

City of Alexandria, Virginia

# Legal Procedures and Processes Worksession

Board of Architectural Review

May 1, 2019





# What will we discuss?

- ✓ Overall Rules – keeping us straight!
  - FOIA Meeting and Document Rules
  - Conflicts of Interest
  - Rules general to all Boards and Commissions
  - Roberts Rules & By Laws
- ✓ Why we are here and what are we authorized to do?
  - Historic Preservation and Enabling Legislation
- ✓ Rules Specific to the Alexandria Historic Districts
  - Application Processes, Timing of hearing cases, standards used in decision making, appeals and much more!

# Why we are here and what are we authorized to do?



- What Code Sections govern the Boards of Architectural Review:
  - Freedom of Information Act
  - Virginia Conflicts of Interest Act
  - City Code Title 2 (General Government), Chapter 4 (Committees, Boards and Commissions), Article A (General Provisions)
  - Robert's Rules of Order and By-Laws
  - Zoning Ordinance Article X

# Overall Rules - FOIA



- The Virginia Freedom of Information Act (or FOIA) has two main components.
- Laws related to citizen access to public records.
- Laws related to citizen access to meetings of public bodies.
- The Act is found under Code of Virginia § 2.2-3700 through 2.2-3714.

# Overall Rules - FOIA



- What are public records?
  - “[A]ll writings and recordings . . . regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.”

# Overall Rules - FOIA



- What is a public body?
  - “[A]ny legislative body, authority, board, bureau, commission, district or agency . . . of any political subdivision of the Commonwealth, including cities, . . . municipal councils, . . . and planning commissions; . . . and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.”
  - “It shall include . . . any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body.”
  - “It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members.”
  - The City’s Board of Architectural Review (BAR) is a public body under FOIA.

# Overall Rules - FOIA



- What are the City's obligations generally under FOIA?
  - To retain records related to the public business for the required retention period.
  - And to provide those records for inspection upon request by a citizen.
  - To provide citizen access to meetings of public bodies.

# Overall Rules - FOIA



- What are the obligations of BAR members, under FOIA, related to public records?
  - You must retain all records related to the business of the Board, any record that is not maintained or provided to you by staff.
  - All records need to be retained for the period stated in the Library of Virginia, Retention Schedules for localities
    - [http://www.lva.virginia.gov/agencies/records/sched\\_local/index.htm](http://www.lva.virginia.gov/agencies/records/sched_local/index.htm)



# Overall Rules - FOIA



- What is a meeting of a public body?
  - The BAR is a public body
  - A meeting is defined as “. . . when sitting physically, or through electronic communication . . . as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. ”

# Overall Rules - FOIA



- What are the obligations of BAR members, under FOIA, related to public meetings?
  - Any gathering of 3 or more members of the BAR is a meeting, if the members are discussing BAR business
  - FOIA meeting requirements
    - Notice 3 working days prior to the meeting
    - Meeting must be open to the public
    - Minutes of the meeting must be prepared
    - Information provided to the members must be public

# Overall Rules - FOIA



- What are the obligations of BAR members, under FOIA, related to public meetings?
  - Social events
    - Three or more members may attend social events and converse with one another, so long as:
      - No part of the event involves the discussion of public business and
      - The gathering was not planned for that purpose

# Overall Rules - FOIA



- What are the obligations of BAR members, under FOIA, related to public meetings?
  - Electronic Communication
    - In its 2012 decision, in Hill v. Fairfax County School Board, the Virginia Supreme Court stated that:
      - “[T]he key difference between permitted use of electronic communication, such as e-mail, outside the notice and open meeting requirements of [the] FOIA, and those that constitute a ‘meeting’ under [the] FOIA, is the feature of simultaneity inherent in the term ‘assemblage.’”
      - “[T]he dispositive inquiry to be made by the trier of fact is ‘how the e-mail is used.’”

