

Docket Item #1
BZA CASE #2006-0002

Board of Zoning Appeals
July 20, 2006

ADDRESS: 901-915 SOUTH WASHINGTON STREET
ZONE: RCX/RESIDENTIAL
APPLICANT: KRISHNAN SUTHANTHIRAN, TRUSTEE

ISSUE: Appeal from the determinations of the Director of Planning and Zoning that (1) the contract tendered by the Alexandria Housing Development Corporation to purchase the Gunston Hall Apartments fully complied with the requirements of Section 10-108(A) of the Zoning Ordinance and Virginia Code, and (2) neither the applicant, nor any other entity, has a present right to demolish the buildings at the subject address.

SUMMARY OF CASE ON APPEAL

This case concerns Section 10-108(A) of the City of Alexandria's ("the City's") Zoning Ordinance, which sets forth procedures for seeking the sale of a property in the Old and Historic Alexandria District for preservation and restoration purposes before a demolition permit for the property may be sought. In particular, Mr. Krishnan Suthanthiran, Trustee, as owner of the Gunston Hall Apartments at 901-915 South Washington Street ("Owner"), appeals from the determinations of the City's Director of Planning and Zoning that (1) the Alexandria Housing Development Corporation's ("AHDC's") offer to purchase the Gunston Hall Apartments fully complied with the requirements of Section 10-108(A) of the Zoning Ordinance, and (2) neither the applicant, nor any other entity, has a present right to demolish the buildings at the subject address. The Director found that AHDC provided reasonable assurance that it would preserve and restore the Gunston Hall Apartments. There were no grounds for the Owner to reject AHDC's offer under Section 10-108(A). Therefore, the Director properly determined that the Owner was not entitled to a demolition permit under the Zoning Ordinance.

FACTUAL BACKGROUND

The Gunston Hall Apartments are an eight-building family garden apartment complex constructed in 1939. The architect for the Gunston Hall Apartments was Harvey H. Warwick, one of the most important architects for apartments in the Washington metropolitan area in the 1930s and 1940s. The apartments are among a number of garden apartment complexes constructed during the same time fronting directly on the George Washington Memorial Parkway ("GW Parkway") (South Washington Street as it passes through Alexandria). Like other properties fronting the GW Parkway at that time, the Gunston Hall Apartments were evaluated and approved by the Federal government,

acting through the National Capital Park and Planning Commission and, later, the National Park Service, to ensure that they contributed to the memorial character of the GW Parkway.

The current owner of the Apartments, Mr. Suthanthiran, as Trustee, entered into a purchase contract with a developer, Basheer/Edgemoore Properties, L.L.C., for development of two condominium buildings and twelve townhouses at the property, conditioned on the City's approval of building plans. On February 18, 2004, Basheer/Edgemoore filed an application with the Old and Historic Alexandria District Board of Architectural Review ("BAR") for demolition of Gunston Hall Apartments and conceptual approval of the planned development. Staff recommended denial of the permit application under Section 10-105(B) of the Zoning Ordinance for, among other reasons, the historic and architectural qualities of the buildings. The BAR first deferred consideration of the application and requested the applicant to provide an analysis regarding the financial viability of renovating the existing apartments rather than demolishing the buildings. The applicant's analysis demonstrated that renovation of the buildings would not be economically feasible at a fair market value of \$11.5 million. Staff recognized the feasibility finding, but still recommended denial of the permit because of the historic and architectural significance of the property.

On August 18, 2004, the BAR voted 4-1 to approve the demolition permit. A group of interested citizens appealed the BAR's decision to the City Council. At its October 16, 2004, meeting, the City Council reversed the BAR decision and denied the applicant's permit application.

The preliminary facts described above are not at issue on this appeal but provide context for the subsequent proceedings, described below, which give rise to the appeal.

Following the City Council's October 16, 2004 decision, the Owner exercised his right under Section 10-108(A) of the Zoning Ordinance to make a bona fide offer to sell the property, for a period of one year and at a price reasonably related to fair market value, to any person or entity that provides reasonable assurance that it is willing to preserve and restore the Gunston Hall Apartments. Under the ordinance, if no bona fide contract were entered into during the one-year period, the Owner would be entitled to proceed with demolition of the buildings.

