IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

EILEEN M. McLANE,
FAIRFAX COUNTY ZONING ADMINISTRATOR,

Appellant,

v.

DEREK B. VEREEN and ANGELIQUE VEREEN,

Appellees.

Record No. 081863

REPLY BRIEF OF APPELLANT

David P. Bobzien (VSB No. 12027)
County Attorney

R. Scott Wynn (VSB No. 22380)
Senior Assistant County Attorney

Paul T. Emerick (VSB No. 33443)
Assistant County Attorney

12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035-0064
(703) 324-2421; (703) 324-2665 (fax)
Paul.Emerick@fairfaxcounty.gov

Counsel for Appellant Eileen M. McLane
Fairfax County Zoning Administrator

SUBJECT INDEX

Page

TABLE OF CITATIONS ii

ARGUMENT 2

I. THE JUNE 18, 2008, ORDER THAT THE ZONING ADMINISTRATOR APPEALED IN THIS CASE IS THE FINAL ORDER BECAUSE IT ADJUDICATED ALL OF THE ISSUES IN THIS CASE, LEFT NOTHING TO BE DONE EXCEPT THE MINISTERIAL EXECUTION OF THE JUDGMENT, AND WAS NEVER SUSPENDED, VACATED, OR MODIFIED 3

II. THE ZONING ADMINISTRATOR DOES NOT CLAIM THAT THE CONSENT DECREE IS SELF-EXECUTING 8

III. THE CIRCUIT COURT IMPROPERLY MODIFIED THE CONSENT DECREE 9

IV. THE SANCTIONS PAYABLE UNDER THE CONSENT DECREE ARE NOT UNENFORCEABLE PENALTIES BECAUSE THERE IS NO EVIDENCE THAT DAMAGES RESULTING FROM THE VIOLATION OF THE CONSENT DECREE ARE SUSCEPTIBLE OF DEFINITE MEASUREMENT OR THAT THE STIPULATED SANCTIONS FOR SUCH VIOLATION ARE GROSSLY IN EXCESS OF THE ACTUAL DAMAGES SUFFERED BY THE ZONING ADMINISTRATOR AND THE PUBLIC. 13

CONCLUSION 14

CERTIFICATE REQUIRED BY RULE 5:26(d) 16

TABLE OF CITATIONS

Cases **Page**

Brooks v. Bankson, 248 Va. 197, 445 S.E.2d 473 (1994) 13

Foreign Mission Bd. v. Wade, 242 Va. 234, 409 S.E.2d 144 (1991) 9, 11

Super Fresh Food Markets v. Ruffin, 263 Va. 555, 561 S.E.2d 734 (2002) 5

Wilcox v. Lauterbach Elec. Co. Inc., 233 Va. 416, 357 S.E.2d 197 (1987) 6, 7

Rules of the Supreme Court of Virginia

Rule 5:26(d) 16

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

EILEEN M. McLANE, FAIRFAX COUNTY ZONING ADMINISTRATOR,	:	
Appellant,	:	
v.	:	
DEREK B. VEREEN,	:	**Record No. 081863**
and	:	
ANGELIQUE VEREEN,	:	
Appellees.	:	

REPLY BRIEF OF APPELLANT

TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA

Appellant, Eileen M. McLane, the Fairfax County Zoning Administrator ("Zoning Administrator"), by counsel, submits this Reply Brief of Appellant in response to the Brief of Appellees ("Brief") and asserts, for the reasons set forth herein and in the Opening Brief of Appellant, that the Circuit Court of Fairfax County, Virginia, the Honorable R. Terrence Ney presiding ("Circuit Court"), erred when it failed to

impose the sanctions required by the Consent Decree in this case on the Appellees, Derek B. Vereen and Angelique Vereen ("the Vereens"), for their admitted failure to clear the violations of the Fairfax County Zoning Ordinance ("Zoning Ordinance") from their property as required by the Consent Decree.

ARGUMENT

The Vereens assert in their Brief[1] that (1) the Zoning Administrator did not appeal the final order in this case (Br. at 7), (2) the Zoning Administrator failed to object to the Circuit Court's determination that the Consent Decree is not self-executing (Br. at 8-9), (3) the Circuit Court did not modify the Consent Decree in this case (Br. at 9), and (4) the $20,600 sanction the Vereens owe the Zoning Administrator under the Consent Decree for failing to comply with the Consent Decree for 206 days is an unenforceable

---

[1] References to the Brief of Appellees are cited herein as "(Br. at _____.)".

penalty. (Br. at 10.) For the reasons set forth below, none of these assertions have merit.