# Overall Rules - FOIA



- Electronic Communication
  - This rule is applicable to other forms of electronic communications, including chat rooms, instant messaging, text messaging, etc.
  - In other words, the closer in time that electronic communications are sent and responded to by 3 or more members of the BAR, the more likely that a meeting could be found.
  - In order to avoid problems, it is advisable
    - To NOT reply all to emails
    - To NOT respond to or email more than one other Board member at a time
    - Alternatively, if you have something you would like to say to the entire Board, then you can always say it at the next Board meeting

# Overall Rules - FOIA



- **Generally FOIA requires the physical assembly of the members and remote participation is prohibited.**
- This means no meetings by conference telephone calls, video-conferencing, or other electronic communications.
- FOIA only allows public bodies that wish to permit one or more of their members to participate in meetings remotely
  - In cases of a personal matter or medical condition when
  - A quorum is physically assembled and
  - The public body has adopted an electronic participation policy that complies with FOIA

# Overall Rules – Conflicts of Interest



- Conflicts of interest laws applicable to the BAR include the State and Local Government Conflict of Interests Act (Act) and certain provisions of the City's Zoning Ordinances.
- The Act is found under Code of Virginia § 2.2-3100 through 2.2-3131.
- The Zoning Ordinances are at § 11-350 through 11-356 and § 10-401(D).

# Overall Rules – Conflicts of Interest



- What are the obligations of BAR members with regard to conflicts of interest?
  - Zoning Ordinance Section 10-401(D) addresses conflicts of interest related to BAR members.
    - “Each member of the . . . [BAR] shall be under a continuous duty to remain conscious of and sensitive to any possible conflict of interest which may arise by virtue of his membership on the board. A member, promptly upon his determining he has a conflict of interest relative to any matter brought, shall disqualify himself from participating, in any manner, publicly or privately, in the presentation, discussion or deliberation of and the voting on any such matter.”
  - The Act and Zoning Ordinance are not codes of ethics but merely sets minimum standards of conduct with respect to the financial interests of BAR members.
  - They do not protect against all appearances of improper influence.
  - Instead, they place the burden on the individual Board member to evaluate whether the facts presented create an appearance of impropriety that is unacceptable or that could affect the confidence of the public in the ability of the Board member to be impartial.



# Overall Rules – Conflicts of Interest



- What conduct is prohibited under the Act?
  - No BAR member may accept money or any other thing of value or take other advantages based upon his position as a member of the BAR.
  - Members cannot have a “personal interest” in a “contract” or “transaction.”
    - A “personal interest” is a financial benefit or liability accruing to a BAR member or to a member of his immediate family.
    - A “contract” is any agreement to which the City is a party.
    - A “transaction” is any matter considered by the Board.

# Overall Rules – Conflicts of Interest



- What conduct is prohibited under the Zoning Ordinance?
  - Any BAR member who has or has had a business or financial relationship shall be ineligible to vote or participate in any way in consideration of an application.
    - A “business or financial relationship” means a relationship that a BAR member or any member of his immediate household has, or has had within the 12-month period prior to a hearing on an application, with the applicant in the case, or with a party with an ownership interest in the applicant, or the property that is the subject of the application.
    - There are a variety of relationship types, both direct and indirect.
    - Since the question of whether a conflict of interest exists is fact specific, it is advisable to contact the City Attorney’s Office related to a particular situation.

