complete record of the previous proceeding, as it formed the basis to be decided by this Court. *See id.* Indeed, the holding in *Culpeper National Bank* makes clear that when a court is tasked with ruling on ***any*** record or paper, it has a duty to require the plaintiff to produce all material parts. *See id.* The *Culpeper*

National Bank holding was in no way limited only to cases involving deeds or probate.

The overwhelming majority of courts interpreting *Culpeper National Bank* similarly have found that motions craving oyer are permissible in a variety of subject matters unrelated to deeds or letters of probate. In a September 16, 2019 decision, Judge Daniel E. Ortiz, of the Circuit Court for Fairfax County, held that motions craving oyer "ensure that documents which form the basis of an action – ***regardless of the type of action*** – become part of the record." *Marios v. Va. Elec. & Power Co.,* No. CL-2019-1068, 2019 Va. Cir. LEXIS 453, at *4 (Fairfax Cir. Ct. Sept. 16, 2019) (emphasis added). Relying on *Culpeper National Bank v. Morris,* Judge Ortiz explained that, "[f]rom a court's perspective, 'a litigant has no right to put [blinders] on the Court and attempt to restrict its vision to only such parts of the record as the litigant thinks tends to support his view.'" *Id.* (quoting *Culpeper Nat'l Bank,* 168 Va. at 382-83) (insertion in original). Accordingly, the *Marios* court concluded that "oyer may be granted over documents whenever 'a court is asked to make a ruling upon any paper or record.'" *Id.* (quoting *Culpeper Nat'l Bank,* 168 Va. at 382-83). The *Marios* decision is in accord with the majority of other courts in the Commonwealth that have taken a similarly appropriate view of oyer. *See, e.g., Fielder's*

Choice Enter. v. Augusta Cty., 92 Va. Cir. 66, 73 (Augusta Cir. Ct. 2015) (granting oyer for bid forms); *Schur v. Sprenkle,* 86 Va. Cir. 455, 461 (Richmond Cir. Ct. 2013) (granting oyer for an operating agreement); *Stumpf v. Brown Distrib. Co.,* 79 Va. Cir. 284, 285 (Richmond Cir. Ct. 2009) (granting oyer for a franchise agreement); *Ragone,* 54 Va. Cir. at 581-82 (granting oyer for sales contract); *Spiller v. James River Corp.,* 32 Va. Cir. 300, 302 (Richmond Cir. Ct. 1993) (granting oyer for employment contract).

For these reasons, the Court should affirm prior precedent and find that oyer was properly granted in this case, as the specific papers or records form the basis of Appellant's claim, as explained more fully below.

B. The Legislative Record Forms The Basis Of Byrne's Appeal To The Trial Court.

Like the plaintiffs in *Culpeper National Bank*, Byrne effectively asked the trial court to make a ruling on the record that was before the City Council when it affirmed the approval of the Certificate of Appropriateness. Specifically, Byrne sought "a review of the City Council's upholding of [the] Old and Historic Alexandria District Board of Architectural Review's (BAR) December 20, 2017 decision approving a Certificate of Appropriateness 'with conditions' for the width of double gates at 420 South Lee Street." JA at 1. To be clear, the action below was an *appeal* of the City Council's decision pursuant to Section 10-107(B) of the Alexandria Zoning

Ordinance. Accordingly, for purposes of Byrne's appeal, "[f]indings of fact by the council shall be conclusive on the court[.]" ALEX. ZONING ORD. § 10-107(B). Section 10-107(B) further provides that "[t]he court may reverse or modify the decision of council, in whole or in part, if it finds upon review that the decision of the council is contrary to law or that its decision is arbitrary and constitutes an abuse of discretion, or it may affirm the decision of council." *See* ALEX. ZONING ORD. § 10-107(B). Because the trial court was tasked with reviewing the appropriateness of the City Council's decision, the legislative record – which reflects the reasons for the decision – necessarily forms the basis of Byrne's appeal to the trial court. Therefore, consistent with *Culpeper*, the trial court properly granted the City's Motion Craving Oyer.

