

AGENDA

STATE BUILDING CODE TECHNICAL REVIEW BOARD

Friday, July 19, 2019 - 10:00am

Virginia Housing Center
4224 Cox Road Glen Allen, Virginia

- I. Roll Call **(TAB 1)**
- II. Approval of May 17, 2019 Minutes **(TAB 2)**
- III. Approval of May 20, 2019 Retreat Minutes **(TAB 3)**
- IV. Approval of Final Order **(TAB 4)**
In Re: Appeal of Karen Hobbs
Appeal No 18-21
- V. Approval of Interpretation **(TAB 5)**
In Re: Jeff Brown (DHCD)
Interpretation No. 04-19
- VI. Public Comment
- VII. Appeal Hearing **(TAB 6)**
In Re: Freemason Street Area Association
Appeal No 18-22
- VIII. Preliminary Hearing **(TAB 7)**
In Re: Jack Singleton
Appeal No 19-01
- IX. Potential Code Change Proposal #183 by Kenney Payne **(Tab 8)**
- X. Secretary's Report
 - a. E. G. Middleton Resignation
 - b. Alan Givens Review Board position
 - c. Board Policy Process and upcoming Board Retreat
 - d. September meeting update

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STATE BUILDING CODE TECHNICAL REVIEW BOARD

James R. Dawson, Chairman
(Virginia Fire Chiefs Association)

W. Shaun Pharr, Esq., Vice-Chairman
(The Apartment and Office Building Association of Metropolitan Washington)

Vince Butler
(Virginia Home Builders Association)

J. Daniel Crigler
(Virginia Association of Plumbing-Heating-Cooling Contractors and the Virginia Chapters of the Air Conditioning Contractors of America)

Alan D. Givens
(Virginia Association of Plumbing-Heating-Cooling Contractors and the Virginia Chapters of the Air Conditioning Contractors of America)

Christina Jackson
(Commonwealth at large)

Joseph A. Kessler, III
(Associated General Contractors)

Eric Mays
(Virginia Building and Code Officials Association)

Joanne D. Monday
(Virginia Building Owners and Managers Association)

Patricia S. O'Bannon
(Commonwealth at large)

J. Kenneth Payne, Jr., AIA, LEED AP BD+C
(American Institute of Architects Virginia)

Richard C. Witt
(Virginia Building and Code Officials Association)

Aaron Zdinak, PE
(Virginia Society of Professional Engineers)

Vacant
(Electrical Contractor)

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**STATE BUILDING CODE TECHNICAL REVIEW BOARD
MEETING MINUTES
May 17, 2019
Glen Allen, Virginia**

Members Present

Members Absent

Mr. James R. Dawson, Chairman
Mr. W. Shaun Pharr, Esq., Vice-Chairman
Mr. Vince Butler
Mr. Daniel Crigler
Mr. Alan D. Givens
Ms. Christina Jackson
Mr. Joseph Kessler
Mr. Eric Mays, PE
Mr. E. G. Middleton, III
Ms. Joanne Monday
Ms. Patricia S. O'Bannon
Mr. J. Kenneth Payne, Jr.
Mr. Richard C. Witt
Mr. Aaron Zdinak, PE

Call to Order The meeting of the State Building Code Technical Review Board (“Review Board”) was called to order at approximately 10:00 a.m. by Chairman Dawson.

Roll Call The roll was called by Mr. Luter and a quorum was present. Mr. Justin I. Bell, legal counsel for the Board from the Attorney General’s Office, was also present.

Approval of Minutes The draft minutes of the March 15, 2019 meeting in the Review Board members’ agenda package were considered. Mr. Witt moved to approve the minutes with the removal of the word “the” in the second line of the third paragraph on page nine of the agenda package. The motion was seconded by Ms. Monday and passed with Messrs. Crigler and Middleton abstaining.

Final Orders Appeal of Greg Wooldridge (ODU)
Appeal No. 18-17:

After review and consideration of the final order presented in the Review Board members’ agenda package, Mr. Witt moved to approve the final order with an editorial change replacing the word “*detectors*” with the word “*alarms*” to align with Section 102.7 (Inspections for USBC requirements) in lines three and four of the last paragraph of the first page of the final order (shown on page 17 of the agenda package) and adding the words “*who is the*” in the last sentence in the last paragraph of page two of the final order (shown on page 19 of the

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Final Orders
(continued)

agenda package). The motion was seconded by Ms. Jackson and passed with Messrs. Crigler and Middleton abstaining.

Appeal of Raymond M. Parker Sr.

Appeal No. 18-20:

After review and consideration of the final order presented in the Review Board members' agenda package, Mr. Witt moved to approve the final order with the editorial corrections in the spelling of the word "*statute*" in the first sentence of the first paragraph and the removal of the word "an" in the last sentence of the last paragraph of page three of the final order (shown on page 27 of the agenda package). The motion was seconded by Ms. O'Bannon and passed with Messrs. Crigler and Middleton abstaining.

Appeal of Karen Hobbs

Appeal No. 18-21:

After review and consideration of the continuance order presented in the Review Board members' agenda package, Ms. Monday moved to approve the final order as presented. The motion was seconded by Mr. Witt and passed with Messrs. Crigler and Middleton abstaining.

Reconsideration of Appeal of AMcL, LLC

Appeal No. 18-14:

After review and consideration of the reconsideration order presented in the Review Board members' agenda package, Ms. Jackson moved to approve the final order with the removal of the words "*since the County rescinded the cited violation and application of the code, AMcL, LLC does not have a right to appeal*" to be replaced with the words "*because it lacked merit*" (shown on page 33 of the agenda package). The motion was seconded by Mr. Kessler and passed with Messrs. Crigler and Middleton as well as Ms. O'Bannon abstaining.

Appeal of AMcL, LLC.

Appeal No. 18-14

(Action Requests)

The Board was made aware of the action requests filed by AMcL, LLC. No action was taken by the Board.

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Public Comment

Chairman Dawson opened the meeting for public comment. Mr. Luter advised that no one had signed up to speak. With no one coming forward, Chairman Dawson closed the public comment period.

New Business

Appeal of Karen Hobbs; Appeal No. 18-21:

A hearing convened with Chairman Dawson serving as the presiding officer. The appeal involved citations under the 2012 Virginia Maintenance Code related to the property owned by Karen Hobbs located at 11812 Breton Court, Unit #2, in the County of Fairfax.

The following persons were sworn in and given an opportunity to present testimony:

Karen Hobbs, Owner
Catherine Lunsford, Fairfax County Investigator
C. P. Fitzhugh, Fairfax County Property Maintenance Appeals
Coordinator
Jessica McLemore, Animal Control Officer, Fairfax County
Police Department

Also present was:

Douglas Crockett, Esq., legal counsel for Karen Hobbs
Marc Gori, Esq., legal counsel for Fairfax County

After testimony concluded, Chairman Dawson closed the hearing and stated a decision from the Review Board members would be forthcoming and the deliberations would be conducted in open session. It was further noted that a final order reflecting the decision would be considered at a subsequent meeting and, when approved, would be distributed to the parties and would contain a statement of further right of appeal.

Decision: Appeal of Karen Hobbs; Appeal No. 18-21:

After deliberations, Mr. Mays moved that in accordance with the 2012 Virginia Maintenance Code Section 104.1 (Scope of Enforcement) the County made a reasonable effort to obtain consent to enter the property from the owner and did in fact gain that consent. The motion was seconded by Mr. Witt. The motion passed unanimously.

After further deliberation Mr. Pharr, as a member who voted in the affirmative, moved for reconsideration of Mr. Mays' earlier motion for the purposes of addressing whether Ms. Hobbs was under duress or

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New Business
(continued)

was coerced, into allowing the inspection. Mr. Mays second the motion.

Mr. Pharr's subsequent motion was that in accordance with the 2012 Virginia Maintenance Code Section 104.1 (Scope of Enforcement) the County made a reasonable effort to obtain consent to enter the property from the owner and did in fact gain that consent conditionally which was not offered as a result of coercion or duress. The motion did not receive a second and was withdrawn by Mr. Pharr in favor of the original motion. The original motion stands.

After further deliberations, Mr. Mays moved uphold the Property Maintenance Official and local appeals board that violations of sections 305.1 and 308.1 of the 2012 Virginia Maintenance Code exist; to overturn the Property Maintenance Official and local board of appeals that a violation of section 702.1 exists; and to confirm that the violation of section 202 of the 2012 Virginia Maintenance Code is not properly before the Board because the violation was previously abated on November 15, 2018. Ms. Jackson second the motion. After further deliberation Mr. Mays amended his motion. In Mr. Mays amended motion Mr. Mays moved that in relation to the structure being unfit for human occupancy, since that has been abated the issue is not properly before the Board. Mr. Crigler second the amended motion and the motion passed with Messrs. Butler, Payne, and Pharr voting in opposition.

After further deliberation Mr. Mays moved to uphold the Property Maintenance Official and local appeals board that a violation of sections 305.1 of the 2012 Virginia Maintenance Code exists. Mr. Butler second the motion and motion passed with Mr. Crigler voting in opposition.

After further deliberation Mr. Mays moved to uphold the Property Maintenance Official and local appeals board that a violation of section 308.1 of the 2012 Virginia Maintenance Code exists. Ms. O'Bannon second the motion and motion passed with Messrs. Crigler, Payne, Pharr, Butler, Witt as well as Ms. Monday voting in opposition.

After further deliberation Mr. Mays moved to overturn the Property Maintenance Official and local appeals board that a violation of section 702.1 of the 2012 Virginia Maintenance Code exists because based on the County's testimony the egress violation had been resolved on November 15, 2018. Ms. Jackson second the motion and motion passed with Ms. O'Bannon and Jackson voting in opposition.

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New Business
(continued)

Appeal of Eagle Properties and Investments, LLC; Appeal No. 18-15:

Eagle Properties and Investments, LLC filed a Notice of Dismissal of Appeal on May 9, 2019. The Board was made aware of the notice. No action was taken.

Appeal of Eagle Properties and Investments, LLC; Appeal No. 18-19:

Eagle Properties and Investments, LLC filed a Notice of Dismissal of Appeal on May 9, 2019. The Board was made aware of the notice. No action was taken.

Interpretation Request

An interpretation request from Jeff Brown, Director of the State Building Codes Office was considered concerning the 2015 Virginia Uniform Statewide Building Code (USBC), on Section 102.3 Exemptions concerning whether or not utility companies are regulated pertaining to solar farms.

After deliberations, Mr. Witt moved to approve the interpretation with the editorial change adding a note after each question that reads “*No exempt equipment, wiring, or support structure may create an unsafe condition prohibited by the USBC*”. The motion was seconded by Mr. Mays. The motion passed with Mr. Givens voting in opposition.

Secretary’s Report

No report provided.

Adjournment

There being no further business, the meeting was adjourned by proper motion at approximately 6:00 p.m.

Approved: July 19, 2019

Chairman, State Building Code Technical Review Board

Secretary, State Building Code Technical Review Board

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**STATE BUILDING CODE TECHNICAL REVIEW BOARD
RETREAT MINUTES
May 20, 2019
Glen Allen, Virginia**

Members Present

Mr. James R. Dawson, Chairman
Mr. W. Shaun Pharr, Esq., Vice-Chairman
Mr. Vince Butler
Mr. Daniel Crigler
Mr. Joseph Kessler
Mr. Eric Mays, PE
Ms. Joanne Monday
Ms. Patricia S. O'Bannon
Mr. J. Kenneth Payne, Jr.
Mr. Richard C. Witt
Mr. Aaron Zdinak, PE

Members Absent

Mr. Alan D. Givens
Ms. Christina Jackson
Mr. E. G. Middleton, III

Call to Order

The retreat of the State Building Code Technical Review Board ("Review Board") was called to order at approximately 10:00 a.m. by Chairman Dawson.

Roll Call

The roll was called by Mr. Luter and a quorum was present. Mr. Justin I. Bell, legal counsel for the Board from the Attorney General's Office, was also present. Ms. Lockerman from the Attorney General's Office and Cindy Davis, Deputy Director, Division of Building and Fire Regulation were also present.

FOIA, COIA, and APA Presentation

Mr. Bell provided three presentations. The three presentations focused on the Freedom of Information Act (FOIA), Conflict of Interest Act (COIA), and Administrative Procedure Act (APA) as they related to the Review Board members.

Review Board Policies and Manual Discussion

The Review Board discussed adopting a Review Board policy manual. The Review Board discussed three sample policies and made the following recommendations:

1. Place time limits on each portion of an appeals hearing per party such as:
 - Opening statement – 5 minutes
 - Testimony – 20 minutes
 - Cross examination – 10 minutes
 - Board Q&A – 10 minutes
 - Closing statement/argument – 5 minutes

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Review Board Policies
and Manual Discussion
(continued)

Note 1: Provide shorter timeframes for jurisdictional issues hearings.

Note 2: Provide a list to the parties for guidance outlining what the opening statement should include.

Note 3: Create a way for the parties to request a longer or shorter time limit.

Note 4: Target time to complete each hearing 90 minutes and the Chairperson has the authority to adjust the time limits at his/her discretion based on the case before the Review Board.

2. When a party or Review Board staff identify a potential jurisdictional issue with an appeal application, that jurisdictional issue is to be brought before the Review Board for consideration prior to processing the appeal application on the merits of the case.

Note: When this occurs, Review Board staff is to schedule the jurisdictional issue(s) for the first available meeting and then, schedule the merits of the case for the following meeting.

3. Research the use of Adobe meeting as an option for parties to use during jurisdictional issue hearings.

Mr. Payne moved not to create a policy requiring the use of a specific appeal application form to file an appeal; however, all appeal applications must be in writing. He further moved that the appeal application form be completed within a reasonable timeframe. Mr. Witt second the motion and it passed unanimously.

After the lengthy discussion on just three sample policies, the Board directed Cindy Davis, Deputy Director, Division of Building and Fire Regulation to work with Mr. Bell to draft the needed policies and to bring them back to the Review Board at another retreat to be scheduled later this year.

During this discussion the Review Board directed the Secretary to make two changes to the appeal application provided for use by the department.

Adjournment

There being no further business, the meeting was adjourned by proper motion at approximately 4:15 p.m.

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Approved: July 19, 2019

Chairman, State Building Code Technical Review Board

Secretary, State Building Code Technical Review Board

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VIRGINIA:

BEFORE THE
STATE BUILDING CODE TECHNICAL REVIEW BOARD (REVIEW BOARD)

IN RE: Karen Hobbs
Appeal No. 18-21

DECISION OF THE REVIEW BOARD

Procedural Background

The State Building Code Technical Review Board (Review Board) is a Governor-appointed board established to rule on disputes arising from application of regulations of the Department of Housing and Community Development. See §§ 36-108 and 36-114 of the Code of Virginia. The Review Board's proceedings are governed by the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

Case History

Karen M. Hobbs (Hobbs) owner of the property located at 11812 Breton Court, Unit 2 in Fairfax County, appealed the enforcement action by the County of Fairfax Department of Code Compliance (County) under Part III of the Uniform Statewide Building Code (Virginia Property Maintenance Code or VMC).

In October of 2018, the County, in enforcement of the Virginia Property Maintenance Code, issued a notice of violation to Ms. Hobbs for her property located at 11812 Breton Court, Unit 2. The notice cited three VMC violations, one violation each for Sections 305.1 (General), 308.1 (Accumulation of rubbish and garbage), and 702.1 (General). The County also issued a Notice of Structure Unfit of Human Occupancy in accordance with VMC Section 202 (Definition).

The local appeals board heard Ms. Hobbs' appeal on October 22, 2018 and ruled to uphold the decision of the County. Ms. Hobbs then further appealed to the Review Board on December 5, 2018 after receipt of the local board's decision.

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Findings of the Review Board

A. Whether the County made a reasonable effort to obtain consent to enter the property for an inspection.

Douglas Crockett, legal counsel for Ms. Hobbs, argued that Ms. Hobbs did not provide consent to the County to enter her property. Mr. Crockett argued that the County had approximately four to six employees present for the inspection which lasted over four hours. Mr. Crockett further argued that the building manager and a locksmith were also present at the time of the inspection and that they threatened entry to Ms. Hobbs property. Mr. Crockett also argued that the presence of so many individuals at the property coupled with the actions of those individuals constituted coercion, intrusive conduct, and undue influence which put Ms. Hobbs under duress; therefore, her consent was not voluntary.

Fairfax County, through legal counsel, argued that Ms. Hobbs did in fact provide consent to enter the property the following day at 9:00 a. m. and placed restrictions on that consent; the inspection was not to include the bedrooms and bathrooms. The County, through testimony of Ms. Lunsford, clarified that the locksmith was contacted by the property manager, not the County, and that the threat of entry was not made by the County, but rather by the property manager through his authority. The Review Board finds that the County did make every reasonable effort to obtain consent and did in fact gain that consent as Ms. Hobbs had ample time to change her mind; however, she did not.

B. Whether to overturn the decision of the County and the local board that a violation of the VMC Section 305.1 (General) exists.

Mr. Crockett argued that unsanitary conditions do not exist within the structure; therefore, the cited violations did not exist. Mr. Crockett further argued that the items identified by the County as feces and urine on the floor of the structure was likely shredded cardboard.

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Fairfax County argued that the conditions in the structure were unsanitary as there was a strong ammonia odor, commonly associated with animal urine, that could be detected in the parking lot and became more and more intense the closer you got to Ms. Hobbs' structure. The County further argued that upon entry, the ammonia odor in the structure was so overwhelming that the inspectors had a hard time breathing and their eyes began to water. The County argued that animal feces and urine were present on the floor. The County also argued that there was rotting food in the kitchen area where the presence of flies was noted. Lastly, the County argued that flies were swarming around the entry door to the structure. The Review Board finds that violations of VMC Section 305.1 (General) exist due to the strong smell of ammonia, commonly associated with animal urine, apparent from the parking lot coupled with the other conditions found within the structure.

C. Whether to overturn the decision of the County and the local board that a violation of the VMC Section 308.1 (Accumulation of rubbish and garbage) exists.

Mr. Crockett argued that the cited violations do not exist. Mr. Crockett further argued that the boxes referred to by the County were Ms. Hobbs' personal belongings, files, and other pertinent documents. Mr. Crockett further argued that Ms. Hobbs only used the dining room for storage.

Fairfax County argued that there was an excessive amount of cardboard boxes, papers, and other flammable material throughout the structure. The County further argued that such boxes were stacked to the ceiling in some areas. The County again argued that there was rotting food in the kitchen area. The Review Board finds that violations of VMC Section 308.1 (Accumulation of rubbish and garbage) exist based on the abundance of boxes and other flammable material found throughout the structure as well as the rotting food found in the kitchen area.

D. Whether to overturn the decision of the County and the local board that a violation of the VMC Section 702.1 (General) exists.

Mr. Crockett argued that the cited violations do not exist. Mr. Crockett argued that the inspection took place in the middle of Ms. Hobbs cleaning her structure whereby she was preparing

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to get rid of a few items such as the large couch in the middle of the living room. Mr. Crockett further argued that the shampooer, vacuum, brooms, etc. found in the hallway were there temporarily and were not typically stored in the hallway. Mr. Crockett also argued that Ms. Hobbs was in the midst of cleaning and working on her refrigerator and dishwasher so they were moved away from the wall; the moving of these appliances required Ms. Hobbs to move everything on her counters so now those items were also out of place.

Fairfax County argued that the hallway was impassable and the dining room was totally inaccessible. The County further argued that in several areas of the structure the inspector had to turn sideways to maneuver through the stacks of boxes and furniture. The Review Board finds that violations of VMC Section 702.1 (General) do not exist because the inspectors reasoning for citing this was related to the sliding rear door of the structure which is not a part of the means of egress.

E. Whether to overturn the decision of the County and the local board that in accordance with VMC Section 202 (Definition) the structure is unfit for human occupancy.¹

Mr. Crockett argued that the determination of the structure to be unfit for human occupancy based on the cited violations was excessive. Mr. Crockett further argued that Ms. Hobbs had not made any substantial changes to the appearance of the structure since the original inspection by the County, rather she had simply performed routine cleaning of the structure.

Fairfax County argued that based on the entirety of the cited violations the structure was unfit for human occupancy. The County further argued that during the subsequent inspection after the local board hearing Ms. Hobbs had made substantial progress in abating the cited violations

¹ See Review Board Case No. 03-3 and 17-9. See also Review Board Case Nos. 98-8, 98-16, 00-2, 00-14, 11-9&10, and 16-6.

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therefore, the property was no longer unfit for human occupancy and removed the placard and allowed Ms. Hobbs to return to the property.

The right to appeal is laid out by statute and by the building code. The Virginia Maintenance Code reads in part:

107.5 Right of appeal; filing of appeal application. *Any person aggrieved by the local enforcing agency's application of this code or the refusal to grant a modification to the provisions of this code may appeal to the LBBCA.*

The Maintenance Code clearly states that the right of appeal is for applications of the code and being aggrieved by those applications of the code. The Review Board consistently interpreted that the right to appeal is tied to applications of the code and the aggrievement by applications of the code.² In other words, without applications of the code or being aggrieved by applications of the code, there is no right to appeal.

After the local board hearing Ms. Hobbs allowed the County to re-inspect the property. During the inspection the County determined substantial progress in abating the cited violations had been made; therefore, the property was no longer unfit for human occupancy. The County removed the placard and allowed Ms. Hobbs to return to the property; therefore, the application of the code was also removed. The removal of the application ended whatever aggrievement there was against Ms. Hobbs. Therefore, without the cited violation there is no right to appeal. The Review Board finds that Ms. Hobbs' partial compliance with the NOV and subsequent determination by the County of the structure as no longer unfit for human occupancy, the County rescinded the cited violation and application of the code. So, Ms. Hobbs no longer has a right to appeal the cited violation.

Final Order

² *Id.*

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The appeal having been given due regard, and for the reasons set out herein, the Review Board orders as follows:

- A. Whether the County made a reasonable effort to obtain consent to enter the property for an inspection.

The decision of the local appeals board that the County made a reasonable effort to obtain consent to enter the property for inspection and did in fact gain that consent to be, and hereby is, upheld.

- B. Whether to overturn the decision of the County and the local board that a violation of the VMC Section 305.1 (General) exists.

The decision of County and the local appeals board that a violation of Section 305.1 exists to be and hereby is, upheld.

- C. Whether to overturn the decision of the County and the local board that a violation of the VMC Section 308.1 (Accumulation of rubbish and garbage) exists.

The decision of County and the local appeals board that a violation of Section 308.1 exists to be and hereby is, upheld.

- D. Whether to overturn the decision of the County and the local board that a violation of the VMC Section 702.1 (General) exists.

The decision of County and the local appeals board that a violation of Section 702.1 exists to be and hereby is, overturned.

- E. Whether to overturn the decision of the County and the local board that in accordance with VMC Section 202 (Definition) the structure is unfit for human occupancy.

The Review Board concluded that this cited violation had already been rescinded prior to the Review Board hearing; therefore, no right of appeal exists.

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Chairman, State Building Code Technical Review Board

Date entered: July 19, 2019

As provided by Rule 2A:2 of the Supreme Court of Virginia, you have thirty (30) days from the date of service (the date you actually received this decision or the date it was mailed to you, whichever occurred first) within which to appeal this decision by filing a Notice of Appeal with W. Travis Luter, Sr., Secretary of the Review Board. In the event that this decision is served on you by mail, three (3) days are added to that period.

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VIRGINIA STATE BUILDING CODE TECHNICAL REVIEW BOARD

I N T E R P R E T A T I O N

Interpretation Number: 1/2019

Code: USBC, Part 1, Virginia Construction Code/2015

Section No(s): Section 102.3

102.3 Exemptions. The following are exempt from this code:

1. Equipment and wiring used for providing utility, communications, information, cable television, broadcast or radio service in accordance with all of the following conditions:

1.1. The equipment and wiring are located on either rights-of-way or property for which the service provider has rights of occupancy and entry.

1.2. Buildings housing exempt equipment and wiring shall be subject to the USBC.

1.3. The equipment and wiring exempted by this section shall not create an unsafe condition prohibited by the USBC.

2. Support structures owned or controlled by a provider of publicly regulated utility service or its affiliates for the transmission and distribution of electric service in accordance with all of the following conditions:

2.1. The support structures are located on either rights-of-way or property for which the service provider has rights of occupancy and entry.

2.2. The support structures exempted by this section shall not create an unsafe condition prohibited by the USBC.

3. Direct burial poles used to support equipment or wiring providing communications, information or cable television services. The poles exempted by this section

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shall not create an unsafe condition prohibited by the USBC.

4. Electrical equipment, transmission equipment, and related wiring used for wireless transmission of radio, broadcast, telecommunications, or information service in accordance with all of the following conditions:

4.1. Buildings housing exempt equipment and wiring and structures supporting exempt equipment and wiring shall be subject to the USBC.

4.2. The equipment and wiring exempted by this section shall not create an unsafe condition prohibited by the USBC.

5. Manufacturing, processing, and product handling machines and equipment that do not produce or process hazardous materials regulated by this code, including those portions of conveyor systems used exclusively for the transport of associated materials or products, and all of the following service equipment:

5.1. Electrical equipment connected after the last disconnecting means.

5.2. Plumbing piping and equipment connected after the last shutoff valve or backflow device and before the equipment drain trap.

5.3. Gas piping and equipment connected after the outlet shutoff valve. Manufacturing and processing machines that produce or process hazardous materials regulated by this code are only required to comply with the code provisions regulating the hazardous materials.

6. Parking lots and sidewalks, that are not part of an accessible route.

7. Nonmechanized playground or recreational equipment such as swing sets, sliding boards, climbing bars, jungle gyms, skateboard ramps, and similar equipment where no admission fee is charged for its use or for admittance to areas where the equipment is located.

8. Industrialized buildings subject to the Virginia Industrialized Building Safety Regulations (13VAC5-91) and

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manufactured homes subject to the Virginia Manufactured Home Safety Regulations (13VAC5-95); except as provided for in Section 427 and in the case of demolition of such industrialized buildings or manufactured homes.

9. Farm buildings and structures, except for a building or a portion of a building located on a farm that is operated as a restaurant as defined in Section 35.1-1 of the Code of Virginia and licensed as such by the Virginia Board of Health pursuant to Chapter 2 (Section 35.1-11 et seq.) of Title 35.1 of the Code of Virginia. However, farm buildings and structures lying within a flood plain or in a mudslide-prone area shall be subject to flood-proofing regulations or mudslide regulations, as applicable.

10. Federally owned buildings and structures unless federal law specifically requires a permit from the locality. Underground storage tank installations, modifications and removals shall comply with this code in accordance with federal law.

11. Off-site manufactured intermodal freight containers, moving containers, and storage containers placed on site temporarily or permanently for use as a storage container.

12. Automotive lifts.

QUESTION #1: Are equipment, wiring and support structures that will be under the control of an electric company exempt from the USBC?

ANSWER: Yes, as long as the equipment wiring or support structures in question are located on property for which the electric company has rights of occupancy and entry.

Note: No exempt equipment, wiring, or support structure may create an unsafe condition prohibited by the USBC.

QUESTION #2: Are equipment, wiring and support structures that are under the control of an electric company, but are located on property that is leased, exempt from the USBC?

ANSWER: Yes, exempt equipment, wiring and support structures can be located within utility rights-of-way, land owned or leased by

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the electric company, or on property that the electric has rights of entry and occupancy.

Note: *No exempt equipment, wiring, or support structure may create an unsafe condition prohibited by the USBC.*

QUESTION #3: Are equipment, wiring or support structures that are installed by a contractor or an entity other than the electric company, but the electric company will control the equipment, wiring or support structures once they are installed and will have rights of occupancy and entry to the property, exempt from the USBC?

ANSWER: Yes, regardless of who installs wiring, equipment or support structures, if they will be controlled by the electric company upon completion, they are exempt from the USBC and permits are not required.

Note: *No exempt equipment, wiring, or support structure may create an unsafe condition prohibited by the USBC.*

QUESTION #4: Are equipment, wiring or support structures that are under the control of the electric company and the electric company maintains rights of occupancy and entry to the property, but the wiring, equipment or support structures are being maintained and operated by a contractor or an entity other than the electric company, exempt from the USBC?

ANSWER: Yes, if the electric company utilizes a 3rd party contractor to operate or maintain wiring, equipment or support structures, but the electric company maintains control, the wiring, equipment or support structures in question are exempt from the USBC.

Note: *No exempt equipment, wiring, or support structure may create an unsafe condition prohibited by the USBC.*

QUESTION #5: Are equipment, wiring and support structures that are under the control of an entity that is not an electric company exempt from the USBC?

ANSWER: No.

Note: *No exempt equipment, wiring, or support structure may create an unsafe condition prohibited by the USBC.*

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This Official Interpretation was issued by the State Building Code Technical Review Board at its meeting of May 17, 2019.

Chairman, State Building Code Technical Review Board

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VIRGINIA:

BEFORE THE
STATE BUILDING CODE TECHNICAL REVIEW BOARD

IN RE: Appeal of Freemason Street Area Association
Appeal No. 18-22

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VIRGINIA:

BEFORE THE
STATE BUILDING CODE TECHNICAL REVIEW BOARD (REVIEW BOARD)

IN RE: Appeal of Freemason Street Area Association Inc.
Appeal No. 18-22

REVIEW BOARD STAFF DOCUMENT

Suggested Summary of the Appeal

1. On August 14, 2018, the City of Norfolk Neighborhood Development Department (City), in enforcement of the Virginia Property Maintenance Code (VMC), issued a notice of violation to Mark Sinesi for his property located at 355 W. Freemason Street. The notice deemed the property unsafe and uninhabitable and cited one VMC violation per Section 105.1 (General).

2. Freemason Street Area Association Inc. (Freemason) filed an appeal to the City of Norfolk Board of Building Code Appeals (local appeals board) on October 23, 2018.

3. The local appeals board conducted a hearing in November of 2018 and upheld the decision of the City while also finding the appeal to be untimely. Freemason filed an application for appeal to the Review Board on December 17, 2018 after receipt of the local appeals board decision via email from Norfolk Building Commissioner, Rick Fortner, on December 12, 2018.

4. Review Board staff conducted an informal fact finding conference (IFFC) in March of 2019 to clarify the issues in the appeal to the Review Board. The IFFC was attended by Virginia Van de Water, Greta Gustavson, Madeline Sly, and Jack Kavanaugh, members of the Freemason Board; counsel for Freemason, Joe Sherman; Norfolk Building Commissioner, Rick Fortner; Norfolk City Attorney, Cynthia Hall; and counsel for Mark Sinesi, F. Sullivan Callahan.

5. In route to the IFFC, Review Board staff visited the subject property site and found that the building no longer existed on the site. All parties concurred that the building had been demolished prior to the appeal.

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6. The jurisdictional issues were discussed at the IFFC. During the IFFC Mr. Sherman informed Review Board staff that Freemason believes they should have been properly notified of the violations by the City; therefore, are an aggrieved party. When asked by Review Board staff what Freemason hoped to gain from the appeal, Mr. Sherman stated that Freemason wanted to ensure that historical associations became a required party to be notified of such violations pursuant to the building code so that this situation did not occur again. Review Board staff advised Mr. Sherman that this appeal was only for this specific property and case and any desire to make changes to the notification portion of the building code could be done through the code change process during the next cycle. Discussions during the IFFC revealed that Freemason filed court action for an injunction to stop the demolition of the structure and lost all the way to the Virginia Supreme Court.

7. Concerning the merits of the appeal, the parties agreed that the only issue for resolution by the Review Board is whether a violation of VMC Section 105.1 (General) exists.

8. Subsequent to the IFFC, Review Board staff drafted this staff document and forwarded it, along with a copy of all documents submitted, to the parties and opportunity given for the submittal of additions, corrections or objections to the staff document, and the submittal of additional documents or written arguments to be included in the information distributed to the Review Board members for the appeal hearing before the Review Board.

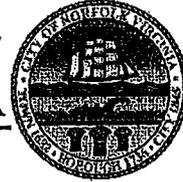
Suggested Issue for Resolution by the Review Board

1. Whether to dismiss the appeal as untimely.
2. Whether to dismiss the appeal as not properly before the Board due to Freemason not being an aggrieved party.
3. If necessary to hear the merits of the appeal, whether to overturn the decision of the City and the local appeals board that a violation of the VMC Section 105.1 (General) exists.

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Basic Documents

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August 14, 2018

Sinesi, Mark
7939 North Shore Rd
Norfolk VA 23505-1736

NOTICE OF VIOLATION

Inspection No: INS-0102998-18
Property Address: 355 W FREEMASON STREET

Dear: Sinesi, Mark

This is to inform you that an inspection has been made at the building or structure located at: 355 W FREEMASON STREET. Our findings are that the structure located at this site is unsafe and uninhabitable. The attached violations of the Virginia Uniform Statewide Building Code (USBC), Part III render the structure unsafe and uninhabitable.

Pursuant to Section 105.1 of the Virginia Uniform Statewide Building Code as adopted by the City of Norfolk, it is here by ordered that this structure must be **repaired or demolished and removed within 10 days of the date of this notice.**

All permits must be obtained prior to starting any repair work or demolition.

Under Part III, Sections 105.4 and 105.9 of the USBC, should you fail to repair or demolish and remove the structure the City of Norfolk, through the Code Official will cause the structure to be demolished and removed by contract or arrangement with a private demolition contractor. The cost of demolition and removal shall be charged against the real estate upon which the structure is located and a lien shall be placed upon the real estate.

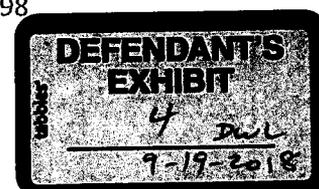
In accordance with the provisions of the USBC Part III, Section 106.5 you have the right to appeal this notice and order by filing a written application to the Local Board of Building Code Appeals of the City of Norfolk. The application for appeal must be filed within (14) days after this notice is served upon you. The appeal shall be based on a claim that the true intent of the code or the rules legally adopted there under have been incorrectly interpreted, the provisions of the code do not fully apply, or the requirements or the code are adequately satisfied by some other means.

Failure to submit an application for appeal within the time specified shall constitute acceptance of the Code Official's decision. Should you have any questions or if we may be of help in your decision, please contact your Code Specialist, Christina Jackson at 757-664-6612 or christina.jackson@norfolk.gov.

Sincerely,

Sherry Johnson, Division Head
Division of Neighborhood Quality
Department of Neighborhood Development

401 Monticello Ave, 1st Floor Norfolk VA 23510
Phone: 757-664-6500 Fax: 757-664-6898



Inspection No: INS-0102998-18
Address: 355 W FREEMASON STREET

Section 105.1 -- To be corrected by: 2018-08-24

105.1 Unsafe Structures Unfit for Human Occupancy

-This section shall apply to existing structures which are classified as unsafe or unfit for human occupancy. All conditions causing such structures to be classified as unsafe or unfit for human occupancy shall be remedied or as an alternative to correcting such conditions, the structure may be vacated and secured against public entry or razed and removed. Vacant and secured structures shall still be subject to other applicable requirements of this code.

Notwithstanding the above, when the code official determines that an unsafe structure or a structure unfit for human occupancy constitutes such a hazard that it should be razed or removed, then the code official shall be permitted to order the demolition of such structures in accordance with applicable requirements of this code.

-Due to the declarations that the property is structurally unsound and otherwise dilapidated and deteriorating it is hereby declared unsafe and unsound which must be demolished. All permits for demolition can be obtained at the Development Service Center 810 Union St-city Hall.



Norfolk

Department of Planning & Community Development

Division of Building Safety
 Development Services Center
 810 Union Street/ First Floor
 Norfolk, VA 23510-1914
 Phone: (757) 664-6565

The Virginia Uniform Statewide Building Code, Part I, Section 119.5 states in part: **Right of appeal; filing of appeal application.** Any person aggrieved by the local building department's application of the USBC or the refusal to grant a modification to the provisions of the USBC may appeal to the I.BBCA.

Appeals of Building Official's decision must be submitted within 30 calendar days of receipt of decision

The Virginia Uniform Statewide Building Code, Part III, Section 106.5 states in part: **Right of appeal; filing of appeal application.** Any person aggrieved by the local enforcing agency's application of this code or the refusal to grant a modification to the provisions of this code may appeal to the I.BBCA.

Appeals of the Maintenance Code Official must be submitted within 14 calendar days of receipt of decision

I (we)/name(s) FREEMASON STREET AREA ASSOCIATION, INC.
 (mailing address) 321 COLLEGE PLACE, NORFOLK, VA 23510

respectfully request that the Local Board of Building Code Appeals review the decision made by the Norfolk Building Official/Norfolk Maintenance Code Official concerning,

Property address on which hearing is based:

355 W. FREEMASON STREET

My interest in the property is:

Owner Contractor Owner's Agent Other (Explain) OWN A NEGATIVE EASEMENT

Application for appeal must be based on one of the following reasons:

(Check one)

Decision: 8/14/18 (Copy must be submitted)

Refusal of the Building Official to grant a modification on the provisions of the USBC, Part I, Description of decision(s) appealed:

(Attach the decision of the Building Official/Maintenance Code Official and any other pertinent documents)

Applicant signature: [Signature] Date: 10/23/18

Note: Please make check payable to Norfolk City Treasurer in the amount of seventy-five (\$75.00) dollars for processing requested appeal. Due at time of application.

Six (6) complete copies of plans and appeal data must be submitted with six (6) copies of application.

Applicant will be notified in writing of the scheduled appeal date.

Freemason Street Area Association, Inc., as an association of historic district property owners which own negative easements over 355 W. Freemason Street, makes this appeal of the Notice of Violation letter dated August 14, 2018, and all associated demolition permits issued by the City of Norfolk.

I. True intent of the code has been incorrectly interpreted

Part III of the Virginia Maintenance Code (2012) requires that the “code official shall inspect any structure” reported as unsafe and “shall prepare a report” which “shall include ... the nature and extent of any conditions found.” § 105.2. Relevant portions attached as Exhibit A.

As to the demolition authorized for 355 W. Freemason Street, the City’s Building Commissioner never inspected the interior of the property. Transcript of testimony attached as Exhibit B.

The true intent of the building code was not interpreted well in this instance as using a third-party report cannot qualify as fulfilling the “shall inspect” portion of the code official’s duties. The report which the Building Commissioner did produce does not meet the intent of the building code because it does, and cannot, report on the conditions found during his inspections.

II. Requirements of code satisfied by some other means

The property at 355 W. Freemason Street is a historic property and should be afforded additional protections than a property not subject to the Va. Const. art XI, § 2, and Va. Code § 15.2-2306. The engineering report on which the City relied, in lieu of an inspection and report of its own, included conclusions that the porch structure was in danger of imminent collapse and the rest of the building was unlikely to collapse. Relevant portions attached as Exhibit C.

Since this is a historic property with the exterior multi-wythe walls in sound condition, the requirements of the building code are better satisfied by emergency repairs to reinforce and stabilize interior features pursuant to § 105.9. These repairs, combined with demolition of the porch, would serve to satisfy the emergency conditions threatening the safety of persons inside the building and preserve the structure.

III. Conclusion

The demolition permit issued to 355 W. Freemason Street did not fulfill the letter or the spirit of the building code. Procedures necessary to document emergency conditions were not verified or reported and the report relied on to reach an emergency conclusion was taken out of context and utilized a cost and reasonableness feasibility analysis rather than a preservation-minded approach appropriate for this property. The proper result would require a combination of demolition to the porch and stabilization of other interior features to allow the preservation process to follow its normal statutory process.

Local Board of Building Code Appeals Resolution

WHEREAS, the City of Norfolk Local Board of Appeals is duly appointed to resolve disputes arising out of enforcement of the Virginia Uniform Statewide Building Code; and

WHEREAS, an appeal has been filed and brought to the attention of the board of appeals; and

WHEREAS, a hearing has been held to consider the aforementioned appeal; and

WHEREAS, the board has fully deliberated this matter; now, therefore, be it

RESOLVED, That the matter of

Appeal Date: October 23, 2018

Inspection No: INS-0102998-18

Property Address: 355 W. Freemason Street

IN RE: Freemason Street Area Association, Inc v. Norfolk Property Maintenance and Building Commissioner

The appeal is hereby **denied**, for the reasons set out below:

1. Pursuant to Section 105.1 of the Virginia Uniform Statewide Building Code the order to demolish the structure. **Denied**
2. Application for appeal within time specified of notice. **Denied**

Hearing Date: November 29, 2018



Signature _____
Chairman of Norfolk Local Board of Appeals

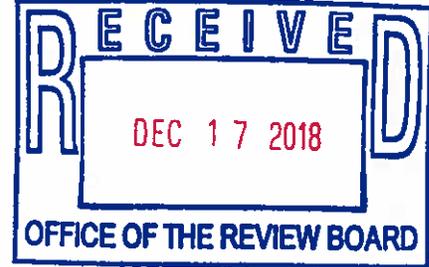
Note: Any person who has a party to the appeal may appeal to the State Building Code Technical Review Board by submitting an application to such board within 21 calendar days upon receipt by certified mail of this resolution. Application forms are available from the Office of the State Review Board, 600 East Main Street, Richmond, VA 23219, (804) 371-7150.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
State Building Codes Office and Office of the State Technical Review Board
Main Street Centre, 600 E. Main Street, Suite 300, Richmond, Virginia 23219
Tel: (804) 371-7150, Fax: (804) 371-7092, Email: sbco@dhed.virginia.gov

APPLICATION FOR ADMINISTRATIVE APPEAL

Regulation Serving as Basis of Appeal (check one):

- Uniform Statewide Building Code
- Statewide Fire Prevention Code
- Industrialized Building Safety Regulations
- Amusement Device Regulations



Appealing Party Information (name, address, telephone number and email address):

Freemason Street Area Association, Inc.

312 College Place

Norfolk, Virginia 23510

Opposing Party Information (name, address, telephone number and email address of all other parties):

City of Norfolk

810 Union Street

Norfolk, Virginia 23510

Additional Information (to be submitted with this application)

- Copy of enforcement decision being appealed
- Copy of record and decision of local government appeals board (if applicable and available)
- Statement of specific relief sought

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2018, a completed copy of this application, including the additional information required above, was either mailed, hand delivered, emailed or sent by facsimile to the Office of the State Technical Review Board and to all opposing parties listed.

Note: This application must be received by the Office of the State Technical Review Board within five (5) working days of the date on the above certificate of service for that date to be considered as the filing date of the appeal. If not received within five (5) working days, the date this application is actually received by the Office of the Review Board will be considered to be the filing date.

Signature of Applicant: _____

Name of Applicant: Joseph Sherman, Esq.
(please print or type)

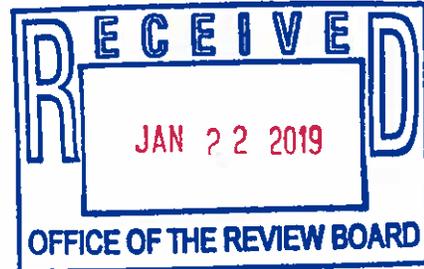
COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
State Building Codes Office and Office of the State Technical Review Board
Main Street Centre, 600 E. Main Street, Suite 300, Richmond, Virginia 23219
Tel: (804) 371-7150, Fax: (804) 371-7092, Email: sbco@dhcd.virginia.gov

Revised Appeal
Application
requested by Review
Board staff for
clerical purposes.
Appeal received
December 17, 2018

APPLICATION FOR ADMINISTRATIVE APPEAL

Regulation Serving as Basis of Appeal (check one):

- Uniform Statewide Building Code
 Statewide Fire Prevention Code
 Industrialized Building Safety Regulations
 Amusement Device Regulations



Appealing Party Information (name, address, telephone number and email address):

Freemason Street Area Association, Inc.; Joseph V. Sherman, Esq.

324 West Freemason Street, Norfolk, Virginia 23510

(757) 350-8308; joe@lawfirmJVS.com

Opposing Party Information (name, address, telephone number and email address of all other parties):

City of Norfolk Department of Planning; Rick Fortner, CBO, CFM

401 Monticello Avenue, First Floor, Norfolk, Virginia 23510

(757) 664-6511; richard.fortner@norfolk.gov

Additional Information (to be submitted with this application)

- o Copy of enforcement decision being appealed
- o Copy of record and decision of local government appeals board (if applicable and available)
- o Statement of specific relief sought

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January, 2019, a completed copy of this application, including the additional information required above, was either mailed, hand delivered, emailed or sent by facsimile to the Office of the State Technical Review Board and to all opposing parties listed.

Note: This application must be received by the Office of the State Technical Review Board within five (5) working days of the date on the above certificate of service for that date to be considered as the filing date of the appeal. If not received within five (5) working days, the date this application is actually received by the Office of the Review Board will be considered to be the filing date.

Signature of Applicant: _____

A handwritten signature in black ink, appearing to read "JOSEPH V. SHERMAN", written over a horizontal line.

Name of Applicant: _____

JOSEPH V. SHERMAN
(please print or type)

THE LAW FIRM OF
JOSEPH V. SHERMAN
A PROFESSIONAL CORPORATION

324 WEST FREEMASON STREET
NORFOLK, VIRGINIA 23510
JVS@LAWYER.COM
(757)350-8308

December 17, 2018

VIA ELECTRONIC MAIL: travis.luter@dhd.virginia.gov

W. Travis Luter, Sr.
STATE TECHNICAL REVIEW BOARD
600 East Main Street
Richmond, Virginia 23219

Re: Appeal of Local Board of Building Code Appeals Resolution

Dear Mr. Luter:

Please accept this letter as a statement of specific relief sought as part of an appeal of the enclosed resolution and corresponding enforcement decision. The case deals with an “emergency” demolition of a historic property. Freemason Street Area Association, Inc., seeks two specific rulings:

(1) the notice of violation failed to comport with § 105.1 as it did not follow the applicable requirements of the uniform statewide building code; and

(2) notice of violation, and thus appeal procedures, were not provided to all persons of interest and so a subsequent denial for failure to appeal within the specific time of the notice violation is inconsistent with the spirit of the uniform building code.

First, there was no emergency justifying the demolition. Code § 105.9 requires “[t]o the extent permitted by the locality, the code official ... shall be permitted to cause the structure to be demolished.” The local zoning ordinance requires actual emergency to demolish historic structures.¹ The report relied on by the City of Norfolk evaluated the feasibility and *reasonableness* of restoring the house.² Attached are photos of the structure contemporaneous to its “emergency” condition.³

¹ *City of Norfolk Zoning Ordinance* § 2.4.10(B)(2)(c) (requiring “such condition could reasonably be expected to cause death or serious physical harm”). Attached as Exhibit A.

² See 355 West Freemason Street Structural Investigation dated August 9, 2018, p. 48-49 (finding “exterior multi-wythe walls appear to be in sound condition. ... the best and most *reasonable* course of action for this structure is complete demolition.”) (emphasis added). Report attached as Exhibit B.

³ Photographs attached to Structural Investigation dated August 9, 2018, attached as Exhibit C.

Mr. W. Travis Luter, Sr.
December 17, 2018
Page 2

THE LAW FIRM OF
JOSEPH V. SHERMAN
A PROFESSIONAL CORPORATION

324 WEST FREEMASON STREET
NORFOLK, VIRGINIA 23510
JVS@LAWYER.COM
(757)350-8308

Second, the City gave no notice of the appeal procedures consistent with § 104.5.4 to the historic district, and then relied on its failure to appeal to dismiss the complaint. As an aggrieved party, the historic district should get an opportunity to prevent abuse of the emergency exception to the historic review process. The note in Code § 105.9 shows that such notice to historic districts is contemplated by the spirit of the code, suggesting newspaper publication is required until the owner has an opportunity for a hearing. In this case, the historic district owns a right to object to use of the property for purposes other than demolition and should likewise have a right to notice of appeal procedures necessary to assert its rights. The City did not serve or otherwise publish the notice of violation which included the appeal procedures and corresponding deadline to appeal.⁴

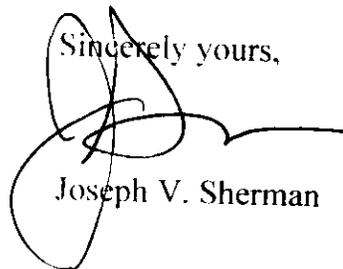
The historic district did get notice of the demolition itself, by virtue of notice to the City's Architectural Review Board on which the district has a seat, but that notice failed to include the appeal procedures, timeline, and requirements.⁵

The City, in collusion with the owner, subverted the historic review process by pursuing a demolition which stretches the word "emergency" so thin that the exception consumes any protection of the rule. The City gave no indication of appellate process or requirements to the historic district until the fourteen (14) day period had lapsed.

Please consider overturning the enforcement actions and recommending future modifications to the building code to prevent this injustice again in the future.

If you have any questions please do not hesitate to call my office: (757) 350-8308.

Sincerely yours,



Joseph V. Sherman

Enclosures

cc: Freemason Street Area Association, Inc. (without enclosures)
Richard Potts (via electronic mail: Richard.potts@dhcd.virginia.gov)
Cindy Hall, Esq. (without enclosures)

⁴ Notice of Violation dated August 14, 2018, attached as Exhibit D.

⁵ Memorandum from Robert J. Tajan dated August 13, 2018, attached as Exhibit E.

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Documents Submitted
By Freemason Street
Area Association

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EXHIBIT A

C. DEVELOPMENT CERTIFICATE REVIEW STANDARDS

A Development Certificate shall be approved if the Planning Commission finds that all of the following standards are met:

- (1) The development proposed with the minor modification is compatible with surrounding land uses;
- (2) The development proposed is consistent with the comprehensive plan;
- (3) The uses proposed are allowed in the base and overlay districts where the development is located;
- (4) The modifications in development standards requested in the development certificate do not exceed those established in for the applicable zoning district.
- (5) Any modifications are the absolute minimum necessary to accommodate the development proposal; and
- (6) The proposed development complies with all applicable proffers and conditions applicable to the land.

D. EFFECT

Approval of a development certificate authorizes only the particular regulatory relief approved. It does not exempt the applicant from the responsibility to obtain all other approvals required by this Ordinance and any other applicable laws, and does not indicate that the development for which the development certificate is granted should receive other permits or development approvals under this Ordinance unless the relevant and applicable portions of this Ordinance or any other applicable laws are met.

E. EXPIRATION

Unless otherwise specified in the development certificate, an application for a building permit or a Certificate of Occupancy shall be applied for and approved within five years of the date of the approval of the development certificate, or the approval shall become null and void, and automatically expire, subject to the vesting provisions of the Code of Virginia. Permitted timeframes do not change with successive owners.

2.4.10. CERTIFICATE OF APPROPRIATENESS

A. PURPOSE

The purpose of this section is to identify the appropriate review procedure and special standards for any development proposed within a Historic or Historic Overlay District, or a designated Norfolk Historic Landmark, to ensure architectural compatibility with the historic character of the district or landmark.

B. APPLICABILITY

(1) General

Unless exempted in accordance with subsection (2), below, a Certificate of Appropriateness (COA) shall be approved before any of the following development occurs within a Historic or Historic Overlay District, or on the site of a designated Norfolk Historic Landmark:

- (a) Alteration of the exterior appearance of any building or structure (this includes any exterior alteration without regard to whether such alteration requires a building permit, if it will change the exterior appearance of a building or structure, including but not limited to, replacement of doors, windows, window sashes, porch railings, floors and ceilings, roofs or portions of roofs, installation, removal, or replacement of trim detail, shutters, gutters or down spouts, exterior mechanical and lighting fixtures, and sign face changes).
- (b) Construction, reconstruction, or relocation of a building or structure;
- (c) Installation of a driveway to access property;
- (d) Construction or installation of a site feature or appurtenance, including but not limited to walls, fences, arbors, paved parking areas, patios, decks, garages, tool sheds, other accessory structures, or signs, if any part of the feature or appurtenance is visible from a public right-of-way or a public space;
- (e) Demolition or removal of all or any significant part of a structure located within an Historic or Historic Overlay District or designated as a Norfolk Historic Landmark all in accordance with Section 2.4.10.D(3):
Demolition, below.