# Overall Rules - City Rules for All Boards and Commissions



General rules apply unless otherwise specified in the enabling legislation of the Board

## Membership:

- Appointed by City Council
- 10 year term limits
- Must attend or have an excused absence for 75% of meetings
- May be removed from the Board by the City Council for neglect of duty or violations of the law

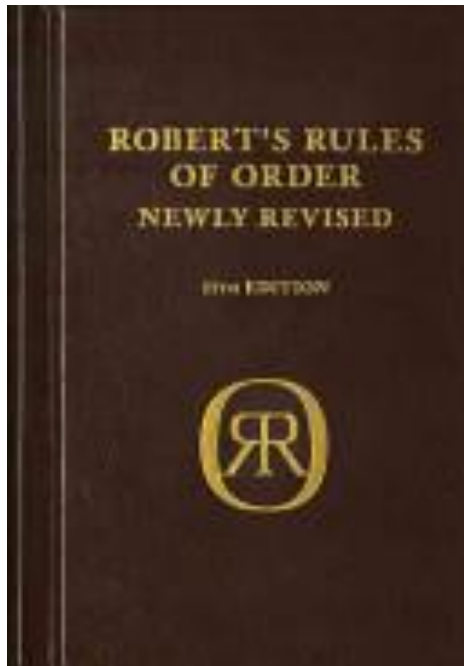
## Meetings:

- At least one regular meeting each year
- Annual report to the City Council listing the Board's principle activities and any recommendations to improve the functions and duties of the Board
- Minutes of each meeting must be prepared and kept

## Procedure:

- Quorum
- Vote requires a majority of those present, unless otherwise specified
- Must establish procedures for the conduct of business (by-laws)
- Robert's Rules of Order applies unless otherwise specified by the law

# Overall Rules – Robert's Rules of Order



- Basic Requirements:
  - Chair presides
  - Members need to be recognized to speak
  - Quorum is majority of member of the board
  - Vote requires a majority of those present unless otherwise specified
  - Tie vote means the motion does not pass

# Overall Rules – Robert's Rules of Order



- Motions and Amendments
  - All motions require a second
  - Motions can be amended with an amendment to the motion or a substitute motion
  - Amendments need to have a second and be voted on separately
  - Main motion, as amended is then on the table for consideration

# Overall Rules – Robert's Rules of Order



- Amending an approved decision
  - Motion to reconsider
    - Made at the same meeting
    - Only a member who voted for the motion may make a motion to reconsider
  - Motion to Rescind
    - Can be made at any time after a decision is made
    - Requires a 2/3 majority of those present unless there was prior notice of the reconsideration
    - Cannot be done if decision has been relied on to do something that cannot be undone.

# Why we are here and what are we authorized to do?



- Historic Preservation has been established as a Public Purpose

*Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 129 (1978):  
“... this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city”

*Dolan v. City of Tigard*, 512 US 374 (1984) and *Nolan v. California Coastal Commission*, 483 US 825 (1987): There must be an “essential nexus” and “rough proportionality” between the governmental interest being protected and the regulation and/or permit condition.

- Historic district regulations should be:
  - Related to and within the scope of the historic preservation
  - Comprehensive
  - Allow for a reasonable return on investment
  - Applied a manner that is not arbitrary or capricious

# Why we are here and what are we authorized to do?



- **Dillon Rule:** The City is only authorized to do what the State has authorized the City to do either through the City Charter or the Virginia Code

“The Dillon Rule of strict construction controls our determination of the powers of local governing bodies. This rule provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.” *City Council of Alexandria v. The Lindsey Trust*, 258 Va. 424, 427, 520 S.E.2d 181, 182 (1999), citing *Ticonderoga Farms v. County of Loudoun*, 242 Va. 170, 173-74, 409 S.E.2d 446, 448 (1991); *City of Richmond v. Confrere Club of Richmond*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990).