In addition, this Court has approved the use of oyer in land use cases such as this. *See EMAC, LLC,* 291 Va. at 16. *EMAC* involved a challenge to a government entity's denial of a conditional use permit. *See id.* The trial court granted a motion craving oyer and sustained the defendant's demurrer, concluding that the legislative action was fairly debatable after it reviewed the facts alleged in the complaint together with "the materials that the Board considered when it denied EMAC's extension application." *Id.* at 32. This Court affirmed, explaining that "[t]he circuit court properly relied on

this extensive record to conclude that the Board's decision was fairly debatable, and that EMAC had failed to allege facts upon which it could prevail in its challenge of the Board's zoning decision. It was, therefore, proper for the circuit court to sustain the defendants' demurrer and motion to dismiss." *Id.* at 23.

Though the plaintiff in *EMAC* consented to the defendant's motion craving oyer, the *EMAC* decision confirmed the long-standing practice of Virginia courts to grant oyer motions in the context of land use appeals.[1] For example, in *Resk v. Roanoke County*, the plaintiffs challenged the decision by the Roanoke County Board of Supervisors (the "Board") to rezone forty (40) acres of land as arbitrary, capricious, irrational, and unreasonable. *See* 79 Va. Cir. at 272. The Board demurred to the complaint, and craved oyer of the entire legislative record, which consisted of several documents: the rezoning application; the traffic impact analysis; the design guidelines; the Roanoke County Community Plan; the minutes of the Planning Commission's meeting; the minutes of the Board's meeting; a staff report; a transmittal report; and a report by the Deputy Director of Planning. *See id.* at 273. The *Resk* court explained that to determine whether it should affirm the Board's decision, it was required to decide

[1] There is no language in the *EMAC* opinion limiting the use of oyer in land use cases only to consent motions.

whether "the Board's discretion was within a broad range of reasonableness." *Id.* To do so, the Court needed to explore how the Board made its decision, not the "wisdom or appropriateness of [its] decision." *Id.* The court granted the motion craving oyer, concluding that "the plaintiffs' claims depend upon the legislative record that shows what the Board considered and the process the Board went through in making its decision to adopt the ordinance." *Id.* at 274; *see also Alex. Coalition of Resp. Stewardship, et al. v. City of Alexandria*, No. CL18001681 (Alex. Cir. Ct. Feb. 19, 2019) (granting motion craving oyer in appeal challenging approval of a development site plan); *Hardaway v. City Council,* No. CL16001064 (Alex. Cir. Ct. Apr. 29, 2016) (granting motion craving oyer for legislative record in land use appeal and sustaining demurrer); and *Peck v. City Council,* 2012 WL 655414, at *1 (Alex. Cir. Ct. Sept. 4, 2012) (same).

As in *Resk*, Byrne's appeal to the trial court challenged the City Council's decision to affirm the BAR's approval of the Certificate of Appropriateness with conditions as arbitrary, capricious, contrary to law, and as an abuse of discretion because, according to Byrne, the City Council and the BAR allegedly considered an improper factor; namely, the issue of parking on the Property. *See* JA at 1-2. Thus, in order to test the allegations in the Petition for Appeal, and because the City Council's

findings of fact were conclusive on the trial court, the trial court was required to consider the documents and testimony that were before the City Council when it made its decision, as well as the processes and procedures the City Council followed in making its determination. *See Resk,* 73 Va. Cir. at 274. Accordingly, in ruling on the City's Demurrer, the trial court considered only the limited documents in the legislative record, which included the Application, two staff reports, the public docket, meeting minutes, and the transcripts of the public hearings. *See* JA at 29-30.

C. The Authorities Cited By Byrne Are Unpersuasive.

The Court should reject Byrne's limited view of oyer as articulated in *Antigone v. Taustin,* 98 Va. Cir. 213 (2018), because even the *Antigone* court noted that its holding reflects the "minority position among Circuit Courts" regarding the use of oyer. *See id.* at 217.

