

# Commonwealth of Virginia

## FIFTEENTH JUDICIAL CIRCUIT

### JUDGES

Gordon F. Willis  
Joseph J. Ellis  
J. Overton Harris  
Charles S. Sharp  
Sarah L. Deneke  
Michael E. Levy  
Patricia Kelly  
Herbert M. Hewitt  
Victoria A. B. Willis  
R. Michael McKenney  
Ricardo Rigual



**Sarah L. Deneke**  
Caroline Circuit Court  
Post Office Box 918  
Bowling Green, Virginia 22427-0918  
(804) 633-4541  
FAX (804) 633-4482

### RETIRED JUDGES

William H. Ledbetter, Jr., Retired  
H. Harrison Braxton, Jr., Retired  
Ann Hunter Simpson, Retired  
John R. Alderman, Retired  
Horace A. Revercomb, III, Retired  
J. Martin Bass, Retired  
David H. Beck, Retired  
Harry T. Taliaferro, III, Retired

February 14, 2020

Kathleen Dooley, Esquire  
Don Martin, Esquire  
City of Fredericksburg  
601 Caroline Street, Suite 200B  
Fredericksburg, Virginia 22404

Joseph Peter Drennan, Esquire  
218 North Lee Street, Third Floor  
Alexandria, Virginia 22314-2631

Re: E.D. Cole Building, L.L.C. and Local Holdings, L.L.C. v. Council of the City of Fredericksburg and City of Fredericksburg  
Circuit Court Case Number: CL19000951-00

### Letter Opinion

Dear Counsel:

This matter came before the Court on February 10, 2020 on defendants' motion for partial summary judgment and petitioners' cross motion for summary judgment.

There is no factual dispute. The legal issues placed before the Court center on two critical questions.

- 1). Did the city council have the authority to vote for removal of the historical auction block; and
- 2). Did the Architectural Review Board's (ARB) rejection of a

motion to deny a certificate of appropriateness and ultimate non action on the City's application result in an appealable "decision" from the ARB to city council.

Both questions must be answered in the affirmative.

### Facts

On June 19, 2019 after public debate, the city council approved a motion to move the auction block located at Charles and William Street from its present location within the historic district of Fredericksburg. On July 31, 2019 the city manager submitted an application for a certificate of appropriateness for such a move to the Architectural Review Board (ARB).

The ARB held four meetings that dealt with the application and on October 14, 2019 failed to pass a motion to deny the certificate of appropriateness. The ARB took no further action on the application.

The city manager filed an appeal of the decision, or non-decision, of the ARB. On November 12, 2019 the city council enacted a resolution granting the certificate of appropriateness as a result of this appeal from the ARB.

On December 10, 2019 the petitioners filed the current suit with the Circuit Court, asking this Court to grant a petition for declaratory judgment. The petition seeks to have the resolution of November 12, 2019 "vacated and voided" as contrary to law. These motions for partial summary judgment by the defendants and summary judgement by the petitioners follow.

### The Law

The Charter of the City of Fredericksburg states in its general powers of section 1 that the city may:

acquire from any source real and personal property within and without its boundaries... and may sell, lease, mortgage, pledge, hold, manage, regulate the use and management of, control and dispose of such

property as its interests may require...

See §1 Charter of the City of Fredericksburg

Subsequent to the charter, the City passed ordinances creating a historical district and provided for an architectural review board (ARB) pursuant to § 15.2-2306 of the Code of Virginia.

Section 72-23.1 of the City Code contains a number of subsections relevant to this suit. In 72-23.1 D(3)(a) the ordinance provides that:

No historic landmark, building or structure within the HFD shall be razed, demolished or moved until the razing, demolition or moving thereof is approved by the ARB...

The ordinance then sets out factors to be considered in the approval process. §72-23.1 C sets forth the review process to be conducted by the ARB. It requires public hearings, prompt review and sets forth allowable options. The ARB may approve, deny or approve with modification the application, but any such action must occur within 90 days of submission of the application to remain with the purview of the ARB.

The appeal process from a decision of the ARB is set forth in § 72-23.1F(1). It provides an appeal to the city council for “any person aggrieved by a decision of the ARB”, provided the appeal is filed in writing within 30 days of the ARB decision. The city council may affirm, reverse or modify the ARB’s decision. The ordinance gives the city council 45 days to determine the appeal.

There is also an appeal from the city council decision to the Circuit Court. The standard for Circuit Court review is whether the city council action is contrary to the law or constitutes an abuse of discretion. § 72-23.1 F(2)

## Findings

The petitioner argues that the city council decision on June 19, 2019 to move the historic auction block was without authority and in violation of the Dillion Rule. This argument ignores the city charter which specifically grants from the Commonwealth to the City the authority to control, manage and dispose of personal property.

The petitioner further argues that the actions of the city council in appealing and then granting the certificate of appropriateness is contrary to the law.

The city manager filed an application for a certificate of appropriateness to relocate the historic auction block on July 31, 2019. It is inconsequential that this application came after the city council vote to move the auction block, the ARB still had ninety (90) days to approve, deny, or approve with modifications the application. After public debates and one failed motion to deny the application the ARB failed to reach a majority decision and on or about October 30, 2019 their authority to act expired.

At the expiration of the ARB's ninety-day action period the city manager, as an applicant, was clearly aggrieved by the failure of the ARB to act on his application. The failure of the ARB to reach a majority vote on the options available to them and to allow the time for reaching a majority decision to expire is a decision within the meaning of the ordinance. Any other interpretation of the application and appeal process would render the language of the City ordinance meaningless.

The petitioner argues that the remedy for an applicant who is denied a final decision by the ARB is to seek a writ of mandamus from the Court. But a writ of mandamus cannot force a member of the ARB who has abstained to vote or provide a majority or extend the time period to

act under the law. In any event, a remedy of appeal is set forth in the statutory scheme and in November 2019 the city manager appealed the ARB's decision to the city council as allowed by §72-23.1 of the city code.

In this case the timely appeal of the ARB's decision resulted in the city council's application being appealed to the city council who promptly voted to approve the certificate required in § 72-23.1(D) by their resolution of November 12, 2019. This is within the legal authority of the city council on any appeal pursuant to § 72-23.1F(1).

Applying the standards of review set forth in § 72-23.1F(2) the procedural actions of the city council were lawful. The action was not arbitrary nor capricious either in filing the appeal or voting to approve the certificate and the motion for partial summary judgment filed by the defendant is granted. The issue of standing of the petitioners to sue is moot. Further, the motion for summary judgment filed by the petitioner is denied.

Ms. Dooley will prepare the Order and circulate to Mr. Drennan to note his objections.

Sincerely,

  
Sarah L. Deneke

SLD/ajh

cc: File