(2) Exemptions

The following shall be exempt from the requirements of this section:

(a) Minor Works and Ordinary Maintenance

Minor works or actions determined by the ZA as not having a permanent effect on the historic or architectural character of the site of a designated Norfolk Historic Landmark or the Historic or Historic Overlay District. Minor works and actions shall include, but are not limited to, the following:

- (i) Antennas, skylights, and solar collectors located so as not to be visible from a public street right-of-way;
- (ii) Alterations or repainting of the interiors of buildings that do not impact exterior appearance or functionality;
- (iii) Ordinary maintenance, such as repainting of previously painted surfaces, or repair of any building or any structure using the same materials having the same appearance as those being repaired.

(Replacement of a building element, feature or appurtenance shall not be interpreted to constitute ordinary maintenance for purposes of this provision unless it is a like-for-like replacement in all respects of material, function, and exterior appearance and the material is acceptable based on the adopted historic or architectural standards and guidelines applicable to the building or structure.); and

- (iv) Ordinary yard maintenance and maintenance and care of existing landscaping on the premises of a property.

(b) Emergency Repairs

Where a building or structure within an Historic or Historic Overlay District or on the site of a designated Norfolk Historic Landmark is damaged due to a fire, flood, or other natural disaster or similar event beyond the control of the landowner, emergency repairs to the building or structure may be made without a COA, provided if a COA would otherwise be required by this section an application for a COA is submitted within 30 days of the event creating the need for the emergency repairs.

(c) Emergency Demolition

The emergency demolition of any structure or any portion of a structure which is in such a dangerous, hazardous or unsafe condition that it has been ordered demolished by the Building Commissioner or the Fire Marshal when they have determined that such condition could reasonably be expected to cause death or serious physical harm. The Building Commissioner or Fire Marshal, as appropriate, shall notify the ZA about the demolition of the structure and the ZA shall notify the chairperson of the ARB and any other interested person as soon as practicable after such a determination has been made by the Building Commissioner or Fire Marshal.

(d) Temporary Signs

The location of temporary signs on property.

(e) Certain Alterations or Improvements

- (i) The alteration or improvement of any portion of the exterior appearance of a building located within the Ghent Historic and Cultural Conservation Districts (HC-G1, HC-G2 and HC-G3) or the West Freemason Historic and Cultural Conservation Districts (HC-WF1 and HC-WF2) or the Norfolk & Western Historic Overlay District (HO-N&W), or any portion of the exterior of a Norfolk Historic Landmark that is not visible from a public right-of-way.
- (ii) The alteration or improvement of any portion of the exterior appearance of a building located within the Downtown Historic Overlay District (HO-Downtown) or the East Freemason Historic

and Cultural Conservation District (HC-EF) that is not visible from a public right-of-way other than an alley.

(3) Failure to Comply

- (a)** Except as otherwise provided in section (b) below, failure to receive approval of a COA when it is required by this section constitutes a violation of this Ordinance.
- (b)** Failure to receive approval for a COA when it is required in accordance with this section shall not constitute a violation of this Ordinance if application is made within 30 days of receiving notice that a COA is required, and upon timely consideration and approval by the ARB. Applications for an after-the-fact review shall require the payment of the application fee plus an after- the-fact filing fee, as established in accordance with this Ordinance.
- (c)** If a COA is required, no other permit or development approval of the proposed development shall be reviewed until receipt of the COA in accordance with this section.

C. CERTIFICATE OF APPROPRIATENESS PROCEDURE

COA applications shall be reviewed using the procedures outlined in Section 2.3.4, Architectural Review Board Procedure.

D. COA REVIEW STANDARDS

A Certificate of Appropriateness shall be approved if it is demonstrated the proposed development complies with the following standards:

(1) Historic or Historic Overlay District

If the proposed development is located in an Historic or Historic Overlay District, it shall:

- (a)** Be architecturally compatible and appropriate with the character, appearance and efficient functioning of the district and not adversely affect the primary character of the district; and
- (b)** Be generally consistent with any applicable design guidelines adopted by the ARB for the district.

(2) Norfolk Historic Landmark

If the proposed development is on the site of a designated a Norfolk Historic Landmark, it shall be architecturally compatible with the historic nature of the building or landmark and preserve its distinguishing characteristics and historic character.

(3) Demolition

If the proposed development involves the demolition or razing of a building or structure, any or all of the following factors shall be considered in addition to those in subsections (1) and (2), above:

EXHIBIT B

DISCUSSION OF FINDINGS

The overall condition of the building can be best described as extremely poor and in is largely in a state of disrepair. No portion of the structure is considered safe for inhabitation in its current condition. That said, the severity of damage throughout the structure does vary. For the purpose of clarifying the severity and approximate extents of the damage, we have separated the building into zones to distinguish these extents. The zones are displayed in the 'FIRE DAMAGE PLANS' and 'ZONE EXTENT CLARIFICATION SECTION' in Appendix A. The zones are separated by vertical level and plan location as follows:

- Zone R: Roof Framing Zones (all roof framing):
 - R-A
 - R-B
 - R-C
 - R-D

- Zone A: Attic Framing Zones (attic framing and second-floor walls):
 - A-A
 - A-B
 - A-C
 - A-D

- Zone 2: Second-Floor Framing Zones (second-floor framing and first-floor walls):
 - 2-A
 - 2-B
 - 2-C
 - 2-D

- First-Floor Framing Zones (first-floor framing and basement supports):
 - 1-A
 - 1-B
 - 1-C
 - 1-D

- Basement Zones (all structure below the first-floor framing):
 - B-A
 - B-B
 - B-C
 - B-D

DISCUSSION OF FINDINGS (Continued):

The fire damage plans indicate which portions of framing are physically impossible to be salvaged due to the fire damage, those that could potentially be salvaged due to the fire damage, and those in which fire has not impacted the structure. However, it should be clear that simply because a framing member or support is theoretically salvageable it does not mean it is practical or feasible to be salvaged. This concept will be elaborated upon later in this report.

Overall Structural Condition By Zone:

Zone R: Roof Framing Zone:

The roof framing is in disrepair. We estimate over 60% of the roof is completely unsalvageable. However, due to the location of the severe damage, as it correlates to the various hips and valleys, it is impossible to salvage any of the roof framing. **All roof framing must be demolished.**

Zone A: Attic Framing Zone:

The attic framing is in disrepair. We estimate over 80% of the attic framing is completely unsalvageable. This is due to both the framing being directly damaged by fire; combined with the damage of the second-floor zone that support these members, which will render them unsalvageable upon their removal. **All of the attic framing must be demolished.**

Zone 2: Second-Floor Framing Zone:

The second-floor framing is in disrepair. We estimate over 80% of the second-floor framing is completely unsalvageable. This is due to both the framing being directly damaged by fire combined with the damage of the first-floor zone that support these members which will render them unsalvageable upon their removal. **All of the second-floor framing must be demolished.**

Zone 1: First-Floor Framing Zone:

The first-floor framing condition is extremely poor. All bearing walls, partition walls, and approximately 80% of the wood subflooring is unsalvageable. A majority of the first-floor joists appear to be unaffected by

DISCUSSION OF FINDINGS (Continued):

the fire, excluding the rear porch, which are also unsalvageable. Although it may be technically feasible to salvage portions of the floor, **our recommendation is that all first-floor framing should be demolished.**

The building's exterior multi-wythe walls appear to be in sound condition. It is our opinion this is the only portion of the structure that is theoretically feasible to be salvaged. That said, as the wood portions of the framing are removed, the exterior walls will lose the lateral stability the roof and floors provide the exterior walls during a wind or seismic event. In order to salvage these exterior walls, a complex and expensive system of temporary shoring and lateral bracing utilizing structural steel struts, walers and bracing would be required to temporarily stabilize the walls during demolition of the wood framing. Site constraints such as the building's proximity to the street would further complicate the feasibility of salvaging these walls.

The smoke damage described in the 'Findings' portion of this report is rampant throughout the structure. Excluding most of the floor joists over the basement level, nearly all walls and framing in the structure have been exposed to smoke damage. The cleaning and rehabilitation process for smoke damage this extensive would likely be an unrealistic task.

The porch structure, defined as Zone A in the 'FIRE DAMAGE PLANS', has already partially collapsed. The second-floor framing has partially collapsed on to the first floor and it appears that even the presence of a very light load, such as a trespasser walking on the second floor, could trigger a full collapse of the second floor which would in turn collapse the roof and first floor framing levels. The loss of the first-floor framing could destabilize and cause failure of the basement walls, which currently retain several feet of exterior soil. Although unlikely, the collapse of the three (3) story porch could potentially initiate collapses of the brick wall separating Zone A from Zone B due to the severity of damage found in Zone B. Because of this, **we recommend the porch structure be demolished as soon as possible to prevent a potential hazard to the public.**

CONCLUSION

Our investigation determined there are multiple structural deficiencies requiring repair. Generally, the deficiencies are major and cannot be readily repaired. It is our opinion salvaging any of the wood framing, excluding the limited amount within the basement is not feasible. Upon the removal of the wood framing, which dangerously stabilizes the exterior walls without a complicated bracing system, it is our opinion the best and most reasonable course of action for this structure is complete demolition.

EXHIBIT C



NORTH ELEVATION



SOUTH ELEVATION



EAST ELEVATION



WEST ELEVATION

EXHIBIT D

City of Norfolk
Notice of Violation
Moved to the
Basic Documents

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Additional Documents
Submitted By
Freemason Street
Area Association

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EXHIBIT A

safe, decent and sanitary living conditions for the tenants of such property.

If a multifamily development has more than 10 dwelling units, in the initial and periodic inspections, the building department shall inspect only a sampling of dwelling units, of not less than two and not more than 10% of the dwelling units, of a multifamily development, that includes all of the multifamily buildings that are part of that multifamily development. In no event, however, shall the building department charge a fee authorized by this section for inspection of more than 10 dwelling units. If the building department determines upon inspection of the sampling of dwelling units that there are violations of this code that affect the safe, decent and sanitary living conditions for the tenants of such multifamily development, the building department may inspect as many dwelling units as necessary to enforce these provisions, in which case, the fee shall be based upon a charge per dwelling unit inspected, as otherwise provided in the fee schedule established pursuant to this section.

Upon the initial or periodic inspection of a residential rental dwelling unit subject to a rental inspection ordinance, the building department has the authority under these provisions to require the owner of the dwelling unit to submit to such follow-up inspections of the dwelling unit as the building department deems necessary, until such time as the dwelling unit is brought into compliance with the provisions of this code that affect the safe, decent and sanitary living conditions for the tenants.

Except as provided for above, following the initial inspection of a residential rental dwelling unit subject to a rental inspection ordinance, the building department may inspect any residential rental dwelling unit in a rental inspection district, that is not otherwise exempted in accordance with this section, no more than once each calendar year.

Upon the initial or periodic inspection of a residential rental dwelling unit subject to a rental inspection ordinance for compliance with these provisions, provided that there are no violations of this code that affect the safe, decent and sanitary living conditions for the tenants of such residential rental dwelling unit, the building department shall provide, to the owner of such residential rental dwelling unit, an exemption from the rental inspection ordinance for a minimum of four years. Upon the sale of a residential rental dwelling unit, the building department may perform a periodic inspection as provided above, subsequent to such sale. If a residential rental dwelling unit has been issued a certificate of occupancy within the last four years, an exemption shall be granted for a minimum period of four years from the date of the issuance of the certificate of occupancy by the building department. If the residential rental dwelling unit becomes in violation of this code dur-

ing the exemption period, the building department may revoke the exemption previously granted under this section.

A local governing body may establish a fee schedule for enforcement of these provisions, which includes a per dwelling unit fee for the initial inspections, follow-up inspections and periodic inspections under this section.

The provisions of this section shall not in any way alter the rights and obligations of landlords and tenants pursuant to the applicable provisions of Chapter 13 (§ 55-217 et seq.) or Chapter 13.2 (§ 55-248.2 et seq.) of Title 55 of the Code of Virginia.

The provisions of this section shall not alter the duties or responsibilities of the local building department under § 36-105 of the Code of Virginia to enforce the USBC.

Unless otherwise provided for in § 36-105.1:1 of the Code of Virginia, penalties for violation of this section shall be the same as the penalties provided for violations of other sections of the USBC.

SECTION 104 ENFORCEMENT, GENERALLY

104.1 Scope of enforcement. This section establishes the requirements for enforcement of this code in accordance with § 36-105 of the Code of Virginia. The local governing body may also inspect and enforce the provisions of the USBC for existing buildings and structures, whether occupied or not. Such inspection and enforcement shall be carried out by an agency or department designated by the local governing body.

If the local building department receives a complaint that a violation of this code exists that is an immediate and imminent threat to the health or safety of the owner, tenant, or occupants of any building or structure, or the owner, occupant, or tenant of any nearby building or structure, and the owner, occupant, or tenant of the building or structure that is the subject of the complaint has refused to allow the code official or his agent to have access to the subject building or structure, the code official or his agent may present sworn testimony to a magistrate or court of competent jurisdiction and request that the magistrate or court grant the code official or his agent an inspection warrant to enable the code official or his agent to enter the subject building or structure for the purpose of determining whether violations of this code exist. The code official or his agent shall make a reasonable effort to obtain consent from the owner, occupant, or tenant of the subject building or structure prior to seeking the issuance of an inspection warrant under this section.

Note: Generally, official action must be taken by the local government to enforce the VMC. Consultation with the legal counsel of the jurisdiction when initiating or changing such action is advised.

104.1.1 Transfer of ownership. In accordance with § 36-105 of the Code of Virginia, if the local building department has initiated an enforcement action against the owner of a building or structure and such owner subsequently transfers the ownership of the building or structure to an entity in which the owner holds an ownership interest greater than 50%, the pending enforcement action shall continue to be enforced against the owner.

104.2 Fees. In accordance with § 36-105 of the Code of Virginia, fees may be levied by the local governing body in order to defray the cost of enforcement and appeals.

104.3 State buildings. In accordance with § 36-98.1 of the Code of Virginia, this code shall be applicable to state-owned buildings and structures. Acting through the Division of Engineering and Buildings, the Department of General Services shall function as the building official for state-owned buildings.

104.3.1 Certification of state enforcement personnel. State enforcement personnel shall comply with the applicable requirements of Sections 104.4.2 through 104.4.4 for certification, periodic maintenance training, and continuing education.

104.4 Local enforcing agency. In jurisdictions enforcing this code, the local governing body shall designate the agency within the local government responsible for such enforcement and appoint a code official. The local governing body may also utilize technical assistants to assist the code official in the enforcement of this code. A permanently appointed code official shall not be removed from office except for cause after having been afforded a full opportunity to be heard on specific and relevant charges by and before the appointing authority. DHCD shall be notified by the appointing authority within 30 days of the appointment or release of a permanent or acting code official and within 60 days after retaining or terminating a technical assistant.

Note: Code officials and technical assistants are subject to sanctions in accordance with the VCS.

104.4.1 Qualifications of code official and technical assistants. The code official shall have at least five years of building experience as a licensed professional engineer or architect, building, fire or trade inspector, contractor, housing inspector or superintendent of building, fire or trade construction or at least five years of building experience after obtaining a degree in architecture or engineering, with at least three years

in responsible charge of work. Any combination of education and experience that would confer equivalent knowledge and ability shall be deemed to satisfy this requirement. The code official shall have general knowledge of sound engineering practice in respect to the design and construction of structures, the basic principles of fire prevention, the accepted requirements for means of egress and the installation of elevators and other service equipment necessary for the health, safety and general welfare of the occupants and the public. The local governing body may establish additional qualification requirements.

A technical assistant shall have at least three years of experience and general knowledge in at least one of the following areas: building construction, building, fire or housing inspections, plumbing, electrical or mechanical trades, fire protection, elevators or property maintenance work. Any combination of education and experience which would confer equivalent knowledge and ability shall be deemed to satisfy this requirement. The locality may establish additional certification requirements.

104.4.2 Certification of code official and technical assistants. An acting or permanent code official shall be certified as a code official in accordance with the VCS within one year after being appointed as acting or permanent code official. A technical assistant shall be certified in the appropriate subject area within 18 months after becoming a technical assistant. When required by a locality to have two or more certifications, a technical assistant shall obtain the additional certifications within three years from the date of such requirement.

Exception: A code official or technical assistant in place prior to April 1, 1995, shall not be required to meet the certification requirements in this section while continuing to serve in the same capacity in the same locality.

104.4.3 Noncertified code official. Except for a code official exempt from certification under the exception to Section 104.4.2, any acting or permanent code official who is not certified as a code official in accordance with the VCS shall attend the core module of the Virginia Building Code Academy or an equivalent course in an individual or regional code academy accredited by DHCD within 180 days of appointment. This requirement is in addition to meeting the certification requirement in Section 104.4.2.

104.4.4 Requirements for periodic maintenance training and education. Code officials and technical assistants shall attend periodic maintenance training as designated by DHCD. In addition to the periodic

maintenance training required above, code officials and technical assistants shall attend 16 hours of continuing education every two years as approved by DHCD. If a code official or technical assistant possesses more than one BHCD certificate, the 16 hours shall satisfy the continuing education requirement for all BHCD certificates.

104.4.5 Conflict of interest. The standards of conduct for code officials and technical assistants shall be in accordance with the provisions of the State and Local Government Conflict of Interests Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2 of the Code of Virginia.

104.4.6 Records. The local enforcing agency shall retain a record of applications received, permits, certificates, notices and orders issued, fees collected and reports of inspections in accordance with The Library of Virginia's General Schedule Number Six.

104.5 Powers and duties, generally. The code official shall enforce this code as set out herein and as interpreted by the State Review Board and shall issue all necessary notices or orders to ensure compliance with the code.

104.5.1 Delegation of authority. The code official may delegate powers and duties except where such authority is limited by the local government. When such delegations are made, the code official shall be responsible for assuring that they are carried out in accordance with the provisions of this code.

104.5.2 Issuance of modifications. Upon written application by an owner or an owner's agent, the code official may approve a modification of any provision of this code provided the spirit and intent of the code are observed and public health, welfare and safety are assured. The decision of the code official concerning a modification shall be made in writing and the application for a modification and the decision of the code official concerning such modification shall be retained in the permanent records of the local enforcing agency.

104.5.2.1 Substantiation of modification. The code official may require or may consider a statement from a professional engineer, architect or other person competent in the subject area of the application as to the equivalency of the proposed modification.

104.5.3 Inspections. The code official may inspect buildings or structures to determine compliance with this code and shall carry proper credentials when performing such inspections. The code official is authorized to engage such expert opinion as deemed neces-

sary to report upon unusual, detailed, or complex technical issues in accordance with local policies.

104.5.3.1 Observations. When, during an inspection, the code official or authorized representative observes an apparent or actual violation of another law, ordinance, or code not within the official's authority to enforce, such official shall report the findings to the official having jurisdiction in order that such official may institute the necessary measures.

104.5.3.2 Approved inspection agencies and individuals. The code official may accept reports of inspections or tests from individuals or inspection agencies approved in accordance with the code official's written policy required by Section 104.5.3.3. The individual or inspection agency shall meet the qualifications and reliability requirements established by the written policy. Reports of inspections by approved individuals or agencies shall be in writing, shall indicate if compliance with the applicable provisions of this code have been met, and shall be certified by the individual inspector or by the responsible officer when the report is from an agency. The code official shall review and approve the report unless there is cause to reject it. Failure to approve a report shall be in writing within five working days of receiving it, stating the reasons for rejection.

104.5.3.3 Third-party inspectors. Each code official charged with the enforcement of this code and who accepts third-party reports shall have a written policy establishing the minimum acceptable qualifications for third-party inspectors. The policy shall include the format and time frame required for submission of reports, any prequalification or preapproval requirements before conducting a third-party inspection, and any other requirements and procedures established by the code official.

104.5.3.4 Qualifications. In determining third-party qualifications, the code official may consider such items as DHCD inspector certification, other state or national certifications, state professional registrations, related experience, education, and any other factors that would demonstrate competency and reliability to conduct inspections.

104.5.4 Notices, reports and orders. Upon findings by the code official that violations of this code exist, the code official shall issue a correction notice or notice of violation to the owner or the person responsible for the maintenance of the structure. Work done to correct violations of this code subject to the permit,

inspection and approval provisions of the VCC shall not be construed as authorization to extend the time limits established for compliance with this code.

104.5.4.1 Correction notice. The correction notice shall be a written notice of the defective conditions. The correction notice shall require correction of the violation or violations within a reasonable time unless an emergency condition exists as provided under the unsafe building provisions of Section 105. Upon request, the correction notice shall reference the code section that serves as the basis for the defects and shall state that such defects shall be corrected and reinspected in a reasonable time designated by the code official.

104.5.4.2 Notice of violation. If the code official determines there are violations of this code other than those for unsafe structures, unsafe equipment or structures unfit for human occupancy under Section 105, the code official may issue a notice of violation to be communicated promptly in writing to the owner or the person responsible for the maintenance or use of the building or structure in lieu of a correction notice as provided for in Section 104.5.4.1. In addition, the code official shall issue a notice of violation for any uncorrected violation remaining from a correction notice established in Section 104.5.4.1. A notice of violation shall be issued by the code official before initiating legal proceedings unless the conditions violate the unsafe building conditions of Section 105 and the provisions established therein are followed. The code official shall provide the section numbers to the owner for any code provision cited in the notice of violation. The notice shall require correction of the violation or violations within a reasonable time unless an emergency condition exists as provided under the building provisions of Section 105. The owner or person to whom the notice of violation has been issued shall be responsible for contacting the code official within the time frame established for any re-inspections to assure the violations have been corrected. The code official will be responsible for making such inspection and verifying the violations have been corrected. In addition, the notice of violation shall indicate the right of appeal by referencing the appeals section of this code.

104.5.5 Coordination of inspections. The code official shall coordinate inspections and administrative orders with any other state or local agencies having related inspection authority and shall coordinate those inspections required by the Virginia Statewide Fire Prevention Code (13VAC5-51) for maintenance of fire protection devices, equipment and assemblies so

that the owners and occupants will not be subjected to numerous inspections or conflicting orders.

Note: The Fire Prevention Code requires the fire official to coordinate such inspections with the code official.

104.5.6 Further action when violation not corrected. If the responsible party has not complied with the notice of violation, the code official shall submit a written request to the legal counsel of the locality to institute the appropriate legal proceedings to restrain, correct or abate the violation or to require the removal or termination of the use of the building or structure involved. In cases where the locality so authorizes, the code official may issue or obtain a summons or warrant.

104.5.7 Penalties and abatement. Penalties for violations of this code shall be as set out in § 36-106 of the Code of Virginia. The successful prosecution of a violation of the code shall not preclude the institution of appropriate legal action to require correction or abatement of a violation.

SECTION 105 UNSAFE STRUCTURES OR STRUCTURES UNFIT FOR HUMAN OCCUPANCY

105.1 General. This section shall apply to existing structures which are classified as unsafe or unfit for human occupancy. All conditions causing such structures to be classified as unsafe or unfit for human occupancy shall be remedied or as an alternative to correcting such conditions, the structure may be vacated and secured against public entry or razed and removed. Vacant and secured structures shall still be subject to other applicable requirements of this code. Notwithstanding the above, when the code official determines that an unsafe structure or a structure unfit for human occupancy constitutes such a hazard that it should be razed or removed, then the code official shall be permitted to order the demolition of such structures in accordance with applicable requirements of this code.

Note: Structures which become unsafe during construction are regulated under the VCC.

105.2 Inspection of unsafe or unfit structures. The code official shall inspect any structure reported or discovered as unsafe or unfit for human habitation and shall prepare a report to be filed in the records of the local enforcing agency and a copy issued to the owner. The report shall include the use of the structure and a description of the nature and extent of any conditions found.

105.3 Unsafe conditions not related to maintenance. When the code official finds a condition that constitutes a

serious and dangerous hazard to life or health in a structure constructed prior to the initial edition of the USBC and when that condition is of a cause other than improper maintenance or failure to comply with state or local building codes that were in effect when the structure was constructed, then the code official shall be permitted to order those minimum changes to the design or construction of the structure to remedy the condition.

105.3.1 Limitation to requirements for retrofitting.

In accordance with Section 103.2, this code does not generally provide for requiring the retrofitting of any structure. However, conditions may exist in structures constructed prior to the initial edition of the USBC because of faulty design or equipment that constitute a danger to life or health or a serious hazard. Any changes to the design or construction required by the code official under this section shall be only to remedy the serious hazard or danger to life or health and such changes shall not be required to fully comply with the requirements of the VCC applicable to newly constructed buildings or structures.

105.4 Notice of unsafe structure or structure unfit for human occupancy. When a structure is determined to be unsafe or unfit for human occupancy by the code official, a written notice of unsafe structure or structure unfit for human occupancy shall be issued by personal service to the owner, the owner's agent or the person in control of such structure. The notice shall specify the corrections necessary to comply with this code, or if the structure is required to be demolished, the notice shall specify the time period within which the demolition must occur. Requirements in Section 104.5.4 for notices of violation are also applicable to notices issued under this section to the extent that any such requirements are not in conflict with the requirements of this section.

Note: Whenever possible, the notice should also be given to any tenants of the affected structure.

105.4.1 Vacating unsafe structure. If the code official determines there is actual and immediate danger to the occupants or public, or when life is endangered by the occupancy of an unsafe structure, the code official shall be authorized to order the occupants to immediately vacate the unsafe structure. When an unsafe structure is ordered to be vacated, the code official shall post a notice with the following wording at each entrance: "THIS STRUCTURE IS UNSAFE AND ITS OCCUPANCY (OR USE) IS PROHIBITED BY THE CODE OFFICIAL." After posting, occupancy or use of the unsafe structure shall be prohibited except when authorized to enter to conduct inspections, make required repairs or as necessary to demolish the structure.

105.5 Posting of notice. If the notice is unable to be issued by personal service as required by Section 105.4, then the notice shall be sent by registered or certified mail to the last known address of the responsible party and a copy of the notice shall be posted in a conspicuous place on the premises.

105.6 Posting of placard. In the case of a structure unfit for human habitation, at the time the notice is issued, a placard with the following wording shall be posted at the entrance to the structure: "THIS STRUCTURE IS UNFIT FOR HABITATION AND ITS USE OR OCCUPANCY HAS BEEN PROHIBITED BY THE CODE OFFICIAL." In the case of an unsafe structure, if the notice is not complied with, a placard with the above wording shall be posted at the entrance to the structure. After a structure is placarded, entering the structure shall be prohibited except as authorized by the code official to make inspections, to perform required repairs or to demolish the structure. In addition, the placard shall not be removed until the structure is determined by the code official to be safe to occupy, nor shall the placard be defaced.

105.7 Revocation of certificate of occupancy. If a notice of unsafe structure or structure unfit for human habitation is not complied with within the time period stipulated on the notice, the code official shall be permitted to request the local building department to revoke the certificate of occupancy issued under the VCC.

105.8 Vacant and open structures. When an unsafe structure or a structure unfit for human habitation is open for public entry at the time a placard is issued under Section 105.6, the code official shall be permitted to authorize the necessary work to make such structure secure against public entry whether or not legal action to compel compliance has been instituted.

105.9 Emergency repairs and demolition. To the extent permitted by the locality, the code official may authorize emergency repairs to unsafe structures or structures unfit for human habitation when it is determined that there is an immediate danger of any portion of the unsafe structure or structure unfit for human habitation collapsing or falling and when life is endangered. Emergency repairs may also be authorized where there is a code violation resulting in the immediate serious and imminent threat to the life and safety of the occupants. The code official shall be permitted to authorize the necessary work to make the structure temporarily safe whether or not legal action to compel compliance has been instituted. In addition, whenever an owner of an unsafe structure or structure unfit for human habitation fails to comply with a notice to demolish issued under Section 105.4 in the time period stipulated, the code official shall be permitted to cause the structure to be demolished. In accordance with §§ 15.2-906 and 15.2-1115 of the Code of Virginia, the legal counsel of the locality

may be requested to institute appropriate action against the property owner to recover the costs associated with any such emergency repairs or demolition and every such charge that remains unpaid shall constitute a lien against the property on which the emergency repairs or demolition were made and shall be enforceable in the same manner as provided in Articles 3 (§ 58.1-3490 et seq.) and 4 (§ 58.1-3965 et seq.) of Chapter 39 of Title 58.1 of the Code of Virginia.

Note: Code officials and local governing bodies should be aware that other statutes and court decisions may impact on matters relating to demolition, in particular whether newspaper publication is required if the owner cannot be located and whether the demolition order must be delayed until the owner has been given the opportunity for a hearing. In addition, historic building demolition may be prevented by authority granted to local historic review boards in accordance with § 15.2-2306 of the Code of Virginia unless determined necessary by the code official.

105.10 Closing of streets. When necessary for public safety, the code official shall be permitted to order the temporary closing of sidewalks, streets, public ways or premises adjacent to unsafe or unfit structures and prohibit the use of such spaces.

SECTION 106 APPEALS

106.1 Establishment of appeals board. In accordance with § 36-105 of the Code of Virginia, there shall be established within each local enforcing agency a LBBCA. Whenever a county or a municipality does not have such a LBBCA, the local governing body shall enter into an agreement with the local governing body of another county or municipality or with some other agency, or a state agency approved by DHCD for such appeals resulting therefrom. Fees may be levied by the local governing body in order to defray the cost of such appeals. The LBBCA for hearing appeals under the VCC shall be permitted to serve as the appeals board required by this section. The locality is responsible for maintaining a duly constituted LBBCA prepared to hear appeals within the time limits established in this section. The LBBCA shall meet as necessary to assure a duly constituted board, appoint officers as necessary, and receive such training on the code as may be appropriate or necessary from staff of the locality.

106.2 Membership of board. The LBBCA shall consist of at least five members appointed by the locality for a specific term of office established by written policy. Alternate members may be appointed to serve in the absence of any regular members and as such, shall have the full power and authority of the regular members. Regular and alternate members may be reappointed. Written records of current

membership, including a record of the current chairman and secretary shall be maintained in the office of the locality. In order to provide continuity, the terms of the members may be of different length so that less than half will expire in any one-year period.

106.3 Officers and qualifications of members. The LBBCA shall annually select one of its regular members to serve as chairman. When the chairman is not present at an appeal hearing, the members present shall select an acting chairman. The locality or the chief executive officer of the locality shall appoint a secretary to the LBBCA to maintain a detailed record of all proceedings. Members of the LBBCA shall be selected by the locality on the basis of their ability to render fair and competent decisions regarding application of the USBC and shall to the extent possible, represent different occupational or professional fields relating to the construction industry. At least one member should be an experienced builder; at least one member should be an RDP, and at least one member should be an experienced property manager. Employees or officials of the locality shall not serve as members of the LBBCA.

106.4 Conduct of members. No member shall hear an appeal in which that member has a conflict of interest in accordance with the State and Local Government Conflict of Interests Act (§ 2.2-3100 et seq. of the Code of Virginia). Members shall not discuss the substance of an appeal with any other party or their representatives prior to any hearings.

106.5 Right of appeal; filing of appeal application. Any person aggrieved by the local enforcing agency's application of this code or the refusal to grant a modification to the provisions of this code may appeal to the LBBCA. The applicant shall submit a written request for appeal to the LBBCA within 14 calendar days of the receipt of the decision being appealed. The application shall contain the name and address of the owner of the building or structure and, in addition, the name and address of the person appealing, when the applicant is not the owner. A copy of the code official's decision shall be submitted along with the application for appeal and maintained as part of the record. The application shall be marked by the LBBCA to indicate the date received. Failure to submit an application for appeal within the time limit established by this section shall constitute acceptance of a code official's decision.

106.6 Meetings and postponements. The LBBCA shall meet within 30 calendar days after the date of receipt of the application for appeal, except that a period of up to 45 calendar days shall be permitted where the LBBCA has regularly scheduled monthly meetings. A longer time period shall be permitted if agreed to by all the parties involved in the appeal. A notice indicating the time and place of the hearing shall be sent to the parties in writing to the addresses listed on the application at least 14 calendar

days prior to the date of the hearing, except that a lesser time period shall be permitted if agreed to by all the parties involved in the appeal. When a quorum of the LBBCA is not present at a hearing to hear an appeal, any party involved in the appeal shall have the right to request a postponement of the hearing. The LBBCA shall reschedule the appeal within 30 calendar days of the postponement, except that a longer time period shall be permitted if agreed to by all the parties involved in the appeal.

106.7 Hearings and decision. All hearings before the LBBCA shall be open meetings and the appellant, the appellant's representative, the locality's representative and any person whose interests are affected by the code official's decision in question shall be given an opportunity to be heard. The chairman shall have the power and duty to direct the hearing, rule upon the acceptance of evidence and oversee the record of all proceedings. The LBBCA shall have the power to uphold, reverse or modify the decision of the official by a concurring vote of a majority of those present. Decisions of the LBBCA shall be final if no further appeal is made. The decision of the LBBCA shall be by resolution signed by the chairman and retained as part of the record of the appeal. Copies of the resolution shall be sent to all parties by certified mail. In addition, the resolution shall contain the following wording:

"Any person who was a party to the appeal may appeal to the State Review Board by submitting an application to such Board within 21 calendar days upon receipt by certified mail of this resolution. Application forms are available from the Office of the State Review Board, 600 East Main Street, Richmond, Virginia 23219, (804) 371-7150."

106.8 Appeals to the State Review Board. After final determination by the LBBCA in an appeal, any person who was a party to the appeal may further appeal to the State Review Board. In accordance with § 36-98.2 of the Code of Virginia for state-owned buildings and structures, appeals by an involved state agency from the decision of the code official for state-owned buildings or structures shall be made directly to the State Review Board. The application for appeal shall be made to the State Review Board within 21 calendar days of the receipt of the decision to be appealed. Failure to submit an application within that time limit shall constitute an acceptance of the code official's decision. For appeals from a LBBCA, a copy of the code official's decision and the resolution of the LBBCA shall be submitted with the application for appeal to the State Review Board. Upon request by the Office of the State Review Board, the LBBCA shall submit a copy of all pertinent information from the record of the appeal. In the case of appeals involving state-owned buildings or structures, the involved state agency shall submit a copy of the code official's decision and other relevant information with the application for appeal to the State Review Board.

Procedures of the State Review Board are in accordance with Article 2 (§ 36-108 et seq.) of Chapter 6 of Title 36 of the Code of Virginia. Decisions of the State Review Board shall be final if no further appeal is made.

EXHIBIT B

1 THE COURT: You agree there's nothing
 2 preventing cars from parking next to the building right
 3 now, correct?

4 THE WITNESS: Agreed, yes, sir.

5 THE COURT: All right.

6 BY MR. SHERMAN:

7 Q. And you agree as the building inspector,
 8 you didn't inspect this property --

9 THE COURT: Building Commissioner.

10 MR. SHERMAN: I'm sorry.

11 BY MR. SHERMAN:

12 Q. You're in charge of inspections.
 13 You're in charge of inspections, right?

14 A. I'm in charge of new construction
 15 inspections.

16 Q. Right. And this is not --

17 A. And I work very closely with the property
 18 maintenance official who is in charge of the inspectors
 19 that were inside this building. Miss Jackson is -- she
 20 was the inspector. So, yes, I communicated with her as
 21 well.

22 Q. And you personally never went in the
 23 building.

24 A. No, I did not.

25 Q. And you're aware that the City had

EXHIBIT C







Photograph
Provided by Review
Board staff

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Photograph taken by Review Board staff on March 5, 2019

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City of Norfolk
Circuit Court Findings
Submitted to Review Board
staff at the IFFC;
Approved by All Parties

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FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

DAVID W. LANNETTI
JUDGE

150 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

October 10, 2018

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**Re: Freemason Street Area Association, Inc. v. City of Norfolk and
Dr. Mark S. Sinesi (Docket No.: CL18-7735)**

Dear Counsel:

Today, the Court rules on a “Petition for Temporary Injunction” filed by the Freemason Street Area Association, Inc. (“Freemason”) seeking to enjoin Dr. Mark S. Sinesi and the City of Norfolk¹ (the “City”) from demolishing the building located at 355 W. Freemason Street (“Grandy House”²). Sinesi owns the structure, which is a contributing building to the West Freemason Street Area Historical District. The Court finds that, although Freemason has standing to challenge Sinesi’s City-ordered demolition of Grandy House, Freemason failed to satisfy the requirements for the Court to grant a temporary injunction. Specifically, the Court finds that—despite the possibility that Freemason may suffer irreparable injury in the absence of the requested temporary injunction—Freemason failed to prove that it is likely to succeed on the merits, that its potential harm without preliminary relief outweighs the potential harm to Sinesi with the temporary injunction, and that the requested temporary injunction is in the public interest. The Court therefore DENIES the “Petition for Temporary Injunction.”

¹ Despite Freemason seeking relief from the City in its “Petition for Temporary Injunction,” the City is not a party to the petition. Additionally, Freemason did not file the associated “initial” pleading—a “Petition for Declaratory Judgment”—until *after* both the August 31, 2018, *ex parte* hearing and the September 19, 2018, hearing, at which both Freemason and Sinesi were represented. Because the City was not a party to the proceedings during the hearings on Freemason’s “Petition for Temporary Injunction,” the Court declines to entertain any request to enjoin the City.

² The building, which is a Georgian Revival-style house, apparently served as the home and office of Dr. Charles Rollins Grandy, a pathologist and leader in the fight against tuberculosis.

Background

Grandy House was built in or about 1901 in the West Freemason Section of Norfolk, Virginia. (Pet'r's Ex. 5.) The City of Norfolk established the West Freemason Historic District (the "Historic District") in 1978, and Grandy House is a contributing building to the Historic District. *See Norfolk, Va., Zoning Ordinance* § 3.6.8. Sinesi purchased the house in October 2015 with the intent to renovate it and make it his primary residence. (Pet'r's Ex. 10.) He apparently developed construction plans that were approved by the City's Architectural Review Board ("ARB") and expended significant funds in support of this effort.

On December 16, 2016, an arsonist set the house on fire, extensively damaging the porch structure and the interior of the building. (Pet'r's Ex. 1.) In light of the damage, the City issued multiple citations to Sinesi, which required that he make certain improvements to the building. (Pet'r's Ex. 2.) It is undisputed that Sinesi failed to make the required improvements, and there are pending enforcement actions in Norfolk General District Court. (Pet'r's Ex. 11.)

On June 18, 2018—relying on a structural engineer's February 7, 2018, letter and subsequent evaluation and recommendation "noting the damage to the framing of the building"—the City's Building Commissioner determined that Grandy House was "structurally unsafe" according to the Virginia Uniform Statewide Building Code (the "USBC").³ (Pet'r's Ex. 3.)

On August 9, 2018, the structural engineer produced a new evaluation and report (the "Report"). (*Id.*) In the Report, the engineer recommended that Sinesi demolish the framing associated with the first floor, second floor, attic, and roof and that the "porch structure be demolished as soon as possible to prevent a potential hazard to the public." (*Id.*) The engineer also opines that

[t]he second-floor framing has partially collapsed on to the first floor and it appears that even the presence of a very light load, such as a trespasser walking on the second floor, could trigger a full collapse of the second floor which would in turn collapse the roof and first floor framing levels. The loss of the first-floor framing could destabilize and cause failure of the basement walls, which currently retain several feet of exterior soil.

(*Id.*) The Report concludes that, although "[t]he building's exterior multi-wythe [brick] walls appear to be structurally sound," "[u]pon the removal of the wood framing, which dangerously stabilizes the exterior walls without a complicated bracing system, it is our opinion [that] the best and most reasonable course of action for this structure is complete demolition." (*Id.*)

Based on the Report, the City's Building Commissioner forwarded a memorandum to the City's Zoning Administrator that same day. (*Id.*) In the memorandum, the Building

³ All citations to the USBC in this letter opinion are to the Maintenance Code (Part III) of the USBC. *See Va. Unif. Statewide Bldg. Code*, Part III (2012).

Commissioner states that this memorandum is being sent to notify you of the required emergency demolition of the historic building located at 355 West Freemason Street" and based on new information provided by the structural engineer and [his] professional experience"-declares "the structure 'Unsafe' and, in such condition that could reasonably be expected to cause death or serious physical harm to the public." (*Id.*)

On August 13, 2018, the Zoning Administrator notified, *inter alia*, various City officials, the Architectural Review Board Chairman, and members of the City Architectural Review Board of "the required emergency demolition of the historic building located at 355 West Freemason Street," stating that "[t]he condition [of Grandy House] has deteriorated significantly since the fire, and the Building Commissioner has determined that the building, if left in its current condition, 'could reasonably be expected to cause death or serious physical harm.'" (*Id.*) The Zoning Administrator also informed them that the City's Property Maintenance Official "has been notified to take all necessary action to promptly compel the demolition of the property to protect public safety," (*Id.*)

On August 14, 2018, the City issued Sinesi a "Notice of Violation" (the "Notice"). in which it reported its finding that Grandy House was "unsafe and uninhabitable." (Resp'ts Ex 4.) The Notice ordered that, pursuant to the USBC, the structure "must be repaired or demolished and removed within 10 days of the date of this notice." (*Id.* (referencing *Va. Unif. Statewide Bldg. Code* § 105.1).) It went on to state that per the USBC,

should you fail to repair or demolish and remove the structure[,] the City of Norfolk . . . will cause the structure to be demolished and removed by contract or arrangement with a private demolition contractor[, and t]he cost of demolition and removal shall be charged against the real estate upon which the structure is located and a lien shall be placed upon the real estate.

(*Id.*) The Notice further pointed out that, pursuant to Section 106.5 of the USBC, Sinesi had the right to appeal to the Local Board of Building Code Appeals ("LBBCA") within fourteen days of service of the Notice. (*Id.*) Sinesi testified that he subsequently commenced the process of obtaining a demolition company to take down the structure.

Freemason filed a "Petition for Temporary Injunction" against Sinesi on August 30, 2018, asking the Court to enjoin Sinesi from taking any actions to demolish Grandy House. The Court held an emergency *ex parte* hearing on August 31, 2018 (the "Initial Hearing"). During that hearing, the Court commented to Freemason's counsel that Freemason needed to file a corresponding initial pleading seeking permanent relief. At the conclusion of the hearing, the Court granted a fourteen-day temporary injunction-enjoining Sinesi from taking any steps to demolish Grandy House-in order to maintain the *status quo* while the parties made arrangements for a hearing during which they both could appear before the Court. The Court did not enjoin the City, as it was not a party to the temporary injunction action.

The Court held a subsequent hearing on the "Petition for Temporary Injunction" on September 19, 2018 (the "Second Hearing"), during which both parties had representation. At

the conclusion of that hearing, the Court took the matter under advisement and granted the parties leave to file post-hearing briefs on the issue of whether the Court had subject matter jurisdiction. The Court also extended the temporary injunction issued at the conclusion of the Initial Hearing for thirty days or until further order from the Court, whichever occurred first.

Freemason filed a related "Petition for Declaratory Judgment" on September 21, 2018, naming both Sinesi and the City of Norfolk as defendants.

Positions of the Parties

Freemason's Position

Freemason argues that the City's determination that the post-arson condition of Grandy House demanded immediate demolition was arbitrary and capricious. (Mem. Supp. Mot. Temp. Inj. 4-5.) It notes that the decision was made more than twenty months after the arson and claims that the condition of the structure remained relatively unchanged throughout this time period, despite periodic extreme weather events. (*Id.* at 4-5.) Freemason further asserts that the City's determination was based on a structural engineer's report-obtained by Sinesi-which concluded that although the porch structure required immediate demolition, the exterior walls were stable. (*Id.* at 5.) The Report recommended complete demolition of the building only because renovation was not "feasible." (*See* Pet'r's Ex. 3.)

Freemason contends that Sinesi is manipulating the situation in order to, *inter alia*, bypass the review and appeal procedures of the *Norfolk, Virginia, Zoning Ordinance* (the "Zoning Ordinance") that pertain to historic districts, facilitate immediate demolition of his house, and make a financial profit through the sale of the lot without improvements and the concomitant historic district requirements. (Mem. Supp. Mot. Temp. Inj. 4-5.) Instead of relying on the emergency demolition procedures of the USBC, Freemason asserts that Sinesi should be required to proceed under the certificate-of-appropriateness demolition procedure of the Zoning Ordinance, which requires the applicant to demonstrate to the Architectural Review Board (the "ARB") that preservation of the contributing building is "economically infeasible." (*Id.* at 3, 5); *Norfolk, Va., Zoning Ordinance* § 2.4.D(3). Further, Freemason points out that if an application for a demolition certificate of appropriateness is denied by the ARB and, if appealed, the disapproval is upheld by the City Council, Sinesi would be required to market the property at a price reasonably related to its fair market value for twelve months before the structure could be demolished. *See Norfolk, Va., Zoning Ordinance* § 2.4.D(3)(e).

Sinesi's Position

Sinesi contends that, after purchasing Grandy House in October 2015, he developed plans that were approved by the ARB to make substantial improvements to the building. (Memo. Opp. Pet. Temp. Inj. ¶ 1, 5.) He asserts that an arsonist set fire to the structure in December 2016, which caused substantial damage to the building and resulted in the City ordering that he repair and remediate the damage. (*Id.* ¶ 2-3.) Sinesi claims that he subsequently requested an engineering firm inspect Grandy House and prepare a structural engineering report. (*Id.* ¶ 116-7.)

Based largely on the Report, the City ultimately notified Sinesi to repair or demolish the structure. (*Id.* 11-9.) Sinesi asserts that he then took actions to have his house demolished until the Court entered an injunctive order. (*id.* 1110, 12)

Sinesi argues that he simply was doing what the City properly ordered him to do. (*Id.* 11 15-16.) Based on the City Building Commissioner's recommendation that complete demolition of Grandy House was required, the City ordered him to repair or demolish the structure within ten days. (*Id.* 8-9.) Sinesi testified that, according to the Notice, if he failed to demolish his house, the City could arrange for demolition and hold him responsible for all associated costs via a charge to the real estate and a lien.⁴ (*See* Resp't's Ex. 4.)

Sinesi asserts that the City's Building Commissioner reasonably concluded that public safety concerns warranted emergency demolition of the structure. (Memo. Opp. Pet. Temp. Inj. 1 8.) He also contends that Freemason had the opportunity to appeal the Building Commissioner's decision to the LBBCA but opted not to do so, thereby failing to exhaust its administrative remedies and making judicial intervention inappropriate. (*Id.* 11, 12, 17-18.)

Analysis

Legal Standard

Virginia's Declaratory Judgment Act provides as follows:

In cases of actual controversy, circuit courts ... shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed and no action or proceeding shall be open to objection on the ground that a judgment order or decree merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, and other instruments of writing, statutes, municipal ordinances and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

Va. Code § 8.01-184 (2015 Repl. Vol.).

The City's Zoning Ordinance provides procedures to obtain a certificate of appropriateness for any development proposed within a historic district to ensure compatibility with the historic character of the district. Norfolk, Va., Zoning Ordinance §2.4.10. The ordinance provides several conditions that are exempt from the certificate-of-appropriateness requirements, including emergency demolition:

The emergency demolition of any structure or any portion of a structure which is in such a dangerous, hazardous or unsafe condition that it has been ordered

⁴ Of note, the City is not a party to Freemason's "Petition for Temporary Injunction."

demolished by the Building Commissioner or the Fire Marshal when they have determined that such condition could reasonably be expected to cause death or serious physical harm. The Building Commissioner or Fire Marshal, as appropriate, shall notify the [Zoning Administrator] about the demolition of the structure and the [Zoning Administrator] shall notify the chairperson of the [Architectural Review Board] and any other interested person as soon as practicable after such a determination has been made by the Building Commissioner or Fire Marshal.

Id. § 2.4.10.B.(2)(c).

Section 105 of the USBC provides as follows:

This section shall apply to existing structures which are classified as unsafe or unfit for human occupancy. All conditions causing such structures to be classified as unsafe or unfit for human occupancy shall be remedied or as an alternative to correcting such conditions, the structure may be vacated and secured against public entry or razed and removed Notwithstanding the above, when the code official determines that an unsafe structure or a structure unfit for human occupancy constitutes such a hazard that it should be razed or removed, then the code official shall be permitted to order the demolition of such structures in accordance with applicable requirements of this code.

Va. Unif. Statewide Bldg. Code § 105.1 (2012); *see also* Norfolk City Code § 11.1-1.1 (adopting the Va. Unif. Statewide Bldg. Code).

Regarding required notice, the USBC provides, in pertinent part, as follows:

When a structure is determined to be unsafe or unfit for human occupancy by the code official, a written notice of unsafe structure or structure unfit for human occupancy shall be issued by personal service to the owner, the owner's agent or the person in control of such structure. The notice shall specify the corrections necessary to comply with this code, or if the structure is required to be demolished, the notice shall specify the time period within which the demolition must occur.

Va. Unif. Statewide Bldg. Code § 105.4.

The USBC further provides the following:

[W]henever an owner of an unsafe structure or structure unfit for human habitation fails to comply with a notice to demolish issued under Section 105.4 in the time period stipulated, the code official shall be permitted to cause the structure to be demolished. In accordance with . . . the Code of Virginia, the legal counsel of the locality may be requested to institute appropriate action against the property owner to recover the costs associated with any such emergency repairs or demolition and

every such charge that remains unpaid shall constitute a lien against the property on which the emergency repairs or demolition were made

Id § 105.9. The Code section has a note that states, in pertinent part, that "historic building demolition may be prevented by authority granted to local historic review boards in accordance with . . . the Code of Virginia unless determined necessary by the code official." *Id*

The USBC defines an "unsafe structure" as

[a]n existing structure (i) determined by the code official to be dangerous to the health, safety and welfare of the occupants of the structure or the public, (ii) that contains unsafe equipment, or (iii) that is so damaged, decayed, dilapidated, structurally unsafe or of such faulty construction or unstable foundation that partial or complete collapse is likely. A vacant existing structure unsecured or open shall be deemed to be an unsafe structure.

Id § 202. It defines a "structure unfit for human occupancy" as

[a]n existing structure determined by the code official to be dangerous to the health, safety and welfare of the occupants of the structure or the public because (i) of the degree to which the structure is in disrepair or lacks maintenance, ventilation, illumination, sanitary or heating facilities or other essential equipment, or (ii) the required plumbing and sanitary facilities are inoperable.

Id.

Regarding rights of appeal, Section 106.5 of the USBC states the following:

Any person aggrieved by the local enforcing agency's application of this code or the refusal to grant a modification to the provisions of this code may appeal to the LBBCA. The applicant shall submit a written request for appeal to the LBBCA within 14 calendar days of the receipt of the decision being appealed. . . . The application shall be marked by the LBBCA to indicate the date received. Failure to submit an application for appeal within the time limit established by this section shall constitute acceptance of a code official's decision.

Id. § 106.5.

"[A movant] seeking a [temporary] injunction must establish [(1)] that he is likely to succeed on the merits, [(2)] that he is likely to suffer irreparable harm in the absence of preliminary relief, [(3)] that the balance of equities tips in his favor, and [(4)] that an injunction is in the public interest: • *Winter v. Nat. Res. Def Council, Inc.*, 555 U.S. 7, 20 (2008).

Discussion

The Court has considered the pleadings, evidence and oral arguments presented at the Second Hearing, and applicable authorities. The Court now rules as follows.

As an initial matter, the Court inquired of the parties during the Second Hearing whether, based on Freemason's possible failure to exhaust administrative remedies, the Court had subject matter jurisdiction over the dispute and asked the parties to provide post-hearing briefs on the issue. The Court notes that courts have viewed the failure to exhaust administrative remedies inconsistently; some have viewed it as a jurisdictional bar, while others have viewed it as a required condition precedent often raised as an affirmative defense. *See, e.g., Davis v. Fort Bend Cty.*, 893 F.3d 300, 303–04 (5th Cir. 2018) (discussing the different approaches). Virginia has not addressed the issue directly, although it appears to favor the latter position. *See* 1A M.J., *Administrative Law*, § 17 (“The general requirement of the exhaustion of administrative remedies is not a jurisdictional doctrine, but is a matter of comity.” (relying in part on *United States ex rel. Tobias v. Laird*, 413 F.2d 936 (4th Cir. 1969); *Sitwell v. Burnette*, 349 F. Supp. 83 (W.D. Va. 1972))).