I. THE JUNE 18, 2008, ORDER THAT THE ZONING ADMINISTRATOR APPEALED IN THIS CASE IS THE FINAL ORDER BECAUSE IT ADJUDICATED ALL OF THE ISSUES IN THE CASE, LEFT NOTHING TO BE DONE EXCEPT THE MINISTERIAL EXECUTION OF THE JUDGMENT, AND WAS NEVER SUSPENDED, VACATED, OR MODIFIED.

On June 13, 2008, the Circuit Court heard argument on the Zoning Administrator's request that the Circuit Court enter an order requiring the Vereens to pay the $20,600 sanction required by the Consent Decree for the Vereens' admitted failure to comply with the Consent Decree for 206 days. (App. at 69.)[2] At the conclusion of the hearing, the Circuit Court took the matter under advisement. (App. at 82-83.) On June 18, 2008, the Circuit Court issued a Letter Opinion in which it ruled that the Vereens should only be sanctioned $3,500 for their failure to comply with the Consent Decree for 206 days, and it entered an order

---

[2] References to the Appendix herein are cited as "(App. at ____.)".

imposing sanctions in that amount on the Vereens. (App. at 85.)

On July 2, 2008, the Zoning Administrator filed a motion for reconsideration requesting that the Circuit Court vacate its June 18, 2008, Order and enter judgment against the Vereens and in favor of the Zoning Administrator in the amount of $20,600. (App. at 90.) On July 9, 2008, *without ever suspending or vacating or modifying the June 18, 2008, Order*, the Circuit Court entered an order that denied the Zoning Administrator's motion for reconsideration. (App. at 109.) On July 9, 2008, the Zoning Administrator timely filed her Notice of Appeal to the Supreme Court of Virginia, in which she appealed the Circuit Court's June 18, 2008, Order.

The Vereens assert that the final order in this case is the order the Circuit Court entered on July 9, 2008, denying the Zoning Administrator's motion for reconsideration and not the June 18, 2008, Order, that adjudicated all of the issues in the case and awarded the Zoning Administrator $3,500 in sanctions. This assertion is without merit.

The June 18, 2008, Order is the final order in this case because it disposed of the entire action and left nothing to be done except the ministerial superintendence of the execution of the judgment. *See Super Fresh Food Markets v. Ruffin,* 263 Va. 555, 560, 561 S.E.2d 734, 737 (2002). By contrast, the July 9, 2008, Order did nothing but deny the Zoning Administrator's motion for reconsideration.

Moreover, the July 9, 2008, Order cannot be the final order in this case because it did not and could not confirm and ratify the June 18, 2008, Order because the June 18, 2008, Order was never suspended, vacated, or modified. *See Super Fresh Food Markets,* 263 Va. at 564, 561 S.E.2d at 739 (holding that a judgment *which has been properly vacated or suspended* does not become a final judgment thereafter without a subsequent order confirming it as originally entered or as modified). Therefore, it is clear that the June 18, 2008, Order was an appealable final order, and the Zoning Administrator timely appealed this order when she filed her Notice of Appeal on July 9, 2008.

Despite the fact that it is clear that the June 18, 2008, Order is the final order in this case because it adjudicated all of the issues in the case, left nothing to be done but the execution of the judgment, and was never suspended, vacated, or modified, the Vereens cite *Wilcox v. Lauterbach Elec. Co.*, 233 Va. 416, 357 S.E.2d 197 (1987), in support of their assertion that the July 9, 2008, Order and not the June 18, 2008, Order is the final order in this case. The Vereens' reliance on *Wilcox* is misplaced.

In *Wilcox,* the Court did not hold that an order that merely denies a motion for reconsideration is the final order in the case for purposes of appeal where the final order that is the subject of the motion for reconsideration has never been suspended, vacated, or modified. Rather, the Court simply held that a final order that was entered on December 23, 1985, which confirmed and ratified a judgment entered on August 26, 1985, which judgment did not adjudicate all of the issues in the case but expressly reserved issues for further adjudication and was temporarily set aside on September 16,