In *Antigone*, the defendant craved oyer of various corporate documents it claimed formed the basis of the plaintiff's complaint. *See id.* at 213. The court denied the motion, finding that this Court had never expanded the oyer doctrine beyond deeds or letters of probate. *See id.* at 215. In doing so, the court assumed that "if the Court in *Culpeper* intended to broaden the permissible categories of oyer, it certainly would have said so as it dramatically expanded the scope of a Common Law doctrine." *Id.*

However, this assumption by the *Antigone* court is belied by the plain language in *Culpeper*. Indeed, in *Culpeper*, this Court held – without limitation – that a court has a "***duty to require*** the pleading to produce all material parts" of ***any*** record or paper forming the basis of a complaint. *See Culpeper,* 168 Va. at 383 (emphasis added). This clear language was not qualified or otherwise limited to deeds and/or letters of probate. The *Antigone* court further notes that the majority of circuit court decisions in the years since Culpeper was decided have found the use of oyer to be appropriate in a variety of cases. *See Antigone,* 98 Va. Cir. at 216-17 (compiling multiple cases granting motions craving oyer). Tellingly, the *Antigone* court could identify only a single opinion that disapproved of the use of oyer. *See id.* at 217 ("Against this wave, the court is aware of one Circuit Court opinion that criticized the practice of oyer, calling it 'archaic' and writing that it should be avoided. . . . This, though, is a modern minority position among Circuit Courts.").[2] Accordingly, the Court should find *Antigone* to be an anomaly and affirm the traditionally accepted view of oyer, which was expressly approved in *Culpeper*.

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[2] The *Antigone* court cited to *Glass v. Trafalgar House Prop.,* 58 Va. Cir. 437, 439 (Loudoun Cir. Ct. 2002). In *Glass*, the trial court summarily denied the motion craving oyer, concluding that the practice should be avoided. Again, this is the minority view and contrary to this Court's prior precedent.

Byrne's argument that "[t]his Court has repeatedly admonished trial courts to avoid short circuiting litigation and deciding cases without permitting the parties to reach a trial on the merits" is equally unpersuasive. *See* Byrne Op. Brief at 10. In support of this argument, Byrne cites to a variety of cases in which a trial court's decision to sustain a demurrer or grant summary judgment has been reversed for various reasons. However, none of the cases cited by Byrne involved the use of oyer or consideration of a document that formed the basis of a complaint. *See Renner v. Stafford,* 245 Va. 351, 355 (1993) (reversing summary judgment in medical malpractice suit because the record was incomplete with regard to medical evidence supporting plaintiff's theory of the case); *Catercorp, Inc. v. Catering Concepts, Inc.,* 246 Va. 22, 29 (1993) (reversing dismissal in breach of contract action because court concluded that complaint stated a viable cause of action and informed defendant of the nature of the claim); *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship,* 253 Va. 93, 97 (1997) (reversing decision to strike evidence at conclusion of opening statements in fee dispute because plaintiff should have had opportunity to present evidence before it was stricken); *Breeding v. Hensley,* 258 Va. 207, 216 (1999) (reversing decision to dismiss nuisance action because factual allegations were sufficient to withstand

demurrer); *Walsh v. Bennett,* 260 Va. 171, 176 (2000) (reversing decision to strike expert report prior to expiration of discovery deadline); *Fultz v. Delhaize America, Inc.,* 278 Va. 84, 91 (2009) (reversing summary judgment in negligence action because contributory negligence question was jury issue); *Assurance Data, Inc. v. Malyevac,* 286 Va. 137, 145 (2013) (reversing dismissal in non-compete and non-solicitation action because complaint alleged sufficient facts to state a claim); *Slone v. General Motors Corp.,* 249 Va. 520, 528 (1995) (reversing summary judgment in negligence and warranty action because complaint had sufficient allegations to state claim); *Rosen v. Smith,* 254 Va. 99, 106 (1997) (affirming denial of summary judgment motion because there were disputed issues of fact). Thus, these cases have no application here because the legislative record directly refutes Byrne's sole allegation that the City Council improperly considered the issue of parking. A trial was therefore unnecessary.

Bryne's argument that oyer motions short circuit discovery should be rejected for the additional reason that it misunderstands the impact of oyer. When a motion craving oyer is granted, the documents produced are treated as part of the pleadings. *See Ward's Equip., Inc.,* 254 Va. at 382; *see also Sjolinder v. Am. Enter. Sols.,* Inc., 51 Va. Cir. 436, 437

(Charlottesville Cir. Ct. 2000). It does not necessarily follow that judgment will automatically be rendered in favor of the defendant simply because a motion craving oyer is granted. If, upon review of the pleadings and the documents produced through oyer, a court finds that a complaint states a cause of action, the demurrer or other dispositive motion would be overruled, and the case would proceed through the normal channels. Thus, Byrne's concern that meritorious actions will somehow be dismissed at the pleadings stage is wholly unfounded.