Before making a bona fide offer to sell under Section 10-108(A), the property owner must provide written notice to the Director of Planning and Zoning, identifying the property, the offering price, the date the offer of sale is to begin, and the name of the real estate agent. *See* Zoning Ordinance § 10-108(B)(1). Mr. Suthanthiran, through counsel, provided the required notice to the Director by letter dated November 19, 2004. The November 19, 2004 letter, however, failed to identify when the offer of sale would begin. Thus, Mr. Suthanthiran, again through counsel, sent a follow-up letter dated November 29, 2004, which informed the Director that advertisements for the property began to run in local newspapers on November 24, 2004, and would continue to run once a week in at least one paper for a period of one year. The parties agree that the one-year period expired at the close of business on November 23, 2005.

On October 15, 2005, the City Council approved a general obligation bond authorization ordinance that included an authorization for the City to issue up to \$22.1 million in general obligation bonds for affordable housing. On November 9, 2005, the City Council approved the allocation of

proceeds from the sale of General Obligation Bonds to fund two loans to the Alexandria Housing Development Corporation (“AHDC”) to purchase the Gunston Hall Apartments, contingent on the Owner’s acceptance of AHDC’s offer to purchase and AHDC’s due diligence analyses.

On or about October 15, 2005, the AHDC made an initial purchase offer to the Owner for the Gunston Hall Apartments. The parties engaged in negotiations over the course of the next month. On November 23, 2005, AHDC submitted a final purchase offer to the Owner for the Gunston Hall Apartments for the \$12.3 million asking price and including a preservation easement to the City and the Alexandria Historical Restoration and Preservation Commission. The Owner rejected the AHDC’s purchase offer on the grounds that, based on its own interpretation, the offer did not meet the conditions under Section 10-108(A) of the Zoning Ordinance for providing reasonable assurance for the preservation and restoration of the property.

By letter dated December 9, 2005, the AHDC sought a formal determination from the City that its November 23, 2005 purchase offer complied with the terms of Section 10-108(A) of the Zoning Ordinance. *See Exhibit #1.* By letter dated December 22, 2005, the City Attorney determined that the AHDC’s purchase offer fully complied with Section 10-108(A) and that the Owner of Gunston Hall Apartments failed to make a bona fide offer to sell and improperly rejected the AHDC’s purchase offer. *See Exhibit #2.* Among other things, the City Attorney found that the Owner viewed the sale as a forced, below market sale, which is inconsistent with the purpose and intent of the bona fide offer to sell provisions. The Owner also improperly insisted on a right of reverter or right to repurchase the property, which the City Attorney found to be overreaching and inconsistent with a bona fide offer to sell. In addition, the Owner improperly sought to specify and approve the AHDC’s reasonable assurance that it is willing to preserve and restore the Gunston Hall Apartments, a determination that is properly that of the Director of the Department of Planning and Zoning. Lastly, the City Attorney found that the property easement proffered by AHDC fully complied with the requirements of Section 10-108(A) that the purchaser provide reasonable assurance through the preservation easement that it will preserve and restore the buildings.

The City Attorney’s letter was accompanied by a determination by the Director of the Department of Planning and Zoning that neither the Owner, Mr. Krishnan Suthanthiran, Trustee, nor the contract purchaser, Basheer/Edgemoore Properties, L.L.C., complied with the bona fide offer to sell provisions of Section 10-108(A) or the Zoning Ordinance. *See Exhibit #2.* The Director further determined that the AHDC’s purchase offer fully complied with the requirements of Section 10-108(A) and that neither the Owner nor any other entity had a present right to demolish the buildings at the Gunston Hall Apartments. *See id.* Lastly, the Director determined that the Owner submitted an incomplete certificate of appropriateness to the BAR, which is thus not properly pending before the BAR, and the time periods under Section 10-104(F)(1) of the Zoning Ordinance are inapplicable to that application. *See id.*

On appeal, Mr. Suthanthiran challenges the Director’s determinations that the AHDC’s purchase offer complied with Section 10-108(A) and that the Owner has no present right to demolish the Gunston Hall Apartments. In particular, Mr. Suthanthiran argues that the AHDC’s purchase offer failed to provide reasonable assurances that AHDC would preserve and restore the property because, among other things, the preservation easement attached to the purchase offer did not include required information and it was improper for the grantor and grantee of the easement to both be entities of the City. Mr. Suthanthiran also argues that the AHDC’s purchase offer was incomplete and thus failed

to create a contract that the Owner could have signed within the one-year period provided under Section 10-108(A) of the Zoning Ordinance. Notably, however, Mr. Suthanthiran did not appeal the Director's determination that neither the Owner nor Basheer/Edgemoore Properties complied with the bona fide offer to sell provisions of Section 10-108(A) of the Zoning Ordinance. The failure to appeal that determination is sufficient to uphold the Director's determination that neither the Owner nor the Basheer/Edgemoore Properties is entitled at the present time to a demolition permit for the property.

