


*City of Alexandria, Virginia*

**MEMORANDUM**

DATE: MAY 20, 2009  
TO: THE HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL  
FROM: JAMES K. HARTMANN, CITY MANAGER   
SUBJECT: FINES FOR ILLEGAL ALTERATION AND DEMOLITION OF HISTORIC STRUCTURES

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**ISSUE:** Consideration of possible zoning changes to clarify the issue of authorized fines for after-the-fact approval of illegal alteration or demolition of historic buildings or structures.

**RECOMMENDATION:** That City Council review this memorandum and direct staff to: (1) confer with the two Boards of Architectural Review (BARs) and with the public and appropriate groups in the historic districts regarding potential changes to the zoning ordinance; and (2) prepare a text amendment for formal consideration by the Planning Commission and City Council.

**BACKGROUND:** The City of Alexandria prides itself on its historic districts and has an elaborate system of laws and practices in place to celebrate its history, to educate its citizens and others about its great treasure and to regulate any exterior changes to the buildings and structures that make up its historic districts. Within the historic districts, for example, a property owner is not permitted to tear down a historic building, nor to construct a new building or to alter an existing one. More specifically, within the Old and Historic Alexandria District, the Parker Gray District, or with regard to a listed 100 Year Old Property, the removal of a building or structure or a portion of one or the alteration of a building or structure, or a portion of one, requires approval by the appropriate Board of Architectural Review. Included within this requirement, the covering up or hiding of material (encapsulation) is considered a form of demolition. The painting of unpainted brick is considered an alteration. The BARs routinely review minor demolition cases and approve permits for them, especially when new construction is proposed. The BARs also routinely approve Certificates of Appropriateness for new construction or for alterations of existing buildings.

Occasionally, the BAR will be asked to review an “after-the-fact” demolition or alteration case, i.e., one where demolition or alteration has occurred but without prior BAR approval. These are difficult cases, primarily because of the loss of history, and the failure to respect the established requirements for work in the historic district. Nevertheless, the zoning ordinance makes clear that such cases are violations of the ordinance and spells out a process for handling them.

## **PENALTIES FOR ILLEGAL DEMOLITION OR ALTERATION CASES**

### ***Illegal Demolition Cases***

Section 10-103(B)<sup>1</sup> requires a BAR approved permit in order to move, remove, capulate or demolish in whole or in part. An exception exists for the removal of less than 25 square feet of non-visible exterior wall, roof or surface material. A violation of this provision is specifically addressed in a separate category of the zoning penalties as a class one civil violation (Section 11-207(B)(4)) for which the penalty is \$1,500 (Section 11-207(C)(1)), the most serious civil penalty listed. Each day that any class one violation exists constitutes a separate individual offense. And the violation continues to exist until

the director certifies to the BAR that the unlawfully demolished building or structure has been reconstructed to the preexisting footprint, envelope, configuration and appearance, using original materials and techniques of construction to the extent possible. Section 11-207(C)(6).

In order to stop a violation, a property owner who does not wish to or cannot correct an illegal demolition of property, must apply for “after-the-fact” approval from the BAR to allow the demolition to continue. The BAR then must decide whether the removal of historic material meets the standards for demolition (Section 10-105(B)).

As an alternative, the BAR may determine that the violation ceases to exist when the person responsible for the violation pays to the City

a sum equivalent to the cost of reconstruction ..., such sum to be used exclusively for the purpose of promoting historic preservation within the city as determined by the director. The [fine] shall in no case exceed the market value of the property, which shall include the value of any improvements together with the value of the land upon which any improvements are located, and shall be determined by the assessed value of the property at the time of the violation. Section 11-207(C)(6).

Furthermore, under the express terms of section 11-207(C)(6) and City Charter section 9.09(j), the City’s maximum civil penalty in such cases is the assessed value of land and buildings. Other than the above language, there is no guidance in the zoning ordinance or the *Design Guidelines* to assist the City when it wishes to impose a fine but is concerned that the actual cost to correct the violation is, while less than the value of the property, very high.