Lastly, Byrne's argument that courts will experience a flood of oyer motions if the trial court's order is affirmed is without merit. As Byrne acknowledges in his brief, Virginia courts have taken an expansive view of the oyer doctrine in light of this Court's holding in *Culpeper*. Yet, according to Byrne's own statistics, only an "insignificant" number of cases filed each year involves a motion craving oyer. *See* Byrne Op. Brief at 13. Byrne offers no explanation as to why an affirmance of the trial court's order, which is consistent with *Culpeper*, will lead to any meaningful increase of oyer motions.

* * *

As Byrne offers no compelling reason as to why the trial court's decision to grant the City's Motion Craving Oyer should be reversed, this

Court should affirm the trial court's December 12, 2018 order granting the Motion Craving Oyer.

II. The Trial Court Correctly Sustained The City's Demurrer.

A. The Trial Court Was Also Entitled To Take Judicial Notice Of The Legislative Record.

Byrne erroneously argues that if the Court reverses the trial court's order granting the City's Motion Craving Oyer, it must also reverse the trial court's order sustaining the City's Demurrer. However, this argument ignores that, even in the absence of oyer, the trial court was permitted to take judicial notice "of records of the underlying actions" (*i.e.,* the BAR and City Council appeals). *See Titan Am. v. Riverton Inv. Corp.,* 264 Va. 292, 305 (2002).

In *Titan*, the plaintiff filed suit alleging tortious interference with contract and business expectancy, statutory and common law conspiracy and defamation based on previous litigation pursued by the defendant. *See id.* at 300. The defendant demurred on the grounds that the claim was barred by the Noerr-Pennington doctrine. *See id.* The plaintiff appealed on the grounds that, *inter alia*, the trial court should not have sustained the demurrer without discovery and further development of the evidence, and should not have considered the record in the previous action that prompted the lawsuit. *See id.* at 305. This Court rejected the plaintiff's argument,

explaining that "[w]here a plaintiff refers to another proceeding or judgment, and specifically bases his right of action, in whole or in part, on something which appears in the record of the prior case, the court, in passing on a demurrer to the complaint, will take judicial notice of the matters appearing in the former case." *Id.* (citing *Fleming v. Anderson,* 187 Va. 788, 794-95 (1948); *Martone v. Martone,* 257 Va. 199, 208 (1999)). Accordingly, this Court found that the trial court did not err in considering the record of the related proceeding.

The facts of this case are remarkably similar to *Titan*, as Byrne's appeal to the trial court was based solely on the proceeding before the City Council. Indeed, in his Petition for Appeal, Byrne stated that he was appealing "the February 24, 2018 decision of the Alexandria City Council in BAR Appeal Case Number 2016-00160 pursuant to Alexandria Code 10-107(B)." JA at 1. Byrne then went on to describe various arguments made at the hearing before the City Council, and requested that the trial court declare the City Council's decision to be arbitrary, capricious, contrary to law, and an abuse of discretion. *See* JA at 1-2. Thus, to test the allegations in Byrne's Petition for Appeal, the trial court was required to consider the legislative record. Therefore, even if the Court finds that the Motion Craving Oyer should not have been granted, the Court should not

reverse the decision to sustain the Demurrer on the grounds that the trial court considered the legislative record. *See Titan,* 264 Va. at 305 (explaining that judicial notice of the records of underlying actions is "a procedure long recognized as appropriate by our jurisprudence.").

That the trial court did not base its decision to consider the legislative record on the principle of judicial notice is of no consequence. It is well-settled that "[a]n appellate court is not limited to the grounds offered by the trial court in support of its decision, and it is 'entitled to affirm the court's judgment on alternate grounds, if such grounds are apparent from the record.'" *Perry v. Commonwealth,* 280 Va. 572, 582 (2010) (quoting *MM v. Sch. Dist. of Greenville Cty.,* 303 F.3d 523, 536 (4th Cir. 2002)); *see also Rosenruist-Gestao E Servicos LDA v. Virgin Enters. Ltd.,* 511 F.3d 437, 447 (4th Cir. 2007) ("A prevailing party may urge an appellate court to affirm a judgment on any ground appearing in the record."). Here, the City raised the issue of judicial notice in its demurrer as an alternative vehicle for the trial court to consider the legislative record. *See* JA at 14-15, 303-04. Accordingly, both the trial court and this Court are entitled to consider the legislative record in connection with the Demurrer.