Although the Court considers this issue—in light of the evidence presented at the Second Hearing—in its evaluation of Freemason's likelihood of success on the merits at trial, discussed *infra*, the Court declines at this time to rule on the issue of exhaustion of remedies without providing the parties an opportunity to present additional evidence.

A. *Freemason Has Standing to Pursue this Matter.*

As a threshold matter, the Court finds that Freemason has standing to request that the Court enjoin Sinesi from taking steps to demolish Grandy House.

The suit underlying the request for preliminary relief is a Petition for Declaratory Judgment. Under Virginia's Declaratory Judgment Act, the Court has the power to issue declaratory judgments in “cases of actual controversy” and in “instances of actual antagonistic assertion and denial of right.” *Va. Code* § 8.01-184 (2015 Repl. Vol.). This statute is remedial and is to be “liberally interpreted and administered with a view to making the courts more serviceable to the people.” *Id.* § 8.01-191. “A plaintiff has standing to bring a declaratory judgment proceeding if he has ‘a justiciable interest’ in the subject matter of the litigation, either in his own right or in a representative capacity.” *Bd. of Supervisors v. Fralin & Waldron, Inc.*, 222 Va. 218, 223, 278 S.E.2d 859, 862 (1981) (quoting *Lynchburg Traffic Bureau v. Norfolk & W. Ry.*, 207 Va. 107, 108, 147 S.E.2d 744, 745 (1966)).

In determining whether Freemason has a justiciable interest in the potential demolition of Grandy House, the Court finds it instructive to analyze whether Freemason would have standing to challenge Sinesi's demolition of his house pursuant to both the City's Zoning Ordinance and the USBC, which Norfolk has adopted. *See Norfolk City Code* § 11.1-1.1

It is undisputed that Grandy House is a contributing building to the West Freemason Historic District. Under the Certificate of Appropriateness section of the Zoning Ordinance, “any person owning real property in the same Historic . . . District” has standing to appeal decisions of the ARB concerning applications for certificates of appropriateness, including for demolition. *Norfolk, Va., Zoning Ordinance* § 2.4.10.E. At the hearings in this matter, real property owners within the Historic District provided testimony. Moreover, Freemason—as an organization—has standing to seek relief as long as at least one property owner within the Historic District is a member of Freemason, which is the case here. *See Philip Morris USA, Inc. v. Chesapeake Bay Found., Inc.*, 273 Va. 564, 577, 643 S.E.2d 219, 226 (2007) (citing *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977)) (holding that representational standing requires that (a) at least one of the organization’s members would otherwise have standing to sue in their own right, (b) the interests the organization seeks to protect are germane to the its purpose, and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit).

Of significant note, emergency demolition is exempt from the Zoning Ordinance’s section regarding historic districts. *Norfolk, Va., Zoning Ordinance* § 2.4.10.B.(2)(c); *see also Va. Code* § 36-105.C.6 (2014 Repl. Vol.). The ordinance states the following:

The emergency demolition of any structure . . . which is in such a dangerous, hazardous or unsafe condition that it has been ordered demolished by the Building Commissioner . . . when [he] ha[s] determined that such condition could reasonably be expected to cause death or serious physical harm. The Building Commissioner . . . shall notify the [Zoning Administrator] about the demolition of the structure and the [Zoning Administrator] shall notify the chairperson of the [Architectural Review Board] and any other interested person as soon as practicable after such a determination has been made

Norfolk, Va., Zoning Ordinance § 2.4.10.B(2)(c). In the absence of governing historic district zoning procedures, the USBC governs because the USBC applies to all structures in the City of Norfolk. *See Va. Code* § 36-105; *Norfolk City Code* § 11.1-1.1. The USBC expressly addresses emergency demolition procedures.

This section shall apply to existing structures which are classified as unsafe or unfit for human occupancy. All conditions causing such structures to be classified as unsafe or unfit for human occupancy shall be remedied or . . . vacated and secured against public entry or razed and removed. [W]hen the code official determines that an unsafe structure or a structure unfit for human occupancy constitutes such a hazard that it should be razed or removed, then the code official shall be permitted to order the demolition of such structures in accordance with applicable requirements of this code.

Va. Unif. Statewide Bldg. Code § 105.1.

The USBC further provides that “[a]ny person aggrieved by the local enforcing agency’s application of this code” can appeal that decision to the LBBCA within fourteen days of receiving the decision. *Id.* § 106.5 (emphasis added). Regarding the interpretation of “person ‘aggrieved,’” the Virginia Supreme Court has opined as follows:

The term “aggrieved” has a settled meaning in Virginia when it becomes necessary to determine who is a proper party to seek court relief from an adverse decision. In order for a petitioner to be “aggrieved,” it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack. The petitioner “must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest.” Thus, it is not sufficient that the sole interest of the petitioner is to advance some perceived public right or to redress some anticipated public injury when the only wrong he has suffered is in common with other persons similarly situated. The word “aggrieved” in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.

Va. Beach Beautification Comm’n v. Bd. of Zoning Appeals, 231 Va. 415, 419–20 (citation omitted) (quoting *Nicholas v. Lawrence*, 161 Va. 589, 593, 171 S.E. 673, 674 (1933)).

Here, the demolition of Grandy House would have a direct impact—both cultural and financial—on the other property owners within the Historic District and on Freemason itself. Hence, Freemason has a direct interest in the subject matter of this proceeding, and this interest is different from that suffered by the non-Historic District public generally. The Court therefore finds that Freemason is a “person aggrieved” under the USBC.

Based on the language of Virginia’s Declaratory Judgment Act, and in the context of the Zoning Ordinance and the Building Code, the Court finds that Freemason has standing to pursue a temporary injunction against Sinesi.

B. Freemason Has Not Adequately Demonstrated the Necessary Factors for a Temporary Injunction.

A temporary injunction under Virginia law, like a federal preliminary injunction, is considered an extraordinary remedy. *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 61, 662 S.E.2d 44, 53 (2008). Unfortunately, the Virginia General Assembly and Virginia appellate courts have not provided guidance regarding how Virginia circuit courts should evaluate motions for temporary injunctions. In 1988, when evaluating a federal preliminary injunction related to an underlying claim that the defendant had violated a Virginia statute, the U.S. Court of Appeals for the Fourth Circuit opined that “there is no great difference between federal and Virginia standards for preliminary injunctions” and that “[b]oth draw on the same principles.” *Capital Tool and Mfg. v. Maschinesfabrik Herkules*, 837 F.2d 171, 173 (4th Cir. 1988). Since then, many

Virginia circuit courts implicitly have relied on the Fourth Circuit's proclamation and have applied federal preliminary injunction law when analyzing Virginia temporary injunctions.⁵

Against a backdrop where virtually every federal circuit court of appeals evaluated preliminary injunctions differently, the United States Supreme Court in 2008 decided *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). There, the Court held that “a [movant] seeking a preliminary injunction must establish [(1)] that he is likely to succeed on the merits, [(2)] that he is likely to suffer irreparable harm in the absence of preliminary relief, [(3)] that the balance of equities tips in his favor, and [(4)] that an injunction is in the public interest.” *Id.* at 20.

The first post-*Winter* preliminary injunction case presented to the Fourth Circuit was *The Real Truth About Obama, Inc. v. Federal Election Commission*, which was decided in 2009.⁶ 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), *aff'd*, *The Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 607 F.3d 355 (4th Cir. 2010) (*per curiam*). The Fourth Circuit held that “[b]ecause a preliminary injunction affords, on a temporary basis, the relief that can be granted permanently after trial, the party seeking the preliminary injunction must demonstrate by ‘a clear showing’ that, among other things, it is likely to succeed on the merits at trial.” *Id.* at 345 (quoting *Winter*, 555 U.S. at 22). The court then declared that “the Supreme Court articulated clearly what must be shown to obtain a preliminary injunction” and pointed out that “all four requirements must be satisfied.” *Id.* at 346. The court went on to state the following:

Indeed, the Court in *Winter* rejected a standard that allowed the [movant] to demonstrate only a “possibility” of irreparable harm because that standard was “inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a *clear showing* that the [movant] is entitled to such relief.”

Id. (emphasis added) (citations omitted). The Fourth Circuit reiterated that “*Winter* articulates four requirements, *each of which must be satisfied as articulated.*” *Id.* (emphasis added) (citations omitted).

⁵ Notably, the *Virginia Civil Benchbook* clearly endorses this practice. See *Virginia Civil Benchbook for Judges and Lawyers* § 8.06[3][b] (2018-19 ed. Matthew Bender).

⁶ Of note, the various federal circuit courts of appeals did not interpret *Winter* consistently. For a description of the various post-*Winter* approaches adopted, as well as a recommendation on how courts should apply the test for Virginia temporary injunctions, see David W. Lannetti, *The “Test”—or Lack Thereof—for Issuance of Virginia Temporary Injunctions: The Current Uncertainty and a Recommended Approach Based on Federal Preliminary Injunction Law*, 50 U. Rich. L. Rev. 273, 299–311, 318-22 (2015).

Since the Fourth Circuit decided *Real Truth*, most Virginia circuit courts have evaluated temporary injunctions using the *Real Truth* sequential analysis.⁷ See, e.g., *CG Riverview, LLC v. 139 Riverview, LLC*, 2018 Va. Cir. LEXIS 3, at *8–9 (City of Norfolk, Jan. 9, 2018); In re *Volkswagen "Clean Diesel" Litigation*, 94 Va. Cir. 189, 206 (Fairfax Cty., 2016); *Wings, LLC v. Capitol Leather, LLC*, 88 Va. Cir. 83, 89 (Fairfax Cty., 2014); *McEachin v. Bolling*, 84 Va. Cir. 76, 77 (City of Richmond, 2011); *Strong Found. Youth Initiative LLC v. Ashford*, 2009 Va. Cir. LEXIS 140, at *1 (City of Richmond, Nov. 4, 2009). Consistent with this approach, the *Virginia Civil Benchbook* refers to the *Winter* four-factor test—and the Fourth Circuit’s interpretation of the *Winter* factors as applied in *Real Truth*—in the section regarding motions for temporary injunctions. See *Virginia Civil Benchbook for Judges and Lawyers* § 8.06[3][b] (2018-19 ed. Matthew Bender).

1. Freemason has demonstrated that it likely will suffer irreparable injury in the absence of preliminary relief.

As part of its four-part analysis, “*Winter* requires that the plaintiff make a *clear showing* that it is likely to be irreparably harmed absent preliminary relief.” *Real Truth*, 575 F.3d at 347 (emphasis added) (citing *Winter*, 555 U.S. at 19–23). Freemason’s alleged irreparable injury is the loss of a contributing building to an established historic district. In addition to the traditionally recognized uniqueness of real property, Grandy House is an acknowledged historical structure that is more than a century old. If demolished, it simply cannot be replaced.

When evaluating preliminary relief, the irreparable injury analyzed is the harm without the preliminary relief, *i.e.*, prior to the trial on the merits. The implication of granting a temporary injunction is that judicial intervention will prevent the irreparable injury about which the movant is concerned. The Court notes that here, however, the potential irreparable injury is present with or without the requested temporary injunction. *Without* the injunction, Sinesi likely will immediately demolish Grandy House, as he has been ordered to do by the City. *With* the

⁷ This is consistent with Virginia circuit courts’ prior reliance on another Fourth Circuit decision, *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977), which was overturned by *Real Truth*. See, e.g., *Midgette v. Arlington Props.*, 83 Va. Cir. 26, 28 (City of Chesapeake, 2011); *Owens v. City Council*, 75 Va. Cir. 91, 101 (City of Norfolk, 2008); *Long & Foster Real Estate, Inc. v. CLPF – King St. Venture, L.P.*, 74 Va. Cir. 87, 89 (City of Alexandria, 2007); *S. Auburn, L.P. v. Old Auburn Mills, L.P.*, 69 Vir. Cir. 145, 145 (Loudoun Cty., 2005); *Int’l Limousine Serv. v. Reston Limousine & Travel Serv.*, 68 Va. Cir. 84, 85-86 (Loudoun Cty., 2005); *Hardinge, Inc. v. Buhler*, 72 Va. Cir. 39, 39 (Amherst Cty., 2006); *Wilson v. Henry Cty. Zoning Appeals Bd.*, 68 Va. Cir. 317, 317-18 (Henry Cty., 2005) (citing *Child Evangelism v. Montgomery Cty.*, 373 F.3d 589, 593 (4th Cir. 2004) and *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004), which “follow[ed] *Blackwelder*”); *Villalobos v. City of Norfolk*, 62 Va. Cir. 158, 158 (City of Norfolk, 2003); *Democratic Party of Va. v. State Bd. of Elections*, 1999 Va. Cir. LEXIS 551, at *4 (City of Richmond, Oct. 19, 1999); *Cubic Toll Sys., Inc. v. Va. Dep’t of Transp.*, 37 Va. Cir. 522, 522 (Fairfax Cty., 1993); In re *Smith*, 1999 Va. Cir. LEXIS 743, at *5-6 (Loudoun Cty., June 4, 1999); *Newell Indus. Corp. v. Lineal Techs.*, 43 Va. Cir. 412, 413 (City of Roanoke, 1997); *MFS Network Techs. v. Commonwealth*, 33 Va. Cir. 406, 408-09 (City of Richmond, 1994); *Plate v. Kincannon Place Condo. Unit Owners’ Assn. Bd. of Dirs.*, 30 Va. Cir. 323, 325 (Fairfax Cty., 1993).

temporary injunction, the City potentially could nevertheless have the building demolished because it appears that the City has the authority to order demolition, it already has ordered the demolition, it has the right and ability to conduct the demolition itself, and it is not a party to Freemason's request for preliminary relief.

Considering the facts as presented to the Court at this early juncture and in light of the express language of *Winter*, however, the Court finds that Freemason has demonstrated that it likely will suffer irreparable harm—the destruction of Grandy House—in the absence of preliminary relief.

2. **Freemason failed to clearly show that it likely will succeed on the merits of its Petition for Declaratory Judgment.**

"[T]he Supreme Court in *Winter*, recognizing that a preliminary injunction affords relief before trial, requires that the plaintiff make a *clear showing* that it likely will succeed on the merits at trial." *Real Truth*, 575 F.3d at 346 (emphasis added) (citing *Winter*, 555 U.S. at 19–20, 22–23). In other words, Freemason must prove that it is likely to succeed on the merits of its underlying claim, *i.e.*, its petition for a declaration that the City's decision ordering emergency demolition of Grandy House was improper.

Based on the facts known at this early stage of the case, it appears that the City Building Commissioner's conclusion that emergency demolition of Grandy House was required—ostensibly considering the building's contribution to the Historic District and the potential impact on the neighboring historic property owners—was based primarily on the findings and recommendations contained in the Report as well as his own professional experience. The Court notes that the Report does not expressly opine that immediate takedown of the building is necessary. Rather, it concludes that "the best and most reasonable course of action for this structure is complete demolition." The Report does, however, recommend immediate demolition of the partially collapsed porch structure "to prevent a potential hazard to the public." It also opines that "a very light load, such as a trespasser walking on the second floor," could cause a catastrophic chain of events—collapse of the second floor, and then the roof, and then the first-floor framing, followed by failure of the basement walls and potentially the exterior walls, *i.e.*, a collapse of the entire structure. Additionally, the Zoning Administrator noted in his memorandum that the condition of the structure "has deteriorated significantly since the fire," implying that further deterioration can be expected absent intervening action.

At trial, "the duty of the court with respect to issues of fact shall be to determine whether there was substantial evidence in the agency record to support the agency decision." *Va. Code* § 2.2-4027 (2017 Repl. Vol.). "The 'substantial evidence' standard, adopted by the General Assembly, is designed to give great stability and finality to the fact-findings of an administrative agency."⁸ *Va. Real Estate Comm'n v. Bias*, 226 Va. 264, 269, 308 S.E.2d 123, 125 (1983).

⁸ Judicial review of USBC decisions normally is governed by the Virginia Administrative Process Act. See *Va. Code* § 36-114 (2014 Repl. Vol.) ("Proceedings of the [State] Review Board shall be governed by

Freemason therefore will bear the heavy burden of proving at trial that, “considering the record as a whole, a reasonable mind would *necessarily* come to a different conclusion,” *i.e.*, that emergency demolition of the structure is *not* required. *Id.* Based on the limited information known at this time, the Court finds that Freemason likely will not be able to satisfy this burden.

Perhaps more importantly, Freemason’s apparent failure to exhaust its administrative remedies could be fatal. Pursuant to the USBC, Freemason—as an aggrieved party—was required to note any appeal of the City’s decision ordering the emergency demolition of Grandy House to the LBBCA within fourteen calendar days.⁹ *Va. Unif. Statewide Bldg. Code* § 106.5 (2012). On August 14, 2018, the City directed Sinesi to demolish Grandy House, and Sinesi testified that he received and made arrangements to comply with the Notice. Based on this evidence, it appears that the date on which Sinesi received the appealable decision was on or about August 14, 2018. It therefore appears that any aggrieved party, including Freemason, would have had to file an appeal with the LBBCA on or before August 28, 2018. Counsel for Freemason stated on September 19 at the Second Hearing—upon viewing the Notice when it was offered into evidence—that he had not previously seen the Notice.¹⁰ The USBC expressly provides that “[f]ailure to submit an application for appeal within the time limit established by this section shall constitute acceptance of a code official’s decision.” *Id.* Hence, based on the evidence presented thus far, it appears that Freemason may have failed to exhaust its administrative remedies before resorting to judicial intervention.

Based on the facts as currently known, the Court finds that Freemason failed to clearly demonstrate that it likely will succeed on its Petition for Declaratory Judgment at trial.

Although the movant seeking a temporary injunction must satisfy all four temporary injunction factors in order to prevail, *Real Truth*, 575 F.3d at 346, the Fourth Circuit recently held that a district court did not err in denying preliminary injunctive relief by not evaluating other factors once it found that the movant failed to prove irreparable injury, *Henderson v. Bluefield Hosp. Co.*, No. 16-2331/2332, 2018 U.S. App. LEXIS 24334, at *15 (4th Cir. Aug. 28, 2018). In light of the fact that *Henderson* involved the failure to demonstrate irreparable injury—which is not the case here—and the lack of clear precedent regarding what exactly constitutes a “clear showing” that the movant will succeed on the merits at trial, the Court elects to address the remaining preliminary relief factors.

the provisions of the Administrative Process Act (§ 2.2-4000 *et seq.*), except that an informal conference pursuant to § 2.2-4019 shall not be required.”)

⁹ Had Freemason’s appeal to the LBBCA been unsuccessful, it could have further appealed the decision to the State Review Board. *Va. Unif. Statewide Bldg. Code* § 106.5.

¹⁰ The Court makes no ruling at this time regarding whether Freemason, as a potentially aggrieved party, was entitled to receive a copy of the Notice. The Court notes, however, that recipients of the City’s Zoning Administrator’s August 13, 2018, memorandum included the “Architectural Review Board Chairman” and “Architectural Review Board Members.” Additionally, several of the witnesses for Freemason at the Second Hearing apparently are members of both the ARB and Freemason.

3. Freemason failed to show that the balance of the equities tips in its favor.

Freemason also must prove that the balance of the equities tips in its favor. Stated differently, Freemason must demonstrate that the harm it would suffer without a temporary injunction outweighs the harm to Sinesi with a temporary injunction. This analysis necessarily focuses on the pretrial time period.

The harm to Freemason *without* the requested preliminary relief flows from the anticipated demolition of Grandy House. In addition to the loss of this unique and irreplaceable structure, there likely would be an associated diminution in value of the individual neighboring historic properties as well as a decrease in the historical and cultural value of the Historic District as a whole. The harm to Sinesi *with* the temporary injunction, on the other hand, consists of the consequences associated with his failure to comply with the City's Notice to demolish his house—including any concomitant civil fines and the potential assessment of the City's costs to demolish the building¹¹—as well as the potential liability for any injuries to third parties caused by the property's condition, which injuries may not be insurable considering the current state of the structure. Additionally, the temporary injunction will prevent Sinesi from moving forward with demolition of Grandy House and any future plans he might have for the property.

Based on the limited evidence presented, the Court finds that Freemason has failed to demonstrate that the equities tip in its favor.

4. Freemason failed to demonstrate that the temporary injunction is in the public interest.

Lastly, Freemason must demonstrate that the requested temporary injunction is in the public interest, *i.e.*, that prior to a trial on the merits without preliminary relief, the public interest outweighs the possible irreparable harm to Freemason. The United States Supreme Court discussed this factor at length in *Winter*, noting that the related analysis is far-reaching. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24–26 (2008) (pointing out in a marine environmental case that the public interests “must be weighed against the possible harm to the ecological, scientific, and recreational interests that are legitimately before this Court”). The Court opined that “[i]n exercising their sound discretion, courts of equity should pay *particular regard* for the public consequences in employing the extraordinary remedy of injunction.” *Id.* at 24 (emphasis added) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

As discussed *supra*, the possible pretrial irreparable harm to Freemason without preliminary relief is the potential loss of Grandy House, which is a contributing building to the established Historic District. The countervailing public interest, or harm to the public *with* the temporary injunction, is infringement upon Sinesi's and similarly situated property owners' rights to possess and control their realty as they see fit in the context of the Historic District

¹¹ As noted *supra*, the requested temporary injunction does not prevent the City from taking steps to demolish Grandy House.

zoning requirements and its emergency demolition exemption. More significantly, the City's Building Commissioner assessed the current condition of Grandy House—which would be preserved if the Court granted preliminary relief—and declared “the structure ‘Unsafe’ and, in such condition that could reasonably be expected to cause death or serious physical harm to the public.” Based on this declaration, the City's Zoning Administrator directed the City's Property Maintenance Official “to take all necessary action to promptly compel the demolition of the property to protect public safety.” The City clearly concluded, and harbors great concern about, the possibility that the current state of the structure could immediately cause *death or serious physical harm to the public*. The Court recognizes that Freemason disagrees with the City's assessment, but the Court is reluctant—based on the City's concerns and the minimal evidence produced in support of the request for preliminary relief—to discount the City's dire assessment. When the City issued the Notice, it was fully aware that Grandy House is a historic building,¹² and the City has an interest in both preserving designated historic districts *and* protecting the public. In light of this, the Court feels bound to seriously heed the City's conclusion that public safety outweighs the preservation of a historic building.

In consideration of the foregoing, the Court finds that the requested temporary injunction is not in the public interest.

Conclusion

The Court fully appreciates that Granby House—at least prior to the 2016 arson—contributed to the historic and cultural status of the West Freemason Historic District and, more generally, the City of Norfolk. The Court also understands that the structure is irreplaceable in the eyes of the law, making the injury to Freemason stemming from its demolition irreparable. As discussed above, however, the Court finds that Freemason failed to adequately demonstrate that it is likely to succeed on the merits of its Petition for Declaratory Judgment, that the balance of the equities tips in its favor, and that the possible irreparable harm without preliminary relief outweighs the public interest. As such, the Court finds that Freemason has not satisfied all four temporary injunction factors and therefore cannot prevail.

The Court DENIES Freemason's “Petition for Temporary Injunction,” despite the possibility that Freemason may suffer irreparable injury in the absence of the requested temporary injunction. The Court notes that, as is the case whenever a court denies preliminary relief, Freemason can seek monetary damages associated with any pretrial injury should it ultimately prevail at the trial on the merits.¹³

¹² The City's Zoning Administrator's memorandum stating that the Building Commissioner has determined that Grandy House “could reasonably be expected to cause death or serious physical harm” expressly identifies the structure as “the *historic building* located at 355 West Freemason Street” (emphasis added).

¹³ Because the movant must prove the inadequacy of damages, *i.e.*, irreparable injury, to prevail at a trial on an equitable claim, money damages by definition will be insufficient to make the movant whole. Nonetheless, to the extent that the irreparable injury the movant sought to prevent via a temporary injunction already has occurred, money damages are the best a court can offer.

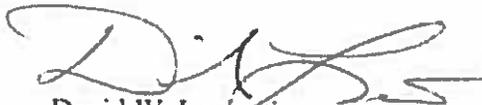
Re: Freemason Street Area Association, Inc. v. City of Norfolk, *et al.* (CL18-7735)

October 10, 2018

Page 17

Attached is an Order consistent with the ruling in this letter opinion. Signatures are waived pursuant to Rule 1:13 of the *Rules of Supreme Court of Virginia*. The parties shall file any objections with the Court within fourteen days.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Lanfetti", with a long horizontal flourish extending to the right.

David W. Lanfetti
Circuit Court Judge

DWL/gbs

cc: City of Norfolk (Adam Melita, Esq.)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

FREEMASON STREET
AREA ASSOCIATION, INC.,
Petitioner,

v.

Civil Docket No.: CL18-7735

DR. MARK S. SINESI,
and
CITY OF NORFOLK
Respondents.

ORDER

For the reasons stated in the Court's October 10, 2018, letter opinion, the Court DENIES the "Petition for Temporary Injunction." The temporary injunction ordered by the Court on August 31, 2018, and extended on September 19, 2018, is hereby vacated.

Endorsements are waived pursuant to Rule 1:13 of the *Rules of Supreme Court of Virginia*. Any objections shall be filed within fourteen days. The Clerk shall send a copy of this order to Joseph V. Sherman, Esq., F. Sullivan Callahan, Esq., and Adam Melita, Esq.

IT IS SO ORDERED this 10th day of October, 2018.



David W. Lannetti
Judge

Final Documents
Submitted By
Freemason Street
Area Association

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From: Pishko, Bernard <bernard.pishko@norfolk.gov>
Sent: Tuesday, October 23, 2018 2:22 PM
To: John Kavanaugh; joe@lawfirmjvs.com; Melita, Adam; Tajan, Robert
Cc: Alexander, Kenneth; McClellan, Andria; Doyle, Courtney
Subject: RE: Meeting

Jack, while not without issue, we think the best way to give you your day in court is for Joe to appeal the demolition permit to the Building Code Board. We will not rely upon the 14 day limitation period, its timeliness should not be an issue. The filing of the appeal will allow Rick Fortner to stay the demolition permit pending the outcome of your appeal of the permit. Joe, I have asked Adam to call you to explain the process of the proposed appeal.

From: Pishko, Bernard
Sent: Tuesday, October 23, 2018 6:58 AM
To: John Kavanaugh <ocs1062@cox.net>
Cc: Melita, Adam <adam.melita@norfolk.gov>; Alexander, Kenneth <Kenneth.Alexander@norfolk.gov>; Doyle, Courtney <Courtney.Doyle@norfolk.gov>; McClellan, Andria <Andria.McClellan@norfolk.gov>; joe@lawfirmjvs.com; Thomas, Martin <Martin.Thomas@norfolk.gov>; Moye, Luanne <luanne.moye@norfolk.gov>; Stone, Mary Lou <MaryLou.Stone@norfolk.gov>; Newcomb, Leonard <Leonard.Newcomb@norfolk.gov>
Subject: Re: Meeting

Jack, the mayor is agreeable to meeting with you if you would like. If so, please include whomever you think helpful. Lu and Mary Lou, please try to schedule for the first time that Kenny is available. Demolition could be imminent. Lu, please take the lead in scheduling, I will rearrange my schedule if needed to be available for the first time Kenny is available. Lu, in addition to Admiral Kavanaugh, include me and Lenny.
Sent from my iPhone

On Oct 22, 2018, at 10:47 PM, John Kavanaugh <ocs1062@cox.net> wrote:

*** This is an EXTERNAL email. Please exercise caution. ***

Bernard LSU the Mayor and Council aware that the Building Commissioner has never set foot into that historic home before ordering it demolished? And are they aware City inspectors took 11 months to visit the home only after I dragged Mr. Rogers and them to the site 11 months after the home was torched. And are they aware the fire department will not release the arson report saying it is still under investigation?

Sent from my iPhone Jack Kavanaugh.

On Oct 22, 2018, at 10:30 PM, Jack Kavanaugh <ocs1062@cox.net> wrote:

Bernard, is the Mayor and Council aware of the Criminal Case you have going against Dr. Sinesi?

From: Pishko, Bernard [<mailto:bernard.pishko@norfolk.gov>]
Sent: Monday, October 22, 2018 3:46 PM
To: John Kavanaugh <ocs1062@cox.net>; Melita, Adam <adam.melita@norfolk.gov>

Cc: Alexander, Kenneth <Kenneth.Alexander@norfolk.gov>; Doyle, Courtney <Courtney.Doyle@norfolk.gov>; McClellan, Andria <Andria.McClellan@norfolk.gov>; joe@lawfirmjvs.com
Subject: RE: Meeting

Thank you for the e-mail. While it is the first that I have seen the e-mail, I have been advising the Mayor.

From: John Kavanaugh [<mailto:ocs1062@cox.net>]
Sent: Monday, October 22, 2018 3:33 PM
To: Melita, Adam <adam.melita@norfolk.gov>; Pishko, Bernard <bernard.pishko@norfolk.gov>
Cc: Alexander, Kenneth <Kenneth.Alexander@norfolk.gov>; Doyle, Courtney <Courtney.Doyle@norfolk.gov>; McClellan, Andria <Andria.McClellan@norfolk.gov>; joe@lawfirmjvs.com
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From: <joe@lawfirmjvs.com>
Date: October 22, 2018 at 2:43:03 PM EDT
To: "John Kavanaugh" <ocs1062@cox.net>
Subject: Meeting

Nobody wants this saga to go on any longer – me included. Yet the process so far employed failed the Freemason district and many of the residents believe they can sue in federal court to litigate whether the process itself satisfies basic due process. The City gave no notice of the administrative process to the neighborhood until the injunction hearing, at which point they argued the time to an appeal expired. The building coming down will not just serve to end this mess, rather prolong it. Judge Lanetti's opinion found individual standing for citizen members of the historic district to protest the process of historical demolition, so several of them plan to petition the federal court for a class action suit as individuals. The Building Commissioner never inspected the property so a federal judge might just find that he, and the City, exceeded their powers. Unlike the three days to prepare an injunction, an attorney has three years to file the federal case.

The alternative is revoke the building permits, inspect the property, and set an appeal with the building code appeals board so that City officials, FSAA experts, and Building Code inspectors can discuss the urgency of demolition in consideration of other emergency repairs to save and stabilize the building. World-class 1900 era homes, which this building

is, were built with multi-wythe brick to prevent the need to re-build the exterior if the interior burned, as open-flame heat systems used to warm and cook.

Now that we have formal notice of the procedures that are meant to be used in this situation, let's use leadership to get our personalities out of the way of the right decision. The City does not need to get caught holding the bag for Sinesi. Thanks for consideration.

From: Pishko, Bernard <bernard.pishko@norfolk.gov>
Sent: Wednesday, October 24, 2018 12:08 PM
To: John Kavanaugh; joe@lawfirmjvs.com; Melita, Adam; Tajan, Robert; Hall, Cynthia
Cc: Alexander, Kenneth; McClellan, Andria; Doyle, Courtney; Thomas, Martin
Subject: RE: Meeting

Jack, we have reviewed the prospect of your being heard by the Building Code Board and now know that the 14 day limitation period will prevent any hearing. In lieu of a hearing, planning is making arrangements for one of its inspectors to inspect and report. I believe Sherry Johnson will try to gain admittance today for the purpose of inspecting and reviewing the accuracy of the independent engineer.

From: Pishko, Bernard
Sent: Tuesday, October 23, 2018 2:24 PM
To: 'John Kavanaugh' <ocs1062@cox.net>; joe@lawfirmjvs.com; Melita, Adam <adam.melita@norfolk.gov>; Tajan, Robert <Robert.Tajan@norfolk.gov>
Cc: Alexander, Kenneth <Kenneth.Alexander@norfolk.gov>; McClellan, Andria <Andria.McClellan@norfolk.gov>; Doyle, Courtney <Courtney.Doyle@norfolk.gov>
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joe@lawfirmjvs.com

From: Hall, Cynthia <cynthia.hall@norfolk.gov>
Sent: Friday, October 26, 2018 7:48 AM
To: Melita, Adam; joe@lawfirmjvs.com
Cc: Pishko, Bernard; John Kavanaugh; Tajan, Robert; Alexander, Kenneth; McClellan, Andria; Doyle, Courtney; Thomas, Martin
Subject: RE: Meeting

The board will first consider timeliness and jurisdiction. The appeal application you submitted delineates the issues that will be considered by the Board, provided the issues raised in the application are within the authority of the Board to consider.

From: Melita, Adam
Sent: Friday, October 26, 2018 6:29 AM
To: joe@lawfirmjvs.com
Cc: Hall, Cynthia <cynthia.hall@norfolk.gov>; Pishko, Bernard <bernard.pishko@norfolk.gov>; John Kavanaugh <ocs1062@cox.net>; Tajan, Robert <Robert.Tajan@norfolk.gov>; Alexander, Kenneth <Kenneth.Alexander@norfolk.gov>; McClellan, Andria <Andria.McClellan@norfolk.gov>; Doyle, Courtney <Courtney.Doyle@norfolk.gov>; Thomas, Martin <Martin.Thomas@norfolk.gov>
Subject: Re: Meeting

Joe,

You'd have to get with Cindy to be sure what she meant by "procedural issue," but I think there is a chance the owner may raise the 14 day timeliness issue (which I think is "procedural") even if the City opts not to.

As for the other things you asks about being allowed to raise, I don't know of any rule that limits what you can and can't raise before the LBBCA. It's your appeal. I think you can raise whatever you think is relevant. Cindy, anything to add/clarify?

Adam

On Oct 25, 2018, at 4:46 PM, "joe@lawfirmjvs.com" <joe@lawfirmjvs.com> wrote:

*** This is an EXTERNAL email. Please exercise caution. ***

Second attempt. Please confirm receipt.

From: joe@lawfirmjvs.com <joe@lawfirmjvs.com>
Sent: Wednesday, October 24, 2018 4:42 PM
To: 'Hall, Cynthia' <cynthia.hall@norfolk.gov>; 'Pishko, Bernard' <bernard.pishko@norfolk.gov>; 'John Kavanaugh' <ocs1062@cox.net>; 'Melita, Adam' <adam.melita@norfolk.gov>; 'Tajan, Robert' <Robert.Tajan@norfolk.gov>
Cc: 'Alexander, Kenneth' <Kenneth.Alexander@norfolk.gov>; 'McClellan, Andria' <Andria.McClellan@norfolk.gov>; 'Doyle, Courtney' <Courtney.Doyle@norfolk.gov>; 'Thomas, Martin' <Martin.Thomas@norfolk.gov>
Subject: RE: Meeting

Which procedural issue? The fact that FSAA got no notice of the violation letter until the injunction trial or that the City failed to inspect the property?

Will we get to argue that the requirements of the building code can be satisfied by other means, such as demolishing the wooden porch and stabilizing the historic structure, as part of reviewing Sherry Johnson's status report?

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Subject: RE: Meeting

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Cc: Alexander, Kenneth <Kenneth.Alexander@norfolk.gov>; McClellan, Andria

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Sent: Tuesday, October 23, 2018 6:58 AM

To: John Kavanaugh <ocs1062@cox.net>

Cc: Melita, Adam <adam.melita@norfolk.gov>; Alexander, Kenneth <Kenneth.Alexander@norfolk.gov>;

Doyle, Courtney <Courtney.Doyle@norfolk.gov>; McClellan, Andria <Andria.McClellan@norfolk.gov>;

joe@lawfirmjvs.com; Thomas, Martin <Martin.Thomas@norfolk.gov>; Moye, Luanne

<luanne.moye@norfolk.gov>; Stone, Mary Lou <MaryLou.Stone@norfolk.gov>; Newcomb, Leonard

<Leonard.Newcomb@norfolk.gov>

Subject: Re: Meeting

Jack, the mayor is agreeable to meeting with you if you would like. If so, please include whomever you think helpful. Lu and Mary Lou, please try to schedule for the first time that Kenny is available. Demolition could be imminent. Lu, please take the lead in scheduling, I will rearrange my schedule if needed to be available for the first time Kenny is available. Lu, in addition to Admiral Kavanaugh, include me and Lenny.

Sent from my iPhone

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Bernard LSU the Mayor and Council aware that the Building Commissioner has never set foot into that historic home before ordering it demolished? And are they aware City inspectors took 11 months to visit the home only after I dragged Mr. Rogers and them to the site 11 months after the home was torched. And are they aware the fire department will not release the arson report saying it is still under investigation?

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Bernard, is the Mayor and Council aware of the Criminal Case you have going against Dr. Sinesi?

joe@lawfirmjvs.com

From: Pishko, Bernard <bernard.pishko@norfolk.gov>
Sent: Friday, October 26, 2018 12:18 PM
To: joe@lawfirmjvs.com
Cc: Hall, Cynthia; Melita, Adam; Tajan, Robert
Subject: FW: Meeting

The demolition permits are not stayed/suspended or otherwise changed. The appeal is time barred.

From: joe@lawfirmjvs.com [mailto:joe@lawfirmjvs.com]
Sent: Friday, October 26, 2018 7:10 AM
To: Melita, Adam <adam.melita@norfolk.gov>
Cc: Hall, Cynthia <cynthia.hall@norfolk.gov>; Pishko, Bernard <bernard.pishko@norfolk.gov>; 'John Kavanaugh' <ocs1062@cox.net>; Tajan, Robert <Robert.Tajan@norfolk.gov>; Alexander, Kenneth <Kenneth.Alexander@norfolk.gov>; McClellan, Andria <Andria.McClellan@norfolk.gov>; Doyle, Courtney <Courtney.Doyle@norfolk.gov>; Thomas, Martin <Martin.Thomas@norfolk.gov>
Subject: RE: Meeting

*** This is an EXTERNAL email. Please exercise caution. ***

Thanks Adam. Can you confirm permits are suspended as promised during pendency of the LBBCA appeal? Thanks again,

Joe Sherman
(757) 350-8308

From: Melita, Adam <adam.melita@norfolk.gov>
Sent: Friday, October 26, 2018 6:29 AM
To: joe@lawfirmjvs.com
Cc: Hall, Cynthia <cynthia.hall@norfolk.gov>; Pishko, Bernard <bernard.pishko@norfolk.gov>; John Kavanaugh <ocs1062@cox.net>; Tajan, Robert <Robert.Tajan@norfolk.gov>; Alexander, Kenneth <Kenneth.Alexander@norfolk.gov>; McClellan, Andria <Andria.McClellan@norfolk.gov>; Doyle, Courtney <Courtney.Doyle@norfolk.gov>; Thomas, Martin <Martin.Thomas@norfolk.gov>
Subject: Re: Meeting

Joe,

You'd have to get with Cindy to be sure what she meant by "procedural issue," but I think there is a chance the owner may raise the 14 day timeliness issue (which I think is "procedural") even if the City opts not to.

As for the other things you asks about being allowed to raise, I don't know of any rule that limits what you can and can't raise before the LBBCA. It's your appeal. I think you can raise whatever you think is relevant. Cindy, anything to add/clarify?

Adam

On Oct 25, 2018, at 4:46 PM, "joe@lawfirmjvs.com" <joe@lawfirmjvs.com> wrote:

*** This is an EXTERNAL email. Please exercise caution. ***

Second attempt. Please confirm receipt.

From: joe@lawfirmjvs.com <joe@lawfirmjvs.com>
Sent: Wednesday, October 24, 2018 4:42 PM
To: 'Hall, Cynthia' <cynthia.hall@norfolk.gov>; 'Pishko, Bernard' <bernard.pishko@norfolk.gov>; 'John Kavanaugh' <ocs1062@cox.net>; 'Melita, Adam' <adam.melita@norfolk.gov>; 'Tajan, Robert' <Robert.Tajan@norfolk.gov>
Cc: 'Alexander, Kenneth' <Kenneth.Alexander@norfolk.gov>; 'McClellan, Andria' <Andria.McClellan@norfolk.gov>; 'Doyle, Courtney' <Courtney.Doyle@norfolk.gov>; 'Thomas, Martin' <Martin.Thomas@norfolk.gov>
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Cc: Alexander, Kenneth <Kenneth.Alexander@norfolk.gov>; Doyle, Courtney <Courtney.Doyle@norfolk.gov>; McClellan, Andria <Andria.McClellan@norfolk.gov>; joe@lawfirmjvs.com
Subject: Fwd: Meeting

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Begin forwarded message:

From: <joe@lawfirmjvs.com>
Date: October 22, 2018 at 2:43:03 PM EDT
To: "John Kavanaugh" <ocs1062@cox.net>
Subject: Meeting

Nobody wants this saga to go on any longer – me included. Yet the process so far employed failed the Freeman district and many of the residents believe they can sue in federal court to litigate whether the process itself satisfies basic due process. The City gave no notice of the administrative process to the neighborhood until the injunction hearing, at which point they argued the time to an appeal expired. The building coming down will not just serve to end this mess, rather prolong it. Judge Lanetti's opinion found individual standing for citizen members of the historic district to protest the process of historical demolition, so several of them plan to petition the federal court for a class action suit as individuals. The Building Commissioner never inspected the property so a federal judge might just find that he, and the City, exceeded their powers. Unlike the three days to prepare an injunction, an attorney has three years to file the federal case.

The alternative is revoke the building permits, inspect the property, and set an appeal with the building code appeals board so that City officials, FSAA experts, and Building Code inspectors can discuss the urgency of demolition in consideration of other emergency repairs to save and stabilize the building. World-class 1900 era homes, which this building is, were built with multi-wythe brick to prevent the need to re-build the exterior if the interior burned, as open-flame heat systems used to warm and cook.

Now that we have formal notice of the procedures that are meant to be used in this situation, let's use leadership to get our personalities out of the way of the right decision. The City does not need to get caught holding the bag for Sinesi. Thanks for consideration.

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From: Hall, Cynthia <cynthia.hall@norfolk.gov>
Sent: Thursday, November 1, 2018 12:05 PM
To: joe@lawfirmjvs.com; sully@fsullivancallahan.com
Subject: 355 W. Freemason

In light of recent events, is there a need to conduct the hearing before the Local Board of Building Code Appeals? Thanks.

Cynthia B. Hall
Deputy City Attorney
Department of Law
810 Union Street
Norfolk, VA 23510
757-664-4214 (telephone)
757-664-4201 (facsimile)

In The Matter Of:
Freemason Street Area Association v.
Dr. Mark S. Sinesi

Proceedings Before the Court
September 19, 2018

ZAHN
COURT REPORTING

208 E. Plume Street, Suite 214
Norfolk, Virginia 23510
tel: 757 627 6554 *fax:* 757 625 7077
email: info@zahncourtreporting.com

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

Freemason Street Area)	
Association,)	
)	
Plaintiff,)	
v.)	Case No. CL18007735-00
)	
Dr. Mark S. Sinesi,)	
)	
Defendant.)	

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

Wednesday, September 19, 2018

BEFORE: THE HONORABLE DAVID W. LANNETTI

1 **Appearances:**

2

3

LAW OFFICES OF JOSEPH SHERMAN, PC
By: JOSEPH V. SHERMAN, ESQUIRE
324 Freemason Street
Norfolk, Virginia 23510
jvs@lawyer.com
Counsel for the Plaintiff

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7

8

LAW OFFICE OF F. SULLIVAN CALLAHAN
By: F. SULLIVAN CALLAHAN, ESQUIRE
327 Duke Street
Norfolk, Virginia 23510
sully@fsullivancallahan.com
Counsel for the Defendant

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11

12 **Also Present:**

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Cynthia B. Hall, Deputy City Attorney

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Adam Melita, Deputy City Attorney

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I N D E X
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ON BEHALF OF THE PLAINTIFF

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
PAIGE POLLARD				
By Mr. Sherman	38		57	
By Mr. Callahan		55		
GRETA GUSTAVSON				
By Mr. Sherman	63			
GARY NAIGLE				
By Mr. Sherman	66			
By Mr. Callahan		72		
DEBORAH CACACE				
By Mr. Sherman	75			
By Mr. Callahan		95		
Voir Dire - 77				
EDWARD ANDREW McCULLOUGH				
By Mr. Sherman	99			
By Mr. Callahan		125		
Voir Dire - 104				
LIN MILLER				
By Mr. Sherman	129			
By Mr. Callahan		140		

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I N D E X
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ON BEHALF OF THE DEFENDANT

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
RICK FORTNER				
By Mr. Callahan	147			
By Mr. Sherman		151		
ROBERT TAJAN				
By Mr. Callahan	172			
SHERRY JOHNSON				
By Mr. Callahan	174			
By Mr. Sherman		180		
LEONARD NEWCOMB, III				
By Mr. Callahan	184			
by Mr. Sherman		185		
KRISTINA JACKSON				
By Mr. Callahan	187			
By Mr. Sherman		190		
DR. MARK SINESI				
By Mr. Callahan	192			
By Mr. Sherman		198		
JAMES STEVEN COWAN				
By Mr. Callahan	213			
By Mr. Sherman		220		

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E X H I B I T S
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ON BEHALF OF THE PLAINTIFF

NUMBER	DESCRIPTION	ID	RECEIVED
1	Fire Marshal's report		10
2	Collection of Citations		10
3	City Memoranda with Attached Engineer's Report		10
4	Two photos of the Subject Property		10
5	Historic Picture of property and Building Permit from 1901		62
A	Cacace Report	93	
6	Conceptual Site Plan		113
7	355 West Freemason Schematic Site Plan		127
8	Photo		132
9	Listing		135
10	Certified Copy of Deed		138
11	Violations		191
12	List of Calls		206
13	Email from Allendriscoll@norfolk.gov		207

ON BEHALF OF THE DEFENDANT

NUMBER	DESCRIPTION	ID	RECEIVED
1	August 17th letter from McCullough Dr. Sinesi		124
2	Building Code Excerpts		171
3	Zoning ordinance Excerpts		177

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P R O C E E D I N G S

- - - (2:08 p.m.)

(The court reporter was duly sworn.)

THE COURT: Please have a seat.

And good afternoon. We're here on the matter of Freemason Street Area Association, Inc. versus Dr. Mark Sinesi, CL18-7735.

Let me ask counsel to please introduce yourself so we can get you on the record as well as who you have with you today.

MR. SHERMAN: Joseph E. Sherman on behalf of the plaintiff Freemason Street Area Association. I've got the president Jack Kavanaugh, Admiral Jack Kavanaugh, with me.

THE COURT: All right. Thank you.

MR. CALLAHAN: F. Sullivan Callahan, and I represent Dr. Sinesi who's seated with me at counsel table.

THE COURT: Very good.

I also see Mr. Melita. Are you making an official appearance or just observing?

MR. MELITA: The City is here to observe today, Your Honor.

THE COURT: All right. The Court had received a petition for temporary injunction.

1 Based on that, the Court had a hearing on
2 August 31st. It was an ex parte hearing.

3 Representation was made at that time that
4 service of the petition was made on Dr. Sinesi, but the
5 Court under the Virginia Code elected to go forward on
6 an ex parte proceeding, did issue a temporary
7 injunction, but I think the Court made it clear that the
8 real concern was to get the parties both here to hear
9 both sides of the story before we entertain any more
10 preliminary or permanent relief.

11 That injunction, temporary injunction,
12 it's my understanding, has now expired.

13 We didn't have a court reporter at that
14 proceeding. So, Mr. Callahan, I know you're probably
15 relying a little bit on hearsay on what happened there.

16 So I'm going to make it clear from the
17 outset that we're treating this as a new hearing. So
18 anything that came in by way of evidence or anything
19 that came in by way of testimony I'm going to put the
20 plaintiff back -- the burden back on the plaintiff to
21 present that material again.

22 MR. CALLAHAN: Thank you, Judge.

23 THE COURT: Have you received a copy of
24 the petition for temporary injunction with the
25 attachments?

1 MR. CALLAHAN: I have, Your Honor. I've
2 also received the memorandum. We're ready to go forward
3 today.

4 THE COURT: All right, very good.

5 That's where I was going next. The Court
6 received yesterday a memorandum in support of motion for
7 temporary injunction as well.

8 There was one minor change.

9 The Court did receive exhibits, and I
10 understand they may not have been available on line, is
11 why I mention this. They were basically the exhibits
12 that were attached to the original petition with one
13 exception.

14 Plaintiff's Exhibit C was a memorandum --
15 or two memoranda, I believe, involving the City,
16 basically, and with that was attached the actual
17 engineer's report from Speight Marshall.

18 And so the Court received that as
19 Plaintiff's Exhibit 3 at that hearing.

20 I anticipate plaintiff's going to offer
21 all these exhibits up again today, but I didn't know if
22 you had a copy of that engineer's report.

23 MR. CALLAHAN: Judge, not only do I have
24 a copy of the report, but I have the engineer here.

25 THE COURT: Very good.

1 Well, anticipating the motion, are you
2 going to move the exhibits to come in?

3 MR. SHERMAN: I am, Your Honor.

4 THE COURT: Do you have any objection?
5 Do you need to lay a foundation on those?

6 MR. CALLAHAN: Judge, no, I do not have
7 an objection on that report coming in.

8 What are the other two?

9 THE COURT: The first exhibit was, I
10 forget how it was characterized, but it was -- let me
11 ask the plaintiff to go ahead and characterize the
12 exhibits.

13 MR. SHERMAN: The first exhibit was the
14 Fire Marshal's report from December 17th, 2017.

15 THE COURT: 2016, I believe.

16 MR. SHERMAN: 2016. Thank you,
17 Your Honor.

18 THE COURT: Okay. And then the second
19 report was a collection of citations from the City to
20 the homeowner.

21 The third report was those two City
22 memoranda with the attached engineer's report.

23 Then the fourth exhibit were two
24 photographs, again, that were attached to the petition.

25 MR. SHERMAN: Yes, Your Honor.

1 THE COURT: Any objection to any of those
2 exhibits coming into evidence?

3 MR. CALLAHAN: Judge, I've seen all those
4 exhibits, and I have no objection --

5 THE COURT: Very well.

6 MR. CALLAHAN: -- to any of those.

7 THE COURT: They will be marked as they
8 were at the prior hearing:

9 Plaintiff's Exhibit 1 will be the
10 Fire Marshal's report, Plaintiff's Exhibit 2 will be the
11 collection of citations, Plaintiff's Exhibit 3 will be
12 the City memoranda with the attached engineer's report,
13 Plaintiff's Exhibit 4 will be the two photographs of the
14 subject property.

15 (Plaintiff Exhibit Numbers 1-4 were
16 received.)

17 THE COURT: All right. I'll hear from
18 the plaintiff.

19 MR. SHERMAN: Your Honor, I'd like to
20 make a motion to separate the witnesses before we begin.

21 THE COURT: Mr. Callahan?

22 MR. CALLAHAN: Judge, it's a proper
23 motion.

24 THE COURT: All right. Anybody who plans
25 on testifying at the hearing this afternoon, I'm going

1 to ask you to have a seat outside. We'll call you in at
2 the appropriate time. If you stay in the courtroom, you
3 will not be testifying in this hearing. That's with the
4 exception of those at counsel table.

5 (The witnesses withdrew from the
6 courtroom.)

7 THE COURT: I think we had an hour
8 blocked off for this hearing. I wasn't anticipating
9 that number of witnesses.

10 MR. CALLAHAN: They won't be as long as
11 they appear -- as the line appears.

12 THE COURT: And I'll point out from the
13 start that to the extent you want to proffer without
14 opposition from opposing counsel, the Court's happy to
15 hear proffered testimony as well.

16 MR. CALLAHAN: Thank you, Judge.

17 THE COURT: All right. Mr. Sherman.

18 MR. SHERMAN: Thank you, Your Honor.

19 Your Honor, the more that I get to dig
20 into this case and appreciate the perspective of all the
21 stakeholders involved -- and you can see today that
22 there's a lot of people here because the neighborhood
23 does care about this issue and I think that folks beyond
24 the neighborhood care -- and as I appreciate everybody's
25 perspective, I can more and more appreciate the rational

1 actions that were taken by differing perspectives that
 2 led to this result.

3 And I think that's why this case is so
 4 important, because the process is important.

5 And the State has made law in Section
 6 15.2-2306 which allows municipalities to create historic
 7 districts.

8 And enabling the Cities to do the same,
 9 the Cities are allowed to make historic districts with a
 10 board that governs historic issues and that rules on
 11 historic decisions and guidelines.