Mr. Suthanthiran's appeal of the Director's determinations should be denied. The City Attorney's letter demonstrates that the AHDC's purchase offer more than met the requirements of Section 10-108(A) of the Zoning Ordinance. Thus, the Director acted reasonably in making her determination that Mr. Suthanthiran is not entitled at the present time to a demolition permit for the Gunston Hall Apartments.

DISCUSSION

A. The Zoning Ordinance at Issue

Article X of the City's Zoning Ordinance governs the regulation of Historic Districts and Buildings in the City. Under Section 10-103(B) of the Zoning Ordinance, no building or structure within the Old and Historic Alexandria District, in which the Gunston Hall Apartments are located, may be demolished without first obtaining a permit approved by the BAR. *See* Zoning Ordinance § 10-103(B).¹ Basheer/Edgemoore Properties, L.L.C., as contract purchaser, sought a demolition permit for the Gunston Hall Apartments under Section 10-103(B) in February 2004. Although the BAR approved the application in August 2004, the City Council reversed that decision in October 2004.

Following the City Council's decision, Mr. Suthanthiran elected to pursue his rights under Section 10-108(A) of the Zoning Ordinance, which provides that the owner of a building for which demolition is sought:

shall, as a matter of right, be entitled to . . . demolish in whole or in part such building or structure provided that,

(1) The owner has applied to the Old and Historic Alexandria District board of architectural review for such right and has also been a party to an appeal from the board's decision to the council.

(2) The owner has for [12 months]² and at a price reasonably related to its fair market value made a bona fide offer to sell such building or structure and the land pertaining thereto to any person, government or agency thereof or political subdivision or agency thereof which gives reasonable assurance that it is willing to preserve and restore the building or structure and the land pertaining thereto.

(3) No bona fide contract, binding upon all parties thereto, shall have been executed for the sale of any such building or structure and the land pertaining thereto prior to the expiration of the [12- month] period

Zoning Ordinance § 10-108(A). The Owner's appeal concerns the Director's interpretation and application of this ordinance.

B. Standard of Review: Deference to the Director

The City Charter and Zoning Ordinance delegate to the Director the authority and responsibility to administer and enforce the Zoning Ordinance. Under settled principles of administrative law, the interpretation given a legislative enactment by public officials charged with its administration and enforcement is entitled to be given significant weight by the courts. *See Payton v. Williams*, 145 S.E.2d 147 (1965). In Virginia, it is settled law that a presumption of correctness attaches to the actions of state and local officials. *See Hladys v. Commonwealth*, 366 S.E.2d 98 (1988). Such actions are presumed to be valid and will not be disturbed by a court absent clear proof that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals or general welfare. *See County of Lancaster v. Cowardin*, 391 S.E.2d 267, 269 (Va. 1990); *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525 (2003) (discussing the presumption of reasonableness attached to Board's legislative acts). Thus, the P&Z Department's determination under the Zoning Ordinance is entitled to substantial deference. Unless the Board can find that the P&Z Department's decision was made without a reasonable basis, the Board should uphold that decision.

The City Attorney's Office has also stated that "substantial deference" to a Director's determination is the appropriate standard of review. The City Attorney's Office has found that the Board of Zoning Appeals stands in the same relationship to the Director as a reviewing court when it reviews an administrative interpretation or decision. Thus, the P&Z Department's determination is entitled to substantial deference, both by this Board and a reviewing court. *See* Opinion to the Chairman and Members of the Board of Zoning Appeals, at 2-3 (April 12, 1989) (available for review).