### ***Illegal New Construction or Alteration Cases***

Any new construction or any alteration of a building or structure in the historic district requires a Certificate of Appropriateness from the BAR (Section 10-103 (A)). Any such work that occurs without prior approval of a Certificate of Appropriateness by the BAR is a violation of the zoning ordinance for which fines representing civil penalties may be assessed under section 11-

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<sup>1</sup> Citations refer to the BAR-OHAD rules but similar rules apply in Parker Gray and with regard to listed 100 Year Old Buildings.

207(B)(2). The penalty is \$100 for the first violation, \$150 for the second, and \$500 for the third and subsequent violations. Section 11-207(C)(3). Each day constitutes a separate offense. Section 11-207(C)(7). Under the City Charter, Section 2.06(c), the maximum fine for the past violation is \$5,000.

Separate and apart from its authority to issue fines, under Section 11-204 of the zoning ordinance, and sections 2.06(e) and 9.22 of the City charter, the City has the clear authority to order the action necessary to correct any violation of the zoning ordinance, including the painting of unpainted brick in the historic district. The City may also cause appropriate action or proceedings to be instituted and prosecuted to abate the violation if the property owner refuses to do so.

In order to stop the violation, a property owner who wishes to retain the new construction or altered state of the building must apply to the BAR to approve the new construction or alteration, which will be an “after-the-fact” approval. The BAR must then decide if the new condition meets the criteria for a Certificate of Appropriateness under Section 10-105(A).

Further, because the City has the authority to abate the violation, it necessarily also has the lesser included authority to issue a permit or certificate allowing the illegal condition to continue, but to require conditions including financial restitution reasonably necessary to redress the ongoing, future continuing violation, including penalties which are not limited by the civil penalty authority to punish past transgressions. Such authority imposed as an alternative to compelling the abatement of the violation is essentially analogous to the power under section 11-207(C)(6) applicable to illegal demolition, allowing a payment in lieu of restoration of illegal demolition of historic fabric equal to the cost of reconstruction, with the money to be used for the purpose of promoting historic preservation.

#### ***Examples of Prior Cases Where A High Fine Has Been Imposed***

During the last 20 years that the above process has been in the zoning ordinance, there have only been four cases in which the City imposed the “cost to correct” or other high penalties with an after-the-fact approval.

In 2002, the owner of 522 Queen Street demolished a wall of a historic building after the BAR had denied a permit allowing its destruction. In that case, the cost to reconstruct the wall with historic materials was determined by an outside expert to be \$20,285. The Old and Historic Alexandria BAR approved a permit allowing the after-the-fact condition to remain and lowering the fine to \$7,743 based on agreed to alternative construction methods.

In 2005, the applicant demolished two walls of a historic building at 1018 Queen Street in violation of a Parker-Gray BAR permit requiring those walls to remain. The fine imposed was \$7,500, consistent with an appropriate multiple of the \$1,500 a day civil fine representing the time between the City’s notice of the unlawful demolition and the owner’s response to the City.

In the case of the Ice House at 200 Commerce Street, in 2007, staff originally recommended a fine of \$10,000, under its standard civil penalty authority (\$1,500 a day), plus \$14,000 for the cost to reconstruct the removed front canopy. The Board approved a permit allowing the after

the fact demolition and imposed a fine of \$25,000, which Council reduced, on appeal, to \$6,500 provided the canopy was reconstructed within six months.

Council is currently considering appropriate action in the case of 900 Prince Street where an unpainted brick building was painted without BAR approval. The cost of correcting the illegal alteration based on contractor estimates in that case is high, between \$56,000 and \$108,500, and has prompted this look at potential alternative approaches to similar cases.