12 And so that's the process that normally
 13 takes place.

14 Norfolk has both. They've got an
 15 Architectural Review Board. The neighborhood is treated
 16 as a subcommittee to that board, the civic league, and
 17 there's a zoning ordinance and, additionally, design
 18 guidelines that applicants are expected to adhere to
 19 when they make certificates, applications for
 20 certificates in front of the Architectural Review Board.

21 All exterior rehabilitation, renovation,
 22 anything that can be seen from the street requires a
 23 certificate of appropriateness from the Architectural
 24 Review Board, including demolition.

25 THE COURT: Including emergency

1 demolition?

2 MR. SHERMAN: Not including emergency
3 demolition. Including demolition.

4 The defendant went to the Architectural
5 Review Board to have the plans to rehabilitate the
6 property approved and he should go to the Architectural
7 Review Board for demolition.

8 The demolition process in the certificate
9 process at the Architectural Review Board encourages
10 preservation. In fact, all of the laws, Federal, State
11 and local level, encourage preservation. That's the
12 point.

13 At the demolition, if you move the
14 Architectural Review Board for a certificate of
15 appropriateness to demolish an historic structure, the
16 committee will look at things that include economic
17 feasibility. They will require that the property be
18 marketed for fair market value for one year in this case
19 because the value exceeds \$90,000.

20 And in this case, the defendant had time
21 to do that. We're 21 months past the fire.

22 So he's almost had enough time to do it
23 twice and market the property for a whole twelve years
24 [sic]. And the reason they encourage that is because
25 they want to encourage preservation. Everybody who buys

1 in the neighborhood has to play by these rules, and the
2 Federal, State and local governments have legislated to
3 require these sorts of requirements because there's a
4 public benefit to it.

5 And you're going to hear testimony on
6 that today.

7 So we're going to put on testimony and
8 evidence that there is market interest for this property
9 at fair market value to rehabilitate and preserve the
10 structure.

11 So I think the rational action on behalf
12 of the defendant is that after he's picking up the
13 pieces from this devastating fire and he's starting to
14 market the property, he realizes that there's a lot more
15 market interest for the property vacant than to
16 rehabilitate the structure.

17 And so that's where the rational action
18 creates a perverse incentive and results in a process
19 where he voluntarily elected to avoid the process.

20 And I think that the totality of the
21 circumstances show that he will make -- he made little
22 or no repair to the building, he allowed it to continue
23 to decline in condition, he obtained multiple
24 continuances from the City on enforcement actions as the
25 result of his hardship situation, you know, he was a

1 victim of a fire, of an arson, and I think that
2 leveraged him to getting preferential treatment from the
3 City who's not trying to be too hard on a guy who's a
4 victim in some sense.

5 And over time as the property continues
6 to deteriorate, he hires an engineering firm to justify
7 the demolition, because with the emergency exemption, as
8 you noted, Your Honor, that is a fail-safe that takes
9 the process out of the civic process, takes it out of
10 the Architectural Review Board's hands, out of the
11 appeals to City Council and corresponding appeal to
12 Circuit Court. The process is in placement to protect
13 all the stakeholders that you see here today.

14 The neighborhood, my client, is upset at
15 the lack of process here.

16 The certificate of appropriateness would
17 require their input, which they didn't get, even though
18 it's been 21 months. The Architectural Review Board
19 decision, there's an opportunity to appeal. And even
20 that City Council's decision can be appealed to Circuit
21 Court.

22 Any -- there's standing in the zoning
23 ordinance for any resident in the historic district to
24 appeal a demolition permit to Circuit Court showing that
25 this is an item of wide interest and it's meant to

1 preserve historic preservation because it helps the City
2 at large, it helps the citizens, it helps the
3 neighborhood.

4 The emergency exemption skips all that,
5 and the, notably, the two people who can require an
6 emergency exemption are the Fire Marshal and the
7 Building Commissioner.

8 And the morning after the fire, the Fire
9 Marshal made the report, and he did not require that the
10 building came down. And I can imagine that if it was an
11 actual need for that, that would be the first thing he
12 did, having been in the building and seen the fire and
13 put it out with his, with his team.

14 So that's notably absent in this case,
15 that there is not evidence from the Fire Marshal,
16 there's not testimony from the Fire Marshal to take that
17 building down the day after the fire.

18 Instead, this is a demolition somewhat by
19 arson but also by neglect, criminal neglect that's been
20 prosecuted by the City.

21 And I think the defendant at this point is
22 taking advantage of the City because he's gotten
23 multiple continuances, there's going to be evidence
24 today he's got the enforcement hearing continued five
25 times, six times if you include for this latest action,

1 and the leniency in enforcement has served to undercut
2 the process and it's taken advantage of the
3 neighborhood.

4 Everyone else plays by the rules and
5 everybody else gets certificates of appropriateness.
6 And to allow somebody to use an exception when it's not
7 a true emergency dilutes the purpose of the fail-safe
8 and creates a perverse incentive for marketplace
9 participants who are buying into a neighborhood, knowing
10 they have to preserve the property.

11 So the process is really at stake here.
12 There's going to be precedential value from the case
13 here and whether or not the emergency exemption is
14 expanded to swallow the process altogether.

15 And I think that the rational economic
16 interest to demolish historic properties as we'll see in
17 this case is antithetical to preservation itself and the
18 complete opposite of the purpose of Federal, State and
19 local laws that encourage and make preservation a
20 priority for the City for the benefit of their citizens.

21 The public interest and the equities
22 favor the neighborhood. The laws show that there's a
23 public interest in historic preservation.

24 And the evidence that shows the economic
25 incentive and the windfall to the defendant for selling

1 the property vacant instead of preserving the structure
2 intertwines with the irreparable harm that neighborhood
3 will have from losing a structure that can't be
4 replaced.

5 So, Your Honor, the neighborhood's likely
6 to win in --

7 THE COURT: Well, what are you seeking?
8 What are you asking the Court to do?

9 MR. SHERMAN: I'm asking the Court to
10 enjoin demolition of that house until the Architectural
11 Review Board has had the process occur, until there's a
12 lawsuit on a declaratory judgment to declare the City's
13 emergency status arbitrary and capricious or until he
14 disposes of the property to someone who does want to
15 maintain it.

16 THE COURT: We went over this a little
17 bit last time. But you filed a motion for a temporary
18 injunction. Usually that is a motion that's part of a
19 larger suit. Maybe it's a declaratory judgment suit. I
20 don't know. But nothing has been filed yet.

21 It sounds like the declaratory judgment
22 you're seeking would be against the City; that the City,
23 finding, whether it's the Building Commissioner, the
24 Fire Marshal or someone else in the City, that their
25 decision was arbitrary and capricious, is that correct?

1 MR. SHERMAN: I think so.

2 THE COURT: Well, then wouldn't you have
3 to sue the City? What's Dr. Sinesi have to do with
4 that?

5 MR. SHERMAN: Well, I think that
6 they're -- we had this strategy issue. And I think that
7 we have to enjoin Dr. Sinesi from demolishing the
8 property while we attack that underlying action and also
9 put the process back where it should be which is at the
10 Architectural Review Board.

11 THE COURT: But one of the four factors
12 is the likelihood of success on the merits of the actual
13 suit.

14 So success in what? Your declaratory
15 judgment motion that's not been filed that the City is
16 not involved in yet?

17 MR. SHERMAN: Yes, Your Honor. The
18 petition asked for a remedy in equity and all those
19 interests that are in the interest of justice and all
20 those rulings that are in the interest of justice.

21 And so we had to move fast, given that
22 the process was completely circumvented here.

23 And I would encourage the Court to
24 consider that the underlying action here is an attack on
25 the emergency status and that that emergency status was

1 arbitrary and capricious, and that if this is enjoined,
2 then it be enjoined for a time where we can have a trial
3 on that action and also he has, he has time to do the
4 process that he prefers.

5 THE COURT: Is there something that --
6 what gives me jurisdiction over the declaratory
7 judgment, for instance? Does this come under the APA
8 somehow, the City's decision to -- that demolition was
9 an emergency; that public safety was at risk? How do
10 you bring that before the Court?

11 MR. SHERMAN: Well, I think that we'll
12 bring it before the Court the same way we brought this
13 one, Your Honor. I think that the petition and the
14 prayer for relief in our first one gives you the
15 opportunity to stay this demolition until an
16 adjudication can be had either on the merits of a
17 declaratory action or on the process itself. He can go
18 get a certificate of appropriateness.

19 So all we're asking for here is time,
20 Your Honor.

21 And you can set it in a way that if I
22 were to file tomorrow and we don't get a court date at
23 the next available availability of the docket clerk,
24 then the action -- the injunction can expire.

25 THE COURT: What is the current posture

1 of the case? I mean, you show me the memos that
2 indicate that the City, I guess, was forwarding this up,
3 says, "The property maintenance official has been
4 notified to take all necessary action to promptly compel
5 the demolition of the property to protect public
6 safety." And that was over a month ago.

7 So has anything occurred that you're
8 aware of? Is there a document? What's the procedure
9 supposed to be?

10 MR. SHERMAN: Well, that's just the rub.
11 The procedure is supposed to go for a certificate in
12 front of the ARB.

13 THE COURT: I understand that. Under the
14 emergency provisions, though. I want to know --

15 MR. SHERMAN: We're really there.

16 THE COURT: They don't -- Dr. Sinesi is
17 not even copied on this memo. So there's going to be
18 something that has to go to him to tell him, "Make sure
19 it's vacant because the City's coming in to demolish it
20 or you're responsible for demolishing it"? I don't
21 know. But do you know what the next step would be under
22 the emergency demolition procedure?

23 MR. SHERMAN: My understanding is that
24 the City's been in touch with Dr. Sinesi telling him to
25 demolish it or else they will, yes.

1 THE COURT: So you think everything's in
2 place such that he has the permissions he needs or the
3 direction he needs to do -- actually demolish it today
4 had it not been for court intervention.

5 MR. SHERMAN: The only thing stopping him
6 is you and me.

7 THE COURT: All right. Let me hear from
8 Mr. Callahan.

9 MR. CALLAHAN: Thank you, Judge.

10 Judge, Dr. Sinesi bought this house, had
11 planned a million dollars of renovations to the house.
12 was looking forward to living in the Freemason Historic
13 District, and all of a sudden an arsonist came in and
14 burned it down, and he's unfortunately become persona
15 non grata with the Freemason District.

16 THE COURT: He might appreciate their
17 position had he really gone -- been a resident at some
18 point, perhaps.

19 MR. CALLAHAN: Perhaps.

20 But what we have here, though, Judge, is
21 two different things, two different issues we're looking
22 at here today.

23 Number one, the Statewide Building Code
24 tells the officials exactly what they have to do as far
25 as demolishing a building is concerned and what findings

1 that they have to make in order to do this on an
2 emergency basis.

3 Now, they talk about the timeline.

4 Well, it took insurance -- when you have
5 a building burn down, they don't just run out the next
6 day and give you insurance money. They take a
7 substantial amount of time. And the reason those cases
8 in the General District Court were continued is because
9 the insurance people never reached a settlement until I
10 believe late in the spring of this year.

11 So it took a substantial amount of time.

12 The --

13 THE COURT: So the fire was back in
14 December 2016?

15 MR. CALLAHAN: Right.

16 THE COURT: And you're saying it took
17 into mid 2018 for the insurance to work out?

18 MR. CALLAHAN: That's correct.

19 THE COURT: All right.

20 MR. CALLAHAN: And so during that period
21 of time, yes, we received citations to do the plumbing,
22 the windows, every feature of the house that you can
23 think of.

24 And so they get -- kept getting
25 continued. Judges downstairs continued those to give

1 him an opportunity to get it settled with the insurance
2 companies, which he basically did.

3 After that, he starts to go -- he'd taken
4 his plans to the Freemason people to get them approved.
5 But in order to do the construction, he goes after the
6 fire has taking place and hires Speight Marshall. You
7 have their report.

8 They are the ones that turned the leaning
9 tower of Granby Street, straightened it back up again.
10 They do historic --

11 THE COURT: You weren't at the last
12 hearing. Speight Marshall is well-recognized. I'm not
13 questioning that they are a reliable structural
14 engineer.

15 MR. CALLAHAN: So they come out with
16 their report. And if you've read that report, they are
17 concerned that the back portion of that house where the
18 porch is may fall down at any moment, could have fallen
19 down if that hurricane had come in this direction, could
20 have fallen down and done some damage to people,
21 require, you know, possibly the steps on the interior,
22 holding up the bricks on the outside as a result of
23 their report. It just seems astronomical or
24 unbelievable to do it.

25 Now, could it be done? Probably if you

1 had 5 or \$6 million. Then you have a \$950,000 house
2 after you spent \$5 million.

3 THE COURT: But I think the Association's
4 questioning the procedure more than anything else; why
5 not the certificate of appropriateness procedure for
6 demolishing the property as opposed to the emergency
7 demolition procedure?

8 MR. CALLAHAN: Because I've got three
9 different people coming after Dr. Sinesi. I have the
10 judges downstairs that want to fine him because he
11 hasn't made the improvements to that house. Your Honor
12 has enjoined him from demolishing the house. The City
13 has sent us an order to demolish the house, and if we
14 don't demolish it, they will demolish it.

15 Once the City issued its letter on
16 August 14th --

17 THE COURT: Show me something. I haven't
18 seen anything along those lines.

19 MR. CALLAHAN: The City issued its letter
20 on August 14th saying that, "You have 14 days to appeal
21 this decision, and if you don't appeal the decision, it
22 becomes a thing decided."

23 Any aggrieved party can appeal that
24 decision.

25 THE COURT: Which decision?

1 MR. CALLAHAN: The decision of the
2 Building --

3 THE COURT: Emergency demolition?

4 MR. CALLAHAN: That's correct, okay?

5 They could have appealed that decision.
6 They -- Dr. Sinesi had 14 days to appeal that, they had
7 14 days to appeal.

8 THE COURT: Are you saying they were
9 served?

10 MR. CALLAHAN: They are an aggrieved
11 party.

12 My understanding is they would have been
13 aware of it based upon the Architectural Review Board
14 would have known about it. And no one appealed that
15 decision.

16 So that thing -- that is now a thing
17 decided. It's not appealable.

18 THE COURT: Goes back to my earlier
19 question to opposing counsel. What gives the Court
20 jurisdiction? I didn't see that 14-day timeline in the
21 zoning ordinance. Is that --

22 MR. CALLAHAN: I've got the -- Miss Hall
23 is here with the City Attorney's Office, and she's got
24 those letters to be able to present to the Court.

25 THE COURT: I understand there may be

1 letters. I'm questioning whether there's an ordinance
2 that lays out -- that was one of my questions when I was
3 researching. Seems there's a very methodical procedure
4 to appeal decisions under the certificate of
5 appropriateness route, but I didn't see anything, and
6 seems opposing counsel came to the same conclusion,
7 didn't see anything that allows you to appeal the
8 emergency decision. I understand there may be a letter
9 that says 14 days, but is it in the ordinance?

10 MR. CALLAHAN: Judge, I'll have to yield
11 to Miss Hall on that.

12 THE COURT: Okay. We'll get back to that
13 later.

14 MR. CALLAHAN: All right.

15 Judge, that's the first portion of it.

16 The second portion of it deals with just
17 granting a temporary injunction. There are standards
18 that the Court has to follow. There's no Virginia cases
19 on point. There's Fourth Circuit law. There's law out
20 of the Supreme Court that the --

21 THE COURT: Virginia follows the
22 Fourth --

23 MR. CALLAHAN: Follows the Fourth Circuit
24 to the Winter case out of the Supreme Court.

25 And so there's standards there, and they

1 have a burden to meet every one of those standards.

2 I think at the end of the hearing, they
3 are going to have a difficult time meeting that, because
4 we have building officials here that the Code says you
5 shall demolish it. You shall do this and you shall do
6 your duty.

7 The problem Dr. Sinesi has right now is
8 he has a structure that the building official says --
9 excuse me, that the structural engineer says needs to be
10 torn down.

11 He cannot get insurance on that building.
12 If somebody goes in there and plays and does something
13 and gets hurt, he's going to be liable for it.

14 And so it presents us with a very
15 difficult burden.

16 I agree with the Court. The proper party
17 here should be the City. It shouldn't be Dr. Sinesi.
18 Dr. Sinesi is following the order of this Court, the
19 order of the City and the order of the judges from
20 downstairs.

21 And so, I mean, we wanted to be -- he
22 wanted to be in the Freemason District and be a part of
23 it. Unfortunately, that's not going to take place.

24 And I think the law's got to be followed.
25 And I think at the end of the day, they are not going to

1 be able to meet their burden and, unfortunately, I think
2 it's going to end up having to be torn down.

3 THE COURT: I'm going to ask you a
4 question. I'm not going to require you to answer it if
5 you don't want to.

6 But what are the plans if the Court's --
7 the Court's order, it's moot now, it's ended. Is
8 Dr. Sinesi in a position where he plans to demolish it
9 in the near future?

10 MR. CALLAHAN: Yes.

11 THE COURT: All right.

12 MR. CALLAHAN: We have a contract to
13 demolish it. We've sent that to the City. There are --
14 I believe every one of the services, electrical, water,
15 have all been disconnected. The only service that may
16 not have been completed is the Verizon phone company
17 because Verizon services the whole block. And so
18 they've got to do a little bit more than just snipping
19 the wires going in there.

20 THE COURT: All right. Before we go into
21 testimony, I think I do need -- because it's a
22 jurisdictional threshold, I would like some more
23 information on whether you believe they are time-barred
24 from even bringing this suit. So if -- again, I
25 recognize the City's not a party, but to the extent

1 you'd like to offer any advice on that issue, I would
2 appreciate it.

3 MR. CALLAHAN: I do, Judge.

4 THE COURT: Are you okay with Miss Hall
5 addressing the issue?

6 MR. CALLAHAN: That's fine with me.

7 THE COURT: She was standing up. Looks
8 like she was offering.

9 MS. HALL: Judge, if I could approach the
10 podium.

11 THE COURT: Thank you.

12 MS. HALL: Good afternoon.

13 THE COURT: Thanks for coming. I
14 appreciate it.

15 MS. HALL: Thank you.

16 Judge, there was an order issued by the
17 City. I do have a copy of that order. I do believe it
18 will be presented at some point in this hearing.

19 But the order is dated August 14th of
20 2018. That order was issued as a result of the Building
21 Commissioner's memo indicating that the building needed
22 to be, needed to be an immediate demolition.

23 THE COURT: For purpose of the record,
24 that was the memorandum the day before that order.

25 MS. HALL: That's correct.

1 So the Building Commissioner, you'll hear
2 from him later, I believe Mr. Callahan will call him, he
3 immediately notified the Property Maintenance code
4 official, who is also present today, and that notice
5 went out to the property owner, which is Dr. Sinesi.

6 That order indicated that based on the
7 condition of the property, based on that engineer's
8 report that was received by the City, the building had
9 to be repaired or demolished within ten days of the date
10 of that notice.

11 Now, Judge, in that notice as required by
12 the Uniform Statewide Building Code, which is the
13 governing body of regulation that governs that question
14 of emergency demolitions, in that actual letter is the
15 requirement for -- it's the notification to the parties
16 that if they fail to appeal that decision to the local
17 Board of Building Code Appeals within the time period
18 set forth in the statute for that appeal, that decision
19 is a thing decided.

20 I do have with me today the Uniform
21 Statewide Building Code which --

22 THE COURT: Well, who received that
23 order? I assume it was just the homeowner, isn't it?

24 MS. HALL: That order was received by
25 Dr. Sinesi.

1 I would also note that this injunction I
2 believe was filed within the time period of that -- when
3 that notice period proceeded with respect to the Uniform
4 Statewide Building Code.

5 Now, I don't know myself if the
6 plaintiffs in this matter have received that letter, so
7 I'm not sure about that.

8 But that letter did provide that any
9 person aggrieved by the decision relating to the
10 emergency demolition could appeal that to the local
11 Board of Building Code Appeals. That would be the
12 proper body to evaluate that order to demolish the
13 structure.

14 THE COURT: Can you read me the section
15 from the Statewide Building Code that you think applies?

16 MS. HALL: Yes, sir. It's Section 106.5
17 of the Virginia Maintenance Code which is one of the
18 parts of the Uniform Statewide Building Code, and it
19 says, "Right of appeal. Any person aggrieved by the
20 local enforcing agency's," which is our property
21 maintenance official, "application of this Code has the
22 right to submit a written request for appeal to the
23 local Board of Building Board Appeals within 14 calendar
24 days of the receipt of the decision being appealed."

25 So there is a process for an appeal of

1 that determination.

2 That section goes on to state that,
3 "Failure to submit an application for appeal within the
4 timeline established by this section shall constitute
5 acceptance of the code official's decision."

6 THE COURT: So how do I know that that
7 applies to emergency demolitions as opposed in your case
8 the normal certificate of appropriateness procedure?

9 MS. HALL: Judge, the certificate of
10 appropriateness procedure is a zoning ordinance
11 consideration.

12 This is under a totally separate body of
13 law, totally separate statutory scheme.

14 THE COURT: So is it your position that
15 any decision made regarding Building Code decisions is
16 guided by -- mirror that language in the local
17 ordinance?

18 MS. HALL: Judge, our local ordinance
19 adopts it in its entirety under Section 11.1-1 of the
20 City Code.

21 So we adopt the Uniform Statewide
22 Building Code which includes this section which is the
23 Virginia Maintenance Code.

24 So we adopt the entire Uniform Statewide
25 Building Code as our code for building safety and

1 building-related repairs in the City of Norfolk.

2 THE COURT: And then it's the local
3 zoning ordinance, though, that has the emergency
4 demolition procedure with respect to historic districts,
5 correct?

6 MS. HALL: Judge, it doesn't have a
7 procedure. It has a carve-out or an exemption. If
8 there's an emergency demolition ordered by the building
9 official --

10 THE COURT: It's exempt from the
11 certificate of appropriateness procedure.

12 MS. HALL: Yes.

13 So the certificate of appropriateness
14 procedure in the zoning ordinance does carve out an
15 exception to following the procedure to go through all
16 the hearings and all the other requirements for
17 appraisals and so forth for situations where there is a
18 necessary or need for an emergency demolition.

19 THE COURT: But it's your position that
20 the Statewide Building Code as adopted by the City still
21 has a 14-day appeal.

22 MS. HALL: 14-day appeal period.

23 And, Judge, I would also note that the
24 language in that statutory framework under the Building
25 Code specifically states failure to follow that appeal

1 procedure constitutes a thing decided.

2 And there is a case out of the City of
3 Norfolk, it's Dick Kelly Enterprises. I do have a copy
4 of that here today.

5 THE COURT: If you'd pass that up.

6 MS. HALL: Yes, I'll get that out, Judge.

7 But that stands for the proposition that
8 failure to file -- to follow administrative procedures
9 and your administrative remedies prevents you from
10 arguing about that determination.

11 So to shorten this, the City's position
12 is that that order was made to demolish the structure,
13 that we -- or the building official and the property
14 maintenance official consider that structure to be
15 unsafe and uninhabitable.

16 That decision is a thing decided before
17 this Court today.

18 THE COURT: Is that your position that
19 the filing of this action couldn't stay that, assuming
20 this action was filed within the 14-day period?

21 MS. HALL: Judge, I'm not sure I
22 understand what your question.

23 THE COURT: Assuming they filed the
24 petition for temporary injunction within 14 days of that
25 decision, would that stay the 14-day appeal period?

1 MS. HALL: Judge, they would have also
2 had to file an appeal before the local Board of Building
3 Code Appeals, is my position.

4 THE COURT: Very good. Thank you.

5 Any questions -- she's not testifying,
6 but if you have any questions that you want her to
7 clarify, I'm happy to entertain.

8 Mr. Sherman, anything? You may disagree
9 with her, and I'll let you comment on that. I wanted to
10 make sure you had an opportunity to have her clarify
11 anything if you think she --

12 MR. SHERMAN: I think she said that
13 she -- you concede we didn't get a copy of this and that
14 was only given to the landowner.

15 THE COURT: I don't know if you directly
16 answered that.

17 I asked you who all received the order.
18 You said Dr. Sinesi.

19 Are you aware it was served on anybody
20 else?

21 MS. HALL: I do not know, Judge, if it
22 was served on anybody else.

23 But I do have a copy of Dick Kelly. I'll
24 get that case for you.

25 THE COURT: Thank you.

1 MR. CALLAHAN: Judge, I also have a copy
2 of the Statewide Building Code that had the sections in
3 it that she referred to.

4 THE COURT: I'll let you bring that in
5 evidence in your case in chief.

6 MR. CALLAHAN: Thank you, Your Honor.

7 THE COURT: All right. Plaintiff, call
8 the first witness.

9 MR. SHERMAN: I'd like to call Paige
10 Pollard.

11 THE COURT: The deputy will page her.

12 THE BAILIFF: Raise your right hand.

13 (The witness was duly sworn.)

14 THE COURT: Please have a seat.

15 We do have a court reporter, so if you'll
16 make sure your responses are audible so she can write
17 them down as opposed to shaking your head or something
18 like that.

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1 PAIGE POLLARD, called as a witness by
 2 and on behalf of the Plaintiff, being first duly sworn,
 3 was examined and testified as follows:

4

5 DIRECT EXAMINATION

6 BY MR. SHERMAN:

7 Q. Good morning, Miss Pollard. Would you
 8 please state your full name for the record?

9 A. Paige Pollard.

10 Q. And also your place of employment and
 11 your employer's address for the record.

12 A. Commonwealth Preservation Group, 716 West
 13 20th Street, Norfolk, Virginia.

14 Q. What type of work does the Commonwealth
 15 Preservation Group do?

16 A. We're an historic preservation consulting
 17 firm.

18 Q. And --

19 MR. CALLAHAN: Your Honor, we will
 20 stipulate that she's an expert in that field. I've --

21 THE COURT: What field?

22 MR. CALLAHAN: Restoring historic
 23 properties, because I have hired her myself to restore
 24 my historic property.

25 So she is definitely an expert.

1 THE COURT: I'm not sure that's the
 2 proper basis to concede, but the Court will accept
 3 her -- Miss Pollard will be qualified as an expert in
 4 the field of restoring historic properties. She may
 5 render opinions in that field.

6 MR. SHERMAN: And, Your Honor, just for
 7 clarification, I was going to attempt to qualify her as
 8 an expert in historical preservation, including the
 9 processes involved in the State and local level.

10 THE COURT: Any objection?

11 MR. CALLAHAN: No objection.

12 THE COURT: She'll be so qualified.

13 BY MR. SHERMAN:

14 Q. Miss Pollard, could you please explain to
 15 the Court what levels of Government have incentivized
 16 historical preservation?

17 A. There are State historic rehabilitation
 18 tax credits that are available for historic properties.
 19 There are also Federal historic rehabilitation tax
 20 credits that are available for historic properties.

21 Q. And why do the State and Federal
 22 governments incentivize historical preservation?

23 A. The theory that's borne out by economic
 24 impact analysis is that historic preservation yields
 25 greater returns for the local economy, but it also

1 requires property owners to spend more on renovations,
 2 and so the idea is to offset the costs and encourage
 3 preservation.

4 Q. So the City at large, in this case, City
 5 of Norfolk, would benefit from historical preservation?

6 A. The economic impact analysis would say
 7 yes.

8 Q. In your opinion?

9 A. Yes.

10 Q. And do you think Norfolk has seen that in
 11 the last ten years in downtown alone?

12 A. Yes.

13 Q. Is part of that economical impact the
 14 increase in property values in historic districts?

15 A. The economic impact analysis typically
 16 takes into account real estate tax increases as well as
 17 expenditures by occupants in the building and the net
 18 value of reusing historic buildings rather than
 19 extending public infrastructure to new areas.

20 Q. Okay. So just trying to be clear. The
 21 theory, one of them, is that if you preserve historic
 22 structures, everybody's property value goes up, is that
 23 fair?

24 A. That's never been studied. The studies
 25 focus on the disparate buildings as well as the City or

1 State or Federal ledger.

2 Q. So the specific buildings at issue
3 increase in value and the City's tax base increases.

4 A. Correct.

5 Q. And then what's the big difference
6 between State and Federal tax credits?

7 A. A couple of big differences.

8 The review standards are the same, but
9 the State credits are available for all properties that
10 are listed on the registers as contributing or
11 individually listed. The Federal credits are only for
12 income-producing properties. The credits are usable
13 against passive income tax liability.

14 Q. So on the Federal level, you said it's
15 income-producing properties are only eligible.

16 A. Correct.

17 Q. Versus State which single family
18 residential would be eligible.

19 A. Correct.

20 Q. Okay. And the zoning in the historical
21 Freemason District would allow both?

22 A. The zoning is about building use. The
23 State and Federal tax credit program doesn't look at
24 use. It looks at building treatment and impact of
25 renovations.

1 But West Freemason is listed on the State
2 and National Registers and separately it's also a local
3 historic district.

4 Q. Okay. I'm getting ahead of my script.
5 This subject property 355 is in an
6 historic --

7 A. It's in a State and National Register
8 District.

9 THE COURT: Is it also within the City
10 zoning ordinance, as far as you know?

11 THE WITNESS: Yes, it's in the local
12 district.

13 BY MR. SHERMAN:

14 Q. And the local zoning would allow uses
15 that qualify for State and Federal tax credits.

16 A. Correct.

17 Q. Okay.

18 THE COURT: Mr. Callahan, are you willing
19 to concede the subject property is within the historic
20 district as recognized by the City of Norfolk zoning
21 ordinance?

22 MR. CALLAHAN: Definitely, Your Honor.

23 THE COURT: Thank you.

24 MR. SHERMAN: And the contributing
25 structure to the historic designation.

1 THE COURT: Just within the identified
2 zoning district.

3 MR. CALLAHAN: And it's a contributing
4 structure. It is not an historic house. It is a
5 contributing house.

6 MR. SHERMAN: Right.

7 MR. CALLAHAN: Because it was built in
8 1900 as a lot of houses in Norfolk were built in 1900.

9 BY MR. SHERMAN:

10 Q. So can you get State and Federal tax
11 credits for raw land?

12 A. No.

13 Q. So that --

14 A. Historic rehabilitation tax credits, no.

15 Q. So there's got to be a structure that
16 either is an individual landmark or contributes to an
17 historic district in order to be eligible.

18 A. Correct.

19 Q. So this property with the structure is
20 eligible; without the structure, it's not.

21 A. In my opinion, it's eligible. A formal
22 application hasn't been submitted since the fire.

23 Q. Thank you.

24 THE COURT: Was that your question or is
25 your question if the question was raised, it would still

1 qualify?

2 MR. SHERMAN: I think that -- that's my
3 point which is that --

4 THE COURT: You agree if the improvements
5 on the property were taken down, it would not qualify
6 for tax credit?

7 THE WITNESS: Right.

8 MR. SHERMAN: And her point, you still
9 have to do a formal application.

10 BY MR. SHERMAN:

11 Q. In your opinion, you say the structure
12 would qualify, although you'd want to be certain to get
13 an application approved?

14 A. Correct.

15 THE COURT: What is that based on? Have
16 you been in the house?

17 THE WITNESS: I have been in the house.
18 We actually filed an application prior to the fire and
19 received approval but the fire obviously changed the
20 circumstances in the house. Typically eligibility is
21 based on exterior and, in my opinion, the exterior has
22 not changed so dramatically as a result of the fire to
23 render it noncontributing.

24 So in my opinion, I think it would be
25 approved.

1 THE COURT: Assuming it would stay up.

2 BY MR. SHERMAN:

3 Q. We skipped all the qualification.

4 But for the Judge's benefit, you've
5 worked at the Virginia District of Historic Resources,
6 right?

7 A. Yes.

8 Q. And you also have worked at the City of
9 Norfolk in their historic -- as the historic
10 preservation planner.

11 A. Yes.

12 Q. So you had experience on the municipal
13 level and at the State level.

14 A. Yes.

15 Q. Both of which are separate yet concurrent
16 processes that the property owner would pursue --

17 A. Right.

18 Q. -- to get rehabilitation tax credits.

19 And now you're in private practice and
20 you help clients obtain approvals from localities and
21 State.

22 A. And Federal.

23 Q. And Federal.

24 A. Yes.

25 Q. And you practice up and down the

1 East Coast.

2 A. Yes.

3 Q. Have -- okay.

4 Would you briefly explain the application
5 process?

6 A. For tax credits?

7 Q. Yes, please.

8 A. Three-part process. The first part
9 establishes that the building's eligible and
10 contributing to the district or individually listed.
11 The second part is where you describe the existing
12 conditions and the proposed work in the context of the
13 building treatment standards they use to evaluate
14 proposals. Upon approval of part one and part two, as
15 long as you stick to the outline that was presented, you
16 are eligible for credits. Then you do your
17 construction, and at the end of the project you file the
18 third part of the application which includes an
19 accountant's cost certification and photography to
20 document you complied with the application as previously
21 presented. And upon approval of that, you've awarded
22 credits.

23 THE COURT: Credits mean some kind of
24 rebate check?

25 THE WITNESS: It's a credit against your

1 tax liability. And the State is 25 percent of rehab
 2 costs and the Federal is 20 percent of rehab costs.

3 BY MR. SHERMAN:

4 Q. And for this property at issue, you said
 5 you completed step one out of three?

6 A. Yes.

7 Q. Okay.

8 THE COURT: Before the fire?

9 THE WITNESS: Yes.

10 THE COURT: Okay.

11 BY MR. SHERMAN:

12 Q. And the second step, where did that
 13 stand?

14 A. The building treatment review is very
 15 strict. And based on some of the work the property
 16 owner wanted to undertake, my advice to them was it
 17 wouldn't be a successful tax credit application. And so
 18 they elected to stop the process after the part one.

19 It really revolved around an outbuilding
 20 that was proposed, the garage.

21 Q. And that was before the fire?

22 A. The decision to not pursue credits was
 23 made before the fire, yes.

24 THE COURT: So your opinion, it was not
 25 going to qualify for historic tax credits?

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THE WITNESS: Yes, because of new construction that they want to do on the site.

BY MR. SHERMAN:

Q. And let's -- that's worth refining.

A plan could have been approved with the structure but not the one that the owner wanted to do.

A. Correct.

Q. Okay. So the building caught fire after the owner learned that his preferred plan was not going to receive State tax credits.

A. Well, we never ap- --

Q. Right.

A. We never received a formal response, but my advice, based on my experience, was that the garage outbuilding that they wanted to construct would have been too much to get approval for the historic rehabilitation.

Q. And would the City have the owner submitted plans for the design?

A. Yes, and that went through the review process for the local historic district and was successful.

Q. With the design that you advised them would not be acceptable for State credits?

A. Correct.

1 Q. And talk about the process to get that
2 approved at the City level.

3 A. Currently or at the time that we filed
4 the application?

5 It's changed. So do you want to talk
6 about what the process would be today or do you want to
7 talk about the process we went through at the time?

8 Q. At the City level?

9 A. Um-hum.

10 Q. I want to talk about what the process was
11 at the time.

12 A. Okay. At the time we filed an
13 application. We provided it to the civic league for
14 comments. I believe those comments were provided
15 digitally. We went to the review board and received
16 approval for all but the landscape plan and I believe
17 there were a couple of material selections still in
18 play.

19 But we received approval to proceed while
20 we refine the last details.

21 Q. You applied to the -- on the owner's
22 behalf, you applied to --

23 A. The Department of Planning.

24 At the time I think it was still the
25 Design Review Committee. I have to check that.

1 Recently that Design Review Committee changed to the
 2 Architectural Review Board, and I don't remember the
 3 time that that occurred.

4 Q. May I refresh your recollection?

5 A. Sure.

6 THE COURT: Mr. Callahan is being very
 7 accommodating.

8 Give me a proffer. Where are we going
 9 with all this?

10 MR. SHERMAN: Well, we're going to go
 11 to --

12 THE COURT: I mean, I don't think there's
 13 any dispute that it's a contributing property, that it
 14 would have qualified for tax credits if certain plans
 15 were produced.

16 I'm not sure what any of this has to do
 17 with the temporary injunction.

18 MR. SHERMAN: Well, I wanted her to
 19 explain the process to the extent it helps Your Honor,
 20 and then I want to explain how the -- have her explain
 21 how the appeals process is utilized and then how the
 22 demolition is used in the same process, the same
 23 certificate and that it's also subject to appeals, and
 24 that today's case, the emergency exemption, circumvented
 25 that entire process and that the emergency exemption

1 defeats the purpose of the process and --

2 THE COURT: Let me just ask Mr. Callahan,
3 do you want to concede any of those points? If you are,
4 I think we can bypass some of the testimony. It seems
5 like that's coming right out of the zoning ordinance.

6 MR. SHERMAN: Right.

7 MR. CALLAHAN: Judge, the zoning
8 ordinance has two processes. One is the one he's
9 describing that he wants us to go back to, and that's
10 not the one we feel we're under.

11 THE COURT: Does Dr. Sinesi agree that
12 the City -- his understanding -- that the City is
13 proceeding under the emergency demolition procedure and
14 is bypassing or using an exemption from the certificate
15 of appropriateness procedure?

16 MR. CALLAHAN: That is correct.

17 THE COURT: Okay.

18 MR. SHERMAN: Okay.

19 Well, then let's get to the big finish.

20 BY MR. SHERMAN:

21 Q. In your professional opinion, is this
22 case the one contemplated for an emergency exemption?

23 A. I think an emergency exemption is at the
24 discretion of the Building Code official.

25 The term "emergency" needs to be defined.

1 And I think that the -- I was on the Preservation
2 Committee when this change was made, and I can tell you
3 what the intent was, was that the emergency exemption
4 would be used for imminent threats. I'm not an
5 engineer, so it's not my position to determine whether
6 this is an imminent threat. But at the time that this
7 emergency exemption was created, there was stated
8 concern by the Preservation Commission at both of the
9 neighborhoods that it not be utilized to degrade the
10 standard demolition process -- or the standard
11 certificate of appropriateness process for demolition.

12 THE COURT: Well, let me read into the
13 record what I think is the appropriate sentence. Tell
14 me if this is consistent with your opinion. It says,
15 "The emergency demolition of any structure or any
16 portion of a structure which is in such dangerous,
17 hazardous or unsafe condition that it has been ordered
18 demolished by the Building Commissioner or the
19 Fire Marshal when they have determined that such
20 condition could reasonably be expected to cause death or
21 serious physical harm."

22 THE WITNESS: Correct.

23 THE COURT: All right.

24 BY MR. SHERMAN:

25 Q. And does this case create precedential

1 value for future use of that emergency exemption?

2 MR. CALLAHAN: I object. She's not been
3 an expert in that category.

4 THE COURT: Response?

5 MR. SHERMAN: Well, we did stipulate
6 she's an expert in the process and if other people are
7 going to utilize this exemption, that --

8 THE COURT: I'll allow you to rephrase.
9 Whether it's precedential whether she's seen something
10 like this before, I'm going to sustain the objection.

11 MR. CALLAHAN: Thank you, Judge.

12 BY MR. SHERMAN:

13 Q. Does -- you mentioned the intent of the
14 committee was not to subsume the rule itself, the
15 process itself, right?

16 A. Yes.

17 Q. So is it fair to say that an abuse of the
18 emergency exemption could have that slippery slope
19 effect to impact the process itself?

20 A. There was concern that there was
21 potential to abuse the emergency exemption at the time
22 that it was created.

23 Q. And in this case where the traumatic
24 event was 21 months ago, do you find it concerning on a
25 procedural level?

1 A. It's certainly a unique set of
2 circumstances that weren't contemplated at the time that
3 the emergency exemption was discussed within the
4 Preservation Committee.

5 Q. Is --

6 THE COURT: When you're talking about
7 this change, was this a change to the local zoning
8 ordinance or something else?

9 THE WITNESS: The emergency exemption was
10 introduced in the last few years.

11 THE COURT: Introduced into what?

12 THE WITNESS: Introduced into the Code,
13 into the local Code.

14 THE COURT: The Local Norfolk zoning
15 ordinance.

16 THE WITNESS: Correct. It did not exist
17 prior to that.

18 THE COURT: Got it.

19 BY MR. SHERMAN:

20 Q. Let me ask you this. Does the State
21 enact a law that allows the City to create the local
22 historical preservation rules and guidelines?

23 A. Yes, State Code enables the creation of
24 local historic districts.

25 Q. And does it detail in specifics how you

1 can demolish an historic structure?

2 A. It has guidance and time constraints and
3 mandates about how a demolition application should be
4 reviewed.

5 Q. Does it provide any emergency exemption?
6 The State Code.

7 A. Not in the section about local historic
8 districts, no.

9 Q. And in your opinion, is the demolition of
10 significant historic resources inapposite to the purpose
11 of historic preservation?

12 A. Yes.

13 MR. SHERMAN: No further questions,
14 Your Honor.

15 THE COURT: All right. Mr. Callahan?

16

17 CROSS-EXAMINATION

18 BY MR. CALLAHAN:

19 Q. Miss Pollard, you would agree this
20 building is subject to demolition -- is subject to the
21 Statewide Building Code?

22 A. Yes.

23 Q. Okay. And it's also subject to being
24 taken down, demolished and as a result of the Statewide
25 Building Code.

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A. Yes.

Q. And if the report -- Speight Marshall, you're familiar with them?

A. Yes.

Q. And you were involved with them regarding the leaning tower of Granby Street?

A. Um-hum.

THE COURT: You have to say yes or no.

THE WITNESS: Yes.

BY MR. CALLAHAN:

Q. All right. And you found them to be a very reputable engineering firm?

A. Yes.

Q. One of the best in the area?

A. I'm not going to evaluate that.

Q. All right. And if their report says that this building is structurally not sound and is such that it is a hazard to the community and not safe and it needs to be torn down, would that be the appropriate thing to do if that was their structural engineer's opinion?

A. I think as the Code says, that's a decision for the Building Code official.

Q. And if the Building Code official makes that decision, then that would be the proper decision by

1 the City officials.

2 A. I think that's the proper decision
3 weighing the public interest of the local district.

4 MR. CALLAHAN: Thank you, ma'am.

5 THE COURT: Any redirect?

6 MR. SHERMAN: Yes, Your Honor.

7

8 REDIRECT EXAMINATION

9 BY MR. SHERMAN:

10 Q. Now, if that same report from that
11 reputable engineering firm didn't say it was a hazard
12 but said the most reasonable thing to do would be to
13 take the building down for feasibility purposes, do you
14 think that is the purpose of the emergency exemption?

15 A. I don't think the purpose of the
16 emergency exemption is to allow for the most reasonable
17 approach but to allow for demolition in instances where
18 it is a public safety hazard.

19 Q. And if the property owner sought a
20 certificate of appropriateness for demolition, would
21 that -- would the Architectural Review Board weigh
22 feasibility as a part of their decision-making process?

23 A. There is a clause for economic
24 feasibility in the design guidelines that focuses not on
25 the economics as it relates to the property owner's

1 pocketbook but economics in relation to the property
 2 values in the surrounding area.

3 Q. Mr. Callahan mentioned the Building Code.
 4 Are you aware that there were Building
 5 Code violations on this structure well before the
 6 Building Code was invoked to obtain a demolition permit?

7 A. No, but that's outside of my area of
 8 expertise.

9 Q. Well, if the exemption was the primary
 10 vehicle for citizens to demolish historic property,
 11 would you agree that that puts an emphasis on
 12 enforcement at the City level?

13 A. Yes.

14 Q. And if it's proven or shown that there's
 15 a struggle with enforcement as it is, would that in
 16 itself create burden to a portion of the system that's
 17 already failing?

18 MR. CALLAHAN: Judge, I'm going to
 19 object. I don't see how that's relevant to what
 20 Dr. Sinesi has to do here today.

21 THE COURT: Response?

22 MR. SHERMAN: I'm not sure I know what he
 23 means "what Dr. Sinesi has to do here today."

24 THE COURT: Let him expound on the
 25 objection.

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Go ahead, Mr. Callahan.

MR. CALLAHAN: Dr. Sinesi is -- they are asking about whether the City -- whether or not it's appropriate for the City to do what they have done.

That's not Dr. Sinesi's...

THE COURT: Well, the Court has to evaluate this.

One of the factors is the reasonable likelihood of success on the merits.

I guess the Court's treating this as there may be some declaratory judgment coming questioning the City's actions. So I'll give him some leeway.

Overruled.

MR. CALLAHAN: Thank you, Judge.

BY MR. SHERMAN:

Q. Does this put burden on the enforcement at the City level?

A. Yes.

Q. And if there's no opportunity for the neighborhood to participate, will that create their only process -- if the neighborhood has no opportunity to participate in the civic process at the ARB because this is an exemption, will that create for them their only way to participate by hounding the City and the

1 enforcement officials?

2 A. I would expect that if the emergency
3 demolition provision is invoked, there will be much
4 higher scrutiny within the -- all of the local historic
5 districts about the status of enforcement actions. I
6 think that would be a natural result.

7 Q. Does Dr. --

8 A. Was that your --

9 Q. I think so.

10 I think the -- if you agree that the
11 emergency exemption takes us out of the normal civic
12 process, right, and at that point --

13 A. Yes.

14 Q. -- all everyone can do is look to the
15 City for enforcement before it becomes too late.

16 A. Yes, I think that would be the outcome.

17 Q. Do you think that Dr. Sinesi should have
18 gone to get a certificate of appropriateness in this
19 case for demolition?

20 MR. CALLAHAN: Objection, Your Honor. I
21 don't know how that's relevant. She's not an expert in
22 that.

23 THE COURT: Sustained.

24 You can rephrase it, if you'd like.

25 MR. SHERMAN: Well, I'll try, Your Honor.

1 THE COURT: You can give her a
2 hypothetical if you like.

3 BY MR. SHERMAN:

4 Q. Imagine that there's a beautiful historic
5 structure at the epicenter of an historic district and
6 it caught on fire in three places by an arsonist and it
7 sat without any, little or no repair for 21 months and
8 then the owner appealed for -- to the Building
9 Commissioner for an emergency exemption.

10 Do you think that owner would have been
11 better served, do you think the process would have been
12 better served by seeking a certificate of
13 appropriateness for demolition?

14 A. Yes.

15 MR. SHERMAN: No further questions.

16 THE COURT: Any need to hold the witness
17 for possible re-call?

18 MR. SHERMAN: No, Your Honor.

19 MR. CALLAHAN: No, Your Honor.

20 THE COURT: All right. You're free to
21 go, you're free to stay in the courtroom, if you'd like,
22 but you're not required to stay in the courthouse.

23 Next witness?

24 MR. SHERMAN: Greta Gustavson.

25 Your Honor, we're going to stipulate that

1 this historic photograph from the Slover Sargeant
 2 Memorial Collection is the property, historic picture of
 3 the property and that this building permit from 1901 is
 4 relating to the building at issue.

5 THE COURT: You agree, Mr. Callahan?

6 MR. CALLAHAN: I do. No objection.

7 THE COURT: Plaintiff's Exhibit 5. It
 8 will be collectively.

9 MR. SHERMAN: Thank you.

10 MR. CALLAHAN: Thank you, Judge.

11 (Plaintiff Exhibit Number 5 was received.)

12 THE BAILIFF: Raise your right hand and
 13 turn to the Judge.

14 (The witness was duly sworn.)

15 THE COURT: Please have a seat.

16 We do have a court reporter, so if you'll
 17 make sure your responses are audible so she can write
 18 them down as opposed to saying yes or shaking your head.
 19 Thanks.

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1 GRETA GUSTAVSON, called as a witness by
 2 and on behalf of the Plaintiff, being first duly sworn,
 3 was examined and testified as follows:

4

5

DIRECT EXAMINATION

6

BY MR. SHERMAN:

7

Q. Please state your full name and address
 8 for the record.

9

A. Greta Gustavson, 421 West Bute Street,
 10 Norfolk, Virginia.

11

Q. Do you have any civic affiliations
 12 relevant to this matter?

13

A. Yes, I do. I'm a long-time board member
 14 and former president of the Freemason Street Area
 15 Association. I also am a nonvoting member on the, the
 16 Oversight Committee, the FSAA's Historic District
 17 Committee.

18

Q. Do you think the neighborhood would be
 19 harmed by the loss of this structure?

20

A. Greatly.

21

Q. Do you think the structure could be
 22 replaced?

23

A. Very unlikely that it could be. It's a
 24 Flemish bond pattern with ionic columns. Just the work
 25 of the building is something that could not be very

1 easily replicated.

2 MR. SHERMAN: Your Honor has already
3 accepted both of these as exhibits without objection.

4 BY MR. SHERMAN:

5 Q. And so my last question is, do you think
6 that the neighborhood benefits from historical
7 preservation?

8 A. It, it definitely does. Prior to 1977
9 when it became a local historic district, many of the
10 buildings had been abandoned or made into apartments or
11 businesses. And with this particular building, the
12 intent was to go from a business and back into a
13 single-family home, which was wonderful. And that
14 particular intersection is one that's very visible in
15 the neighborhood, and the loss of that structure would
16 be detrimental to the neighborhood.

17 MR. SHERMAN: No further questions.

18 THE COURT: All right. Let me ask you,
19 ma'am. You mentioned you live at 421 West Bute Street.

20 Is that also within the historic
21 district?

22 THE WITNESS: Yes, it is.

23 THE COURT: Thank you.

24 Mr. Callahan?

25 MR. CALLAHAN: No questions, Your Honor.

1 THE COURT: Any reason to hold the
2 witness for possible re-call?

3 MR. SHERMAN: No, Your Honor.

4 THE COURT: All right. You're excused,
5 ma'am. You're free to stay in the courtroom, if you'd
6 like, or you can leave the courthouse, if you'd like.

7 THE WITNESS: Thank you.

8 MR. SHERMAN: Your Honor, I'd like to
9 call Gary Naigle.

10 THE BAILIFF: Turn and face the Judge and
11 raise your right hand.

12 (The witness was duly sworn.)

13 THE COURT: All right. Please have a
14 seat.

15 We do have a court reporter who's writing
16 everything down, so please say yes or no as opposed to
17 shaking your head or something like that when you
18 answer, okay?

19 THE WITNESS: Okay.

20 THE COURT: Thank you.

21

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1 GARY NAIGLE, called as a witness by and
 2 on behalf of the Plaintiff, being first duly sworn, was
 3 examined and testified as follows:

4

5

DIRECT EXAMINATION

6

BY MR. SHERMAN:

7

Q. Would you please state your name and
 8 address for the record?

9

A. Gary Naigle, N-a-i-g-l-e, 421 West Bute
 10 Street, Number 206.

10

11

Q. And, Mr. Naigle, what is your
 12 professional background?

12

13

A. Well, I've been in construction since I
 14 was a teenager. But I was a City superintendent for
 15 five years and then three years building construction
 16 house -- houses out in Virginia Beach. In 1968 I was
 17 with the Norfolk Redevelopment and Housing, spent 30
 18 years there.

18

19

Q. And what positions did you hold at NRHA?

20

A. I started out as a -- the first rehab
 21 specialist there, moved up to a supervisory position
 22 from there, and ended up with being the rehabilitation
 23 construction officer for the Redevelopment Authority.

23

24

Q. And as the officer, did you have a team
 25 of inspectors reporting to you?

25

1 A. Yes, I had, let's see, three inspectors
2 from the Health Department and five rehabilitation
3 specialists, and that varied from time to time.

4 Q. What kind of work was the NRHA doing at
5 that time?

6 A. We were in the conservation projects for
7 the City of Norfolk, rehabilitation of the old
8 structures.

9 Q. At the time the City believed that that
10 would benefit the citizens and the municipality at
11 large, historic preservation?

12 A. Yes.

13 Q. What areas in Norfolk specifically did
14 you work on?

15 A. Well, we worked -- we started out in
16 Ghent and we went to Freemason, which was Downtown West
17 at that time we called it, Park Place, Colonial Place,
18 Riverview, Ocean View, Huntersville, Berkley. The main
19 thing that would be close to this type housing would
20 have been the Ghent project.

21 Q. And how did NRHA facilitate
22 redevelopment?

23 A. Well, this wasn't redevelopment. This
24 was conservation.

25 Q. Thank you.

1 How did they facilitate it as far as --

2 A. Conservation project ended up with
3 standards. Standards were above the Minimum Housing
4 Code.

5 Our office was in charge with doing the
6 inspections.

7 And then the Federal Government had
8 what's called a 312 home program and 115 grant program
9 which allowed us to make low interest loans to the
10 owners.