B. The Decision To Approve The Certificate Of Appropriateness Was Not Arbitrary And Capricious.

Byrne argues that the decision to approve the Certificate of Appropriateness was arbitrary and capricious because the City Council allegedly (1) improperly considered the use of the proposed gate, (2) failed to consider a curb cut in front of the Property, (3) failed to consider appropriate comparator gates, (4) failed to consider an undated photograph of the Property, and (5) "arbitrarily applied standards which applied only to pedestrian use" when evaluating the Application.[3] *See* Byrne Op. Brief at 14-17. Each of these arguments lacks merit and is addressed in turn.

1. Byrne, Not The City, Suggested That The Gate Would Be For Pedestrian Use.

As in the appeal below, Byrne continues to erroneously maintain that the City improperly classified the proposed gate as a "pedestrian gate." However, this argument is directly refuted by the legislative record which

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[3] Byrne frames the issue to be resolved on appeal differently than in the trial court. In his Petition for Appeal to the trial court, Byrne asserted that the City Council's decision was arbitrary and capricious solely because the City Council allegedly "consider[ed] zoning regulations related to parking." JA at 1. Here, however, Byrne asserts that the City Council's decision is arbitrary and capricious, not because it considered parking, but because it allegedly failed to consider other gates in the Old and Historic District, many of which are specifically used to access parking. *See* Byrne Op. Brief at 15-16. To the extent Byrne attempts to raise a new issue on appeal, this argument must be rejected. *See Gazette, Inc. v. Harris,* 229 Va. 1, 30 (1985) ("[W]e will not notice on appeal an issue that was not raised in the trial court."). In any event, each of Byrne's arguments are directly refuted by the legislative record.

conclusively establishes that it was Byrne – and not the City – who suggested that the gate would be for pedestrian use.

In his application to the BAR, Byrne stated that "[t]he proposed wick and spear fence with gate is part of the reorientation of the entrance of our home with the new gate and lead ***walk*** at the south end of the front property line." JA at 52 (emphasis added). Architectural drawings attached to the application clearly depict the proposed double gate opening onto a "walk" that connects to two other walkways at the front of the Byrne residence. *See* JA at 54. Further, one of the stated purposes for the proposal was to "[o]rient[] the visitor to the largest and most historically most [sic] important part of the house which is the center flounder section." JA at 52. The flounder contains the original historic entrance to the property, though it was later obscured by subsequent additions. *See* JA at 146-47. Tellingly, the application is devoid of any reference to the curb cut in front of the property or vehicular access to the property. *See* JA at 52-58. Thus, it is clear that Byrne intended that the proposed double gate would be for pedestrian use.[4]

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[4] The issue of parking on the Property was the subject of a parallel proceeding. Pursuant to Zoning Ordinance Section 8-200(C)(5)(a), parking on the Property is unlawful since it cannot be accessed from an alley or interior court. Nonetheless, Byrne illegally parked on the Property on multiple occasions and was appropriately cited for violations of the Zoning Ordinance. Summary judgment on that issue was entered in favor of the City, and this Court refused Byrne's appeal on October 23, 2019.

The representations made in the application are consistent with those made by Byrne, his wife, and his attorney during the hearings before the BAR and City Council. For example, during the BAR hearing, Duncan Blair, Byrne's attorney, stated that the double gate was to provide the Byrnes with ingress and egress to the property, and to remove trash from the property. Mr. Blair emphasized that Byrne was "reorienting, as you saw, the ***walkway*** to enter the south and enter on the side of their home." JA at 70-71 (emphasis added). When asked why a six-foot gate was not sufficient, Mr. Blair responded that the gate was needed "to take your trash out, take your bikes out, have your wood guy bring wood in, to have your arborist come in[.]" JA at 90. Each of these proposed uses is pedestrian in nature. During the City Council hearing, Amanda Byrne confirmed that the proposed gate was to provide access to the property for things such as "yardwork" and "maintenance." JA at 242. As the trial court aptly noted, "[i]t is noteworthy that Petitioner Byrne's application specifies that the gate will open to a four-foot 'walk,' and that his representative raised the issue of the potential uses that the gate would allow when he appeared before the BAR." JA at 327.