# Why we are here and what are we authorized to do?



## City Authorization comes from it's Charter:

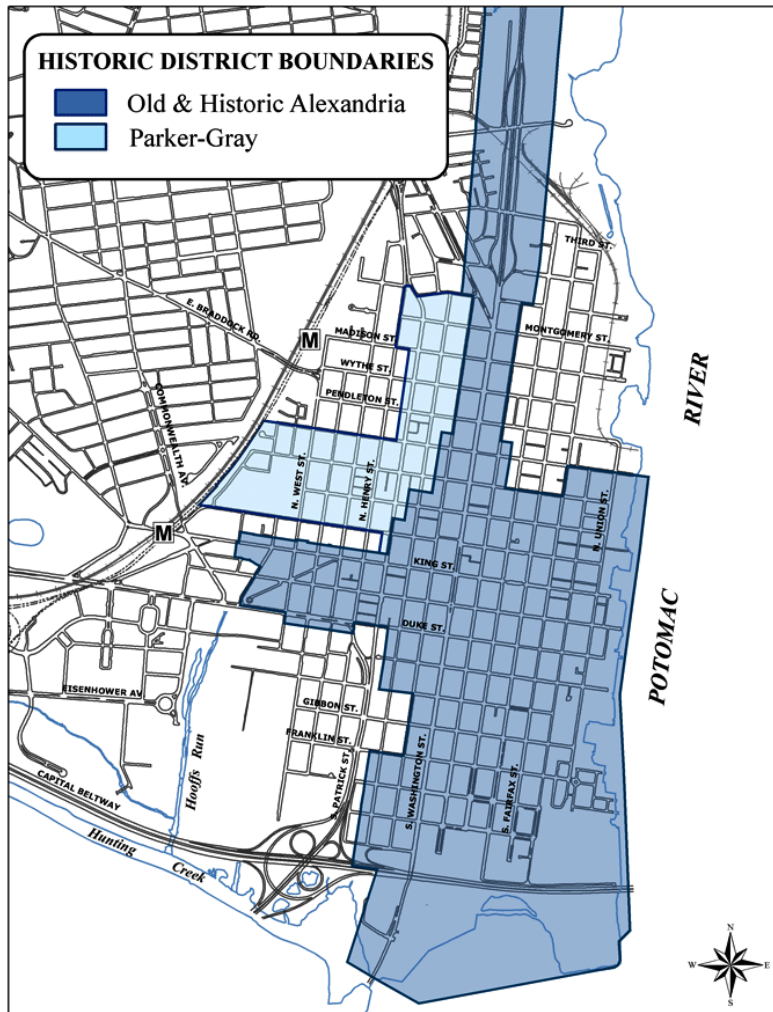
Alexandria City Charter Section 9.09:

“... (i) It may, **in order to promote the general welfare** through the preservation and protection of historic places and any other buildings or structures within the city having an important historic, architectural or cultural interest and other areas of historic interest in the city and through the preservation of the memorial character of the George Washington Memorial Highway, **provide for old and historic districts or designated preservation districts** in which no building or structure shall be erected, reconstructed, altered, restored, moved, removed, capsulated or razed until approved by a board of architectural review and in which, notwithstanding any contrary provision of general law, no building or structure shall be allowed to deteriorate so that the building or structure or any exterior architectural feature thereof shall be lost or threatened with loss...”

Alexandria City Charter Section 9.09:

“... (j) It may create **boards of architectural review which shall have the power to pass upon the appropriateness of exterior architectural features, including signs, of buildings and structures** to be erected, reconstructed, altered or restored in any old and historic districts or in designated preservation districts established in the city **and prohibit the moving, removing, capsulation, demolition or razing of any building in such a district without a permit** if any such building is of such historic, architectural or cultural interest that its removal would be to the detriment of the public interest...”

# Why we are here and what are we authorized to do?



10-102 District established.

There is hereby created in the city a district to be known as the "**Old and Historic Alexandria District**," the boundaries of which shall be those shown on the zoning maps adopted herewith.

10-202 District established.

There is hereby created in the city a district to be known as the "**Parker-Gray District**," the boundaries of which shall be those shown on the zoning maps adopted herewith.

10-401 Board of architectural review.

(A) *Board of architectural review established.* There is hereby established the board of architectural review to be composed of seven members.