11 These are houses people owned. They
12 weren't buying the house. They owned the house. And it
13 will pay for the rehabilitation of that structure.

14 Q. How many properties would you guess that
15 you inspected or supervised the construction of?

16 A. Like this one or do you want total?
17 Total all over the City would probably be in the couple
18 thousand.

19 Q. How about just in the same construction?

20 A. In Ghent, we had 600 units and probably
21 got 50 units in Downtown West.

22 Q. Of similar construction?

23 A. Similar construction.

24 Q. Building era to the subject property.

25 A. Right.

1 Q. And what conditions were those in, the
2 600 you mentioned?

3 A. It varied. They were inhabited, some
4 were unfit for human habitation when we got them, some
5 were shells. It was the whole spectrum.

6 Q. When you say uninhabitable, did that mean
7 it will require demolition?

8 A. No.

9 Q. So a structure that was uninhabitable to
10 be saved.

11 A. Yes.

12 Q. What was the standard construction method
13 back then in 1900 when those 600 homes were built?

14 A. Well, in 1900, most of the houses like
15 would be brick, it would be multi-brick which means
16 wide, thick brick walls, solid brick some people call
17 it, and a standard framing at the time would be platform
18 with joist pockets. That's what holds your floor. Then
19 they would build from the floor up.

20 Q. Can you explain a joist pocket to the
21 Court.

22 THE COURT: Before you go too much
23 further, I assume everyone conceded the subject
24 property, at least prior to the fire, contributed to the
25 historic district, Mr. Callahan?

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MR. CALLAHAN: Yes, sir.

THE COURT: All right.

MR. SHERMAN: And, Your Honor, I want to make the point that he's got experience constructing, rehabilitating, conserving homes.

THE COURT: All right. We can agree to that point.

BY MR. SHERMAN:

Q. So how did the building materials in 1900 compare to modern construction?

A. Well, bricks are bricks. As far as -- what do you mean what do --

Q. Do they still tie in the framing to the --

A. There's different framing practices from 1900 to like 1920 there's even different framing.

If it was a wooden building, it will be most likely balloon construction, but this house was built basically the same as every other house in Ghent or any other area that had 1900 houses.

Q. Okay. And the bricks are bricks.

How about the lumber? Was the lumber similar or different?

A. Well, most of the time it's a rough-cut lumber instead of a nominal lumber like they have today

1 which is dimensional.

2 Q. What about the maturity of the lumber?

3 A. Well, the forests and what have you
4 weren't depleted like they are today. So lumber was
5 much clearer and a better quality actually with the old
6 houses.

7 Q. Better quality wood, would that mean
8 denser? More mature?

9 A. Well, it's more mature, yes.

10 Q. Dimensions were the same or different?

11 A. Dimensions were different. Two-by-four
12 would actually be two by four, not one by three.

13 Q. Okay. And then as far as the heavier
14 rough-cut lumber, how would that, how would that catch
15 fire different than a modern --

16 A. Basically it wouldn't, it wouldn't catch
17 fire differently. It would ignite on the rough surface
18 first, but as far as once it got going, it's going to go
19 just as fast as...

20 Q. All right. Do you walk by your -- do you
21 walk your dog by the structure on a regular basis, the
22 subject structure?

23 A. Oh, yes.

24 Q. Are you in fear for your life on the
25 sidewalk next to the structure?

1 A. No.

2 Q. In your opinion, is the house savable?

3 A. Yes.

4 MR. SHERMAN: No further question,
5 Your Honor.

6 THE COURT: Mr. Callahan?

7 MR. CALLAHAN: Thank you.

8

9 CROSS-EXAMINATION

10 BY MR. CALLAHAN:

11 Q. Mr. Naigle, you haven't been inside this
12 house, have you?

13 A. Pardon me?

14 Q. Have you been inside the house?

15 A. No, I have not.

16 Q. Have you ever been inside of it?

17 A. No, I have not.

18 Q. Okay. And you said you were with the
19 Norfolk Redevelopment and Housing Authority?

20 A. Yes, sir.

21 Q. Okay. And they were -- they were in the
22 conservation of buildings; is that correct?

23 A. Yes, sir.

24 Q. Okay. And so they are the ones that tore
25 down east Ghent?

1 A. That was not part of the conservation
2 project.

3 Q. What was that?

4 A. That was redevelopment.

5 Q. Okay.

6 A. Two different horses.

7 Q. All right. And so none of the buildings
8 over there would have been -- could have been conserved?

9 A. Probably, but that wasn't my job.

10 Q. Okay. And so just the ones that you're
11 saying that are up by the Hague, those areas where along
12 Colonial Avenue?

13 A. They go from the Hague to the Princess
14 Anne, yeah.

15 Q. And that area went from the Hague to
16 Redgate Avenue, didn't it?

17 A. That's correct.

18 Q. Okay.

19 All right. And there was some houses
20 that were torn down in that area. New construction took
21 place.

22 A. Most likely, yes.

23 Q. And some of those buildings there were
24 not conserved.

25 A. That's right.

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MR. CALLAHAN: Thank you.

THE COURT: Redirect?

MR. SHERMAN: No questions, Your Honor.

THE COURT: All right. Do you need to hold the witness?

MR. SHERMAN: No.

THE COURT: All right. You're excused, sir. You're free to stay in the courtroom, if you'd like, or you're free to leave the courthouse, if you would like.

Next witness?

MR. SHERMAN: I'd like to call Deborah Cacace.

(The witness was duly sworn.)

THE COURT: All right. Please have a seat.

The court reporter is writing everything that's being said today, so if you'll make your responses, use yes or no as opposed to shaking your head or something, okay?

1 DEBORAH CACACE, called as a witness by
 2 and on behalf of the Plaintiff, being first duly sworn,
 3 was examined and testified as follows:

4

5

DIRECT EXAMINATION

6

BY MR. SHERMAN:

7

Q. Good afternoon, would you please state
 8 your name and address for the record and spell it for
 9 the court reporter.

10

A. Deborah Cacace, spelled C-a-c-a-c-e. My
 11 address is 801 Lord Leighton Court, Virginia Beach,
 12 Virginia.

13

Q. And where do you work?

14

A. Engineering and Testing Consultants,
 15 Incorporated.

16

Q. And what is your role there?

17

A. I am the president.

18

Q. And how long have you been the president?

19

A. Since 1993.

20

Q. And would you explain for the Court your
 21 educational background?

22

A. I have a bachelor of science in education
 23 from Old Dominion University and bachelor of science in
 24 civil engineering and technology from Old Dominion
 25 University; in addition, various additional training,

1 seminars and things like that, probably about 800 hours.

2 Q. And can you explain some of your relevant
3 experience to the situation at hand here?

4 A. My specialty is looking at problems with
5 structures in relation to materials and how they
6 perform. That includes a lot of old brick structures.

7 I've worked on projects for -- under the
8 City of Norfolk contracts, some of the projects there
9 such as Harrison Opera House and I've worked at the --
10 up in Annapolis, an admin building up there that was
11 being rehabbed. That was an old brick building. Some
12 residential structures including one that was built in
13 1750 in Windsor, several structures throughout the City
14 of Norfolk, residential brick structures. Called upon
15 to look at issues or just general structural soundness
16 of those buildings.

17 Q. Thank you.

18 Any experience at the old Cavalier Hotel?

19 A. The old Cavalier Hotel as well, I did
20 some work there while they were rehabbing that.

21 Q. Structural engineering work at the
22 Chamberlain Hotel in Hampton?

23 A. Yes.

24 Q. And then how about for the Cape Charles
25 Historical Society?

1 A. Cape Charles Historical Society, I've
2 worked on their museum and the Palace Theater as well as
3 a new project over there which is an old structure, an
4 old pilothouse.

5 Q. Is this a copy of your resume? Is this
6 an accurate copy of your resume?

7 A. Yes, it is.

8 Q. All right.

9 MR. SHERMAN: Your Honor, I'd like to
10 move her resume into evidence and move to qualify her as
11 an expert in structural engineering.

12 THE COURT: Any objection?

13 MR. CALLAHAN: Yes, I'm going to object
14 to any structural engineering, Judge. I don't see --

15 THE COURT: I'll allow you to conduct
16 additional voir dire, if you'd like.

17 MR. CALLAHAN: Thank you, Judge.

18

19 VOIR DIRE EXAMINATION

20 BY MR. CALLAHAN:

21 Q. Miss Cacace, do you have a license as a
22 structural engineer?

23 A. I'm licensed as a professional engineer
24 in the State of Virginia.

25 Q. Okay. And do you have a specialty in

1 structural engineering?

2 A. I don't have a specialty in structural
3 design engineering. I don't do new design work, only
4 old structures.

5 Q. All right. And did you have -- and I see
6 that you had a chance to review the report of
7 Speight Marshall, did you not?

8 A. Yes.

9 Q. You had an opportunity to review that.
10 But they are structural engineers, are
11 they not?

12 A. They are structural design engineers.

13 Q. Okay.

14 A. Yes.

15 Q. And so you're not someone that a
16 homeowner would have come in and do the structural
17 engineering work for your home, are you?

18 A. I'm someone who a homeowner would have
19 come in and evaluate structural issues and provide
20 recommendations for repair. I don't do things like,
21 "What size beam do I need? I want to take this wall
22 out." I evaluate the existing, make repairs, bring
23 things back into conformance or structural soundness.

24 Q. Okay. And so the report that you
25 reviewed by the structural engineers made some

1 conclusions as to what the condition of the structure
 2 was inside and what should come down; is that correct?

3 A. Yes.

4 Q. And, for example, the back portion of the
 5 house, the porch, they recommended that it come down
 6 because it could fall down at any minute.

7 A. Yes.

8 Q. Is that correct and that --

9 THE COURT: She's not on cross right now.
 10 She's just voir dire.

11 MR. CALLAHAN: Okay. Judge, I would
 12 suggest she does not qualify as an expert.

13 THE COURT: I'm going to ask you to get a
 14 little more specific with regards to her proposed
 15 designation.

16 BY MR. SHERMAN:

17 Q. You testified that your specialty was in
 18 reviewing the structural soundness of historic
 19 structures?

20 A. Historic and any structures, but historic
 21 structures is something that I've done a lot with,
 22 analyzing their condition and determining if they are
 23 sound or if repairs are needed, very similar to what was
 24 done in this report.

25 Q. Right.

1 And so based on your knowledge, skill and
2 experience, is this a job that you would --

3 THE COURT: I don't want opinions yet. I
4 just need to --

5 MR. SHERMAN: I know, I understand.

6 BY MR. SHERMAN:

7 Q. But I'm saying, is this a client that
8 you'll feel comfortable taking into your practice?
9 Whether it be the review of the report or view of the
10 house, is this a structure that fits your specialty and
11 your expertise?

12 A. Yes, my expertise is doing what they have
13 done on this particular job with --

14 THE COURT: Tell me how you would
15 characterize what you do. You're not a structural
16 design engineer, so tell me again what you hold yourself
17 out to be.

18 THE WITNESS: I don't do new design work.
19 I do evaluation of existing materials and assemblies,
20 which include structural systems, to determine if they
21 are sound or if they need repair, but those repairs
22 are --

23 THE COURT: Including the design of those
24 repairs?

25 THE WITNESS: To a certain limit, yes,

1 the design of the repairs, I do that for many, many
 2 structures. Some are beyond my expertise, some are not,
 3 but I do that for many structures, the design of those
 4 repairs.

5 BY MR. SHERMAN:

6 Q. Are you qualified to review the report of
 7 another engineer and opine on whether or not --

8 MR. CALLAHAN: Judge, I'm going to
 9 object. I don't think we're there yet for her to opine
 10 on anything. I don't think this lady is qualified yet
 11 as a structural engineer.

12 THE COURT: The Court is not going to
 13 qualify her as a structural engineer.

14 The Court will entertain another more
 15 limited designation, and I'd like you to offer what that
 16 limited designation would be.

17 MR. SHERMAN: Okay.

18 BY MR. SHERMAN:

19 Q. You're a professional engineer in
 20 Virginia.

21 A. Yes.

22 Q. And how many years experience do you
 23 have?

24 A. 36.

25 Q. Okay. And have you performed and managed

1 projects that include historic structures built in the
2 1900 era?

3 A. Yes.

4 Q. Have you recommended for clients whether
5 or not their structure was sound?

6 A. Yes.

7 Q. Have you recommended whether or not
8 further repairs were necessary?

9 A. Yes.

10 Q. Have you recommended the types of repairs
11 that were necessary?

12 A. Yes.

13 Q. Have you recommended at times that
14 clients seek additional engineering from other companies
15 if there was additional design work beyond the initial
16 review?

17 A. Yes.

18 MR. SHERMAN: So, Your Honor, I would
19 offer her testimony which will assist you in
20 understanding the evidence and understanding this report
21 as far as the structural soundness of the structure and
22 the, and the report for what it says and what it doesn't
23 say as far as structural integrity of that building, not
24 how to fix it, but whether or not it's an imminent
25 threat.

1 MR. CALLAHAN: Your Honor, we would
2 object. She's not a structural engineer.

3 What's been handed to me as her
4 curriculum vitae says her expertise includes all aspects
5 of construction materials testing and evaluation of
6 existing materials and systems including soil, concrete,
7 asphalt, et cetera, et cetera.

8 And so they are trying to offer her as
9 someone to contradict the report that you have of a
10 structural engineer who has made their findings as a
11 structural engineer, which she is not.

12 MR. SHERMAN: That's not why we're
13 offering her, Your Honor.

14 We're offering her to give an evaluation
15 of a structural brick residence built in 1900, which is
16 exactly what she does.

17 THE COURT: As I understand, I think what
18 she's being offered for is the evaluation of historic
19 structures, including structural soundness and design of
20 associated repairs. Do you have a problem with that?

21 MR. CALLAHAN: The only problem I have
22 with that, Judge, she's not been inside this building,
23 so I don't know how --

24 THE COURT: That goes to the weight of
25 her opinions, not whether she can render those opinions.

1 MR. CALLAHAN: All right.

2 THE COURT: She'll be qualified as an
3 expert in the field of evaluation of historic
4 structures, including structural soundness and the
5 design of associated repairs and she may render opinions
6 in those fields.

7 BY MR. SHERMAN:

8 Q. How did you get involved in this project?

9 A. I was contacted by a member of the
10 Freemason Street Area Association and asked if I would
11 review a structural report that was prepared for this
12 residence that was used to obtain an emergency
13 demolition order.

14 Q. Did you review any other documents?

15 A. I reviewed only that report and there
16 were two memorandums from the City of Norfolk included.

17 Q. Did you, did you inspect the property?

18 A. No, I did not inspect the property.

19 Q. Okay. And so you reported on the report,
20 is that fair?

21 A. Yes.

22 Q. Okay. So let's start with what the
23 report does say.

24 How does the report describe the brick
25 shell of the building?

1 A. The report describes the brick shell of
2 the building as structurally sound with some minor
3 deficiencies that at this time were not affecting its
4 structural integrity.

5 Q. And in that 1900 era, was it common for
6 homeowners to have open flames in the house?

7 A. Yes.

8 Q. Did that lead to fires?

9 A. Yes.

10 Q. So is it a common occurrence to have the
11 inside catch on fire and, and the bricks on the exterior
12 remain?

13 A. Yes, I would -- several houses that have
14 had an issue with the fire on the interior and the brick
15 is still in place.

16 Q. Is it fair to say that was somewhat
17 common back in 1900?

18 A. Regularly happened, yes.

19 Q. Okay. And so the brick shell, how has it
20 held up in the two years since the fire in this case?

21 A. Based on this report, there has not been
22 any changes to that brick shell. The only issues that
23 they pointed out were some minor cosmetic issues from
24 long-term erosion, a little bit of erosion of the mortar
25 and I think one crack.

1 Q. The report on page 48 has that quote that
2 you just mentioned, the building's exterior multi-width
3 walls appear to be in sound condition.

4 A. Yes.

5 Q. And do you disagree with his opinion in
6 the next sentence that the brick walls are feasible to
7 be salvaged?

8 A. No, I don't disagree with that.

9 Q. Okay. And then the third sentence is
10 when the parade of horrors begins and the dominoes
11 start to fall. That third sentence says, "As the wood
12 portions of the framing are removed, the exterior walls
13 will lose the lateral stability the roof and the floors
14 provide the exterior walls."

15 A. Yes.

16 Q. If the interior did require extensive
17 repairs, is that how you would do it? Would you rip it
18 out all at once?

19 A. Typically they stage it and would do a
20 floor at a time and they would provide bracing that
21 would maintain the lateral support.

22 Q. Is that, is that a common renovation?

23 A. That's something that's done regularly
24 when they rehab this type of a structure.

25 Q. Okay. And so in your opinion, is this

1 building at risk for imminent collapse?

2 A. No, except for the porch.

3 Q. Okay. And let's contrast the porch to
4 the overall building, if we can.

5 On page 48 at the very, very bottom in
6 bold, you see his recommendation as to the future of the
7 porch?

8 A. Yes, they recommend it be demolished as
9 soon as possible to prevent a potential hazard to the
10 public.

11 Q. Okay. Can you compare and contrast that
12 to his conclusion on page 49 at the bottom in bold for
13 the overall structure?

14 A. That conclusion said --

15 MR. CALLAHAN: Judge, I've got to object
16 because I don't think she can have --

17 THE COURT: The report says what it says.
18 It's been accepted into evidence. I understand we're
19 going to have someone from the firm that will be
20 available for cross-examination. Having her read the
21 report doesn't help me.

22 If you want to have her specifically
23 agree or disagree with portions, I'm happy to go there.
24 But the report's in evidence already.

25

1 BY MR. SHERMAN:

2 Q. Miss Cacace, I'm trying to have you
3 contrast the two -- just for the Court, you mentioned
4 that the porch is in danger of imminent collapse but the
5 overall building, in your opinion, that it's not.

6 Can you contrast what in the report led
7 you to that opinion that there may be two different
8 outcomes for the porch as opposed to the structure?

9 A. Well, the report lists two different
10 things. They said that the exterior was structurally
11 sound and then they mentioned specifically that the
12 porch was in imminent danger of collapse.

13 Q. So if the house was in danger of imminent
14 collapse, would you -- what kind of language would you
15 expect to be in the report?

16 A. The similar language to what they
17 mentioned in the report, that the house was in danger or
18 the entire structure was in danger of imminent collapse.

19 Q. Okay. Is this a true and accurate copy
20 of your report on the report?

21 A. Yes.

22 Q. Okay. And would you for the record read
23 the last two paragraphs of the second page?

24 MR. CALLAHAN: Your Honor, I've got to
25 object. The report he put into evidence. The plaintiff

1 put the report into evidence. Now he wants to
2 contradict his own report.

3 Once he puts it into evidence, he's got
4 to live with what that report says. He can't then put
5 somebody else on the stand to contradict that report.
6 Massie v. Firmstone I think is the case. And so it's
7 long-standing.

8 THE COURT: I'm not sure he put the
9 report -- I mean, he's just relying on the report.

10 MR. SHERMAN: But he put it into
11 evidence.

12 THE COURT: Response?

13 MR. SHERMAN: Your Honor, I put the
14 report into evidence because that's what the Building
15 Commissioner used to justify demolition. So it is
16 evidence in this case, and it needs to be considered and
17 it needs to be attacked.

18 THE COURT: The Court is viewing that as
19 merely an exhibit to a memorandum that he's relying upon
20 to explain the situation.

21 So the Court is not going to find -- I'm
22 not saying this report is coming in, it hasn't been
23 offered yet, but the Court finds that he can go into a
24 counter report.

25

1 BY MR. SHERMAN:

2 Q. Miss Cacace, the last two paragraphs of
3 the second page, would you read those into the record?

4 A. Okay. "Based on the report lacking any
5 indication of damage to the exterior --"

6 THE COURT: I know there's no objection.
7 Have her give me her opinion.

8 Is the report coming in or not?

9 MR. CALLAHAN: I've objected to it.

10 THE COURT: Okay. She's been qualified.
11 Ask her opinion. Her reading from another document is
12 technically still hearsay.

13 So ask her the question and have her
14 answer the question. I don't want her citing from the
15 report, though.

16 BY MR. SHERMAN:

17 Q. I'd like you to give your opinion on the
18 structural soundness and whether or not it's in need of
19 imminent repair.

20 MR. CALLAHAN: Judge, I would ask that
21 the report be removed from her because all she's going
22 to do is read the report. If she doesn't have an
23 opinion based on anything she knows --

24 THE COURT: I agree.

25 If you want to lay a foundation and try

1 to get the report in, that's one issue, but otherwise
2 she doesn't need to have it in front of her.

3 THE WITNESS: Okay. The summary of my
4 report that I provided after reviewing this report was
5 that based on what the Speight Marshall report had
6 described and had recommended that the exterior walls of
7 the house are structurally sound, they are still
8 standing, they have been standing without damage for two
9 years since the fire, almost two years since the fire,
10 and nothing has changed as far as those go. So that
11 they remain structurally sound as indicated in the
12 Speight Marshall report and that they are not in
13 imminent danger of collapse; that there were some
14 portions of the structure that were separate from the
15 brick walls, meaning the back porch was in danger of
16 collapse.

17 And my summary was that the overall
18 exterior structure, which in structural brick houses is
19 where the main structure gets its strength and support,
20 was intact and sound and did not require demolition at
21 this time.

22 BY MR. SHERMAN:

23 Q. Okay, thank you.

24 Did you prepare this report?

25 A. Yes.

1 Q. Does it fairly and accurately state your
2 opinion?

3 A. Yes.

4 Q. Okay. And you mentioned that there were
5 two portions of the structure that are in danger of
6 imminent failure.

7 What is your opinion on the portions of
8 the structure that are in danger of imminent failure?

9 A. They appear to be described accurately
10 based on the pictures I saw and based on the type of
11 construction. The porch is wood frame, so it would have
12 sustained a fair amount of damage from the fire, and
13 that is in danger of further collapse. There was an
14 area mentioned in regards to an interior stairwell where
15 some of the stringers and beams were in danger of
16 falling and people shouldn't walk on that stairwell, and
17 that also is something that needed to be addressed if
18 anybody's going to be inside that house.

19 MR. SHERMAN: Your Honor, I'd move to
20 admit the report as evidence.

21 MR. CALLAHAN: Judge, I'm objecting to
22 the report. She can testify, she has testified. What
23 she's testified to has come into evidence. I don't
24 think her report comes in.

25 THE COURT: I agree. The Court's not

1 going to accept it in as evidence. If you want to have
2 her opine on anything else in her report. But she's a
3 live witness, she can certainly testify.

4 MR. SHERMAN: Sure. Can I offer it and
5 have it marked as rejected?

6 THE COURT: Sure. It will be marked as
7 Plaintiff's Exhibit A that the Court will not be
8 considering.

9 MR. SHERMAN: Thank you, Your Honor.
10 (Plaintiff Exhibit A was marked.)

11 BY MR. SHERMAN:

12 Q. Miss Cacace, the opinion on page 49 in
13 the Speight report about the overall structure, that
14 last sentence says that, "Upon the removal of the wood
15 frame which dangerously stabilizes the exterior walls
16 without a complicated bracing system, it is our opinion
17 that the best and most reasonable course of action for
18 this structure is complete demolition."

19 In your experience and in your
20 professional opinion, is the most reasonable course of
21 action the same as in the threat to public safety and
22 health?

23 MR. CALLAHAN: Objection, Your Honor,
24 that's not what she's qualified to tell us here today.

25 The opinion that's contained in there

1 says it should be demolished. Her opinion is associated
2 repairs and structural soundness. She's testified as to
3 the wall. She's not been in the interior. I don't
4 think she can give us that opinion.

5 THE COURT: I'm going to overrule because
6 I don't think that was the question. I think the
7 question is just whether she understands the term
8 reasonable to be the same as some other term.

9 So go ahead and rephrase the question, if
10 you would like.

11 BY MR. SHERMAN:

12 Q. It's your opinion that the overall
13 structure in this report does not demonstrate imminent
14 failure; is that right?

15 A. Yes.

16 Q. Okay. And so would you expect stronger
17 language in the report if it was in danger of imminent
18 failure?

19 A. Yes, I would.

20 What I think they are recommending here
21 is based on other factors that they have brought up
22 within their report which are true factors about it
23 requiring bracing for repairs and needing to be
24 addressed in a certain manner like we talked about
25 earlier about having to make sure things remain stable

1 while you do the interior work. And they also brought
 2 up cost factors and things like that which are not --
 3 are separate issue from the structural issues.

4 But structurally their report says that
 5 the exterior brick is sound and stable and that the back
 6 porch needs to be removed and the interior has many,
 7 many issues that need to be removed and replaced for
 8 various reasons, some of those being smoke damage, which
 9 is really an odor issue and is something different than
 10 structural damage.

11 MR. SHERMAN: Okay. No further
 12 questions.

13 THE COURT: All right. Cross?

14
 15 CROSS-EXAMINATION

16 BY MR. CALLAHAN:

17 Q. The bracing that you have described, that
 18 would be the bracing that you would have to start
 19 bracing it up at the top, is that correct, of the
 20 structure?

21 A. It depends on how they approach the
 22 rehab.

23 Q. And in order to do that bracing, those
 24 are steel beams that they use?

25 A. There's all different ways to do it. It

1 would be something that was specific to the structure
2 that would -- there are different options. That's one
3 way to do it.

4 Q. All right. And that would go out and
5 possibly block the city street?

6 A. There's only one side that seems to be
7 close to the city street based on the map I looked at.
8 There was 10 or 15 feet to the front of the structure,
9 looks like there's some area behind the structure and
10 one side of the structure has what looks like a parking
11 lot.

12 Q. Have you ever been by the structure?

13 A. I have not. I have only reviewed the
14 maps.

15 Q. You've never been by -- the only thing
16 you've seen is pictures and read the report.

17 A. I've also looked at it on Google Earth
18 and the street maps to see where it lays in relation to
19 the street.

20 Q. Okay. So other than those things and the
21 report prepared by a structural engineer, that's all
22 you've looked at then. You've never gone in the
23 structure, never seen the structure in person.

24 A. No, I have not.

25 MR. CALLAHAN: I don't have any other

1 questions.

2 THE COURT: Redirect?

3 MR. SHERMAN: No, Your Honor.

4 THE COURT: Do you need the witness?

5 MR. SHERMAN: No.

6 THE COURT: Thank you very much. You're
7 excused to stay in the courtroom, if you'd like, or you
8 may leave the courthouse.

9 Any other witnesses for the plaintiff?

10 MR. SHERMAN: Yes, Your Honor. I'd like
11 to call Andy McCullough.

12 THE COURT: All right. How much time do
13 you think -- I scheduled an hour. I really need to be
14 out by 5:30. Is that going to be an issue?

15 MR. SHERMAN: No, Your Honor. I've got
16 two more.

17 THE COURT: All right.

18 MR. SHERMAN: And I would like to offer
19 the opportunity to stipulate that the neighborhood and
20 the City will be irreparably harmed by the loss of the
21 structure which will prevent the need for any more
22 citizens to make that point.

23 MR. CALLAHAN: Judge, if -- I know every
24 one of these citizens would come in and say it was
25 irreparably harmed, okay? I have no doubt they would

1 say that. So there's no need to parade 25 of them up
2 here to say exactly --

3 THE COURT: Ultimately it's a legal
4 issue. But I understand that you're proffering -- if
5 you want to put their names on the record, you're
6 proffering that certain witnesses would testify that the
7 loss of this structure will be irreparable harm to the
8 association, to the local neighborhood.

9 Sounds like Mr. Callahan is willing to
10 stipulate that that's how they would testify.

11 MR. SHERMAN: Thank you, Your Honor.

12 MR. CALLAHAN: I am.

13 (The witness was duly sworn.)

14 THE COURT: You may have a seat.

15 With that said, I don't know if anyone's
16 waiting outside because they anticipated testifying. If
17 someone wants to go out and let them know they are free
18 to come in, that's fine as well.

19 MR. SHERMAN: Could you do that for Mike
20 Spencer? Thank you.

21 THE COURT: All right. We do have a
22 court reporter with us, so if you will make sure your
23 responses are audible so she can write them down as
24 opposed to shaking your head or something like that.

25

1 EDWARD ANDREW McCULLOUGH, called as a
 2 witness by and on behalf of the Plaintiff, being first
 3 duly sworn, was examined and testified as follows:

4
 5 DIRECT EXAMINATION

6 BY MR. SHERMAN:

7 Q. Mr. McCullough, will you please state
 8 your name for the record and spell it for the court
 9 reporter?

10 A. Edward Andrew McCullough,
 11 M-c-C-u-l-l-o-u-g-h.

12 Q. And, Mr. McCullough, what is your
 13 educational background?

14 A. Electrical engineering from Virginia Tech
 15 and I did some graduate work in real estate analysis at
 16 Harvard.

17 Q. Okay, great.
 18 And your career experience?

19 A. I was originally an engineer and did
 20 robotics and satellite work, followed by some
 21 construction and mechanical construction design, and
 22 I've been doing development since 1994, 1995. I started
 23 in the mid nineties doing recreation development all
 24 over the country and then shifted in 2002 or 2003, did a
 25 lot of Enterprise and Empowerment Zone work, office

1 warehouse development, and then in 2005 shifted to what
2 I currently do which is mostly historic -- redevelopment
3 of historic properties.

4 Q. And at this point in your career, what
5 percentage of your work is historic redevelopment?

6 A. Almost all. I mean, certainly more than
7 90 percent.

8 Q. Has that been true for the last 13 years
9 since 2005, as you mentioned?

10 A. Yes.

11 Q. All right. And what type of uses have
12 you converted historic structures into?

13 A. We started initially with small projects
14 that were condominiums, that evolved into apartments,
15 mixed use with apartments, so a lot of retail,
16 restaurants, things like that. We've done some
17 commercial space, some regional headquarters for some
18 self-owned companies in historic space.

19 Mostly now it's, because of the market,
20 the financing, it's mostly a hundred percent apartments,
21 residential.

22 Q. I see.
23 Multi-family?

24 A. Yes.

25 Q. Have you done condos?

1 A. Yes.

2 Q. Have you done single family?

3 A. Yes.

4 Q. Have you done commercial?

5 A. Yes.

6 Q. Multi use?

7 A. Mixed use, like retail?

8 Q. Yes, sir.

9 A. Yes.

10 Q. Okay. And then what localities have the

11 majority of your work been in?

12 A. Most of them local; Suffolk, Portsmouth,

13 Norfolk, and Richmond.

14 Q. Okay. And then briefly your experience

15 in Portsmouth?

16 A. We developed several blocks of buildings

17 in the 600 block and 700 block of High Street. We

18 developed some condominiums and homes on Dinwiddie

19 Street, on Queen Street, on County Street.

20 Q. And then in Norfolk?

21 A. In Norfolk, we did a big project called

22 Riverview Lofts which is down at the end of Colley

23 Avenue, Fort Norfolk.

24 Q. How many units are in that multi-family?

25 A. 81.

1 Q. And then in Suffolk?

2 A. Suffolk we did -- actually, it was the
3 first LEED certified historic -- it's a mixed use
4 project of apartments and retail.

5 Q. Then last but not least, Richmond.

6 A. In Manchester, that's a 70-unit apartment
7 building.

8 Q. Your website says you specialize in
9 complicated and sensitive existing conditions.

10 Can you explain that for the Court a
11 little bit?

12 A. I guess the easiest way is that in
13 historic tax credits, historic tax redevelopment, the
14 biggest disallowed expense or cost is the acquisition of
15 the property.

16 So we always say kind of the uglier, the
17 tougher, the better, because you can usually acquire
18 them cheaper. You don't get any credits on the
19 acquisition and some other things related to the
20 acquisition in addition to some other nonqualified uses.

21 So by default, we've -- the projects that
22 we have found that seemed economically viable to us were
23 projects where the buildings were not in good shape,
24 were not wanted or sort of interested by maybe 20
25 bidders, maybe had to compete against a couple bidders.

1 And for that formula, that has sort of made us like
 2 those types of buildings.

3 Q. You can get ahead doing dirty work.

4 A. For those you can, yeah.

5 Q. All right. How many projects would you
 6 say you've done since -- historic redevelopment projects
 7 since 2005?

8 A. Like total --

9 Q. Maybe it's better to express it in total
 10 construction cost.

11 What's the big picture of your
 12 experience? How would you sum it up for the Court?

13 A. I'd estimate 20 buildings. And we just
 14 recently, but our website's a little outdated, we're
 15 looking at this, I'd say about \$70 million debt and
 16 equity all in.

17 MR. SHERMAN: Your Honor, I'd move to
 18 qualify Mr. McCullough as an expert in historic
 19 redevelopment.

20 THE COURT: Any objection or additional
 21 voir dire?

22 MR. CALLAHAN: Yeah, I'd like to have
 23 some additional voir dire.

24 THE COURT: Go ahead.

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VOIR DIRE EXAMINATION

BY MR. CALLAHAN:

Q. Mr. McCullough, the structures that you did in Richmond, how old were they?

A. Don't totally quote me on this. I think it was 1921, I think. But that's circa.

Q. Okay. And the buildings that you did in Portsmouth, how old were they?

A. They range, again, circa, somewhere between 1901, 1903 to 1930.

Q. Okay. And you are an engineer, electrical engineer?

A. Yes, sir.

Q. Okay. Are you currently licensed as an electrical engineer?

A. No, sir.

Q. So you don't hold any engineering degrees at this stage -- I mean, licenses as of this stage.

A. That's correct.

Q. Okay. And how many historic homes have you done? Anywhere in the State of Virginia.

A. Individual homes?

Q. Yes.

A. Historic homes, we've only done two -- three. One's a duplex, so three.

1 Q. And where are they located?

2 A. In Portsmouth.

3 Q. And how many in Norfolk?

4 A. No historic homes in Norfolk.

5 Q. Okay.

6 MR. CALLAHAN: Thank you.

7 THE COURT: Is there any objection to the
8 qualification?

9 MR. CALLAHAN: No, Judge, I'm going to
10 let it go.

11 THE COURT: Very well. He'll be
12 qualified as an expert in the field of historic
13 redevelopment and he can offer opinions in that field.

14 BY MR. SHERMAN:

15 Q. Are you familiar with the property
16 subject to this litigation, 355 West Freemason Street?

17 A. Yes.

18 Q. And how did you become familiar with that
19 property?

20 A. We originally came to look at the
21 property across the street. I think it's 358 West
22 Freemason. And while we were there, we didn't even
23 know, we hadn't even heard -- even though we lived in
24 Norfolk for a long time, we didn't really know anything
25 about this property.

1 So we came and looked at the other
2 property, and then we saw the gentleman who's the broker
3 for it, I've known for a long time, Lin Miller. So when
4 we went to look at 358, I called up and -- picked up the
5 phone and called Lin.

6 Q. So as soon as you noticed the property,
7 you became interested and called Lin for what purpose?

8 A. To do a project, to do an historic
9 redevelopment.

10 Q. Okay. And did you get in touch with Lin?

11 A. After a little bit of phone tag, yes, we
12 talked and he sent me some information.

13 Q. And let me be clear. This is before or
14 after the fire?

15 A. Well, this is way after. This is -- I
16 think this was early April this year.

17 Q. Okay.

18 A. I don't know the exact date of the fire,
19 but --

20 Q. Right.

21 Okay. And so did Lin get you inside?

22 A. Yes.

23 Q. And tell the Court about the tour of the
24 interior of the property.

25 A. We came in the front door. A gentleman

1 was there. It was secure, so a gentleman had to open it
2 up for us.

3 We came in the front door. And as soon
4 as you come in the front door, you could tell everything
5 had -- not happened -- is charred. From what I
6 recollect, all of the walls were open, gutted down to
7 the studs. The framing studs, and you could even see --
8 it was explained, we learned that an elevator shaft had
9 been built by the stairwell that was new to what the
10 construction was. There was on the right side, which is
11 typical of some things we do, too, there were some new
12 headers that had been installed to change the volume of
13 the space.

14 Then we walked the entire first floor.
15 When we got to the back of the first floor, Lin said he
16 thought -- you could tell from the outside that the back
17 of the house to me looked like it was where it was
18 burned the worst.

19 So the -- in the far back of the house as
20 far as you could walk, that floor did seem a little soft
21 to me. I think the back porch, you couldn't see a whole
22 lot from the outside, the back porch looked like it had
23 to be rebuilt.

24 But the rest of the first floor appeared
25 and felt stable to me.

1 Q. Okay. Was anybody with you?

2 A. Yes, my wife was with me and Lin and the
3 gentleman, I can't remember his name, who let us in.

4 Q. And what does your wife do for a living?

5 A. She's an architect.

6 Q. Does she work with you?

7 A. She does.

8 Q. Did you go to the second floor?

9 A. We went up. Lin cautioned us that --
10 because we asked some questions about the roof. We were
11 curious about the condition of the roof, because you
12 couldn't see -- you could up a lot, but you couldn't see
13 everything.

14 So we said could we go to the second
15 floor, and Lin told us, "Well, it's not advisable you go
16 up to the second floor. We think it may be unsafe." So
17 we walked to the top of the stairs and looked around.

18 Q. Okay. And did you see any collapsed
19 floors?

20 A. No, where we were, I did not see any
21 collapsed floors other than the back, that soft area,
22 but I didn't see any soft -- or collapsed floors, no.

23 Q. Did you see any collapsed walls?

24 A. No.

25 Q. Did you knock on any of the framing?

1 A. We did. We did. I mean, just -- it
2 didn't look like anything had buckled or was buckling,
3 so we did it more just from a -- that wood is different
4 than wood nowadays. Your wood nowadays, your wood
5 nowadays, two-by-fours are really a
6 one-and-a-half-by-three-and-a-half. That wood is --
7 looks like at least a true two-by-four. So we did.

8 Q. And did the wood pass, the framing pass
9 the knock test to your satisfaction?

10 A. It seemed like it was usable. It didn't
11 seem that it was unusable, that you would have to --
12 that you would have to remove it. You would have to
13 clean it for sure and -- I guess depending on how you
14 would lay the house out, because it was broken up into
15 rooms, that if you put your own headers in, you would
16 have to put some new structure in to create new open
17 spaces or we have -- in old buildings, a lot of times
18 you see in roof joists, that you have to sister up the
19 joist, you have to attach them to each other. That you
20 could also do in a wall.

21 But the walls seemed because of the
22 thickness of the wood, they seemed to have structural
23 integrity.

24 Q. Did you have any concerns moving forward
25 with, with pursuit for development?

1 A. No.

2 And I rely heavily on my wife when it
3 comes to a lot of that, too. I learned from her that
4 she said the house across the street scared her more
5 than this house.

6 Q. So did you pursue the structure for
7 purchase and development?

8 A. We did. So we started talking with Lin
9 about it and, and conversing with Lin and just sort of
10 starting a dialogue, even inquiring -- we didn't know
11 Dr. Sinesi. Lin had lots of good things to say about
12 Dr. Sinesi. So we inquired whether Dr. Sinesi, what was
13 his objective, what was his goal. Would he want to be a
14 partner in development? Is it just an outright sale?
15 Does he plan on redeveloping it?

16 So we sort of started that dialogue. We
17 told Lin right out of the gate it was a project because
18 of where it is in the City, that we wouldn't even dream
19 of going under contract until we met with the
20 association and had their, if not hundred percent
21 blessing, 95 percent blessing of what we were proposing.

22 So we went to work on a site plan of what
23 could fit, what -- we thought preserving the historic
24 structure and the historic garden was where the value
25 was if you redeveloped this project -- and what else we

1 could fit to make it economically viable on that.

2 And we went through, you know -- the
3 Building Code and the City Code is in black and white.
4 You always do miss a few things. That's why you make
5 sure you get City approvals before you go through it.

6 But we believed that per City Code, we
7 came up with a site plan, conceptual site plan that
8 would work, and that's when we met with about ten or so
9 folks from the Freemason association.

10 Q. Okay, great. I'm going to hand you a
11 copy of the conceptual site plan.

12 Is that a true and accurate copy of the
13 conceptual site plan that you gave to the neighborhood
14 subcommittee on August 2nd at that meeting you
15 described?

16 A. Yes. This is my wife's handwriting, yes.

17 Q. Okay. And for those who aren't looking
18 at it, can you just describe what the idea was and what
19 the development was you were pursuing to the point that
20 you wanted to get neighborhood approval?

21 A. Okay. Our idea was we were going to --
22 the historic building and piece of property, we had
23 learned that historically there had not been another
24 property, another structure, building on the piece of
25 property, so we thought it was important valuewise to

1 preserve the garden.

2 So we took the -- this is basically a
3 square and we made a large L encompassing the long side
4 of the L, the historic house, and on the short side of
5 the L, the historic garden, and that would be one
6 property, and then we took the remaining part of the
7 property and subdivided it into two parcels to build two
8 wide -- 24-foot wide townhomes.

9 Q. And at this point had you made a formal
10 offer to Dr. Sinesi for the house?

11 A. No. I just talked numbers with Lin.

12 Q. So why would you waste your time with the
13 neighborhood without having made a formal offer?

14 A. Well, we -- I didn't think that the house
15 could -- would ever be demolished. In my experience and
16 I know other houses have been demolished and buildings
17 have been demolished, but -- so we thought this was the
18 plan to go.

19 And we thought, again, this had some
20 complexities to it that we could handle and that we
21 were -- we think were good projects this size and this
22 complexity.

23 So, but I think the most -- once we knew
24 the math worked for the lot sizes and setbacks and all
25 of those kind of things, we believed then, you know,

1 that we could -- we wouldn't want to sit down and
 2 negotiate -- we typically don't like to get things under
 3 contract and then play games with changing negotiations.
 4 We like to know where we stand.

5 And meeting with the association, we know
 6 the association of Freemason, some folks that we had
 7 known in the past are very involved with the community,
 8 as evidenced, I guess, that we needed to have at least a
 9 partial blessing there before we got into formal
 10 details.

11 MR. SHERMAN: Your Honor, at this time I
 12 would like to move the conceptual site plan into
 13 evidence.

14 MR. CALLAHAN: No objection.

15 THE COURT: Very well. Plaintiff's 6, I
 16 believe.

17 (Plaintiff Exhibit Number 6 was received.)

18 MR. SHERMAN: Thank you.

19 THE COURT: Did you formulate a cost plan
 20 with this renovation plan?

21 THE WITNESS: Yes, sir.

22 BY MR. SHERMAN:

23 Q. And what were the ballpark of numbers
 24 that you were talking to for the right range where you
 25 could acquire this property?

1 A. With the historic structure there?

2 Q. Yes.

3 A. Around \$500,000.

4 Q. Okay.

5 A. And that had some contingencies on
6 whether or not we could resell a townhouse or whether we
7 could -- all those things mattered. And we knew that in
8 this price range if we could make our offer 50 or 75,000
9 better, that maybe would make a difference. So we knew
10 there were some market conditions that if we could meet,
11 we could offer a little bit more.

12 Q. It's fair to say, though, Dr. Sinesi
13 through his realtor was aware that you were a serious
14 candidate to pursue development of the property with the
15 structure.

16 A. I've known Lin for about 20 years and so,
17 yeah, I think no question, Lin as I spoke a lot about
18 it.

19 Q. Okay. And then you're aware now that you
20 did get a demo permit.

21 A. Yes. I mean, I haven't seen the permit,
22 but I've been told that or I've seen an email, I guess.

23 Q. And do you maintain an interest in
24 purchasing the property even if it was vacant?

25 A. If it doesn't get demoed?

1 Q. If it does.

2 A. Oh.

3 Q. If it did get demoed, would you still be
4 interested?

5 A. We would be. At that point, we probably
6 are competing against more people and we may not be able
7 to offer -- and we made an offer to Dr. Sinesi that if
8 it was demoed.

9 Q. What did you offer for the property if
10 vacant?

11 A. Including demolition cost, 7 -- I believe
12 \$700,000. I don't have that with me, but I think
13 700,000 is the number.

14 Q. Okay. So the land is worth more than the
15 land with the structure, from your perspective.

16 A. In my opinion, most definitely.

17 Q. Okay. In the neighborhood of \$200,000
18 more, the land alone.

19 A. To me.

20 Q. Right.

21 A. But to me, it would be.

22 Q. Okay. If there was no emergency
23 exemption demolition permit and the doctor had to market
24 the property for fair market value, would you remain
25 interested in purchasing the property for redevelopment

1 of the structure?

2 A. Sure.

3 Q. And with the structure, there's still an
4 opportunity for tax credits, right? As opposed to
5 without a structure, there's no opportunity for any
6 marketplace participant to pursue rehabilitation tax
7 credits.

8 A. That's correct. I mean, until you file
9 your part two and get it approved, you never know what
10 you'll have to do. But I believe that to be correct.

11 Q. Okay. And then have you seen the
12 engineering report, by any chance?

13 A. I haven't read it, no.

14 Q. Okay. It shows a lot of burned wood
15 and -- and is that consistent with your experience in
16 the house?

17 A. Yeah, I would say everything was charred.

18 Q. Okay. The report also says that the
19 framing must be demolished and replaced.

20 Is that how you would approach it?

21 MR. CALLAHAN: Judge, if -- I'm going to
22 let him testify to that. His approach to it is far -- I
23 mean, that's his approach. I don't think it's his
24 opinion as to -- take it out if you want to.

25 THE COURT: I know you withdrew your

1 objection. He may answer the question.

2 THE WITNESS: We would have our own -- as
3 part of our design process, we would have an architect
4 and structural engineer go through, you know, maybe not
5 a fine-toothed comb, but go through foot by foot in the
6 structure to see what we can do.

7 But from what I saw and what I've learned
8 from Monica's analysis, that it did not appear to me
9 that you would have to take things out and replace it
10 if -- if you had to do that, it wouldn't have the value
11 to me just because I'm not sure how you would even do
12 that in a structure like that.

13 BY MR. SHERMAN:

14 Q. Um-hum.

15 So the repairs that you contemplated
16 making to the interior framing, would you consider those
17 common in your line of work or extraordinary?

18 A. Common. There was nothing that, that I
19 thought out of the ordinary. Even the back porch. When
20 you get to a point where something is not salvageable,
21 you're able to recreate it, which we've done before,
22 too. And the metal stairs on the side were modern
23 additions, as far as we know. Those would be taken off
24 permanently anyways. They were on the left side of the
25 house.

1 Q. Okay. One note I missed in my outline
2 here.

3 Is the reason that the land's worth more
4 vacant, does that have to do with density that the
5 developers can utilize?

6 A. Yes.

7 Q. Okay. And do you have any experience
8 with emergency demolitions in the City of Norfolk?

9 A. Yes, we have had a building that was
10 proposed to be emergency demolished. We currently still
11 own the property, but the building's been demolished.

12 Q. And was that subject to a temporary
13 injunction in Norfolk?

14 A. It was.

15 Q. And you as the building owner were trying
16 to prevent demolition, right?

17 A. Correct.

18 Q. Okay. And that building, did it have a
19 roof?

20 A. No.

21 Q. Did it have all four walls?

22 A. No. It had about three and a quarter
23 walls.

24 Q. Okay. And the Court did initially grant
25 the temporary injunction; is that right?

1 A. Yes.

2 Q. And when the demolition was done
3 eventually, it was not due to structural instability; is
4 that fair?

5 A. Correct.

6 Q. Okay. And who -- what engineering firm
7 helped create a shoring report that allowed that
8 building to remain standing with no roof and three and a
9 quarter walls?

10 A. Danny Speight, Speight Marshall.

11 Q. Okay.

12 MR. SHERMAN: Your Honor, I have no
13 further questions.

14 THE COURT: All right. Mr. Callahan?

15

16 CROSS-EXAMINATION

17 BY MR. CALLAHAN:

18 Q. So it's my understanding then that when
19 you looked at this building and you met with the people
20 with the Freemason association, it was your intent to
21 preserve the building and rehab the building as it
22 existed.

23 A. Yes, sir.

24 Q. And then to add on two more townhouses on
25 the lots next to it.

1 A. And a garage on for the house, too.

2 Q. And do you know Paige Pollard?

3 A. I do very well.

4 Q. And you know that she does historical
5 structures, do you not?

6 A. She has done all of our work since '05.

7 Q. Okay. Did you talk with her about this
8 structure?

9 A. We did not.

10 Q. Okay.

11 A. I guess we -- maybe we briefly did. I
12 don't remember, but not in any detail that we normally
13 would have.

14 Q. And she had an opinion earlier that a
15 proposed garage would not be phase two of the historical
16 preservation to get the tax credits.

17 Your proposal has a garage.

18 A. We would not do this project with tax
19 credits.

20 Q. You would not.

21 A. We -- this is again our understanding
22 because we didn't -- again, we don't like to waste
23 Paige's time either.

24 We wouldn't have gone to Paige until we
25 were doing this.

1 But we understood through Lin that
2 Dr. Sinesi couldn't build a garage and some things next
3 to him because of what I stated before, that there
4 historically had not been another structure there.

5 When you look at this economically, you
6 have to do the two other homes.

7 We tried actually to squeeze three in,
8 but they were kind of small.

9 You have to do them economically to make
10 this work.

11 Well, we knew once you did that, once you
12 triggered any other structure, that you would not be
13 able to do State or Federal credits on the house.

14 So once you did that, we said, "Well, how
15 do we make the house more marketable?" We thought we
16 would set back a garage for it and we would do the two
17 townhouses.

18 So our plan would not be to apply for any
19 historic credits on this project.

20 Q. So your position as far as preserving the
21 house has always been the same. It's always been your
22 intent to preserve the house and rehabilitate it up
23 through today's date.

24 A. Yes.

25 Q. Okay. And that's always been your

1 position.

2 A. I guess I'm -- I don't understand.

3 Q. Well, that's what you always intended to
4 do.

5 If you acquired the property, you were
6 going to rehab the structure, 355 West Freemason Street,
7 so you could use it again as a house.

8 A. To sell.

9 Q. Yes.

10 A. And then we were told that a demo permit
11 had been issued, so Lin said, "If you want to make an
12 offer, now's the time. I've got other people interested
13 in the land. Make us an offer as land." So then we
14 also made an offer as just raw land, too.

15 Q. So you run Rockville Development, LLC, do
16 you not?

17 A. Yes, sir.

18 Q. And on August 17th, you sent a letter to
19 Dr. Sinesi advising him that you would buy the property
20 for \$600,000 cash, isn't that correct?

21 A. I think I added some demo costs in there.
22 I'm sorry if I misspoke before. I thought I remember
23 that being 625 plus 75. I thought it was 700. I didn't
24 look at it today.

25 Q. But as part of that contract, you wanted,

1 you wanted Dr. Sinesi to demolish the house.

2 A. I was told that's what -- how it had to
3 happen. Lin told me I had to frame my offer that way.

4 Q. And you've done developments all over,
5 you said.

6 A. Virginia.

7 Q. Right.

8 And you don't take Lin Miller with you
9 all over Virginia, do you?

10 A. No.

11 Q. Okay. And so this is your signature, is
12 it not, that appears on the last page of this document?

13 A. Yes.

14 Q. And the paragraph under Demolition of
15 Existing Structure, read me what that says.

16 A. "Seller shall engage and incur the cost
17 of a demolition contractor to demolish the existing
18 house and all interior walls and other hard materials.
19 Only brick fence on West Freemason to remain. This
20 shall include filling any basements or holes with proper
21 structural fill material. Purchaser to reimburse seller
22 up to \$75,000 for these expenses at closing."

23 Q. So it's been your intent to demolish the
24 building.

25 A. No, that was the new. Once we were told

1 it was being demolished, that was, that was our new
2 offer.

3 MR. CALLAHAN: Your Honor, I'd like to
4 offer this, please, as Defendant's Exhibit 1.

5 THE COURT: Any objection?

6 MR. SHERMAN: No, Your Honor.

7 THE COURT: Defense Exhibit 1.

8 (Defendant Exhibit Number 1 was received.)

9 BY MR. CALLAHAN:

10 Q. So this plan you showed the people at
11 Freemason was just a fairytale.

12 A. No, at that time, like I testified
13 earlier, there was no way I thought that this house
14 would be demolished. I never thought that --

15 Q. And you said --

16 A. -- it would be allowed to be demolished.
17 That was our plan.

18 Q. You've come into this courthouse before
19 and made the same type of promises on the American Cigar
20 building, have you not?