1985, was the final order in the case for purposes of appeal. *Wilcox,* 233 Va. at 418-19, 357 S.E.2d at 198. The differences between *Wilcox* and the instant case are manifest: (1) the June 18, 2008, Order in this case is a final order because it adjudicated all of the issues in the case and left nothing to be done but the execution of the judgment, whereas the August 26, 1985, Order in *Wilcox* was not a final order because it expressly reserved issues in the case for further adjudication; (2) the June 18, 2008, Order in this case was never suspended or temporarily set aside, whereas the August 26, 1985, Order in *Wilcox* was temporarily suspended and set aside on September 16, 1985; and (3) the July 9, 2008, Order in this case denying the Zoning Administrator's motion for reconsideration never reconfirmed or ratified any prior order that had been suspended or temporarily set aside, whereas the December 23, 1985, Order in *Wilcox* expressly ratified and confirmed the August 26, 1985, Order that had been temporarily suspended and set aside. Therefore, it is clear that *Wilcox* does not support the Vereens' position in this

case that the July 9, 2008, Order is the final order that had to be appealed. It is also clear that the June 18, 2008, Order that the Zoning Administrator appealed is the final order in this case.

II. THE ZONING ADMINISTRATOR DOES NOT CLAIM THAT THE CONSENT DECREE IS SELF-EXECUTING.

The Vereens assert that the Zoning Administrator was required to appeal the Circuit Court's determination that the Consent Decree is not self-executing. (Br. at 8.) It is not clear why the Vereens claim that this is so. In any event, the Zoning Administrator did not appeal this determination by the Circuit Court because the Zoning Administrator does not claim that the Consent Decree is self-executing. That is why the Zoning Administrator filed the Motion for Rule to Show Cause in this case requesting that the Circuit Court enforce the clear and unambiguous terms of the Consent Decree by entering an order imposing sanctions in the amount of $20,600 on the Vereens for their admitted failure to comply with the terms of the Consent Decree for 206 days. (App. at 23.) It has never been the Zoning Administrator's position in this case that the

Consent Decree is self-executing. Rather, it is the Zoning Administrator's position in this case that the Circuit Court lacks the authority to modify the terms of the Consent Decree by failing to enforce its clear and unambiguous terms when it is *uncontested* that the Vereens have violated the Consent Decree for 206 days. Based on that undisputed fact, it is the contention of the Zoning Administrator that the Circuit Court had no authority not to enforce the terms of the Consent Decree and fashion its own remedy. *See Foreign Mission Bd. v. Wade,* 242 Va. 234, 237, 409 S.E.2d 144, 146 (1991) (holding that "[w]hen a court considers a written contract, the intent of the parties is presumed to be embodied in the contractual terms. If those terms are clear and unambiguous, *it is the duty of the court to enforce them.*") (emphasis added.)

III. THE CIRCUIT COURT IMPROPERLY MODIFIED THE CONSENT DECREE.

The Vereens assert that the Circuit Court did not improperly modify the Consent Decree when it imposed a $3,500 sanction on the Vereens for their violation of the

Consent Decree for 206 days. Instead, the Vereens assert that the Circuit Court merely "interpreted its own decree." (Br. at 9.) This assertion is without merit.

The Circuit Court did not have the authority to *interpret* the plain and unambiguous terms of the Consent Decree, which required the Vereens to pay $100/day for every day the Court found a violation, to require a payment of only $17/day for every day the Court found a violation, which is what the Court did when it imposed the sanction of only $3,500 in this case for the 206 days the Vereens were found by the Court to have violated the Consent Decree.

The Consent Decree is a written agreement between the Zoning Administrator and the Vereens, which was memorialized in an order that was approved and entered by the Circuit Court on June 4, 2007. The Circuit Court expressly found as a fact that the terms of this agreement are reasonable. (App. at 21.) "When a court considers a written contract, the intent of the parties is presumed to be embodied in the contractual terms. If those terms are clear and

unambiguous, *it is the duty of the court to enforce them."* *Foreign Mission Bd. v. Wade,* 242 Va. 234, 237, 409 S.E.2d 144, 146 (1991) (emphasis added).

The terms of the Consent Decree are clear and unambiguous on their face. The Vereens agreed that the terms of the Consent Decree are reasonable, and the Circuit Court expressly found as a fact that the terms of the Consent Decree are reasonable. (App. at 21.) Therefore, it was the duty of the Circuit Court to enforce the terms of the Consent Decree by granting judgment in favor of the Zoning Administrator and against the Vereens in the amount of $20,600 for their failure to comply with the terms of the Consent Decree for 206 days, and the Circuit Court did not have any authority to do otherwise.