C. The Determination that Mr. Suthanthiran Failed to Comply with the Bona Fide Offer to Sell Provisions of Section 10-108(A) of the Zoning Ordinance was Reasonable, and, Moreover, His Failure to Appeal this Determination Requires the Director's Determination be Upheld

The December 22, 2005 Determination by the Director of Planning and Zoning first finds that the Owner failed to comply with the bona fide offer to sell provisions of Section 10-108(A) of the Zoning Ordinance. In his Basis for Appeal, the Owner failed to expressly appeal this determination. As discussed further below, his failure to appeal this determination requires that the determination be upheld. The determination must also be upheld as reasonable in its own right.

1. The Owner's Offer to Sell Did Not Effect the Purpose and Intent of the Ordinance in a Commercially Reasonable Manner.

Section 10-108(A) of the Zoning Ordinance derives from the final paragraph of Section 9.09(j) of the Alexandria City Charter, and gives an owner of property in the City's Old and Historic Alexandria District the right to demolish a building or structure, notwithstanding the denial of a demolition permit by the City Council, provided (1) that the property owner makes a bona fide offer to sell the property, (2) at a price reasonably related to its fair market value, (3) to an entity which give reasonable assurance that it is willing to preserve the property, and (4) that for properties with an offering price of \$90,000 or more, no bona fide contract of sale is executed within 12 months from the commencement of the offering.

The purpose and intent of the relevant provisions of Charter Section 9.09(j), and the implementing provisions of the Zoning Ordinance, is to afford a property owner a mechanism to avoid economic loss resulting from the inability to demolish a building or structure. The owner offers the property for sale at its fair market value, which assumes the highest and best use of the property, which in many cases encompasses the demolition of the existing improvements. The prospective purchaser must give reasonable assurance that the *public* interest of the City in preservation and restoration of the existing improvements will be accomplished. Under this statutory scheme, if the property is sold, both the private economic interest of the owner, and the public interest of the City in historic preservation, are vindicated. If no purchaser materializes, the economic interest of the owner is protected in that the owner can proceed to demolish the building or structure, and put the property to its highest and best use, and the City's public interest in preservation is vindicated since the City and other entities had the opportunity, but elected not, to acquire and preserve the property. If a purchaser materializes, but the owner elects not to sell, the economic interest of the owner has been vindicated, since the owner had the opportunity to realize the property's fair market value, but elected not to, and the public interest in preservation is likewise vindicated, since the owner has failed to acquire the right to demolish the building or structure.

(a) The Owner Did Not Make the Offer to Sell in Good Faith.

Section 10-108(A) requires the offer to sell to set a price "reasonably related" to the property's fair market value. The intent of this provision is that the seller would pursue the sale of the property in good faith. However, correspondence from the Owner's counsel to the AHDC dated October 26, 2005, indicates that the Owner did not proceed with the appropriate intent. In the October 26, 2005, letter the Owner's counsel stated that the Owner considered "this sale as a forced, below market sale at substantially below the current market value." Exhibit #3. This view, and the Owner's conduct in pursuance of this view, are in and of themselves inconsistent with the bona fide offer of sale at a price reasonably related to fair market value required by the ordinance and charter, particularly since the seller established the asking price.

(b) The Owner's Demand for a Right of Reverter or a Right to Repurchase the Property Does Not Comply with the Bona Fide Offer to Sell Provisions of the Ordinance.

In his October 26, 2005, letter, the Owner's counsel also stated the Owner's requirement that any conveyance "be subject to a right of reverter to the seller if the Property is not restored in material compliance with the Secretary of the Interior and Virginia Department of Historic Resources Standards and preserved in accordance with those standards for a period of forty years." Exhibit #3. This position was reiterated in the Owner's counsel's November 3, 2005, letter. *See* Exhibit #4. In response to the preservation easement running to the City and to the Alexandria Historical Restoration and Preservation Commission, tendered by the AHDC, the Owner's counsel again on November 22, 2005 insisted on the Owner having "a right to repurchase the property for the purchase price plus the Purchaser's closing costs." Exhibit #5.

The Owner's demand for a right of reverter, which would revert title to the property in the Owner without compensation to the purchaser, and terminate any security interest of a lender, thus impeding the purchaser's ability to finance the acquisition and restoration of the property, as well as the Owner's subsequent demand for a right to repurchase the property at the \$12.3 million price, are inconsistent with the purpose and intent of the charter and ordinance in two respects. First, these

demands vindicate not the Owner's legitimate economic interest under the ordinance and charter in receiving the present fair market value of the property at the time of the offer, but seek to secure a future economic windfall to the Owner in the event of the purchaser's failure to adhere to its assurances to preserve and restore the property. As explained more fully below, the assurances to preserve and restore vindicate the public's interest, not the Owner's. The Owner's remedy, should the Owner wish to retain future appreciation of the property, is to refuse the sale, and, like the prospective purchaser, preserve and restore the property pending some future, unanticipated event which would warrant demolition. Thus, these demanded terms are overreaching and inconsistent with a bona fide offer of sale under the ordinance and charter.