21 A. I think that's -- those are apples and
22 oranges.

23 Q. Did you not come into this courthouse and
24 seek to have the American Cigar building -- you got a
25 temporary injunction on the American Cigar building,

1 isn't that correct?

2 A. Yes.

3 Q. And Judge Doyle gave you additional time
4 to put all your financing together, isn't that correct?

5 A. Yes.

6 Q. And nothing ever came to fruition.

7 A. Well, we disagree with that statement. I
8 don't believe that to be true.

9 Q. Okay. But Judge Doyle authorized the
10 City to tear down that structure.

11 THE COURT: The Court is familiar with
12 the case. The Court will take judicial notice that was
13 ordered.

14 THE WITNESS: I can't speak for what
15 Judge Doyle said or didn't say.

16 MR. CALLAHAN: No further questions.

17

18 REDIRECT EXAMINATION

19 BY MR. SHERMAN:

20 Q. I just want to make sure the evidence is
21 clear. The American cigar property, you opposed the
22 demolition, right?

23 A. Of course.

24 Q. Okay. And in this case, your initial
25 interest was based on preserving the structure, right?

1 A. Yes. We're not as interested as a piece
2 of raw land. We're interested because this is what we
3 like, we think we know and we think we do well.

4 So, yes, we still made an offer for the
5 raw land, but that was after we were told it was a
6 foregone conclusion the house was being torn down.

7 THE COURT: You're saying you're not as
8 interested, but your offer was actually higher without
9 the building, isn't it, or did I miss something?

10 THE WITNESS: It was higher because of
11 the density. You could do up to five structures. And
12 at that point I didn't think -- we were told then that
13 our offer was rejected; it was not high enough for the
14 raw land.

15 BY MR. SHERMAN:

16 Q. Is this a true and accurate copy of the
17 density schematic site plan that you could achieve on
18 the site if the house was -- the existing structure was
19 not there?

20 A. Yes.

21 Q. All right.

22 MR. SHERMAN: Your Honor, I'd offer the
23 355 West Freemason schematic site plan into evidence.

24 THE COURT: Any objection?

25 MR. CALLAHAN: I have no objection,

1 Judge.

2 THE COURT: Plaintiff's 7.

3 (Plaintiff Exhibit Number 7 was received.)

4 BY MR. SHERMAN:

5 Q. So the owner of the property perceives
6 the value higher without the house.

7 MR. CALLAHAN: Judge, objection as to
8 what the owner perceives unless he's reading minds.

9 THE COURT: Sustained. Rephrase.

10 BY MR. SHERMAN:

11 Q. Okay. Do you think there's more bidders
12 in the market with or without the house?

13 MR. CALLAHAN: Objection, Your Honor.
14 He's not qualified to make these assertions.

15 THE COURT: Response.

16 MR. SHERMAN: He's in the marketplace.

17 THE COURT: He's not been qualified --

18 MR. SHERMAN: He's a builder. He
19 competes for these projects.

20 THE COURT: He's qualified in historic
21 redevelopment, not on market pricing. The objection is
22 sustained. Next question.

23 MR. SHERMAN: Do I need to requalify him
24 as a builder?

25 THE COURT: He's been qualified as an

1 historic -- I guess you can try. I'm not sure --

2 MR. SHERMAN: Will you stipulate he's an
3 expert in --

4 MR. CALLAHAN: I will not stipulate to
5 anything based upon what I've come to understand about
6 the projects that he's worked on. So I cannot stipulate
7 to that.

8 THE COURT: You can make the argument.

9 MR. SHERMAN: I understand.

10 THE COURT: If this guy is willing to
11 offer more vacant than with the house, I think that's
12 kind of a proxy to the fact the market's interest is
13 higher without the building there. I got it.

14 BY MR. SHERMAN:

15 Q. In your professional opinion and based on
16 your experience as -- in historic redevelopment, do you
17 have any concern pursuing the existing structure for the
18 project?

19 A. No.

20 MR. SHERMAN: No further questions.

21 THE WITNESS: Not today.

22 THE COURT: Anything else?

23 MR. CALLAHAN: No, sir.

24 THE COURT: All right. Any reason to
25 hold the witness?

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MR. SHERMAN: No, Your Honor.

THE COURT: You're excused, sir. You're free to stay in the courtroom or leave the courthouse. It's your choice.

MR. SHERMAN: Lin Miller is the last witness.

THE COURT: All right.

THE BAILIFF: Step up here, sir.

(The witness was duly sworn.)

THE COURT: Please have a seat.

The court reporter is writing everything that's being said, so if you'll make sure your responses to the questions are audible so she can understand them and write them down as opposed to shaking your head, okay?

LIN MILLER, called as a witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHERMAN:

Q. Good afternoon. Would you please state your name for the record.

A. Lin Miller.

1 Q. Thank you.

2 And, Mr. Miller, what type of work do you
3 do?

4 A. I'm a realtor with Berkshire Hathaway
5 Towne Realty.

6 Q. How long have you been doing that?

7 A. I've been in real estate for 29 years.

8 Q. Do you consider yourself an expert in
9 real estate?

10 A. I do.

11 Q. And --

12 MR. CALLAHAN: Judge, so do I.

13 THE COURT: Let's get a little more
14 specific. Talking about commercial real estate?

15 MR. CALLAHAN: Judge, as far as
16 residential real estate is concerned, if you want to buy
17 or sell a house, get Lin Miller to do it.

18 THE COURT: All right. Residential real
19 estate, is that where we're going?

20 MR. SHERMAN: I wasn't going to qualify
21 him. I wanted to make sure he was confident in his own
22 opinions.

23 THE COURT: Mr. Callahan is confident. I
24 think that's probably good enough for your purposes.

25 MR. SHERMAN: It will do.

1 BY MR. SHERMAN:

2 Q. Do you consider yourself in the business
3 of selling good advice?

4 A. Yes.

5 Q. How did you become familiar with the
6 subject property 355 West Freemason Street?

7 A. When it was listed for sale when the
8 Shrivvers were selling it, my clients became interested
9 in it and we started investigating.

10 Q. I want to show you a picture.
11 Do you recognize that picture?

12 A. I do.

13 MR. CALLAHAN: Thank you.

14 BY MR. SHERMAN:

15 Q. Can you describe for the court reporter
16 what you see there?

17 A. I see the parking lot that's adjacent to
18 the property.

19 Q. And that parking lot, that's part of the
20 property owned as part of this subject property, right?

21 A. Correct.

22 Q. Okay. And do you see your for sale sign?

23 A. Yes, I do.

24 Q. Okay. And do you see the cars in the
25 parking lot?

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A. I do.

Q. Do you recognize those cars?

A. I do not.

Q. Okay.

MR. SHERMAN: Your Honor, I move the picture into evidence as Plaintiff's Exhibit 8.

THE COURT: Any objection?

MR. CALLAHAN: No objection.

THE COURT: Plaintiff's Exhibit 8.

(Plaintiff Exhibit Number 8 was received.)

BY MR. SHERMAN:

Q. So you're marketing the property now?

A. Yes.

Q. You've got a listing.

A. Yes.

Q. And you're marketing the property for its land value?

A. Marketing it for 899,000.

THE COURT: That's not the question.

The question was whether you're marketing with the improvements or without the improvements.

THE WITNESS: The total package. The land value.

BY MR. SHERMAN:

Q. With or without?

1 A. Well, the house exists, so it becomes
2 part of the equation.

3 Q. Okay. But do you think that the 899 list
4 value is based on the structure as a contributing --

5 A. No.

6 Q. Okay.

7 THE COURT: When you're holding it out
8 for sale, is it with the structure or without the
9 structure? Buy it today, is the understanding you're
10 going to -- it will be demolished by the time we close
11 or it will still be there or you don't know?

12 THE WITNESS: I don't know. It's not my
13 decision.

14 BY MR. SHERMAN:

15 Q. Okay. And do you think that the list
16 price is validated by the land value? It's got to be.

17 A. Yes.

18 Q. Have you shown the property to anybody?

19 A. Yes.

20 Q. And how many people have you shown the
21 property to?

22 A. Seriously, about three.

23 Q. Okay. Have you shown the inside of the
24 property to anybody?

25 A. Yes, once.

1 Q. Okay. So I think you said today to some
2 degree you are marketing the structure itself, too, that
3 is on the land.

4 A. Well, I can't disclose what can happen
5 with it, but I clearly think the value's in the parcel
6 without the structure.

7 Q. Okay. Would you agree that the list
8 price would be less if the structure had to remain?

9 A. Probably.

10 Q. Okay. I'm going to hand you a copy of a
11 listing that I've printed last week.

12 A. Um-hum.

13 Q. That's off of Linmiller.com, do you see
14 on the bottom left?

15 A. Correct.

16 Q. The first backslash land, I guess this
17 has been tagged as a land sale, is that accurate?

18 And then you already stipulated the
19 purchase -- the listing price, \$899,000.

20 A. (Nodding).

21 Q. I need you to say yes or no for the --

22 A. Yes, yes.

23 Q. And then on the second page, you've got
24 an overview.

25 Is this a true and accurate copy of the

1 listing?

2 A. Yes.

3 Q. Does it accurately reflect the listing
4 that you posted on line?

5 A. Yes.

6 Q. Okay.

7 MR. SHERMAN: Your Honor, I'd move the
8 listing into evidence.

9 THE COURT: Objection?

10 MR. CALLAHAN: No objection.

11 THE COURT: Plaintiff's Exhibit 9.

12 (Plaintiff Exhibit Number 9 was received.)

13 BY MR. SHERMAN:

14 Q. And I'm going to read from the overview.
15 It says, "Very large parcel with an uninhabitable
16 existing structure with historical significance. Many
17 development possibilities along with potential for tax
18 abatement depending on final approved plans. Property
19 survey attached."

20 So why notate the historical significance
21 if the value's in the land?

22 A. Because of where it's located. I think
23 Freemason is a very -- I think everybody would agree
24 it's an historical neighborhood.

25 Q. So it's your position that the phrase "an

1 inhabitable existing structure with historical
 2 significance --"

3 A. Uninhabitable.

4 Q. Oh, I'm sorry. "Existing structure with
 5 historic significance"?

6 A. It's relative. I don't personally think
 7 it has historic significance, but...

8 Q. Well, I guess you don't really care, do
 9 you, if you sell it with or without a house or someone
 10 is buying it for not the house, you don't really care,
 11 do you?

12 A. No.

13 Q. So you're marketing it both ways really,
 14 right?

15 A. I have never been certain that the house
 16 could be torn down, so based on that, I put it out there
 17 the way it is.

18 But when asked, I do believe the value is
 19 in the land, not in the house.

20 Q. Sure.

21 And if someone showed up and said, "Hey,
 22 I'll pay 901 for the house," you would take it and run.
 23 You wouldn't --

24 A. Well, I would present it to my client.

25 Q. Would you run to your client?

1 A. I would call my client and find out his
2 availability. I'm only the conduit.

3 Q. Again, in here you mentioned tax
4 abatement depending on final approved plans.

5 A. Possibility is what I --

6 Q. That goes to the structure, though.
7 There's not -- there's not tax abatement in the land?

8 A. I don't know for sure either way.

9 Q. So is it your custom and practice to
10 market information you're not sure of?

11 A. The possibility of it because I've talked
12 to people with opinions. I didn't -- I couldn't prove
13 or disprove those opinions, so I put the possibility in
14 there.

15 Q. Right. You're just the conduit.
16 Do you know what Dr. Sinesi paid for the
17 property?

18 A. I do.

19 Q. And how much is that?

20 A. 675,000.

21 Q. Okay, great.

22 MR. SHERMAN: I've got a certified copy
23 of the deed from the land records. I'm going to move
24 that into evidence, Your Honor, as Plaintiff's
25 Exhibit 9.

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THE COURT: 10.

Any objection?

MR. CALLAHAN: No, thank you, Judge.

This is the deed that was returned to my office after I closed it.

THE COURT: Plaintiff's Exhibit 10 without objection.

MR. SHERMAN: Let me give you the certified copy. That was his copy. Thank you.

(Plaintiff Exhibit Number 10 was received.)

BY MR. SHERMAN:

Q. So you testified that Dr. Sinesi paid \$675,000 when he was obligated to preserve the structure, right?

A. Well, I don't know the obligated, but he bought it as a structure he was planning to preserve.

Q. Okay. For 675.

A. Correct.

Q. And now he's selling it for land value for almost \$900,000.

A. Well, that's what we feel it's worth.

Q. I understand. I'm just trying to be clear.

So the value of the property went from

1 675 --

2 THE COURT: I got it. I got it.

3 MR. SHERMAN: You got it?

4 THE COURT: I got it.

5 MR. SHERMAN: I want him to say it,
6 though, Judge.

7 BY MR. SHERMAN:

8 Q. If he's allowed to demolish it, you get
9 full listing price, he stands to gain \$225,000?

10 MR. CALLAHAN: Judge, this is America.

11 THE COURT: It's not even relevant to a
12 temporary injunction. So I've got -- we need to move
13 along.

14 MR. SHERMAN: That's the last question.
15 I'm done. But I would -- I know it's been a long
16 process, but the equities are a part of the injunction.
17 And if the -- everybody loses except for the owner, I
18 would posit that there is a balance of equities in the
19 issue.

20 THE COURT: I agree. I think you
21 demonstrated by -- I've got your point. I don't think
22 you should say it again. You can raise it again in
23 closing.

24 MR. SHERMAN: No further questions.

25 THE COURT: Okay. Thank you.

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Cross?

MR. CALLAHAN: Yes.

CROSS-EXAMINATION

BY MR. CALLAHAN:

Q. Mr. Miller you've been -- you sold Dr. Sinesi the house.

A. Yes.

Q. And was it his plan to live in the neighborhood?

A. Yes.

Q. Would you say he was excited about living in the neighborhood?

A. Yes.

Q. And did he have plans prepared and undergo expense in order to make improvements to the home?

A. Significantly.

Q. And what type -- how much expense are you aware of that he had --

A. I don't honestly know how much, but I know --

MR. SHERMAN: Objection. He doesn't know.

THE COURT: Hold on.

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THE WITNESS: I don't know.

BY MR. CALLAHAN:

Q. But it was his plan to renovate the structure?

A. And live there.

MR. CALLAHAN: Thank you very much.

THE COURT: Redirect?

MR. SHERMAN: No.

THE COURT: Any reason to hold the witness?

MR. SHERMAN: No, Your Honor.

THE COURT: You're excused, sir. You're welcome to stay in the courtroom or leave the courthouse. Your choice.

MR. SHERMAN: No other witnesses.

THE COURT: All right. Any other evidence? Plaintiff rests.

MR. SHERMAN: Your Honor, we just want to put on the record that Mike Spencer and Jack Kavanaugh would both testify that the property has inherent value with the structure that contributes to the historic neighborhood and the designation as an historic district and that the neighborhood and the City and individuals living in the neighborhood would be irreparably harmed as a result of the loss of the structure, including with

1 an unknown loss in value to their own real estate.

2 THE COURT: Any objection to the proffer
3 that that's what the testimony would be?

4 MR. CALLAHAN: No, Judge, I don't have
5 any objection to that.

6 THE COURT: Very well.

7 All right. Does the plaintiff rest?

8 MR. SHERMAN: Yes, Your Honor.

9 THE COURT: Mr. Callahan?

10 MR. CALLAHAN: I'd like to move to strike
11 at this stage.

12 Your Honor, they are here asking for a
13 temporary injunction.

14 And as I mentioned when we started this
15 case, that obviously there are no cases in the State of
16 Virginia that deal with this.

17 The leading case in the Fourth District
18 is The Real Truth About Obama, Inc. versus Federal
19 Election Commission where the Fourth Circuit went back
20 and had to change its opinion based on the Winter case.

21 And as a result of that, there are four
22 tests that the plaintiff has to meet in order to have a
23 temporary injunction put in place.

24 As you're aware, Judge, under the old
25 case law, the burden under the old case law, and that

1 was Blackwell Furniture Company of Statesville versus
2 Seilig Manufacturing, 550 F.2d 189, it was a Fourth
3 Circuit opinion from 1977, was the old testing was a
4 balancing test. I know Your Honor's aware of that.

5 The new test, there are four phases that
6 he's got to show, Judge, and at this stage, I don't
7 think they've met that burden.

8 Number one, that he's likely to succeed
9 on the merits.

10 You received evidence, you heard
11 proffered statement from the City that the building
12 official has acted in accordance with what he's required
13 to do by law; number two, that they had so many days, 14
14 days as an aggrieved person to make a claim to come in
15 here administratively to appeal it and then to bring it
16 here if they lost that appeal --

17 THE COURT: Just to be clear, I'm viewing
18 that as a jurisdictional question separate and apart
19 from likelihood of success on the merits.

20 I'm going to assume if we're going to
21 argue likelihood of success, then there is jurisdiction.
22 The Court's going to have to look at that separately,
23 and I'll mention that when we're done today. I'm going
24 to need some additional information, because if this
25 Court doesn't have jurisdiction, the Court doesn't have

1 jurisdiction. That's a separate issue, though.

2 MR. CALLAHAN: That is a separate issue.

3 We would suggest that Your Honor does not
4 have subject jurisdiction.

5 I think the request by the Freemason
6 association just to come in and ask for a temporary
7 injunction when there's no case to ride on is not
8 appropriate.

9 And, Judge, the last test and --

10 THE COURT: Do you have a case that says
11 that, by chance? That's my inherent understanding as
12 well, but -- I don't know if there's a case that says
13 that because Virginia law on temporary injunctions is
14 sparse at best.

15 MR. CALLAHAN: And that's the problem.
16 So you got to rely on the Fourth Circuit. And those
17 cases are lined up, the Winter's case because of the
18 Navy doing their testing off the coast of California.

19 I hear that they are going to suffer
20 irreparable harm and do the balance of the equities tip
21 in their favor.

22 I would suggest to you they do not as it
23 pertains to Dr. Sinesi.

24 THE COURT: What's the inherent -- what's
25 the harm to Dr. Sinesi should the Court grant the

1 temporary injunction?

2 MR. CALLAHAN: Well, other than going to
3 jail and being fined by the Court down on the first
4 floor, other than that, eight years in Norfolk City
5 Jail, I guess there really is no inherent problem.

6 It's like getting 29 days in the electric
7 chair and getting one of those days suspended. You
8 know, it's just one day in the electric chair's going to
9 cause you problem.

10 You know, he can't do anything.

11 Now the City's going to turn around and
12 he's getting harmed because now the City's going to go
13 out and they are going to tear it down, and he'll have
14 to pay the expense of it even though he's gone to the
15 stage to get somebody to do that, which is not in
16 evidence before you at this stage.

17 But last but not least, Your Honor, the
18 City has found that the fourth prong of this test is
19 that injunction is in the public interest.

20 Judge, the public interest is all the
21 public, not just what's going on in Freemason, even
22 though it may be an historic district.

23 And Dr. Sinesi is very sad that this has
24 happened.

25 But the building official says this

1 building could harm somebody. A couple children get in
2 that building and get killed, then no one's going to
3 really care about the historic significance. They are
4 going to care that a couple children have died.

5 And so the irreparable harm is there to
6 the general public, to the public interest, and the
7 public interest says that it needs to be torn down.

8 And that's a test I don't think that they
9 can overcome in looking at a temporary injunction.

10 THE COURT: All right. I'm going to
11 foreclose argument by opposing counsel.

12 The Court is going to find that in the
13 light most favorable to the plaintiff at this point in
14 the proceedings, the motion to strike is going to be
15 denied.

16 However, the Court is going to take the
17 motion to strike regarding jurisdiction under
18 advisement, and I'm going to need some additional
19 information on that matter separately.

20 MR. CALLAHAN: Note my exception.

21 THE COURT: Very good.

22 The defense certainly has the opportunity
23 to present evidence today, if it would like.

24 MR. CALLAHAN: Please. I would like to
25 call Dr. -- Judge, let me get some of the City officials

1 that are here.

2 If I could call, please, Rick Fortner,
3 please.

4 Judge, may I please receive from you I
5 think it was Plaintiff's 1 and 2?

6 May I approach?

7 THE COURT: You may.

8 (The witness was duly sworn.)

9 THE COURT: Have a seat, please.

10 We do have a court reporter writing
11 everything down, so please make sure your responses are
12 audible.

13 Mr. Callahan.

14 RICK FORTNER, called as a witness by and
15 on behalf of the Defendant, being first duly sworn, was
16 examined and testified as follows:

17

18 DIRECT EXAMINATION

19 BY MR. CALLAHAN:

20 Q. State your name for the record, please.

21 A. Rick Fortner.

22 Q. And how are you employed?

23 A. I'm employed by the City of Norfolk. I
24 am the Building Commissioner.

25 Q. And what is your job as Building

1 Commissioner? What does that position entail?

2 A. My job is to, I supervise all of the plan
3 review and new construction, permitting, inspections,
4 building inspections, trade inspections for the City.

5 Q. Okay. And in that regard, did the
6 structure 355 West Freemason Street, a structural
7 engineering report come to your attention?

8 A. Yes, sir, it did.

9 Q. I'm going to show you this report, it's
10 already been identified collectively as Plaintiff's
11 Exhibit 3, and ask you if this is the report you
12 reviewed?

13 THE COURT: I think the report starts
14 four, five pages back.

15 THE WITNESS: Yes, sir, this is the
16 report I reviewed.

17 BY MR. CALLAHAN:

18 Q. Okay. And based on that report, is it
19 your duty under the Code to issue a memorandum to the
20 zoning administrator?

21 A. Yes, sir, under the Virginia Uniform
22 Statewide Building Code, Section 118, it is my duty to
23 evaluate a report such as this and make a decision as to
24 whether the structure's safe or unsafe.

25 Q. And after evaluating that report, what

1 was your decision?

2 A. My decision was, based on this report, it
3 was unsafe.

4 Q. Okay. And as a result of that, did you
5 issue this memorandum on August 9th of 2018?

6 THE COURT: Is that different than the
7 memorandum that's attached to Exhibit 3?

8 MR. CALLAHAN: That is attached to
9 Exhibit 3.

10 THE COURT: It is.

11 THE WITNESS: Yes, sir, I did issue this
12 memorandum.

13 BY MR. CALLAHAN:

14 Q. All right. And as a result of that, that
15 memorandum is issued -- Mr. Tajan then has to notify
16 individuals; is that correct?

17 A. Yes, sir. I believe the way the zoning
18 ordinance reads is that I am to notify the zoning
19 administrator and then he takes it from there.

20 Q. And this is the rest of Exhibit 3 which
21 appears to be the memorandum that Mr. Tajan issued.

22 Was it issued to the appropriate people
23 under the ordinances of the City of Norfolk?

24 A. To the best of my knowledge, yes, it is.

25 Q. Okay. And based on your experience -- if

1 I could just take those back from you.

2 A. Sure.

3 Q. So it is your opinion then and your duty
4 then to make the call to have the building torn down; is
5 that correct?

6 A. That is correct, yes, sir.

7 Q. All right. And was a notice issued to
8 the homeowner to tear down that structure?

9 A. Yes, it was.

10 Q. All right. And has the time to contest
11 that appeal run out?

12 A. The notice was issued by the property
13 maintenance official and Mr. Tajan, and because of
14 the -- my determination of the building being unsafe and
15 the recommendations in that report by the engineer, it
16 was meant to be immediate.

17 Q. Okay.

18 THE COURT: When you say it was meant to
19 be immediate, he had to do it that day?

20 THE WITNESS: Well, as soon as possible.
21 But because of an unsafe condition, it's recommended
22 that it happens as soon as possible. Protocol is to
23 give a reasonable amount of time, Your Honor, for them
24 to be able to do that, and I did not issue that. I
25 believe Mr. Tajan gave him a time frame in there. I may

1 be wrong about that.

2 MR. CALLAHAN: I don't have any further
3 questions for this witness.

4 THE COURT: All right.

5

6 CROSS-EXAMINATION

7 BY MR. SHERMAN:

8 Q. Mr. Fortner, how are you doing?

9 A. Very good. How are you, sir?

10 Q. Good.

11 You mentioned you're the building
12 inspector.

13 A. Building official or Building
14 Commissioner is my official title.

15 Q. Building Commissioner, I'm sorry.
16 And you do -- you're in charge of new
17 construction?

18 A. Primarily, yes, sir.

19 Q. Will you rattle off the things you're in
20 charge of again?

21 A. Plan review --

22 Q. Um-hum.

23 A. -- permitting, inspections, I work very
24 closely with the property maintenance official who
25 primarily is in charge of existing structures.

1 Q. And explain that role. The property
2 maintenance official does what?

3 A. So the way the Virginia Uniform Statewide
4 Building Code is structured, there's different volumes
5 that deal with different things.

6 So, for instance, Volume 1 deals with the
7 new construction codes and buildings that are being
8 renovated, additions being built such as that nature.
9 The property maintenance is Volume 3, and that deals
10 with existing structures.

11 Q. Okay. Did this subject property have any
12 Volume 3 existing structure Building Code violations?

13 A. Yeah, to my knowledge, yes, it did. And
14 I think the property maintenance official would verify
15 that they had it under action.

16 Q. Right.

17 Was there ever an adjudication?

18 A. I don't want to answer for her. I'm not
19 sure exactly what process the property maintenance
20 official went through.

21 I can tell you that there were permits
22 taken out because there was renovation work going on as
23 well, which is also how I was involved with the
24 structure.

25 Q. Right.

1 You never -- sounds like you never
2 followed up with her and asked her what the status of
3 those actions were before you issued your --

4 A. Actually, I talked to her almost daily
5 about it. They questioned me, the inspector Kristina
6 Jackson questioned me about, "Have you heard anything
7 about this? You know, what's going on?"

8 There was an original report that came
9 out in February from the same engineer. It was nowhere
10 near as detailed. And I did a memo to that effect as
11 well back earlier when I was made aware of that report.

12 Q. So you do -- you do have knowledge as to
13 whether or not there was an adjudication on Volume 3
14 existing structure Uniform Building Code violations.

15 A. I do. To my -- the best of my knowledge,
16 it was. I don't know the exact --

17 Q. It was adjudicated?

18 A. Please explain to me what you mean by
19 adjudication. I'm not sure I understand exactly what
20 you're asking.

21 Q. Well, you tell me what happens when you
22 have a Building Code violation. How does that work?

23 A. There's a protocol and there's a
24 procedure that you follow under the Code to deliver
25 notice to the owner and, you know, there's a contractor

1 involved or whatever, everybody gets notified in
2 writing.

3 To my knowledge, that was done, yes.

4 Q. But is that the end of it or do you
5 follow up and --

6 A. I know they had a court case on it and
7 they went to court I believe on that.

8 Q. And there was a resolution.

9 A. I do not know what the resolution was.
10 The resolution, to my knowledge, was that
11 it needed to be repaired.

12 Q. Had it been repaired?

13 A. No, not to my knowledge.

14 Q. So there were existing code violations in
15 this property at the time that you issued a demolition
16 exemption.

17 A. There were existing violations under the
18 property maintenance code, yes.

19 Q. And do you have any idea how long those
20 had been pending?

21 A. From -- my understanding, from the time
22 of the fire.

23 Q. Right.

24 So today's -- or the date of your memo
25 was August 13th; is that right?

1 A. August 9th.

2 Q. August 9th.

3 From the date of the fire to August 9th,
4 would you agree with me that's about 21 months?

5 A. I would agree.

6 Q. So the code violations on this property
7 had been pending for 21 months with no resolution when
8 you issued an emergency exemption.

9 A. Code violations, yes. But until I got
10 that report from the engineer and reviewed that report
11 on August 9th, there was no indication to me that there
12 was an unsafe or immediate condition. I had not been in
13 the building, I had not been privy to be in the
14 building. I had inspected the outside of it and looked
15 at it but could not determine from that that it was
16 unsafe.

17 It was until I received that report on
18 August 9th from Speight Marshall Francis that it was my
19 determining that it would be considered unsafe.

20 Q. So you've never been in the building to
21 verify those conditions.

22 A. Property Maintenance has.

23 Q. So you issued your building -- your
24 memorandum for emergency demolition without going in the
25 building.

1 A. Based on what that engineer's report
2 said.

3 Q. Right.

4 A. Yes, that is correct.

5 Q. Okay. And you -- you think that the
6 report stands for the proposition that there's an
7 immediate threat to public safety?

8 A. In this case, I do. And when a report is
9 done by a licensed professional structural engineer in
10 that detail, identifying the specifics that were
11 identified, I, under Virginia State law, don't have a
12 choice but to issue that.

13 Q. Which specifics did you rely on?

14 A. I went through the report in depth and
15 the, the type of construction, the double width
16 construction of the masonry walls, the fact that without
17 the structure inside that was, that was damaged by the
18 fire, the first floor, the second floors especially, my
19 biggest concern here is the lateral loading on the
20 building. This (indicating). This load's okay
21 (indicating) because it's sitting on what we think is a
22 concrete foundation, but those structural elements
23 inside that building that were damaged by fire are
24 completely missing. For instance, the roof is what
25 keeps those walls from doing this (indicating), and I

1 also believe that the engineer mentioned that, you know,
2 wind, possible extreme wind condition, maybe somebody
3 bumping into the building with a car, that gave me
4 serious concern, yes, sir.

5 Q. Well, I just -- you've got to accept my
6 righteous indignation because there are cars parked
7 right next to the building right now, right?

8 A. I don't know any of them have backed into
9 the building.

10 Q. Right.

11 But if the -- if the City and owner were
12 serious about protecting the health, the safety and
13 welfare of the citizens, wouldn't you prevent access to
14 that property in some way, shape or form?

15 A. You would have to ask the property
16 maintenance official how they go about doing that. But
17 I believe that's what was the intention.

18 Q. Let me show you what's in evidence.

19 THE COURT: I think he's just saying he's
20 not the one that would be responsible. I'm not sure
21 that answers the question.

22 MR. SHERMAN: I'll move on.

23 BY MR. SHERMAN:

24 Q. That's Plaintiff's Exhibit 8 which is a
25 photograph.

1 THE COURT: You agree there's nothing
 2 preventing cars from parking next to the building right
 3 now, correct?

4 THE WITNESS: Agreed, yes, sir.

5 THE COURT: All right.

6 BY MR. SHERMAN:

7 Q. And you agree as the building inspector,
 8 you didn't inspect this property --

9 THE COURT: Building Commissioner.

10 MR. SHERMAN: I'm sorry.

11 BY MR. SHERMAN:

12 Q. You're in charge of inspections.
 13 You're in charge of inspections, right?

14 A. I'm in charge of new construction
 15 inspections.

16 Q. Right. And this is not --

17 A. And I work very closely with the property
 18 maintenance official who is in charge of the inspectors
 19 that were inside this building. Miss Jackson is -- she
 20 was the inspector. So, yes, I communicated with her as
 21 well.

22 Q. And you personally never went in the
 23 building.

24 A. No, I did not.

25 Q. And you're aware that the City had

1 problem enforcing the code violations against this
2 property owner, right?

3 A. I am aware that Property Maintenance had
4 it under action. I don't know their particular problems
5 and what the details of those problems were. I just
6 know the Property Maintenance official has had it under
7 action.

8 Q. You're aware they had it under action for
9 21 months, right?

10 A. Yes.

11 Q. Okay. And so if the City has an ongoing
12 21-month problem, that's something you're going to be
13 aware of in your office, right?

14 A. So with -- this is a really tough line
15 here.

16 So I don't get involved with property
17 maintenance conditions with existing buildings that
18 Property Maintenance has under action. I'm primarily
19 dealing every day with new construction.

20 Q. That's good.

21 A. When the Code or the ordinance requires
22 me to do so, when a situation is referred to me, then
23 I -- then I'm going to review it and, and get involved
24 as I'm required to do so.

25 Q. But --

1 A. That's what happened when I got the
2 structural engineer's report.

3 Q. Okay. But you agree that the inspector
4 who had been in the building worked under you and you
5 communicated with her.

6 A. She did not work under me. She works
7 under Sherry Johnson, the property maintenance official.

8 Q. Does she work under you?

9 A. She does not. We work together.

10 Q. Tell me this. You were aware, though,
11 that there was a 21-month problem enforcing code
12 violations at that property, yes or no?

13 A. To be honest with you, no.

14 Q. Okay.

15 A. Like I said, I deal with new construction
16 every day. So when it was referred to me, "Hey, we have
17 an engineer's report. This engineer's report states
18 that there's some structural issues. We need you to
19 review this," that's what the ordinance says I have to
20 do. So that's what I did. That didn't happen till
21 August 9th.

22 Q. Okay.

23 THE COURT: So with respect to evaluating
24 whether something's unsafe, you would be handling new
25 construction and existing structures; is that correct?

1 THE WITNESS: Primarily new construction.

2 THE COURT: I understand primarily.

3 Sounds like the reason you became involved in this one
4 was because by Code, I guess you are the person who has
5 to make that declaration even for existing structures.

6 THE WITNESS: Yes, sir, that's how it's
7 stated in the City ordinance.

8 BY MR. SHERMAN:

9 Q. So you're in charge of unsafe violations
10 and you're unaware of the ongoing violations of this
11 property?

12 A. To my knowledge, at that point I
13 didn't -- there was nothing that told me that it was
14 unsafe.

15 Q. So you testified just now that you had no
16 idea that there was 21 months of problems at this
17 property and that's within your job as the Building
18 Commissioner to be aware of code violations.

19 A. Not existing structures, no, sir.

20 Q. But didn't --

21 THE COURT: Only when it gets to the
22 point where he has to declare it's unsafe and must come
23 down. That's why the two overlapped and he had to get
24 involved; is that correct?

25 THE WITNESS: Yes, Your Honor, that's

1 correct.

2 BY MR. SHERMAN:

3 Q. You told me you'd been through plan
4 review, permitting, inspections and maintenance.

5 A. Not maintenance. I didn't say
6 maintenance, sir. I said I'm in charge of plan review,
7 permitting and inspections as they relate to new
8 construction, alterations and repair under Volume 1 of
9 the Virginia Uniform Statewide Building Code. Property
10 maintenance and existing structures that do not have
11 permitted work going on are under the Volume 3 and the
12 Property Maintenance official.

13 MR. SHERMAN: May I ask the court
14 reporter to read back the original --

15 THE COURT: You can clarify it now. The
16 Court will accept maybe he said it differently
17 beforehand.

18 MR. SHERMAN: That's okay.

19 BY MR. SHERMAN:

20 Q. The point here is that you issued this
21 memorandum without going in that building, right?

22 A. That is correct.

23 Q. And you --

24 A. Based on that professional engineer's
25 report.

1 Q. And you testified that you had no idea
2 what was going on in the building in the 21 months
3 prior, right?

4 A. I testified that I knew that it was under
5 action and I generally, being the Building Commissioner,
6 try to keep up with almost everything with respect to
7 unsafe buildings, buildings under construction, new
8 buildings or buildings being renovated. I try to keep
9 up with all that.

10 So that's why I regularly talk to the
11 Property Maintenance official and we work very closely
12 on this.

13 So as far as having specific detailed
14 knowledge and knowing that the time period was 21
15 months, I can't testify that I did know that. I just
16 knew that Property Maintenance had it under action.
17 They have a lot of properties under action and I try to
18 keep up with ones that might become an issue and become
19 unsafe, et cetera.

20 Q. You're trying to have it both ways,
21 though. You either did or didn't know that there was
22 ongoing issues at this property for 21 months, and
23 you just testified --

24 A. I knew there were ongoing issues. You're
25 asking me to state that I knew it was 21 months, and I

1 can't say that I knew that, sir.

2 Q. No. You said that you knew since the
3 fire, right?

4 A. I knew there was a fire. I didn't know
5 it was 21 months ago. I just knew there was a fire.

6 Q. Okay.

7 Well, if I prove to you through Exhibit 1
8 that the fire was 21 months ago, would you accept that
9 as a number for the rest of our dialogue?

10 A. Yes.

11 Q. Do you want me to do that?

12 A. It's up -- if you say it's 21 months, I
13 accept that.

14 Q. All right.

15 A. I'm just saying you're asking me to
16 testify that I knew it was 21 months it was under
17 action, and I can't do that. I knew it was under
18 action.

19 Q. Mr. Fortner, what I'm asking you to
20 testify to is that you never went in the property before
21 you issued this memorandum.

22 MR. CALLAHAN: I object.

23 THE COURT: He's answered that four
24 times. I think I've got the situation. He's generally
25 aware there was a fire, that there was some issues with

1 the property, he wasn't sure exactly what they were, and
2 when it got to a point where the property inspector
3 thought there was an issue and had a report, they knew
4 by Code they had to go to him, and he's the one that
5 declared it unsafe.

6 BY MR. SHERMAN:

7 Q. So you knew that there was problems with
8 this property and you attempted to solve everybody's
9 problems by issuing the demolition permit.

10 A. The demolition permit has not been issued
11 yet. I wrote a memo that made notification to the
12 zoning administrator, like I'm required to do in the
13 City zoning ordinance, that specifically says the
14 Building Commissioner will notify these people, and
15 that's the zoning -- so my duty at that point in time,
16 having read that report and the evaluation from the
17 structural engineer, was to notify the zoning
18 administrator immediately, and that's what I did the
19 same day.

20 Q. Which provides a solution to everyone
21 else in your office who was having problems enforcing
22 the code violations against that property.

23 A. I don't know it provided a solution.

24 It simply was to serve notice to the
25 zoning administrator that we have an unsafe structure

1 and that all of the other property -- personnel that are
2 required to respond and deal with this situation, it was
3 to notify them that we have this situation.

4 Q. Well, if you are generally aware that
5 there's 21 months of problems ongoing at this property
6 and that you with a stroke of a pen can solve them for
7 everybody, then you knew that you were being the hero to
8 the office --

9 THE COURT: Just cut to the chase.

10 MR. CALLAHAN: Judge, we --

11 THE COURT: Did the fact that there were
12 ongoing violations play into your determination that it
13 was unsafe, sir?

14 THE WITNESS: Based on -- it did,
15 Your Honor, yes.

16 THE COURT: All right. Then how --

17 THE WITNESS: To some degree.

18 THE COURT: How?

19 THE WITNESS: When you have older, older
20 structures that are sitting there and nobody's living in
21 them and I know there's been a fire there, over time,
22 time in and of itself and lack of maintenance can cause
23 a structure to, you know, degrade, mortar and brick
24 joints, things of that nature.

25 So we've had situations where an existing

1 building might be looked at by Property Maintenance or
2 an engineer on such and such date and the engineer
3 doesn't make determinations that it's unsafe, but a year
4 later something happened, maybe a weather event or
5 driving piles for a new building next door to it has
6 caused it to shake some of the mortar joints loose, it
7 can become unsafe at that point.

8 So it's not an unusual situation for me
9 to see a situation where a building gets damaged such as
10 this and it's not unsafe right away but then it could
11 become unsafe. I rely very heavily on professionals'
12 opinions and such as this professional engineer's, and
13 that's what I evaluated this under on -- in this
14 situation.

15 THE COURT: All right. Let me ask you
16 one other line of questions.

17 The engineer's report says that the
18 exterior multi-width wall appears to be in sound
19 condition.

20 THE WITNESS: Yes, sir.

21 THE COURT: And their ultimate conclusion
22 is that it is their opinion that the best and most
23 reasonable course of action for this structure is
24 complete demolition, right?

25 THE WITNESS: Yes.

1 THE COURT: Okay. And you acknowledge
2 that I think in your memo. You can look at it, if you'd
3 like.

4 But my question, how do you go from those
5 recommendations and those conclusions to the assessment
6 that emergency demolition, immediate demolition is
7 required? Because it kind of sounds like if they didn't
8 try to renovate the inside of the house, it was okay.
9 Obviously --

10 THE WITNESS: This is a very tough call
11 to make, Your Honor, yes, sir.

12 THE COURT: She can't write both of us
13 down.

14 It sounds to me like the report could be
15 read that as long as we leave these charred studs in
16 place, don't play with the horizontal members either,
17 the exterior walls are sound, it's in a stable
18 condition. I think you -- one could read it that way.

19 My question is, how did you come to the
20 conclusion that immediate demolition was required unless
21 you considered that they weren't going to make immediate
22 renovations or something?

23 THE WITNESS: Your Honor, I relied very
24 heavily on the engineer's report. They made a
25 recommendation that they thought the best course of

1 action -- they don't say immediate demolition. I don't
2 believe -- but they talk about taking the structure
3 down, to stabilize the exterior walls, which was -- is
4 my major concern, the loss of the structural, the
5 lateral support inside the building that helps support
6 the exterior walls laterally. Because of the things
7 that they identified, like 80 percent of those
8 structural support members on the first and second
9 floors are either gone or severely damaged, it's a tough
10 call, Your Honor.

11 THE COURT: Okay.

12 THE WITNESS: But potential was there
13 and -- for, you know, immediate danger to life safety.

14 It's -- I mean, it could stand that way,
15 sure, for a given period of time. Something could
16 happen tomorrow.

17 So it's just a tough call that you have
18 to make in this position, you know, the potential.

19 And in my professional opinion, it's -- I
20 mean, I've been code enforcement for 31 years. I've
21 been the building official for about four now. It's one
22 of those things that, you know, you have to do
23 everything you can to preserve life safety.

24 THE COURT: Okay.

25

1 BY MR. SHERMAN:

2 Q. And so you want to be conservative in
3 that decision, right?

4 A. Yes, sir.

5 MR. SHERMAN: No further questions.

6 THE COURT: Mr. Callahan?

7 MR. CALLAHAN: Your Honor, you had asked
8 before about putting in Part 3 of the Uniform Statewide
9 Building Code which I can have him identify.

10 THE COURT: I still haven't seen the
11 order to the homeowner to demolish the house.

12 MR. CALLAHAN: Judge, can I give you
13 that?

14 THE COURT: Does it come in without
15 objection?

16 MR. SHERMAN: Well, I mean, I need to
17 note that this is the first time I've seen it.

18 THE COURT: Okay.

19 Well, I think he's -- they can lay the
20 foundation. You can stipulate it now or bring it in
21 with another witness, that's fine.

22 MR. SHERMAN: I don't think this is the
23 proper witness.

24 MR. CALLAHAN: No, I've got him outside.

25 THE COURT: Okay.

1 MR. CALLAHAN: They can bring it in.
 2 THE COURT: I'll read the Building Code.
 3 MR. CALLAHAN: Your Honor, I've got --
 4 THE COURT: It doesn't have to be an
 5 exhibit since I can take judicial notice of it, but if
 6 there's no objection, I'll take it as an exhibit.
 7 MR. CALLAHAN: Take judicial notice of
 8 the ordinances that deal --
 9 THE COURT: Any objection?
 10 MR. SHERMAN: No, Your Honor.
 11 THE COURT: I'll just mark them and keep
 12 them in the file.
 13 I think Plaintiff's 10 was my last one,
 14 so that will be --
 15 MR. CALLAHAN: Defendant's 2
 16 collectively.
 17 THE COURT: The Building Code excerpts
 18 will be Defendant's Exhibit 2 and the zoning ordinance
 19 excerpts will be Defendant's Exhibit 3.
 20 (Defendant Exhibit Numbers 2 & 3 were
 21 received.)
 22 THE COURT: All right. Any other
 23 questions for this witness?
 24 MR. CALLAHAN: Not of this witness.
 25 THE COURT: All right. Thank you, sir.

1 You're excused. You're free to stay in the courtroom or
 2 leave the courthouse.

3 Next witness?

4 MR. CALLAHAN: Robert Tajan.

5 (The witness was duly sworn.)

6 THE COURT: Please have a seat.

7 We do have a court reporter, so please
 8 make sure your responses are audible.

9
 10 ROBERT TAJAN, called as a witness by and
 11 on behalf of the Defendant, being first duly sworn, was
 12 examined and testified as follows:

13
 14 DIRECT EXAMINATION

15 BY MR. CALLAHAN:

16 Q. State your name, please.

17 A. Robert Tajan.

18 Q. How are you employed?

19 A. I'm employed with the City of Norfolk,
 20 zoning administrator.

21 Q. And how long have you been the zoning
 22 administrator?

23 A. For approximately four years.

24 Q. Okay. And are you familiar with the
 25 memorandum from Robert -- from Rick Fortner to you of

1 August 9, 2018, a copy of which has already been
2 admitted into evidence? I'll just show you for your
3 reference.

4 A. Yes, I'm familiar with this.

5 Q. All right. And as a result of that
6 document being written to you, did you then cause
7 another part of Exhibit 3, did you issue that memorandum
8 to the people required to receive it under the Code?

9 A. Yes, sir.

10 Q. And who are the other people that had to
11 receive that?

12 A. By the zoning ordinance, the chairman of
13 the Architectural Review Board is required to be
14 notified if an emergency demolition is required.

15 Q. Okay. And those people on that report
16 were notified of it; is that correct?

17 A. That's correct.

18 Q. Okay. And the -- thank you.

19 And are you familiar -- I'll put it in
20 through her.

21 MR. CALLAHAN: That's all the questions I
22 have for this witness.

23 THE COURT: All right.

24 MR. SHERMAN: Your Honor, I don't have
25 any questions.

1 THE COURT: All right. You're excused,
2 sir. Thank you.

3 MR. CALLAHAN: Sherry Johnson, please.

4 (The witness was duly sworn.)

5 THE COURT: Please have a seat.

6 We do have a court reporter, so please
7 make sure your responses are audible.

8

9 SHERRY JOHNSON, called as a witness by
10 and on behalf of the Defendant, being first duly sworn,
11 was examined and testified as follows:

12

13 DIRECT EXAMINATION

14 BY MR. CALLAHAN:

15 Q. State your name for the record.

16 A. Sherry Johnson.

17 Q. How are you employed?

18 A. I am employed with the City of Norfolk as
19 the property maintenance official.

20 Q. All right. And in that regard, are you
21 the same Sherry Johnson property maintenance official
22 that received this memorandum dated August the 13th,
23 2018 that's already been received into evidence as
24 Plaintiff's Exhibit 3?

25 A. Yes, sir.

1 Q. Okay. And as a result of that
2 determination, did you issue this notice of violation to
3 my client, Dr. Sinesi?

4 A. Yes, sir.

5 Q. Please read it into the record.

6 A. It is addressed to Mark Sinesi,
7 Inspection Number 102998-18, property address 355 West
8 Freemason Street. "Dear Mark Sinesi: This is to inform
9 you that an inspection has been made at the building or
10 structure located at 355 West Freemason Street. Our
11 findings are that the structure located at this site is
12 unsafe and uninhabitable. The attached violations of
13 the Virginia Uniform Statewide Building Code, USBC
14 Part 3, render the structure unsafe and uninhabitable.

15 "Pursuant to 105.1 of the Virginia
16 Uniform Statewide Building Code as adopted by the City
17 of Norfolk, it is hereby ordered that this structure
18 must be repaired or demolished and removed within ten
19 days of the date of this notice." The notice is dated
20 August 14th.

21 "All permits must be obtained prior to
22 starting any repair work or demolition. Under Part 3,
23 Section 105.4, Section 105.9 of the USBC, should you
24 fail to repair or demolish and remove the structure, the
25 City of Norfolk per the Code official will cause the

1 structure to be demolished and removed by contract or
2 arrangement with a private demolition contractor. The
3 cost of the demolition and removal shall be charged
4 against the real estate upon which the structure is
5 located and a lien shall be placed upon the real estate.

6 "In accordance with the provision of the
7 USBC Part 3, Section 106.5, you have the right to appeal
8 this notice and order by filing a written application to
9 the local Board of Building Code Appeals of the City of
10 Norfolk. This application for appeal must be filed
11 within 14 days after this notice is served upon you.
12 The appeal shall be based on the claim that the true
13 intent of the Code or the rules legally adopted
14 thereunder have been incorrectly interpreted, the
15 provisions of the Code do not fully apply or the
16 requirements of the Code are adequately satisfied by
17 some other means.

18 "Failure to submit an application for
19 appeal within the time specified shall constitute
20 acceptance of the Code official's decision.

21 "Should you have any questions or if we
22 may be of help in your decision, please contact your
23 Code specialist, Kristina Jackson at (757)664-6612 or
24 Kristinajackson@norfolk.gov.

25 "Sincerely Sherry Johnson, division head,

1 Division of Neighborhood Quality, Department of
 2 Neighborhood Development."

3 Q. All right. And you included with that an
 4 attachment, did you not?

5 A. I did.

6 Q. And that included what is contained in
 7 the Statewide Building Code under Section 105.1 which is
 8 Part 3 of the Building Code.

9 A. Correct.

10 MR. CALLAHAN: Your Honor, we would move
 11 the introduction of this letter into evidence, please.

12 THE COURT: Any objection?

13 MR. SHERMAN: No, Your Honor.

14 THE COURT: Defendant's Exhibit 4.

15 (Defendant Exhibit Number 4 was received.)

16 BY MR. CALLAHAN:

17 Q. Other than Dr. Sinesi, who did that
 18 letter go to?

19 A. The letter was posted on the property,
 20 sent to Dr. Sinesi in registered mail.

21 Q. Okay. And did anybody else -- and where
 22 is this -- the letter is contained at City Hall over in
 23 your office on Monticello?

24 A. Correct.

25 Q. And does anybody else receive a copy of

1 that letter?

2 A. No, sir.

3 THE COURT: So you were notified to do
4 this because the Architectural Review Board was
5 notified, correct?

6 THE WITNESS: No, sir.

7 THE COURT: What tells you to generate
8 this?

9 THE WITNESS: Under the Property
10 Maintenance Code, it is our responsibility to deem the
11 building unfit or unsafe at any time.

12 The Building Commissioner, Rick Fortner,
13 had reviewed the engineer's report, determined that it
14 was a public health and safety issue, which then
15 prompted us on the Property Maintenance side under Part
16 3 to send the notice to repair, demolish the structure
17 because it was unsafe.

18 THE COURT: So how do you find that out
19 from Mr. Fortner?

20 THE WITNESS: Mr. Fortner -- I was
21 included in an email that had his determination in it.

22 THE COURT: So do you then -- you don't
23 give him a copy of the order, for instance? How does
24 the order work its way down to all the people who were
25 involved on the way up, is my question?

1 THE WITNESS: Well, the order would only
2 be required to be served upon the property owner. We're
3 in the same office. Everybody has -- knew the order.

4 But we would not -- in our standard
5 operating procedure, our dealings are only with the
6 property owner.

7 THE COURT: Okay.

8 BY MR. CALLAHAN:

9 Q. And Miss Jackson works for you?

10 A. Yes.

11 Q. And it was Miss Jackson that went out.

12 And were you familiar -- did you ever go
13 to court with Miss Jackson?

14 A. Yes, I was in court with her just as an
15 observer on several occasions.

16 Q. And the case has been continued for many
17 times for insurance purposes.

18 A. Correct.

19 Q. Because a determination of the insurance
20 wasn't made until May of 2018.

21 A. I couldn't say for sure, but, yes, I know
22 it has been continued.

23 Q. All right. And did you ever go inside
24 this building?

25 A. No, sir.

1 Q. But Miss Jackson did.

2 A. Yes.

3 Q. Very good. Thank you.

4 THE COURT: Cross?

5 MR. SHERMAN: Yes, Your Honor.

6

7 CROSS-EXAMINATION

8 BY MR. SHERMAN:

9 Q. How are you doing? My name is Joe
10 Sherman.

11 You testified that you never sent that
12 letter to my client or anyone else, right?

13 A. To -- to your client as far as?

14 Q. In court today, I'm representing the
15 neighborhood.

16 You never sent the letter to anybody in
17 the neighborhood other than the property owner, right?

18 A. We have not -- we would not have mailed
19 it.

20 I have had several FOIA requests for that
21 notice since then, so I couldn't tell you who's received
22 copies of it.

23 THE COURT: At the time you mailed it out
24 to Dr. Sinesi, you didn't mail it to anybody else.

25 THE WITNESS: No, sir.

1 BY MR. SHERMAN:

2 Q. And in that letter, it doesn't say who
3 can appeal other than "you." It says "You can appeal,"
4 addressed to the landowner, right?