In light of the representations made by Byrne, his family, and his representative, it is clear that he was requesting approval of a "pedestrian"

double gate. Indeed, it was based on these representations that City staff selected the comparators for which Byrne now complains. *See* JA at 253 ("What has been represented to the Board that what was being requested were access gates to a garden. . . . So pedestrian scaled garden gates is what the Board was considering and that's the reason for their determination that an eight- or ten-foot pair of gates was out of scale."). Critically, at no point did the BAR or the City Council purport to impose any use restrictions on the proposed gate. *See* JA at 59-60 (delineating BAR conditions of approval); JA at 174-75 (affirming decision of BAR). That certain vehicles may not fit between the double gates as approved is in no way akin to imposition of a use restriction. For these reasons, any incidental discussion regarding the proposed use of the double gates is not a basis for declaring the City Council's decision arbitrary or capricious.

2. The Curb Cut In Front Of The Byrne Property Was Not Relevant To City Staff's Analysis Of The Proposal.

The legislative record is clear that neither the BAR nor the City Council arbitrarily ignored the existing curb cut in front of the Byrne property. To the contrary, City staff noted in the BAR memorandum that "[t]he use, the ***curb cut***, parking and the preservation and scenic space easement are ***not within the purview of the BAR*** and are not discussed in this report." JA at 46 (emphasis added). In addition, during the July 6,

2016 BAR meeting, then Chairwoman Christina Kelly reminded the BAR and the public that, although members of the community were concerned about various zoning violations at the Byrne property, "the only issue before the BAR tonight is the design of the Fence. The parking, the use, the curb cut and the preservation and open space easement are not within the purview of the BAR." JA at 141.

Notwithstanding the BAR's statement that it could not consider the use or the curb cut, Byrne and his attorney raised the issue of the curb cut during the public hearings and showed photographs of various gates in the Old and Historic District that are located in front of curb cuts. *See* Consent Motion, Exs. A, B. Mr. Goebel, of the BAR, explained that the gates identified with Byrne were not appropriate because they lead to driveways or shared alleys, whereas Byrne had proposed a gate for pedestrian use. *See* JA at 231. Tellingly, Byrne has not identified any authority that required the BAR to consider the existing curb cut in connection with its analysis. Accordingly, this alleged deficiency cannot be a basis to overturn the trial court's well-reasoned decision to affirm the approval of the Certificate of Appropriateness.

3. The Gates Reviewed By The BAR And The City Council Were Proper Comparators.

The legislative record also directly refutes Byrne's argument that the BAR and City Council arbitrarily ignored examples of gates leading to driveways and garages. Again, as explained *supra*, the BAR found that the larger gates identified by Byrne were not relevant to their analysis because the nature of those gates and the one proposed by Byrne were different. *See* JA at 231. Nonetheless, to ensure that Byrne had a full and fair opportunity to be heard, the City Council permitted Byrne to present photographs of his proposed comparators during the public hearing, and confirmed that they received a memorandum he drafted prior to the hearing. *See* JA at 226-28; Consent Motion, Exs. A, B. Byrne explained that several of the photographs showed "a variety of locations in Old Town where there are double gates of four to five feet in front of the historic curb cuts." *See* Consent Motion, Ex. A. The City Council then questioned City staff as to why the gates in the photographs presented by Byrne should not be considered. *See* JA at 249-51. City staff again explained that "the photographs that were shown were a different context. The context here that the BAR was considering was a double gate leading to either a front door or a garden." JA at 250. The fact that the City Council ultimately

accepted the comparator gates over the ones advocated by Byrne does not render its decision arbitrary and capricious.

Byrne's argument that the BAR and City Council failed to adequately consider appropriate comparator gates is further refuted by the numerous examples of gates painstakingly considered by City staff when reviewing Byrne's application. *See* JA at 48-49 (memorandum describing historic examples considered by the BAR); JA at 260 (minutes of BAR hearing noting examples of historic gates considered by the BAR); JA at 81 (City staff testifying that other double gates in the Historic District were considered); JA at 224 (City staff testifying there is support for double gates in the Historic District but not at the width proposed by Byrne); JA at 231-32 (BAR representative detailing City staff's review of other gates in the Historic District). As such, there is simply no merit to Byrne's contention that City staff did not adequately consider appropriate comparator gates when reviewing his application.