# City Rules for Historic Districts



- Historic District Regulations are found in § 10-100 (Old and Historic Alexandria), § 10-200 (Parker-Gray), and § 10-400 (BAR) of the Alexandria Zoning Ordinance
- Separate set of similar regulations for 100 year old buildings outside of the districts that once designated are regulated by the Old and Historic Alexandria BAR (§ 10-300)
- Regulations address:
  - Purpose of boards
  - Composition of the boards
  - Application processing
  - Standards
  - Appeals

# City Rules for Historic Districts



## §10-101 Purpose:

The City of Alexandria seeks, through the establishment of the **Old and Historic Alexandria District**, to protect community health and safety, to promote the education, prosperity and general welfare of the public through the identification, preservation, and enhancement of buildings, structures, landscapes, settings, neighborhoods, places and features with special historical, cultural, artistic, and architectural significance. To achieve these general purposes, the City of Alexandria seeks to pursue the following specific purposes:

- (A) To enrich the quality of life for city residents by protecting the unique resource that is the historic district, including familiar landmarks and other treasured elements of the area;
- (B) To protect historical and cultural resources thus promoting tourism and enhancing business and industry as well as the quality of life of the residents of the city;
- (C) To maintain and improve property values by providing incentives for the upkeep, rehabilitation and restoration of older structures in a safe and healthful manner; and by encouraging desirable uses and forms of economic development that will lead to the continuance, conservation and improvement of the city's historic resources in their setting;
- (D) To educate residents and visitors about the city's cultural and historic heritage;
- (E) To promote local historic preservation efforts through the identification and protection of historic resources throughout the city;
- (F) To encourage the nomination of historic properties to the National Register of Historic Places and the Virginia Landmarks Register.
- (G) To assure that new structures, additions, landscaping, and related elements be in harmony with their historical and architectural setting and environs; and
- (H) To safeguard the city's portion of the George Washington Memorial Parkway and other significant routes of tourist access to the city's historic resources by assuring that development in and along those transportation arteries be in keeping with their historical, cultural and traditional setting.

# City Rules for Historic Districts



## §10-201 Purpose:

The City of Alexandria seeks, through the establishment of the **Parker-Gray District**, to protect community health and safety and to promote the education, prosperity and general welfare of the public through the identification, preservation, and enhancement of buildings, structures, settings, features and ways of life which characterize this nineteenth and early twentieth century residential neighborhood. To achieve these general purposes the City of Alexandria seeks to pursue the following specific purposes:

- (A) To enrich the quality of life for city residents by protecting the architectural character and scale of the district;
- (B) To maintain and improve property values by providing incentives for the upkeep and rehabilitation of older structures in a safe and healthful manner; by protecting against deterioration, destruction of, or encroachment upon such areas, structures and premises; and by encouraging desirable uses which will lead to their conservation and improvement;
- (C) To educate residents and visitors about the Parker-Gray District's cultural and historic heritage;
- (D) To promote local historic preservation efforts through the identification and protection of historic resources within the District;
- (E) To encourage the nomination of historic properties to the National Register of Historic Places and the Virginia Landmarks Register;
- (F) To assure that new structures, additions, landscaping, and related elements be in harmony with their historical and architectural setting and environs; and
- (G) To safeguard the district's approaches and significant routes of tourist access by assuring that development in and along those transportation arteries be in keeping with the district's historical, cultural, and traditional setting.

# City Rules for Historic Districts



- Composition (§ 10-401(C))
  - Seven Members
  - Residents of the City
  - Resided in City for 1 year prior to appointment
  - 1 property owner each from district
  - 2 architect members
  - Members shall have a demonstrated knowledge, professional experience, or education in history, architecture, architectural history, historic preservation, planning, real estate, or building construction
  - Three year terms

# City Rules for Historic Districts



- Application processing (§ 10-104(F) and § 10-204(F))
  - Hear it within 40 days after a complete application is received
  - Decide it by the next regularly scheduled meeting after the public hearing not to exceed 60 days, unless extension is agreed to by the applicant
  - Failure to decide within required time constitutes an automatic approval
    - Deferring is not deciding
  - Notice of public hearings – not more than 30 days nor less than 10 days before the hearing
  - Same application cannot be considered for 1 year after it has been denied
  - Reasons for denial should be stated on the record