5 A. Correct.

6 Q. And it also said in that letter that a
7 valid appeal ground would be other means to fix the
8 problem.

9 A. Correct.

10 Q. Okay. And you're aware that there were
11 ongoing enforcement actions against the property owner,
12 right?

13 A. Certainly, yes.

14 Q. Oh, gosh. Are you aware how long that
15 had been going on?

16 A. For more than a year. Miss Jackson would
17 be able to testify to exact dates for you.

18 Q. Okay. So the demolition of that building
19 solved a big problem for the whole office, right?

20 A. I'm not sure your -- what I understand
21 you to be asking.

22 Q. Well, those code violations, the
23 structural issues, they never have gotten resolved,
24 right?

25 A. Correct, which is how the building became

1 deteriorated and has become unsafe.

2 Q. Right.

3 So the property owner neglected it to the
4 point that demolition was necessary, in your opinion,
5 right?

6 MR. CALLAHAN: Judge --

7 THE WITNESS: No.

8 MR. CALLAHAN: -- objection as -- he's
9 leading the witness saying what his opinion would be.

10 THE COURT: It's cross-examination.

11 MR. CALLAHAN: All right.

12 THE WITNESS: At this point, I would say
13 until this last engineering report that gave us what we
14 needed to -- because it had become so unsafe, at that
15 point because of the continuing deterioration, yes.

16 BY MR. SHERMAN:

17 Q. Right.

18 A. It became a public health, safety issue.

19 Q. Right.

20 You were looking for the justification to
21 demolish the building and solve the problem, right?

22 A. My job is to have it repaired or
23 demolished, one way or the other.

24 Q. Right.

25 A. I need to remedy --

1 Q. Right.

2 A. -- the safety issue.

3 Q. Right. You don't care which one.

4 A. No.

5 Q. Right. As long as it's solved.

6 A. Correct.

7 Q. Okay. So problem solved, right?

8 A. It would be, yes.

9 Q. All right. And the --

10 MR. SHERMAN: No further questions.

11 THE COURT: All right. Redirect?

12 MR. CALLAHAN: Nothing further.

13 THE COURT: All right. You're excused,

14 ma'am. Thank you. You're free to stay or free to go.

15 Next witness?

16 MR. CALLAHAN: Judge, if I could just

17 have Lennie Newcomb, please.

18 THE BAILIFF: Turn toward the Judge and

19 raise your right hand.

20 (The witness was duly sworn.)

21 THE COURT: Please have a seat.

22 We do have a court reporter, so please

23 make sure that your responses are audible so she can

24 hear them and write them down.

25

1 LEONARD NEWCOMB, III, called as a
 2 witness by and on behalf of the Defendant, being first
 3 duly sworn, was examined and testified as follows:

4
 5 DIRECT EXAMINATION

6 BY MR. CALLAHAN:

7 Q. State your name, please.

8 A. My name is Leonard Newcomb, III.

9 Q. And, Mr. Newcomb, how are you employed?

10 A. I work for the City of Norfolk. I'm the
 11 acting director of planning.

12 Q. And in that -- and how long have you been
 13 with the City of Norfolk?

14 A. Over 40 years.

15 Q. Okay. And you've been interim City
 16 planning director for how long?

17 A. I think since May.

18 Q. You've been in the Planning Department
 19 for how long?

20 A. 40 years.

21 Q. And you were -- your name is listed on
 22 this August 13th, 2018 memorandum.

23 Did you receive that document which has
 24 been admitted as Plaintiff's Exhibit 3?

25 A. Yes.

1 Q. And why do you get that document?

2 A. The code official, zoning, all of that is
3 in the Planning Department. So essentially I am
4 ultimately responsible for the people who do these jobs,
5 and I was copied to let me know what was going on.

6 Q. Okay.

7 Now, Susan McBride was also listed as one
8 of the people who received this notice; is that correct?

9 A. Yes.

10 Q. Did Miss McBride have to leave as a
11 result of having to pick up someone from the airport?
12 She was here previously; is that correct?

13 A. That is correct.

14 MR. CALLAHAN: Judge, that's the only
15 other question I have of him.

16 THE COURT: Any questions?

17

18 CROSS-EXAMINATION

19 BY MR. SHERMAN:

20 Q. The dialogue that you just had here, you
21 guys were talking about a ministerial act, right?

22 A. Yes.

23 Q. Just paperwork, right?

24 A. You mean as far as receiving that? Yes.

25 Q. Right.

1 You never went in that building that
2 we're talking about today.

3 A. I've not been in that building.

4 MR. SHERMAN: No further questions.

5 THE COURT: Redirect?

6 MR. CALLAHAN: No. He can be excused.

7 THE COURT: You're excused, sir. You are
8 free to stay or free to go.

9 MR. CALLAHAN: Miss Jackson, please.

10 THE COURT: How many more witnesses do
11 you have?

12 MR. CALLAHAN: After this one, Judge.
13 One more after this one.

14 THE COURT: Okay.

15 THE BAILIFF: Raise your right hand and
16 be sworn.

17 (The witness was duly sworn.)

18 THE COURT: Please have a seat.

19 And we do have a court reporter writing
20 everything down, so please make sure your responses are
21 audible.

22 THE WITNESS: Okay.

23
24
25

1 KRISTINA JACKSON, called as a witness by
 2 and on behalf of the Defendant, being first duly sworn,
 3 was examined and testified as follows:

4

5

DIRECT EXAMINATION

6

BY MR. CALLAHAN:

7

Q. State your name for the record.

8

A. My name is Kristina Jackson.

9

Q. How are you employed?

10

A. I am the codes team leader for the

11

Division of Neighborhood Quality for the Department of

12

Neighborhood Development.

13

Q. And in that regard, was 355 West

14

Freemason Street a part of your responsibilities or

15

duties here in the City of Norfolk?

16

A. Correct. It's in my assigned census

17

track.

18

Q. And how did it come to your attention and

19

did you issue any violations against the owner for

20

conditions that existed at the house?

21

A. Yes. The property caught on fire in

22

December 2016. Being that it's in my assigned census

23

track, the Fire Department sent us notification of the

24

fire. I went out and did an inspection, noted the fire

25

damage. Then we -- standard procedures are then we

1 issue notices of violations and a placard notice to
2 make the necessary repairs.

3 Q. And when did you do that?

4 A. December 19, 2016.

5 Q. Okay. And how many days after the fire
6 was that?

7 Just a couple days?

8 A. Maybe a couple days, yes.

9 Q. And did you go inside of the building?

10 A. Yes, we did.

11 Q. Who is "we"?

12 A. Oh. I had another inspector with me.

13 Q. How many times have you been inside that
14 building?

15 A. Twice.

16 Q. Okay. And after the first time you went
17 in, did you go in December 19th?

18 A. Yes. Right after December 19th, 2016.

19 Q. All right. And when was the next time
20 you went into that building?

21 A. Prior to the City boarding the property.
22 It was open to the public. So I can't -- looks like my
23 photos are from November 1st, 2017.

24 Q. Okay. And at that stage -- now, and then
25 you issued summonses to Dr. Sinesi, did you not?

1 A. Correct.

2 Q. And how many of those did you issue?

3 A. I issued four.

4 Q. Okay. And they are still pending here in
5 the City of Norfolk?

6 A. Yes, they are.

7 Q. All right. And they are still pending in
8 the General District Court; is that correct?

9 A. Yes, they are.

10 Q. And the cases against Dr. Sinesi have
11 been continued until right now till November; is that
12 correct?

13 A. Correct, because of the violations that
14 he's written up for is in regards to the structure not
15 being repaired.

16 Q. Okay. And when Dr. Sinesi took -- the
17 repairs that needed to be made, what were the repairs
18 that you cited him for?

19 A. Sorry. So all together, when the
20 original notices of violation, 12 violations were
21 issued.

22 Q. Okay. And only four of them are pending.

23 A. Correct.

24 Q. Okay. And so at the present time, then
25 there are only those four cases that still remain.

1 A. Correct.

2 Q. All right. And then you received notice
3 through your chain of command that the building had been
4 declared an unsafe structure; is that correct?

5 A. Correct.

6 Q. All right. And did you become aware that
7 the -- Mr. Fortner had made a determination that it
8 should be destroyed?

9 A. Correct. He notified our office.

10 Q. And so since November then, you have not
11 been back in the structure at all, of 2017.

12 A. Correct.

13 MR. CALLAHAN: All right. I don't have
14 any further questions.

15 THE COURT: Cross?

16 MR. SHERMAN: Yes, Your Honor.

17

18 CROSS-EXAMINATION

19 BY MR. SHERMAN:

20 Q. I printed the violations from the Norfolk
21 General District Court site.

22 I'd like you to just confirm that these
23 are accurate.

24 A. (Reviewing the document).

25 Yes, they are.

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Q. Okay.

MR. SHERMAN: I'd like to move those into evidence as Plaintiff's --

THE COURT: Is this the one that was Plaintiff's --

MR. SHERMAN: This is the printout from the Court's website showing what's pending and how many times it's been continued.

THE COURT: All right.

MR. CALLAHAN: Judge, the other ones were the violations that she testified to that there were twelve of them. Eight of them have been resolved.

THE COURT: Got it.

MR. CALLAHAN: These are the four that are remaining.

THE COURT: We're up to Plaintiff's 11.

(Plaintiff Exhibit Number 11 was received.)

BY MR. SHERMAN:

Q. And on the hearing information, it indicates that it was continued October -- excuse me, November 3rd of '17, January 5th of '18, February 9th of '18, May 18th of '18, June 1st of '18 and then again on September 7th of '18. A total of six times.

A. Correct.

1 Q. Okay. And so you testified that you had
 2 not been in the building contemporaneous to when
 3 Mr. Fortner issued the demolition memorandum, right?

4 A. Correct.

5 MR. SHERMAN: No further questions.

6 THE COURT: Redirect?

7 MR. CALLAHAN: Nothing from me.

8 THE COURT: Thank you, ma'am. You're
 9 excused. You're free to stay or free to leave.

10 Next witness?

11 MR. CALLAHAN: Dr. Sinesi, please.

12 (The witness was duly sworn.)

13 THE COURT: As you've heard me tell
 14 others, we have a court reporter, so please make sure
 15 your responses are audible.

16
 17 DR. MARK SINESI, called as a witness by
 18 and on behalf of the Defendant, being first duly sworn,
 19 was examined and testified as follows:

20
 21 DIRECT EXAMINATION

22 BY MR. CALLAHAN:

23 Q. State your name for the record.

24 A. Mark Sinesi.

25 Q. And what do you do for a living?

1 A. I'm a cancer specialist at Eastern
2 Virginia Medical School.

3 Q. And so you're a licensed physician here
4 in the Commonwealth of Virginia?

5 A. That's correct.

6 Q. Okay. And you bought 355 Freemason
7 Street, did you not?

8 A. Yes.

9 Q. Okay. Paid \$675,000 for it.

10 A. Yes, sir.

11 Q. Okay. And what were your plans?

12 A. I was going to turn it from an office
13 building, which it had been used as an architectural
14 office, into my home.

15 Q. And in order to do that, did you engage
16 people to draw plans?

17 A. Yes.

18 Q. And tell me about that.

19 A. I used the Dills Architects who had
20 experience with renovating other historic structures in
21 the Freemason area. They had done Kenmure and other
22 historic homes that had been turned into office space
23 and then converted back into residential.

24 Q. Okay. And did you incur expense in doing
25 those things?

1 A. Yes.

2 Q. Can you give me an idea of how much
3 expense you incurred?

4 THE COURT: Again, this is the expense
5 after you bought the place --

6 THE WITNESS: And I --

7 THE COURT: -- in support of potential
8 renovations.

9 THE WITNESS: At least \$300,000.

10 BY MR. CALLAHAN:

11 Q. So it's fair to say at this stage you
12 have at least a million dollars in this project.

13 A. Yes.

14 Q. And the plans you had to renovate it, did
15 you get a cost estimate on how much it was going to cost
16 to do the renovations you wanted?

17 A. Yes.

18 Q. And what was the amount?

19 A. And that was probably, probably going to
20 be a little over a million.

21 Q. So at that stage, you'd have almost
22 \$2 million into this project; is that correct?

23 A. That's correct.

24 Q. All right. And are you a billionaire?

25 A. No.

1 Q. And do you have unlimited funds to --

2 A. No.

3 Q. -- support a project if it cost between 5
4 and \$10 million to do, could you afford to do that?

5 A. No, not at all.

6 Q. Okay.

7 Now, did you have any problems with the
8 insurance company in dealing with this place?

9 A. Well, yes. Because of the historic
10 nature of the property, it was difficult for them to
11 determine the appropriate value of the structure. I'll
12 give you an example. The windows which were a hundred,
13 in the range of a hundred years of age, they initially
14 said -- give a very low allowance saying, well, they are
15 depreciated. They are old. And so we worked carefully
16 with them to help them appreciate that this was an
17 historic structure and that the compensation that
18 they -- even though they declared it a total loss, they,
19 they paid way less than the face value of my policy.

20 It took more than a year to finally
21 resolve that with the necessity of multiple inspections
22 from the insurance company, and then they, they hired a
23 specialist adjustor that was knowledgeable about
24 historic homes.

25 So it was not a simple process. It, it

1 took a long, long time.

2 Q. And did they give you a hard -- insurance
3 company give you a hard time because the house was a
4 hundred years old and had been fully depreciated?

5 A. Right. So that was it. They, they said
6 that because of the age -- initially their impression
7 was because of the age, that they were reimbursing so
8 very little.

9 Q. Okay. So it took you awhile to make a
10 settlement with the insurance company.

11 When did the settlement take place?

12 A. It was earlier this year.

13 Q. Okay. And at that stage -- and so when
14 did you decide that you needed to go back to -- or
15 engage a structural engineer?

16 A. It was earlier this year. I asked the
17 Speight Marshall group to analyze the viability of
18 making repairs to the property.

19 Q. Did they issue a letter?

20 A. They did.

21 Q. And what did they tell you in that
22 letter?

23 A. They said that they did not believe it
24 was practical to repair it.

25 Q. Did they eventually -- did you send that

1 letter to the City?

2 A. Yes, um-hum.

3 Q. All right. And at some point in time did
4 you engage them to give you a complete evaluation of the
5 building?

6 A. I did.

7 Q. And they eventually issued their report
8 that's been received into evidence?

9 A. Yes.

10 Q. And you've seen that report, have you
11 not?

12 A. Yes, I have.

13 Q. Okay. And you reviewed that report.

14 A. Oh, yes.

15 Q. Okay. It was your desire to live in the
16 neighborhood and be neighbors with everyone here that's
17 against you today.

18 A. I, I wanted to live in the neighborhood,
19 yes.

20 Q. Okay.

21 MR. CALLAHAN: I don't have any further
22 questions of this witness.

23 THE COURT: Cross?

24 MR. SHERMAN: Yes, Your Honor.

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CROSS-EXAMINATION

BY MR. SHERMAN:

Q. Dr. Sinesi, sorry to meet you under these circumstances.

A. It's better than your meeting me the other way around.

THE COURT: Go ahead.

BY MR. SHERMAN:

Q. This is about money, right?

A. Beg your pardon?

Q. Your testimony with Mr. Callahan about being a billionaire or not and how much money you put into the property, this is about money, right?

A. I don't -- this is about what was going to be my dream, my home. I loved this neighborhood. I have deep respect for the historic nature of Norfolk and I love the Freemason area and I -- after buying the property, I spent the better part of a year in architectural and engineering work and ended up with a beautiful plan to renovate the house and to put an historically appropriate garage unit with arches and columns, and all that got approved through the certificate of appropriateness process, and then we just got a few weeks into the internal renovation when it was

1 all taken from me by an arsonist.

2 In fact, I had hoped maybe I could get
3 some tax relief by virtue of restoring this structure,
4 but some of the things I had wanted to do, put an
5 elevator in it because it's four floors from the
6 basement to the top and put that historically
7 appropriate garage unit would have nullified any efforts
8 in that regard. And so I was willing to incur the added
9 expense of doing it that way.

10 So that's really what it's about. It's
11 about the fact that I'm a victim of a crime and now,
12 unfortunately, I'll do exactly what I'm told to do with
13 the property. I was told to demolish it, then I was
14 told to wait, and now I'll do whatever I am instructed
15 to do.

16 Q. Well, you weren't willing to make the
17 code violation repairs, were you?

18 A. Well, it really wasn't possible for me to
19 do so for a couple of reasons.

20 For example, one of the code violations
21 is to restore the electrical and plumbing systems, all
22 of which had been completely destroyed and to remedy the
23 violation of having a structure that's not suitable for
24 human habitation.

25 I understand that.

1 And one of the reasons I couldn't move to
2 make further -- make any efforts at improving it was
3 that I spent over a year with my insurance company
4 wanting to keep reinspecting the property to determine
5 if they could do the right thing, and they still
6 haven't.

7 But I'm all done seeking any further
8 relief as far as that goes.

9 And so those are the reasons really that
10 the violations have been continued, because it just
11 wasn't possible for me to do.

12 You know, it would mean going ahead and
13 restoring the whole building, which I suspect would cost
14 well in the millions and is way beyond, you know, my
15 capacity to do, if it's even possible. I mean, I guess
16 you could rebuild the Golden Gate Bridge, but it's a
17 matter of feasibility and reasonability.

18 Q. And I think that's exactly the issue,
19 about feasibility and reasonability.

20 In fact, you said in your testimony
21 earlier that the February letter from Speight Marshall
22 about viability was that it's not practical, right?

23 A. Exactly. And I take that -- the way I
24 understand that is that given unlimited resources and
25 time, that it would be possible to do almost anything.

1 This is a wonderful country we live in. But within the
2 context of what is reasonable to do in that location,
3 their assessment was that the most appropriate
4 disposition of this building was to remove it.

5 Q. And that was the conclusion in the report
6 also, was that it was not reasonable to repair it; not
7 that it wasn't in imminent danger of collapse, but that
8 it wasn't reasonable to do so. The best and most
9 reasonable thing would be to knock it down, right?

10 A. I can read the sentences the same as you
11 can.

12 THE COURT: Did you have any input into
13 the City regarding the recommendations to demolish it,
14 sir?

15 THE WITNESS: No.

16 THE COURT: Okay.

17 BY MR. SHERMAN:

18 Q. If you really wanted to prevent a tragedy
19 at your property, you would do something to prevent
20 trespassing on your property, wouldn't you?

21 A. I would point out that that property was
22 trespassed an uncountable number of times during the
23 period in which I was undergoing the architecture,
24 engineering and approval process, and we would board it
25 up and it would be -- the boards would be taken down.

1 It would be broken into.

2 It -- oh, actually, I beg your pardon.

3 During the architectural, engineering
4 approval process, it was broken into countless times.
5 What I thought, maybe homeless people were just staying
6 in there. And I didn't really begrudge them, but at the
7 same time, we did notify the police on every occasion.
8 I put up a chain across the entrance to the parking lot.
9 That was ripped down. And so it was -- it was violated
10 regularly.

11 Then after the fire, people would break
12 in and vandalize and steal. All the copper piping was
13 taken out of it. The copper downspouts were removed.
14 There were four air-conditioning condensers out back.
15 Those were stolen.

16 So the property has been exceedingly
17 difficult to fully reinforce and prevent trespassing.
18 But we have done everything we can.

19 In fact, after the fire, we put up boards
20 that were then ripped out, and my contractor would go
21 back and put them back up.

22 And then in dialogue with Miss Jackson, I
23 had said maybe the City has an expertise in boarding
24 these things up that my contractor can't do, and so I
25 agreed to -- you know, I appreciated the City doing what

1 they could to board it up. Evidently they've got ways
2 of putting two big plywood sheets over a window or a
3 door and through-bolting them so they don't have to
4 attach it to any of the perimeter structures. It's a
5 specialized expertise that fortunately the City had, so
6 I was agreeable to that process.

7 Q. Well, when you made those repeated claims
8 to the police, you mentioned the address of the
9 incident, right?

10 A. Correct.

11 Q. And so they should get the memo that
12 there's an ongoing problem over there, right?

13 A. I would certainly think so, yes.

14 And many of my, my what I had hoped would
15 be my neighbors who are here now helped me with that
16 process. They would notify the police themselves or
17 notify me that they've seen trespassing.

18 Previously this was --

19 THE COURT: The neighbors would or would
20 not? I just didn't hear you.

21 THE WITNESS: I beg your pardon?

22 THE COURT: The neighbors would or would
23 not?

24 THE WITNESS: Would, yes. They helped,
25 yeah. They notified the police.

1 THE COURT: I just needed -- I just
2 didn't hear you.

3 THE WITNESS: I recognize almost every
4 face in this room. I still like these people. I like
5 the house, too. I don't want to see it go away, but, I
6 mean, nothing I can do about it.

7 BY MR. SHERMAN:

8 Q. Well, you could put it through an ARB
9 process, right?

10 A. All these things are possible. If I am
11 ordered to do that, I'll do exactly what the judge tells
12 me to do.

13 Q. You and me both.

14 The police should have a record of all
15 those trespassers then, right?

16 A. You know, I hope so.

17 I myself never got a response that a
18 policeman responded to that property and found someone
19 there. By the time they were notified and then, you
20 know, made their rounds, the person was gone, but the
21 evidence of them having been there was present.

22 Q. Right.

23 But to this day, you still haven't put up
24 no trespassing signs, right?

25 A. I've put them up many times. Ripped

1 down.

2 Q. They don't rip down Lin Baker's sign --
3 or Lin Miller's sign, right?

4 A. I have no explanation for that.

5 Q. All right.

6 Okay. So lucky for us, the police do
7 keep stats.

8 A. Um-hum.

9 Q. And so I've requested them here, and I'd
10 like to show you --

11 THE COURT: Is there a proffer where
12 we're going with all this?

13 MR. SHERMAN: I'm going to implicate
14 Dr. Sinesi's credibility with a comprehensive list of
15 calls to that property, and we're going to see that
16 there's dead possums and cats on the roof and no reports
17 of vandalism or trespassing on the property.

18 THE COURT: All right. Show him the
19 list.

20 THE WITNESS: Thank you.

21 I can --

22 THE COURT: The question is why they have
23 all those other reports but they don't have the
24 trespassing reports, if you know.

25 THE WITNESS: I do not know the answer.

1 I'm sorry, I don't know the answer to that.

2 BY MR. SHERMAN:

3 Q. Why would they keep a parking violation
4 but not a trespass?

5 A. I have no explanation for that. But I
6 personally made calls.

7 THE COURT: How many calls did you
8 personally make, roughly?

9 THE WITNESS: Probably five.

10 BY MR. SHERMAN:

11 Q. The nosey neighbors called for a cat on
12 the building, but there's no records --

13 THE COURT: I've got it.

14 MR. SHERMAN: I'll move to admit these.

15 THE COURT: Any objection?

16 MR. CALLAHAN: No objection, Your Honor.

17 THE COURT: Plaintiff's 12.

18 (Plaintiff Exhibit Number 12 was
19 received.)

20 THE COURT: You can make that argument in
21 closing.

22 MR. SHERMAN: I understand.

23 I'd also like to add this email from
24 Allendriscoll@norfolk.gov with regard to police reports.

25 I'll show it to whoever wants to see it.

1 THE COURT: Any objection, Mr. Callahan?

2 MR. CALLAHAN: Judge, I'm going to object
3 to any of this coming in unless he can lay a proper
4 foundation through the Police Department.

5 MR. SHERMAN: All right. Your Honor, my
6 client can lay the foundation. It's his email. So if
7 we need to go through that, we will. Is that what you
8 want?

9 THE COURT: You can do it on rebuttal.

10 MR. CALLAHAN: No, go ahead.

11 THE COURT: Okay. Plaintiff's 13.

12 (Plaintiff Exhibit Number 13 was
13 received.)

14 THE COURT: Tell me, sir, what's your
15 understanding regarding why this engineer's report was
16 prepared? Who initiated it?

17 THE WITNESS: I did.

18 THE COURT: And what was the purpose of
19 you initiating it?

20 THE WITNESS: To determine the status of
21 the property relative to whether I could be expected to
22 fix it or not.

23 THE COURT: And so why did you do it when
24 you did it? In other words, the property had been
25 sitting there for quite some time and -- what was the

1 straw that broke the camel's back, if you will?

2 THE WITNESS: Right.

3 Well, if you know, I've been cited for
4 violations relative to repairing the property, and I
5 wanted to determine if it was something within my
6 capability to do, and the structural engineer's report
7 told me that really it's going to be well beyond my
8 capabilities to do so. And I submitted that to the City
9 and then was told to demolish it.

10 THE COURT: Okay.

11 BY MR. SHERMAN:

12 Q. As soon as the fire happened, you started
13 calculating your losses, right?

14 A. Well, I was really kind of in shock, to
15 tell you the truth. It was -- the first thing I did was
16 to recognize the heroism of the people who went into
17 that building to fight the fire. You know, it was at
18 night. It was around Christmastime. And I knew that
19 people had broken into that house, and I was concerned
20 that they might find someone whose life they needed --

21 THE COURT: Go ahead and repeat the
22 question because I'm not sure he's answering the
23 question you asked.

24 THE WITNESS: I'm sorry. You asked about
25 calculating losses. The answer is no.

1 My first concern was of a humanitarian
2 nature.

3 BY MR. SHERMAN:

4 Q. You did calculate your losses after the
5 fire, right?

6 A. Yes.

7 Q. Okay. And did you bring any evidence of
8 your money spent on the structure for soft cost today?

9 A. No.

10 Q. You didn't bring any evidence of the
11 insurance you collected either, did you?

12 A. No, I didn't bring any of that with me
13 today, but I have it.

14 Q. So when you were calculating your costs,
15 you realized that the land was more valuable vacant,
16 right?

17 A. You know, this is something that's very
18 far from my day-to-day life. I don't really understand
19 these things.

20 THE COURT: Just yes or no and then you
21 can explain.

22 THE WITNESS: No, I didn't understand
23 that.

24 BY MR. SHERMAN:

25 Q. Have you figured that out yet?

1 A. I still don't really have a good handle
2 on that, whether the land is more valuable with the
3 property or with -- with the house or without, the tax
4 assessed value is \$730,000 as it stands now. Most of
5 that is in the land, so I do understand that.

6 Q. You know what you paid for it, right?

7 A. Um-hum.

8 Q. And you know what you're listing it for,
9 right?

10 A. Correct.

11 Q. And you know which amount's higher,
12 right?

13 A. Well, my total cost of ownership is
14 greatly in excess of my asking price on that property.

15 Q. Right, which is my point, that you are
16 looking for the additional costs on the sale. You want
17 the additional value on the land sale to make up the
18 difference for whatever costs come out of pocket.

19 A. I want to sell it for a fair price.

20 Q. Right.

21 And in your case when you're a victim and
22 you've been taken advantage of and you lost a bunch of
23 money in this, fair to you means getting the land value
24 vacant --

25 A. Fair market value. I'm just looking for

1 fair market value. And, and if the house has to stand
2 and I keep it for sale for an extended period of time,
3 I'm prepared to --

4 Q. And you conveniently waited and addressed
5 none of those -- the imminent issues inside the house
6 until the demo permit. You waited until the fair market
7 value was in the land because of the demo permit rather
8 than with the house in order to list the property,
9 right?

10 A. I don't understand your question.

11 Q. You -- I think that the question is that
12 you say you want fair market value, right?

13 A. Yes.

14 Q. All right.

15 A. Um-hum.

16 Q. And you understand from the testimony
17 today that fair market value as improved or fair market
18 value vacant are two different things, right?

19 A. I gather there's been some statement to
20 that effect.

21 But I --

22 Q. Yes or no?

23 A. Okay. I don't really understand real
24 estate values.

25 Q. You understand that if the structure's

1 standing, somebody buying in the neighborhood has the
2 responsibility to preserve it, right?

3 A. I do.

4 And maybe -- the essence of your
5 question -- but maybe with the tax rebate that's
6 possible with the structure standing, maybe I could sell
7 it for more.

8 I don't know. I'm not a professional
9 real estate person.

10 Q. We had professionals here today.

11 And would you agree that they testified
12 it's worth more raw land vacant than it is with the
13 structure with responsibility to maintain it, right?

14 A. I don't exactly remember those
15 statements. And I don't --

16 THE COURT: You made your point.

17 MR. SHERMAN: Thank you.

18 No further questions.

19 THE COURT: Redirect?

20 MR. CALLAHAN: Nothing further for the
21 Doctor.

22 THE COURT: All right.

23 MR. CALLAHAN: I do --

24 THE COURT: You may sit next to your
25 attorney, sir.

1 MR. CALLAHAN: Steve Cowan who is the
2 engineer.

3 THE COURT: Deputy Perkins.

4 THE BAILIFF: Raise your right hand.

5 (The witness was duly sworn.)

6 THE COURT: All right. Please have a
7 seat.

8 JAMES STEVEN COWAN, called as a witness
9 by and on behalf of the Defendant, being first duly
10 sworn, was examined and testified as follows:

11

12 DIRECT EXAMINATION

13 BY MR. CALLAHAN:

14 Q. State your name for the record, please.

15 A. James Steven Cowan.

16 Q. And how are you employed, sir?

17 A. I'm a principal structural engineer at
18 Speight Marshall & Francis.

19 Q. Are you licensed here in the Commonwealth
20 of Virginia?

21 A. Yeah.

22 Q. All right. As an engineer?

23 A. Structural engineer, yep.

24 Q. Structural engineer.

25 Where did you receive your undergraduate

1 degree?

2 A. Old Dominion --

3 Q. Okay.

4 A. -- University.

5 Q. And have you had -- and do you hold a
6 license in Virginia as an engineer?

7 A. Correct.

8 MR. SHERMAN: Your Honor, I'll stipulate
9 he's qualified as an engineer.

10 THE COURT: Do you want to offer him up?

11 MR. CALLAHAN: Yeah, I would offer him as
12 an expert, Judge, as a structural engineer.

13 THE COURT: All right. Any objection?

14 MR. SHERMAN: No.

15 THE COURT: Qualified as an expert in the
16 field of structural engineering and can render opinions
17 in that field.

18 BY MR. CALLAHAN:

19 Q. And I'm going to let you look at your
20 report. It has already been introduced into evidence as
21 Exhibit 3 by the plaintiffs.

22 Do you recognize that report?

23 A. Yes.

24 Q. Did you author that report?

25 A. Yes.

1 Q. Okay. The opinion that you end up coming
2 to is that the building needs to be taken down.

3 A. Yes.

4 Q. What leads you to that --

5 THE COURT: Ask him that question.

6 That's not how I read the report.

7 Is it your conclusion that it must be
8 taken down?

9 THE WITNESS: I'm just -- it's our
10 opinion that the most reasonable fix for the building is
11 demolition.

12 BY MR. CALLAHAN:

13 Q. All right.

14 A. Further, that there are portions of the
15 building that must absolutely be demolished.

16 Q. All right. And what are those portions?

17 A. The porch, I guess it's described as the
18 porch, anything on the rear of the building is in
19 extreme disrepair. It's going to collapse eventually.

20 Pretty much the way it's framed and the
21 extent of the damage, especially primarily at the second
22 floor, is that none of the wood framing is salvageable.

23 Q. Okay. And so if the wood framing is not
24 salvageable, what does that mean?

25 A. What that means, basically if you read --

1 the report basically states there's nothing salvageable
2 in it except the exterior walls.

3 Unfortunately, as you remove the wood
4 framing, it's going to destabilize those walls, which
5 means those are what keep the walls from blowing over,
6 tipping over.

7 As those come out, in order to actually
8 salvage the walls, you have to put in a very extensive
9 system of bracing to even temporarily keep it stable
10 before the wood framing could be replaced.

11 Q. Okay.

12 THE COURT: The way you put it, "If you
13 were to salvage these exterior walls, a complex and
14 expensive system of temporary shoring and lateral
15 bracing utilizing structural steel struts, walers and
16 bracing would be required to temporarily stabilize the
17 walls during demolition of the wood framing."

18 THE WITNESS: Correct.

19 BY MR. CALLAHAN:

20 Q. And do you have an idea of what those
21 type of costs would be to do that?

22 A. I would estimate that the actual design
23 and installation of the steel system to keep it stable
24 would cost more than it would cost to --

25 MR. SHERMAN: I object. It's just not

1 reasonable. It's a feasibility issue. It's not
2 relevant.

3 THE COURT: I'll overrule it. He can
4 answer.

5 BY MR. CALLAHAN:

6 Q. Please.

7 A. So, basically, the system of steel to
8 keep the walls braced and stable and the design of that
9 system would likely cost more than it would to reframe,
10 to demolish and reframe the wood framing.

11 Q. Okay.

12 THE COURT: What do you mean demolish?

13 THE WITNESS: Because basically before
14 they can come in and actually remove all this wood
15 framing which has to come out, they are going to have
16 to, one, hire an engineer and install structural steel
17 because the walls are pretty tall, so you're going to
18 have a pretty complex system of structural steel braces,
19 struts, beams that has to go in prior to actually
20 removing those -- the wood. Then you come in, start
21 removing the wood and a se- -- a complicated sequence.
22 It would be incredibly difficult and expensive.

23 Then you also have some site constraints
24 on the side. I'm not sure which street it is. The one
25 that's really tight on the sidewalk, you wouldn't even

1 be able to do it along the perimeter feasibly.

2 BY MR. CALLAHAN:

3 Q. You'd have to block the street off.

4 A. Either have to block the street or get
5 very creative with the actual design to brace it.

6 Q. And do you have an estimate of what that
7 expense would be in and of itself?

8 A. I don't know if I can actually speak to
9 that.

10 Q. Okay. How long a period of time would it
11 take to do that?

12 A. Several weeks, I would imagine,
13 construction and design.

14 Q. All right. And how long doing the
15 project then?

16 A. What are we talking, full removal of the
17 wood framing, bracing and rebuilding it back to its
18 in-state condition?

19 Q. Yes.

20 A. Several months.

21 Q. And you don't have any opinion as to what
22 the value of that would cost, do you?

23 A. I don't. I -- the only thing I would
24 surmise is that the -- because working within an
25 existing structure in and of itself, you pay a premium

1 for the labor. You could say that.

2 Q. Okay. And would it be your opinion that
3 most any structure could be salvaged?

4 A. Yeah, anything that hasn't already
5 collapsed is theoretically salvageable.

6 Q. Is it your opinion then that this
7 building if you had enough money and had enough time and
8 enough -- the right people, it could get done.

9 A. Correct.

10 Q. Okay. But do you think that's feasible
11 based upon your review of this building?

12 A. No. We looked at it several ways.

13 THE COURT: What's that assumption? If
14 your assumption's unlimited money, I guess the answer is
15 sure, you can do it.

16 So would you say it's not feasible
17 because it cost too much? Because what?

18 THE WITNESS: I would say that if you, if
19 you removed any emotional attachment to the building or
20 historical sensitivity to it, there would be no dispute
21 that demolition would be the course of action for the
22 structure.

23 THE COURT: Agreed.

24 But if you did put some value in the
25 historic aspect of it and wanted to keep the exterior

1 walls and money was no limit, you could do it,
2 theoretically.

3 THE WITNESS: Of course. If money was
4 not an issue, it would be feasible to do it.

5 MR. CALLAHAN: I don't have any further
6 questions.

7

8 CROSS-EXAMINATION

9 BY MR. SHERMAN:

10 Q. Good afternoon, I'm Joe Sherman.

11 A. Hi.

12 Q. You just testified everything is savable.
13 It's just a matter of cost, right?

14 A. The wood framing is not salvageable, but
15 it's replaceable. But you could recreate that house.
16 You know, from a structural engineering standpoint, it's
17 feasible.

18 Q. So it's the demolition of the framing
19 that would cause the instability, right?

20 A. Well, there's -- I mean, there's no
21 engineer that would ever go in that structure and say
22 it's absolutely not -- a storm could come in and blow it
23 over. There's no one that would say definitively in its
24 current state that it's safe, if that makes sense.

25 So in the sense that -- that wood framing

1 is there basically so, you know, so you can walk on it
2 and also braces those walls.

3 In its current state, I would never sign
4 off saying that it's doing its job to stabilize those
5 walls.

6 Q. You crawled over all of it, though,
7 didn't you, right?

8 A. I walked through the house.

9 Q. And so the conclusion in your report
10 requires a domino effect starting with removing the
11 framing, right?

12 A. Correct.

13 Q. Okay. And so when that occurs, dominoes
14 go down, right?

15 A. Yeah. That has to occur, though.

16 Q. And that hadn't occurred yet, right?

17 THE COURT: The question we're getting at
18 is, as it was when you inspected it, would you have
19 considered it stable?

20 THE WITNESS: No.

21 THE COURT: Why? You didn't say it needs
22 to be immediately demolished in your report.

23 THE WITNESS: I guess there's a precedent
24 that it hasn't collapsed yet.

25 I do say in the report that that porch is

1 absolutely a threat to collapse.

2 That said, there's nothing in the report
3 saying that it -- you know, if a storm came through, you
4 know, that it's safe.

5 THE COURT: Well, was it your expectation
6 that the City, based on your report, would require
7 immediate demolition?

8 THE WITNESS: Just the porch. I hold the
9 opinion that we pretty clearly state that the porch has
10 to be demolished.

11 THE COURT: So were you surprised -- or
12 did you know that the City ordered it be demolished?

13 THE WITNESS: I'm not sure when I found
14 out. Probably -- that was probably a couple weeks ago I
15 was contacted.

16 THE COURT: Okay. So it was not your
17 understanding that this report was needed to justify
18 demolition of the entire improvements?

19 THE WITNESS: No. This report was purely
20 an objective structural evaluation report that we would
21 do for any structure that someone was going to renovate
22 or was damaged.

23 BY MR. SHERMAN:

24 Q. Right.

25 And you did it based on a free market

1 standard of what's reasonable, right?

2 A. Again, you see something damaged, you
3 report it and make your evaluation of how you repair it.

4 Q. Right.

5 And you just testified that it wasn't
6 your opinion that the whole house needs to come down,
7 right?

8 A. I'm of the opinion that it is physically
9 possible to restore it to its original condition.

10 I'm of the opinion from a cost standpoint
11 and the complexity of the construction compared to new
12 construction when you're not inhibited with those
13 things, that that's what you would -- that would be our
14 recommendation to demolish it.

15 Q. I understand. And believe me, I get it.

16 If you contrast the two conclusions on 48
17 and 49, it speaks for itself.

18 On 48, you say, "We recommend the porch
19 structure be demolished as soon as possible to prevent a
20 potential hazard to the public," right? And then on 49:
21 "It is our opinion that the best and most reasonable
22 course of action for the structure is complete
23 demolition."

24 A different, a different standard, right?

25 A. Yeah, I guess so, yeah.

1 Q. That's the reasonable versus as soon as
2 possible to prevent a potential hazard, right?

3 A. Yeah.

4 Q. All right.

5 MR. SHERMAN: I've got a bunch of stuff,
6 but I think I can rest on that, Your Honor.

7 THE COURT: All right. Any redirect?

8 MR. CALLAHAN: Nothing, Judge.

9 THE COURT: All right. Thank you, sir.
10 You're excused. You're free to stay or free to leave.

11 MR. CALLAHAN: Judge, we would rest.

12 THE COURT: All right. Any rebuttal
13 evidence today?

14 MR. SHERMAN: No, Your Honor.

15 THE COURT: All right. I'll hear very
16 brief closing. I'm going -- I'll allow the parties an
17 opportunity to provide me a post-hearing brief.

18 In that post-hearing brief I want you to
19 address specifically the issue of whether the Court has
20 jurisdiction in light of the Statewide Building Code,
21 including whether the appeal period in the Statewide
22 Building Code would apply to individuals other than the
23 homeowner, such as the association.

24 I'll give you each five minutes if you'd
25 like on a quick closing, but I'll allow you an

1 opportunity to provide me a brief within a week as well.
2 Then I'll discuss the preliminary relief.

3 MR. SHERMAN: Your Honor, I'm not going
4 to belabor the points. You heard it. You get it, I can
5 tell. We've made our points.

6 As far as the elements and the likeliness
7 to succeed, we put on evidence.

8 THE COURT: Likely to succeed doing what?
9 Are you going to be filing some kind of complaint? I
10 don't know what the ultimate relief you're seeking is.

11 MR. SHERMAN: Yes, we are going to file a
12 declaratory action asking this Court to declare that the
13 emergency status is arbitrary and capricious.

14 THE COURT: Then we're going to need to
15 get the City involved in the lawsuit as well.

16 MR. SHERMAN: I think that would be an
17 appropriate party.

18 THE COURT: I think it's a necessary
19 party.

20 All right. Go ahead.

21 MR. SHERMAN: The likelihood of
22 succeeding on those merits I think has been demonstrated
23 because the builder who's in the market to restore this
24 type of project is interested in buying the structure.

25 The engineer just said that it's not an

1 imminent threat.

2 And the Building Commissioner said that
3 he relied very heavily on there. He didn't go in there
4 himself.

5 Every City employee said they didn't go
6 in there.

7 THE COURT: The question of whether it's
8 arbitrary and capricious for the City to make a
9 determination otherwise, it's a pretty high burden.

10 MR. SHERMAN: I agree.

11 I think that when they enforce something
12 that's drastic and especially with the compelling State
13 interest at issue here and codified as a State interest
14 and empowering the municipality to have this process
15 that they've set up and then they don't enforce the
16 Building Codes through adjudication and then elect to
17 enforce the Building Code to demolish, appears arbitrary
18 and capricious, and it's based on their personal
19 convenience.

20 There's testimony today that it was a
21 problem-solver.

22 So I think we are going to succeed on the
23 merits and I also think that the irreparable harm has
24 been stipulated to and, if not, there's compelling
25 evidence that you're not going to get another

1 contributing structure in its place. You can't. It's
2 just not possible.

3 So with the balance of the equities, I
4 think that the compelling State interest, the local
5 level process and the interest of everybody involved is
6 going to have to outweigh Dr. Sinesi who claims he
7 doesn't even understand the basic
8 accounting principles --

9 THE COURT: Well, it's also the public.
10 Not even the public interest part of it; the potential
11 injury to the public of the structure.

12 Mr. Callahan raised a valid point. I
13 mean, one of the conditions of a bond could be that you
14 provide insurance in case something does happen.

15 I'm not sure whether the insurance is
16 covering that building right now when the City has
17 declared that an emergency exists.

18 MR. SHERMAN: I think that the emergency
19 prong and the public safety issue are intertwined to the
20 extent that the engineer just said it's not a problem
21 and that, you know, we put on evidence that the builder
22 wants to buy it and another engineer said that this
23 isn't a structural issue. It needs to be rebuilt in the
24 right way, but there's substantial evidence that it's
25 not an emergency and there's no threat to the public

1 safety and health.

2 If we wanted to do a relief where that
3 porch comes down because that thing is not part of the
4 brick structure and doesn't have another day in its
5 life, then we can live with that.

6 But knocking the whole structure down is,
7 you know, to spare the need to enforce the Code is
8 arbitrary and the wrong result in this case.

9 THE COURT: Where do we ultimately end
10 up? Say you do prove that the City's decision was
11 arbitrary and capricious. Do you want the Court to
12 order that he has to rehab the house to your standards?

13 MR. SHERMAN: No, no, no. He can
14 demolish the house. There's a process for it. He gets
15 a certificate of appropriateness. He knows that process
16 well. He got it for the building.

17 THE COURT: Which just allows you to
18 appeal and we're back to the same issue.

19 MR. SHERMAN: No, no, no. He has -- as
20 part of that process, he has to market the property for
21 fair market value for 12 months, and if it's not bought
22 by then, he can knock it down.

23 But he hasn't done that.

24 What he's done is abused the time, and
25 he's had enough time to do it twice. He hasn't done it.

1 He's marketing it for the raw land value so that the
2 people who are interested in buying it for the structure
3 won't bid on it, and the -- I mean, the only thing that
4 needs to happen --

5 THE COURT: I wasn't aware. You said
6 there's a condition where he would have to market it for
7 a year?

8 MR. SHERMAN: Yes, Your Honor.

9 THE COURT: And the Court gets it wrong,
10 you're going to have to post a bond for the potential
11 damages for him not being able to sell it in that year,
12 I guess.

13 MR. SHERMAN: He can demolish it then.
14 Yeah, he'll have carrying costs for a year.

15 And based on that transcript and his
16 testimony as to not being good with money, it
17 doesn't sound like it would be a whole lot.

18 And the fact he's gone this two years
19 without doing it, then, I will submit, that we can deal
20 with that, yes, Your Honor.

21 THE COURT: All right. Mr. Callahan?

22 MR. CALLAHAN: Judge, basically what you
23 ever here is that the Freemason folks should have
24 brought the City in right from the start, but obviously
25 they didn't want to upset the City of Norfolk. The City

1 of Norfolk should be here arguing this case because my
2 client is under an order to tear down from the City.

3 The City can go out there tomorrow and
4 tear it down because they have the authority to do that
5 under the Statewide Building Code.

6 And so that's the -- you know, that has
7 been the biggest problem. So that goes to the
8 jurisdictional issue that you talked about that you want
9 briefed.

10 THE COURT: But jurisdictional is whether
11 they missed their time limit and it's barred to begin
12 with.

13 MR. CALLAHAN: I think they are barred.

14 But I think when you look at the holding
15 in the Winter's case, the public has a right to be safe.
16 And this building is not safe and it needs to come down.

17 Dr. -- you know, they want to --

18 THE COURT: Your engineer just said the
19 only thing really unsafe is the porch.

20 MR. CALLAHAN: Right.

21 But at the same time, I mean, where are
22 we going to be -- let's go a year from now. Where are
23 we going to be a year from now?

24 So we'll be a year from now and, you
25 know, they are going to appeal it and they are going to

1 appeal it, so then we're two years from now, okay?
2 We're three years from now. After we take it up from
3 this Court's ruling to the Supreme Court of Virginia,
4 we're three years from now. The house is going to sit
5 there.

6 Now, is it going to be repaired in that
7 period of time? Is it going to be -- somebody going to
8 buy it and fix it up?

9 If somebody was going to buy it and fix
10 it up, if it had been 21 months, there's been a sign up
11 to sell it. They haven't materialized.

12 This gentleman they brought in here that
13 said that he would repair it, he has no intention of
14 repairing it. He has the intention of knocking it down
15 and building on it.

16 Dr. Sinesi has put -- he bought it, he's
17 put engineers, architects to develop plans to fix this
18 up, jump through all the hoops that were required.

19 They are giving -- they are acting like
20 Dr. Sinesi has gone in and done his research and figured
21 out the difference under the ordinance that you need a
22 certificate of appropriateness or you can get it done in
23 an emergency.

24 And I don't think that's his mindset at
25 all.

1 I think what he looks at to get the
2 report done is a question of can I do this, is it
3 feasible to do.

4 You know, you can do anything. They had
5 a fire over here --

6 THE COURT: There's a counter-argument
7 the way he chose to do it or the way that it has
8 progressed has kind of robbed everyone else the
9 opportunity to weigh in.

10 MR. CALLAHAN: Well, Judge, you know, on
11 that is that he's dealing with the insurance companies.
12 And so he doesn't finish dealing with the insurance
13 companies till spring of this year. And so they are in
14 and out and looking at it and making the determination.
15 They are saying it's a hundred-year-old structure,
16 therefore it's fully depreciated, it's not worth what
17 you say it's worth because --

18 THE COURT: I got it, I got it.

19 MR. CALLAHAN: Okay. So if this house
20 was in Ghent, if this house was in Larchmont, they would
21 have torn that house down by now. The Larchmont Civic
22 League could have come in here and jumped up and down,
23 the West Ghent Civic League could have come in here and
24 jumped up and down. The City would have torn it down.

25 So the only reason we're having this

1 discussion is because it's, quote unquote, an historic
2 house.

3 But it's not. It's in an historic
4 district, okay? That's all it is.

5 The house -- there are many other houses
6 in the City of Norfolk that are a lot older than that
7 house in the Ghent area, in the Freemason area.

8 But in this particular case, Judge, the
9 biggest issue here is that Dr. Sinesi does not know
10 which way to go. You know, he is caught between a rock
11 and a hard place here, because the City says to knock it
12 down, Your Honor said don't knock it down, judge
13 downstairs says make these repairs.

14 And so we just want -- you know, the Code
15 says, the Building Code says that once this -- the --
16 Mr. Fortner makes his decision, that that decision is
17 final and therefore it needs to come down.

18 Dr. Sinesi doesn't want that. It makes
19 him sad. But unfortunately those things happen.

20 And he's a victim of a crime, and we
21 would ask that the injunction not be granted.

22 THE COURT: All right. Last word from
23 you, Mr. Sherman?

24 MR. SHERMAN: Your Honor, I think the
25 Court has had the opportunity to gauge the credibility

1 of the witnesses.

2 And the mischaracterizations of the
3 testimony aside, I think the process is worth protecting
4 here inasmuch as the home, and he had every opportunity
5 to do it in a way that the zoning code allows.

6 And so we would ask Your Honor to enjoin
7 the demolition, and we appreciate your time.

8 THE COURT: All right. The Court does
9 have some serious concerns regarding jurisdiction.

10 What I'm going to do, I'm going to extend
11 the current temporary injunction for a period of 30 days
12 or until the Court rules, whatever is sooner.

13 In the meantime, I'm going to give the
14 parties seven days -- the only reason I'm keeping the
15 time frame short is because I'm dealing with a temporary
16 injunction -- to provide me any additional materials you
17 like either by way of brief or cases, however you want
18 to handle that. I'll leave that up to you.

19 If you could forward a courtesy copy to
20 my law clerk. Her email is amuncy@circuitcourtnva.us.
21 File it with the court but also provide her a courtesy
22 copy, and then the Court will rule as soon as possible
23 after that.

24 I certainly plan to rule within the 30
25 days, so we'll know where to go from there.

1 MR. CALLAHAN: Judge, what are we doing
2 about -- we've got no insurance on this piece of
3 property.

4 Is anyone going to provide for the safety
5 of the public in between now and then on a structure
6 that's not insurable, if it falls down and it kills
7 somebody in the next 30 days?

8 THE COURT: So what's your proposal?

9 MR. CALLAHAN: Judge, they are the ones
10 that have come in and asked for an injunction. I
11 think --

12 THE COURT: You just said it's not
13 insurable.

14 MR. CALLAHAN: Well, I think they need to
15 at least post a bond of some sort to do it. I don't
16 know if they can get somebody to do it. I don't know.

17 But I think in the least there's got to
18 be something that protects the public from this
19 building.

20 THE COURT: Mr. Sherman, any response?

21 MR. SHERMAN: Your Honor, they've allowed
22 it to get to this condition. I mean, the entire
23 situation we're in is as a result of criminal neglect.
24 And so he's made his bed and he should sleep in it.

25 And the structural engineer has said that

1 no one's going to get hurt over there today.

2 And he doesn't even have the property
3 secured or no trespassing signs up.

4 And the neighbors are calling for dead
5 possums.

6 And so for him to act like it's a war
7 zone down there is a mischaracterization.

8 And so there's also testimony that the
9 builder who walks his dog by doesn't fear for his life.

10 So I would posit, Your Honor, for him to
11 shift the burden at this point is not equitable.

12 THE COURT: The Court is not going to
13 require a bond at this time.

14 The Court is going to reserve the right
15 to require a bond should it grant the temporary
16 injunction beyond this short term of 30 days or until
17 the Court rules sooner.

18 Any other questions?

19 MR. CALLAHAN: No, Your Honor.

20 THE COURT: All right. I do appreciate
21 the preparation of counsel, and I will be with you
22 shortly. So just make sure you submit anything within
23 the seven days. If I don't hear anything from you
24 within the seven days, I'll assume you're not going to
25 submit anything. But I would encourage you to at least

1 brief the jurisdictional issue.

2 MR. CALLAHAN: Thank you.

3 THE COURT: Very well. The Court will be
4 in recess.

5 (Whereupon, court was adjourned at
6 6:07 p.m.)

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CERTIFICATE OF COURT REPORTER

I, Marianne Martini Holmes, RPR, do hereby certify that I reported verbatim the proceedings in the Circuit Court of the City of Norfolk, in the matter of Freemason Street Area Association vs. Dr. Mark S. Sinesi, heard by The Honorable David W. Lannetti, Judge of said court.