- (c) The Owner's Insistence on Specifying and Approving the Purchaser's "Reasonable Assurance" that It is Willing to Preserve and Restore the Property is Contrary to the Ordinance.

In the course of contract negotiations, the Owner insisted that the AHDC preserve and restore the Gunston Hall Apartments in accord with standards established by the Secretary of the United States Department of Interior and/or the Virginia Department of Historic Resources. The Owner's insistence that the AHDC adhere to these standards is inconsistent with the required bona fide offer of sale under the charter and ordinance for several reasons. Neither the charter nor the ordinance specifies that assurances with respect to these specific preservation standards be given to the seller, much less that they be included in the contract terms between the seller and purchaser. This omission is not surprising because the preservation and restoration of the property vindicate public, not private, interests. It would be an absurd construction of the legislative language to suppose that the seller, who desires the demolition of the building, should judge the adequacy or reasonableness of provisions contrary to their expressed interests. Such an interpretation would frustrate the purpose and intent of the legislative scheme. Thus, under the legislative scheme, the determination of the adequacy of the purchaser's assurances is for the City, in particular for the Director of the Department of Planning and Zoning to make pursuant to Section 11-100 of the Zoning Ordinance.

All of the above reasons establish a reasonable basis for the Director's determination that Mr. Suthanthiran, Trustee, as Owner of the Gunston Hall Apartments, failed to comply with the bona fide offer to sell provisions of Section 10-108(A) of the Zoning Ordinance.

- (2) Mr. Suthanthiran's Failure to Appeal the Determination that He Failed to Comply With the Bona Fide Offer to Sell Provisions of Section 10-108(A) of the Zoning Ordinance Requires that the BZA Uphold the Determination that He is Not Entitled to a Demolition Permit.

The Director of Planning and Zoning's December 22, 2005 Determination with respect to the negotiations for the sale of the Gunston Hall Apartments to AHDC sets forth five determinations. The first determination states:

1. Neither Krishnan Suthanthiran, Trustee, as Owner, nor Basheer/Edgemore Properties, I.L.C., as contract purchaser, have complied with the bona fide offer to sell provisions of Section 10-108(A) of the Zoning Ordinance.

Exhibit #2, at 5. The reasons supporting the Director's determination were set forth in the letter from the City Attorney, which accompanied the Director's determination. In his Basis for Appeal, the Owner fails to appeal this determination. Rather, the Owner appeals instead from the determinations

of the Director that the November 23, 2005, AHDC purchase offer complied with Section 10-108(A) of the Zoning Ordinance and that neither the Owner nor any other entity is entitled at the present time to a demolition permit for the Gunston Hall Apartments. As such, absent an appeal of the Director's first determination within the 30 days required under law to bring such an appeal, the Director's first determination is not subject to challenge. Accordingly, because the Owner failed to comply with the bona fide offer to sell provisions of Section 10-108(A) of the Zoning Ordinance, he necessarily is not entitled to a demolition permit for the Gunston Hall Apartments at this time.

D. The Director's Determination that the AHDC's Purchase Offer Complied with the Terms of Section 10-108(A) of the Zoning Ordinance was Reasonable

(1) AHDC's Purchase Offer Provided Reasonable Assurance that AHDC Would Preserve and Restore the Gunston Hall Apartments.

Section 10-108(A) requires that a prospective purchaser agree to pay the offering price and provide "reasonable assurance that it is willing to preserve and restore the building or structure and the land pertaining thereto." Zoning Ordinance § 10-108(A)(2). The Director reasonably determined that the AHDC's November 23, 2005 purchase offer to the Owner of the Gunston Hall Apartments complied with the terms of Section 10-108(A).