### ***How Other Jurisdictions Handle Similar Cases***

Staff contacted several different jurisdictions with historic districts and found that none has either a similar experience with illegal demolition or construction or as sophisticated a legal process for addressing it. Not all jurisdictions require a separate permit for demolition cases, so procedures are combined. In addition, state laws elsewhere allow different approaches. For example, the City of New Orleans uses an administrative hearing officer system to decide all disputed code and zoning violation cases, including illegal demolition and construction cases. In Charleston, and some towns in Maine, there is an automatic double fee requirement for applications for after the fact approval of any construction or demolition. In Savannah, staff is authorized to proceed directly to court for illegal demolition, with an elaborate process in place for a wholesale demolition (whole building) case. Staff concludes that the demographics of Old Town, and the high land values of Northern Virginia, have led to different circumstances with unique pressures with regard to illegal construction or demolition of historic structures in Alexandria than has been experienced elsewhere.

### **POTENTIAL ZONING ORDINANCE CHANGES**

While the existing zoning ordinance approach is workable, it is not finely calibrated, and does not include many options for the BAR or Council. The ultimate resolution of a case that permits demolition after the fact does not allow consideration of factors other than the full cost of correcting the illegal demolition. The cost of correcting, as in the 900 Prince Street case, can be very high. In some situations, restoring the status quo ante provides limited historic benefits. While staff supports a remedy with a strong deterrent effect, it suggests that the City should consider potential alternative zoning language. If Council agrees, staff will prepare new ordinance language, discuss the matter with the BAR, and meet with interested citizens and groups, all prior to coming back to the Commission and Council with a text amendment. Staff has not drafted new language yet, but has thought about the issue and proposes the following series of ideas as provisions that could be included in a new section of the zoning ordinance for historic districts:

- Address after the fact cases generally, including both illegal construction and illegal demolition.
- Include a general requirement for both illegal construction and demolition that results in substantial injury to and loss of historic resources that the building must be restored and reconstructed with materials that are either original or close to original.

- Require each applicant for an after-the fact approval to admit wrongdoing and pay the civil penalty established for the illegal act (\$1,500 for illegal demolition and \$100 for illegal new construction) at the time he files for the after-the-fact approval.
- Double the fee for after the fact applications, excepting sign cases.
- Provide the BARs and Council on appeal with criteria and standards for consideration for after the fact cases, and specifically for allowing the illegal construction or demolition to remain.
- Criteria for illegal new construction cases could include:
  - Whether the new construction or alteration is or can reasonably be brought into substantial compliance;
  - Whether the cost of reconstruction to the applicant would be disproportionate to the public benefit gained by restoration;
  - Whether the applicant will derive an unjust benefit or windfall if correcting the illegal construction or demolition is not required.
- Criteria for illegal demolition cases could include:
  - Whether the demolition substantially meets the criteria for a BAR demolition permit;
  - Whether the cost of reconstruction to the applicant would be disproportionate to the public benefit gained by restoration;
  - Whether the applicant will derive an unjust benefit or windfall if correcting the illegal construction or demolition is not required.
- The penalty for illegal construction or demolition, e.g., the cost to correct the violation, could include a provision allowing the sum paid in restitution to be less than the full cost if circumstances warrant. For example, there could be a schedule proportionate to the level of culpability of the violator:
  - For simple inadvertence or ignorance, the restitution could be 25% of the cost to correct; provided that someone in the business of developing, purchasing, renting or managing real estate should not be considered innocent or ignorant;
  - For negligence, the restitution could be 50%.
  - For wanton or gross negligence, the restitution could be 75%.
  - For a knowing, willful act, the restitution could be 100%.
- For the unlawful demolition of an entire building or structure, without an after the fact permit, the civil penalty could be equal to the assessed value of the property, including improvements.

**STAFF RECOMMENDATION:**

Staff recommends that Council direct staff to continue studying the issue, to convene a process of discussions with the BAR and interested individuals and groups, and to return with proposed zoning ordinance changes in the future. In the meantime in regard to 900 Prince Street, staff is

recommending that Council consider the alternatives outlined in this memorandum in establishing an appropriate fine in that case.

**STAFF:**

James Banks, City Attorney

Christopher Spera, Deputy City Attorney

Faroll Hamer, Director, Department of Planning and Zoning

Stephen Milone, Division Chief, Zoning and Land Use Services

Lee Webb, Historic Preservation Manager, Department of Planning and Zoning