I further certify that the foregoing is a true, accurate and complete transcript of said proceedings.

Given under my hand this 18th day of October 2018 at Norfolk, Virginia.



Marianne Martini Holmes, RPR
Notary Registration No. 7021737

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Documents and Written
Arguments Submitted
By the City of Norfolk

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NORFOLK

Office of the City Attorney

May 3, 2019

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State Building Codes Office
600 East Main Street – Suite 300
Richmond, Virginia 23219

Re: Appeal of Freemason Street Area Association - Appeal No. 18-22

Dear Mr. Luter:

The City of Norfolk (City) has no objections or additions to your draft staff summary.

With respect to written argument, I submit the following on behalf of the City:

1. Freemason Street Area Association (Freemason) sought to enjoin the demolition by the owner, Mark Sinesi (Sinesi) of the structure located at 355 W. Freemason St. Norfolk, Va. The injunction was denied in Norfolk Circuit Court and was upheld by the Virginia Supreme Court. (Copy of Virginia Supreme Court Order attached). The structure has been demolished and renders this appeal moot. See Cynthia Owens and Richard Owens v. City of Virginia Beach, Memorandum Opinion, Virginia Court of Appeals (unpublished), August 7, 2018.
2. The Norfolk Board of Building Code Appeals correctly found that the appeal of Freemason was untimely. On October 23, 2018 Freemason appealed the property maintenance code official's August 14, 2018 Notice of Violation of Unsafe or Uninhabitable Property issued to the property owner, Sinesi. This was well outside the applicable time period

W. Travis Luter, Sr., C.B.C.O.
Assistant Secretary to the State
May 3, 2019
Page Two

for submitting the appeal under Virginia Maintenance Code (VMC) section 106.

3. Freemason is not an aggrieved party under the Uniform Statewide Building Code. *See Appeal of Deborah Caldwell-Bono and Benny Bono, Appeal No. 17-6, before the State Building Code Technical Review Board (January 28, 2018).*
4. Freemason admitted at the informal fact-finding conference that the only thing it hopes to gain from the present appeal is a mandate that “historical associations” be specifically notified of demolitions by building code officials in the future. An appeal hearing before the Review Board is not the proper forum for attempting to achieve the desired goal as this would require a statutory or regulatory change which is not within the purview of the Review Board. Additionally, Freemason lacks standing to seek prospective relief regarding any hypothetical future claim on behalf of “historical associations”.
5. If the Review Board gets to the merits of the case, the Norfolk Board of Building Code Appeals properly denied Freemason’s arguments that the property maintenance code official did not comply with the provisions of VMC section 105.1. There was ample evidence that the structure was unsafe and unfit for habitation and that demolition was proper.

Very truly yours,



Cynthia B. Hall
Deputy City Attorney

CBH:sb

Attachment

cc: Joseph Sherman, Esq. – **via email delivery**
F. Sully Callahan, Esq. – **via email delivery**
Sherry Johnson, Division Head, Neighborhood Development
Rick Fortner, Building Commissioner, Department of Planning

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 19th day of October, 2018.

Freemason Street Area Association, Inc.,

Petitioner,

against

Record No. 181317

Circuit Court No. CL18-7735

Mark S. Sinesi,

Respondent.

Upon a Petition Under Code § 8.01-626
Justices Mims and Powell and Senior Justice Millette

Upon consideration of the petition and amended petition filed pursuant to Code § 8.01-626, the motion to dismiss and brief in response filed by the respondent, and the brief in response filed by the City of Norfolk, the temporary injunction issued October 16, 2018 is hereby lifted and the petition for review is denied.

This order shall be certified to the Circuit Court of the City of Norfolk.

A Copy,

Teste:

Oliver L. Hamming

Clerk

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VIRGINIA:

BEFORE THE
STATE BUILDING CODE TECHNICAL REVIEW BOARD

IN RE: Appeal of Jack D. Singleton
Appeal No. 19-01

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VIRGINIA:

BEFORE THE
STATE BUILDING CODE TECHNICAL REVIEW BOARD (REVIEW BOARD)

IN RE: Appeal of Jack D. Singleton
Appeal No. 19-01

REVIEW BOARD STAFF DOCUMENT
(For Preliminary Hearing as to Jurisdiction)

Suggested Summary of the Appeal

1. Jack D. Singleton (Singleton), owner of the property located at 190 West Jefferson Street in the Town of Wytheville, appeals enforcement action by the Town of Wytheville, Office of the Building Official (Town of Wytheville) under Part III of the Uniform Statewide Building Code (Virginia Maintenance Code).

2. On March 26, 2018, the Town of Wytheville, in enforcement of the Virginia Maintenance Code, issued a notice of violation to Mr. Singleton for his property located at 190 West Jefferson Street. The notice outlined fifty seven (57) violations of the Virginia Maintenance Code and contained a statement of right of appeal.

3. The Town of Wytheville affixed a placard on the property, near the building, on January 26, 2016. The placard identified the building as unsafe or unfit for human habitation. On March 27, 2018, the Town of Wytheville drafted and affixed a copy of the Notice of Violation (NOV) on the building.

4. Mr. Singleton filed an appeal to the Town of Wytheville Local Board of Appeals (local board) on April 11, 2018.

5. The local board conducted a hearing in May of 2018. On June 13, 2018, Mr. Singleton was served a copy of the local board resolution and subsequently filed an application for

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appeal to the Review Board with a certification of service date of June 22, 2018. The appeal was considered by the Review Board at the October 12, 2018 meeting.

6. In the decision of the Review Board dated November 16, 2018, the Review Board upheld six cited violations. The first upheld cited violation was for VMC Section 105 (Unsafe structures or structures unfit for human occupancy); the Review Board found the structure to be in violation and that the placarding of the structure to be proper. The Review Board then found that the placard was improper and ordered a proper placard be issued by remanding the placard to the Town to be re-issued with the proper date and in full compliance with Section 105 of the VMC. The Review Board also upheld cited violations #2-#5 and #10 of the NOV dated March 26, 2018.

7. The November 16, 2018 decision of the Review Board was further appealed to the Wythe County Circuit court on December 17, 2018. The record of the appeal was sent to the circuit court and all parties on December 20, 2018

8. On January 22, 2019, the Town of Wytheville performed an inspection of the property and re-issued a NOV citing the same six violations as previously cited #2-#5 and #10 in the NOV dated March 26, 2018 which was upheld by the Review Board in the November 16, 2018 decision.

9. Mr. Singleton filed an appeal to the local board February 19, 2019.

10. In a letter dated March 11, 2019, the Town of Wytheville explained that the NOV dated January 22, 2019 was a continuation of the decision issued by the Review Board on November 16, 2018.

11. The local board hearing was held on March 20, 2019. The local board denied the appeal. Mr. Singleton filed an application for appeal to the Review Board with a certification of service date of April 15, 2019.

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12. This staff document along with a copy of all documents submitted will be sent to the parties and opportunity given for the submittal of additions, corrections or objections to the staff document, and the submittal of additional documents or written arguments to be included in the information distributed to the Review Board members for the appeal hearing before the Review Board.

Suggested Issue for Resolution by the Review Board

1. Whether the appeal is properly before the Board.

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Basic Documents

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WYTHEVILLE PUBLIC SAFETY

COUNCIL-MANAGER FOR OF GOVERNMENT SINCE 1924

TOWN MANAGER
WAYNE SUTHERLAND
276-223-3350



BUILDING/FIRE OFFICIAL
CHARLES VANNATTER
276-223-3339

150 East Monroe Street
WYTHEVILLE, VIRGINIA 24382

January 22, 2019

Jack Dennis Singleton
260 West Jefferson Street
Wytheville VA 24382

Re: Report of the unsafe structure located on 190 West Jefferson Street in Wytheville VA

Dear Mr. Singleton,

This is a report, pursuant to VMC 105.2, informing you that your property at 190 West Jefferson Street in Wytheville, Virginia has been determined to be an unsafe structure pursuant to the Virginia Maintenance Code. Please see the enclosed notices with specific code references.

You have ninety (90) days to obtain secure the structure from public entry. You have (14) fourteen calendar days from receipt of this notice to appeal with the Building Code Appeals Board. If the unsafe structure has not been secured within the designated time frame, the Town will proceed to secure the unsafe structure and a lien of cost will be placed on the property. In accordance to the *VMC 105.8., the structure must be secured against public entry. A building permit is required to provide an acceptable barrier. Securing the structure must occur within (90) ninety days.

Jack Dennis Singleton
260 West Jefferson Street
January 22, 2019
Page Two

In accordance with VMC 105.2, an inspection was done on January 22, 2019 by this office and below is results of the inspection.

Use of the structure: Abandoned Structure

Description of the nature: The structure is rectangle one story approximately 30'x40' consisting of four block walls with metal wiring (chicken wire) covering the three window openings and one door opening. This structure does not have a roof and is open to the natural elements such as trees, weather and rodents. The window opening has rotted wood trim. The structure interior is open to the natural elements and has natural vegetation and trees growing. The structure has no records of any sewer, water or electrical services, or any record of person(s) living in the structure, or any activity since the year 1997.

Extent of any conditions found:

1. There are trees growing inside the foundation walls and possibly roots have grown beneath the foundation walls.
2. The east corner of the structure appears to have experience settlement resulting in cracks in the wall.
3. The wood framing on the wall appears to be rotting with moss growing.
4. The site area appears to be poorly graded, no protection from runoff near the foundation
5. An opening by the foundation that appears to be leading under the foundation cavity.
6. Top cavity of the block and cracks in the block are subject to the weather.
7. Dirt floor surface with growth of vegetation and natural elements.

*Virginia Maintenance Code

If you have any inquiries, please do not hesitate to call me.

Sincerely,



Charles Vannatter,
Building Official



NOTICE OF VIOLATION

TOWN OF WYTHEVILLE

P.O. DRAWER 533 - WYTHEVILLE, VA 24382

OFFICE OF THE BUILDING OFFICIAL

OWNER/OCCUPANT Jack Dennis Singleton

DATE January 22 2019

BUILDING 1&2 Dwelling

TIME certified mail AM PM

ADDRESS 190 West Jefferson Street

PERMIT NO. n/a

Wytheville VA ZIP 24382

OCCU/USE GROUP n/a

The following violation(s) of the Virginia Uniform Statewide Building Code were observed during an inspection of the above referenced property. You are responsible for taking action to correct violation(s) immediately.

ITEM NO.	CODE SECTION	VIOLATION
1	2012 VMC 105	Structure unsafe or unfit for human occupancy. (January 22, 2019)
2	2012 VMC 105	Structure must be secured against public entry. Must obtain a building permit detailing the type of barrier around the structure.
3	2012 VMC 301.2	The owners shall maintain the structure and exterior property in compliance with these requirements.
4	2012 VMC 301.2	All vacant structures and premises or vacant land shall be maintained in a clean, safe, secure, safe, sanitary condition as not to cause a blight problem or public health or safety.
5	2012 VMC 302.2	All premises shall be graded and maintained to protect the foundation wall or slab of the structure from accumulation and drainage surface or stagnant water.
6	2012 VMC 304.5	All foundation walls shall be maintained plumb and free from open cracks and breaks and shall be kept such conditions so as to prevent the entry of rodents and other pets.
7		Notice of Violation is located on premise
8		

Failure to correct violation(s) within 90 days from receipt of this notice may result in penalties as noted in Section 36-106, Code of Virginia. You may appeal this order to the Town Building Code Appeals Board by written request within 14 days.

This Notice given to certified mail & Located on the premise

Reinspected _____, 20____ Results _____

charlesv@wytheville.org (276) 223-3339 150 East Monroe Street, Wytheville VA 24382

Issued by: Charles Vannatter Date: January 22, 2019

A TRUE COPY

Shawn A. [Signature]
CLERK OF COUNCIL

Application for Appeal

Town of Wytheville Building/Fire Official
150 East Monroe Street
Wytheville VA 24382
(276) 223-3339 office (276) 223-3315 fax

Building/Fire Code Appeals Board

Type or Print All Information

1. Date of appeal submission: 2/19/19 Date of Code Application: _____

2. Type of Appeal Hearing Requested: (applicant must indicate only those that apply)

- | | |
|----------------------|---|
| Building Code | Elevator Code |
| Electrical Code | Fire Code |
| Mechanical Code | Property Maintenance Code <input checked="" type="checkbox"/> |
| Plumbing Code | Virginia Rehab Code |
| IRC-Residential Code | Other (specify) _____ |

PAID

FEB 19 2019

TOWN OF WYTHEVILLE

3. Applicant's name: Jack Singleton Address: 260 W. Jefferson ST Wytheville Va, 24382

4. Applicant's contact phone/fax information: 276 6134476 Email: _____

5. Owner of Property: NOT different ^{Dem Applicant} Address of Property: 190 W. Jefferson ST

6. Permit Number (if applicable): NA

7. Applicable Code(s): VMC 2012 Edition (s): 2012

8. Applicable Code Section(s): 105, 301, 302, 304

9. Applicant's understanding of the applicable code requirements (please attach additional sheets as needed):
Understand requirements pretty good but not perfect.

10. Grounds for Appeal: Check all that apply (USBC Section 119.5 for new construction and the rehabilitation of existing structures; Section 106.5 for property maintenance; Section 112.5 for the fire prevention code.

I claim that:

- a) The Building Official/Code Official/Fire Official has refused to grant a modification which complies with the intent of the provisions of the code;
- b) The true intent of the code has been incorrectly interpreted;
- c) The provisions of the code do not fully apply;
- d) The use of a form of construction/compliance that is equal to or better than that specified in the code has been denied.

Please attach with reason(s) for each of the items checked in section 10. Please print or type reasons. Manufacturer information, cut sheets, data sheets from approved testing agencies may also be attached.

RESOLUTION

WHEREAS, the Wytheville Local Board of Building Code Appeals is duly appointed to resolve disputes arising out of enforcement of the Virginia Maintenance Code; and

WHEREAS, an appeal has been filed and brought to the attention of the Board of Building Code Appeals; and

WHEREAS, a hearing was held on March 20, 2019 to consider the aforementioned appeal; and

WHEREAS, the Board has fully deliberated this matter; now, therefore, be it

RESOLVED, that in the matter of Jack Dennis Singleton, a motion was made, seconded, and unanimously approved by the Board of Building Code Appeals to uphold the decision made by the Town of Wytheville Building Official ruling the structure located at 190 West Jefferson Street as unsafe, the property needs to be secured against public entry, and debris and trash needs to be cleaned up.

IN RE: Town of Wytheville v. Jack Dennis Singleton

The appeal is hereby denied regarding the vacant structure and property located at 190 West Jefferson Street for the reasons below along with the required actions to be taken:

1. The structure is in violation of 2012 VMC 105 and is in an unsafe condition and unfit for human occupancy.
2. The structure is in violation of 2012 VMC 105 and is not securely enclosed against public entry. The Board is requiring the installation of a fence compliant with OSHA standards within 30 days, the design to be reviewed and approved by the Building Official along with a permit issued prior to the installation, to secure the property.
3. The structure and the exterior property are in violation of 2012 VMC 301.2 and shall be maintained in compliance with the general requirements of 2012 VMC 301.3, 302.2, and 304.5
4. The vacant structure and premises are in violation of 2012 VMC 301.3 and have not been maintained in a clean, safe, secure, or sanitary condition so as not to cause a blight problem to public health or safety. The Board is requiring the property to be cleaned up and all trash removed within 30 days of the installation of the fence in No. 2.
5. The premises are in violation of 2012 VMC 302.2 and shall be graded and maintained to protect the foundation walls or slab of the structure from accumulation and drainage surface or stagnant water.
6. The foundation walls are in violation of 2012 VMC 304.5 and shall be maintained plumb and free from open cracks and breaks and shall be kept in such condition as to prevent the entry of rodents and other pests.

Date: March 20, 2019

Signature:


Chairman of Wytheville Board of Appeals

Signature:


Vice-Chairman of Wytheville Board of Appeals

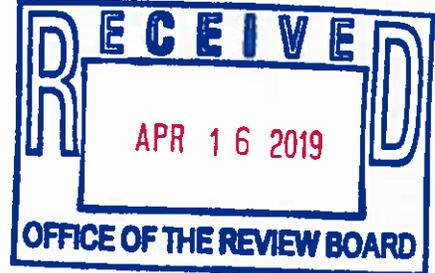
Note: Any person who was a party to the appeal may appeal to the State Building Code Technical Review Board by submitting an application to such Board within 21 calendar days upon receipt by certified mail of this resolution. Application forms are available from the Office of the State Review Board, 600 East Main Street, Richmond, VA 23219, 804-371-7150

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
State Building Codes Office and Office of the State Technical Review Board
Main Street Centre, 600 E. Main Street, Suite 300, Richmond, Virginia 23219
Tel: (804) 371-7150, Fax: (804) 371-7092, Email: sbco@dhcd.virginia.gov

APPLICATION FOR ADMINISTRATIVE APPEAL

Regulation Serving as Basis of Appeal (check one):

- Uniform Statewide Building Code
 Statewide Fire Prevention Code
 Industrialized Building Safety Regulations
 Amusement Device Regulations



Appealing Party Information (name, address, telephone number and email address):

jack singleton 260 w. jefferson st. 24382

diamondjacksing@gmail.com

276 613 4476

Opposing Party Information (name, address, telephone number and email address of all other parties):

charles vannatter code official , fire marshall, zoning enforcement official Town of Wytheville VA. 150 east monroe st.

24382 276 223 3339 email charlesv@wytheville.org

Additional Information (to be submitted with this application)

- Copy of enforcement decision being appealed
- Copy of record and decision of local government appeals board (if applicable and available)
- Statement of specific relief sought

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of april, 2019, a completed copy of this application, including the additional information required above, was either mailed, hand delivered, emailed or sent by facsimile to the Office of the State Technical Review Board and to all opposing parties listed.

Note: This application must be received by the Office of the State Technical Review Board within five (5) working days of the date on the above certificate of service for that date to be considered as the filing date of the appeal. If not received within five (5) working days, the date this application is actually received by the Office of the Review Board will be considered to be the filing date.

Signature of Applicant:

A handwritten signature in red ink that reads "Jack Singleton". The signature is written over a horizontal line.

Name of Applicant: jack singleton

(please print or type)

The appellant seeks the following relief

Specifically:

1. That my structure at 190 W. Jefferson 24382 is secured and is not unsafe ~~per~~ and that the code official's determination is unfounded
2. That item 3 of the NOV is unfounded in Code and should be overturned.
3. That insufficient time ~~considering~~ my age, health, and weather conditions was given to correct items 3-6 on the ~~VAC. NOV~~ NOV.
3. Refusal of the Code official to allow appellant to enter the structure has made the violations uncorrectable by the appellant and violate the ultimate items 3-6 NOV

4. Item 5 is in dispute with my engineering report and should be overturned as evidence.

5.

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Documents Submitted
By the Town of Wytheville

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WYTHEVILLE PUBLIC SAFETY

COUNCIL-MANAGER FOR OF GOVERNMENT SINCE 1924

TOWN MANAGER
WAYNE SUTHERLAND
276-223-3350



BUILDING/FIRE OFFICIAL
CHARLES VANNATTER
276-223-3339

150 East Monroe Street
WYTHEVILLE, VIRGINIA 24382

April 30, 2019

W. Travis Luter Sr., C.B.C.O.
State Building Code Technical Review Board
600 East Main Street, Suite 300
Richmond, Virginia 23219

Re: Appeal to the Review Board for Jack Singleton (Appeal No. 19-01)

Dear Mr. Luter,

Please find the following enclosed supporting documents relating to Mr. Singleton's appeal:

1. A copy of Mr. Singleton's 2019 application to the Wytheville Building Code Appeals Board, which you have requested.
2. Photos taken on January 22, 2019 and April 30, 2019 showing that the structure is not properly secured, in reference to item #1 in Mr. Singleton's appeal letter to your office.
3. A copy of Mr. Singleton's engineer report, as referenced by Mr. Singleton in item #4 of his appeal letter to your office. As you will note, the engineer's report lists several issues with the foundation cracks, openings, and grading.

In reference to item #3 (second #3) of his appeal letter, Mr. Singleton requested and was given permission by this office to enter the structure to remove rubbish from inside.

If you have any inquiries, please do not hesitate to call me.

Sincerely,



Charles Vannatter,
Building Official

VIRGINIA:

BEFORE THE
STATE BUILDING CODE TECHNICAL REVIEW BOARD

IN RE: Appeal of Jack D. Singleton
Appeal No. 18-09

DECISION OF THE REVIEW BOARD

Procedural Background

The State Building Code Technical Review Board (Review Board) is a Governor-appointed board established to rule on disputes arising from application of regulations of the Department of Housing and Community Development. See §§ 36-108 and 36-114 of the Code of Virginia. The Review Board's proceedings are governed by the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

Case History

Jack D. Singleton (Singleton), owner of the property located at 190 West Jefferson Street in the Town of Wytheville, appealed the enforcement action by the Town of Wytheville, Office of the Building Official (Town Building Official) under Part III of the Uniform Statewide Building Code (Virginia Maintenance Code).

In March of 2018, the Town Building Official, in enforcement of the Virginia Maintenance Code (VMC), issued a notice of violation (NOV) to Mr. Singleton for his property located at 190 West Jefferson Street. The notice outlined fifty seven (57) violations of the VMC. The Town Building Official affixed a copy of the NOV on the home of Singleton located at 260 West Jefferson Street; however, the notice was never posted on the structure located at 190 West Jefferson Street. The Town Building Official re-placarded the structure at 190 West Jefferson

Street with a replacement placard. The structure was originally placarded on January 26, 2016. The placard identified the structure as unsafe for habitation.

The local appeals board heard Singleton's appeal on April 11, 2018 and ruled to uphold the decision of the Town Building Official. Singleton then further appealed to the Review Board.

Findings of the Review Board

A. Whether or not the appeal was timely to the local board.

In the Town's written submittal to the Review Board, the Town argued that the appeal was not timely to the local appeals board. The local appeals board heard the appeal and rendered its decision. The Review Board did not agree with the Town that the appeal to the local board was untimely.

B. Whether or not to overturn the decision of the Property Maintenance Official and the local appeals board that violations of the Virginia Maintenance Code Section 105 (Unsafe structures or structures unfit for human occupancy) exist and that the placarding of the structure was proper.

Singleton argued that the violations existed prior to his ownership of the property. He further argued that the Town placarded the property on January 26, 2016 when he was not the owner of the property and that no report was drafted related to the original placarding of the property. Singleton also argued that the placard was misleading and unclear.

The Town argued that the property did fit the description of unsafe structure according to the definitions in section 202 of the VMC. The Town further argued that violations of the VMC section 105 did exist and that the placarding of the structure was proper. The Review Board agreed with the Town that violations exist and the placarding of the structure was proper; however, the Review Board did not agree with the language on the placard.

C. Whether or not to overturn the decision of the Property Maintenance Official and the local appeals board that violations of the Virginia Maintenance Code Section 105 (Unsafe structures or structures unfit for human occupancy) exist and that the securing of the structure was required.

Singleton argued the violations no longer existed due to the installation of fencing on the structure subsequently restricting access to the structure rendering the structure secure. The Town argued that the violations were not satisfied by the installation of the fencing; furthermore, that access to the structure was not secured which was substantiated by Singleton's testimony of people tossing garbage into the structure and removing garbage from the structure. The Review Board agreed with the Town that violations exist and the securing of the property is required.

D. Whether or not to overturn the decision of the Property Maintenance Official and the local appeals board that the remaining violations of the Virginia Maintenance Code listed on the March 26, 2018 Notice of Violation (NOV) exist.

Singleton argued that the remaining violations did not exist as the structure was a block wall and plumbing, electrical, and mechanical violations could not exist. The Town argued that the violations did exist. The Town clarified that they issued the all inclusive NOV at the request of Singleton in an attempt to provide Singleton with a comprehensive list of violations that needed to be addressed to make the structure habitable. The Review Board did not agree with the Town that the remaining violations existed for the structure.

E. Whether or not to overturn the decision of the Property Maintenance Official and the local appeals board that violations of the Virginia Maintenance Code Section 105 (Unsafe structures or structures unfit for human occupancy) exist and that the demolition of the structure was required.

Singleton argued that the structure was secured and as such the demolition of the structure was not required. The Town argued that the structure was not secure and that the Demolition Order was proper; therefore, the structure must be demolished. The Review Board agreed with the Town that the structure was required to be secured; however the Review Board does not agree that the Demolition Order was proper or that demolition of the structure was required.

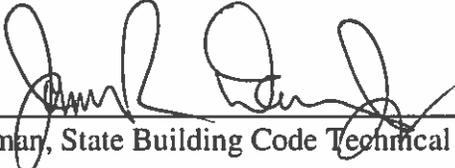
Final Order

The appeal having been given due regard, and for the reasons set out herein, the Review Board orders as follows:

- A. The decision of the local appeals board that the appeal is timely to be, and hereby is, upheld.
- B. The decision of the Town Building Official and the local appeals board that violations of Section 105 exist and the placarding of the structure to be, and hereby is, upheld with a determination that the placard is improper and that a proper placard be issued. In addition, the Review Board orders the placard to be, and hereby is, remanded to the Town to be re-issued with the proper date and in full conformance with Section 105 of the VMC.
- C. The decision of the Town Building Official and the local appeals board that violations of Section 105 exist and that the structure is required to be secured to be, and hereby is, upheld.
- D. The decision of the Town Building Official and the local appeals board that all of the remaining violations of the VMC listed on the March 26, 2018 NOV exist to be, and hereby is, upheld related to items numbered one through five (1-5) and ten (10) with the determinations that item number one (1) only state unsafe structure, not unfit for human habitation, and reference the date of the new placard to be issued pursuant to Item B of this Final Order and that the notice of violation be re-issued for these items and with the specified corrections herein. The decision of the Town Building Official and the local appeals board that all of the remaining violations of the

VMC listed on the March 26, 2018 NOV exist to be, and hereby is, overturned related to items numbered six through nine (6-9) and 11-57.

E. The decision of the Town Building Official and the local appeals board that violations of Section 105 exist and that the demolition of the structure is required to be, and hereby is, overturned.



Chairman, State Building Code Technical Review Board

Date entered: _____November 16, 2018_____

As provided by Rule 2A:2 of the Supreme Court of Virginia, you have thirty (30) days from the date of service (the date you actually received this decision or the date it was mailed to you, whichever occurred first) within which to appeal this decision by filing a Notice of Appeal with W. Travis Luter, Sr., Secretary of the Review Board. In the event that this decision is served on you by mail, three (3) days are added to that period.

WYTHEVILLE PUBLIC SAFETY

COUNCIL-MANAGER FOR OF GOVERNMENT SINCE 1924

TOWN MANAGER
WAYNE SUTHERLAND
276-223-3350



BUILDING/FIRE OFFICIAL
CHARLES VANNATTER
276-223-3339

150 East Monroe Street
WYTHEVILLE, VIRGINIA 24382

March 11, 2019

Jack Dennis Singleton
260 West Jefferson Street
Wytheville VA 24382

Re: Clarification of the Notice of Violation and Report of Unsafe Structure for Property on 190
West Jefferson Street, Wytheville VA 24382

Dear Mr. Singleton,

This is a letter to inform you and to clarify that the "Notice of Violation" and "Report of Unsafe Structure" dated January 22, 2019, is a continuation of the decision made by the Virginia Technical Review Board on November 16, 2018. No new violations were issued but items 1-6 are a reflection of violations previously ruled in favor by the Virginia Technical Review Board.

If you have any inquiries, please do not hesitate to call me.

Sincerely,

Charles Vannatter
Building Official

DANGER – KEEP OUT

THIS STRUCTURE IS UNSAFE AND
ITS OCCUPANCY (OR USE) IS PROHIBITED
BY THE CODE OFFICIAL.
IT IS UNLAWFUL FOR ANY PERSON TO USE OR
OCCUPY THIS STRUCTURE AFTER
January 22, 2019

ANY UNAUTHORIZED PERSON REMOVING OR ALTERING THIS SIGN
WILL BE PROSECUTED

190 West Jefferson Street January 22, 2019 C. Vannatter
Address of Building Date of Posting Code Official

USBC _____ VMC Section 105.4.1 LOCAL _____

AUTHORITY: §36-106, IT SHALL BE UNLAWFUL FOR ANY OWNER OR ANY OTHER PERSON, FIRM OR CORPORATION, ON OR AFTER THE EFFECTIVE DATE OF ANY CODE PROVISION, TO VIOLATE ANY SUCH PROVISIONS. ANY SUCH VIOLATION SHALL BE DEEMED A CLASS I MISDEMEANOR AND IF CONVICTED OF SUCH A VIOLATION SHALL BE PUNISHED BY A FINE OF NOT MORE THAN \$2,500.

NOTE: AFTER A BUILDING IS PLACARDED, ENTERING THE BUILDING SHALL BE PROHIBITED EXCEPT AS AUTHORIZED BY THE CODE OFFICIAL TO MAKE INSPECTIONS, TO PERFORM REQUIRED REPAIRS, OR TO DEMOLISH THE BUILDING.

Jack Singleton

190 W. Jefferson Street

Photos taken January 22, 2019:



WYTHEVILLE PUBLIC SAFETY

COUNCIL-MANAGER FOR OF GOVERNMENT SINCE 1924

TOWN MANAGER
DANE SUTHERLAND
78-223-3339



BUILDING/FIRE OFFICIAL
CHARLES VANNATTER
276-223-3339

150 East Monroe Street
WYTHEVILLE, VIRGINIA 24382

March 11, 2019

Jack Dennis Singleton
260 West Jefferson Street
Wytheville VA 24382

Re: Clarification of the Notice of Violation and Report of Unsafe Structure for Property on 190
West Jefferson Street, Wytheville VA 24382

Dear Mr. Singleton,

This is a letter to inform you and to clarify that the "Notice of Violation" and "Report of
Unsafe Structure" dated January 22, 2019, is a continuation of the decision made by the
Virginia Technical Review Board on November 16, 2018. No new violations were issued
but items 1-9 are a reflection of violations previously ruled in favor by the Virginia
Technical Review Board.

If you have any inquiries, please do not hesitate to call me.

Sincerely,

Charles Vannatter

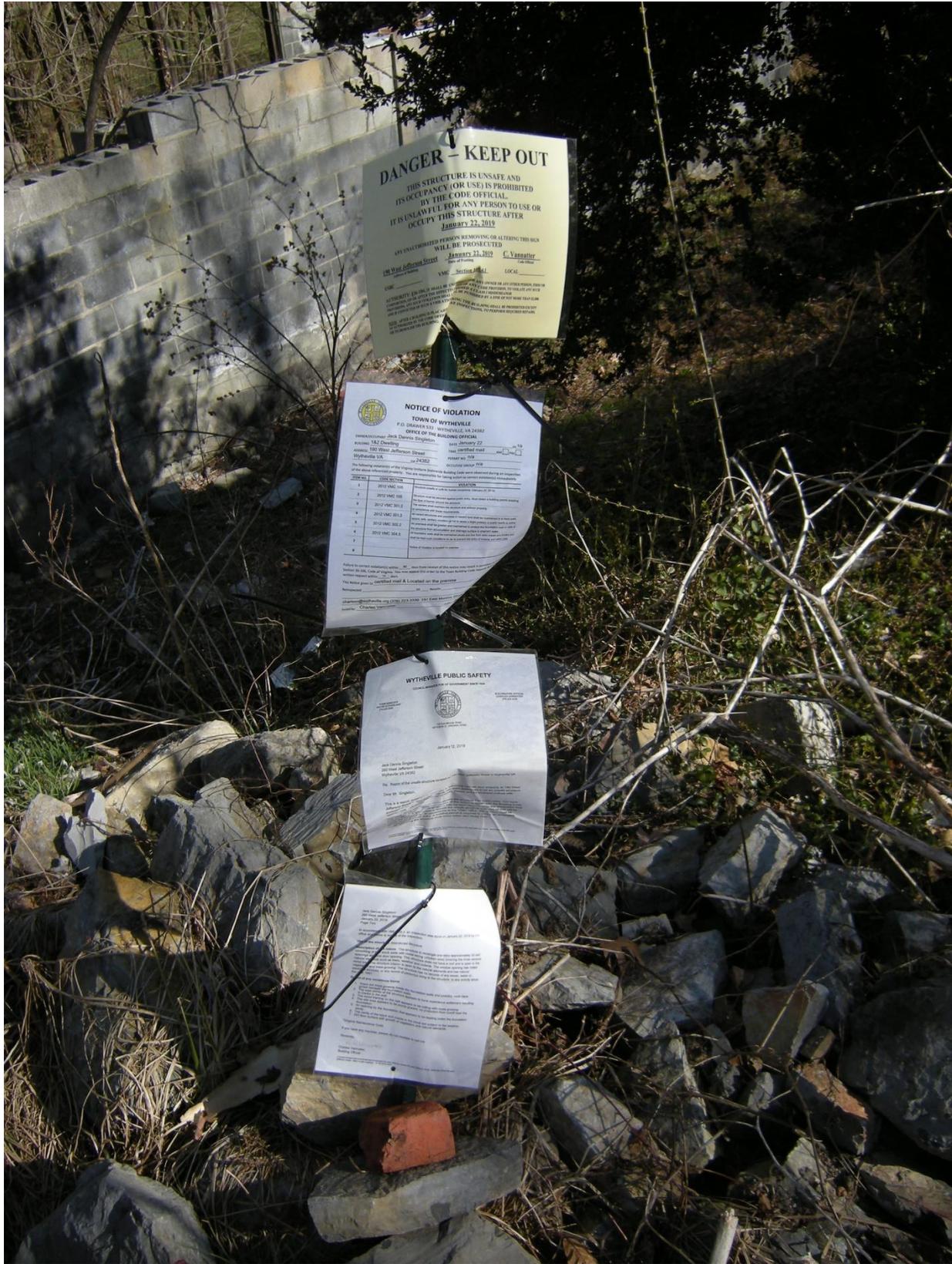
Charles Vannatter
Building Official

Users\charlev\documents\email\propriet\190 west jefferson street\190 west jefferson street january 22 2019\190 west
jefferson street - letter to jack singleton - 03-07-2019 (clarification).docx









Photos taken April 30, 2019:















A119.5-18

: 119.5, 119.7, 119.8, 1 (New), 107.5, 107.6, 107.7, 107.8, 107.9 (New), 112.5, 112.6, 112.7, 112.7.1, 112.8, 112.8.1, 112.9, 112.9.1, 112.9.2, 112.10 (New)

Proponent: Kenney Payne, representing AIA Virginia (kpayne@moseleyarchitects.com)

2015 Virginia Construction Code

119.5 Right of appeal; filing of appeal application. Any person aggrieved by the *local building department's* application of the USBC or the refusal to grant a modification to the provisions of the USBC may appeal to the *LBBCA*. The applicant shall submit a written request for appeal to the *LBBCA* within 30 calendar days of the receipt of the decision being appealed. The application shall contain the name and address of the *owner* of the *building* or *structure* and in addition, the name and address of the person appealing, when the applicant is not the *owner*. A copy of the building official's decision shall be submitted along with the application for appeal and maintained as part of the record. The application shall be marked by the *LBBCA* to indicate the date received. Failure to submit an application for appeal within the time limit established by this section shall constitute acceptance of a building official's decision.

Note: To the extent that a decision of a building official pertains to amusement devices there may be a right of appeal under the VADR.

119.7 Hearings and decision. All hearings before the *LBBCA* shall be open meetings and the appellant, the appellant's representative, the *locality's* representative and any person whose interests are affected by the building official's decision in question shall be given an opportunity to be heard. The chairman shall have the power and duty to direct the hearing, rule upon the acceptance of evidence and oversee the record of all proceedings. The *LBBCA* shall have the power to uphold, reverse or modify the decision of the official by a concurring vote of a majority of those present. Decisions of the *LBBCA* shall be final if no further appeal is made. The decision of the *LBBCA* shall be explained in writing, signed by the chairman and retained as part of the record of the appeal. Copies of the written decision shall be sent to all parties by certified mail. In addition, the written decision shall contain the following wording:

"Any person who was a party to the appeal may appeal to the State Review Board by submitting an application to such Board within 21 calendar days upon receipt by certified mail of this decision. Application forms are available from the Office of the State Review Board, 600 East Main Street, Richmond, Virginia 23219, (804) 371-7150."

119.8 Appeals to the State Review Board. After final determination by the *LBBCA* in an appeal, any person who was a party to the appeal may further appeal to the *State Review Board*. In accordance with Section 36-114 of the Code of Virginia, the *State Review Board* shall have the power and duty to hear all appeals from decisions arising under the application of the USBC and to render its decision on any such appeal, which decision shall be final if no appeal is made therefrom. In accordance with Section 36-98.2 of the Code of Virginia for state-owned buildings and *structures*, appeals by an involved state agency from the decision of the building official for state-owned buildings or *structures* shall be made directly to the *State Review Board*. The application for appeal shall be made to the *State Review Board* within 21 calendar days of the receipt of the decision to be appealed. Failure to submit an application within that time limit shall constitute an acceptance of the building official's decision. For appeals from a *LBBCA*, a copy of the building official's decision and the written decision of the *LBBCA* shall be submitted with the application for appeal to the *State Review Board*. Upon request by the office of the State Review Board, the *LBBCA* shall submit a copy of all pertinent information from the record of the appeal. In the case of appeals involving ~~state-owned~~ state-owned *buildings* or *structures*, the involved state agency shall submit a copy of the building official's decision and other relevant information with the application for appeal to the *State Review Board*. Procedures of the *State Review Board* are in accordance with Article 2 (Section 36-108 et seq.) of Chapter 6 of Title 36 of the Code of Virginia. ~~Decisions of the *State Review Board* shall be final if no further appeal is made.~~

Add new text as follows:

119.9 Hearings and decision. All hearings before the *State Review Board* shall be open meetings and the appellant, the appellant's representative, the *locality's* representative and any person whose interests are affected by the building official's decision in question shall be given an opportunity to be heard. The chairman shall have the power and duty to direct the hearing, rule upon the acceptance of evidence and oversee the record of all proceedings. The *State Review Board* shall have the power to uphold, reverse or modify the decision of the *LBBCA* by a concurring vote of a majority of those present. Proceedings of the Review Board shall be governed by the provisions of the Administrative Process Act (2.2-4000 et seq.), except that an informal conference pursuant to 2.2-4019 shall not be required. Decisions of the *State Review Board* shall be final if no further appeal is made. The decision of the *State Review Board* shall be explained in writing, signed by the chairman and retained as part of the record of the appeal. Copies of the written decision shall be sent to all parties by certified mail. In addition, the written decision shall contain the following wording:

"As provided by Rule 2A:2 of the Supreme Court of Virginia, you have thirty (30) days from the date of service (the date you actually received this decision or the date it was mailed to you, whichever occurred first) within which to appeal this decision by filing a Notice of Appeal with the Secretary of the Review Board. In the event that this decision is served on

you by mail, three (3) days are added to that period."

2015 Virginia Maintenance Code

107.5 Right of appeal; filing of appeal application. Any person aggrieved by the local enforcing agency's application of this code or the refusal to grant a modification to the provisions of this code may appeal to the LBBCA. The applicant shall submit a written request for appeal to the LBBCA within 14 30 calendar days of the receipt of the decision being appealed. The application shall contain the name and address of the owner of the building or structure and, in addition, the name and address of the person appealing, when the applicant is not the owner. A copy of the code official's decision shall be submitted along with the application for appeal and *maintained* as part of the record. The application shall be marked by the LBBCA to indicate the date received. Failure to submit an application for appeal within the time limit established by this section shall constitute acceptance of a code official's decision.

107.6 Meetings and postponements. The LBBCA shall meet within 30 calendar days after the date of receipt of the application for appeal, except that a period of up to 45 calendar days shall be permitted where the LBBCA has regularly scheduled monthly meetings. A longer time period shall be permitted if agreed to by all the parties involved in the appeal. A notice indicating the time and place of the hearing shall be sent to the parties in writing to the addresses listed on the application at least 14 calendar days prior to the date of the hearing, except that a lesser time period shall be permitted if agreed to by all the parties involved in the appeal. When a quorum of the LBBCA is not present at a hearing to hear an appeal, any party involved in the appeal shall have the right to request a postponement of the hearing. The LBBCA shall reschedule the appeal within 30 calendar days of the postponement, except that a longer time period shall be permitted if agreed to by all the parties involved in the appeal.

107.7 Hearings and decision. All hearings before the LBBCA shall be open meetings and the appellant, the appellant's representative, the locality's representative and any person whose interests are affected by the code official's decision in question shall be given an opportunity to be heard. The chairman shall have the power and duty to direct the hearing, rule upon the acceptance of evidence and oversee the

~~"Any person who was a party to the appeal may appeal to the State Review Board by submitting an application to such Board within 21 calendar days upon receipt by certified mail of this decision. Application forms are available from the Office of the State Review Board, 600 East Main Street, Richmond, Virginia 23219, (804) 371-7150."~~

record of

therecord of all proceedings. The LBBCA shall have the power to uphold, reverse or modify the decision of the official by a concurring vote of a majority of those present. Decisions of the LBBCA shall be final if no further appeal is made. The decision of the LBBCA shall be explained in writing, signed by the chairman and retained as part of the record of the appeal. Copies of the written decision shall be sent to all parties by certified mail. In addition, the written decision shall contain the following wording:

"Any person who was a party to the appeal may appeal to the State Review Board by submitting an application to such Board within 21 calendar days upon receipt by certified mail of this decision. Application forms are available from the Office of the State Review Board, 600 East Main Street, Richmond, Virginia 23219, (804) 371-7150."

107.8 Appeals to the State Review Board. After final determination by the LBBCA in an appeal, any person who was a party to the appeal may further appeal to the State Review ~~Board.~~ Board. In accordance with Section 36-114 of the Code of Virginia, the State Review Board shall have the power and duty to hear all appeals from decisions arising under the application of the USBC and to render its decision on any such appeal, which decision shall be final if no appeal is made therefrom. In accordance with 36-98.2 of the Code of Virginia for state-owned buildings and structures, appeals by an involved state agency from the decision of the code official for state-owned buildings or structures shall be made directly to the State Review Board. The application for appeal shall be made to the State Review Board within 21 calendar days of the receipt of the decision to be appealed. Failure to submit an application within that time limit shall constitute an acceptance of the code official's decision. For appeals from a LBBCA, a copy of the code official's decision and the written decision of the LBBCA shall be submitted with the application for appeal to the State Review Board. Upon request by the Office of the State Review Board, the LBBCA shall submit a copy of all pertinent information from the record of the appeal. In the case of appeals involving state-owned buildings or structures, the involved state agency shall submit a copy of the code official's decision and other relevant information with the application for appeal to the State Review Board. Procedures of the State Review Board are in accordance with Article 2 (36-108 et seq.) of Chapter 6 of Title 36 of the Code of Virginia. ~~Decisions of the State Review Board shall be final if no further appeal is made.~~

Revise as follows:

107.9 Hearings and decision. All hearings before the State Review Board shall be open meetings and the appellant, the appellant's representative, the locality 's representative and any person whose interests are affected by the building official's decision in question shall be given an opportunity to be heard. The chairman shall have the power and duty to direct the hearing, rule upon the acceptance of evidence and oversee the record of all proceedings. The State Review

Board shall have the power to uphold, reverse or modify the decision of the LBBCA by a concurring vote of a majority of those present. Proceedings of the Review Board shall be governed by the provisions of the Administrative Process Act (2.2-4000 et seq.), except that an informal conference pursuant to 2.2-4019 shall not be required. Decisions of the State Review Board shall be final if no further appeal is made. The decision of the State Review Board shall be explained in writing, signed by the chairman and retained as part of the record of the appeal. Copies of the written decision shall be sent to all parties by certified mail. In addition, the written decision shall contain the following wording: "As provided by Rule 2A:2 of the Supreme Court of Virginia, you have thirty (30) days from the date of service (the date you actually received this decision or the date it was mailed to you, whichever occurred first) within which to appeal this decision by filing a Notice of Appeal with the Secretary of the Review Board. In the event that this decision is served on you by mail, three (3) days are added to that period."

2015 Virginia Statewide Prevention Fire Code

112.5 Application for appeal. The owner of a structure, the owner's agent or any other person involved in the maintenance of the structure, or activity, may appeal a decision of the fire official concerning the application of the SFPC or the fire official's refusal to grant modification under Section 106.5 to the provisions of the SFPC. The appeal shall first lie to the LBFPCA and then to the *State Review Board* except that appeals concerning the application of the SFPC or refusal to grant modifications by the *State Fire Marshal* shall be made directly to the *State Review Board*. The appeal shall be submitted to the LBFPCA within ~~14~~ 30 calendar days of the ~~application of the SFPC, decision being appealed.~~ The application shall contain the name and address of the owner of the structure and the person appealing if not the owner. A copy of the written decision of the fire official shall be submitted along with the application for appeal and *maintained* as part of the record. The application shall be stamped or otherwise marked by the LBFPCA to indicate the date received. Failure to submit an application for appeal within the time limit established by this section shall constitute acceptance of the fire official's decision.

Note: In accordance with 27-98 of the Code of Virginia, any local fire code may provide for an appeal to a local board of appeals. If no local board of appeals exists, the *State Review Board* shall hear appeals of any local fire code violation.

112.6 Notice of meeting. The LBFPCA shall meet within 30 calendar days after the date of receipt of the application for appeal. Notice indicating the time and place of the hearing shall be sent to the parties in writing to the addresses listed on the application at least 14 calendar days prior to the date of the hearing. Less notice may be given if agreed upon by the applicant.

112.7 Hearing procedures. All hearings before the LBFPCA shall be open to the public. The appellant, the appellant's representative, the *local governing body's* representative and any person whose interests are affected shall be given an opportunity to be heard. The chairman shall have the power and duty to direct the hearing, rule upon the acceptance of evidence and oversee the record of all proceedings.

112.7.1 Postponement. When a quorum of the LBFPCA is not present to hear an appeal, either the appellant or the appellant's representative shall have the right to request a postponement of the hearing. The LBFPCA shall reschedule the appeal within 30 calendar days of the postponement.

112.8 Decision. The LBFPCA shall have the power to uphold, reverse or modify the decision of the fire official by a concurring vote of a majority of those present. Decisions of the LBFPCA shall be final if no appeal is made therefrom and the appellant and the fire official shall act accordingly.

112.8.1 Resolution. The LBFPCA's decision shall be explained in writing, signed by the chairman, and retained as part of the record by the LBFPCA. ~~Copies of the written decision shall be furnished to all parties.~~ The following wording shall be part of the written decision: "Any person who was a party to the appeal may appeal to the State Building Code Technical Review Board (*State Review Board*) by submitting an application to the *State Review Board* within 21 calendar days upon receipt by certified mail of the written decision. Application forms are available from the Office of the *State Review Board*, 600 East Main Street, Richmond, Virginia 23219, (804) 371-7150." ~~Copies of the written decision shall be furnished to all parties.~~

112.9 Appeal to the State Review Board. After final determination by the LBFPCA, any person who was a party to the local appeal may appeal to the *State Review Board*. ~~In accordance with Section 36-114 of the Code of Virginia, the State Review Board shall have the power and duty to hear all appeals from decisions arising under the application of the USBC and to render its decision on any such appeal, which decision shall be final if no appeal is made therefrom.~~ Application shall be made to the *State Review Board* within 21 calendar days of receipt of the decision to be ~~appealed.~~ appealed. ~~Application for appeal to the State Review Board arising from the SFMO's enforcement of the code or from any local fire code violation if no local board of appeals exists shall be made to the State Review Board within 14 calendar days of receipt of the decision to be appealed and shall be accompanied by copies of the~~ inspection reports and other relevant information, fire official's decision and the written decision of the LBFPCA shall be submitted with the application for appeal. Upon request by the office of the State Review Board, the LBFPCA shall submit a copy of all inspection reports and all pertinent information from the record of the LBFPCA .. Failure to submit an application

for appeal within the time limit established by this section shall constitute an acceptance of the *LBFPCA's* resolution or fire official's ~~decision.~~ decision. Procedures of the State Review Board are in accordance with Article 2 (36-108 et seq.) of Chapter 6 of Title 36 of the Code of Virginia.

Delete without substitution:

~~**112.9.1 Information to be submitted.** Copies of the fire official's decision and the written decision of the *LBFPCA* shall be submitted with the application for appeal. Upon request by the office of the *State Review Board*, the *LBFPCA* shall submit a copy of all inspection reports and all pertinent information from the record of the *LBFPCA*.~~

~~**112.9.2 Decision of State Review Board.** Procedures of the *State Review Board* are in accordance with Article 2 (36-108 et seq.) of Chapter 6 of Title 36 of the Code of Virginia. Decisions of the *State Review Board* shall be final if no appeal is made therefrom and the appellant and the code official shall act accordingly.~~

Revise as follows:

112.10 Hearing and decision. All hearings before the *State Review Board* shall be open meetings and the appellant, the appellant's representative, the *locality* 's representative and any person whose interests are affected by the building official's decision in question shall be given an opportunity to be heard. The chairman shall have the power and duty to direct the hearing, rule upon the acceptance of evidence and oversee the record of all proceedings. The *State Review Board* shall have the power to uphold, reverse or modify the decision of the *LBFPCA* by a concurring vote of a majority of those present. Proceedings of the Review Board shall be governed by the provisions of the Administrative Process Act (2.2-4000 et seq.), except that an informal conference pursuant to 2.2-4019 shall not be required. Decisions of the *State Review Board* shall be final if no further appeal is made. The decision of the *State Review Board* shall be explained in writing, signed by the chairman and retained as part of the record of the appeal. Copies of the written decision shall be sent to all parties by certified mail. In addition, the written decision shall contain the following wording:

"As provided by Rule 2A:2 of the Supreme Court of Virginia, you have thirty (30) days from the date of service (the date you actually received this decision or the date it was mailed to you, whichever occurred first) within which to appeal this decision by filing a Notice of Appeal with the Secretary of the Review Board. In the event that this decision is served on you by mail, three (3) days are added to that period."

Reason Statement:

VCC 119.8 / VMC 107.8 / SFPC 112.9: There are numerous references to Code of Virginia sections in Chapter 1, and this added language is the exact wording from Section 36-114 of the COV. This added language will also help guide the TRB in its efforts to determine whether to hear certain cases or not. If this change is approved, then the last sentence of 119.8 / 107.8 is not required.

VCC 119.9 / VMC 107.9 / SFPC 112.10: There currently is no information on the hearings involving the TRB like there is for the LBBCA/LBFPCA. The language is nearly identical to the LBBCA/LBFPCA language, since the TRB hearings and decisions are almost identical as well. The "proceedings" language is from COV 36-114. The referenced COV sections (36-108 et seq) actually do not address the hearing itself. These new sections will provide some guidance for those who may or want to appeal as to how such hearings will be conducted; as well as, help guide the TRB in its efforts to conduct such hearings and make such decisions.

The last paragraph is the exact language (absent the secretary's name) from the "Decision of the Review Board" "Certification" statement.

VMC 107.5 / SFPC 112.5: Revised 14 days to 30 days to match that which is allowed under the VCC, and to provide those aggrieved or affected by such application of the code adequate time to properly file an appeal.

VMC 107.7: Somehow, the "Any person" paragraph was inserted into the preceding paragraph. This just moves it to the end where it belongs. This change is editorial and not technical.

SFPC 112.5: Changed "application of the SFPC" to "decision being appealed" to match the same language used in the VCC and VMC.

SFPC 112.8.1: Relocated the last sentence BEFORE the requirement to copy such wording. One might think, even though the "quotes" are clear, that the "Copies" sentence is a part of the required wording. This is also consistent with the formatting of the VCC and VMC.

SFPC 112.9: Deleted the 14 day limitation for state-owned buildings so that ALL appeals to the TRB are 21 days across the board - whether it is under the VCC, VMC, SFPC, state-owned, or not. Relocated the language from SFPC 112.9.1 and 112.9.2 into 112.9 to make it consistent with the VCC and VMC, thus allowing the deletion of 112.9.1 and 112.9.2.

Resiliency Impact Statement: Will not increase or decrease resiliency.

Cost Impact Statement: Will not increase or decrease cost of construction.

Proposal # 183

A119.5-18

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