# City Rules for Historic Districts



- Scope of the Board's review
  - Certificate of Appropriateness: exterior architectural features, including signs (see Article IX), which are subject to public view from a public street, way or place. (§ 10-103(A)/ § 10-203(A))
  - Permit to Demolish: building or structure...moved, removed, capsulated or demolished in whole or in part...except for demolitions of portions of buildings resulting in the removal of less than 25 square feet total of exterior wall, roof or surface which shall be deemed an alteration and subject to § 10-103(A)
- Standards to be considered (§ 10-105/ § 10-205)
  - Standards for Certificates of Appropriateness
  - Standards for Permits to Demolish
  - Additional Standards for particular areas
- Design guidelines – authority in § 10-104(B)(2) and § 10-204(B)(2)
  - “Develop, adopt and publish criteria and guidelines, within the standards developed by city council under section [10-105/10-205, to be considered in granting or denying certificates of appropriateness and permits to move, remove, capsulate or demolish in whole or in part, provided that such criteria and guidelines shall be consistent with the provisions of this Article X and with such standards, rules, regulations, and procedures as city council may establish pursuant to section 9.09(j) of the city charter.”





# City Rules for Historic Districts

- Historic Preservation Easements
  - Some properties may also be subject to historic preservation easements granted to third parties which may restrict the use of the property.
  - The easement is a private property matter and as such the BAR does not have the authority to interpret, enforce or waive the provisions of the easement.
  - Compliance with the easement restrictions is the responsibility of the easement holder and not the BAR.
  - If the BAR feels a private property matter must be resolved before they move forward for efficiency purposes it may suggest that to the applicant.

# City Rules for Historic Districts



## ■ Concept Review Policy

- The purpose is to provide feedback to the applicant, staff, Planning Commission and the City Council before the Preliminary Site Plan or DSUP is approved
- Concept comments relate to the overall appropriateness of a project's height, mass, scale and general architectural character, based on the criteria and standards in Zoning Ordinance and Design Guidelines
- Not an approval by the BAR, the applicant must still apply for permits to demolish and/or certificates of appropriateness from the BAR
- Advisory to the applicant, staff, the Planning Commission and the City Council, and is not intended to create vested or appealable rights

# City Rules for Historic Districts



- Appeals (§ 10-107 and § 10-207)
  - If BAR denies an application
    - Applicant has 14 days to appeal the denial to the City Council
    - City Council Public Hearing is scheduled no more than 75 days after the appeal is noted
  - If BAR approves an application
    - 25 owners of property in the district may file an appeal within 14 days
    - City Council Public Hearing is scheduled not less than 30 days after the appeal is noted
  - An appeal stays the decision
  - City Council reviews the decision using the same standards that the BAR is required to use
  - City Council may affirm, modify or reverse the BAR decision

# City Rules for Historic Districts



- Appeals of City Council's Decision
  - Appeals go to the Circuit Court for the City of Alexandria
  - Must be appealed within 30 days of the City Council decision
  - The decision of the BAR continues to be stayed while the Circuit Court reviews the decision
  - The Court may affirm, reverse or modify the decision of the City Council
  - To reverse or modify a decision the Court must find that the decision is contrary to law or that the decision is arbitrary and constitutes an abuse of discretion

# City Rules for Historic Districts



- Additional or concurrent right to demolish a historic building (§ 10-108 and § 10-208)
  - An owner has a right to demolish a building in the historic district despite the denial of a permit to demolish if:
    - the applicant appeals the denial
    - owner markets the building for a set period of time at a price reasonably related to its fair market value
    - any purchaser must give a reasonable assurance that it is willing to preserve and restore the building



# Questions?

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