There is no dispute that the AHDC offered to pay the offering price of \$12,306,000. In addition, the purchase offer complied with the "reasonable assurance" of preservation and restoration required by the ordinance. In particular, Paragraph 11(c) of the purchase contract provides:

At settlement, Purchaser shall grant an open space, interior and exterior preservation easement, in substantial accord with the attached Exhibit C entitled "Preservation Easement," to the Alexandria Historical Restoration and Preservation Commission and to the City of Alexandria. At closing, Purchaser shall provide written confirmation that Grantees accept the Easement and Purchaser's work plan for preserving and restoring the Property.

November 23, 2005, Purchase Contract at Para. 11(c). The referenced Exhibit C is the standard preservation easement used repeatedly by the Alexandria Historical Restoration and Preservation Commission, and elsewhere in the Commonwealth, to secure the preservation and restoration of historic properties. The inclusion of the easement in the purchase offer met the "reasonable assurance" provision of the ordinance.

The Owner argues that the preservation easement was inadequate. Although the Owner originally insisted that "reasonable assurance" be provided through a right of reverter or a right to repurchase the property, the AHDC rejected that approach and offered the preservation easement instead.

First, the Owner argues that the preservation easement should have included an assurance that the AHDC would preserve and restore the Gunston Hall Apartments in accordance with the historical preservation standards established by the Secretary of the United States Department of Interior or by the Virginia Department of Historic Resources. As discussed above at Part C.1.(c), this argument is inconsistent with the required bona fide offer of sale provisions under the charter and ordinance, and, thus, holds no weight.

The Owner next argues that the preservation easement offered by the AHDC was inadequate because it was not attached to the purchase offer that AHDC provided to the Owner on the afternoon of November 23, 2005. This argument is meritless. AHDC submitted a purchase offer to the Owner on November 21, 2005 that attached the preservation easement as an exhibit. The Owner thereafter provided comments on the November 21 offer to which the AHDC responded in its November 23, 2005 purchase offer. There was no need for the AHDC to reattach the preservation easement exhibit to the November 23 offer because it was clear from the November 21 offer that the easement was to be made a part of the contract. Nonetheless, the City Attorney's office submitted a copy of the preservation easement to the Owner on the afternoon of November 23 to accompany the AHDC's purchase offer. Thus, it is plain that the Owner had before it on November 23, 2005 a purchase offer that included the preservation easement.

The Owner also complains that the preservation easement attached to the November 23, 2005 purchase offer was inadequate because it was simply a form with certain information missing. Contrary to the Owner's position, the preservation easement was sufficient in this form. Although certain ministerial elements, such as a legal description of the property, and certain discretionary elements, such as the scope of the restoration work plan, remained to be completed, those decisions were for the City and the Alexandria Historical Restoration and Preservation Commission to make, as grantees under the easement, not the Owner. The Owner complains that the fact that both the grantor and grantee under the easement are agencies of the City raises questions about the validity of the easement. However, the law presumes that public officers will exercise their authority in a lawful and reasonable manner, and provides the Owner with ample recourse, by appeal to the BZA and judicial review, to assure that this standard is met with respect to the preservation easement. AHDC's obligation under the contract was to provide, at closing, written confirmation that the City and the Commission accepted the easement and work plan. Absent such confirmation, the AHDC would have been in default at closing, with its entire escrow deposit (\$950,000) forfeited, and the contract terminated, at the Owner's election. For these reasons, the preservation easement attached to the November 23, 2005 purchase offer was more than adequate to meet the "reasonable assurance" provision of Section 10-108(A) of the Zoning Ordinance.

(2) The November 23, 2005 AHDC Purchase Offer Was Otherwise Complete.

The Owner also argues that the AHDC's November 23, 2005 purchase offer did not comply with Section 10-108(A) of the Zoning Ordinance because the contract was otherwise incomplete and could not be executed within the one-year time period prescribed under the ordinance. In particular, the Owner argues that as a Trustee, he could only convey the property under a special warranty, not a general warranty, of title. The November 23, 2005 AHDC purchase offer in fact met this condition, requiring the Owner to provide a "special warranty" deed. The Owner argues, however, that the requirement in the contract for the Owner to provide a deed with English Covenants of Title converted the special warranty to a general warranty in fact, creating a lack of a meeting of the minds on this issue and preventing him from being able to execute the contract within the one-year period. The Owner's argument is contrary to the purpose and intent of the ordinance and must fail.