Furthermore, the Consent Decree expressly provides that the terms of the Consent Decree *"shall not be modified except by the written agreement of the parties hereto with the approval of this Court."* (App. at 21.) (Emphasis added.) The Zoning Administrator never agreed to waive any terms

of the Consent Decree, including the sanctions that are due in this case, and she did not agree to any modification of the terms of the Consent Decree that would permit the Vereens to pay a sanction less than what the Consent Decree requires.

Therefore, it is clear that the Circuit Court was plainly wrong when it entered a judgment against the Vereens for only $3,500 for their failure to comply with the Consent Decree for 206 days. Under the express and enforceable terms of the Consent Decree, the Circuit Court was legally obligated to enter a judgment in favor of the Zoning Administrator and against the Vereens for $20,600, and the Circuit Court did not have the authority to modify the Consent Decree by *interpreting* it to require a sanction of only $3,500.

IV. THE SANCTIONS PAYABLE UNDER THE CONSENT DECREE ARE NOT UNENFORCEABLE PENALTIES BECAUSE THERE IS NO EVIDENCE THAT DAMAGES RESULTING FROM THE VIOLATION OF THE CONSENT DECREE ARE SUSCEPTIBLE OF DEFINITE MEASUREMENT OR THAT THE STIPULATED SANCTIONS FOR SUCH VIOLATION ARE GROSSLY IN EXCESS OF THE ACTUAL DAMAGES SUFFERED BY THE ZONING ADMINISTRATOR AND THE PUBLIC.

The Vereens assert that the sanctions they are required to pay under the Consent Decree are an unenforceable penalty. This assertion is false.

> An agreement between the parties to a contract, fixing the amount to be paid for . . . breach of the contract, will be construed as a penalty when the damage resulting from a breach of contract is susceptible of definite measurement, or where the stipulated amount would be grossly in excess of actual damages. The amount agreed upon will be construed as enforceable liquidated damages, however, when the actual damages contemplated at the time of the agreement are uncertain and difficult to determine with exactness, and when the amount fixed is not out of all proportion to the probable loss.

Brooks v. Bankson, 248 Va. 197, 208, 445 S.E.2d 473, 479 (1994).

In this case, there is no evidence that the damage resulting from the breach of the Consent Decree by the

Vereens is susceptible of definite measurement. Moreover, it is clear that the sanctions payable under the Consent Decree cannot be grossly in excess of the actual damages resulting from a breach of the Consent Decree because there is no evidence in this case what the actual damages for breach of the Consent Decree are and because the Circuit Court expressly found *as a fact* in paragraph 7 of the Consent Decree that the terms of the Consent Decree, including the terms relating to sanctions, *are reasonable*. (App. at 21.) Therefore, it is clear that the $20,600 sanction that the Vereens owe under the Consent Decree cannot be an unenforceable penalty.

CONCLUSION

For the reasons set forth above and in the Opening Brief of Appellant, the Zoning Administrator, by counsel, respectfully requests that this Court reverse the decision of the Circuit Court, vacate its judgment, and enter a judgment in favor of the Zoning Administrator and against the Vereens for $20,600.

EILEEN M. McLANE, FAIRFAX
COUNTY ZONING ADMINISTRATOR

By: _____
David P. Bobzien (VSB No. 12027)
County Attorney

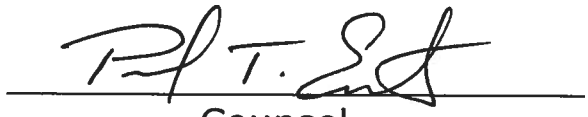
By: _____
R. Scott Wynn (VSB No. 22380)
Senior Assistant County
Attorney

By: _____
Paul T. Emerick (VSB No. 33443)
Assistant County Attorney

CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d)

I hereby certify that on this 18th day of February 2009, twelve copies of the foregoing Reply Brief of Appellant were mailed by certified mail, first-class postage prepaid, return receipt requested, to Patricia L. Harrington, Clerk, Supreme Court of Virginia, 100 N. Ninth Street, 5th Floor, Richmond, Virginia 23219, and on the same day, an electronic copy of the same was submitted via email to scvbriefs@courts.state.va.us, and on the same day, three copies of the foregoing Reply Brief of Appellant were mailed, first-class postage prepaid, to:

Jerry K. Emrich, Esquire (VSB No. 4732)
Walsh, Colucci, Lubeley, Emrich & Walsh, P.C.
2200 Clarendon Boulevard, 13th Floor
Arlington, Virginia 22201
(703) 528-4700



Counsel