4. Both The BAR And The City Council Considered The Undated Photograph Of The Byrne Property.

There is similarly no merit to Byrne's argument that the BAR and the City Council failed to consider an undated photograph of his property that depicts a double gate when it approved the Certificate of Appropriateness. To the contrary, the legislative record establishes that the photograph

referenced by Byrne was received and evaluated by the BAR and the City Council. City staff determined that the gate depicted in the photograph was not architecturally significant and not relevant to the issue of whether the proposed gate was historically appropriate because (1) it showed only half the gate at an angle, making it impossible to determine the gate's exact width; (2) the gate related to a garage, not entranceway, that had long since been demolished; and (3) the gate in the photograph existed for only 40 years out of the property's 200-year existence. *See* JA at 121-22, 230-31. The BAR specifically found that the long since demolished garage and driveway were not relevant to its analysis because they were in existence for only a brief period of time relative to the age of the property. *See* JA at 120-22, 230-31. Indeed, a garage and driveway would have been an anomaly during the nineteenth century, which is the period of historical significance for the Property. *See* JA at 234. Accordingly, the gate in the photograph is not an appropriate comparator, and was properly rejected by the BAR and the City Council.

5. The BAR And The City Council Properly Considered Only Those Factors In Section 10-105 Of The Zoning Ordinance.

Contrary to Byrne's contention, the City did not "arbitrarily appl[y] standards which only applied to pedestrian use" when evaluating the

Application. Rather, City staff reviewed the Application in accordance with the applicable sections of the Zoning Ordinance. To be sure, there are no separate standards relating only to "pedestrian use."

Because the Property is located in the Old and Historic District, Byrne is required to obtain approval from the BAR for certain improvements and modifications to the Property. Section 10-103 of the Zoning Ordinance provides:

> No building or structure shall be erected, reconstructed, altered or restored within the Old and Historic Alexandria District unless and until an application for a certificate of appropriateness shall have been approved by the Old and Historic Alexandria District board of architectural review or the city council on appeal as to exterior architectural features, including signs (see Article IX), which are subject to public view from a public street, way or place. Evidence of such required approval shall be a certificate of appropriateness issued by the Old and Historic Alexandria District board of architectural review or the city council on appeal.

ALEX. ZONING ORD. § 10-103(A). The Design Guidelines for the Old and Historic Alexandria District and the Parker-Gray District ("Design Guidelines") further provide that "[f]ences, garden walls and gates should be appropriate in materials, design and scale to the period and character of the structure they surround." JA at 130.

Section 10-105 of the Zoning Ordinance sets forth the criteria the BAR is required to consider when determining whether to approve a

Certificate of Appropriateness. *See* ALEX. ZONING ORD. § 10-105(A). Specifically, the BAR is required to consider the following factors:

a) Overall architectural design, form, style and structure, including, but not limited to, the height, mass and scale of buildings or structures;

b) Architectural details including, but not limited to, original materials and methods of construction, the pattern, design and style of fenestration, ornamentation, lighting, signage and like decorative or functional fixtures of buildings or structures; the degree to which the distinguishing original qualities or character of a building, structure or site (including historic materials) are retained;

c) Design and arrangement of buildings and structures on the site; and the impact upon the historic setting, streetscape or environs;

d) Texture, material and color, and the extent to which any new architectural features are historically appropriate to the existing structure and adjacent existing structures;

e) The relation of the features in sections 10-105(A)(2)(a) through (d) to similar features of the preexisting building or structure, if any, and to buildings and structures in the immediate surroundings;

f) The extent to which the building or structure would be harmonious with or incongruous to the old and historic aspect of the George Washington Memorial Parkway;

g) The extent to which the building or structure will preserve or protect historic places and areas of historic interest in the city;

h) The extent to which the building or structure will preserve the memorial character of the George Washington Memorial Parkway;

i) The extent to which the building or structure will promote the general welfare of the city and all citizens by the preservation and protection of historic interest in the city and the memorial character of the George Washington Memorial Parkway; and

j) The extent to which such preservation and protection will promote the general welfare by maintaining and increasing real estate values, generating business, creating new positions, attracting tourists, students, writers, historians, artists and artisans, attracting new residents, encouraging study and interest in American history, stimulating interest and study in architecture and design, educating citizens in American culture and heritage and making the city a more attractive and desirable place in which to live.