As discussed above, the purpose and intent of Section 10-108(A) of the Zoning Ordinance is to vindicate both the public interest in preservation and restoration of historic structures with the seller's private economic interest. In this case, where AHDC made a bona fide offer to purchase the property for the asking price and provided reasonable assurance that it would preserve and restore

the property, both the Owner's and the public's interests would be met through execution of the contract. The Owner should not be permitted to defeat the fulfillment of the ordinance's purpose by picking and choosing provisions in the contract that he claims do not comply or prevent compliance with the terms of Section 10-108(A).

In addition, the AHDC's purchase offer in fact specified the special warranty provision that the Owner requested. Also, the Owner did not request that the reference to English Covenants of Title be removed from the AHDC's November 21, 2005 purchase offer. *See* Exhibit #5. Moreover, the purchase offer makes clear that the Owner made no further warranties of title other than the special warranty of title and the specific warranties set forth in Paragraph 10 of the purchase offer. *See* November 23, 2005, Proposed Purchase Agreement, ¶¶ 10(b), 10(i). Thus, the statement about English Covenants of Title is not inconsistent with the special warranty provision in the purchase offer, and the Owner should not be permitted to claim that such requirement defeats the contract.

E. The Owner's Remaining Bases for Appeal Are Not Cognizable Before the BZA

In a supplement to his Basis for Appeal, the Owner sets forth two additional arguments. First, the Owner argues that the City Attorney's opinion that the Owner could not consider whether the purchaser's offer complied with the Zoning Ordinance would allow the purchaser and the City to realize a substantial increase in the value of the property over the advertised value and effect a taking of that value from the Owner. Second, the Owner argues that Section 10-108 effects a taking and forced sale of the property that does not comply with the requirements and procedures for the exercise of eminent domain in Virginia. The Owner fails to develop either of these arguments. Moreover, the arguments go beyond the BZA's authority, which is limited to determining solely whether the Director's determinations in this case were reasonable. For these reasons, the Owner's supplemental Basis for Appeal should not be considered by the BZA.

CONCLUSION

The City Attorney's and Director of Planning and Zoning's interpretation of Section 10-108(A) of the Zoning Ordinance, and the Director's determinations based on that interpretation, are reasonable and in keeping with the purpose and intent of the ordinance. The factual record demonstrates that the AHDC submitted a purchase offer for the Gunston Hall Apartments that fully complied with the requirements of Section 10-108(A) and that the Owner improperly rejected the offer. For this reason, the Owner has no present right to demolish the Gunston Hall Apartments. Moreover, the Owner failed to appeal within 30 days the Director's determination that the Owner failed to comply with the bona fide offer to sell provisions of Section 10-108(A). The failure to appeal this determination alone serves to uphold the Director's determination that the Owner has no present right to demolish the Gunston Hall Apartments.

For all of the above reasons, the City respectfully requests that the BZA uphold the challenged determinations of the Director of Planning and Zoning.

EXHIBITS

- EXHIBIT #1: December 9, 2005, Letter from Daniel R. Abramson, President, Alexandria Housing Development Corporation, to Eileen P. Fogarty, Director, Department of Planning and Zoning
- EXHIBIT #2: December 22, 2005, Letter from Ignacio B. Pessoa, Alexandria City Attorney, to Daniel R. Abramson, President, Alexandria Housing Development Corporation; and Determination by the Director of Planning and Zoning
- EXHIBIT #3: October 26, 2005, Letter from John Fagelson, Counsel to Krishnan Suthanthiran, to Daniel Abramson, President, Alexandria Housing Development Corporation.
- EXHIBIT #4: November 3, 2005, Letter from John Fagelson, Counsel to Krishnan Suthanthiran, to Daniel Abramson, President, Alexandria Housing Development Corporation.
- EXHIBIT #5: November 22, 2005, Letter from John Fagelson, Counsel to Krishnan Suthanthiran, to Daniel Abramson, President, Alexandria Housing Development Corporation.

1 There are some exceptions to the permit requirement that do not apply in this case.

2 When the offering price for a building or structure under Section 10-108(A) of the Zoning Ordinance is \$90,000 or more, the bona fide offer to sell must be held open for a period of 12 months. *See* Zoning Ordinance § 10-108(A)(3)(f). Mr. Suthanthiran set the offering price for the Gunston Hall Apartments at \$12,306,000.

**Exhibits and all other attachments are available in the Department of Planning and Zoning
301 King Street, Room 2100, Alexandria, VA 22314
703-838-4666**