ALEX. ZONING ORD. § 10-105(A)(2).

The legislative record conclusively establishes that the BAR and the City Council considered only the aforesaid enumerated factors. Specifically, City staff determined:

- That while the proposed design, form, and style of the fence were architecturally appropriate, the double gate's proposed width was not compatible with the historic house nor the pedestrian scale of the historic block face on South Lee Street. *See* JA at 121 (discussing Section 10-105(A)(2)(a)).

- The proposed width of the double gate was inconsistent with the 1871 façade of the house. *See* JA at 121 (discussing Section 10-105(A)(2)(b)).

- The addition of an oversized double gate leading to open space will change one's understanding of the nineteenth century site design, which is the period of significance for the property. *See* JA at 122 (discussing Section 10-105(A)(2)(c)).

- The proposed width of the double gate is inconsistent with other nearby comparable historic homes due to its oversized scale. *See* JA at 122 (discussing Section 10-105(A)(2)(d)).

- "[T]he other gates and pathways found in the 400 block of South Lee Street are single gates and are scaled for pedestrians leading to walkways." *See* JA at 122 (discussing Section 10-105(A)(2)(e)).

- The width of the proposed double gate "along the front property line would have a negative impact on the character of this historic block by introducing an out-of-scale element to the public realm." *See* JA at 122 (discussing Section 10-105(A)(2)(g)).

- "The South Lee Street block-face and its buildings generally have a high degree of historic integrity and the gates and pathways found in the 400 block of South Lee Street are single gates scaled to pedestrians." *See* JA at 122 (discussing Section 10-105(A)(2)(g)).

- The size of the proposed double gates would be incompatible with both the historic house, as well as the other historic buildings on South Lee Street. *See* JA at 122 (discussing Section 10-105(A)(2)(g)).

Conspicuously absent from these findings is any mention of parking or use restrictions. Indeed, the legislative record makes clear that the BAR and the City Council went to great lengths to ensure that no improper factors were considered. *See* JA at 47, 68. To the extent there were incidental discussions about the use of the gate, any such discussions were based on representations made by Byrne or his representatives, and were entirely consistent with the requirements of Section 10-105, which

requires that the BAR must consider, *inter alia*, the "[o]verall architectural design, form, style and structure, including, but not limited to, height, mass and scale of buildings or structures[,]" as well as the "functional fixtures of buildings or structures[.]" ALEX. ZONING ORD. § 10-105(A)(2)(a)-(b). By requiring the BAR to consider the "form," "design," and "functional fixtures" of a proposed building or structure, the determination of whether a Certificate of Appropriateness should be issued inherently requires some consideration of the proposed use. In other words, while the BAR does not have the power to impose any conditions regarding use, it may nonetheless consider the proposed use of a building or structure when determining whether the proposal is historically and otherwise appropriate as to design, and to identify appropriate comparators.

In short, the legislative record plainly refutes any allegation by Byrne that the City Council or the BAR considered any improper factors in approving the Certificate of Appropriateness. The decision of the City Council is entitled to extreme deference, and may only be overturned if it acted willfully or unreasonably, and was made "without consideration or in disregard of facts or law or without determining principle." *Wescott,* 254 Va. at 224. While Byrne may believe that the City Council should have given greater weight to the photographs he presented during the public

hearing, the City Council's decision to credit the well-documented findings of the BAR and affirm the approval of the Certificate of Appropriateness cannot reasonably be found to run afoul of the arbitrary and capricious standard. Accordingly, the trial court's decision to sustain the Demurrer must be affirmed.

CONCLUSION

For the foregoing reasons, and those to be advanced at oral argument, Appellees City of Alexandria and City Council for the City of Alexandria respectfully request that this Court affirm the orders of the Circuit Court for the City of Alexandria granting the Motion Craving Oyer and sustaining the Demurrer.

Dated: January 2, 2020

Respectfully submitted,

CITY OF ALEXANDRIA AND CITY COUNCIL OF THE CITY OF ALEXANDRIA

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of January, 2020, pursuant to Rule 5:26, I caused three (3) paper copies of the ***Brief of Appellees City of Alexandria and City Council of the City of Alexandria*** to be hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same date, an electronic copy of the Brief of Appellees was served, via email, upon:

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