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

OPENING BRIEF OF APPELLANT

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

OPENING 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, asserts, for the reasons set forth below, that the Circuit Court of Fairfax County, Virginia, the Honorable R. Terrence Ney presiding ("Circuit Court"), erred when it failed to impose the sanction 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. The Consent Decree mandates that judgment be entered in favor of the Zoning Administrator and against the Vereens in the amount of $20,600 based on their admitted violation of the Consent Decree for a period of 206 days. The Circuit Court was plainly wrong when it refused to enforce the unambiguous terms of the Consent Decree, and it was clear error for the Circuit Court to, in substance, modify the terms of the Consent Decree more than 21 days after it was entered. Therefore, the decision of the Circuit Court should be reversed, and the Circuit Court should be directed to enter judgment in favor of the Zoning Administrator and against the Vereens for $20,600, as required by the Consent Decree.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

This is a zoning enforcement case that was filed by the Zoning Administrator against the Vereens for their unlawful use of certain property as a junk yard in violation of the Zoning Ordinance. On June 4, 2007, the parties resolved the case by entering into a Consent Decree that provided, among other things, a specific deadline by which the Vereens were required to clear the zoning violation from their property and an agreed prospective coercive sanction of $100 per day for every day the Vereens failed to comply with the Consent Decree. (App. at 20.)[1]

The Vereens failed to clear the zoning violation by the specified deadline, and on January 16, 2008, the Circuit Court issued a Rule to Show Cause that required the Vereens to appear in court and show cause why they should not be held in contempt of court for violating the terms of the Consent Decree. (App. at 38.) After several appearances

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[1] References to the Appendix herein will be cited as "(App. at _____.)."

before the Circuit Court in February, March, and April 2008, the Vereens finally cleared the junk yard from the property 206 days after the date required by the Consent Decree. (App. at 87.) The Vereens then challenged the $100-a-day sanction provision contained in the Consent Decree that they had previously agreed was reasonable and that the Consent Decree expressly says is reasonable, claiming it was an unenforceable penalty. (App. at 20, 44.)

After a hearing on June 13, 2008, the Circuit Court issued its letter opinion on June 18, 2008, and entered a judgment against the Vereens in the amount of $3,500, rather than the $20,600 requested by the Zoning Administrator and required by the Consent Decree. On July 9, 2008, the Zoning Administrator filed her Notice of Appeal in this case, which was granted on December 9, 2008.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred when it failed to impose sanctions on the Vereens in the amount of $20,600 and enter a judgment for that amount against the Vereens as required by the Consent Decree because in doing so, in effect, it modified the Consent Decree more than 21 days after it was entered, and it thereby violated Rule 1:1 of the Rules of the Supreme Court of Virginia.

2. The Circuit Court erred when it failed to award a judgment in favor of the Zoning Administrator and against the Vereens in the amount of $20,600 after finding that the Vereens had violated the Consent Decree for 206 days because doing so violated the clear and unambiguous terms of the Consent Decree, and the Circuit Court does not have the authority to refuse to enforce the clear and unambiguous terms of the Consent Decree.

3. The Circuit Court erred in apparently finding that, because the Zoning Administrator did not object to the Circuit Court's continuances of the hearing on the Rule to

Show Cause and the Zoning Administrator stated in the Motion for the Rule to Show Cause that she might ask for alternative sanctions, she had waived her right to recover the full amount of the sanctions she is entitled to recover from the Vereens under the Consent Decree.

QUESTIONS PRESENTED

1. Whether the Circuit Court erred when, in effect, it modified the terms of the Consent Decree more than 21 days after it was entered by reducing the amount of sanctions due under the Consent Decree from $20,600 to $3,500. (Assignment of Error No. 1.)

2. Whether the Circuit Court erred when it failed to give effect to the clear and unambiguous terms of the Consent Decree by failing to award judgment in favor of the Zoning Administrator and against the Vereens in the amount of $20,600 for the Vereens' violation of the Consent Decree for 206 days. (Assignment of Error No. 2.)

3. Whether the Circuit Court erred in apparently ruling that the Zoning Administrator had waived her right to

recover the full amount of the sanctions she is entitled to recover from the Vereens under the Consent Decree because the Zoning Administrator did not object to the Circuit Court's continuances of the hearing on the Rule to Show Cause and/or because the Zoning Administrator stated in the Motion for Rule to Show Cause that she might ask for alternative sanctions to bring the Vereens into compliance with the Consent Decree. (Assignment of Error No. 3.)

STATEMENT OF FACTS

The property that is the subject of this lawsuit is located at 7001 Telegraph Road, Alexandria, Virginia, is shown on the Fairfax County Real Property Identification Map as Tax Map No. 92-1((1)) parcel 7 ("the subject property"), and is owned by the Vereens. (App. at 7.)

On April 4, 2006, the Zoning Administrator sent the Vereens a notice of violation for their use of the subject property as a junk yard in violation of Zoning Ordinance § 2-302(5). (App. at 14.) The Vereens failed to take any action to clear the zoning violation from the subject property, and on

August 3, 2006, the Zoning Administrator filed a Complaint for Declaratory Judgment and Injunctive Relief ("Complaint") against the Vereens to bring the subject property into compliance with the Zoning Ordinance. (App. at 1.) In lieu of protracted litigation, the parties resolved this lawsuit by entering into the Consent Decree on June 4, 2007. (App. at 19.) The Vereens were represented by counsel at the time they entered into the Consent Decree, and the Consent Decree is signed on behalf of the Vereens by their counsel. (App. at 22.)

The Consent Decree required the Vereens to bring the subject property into compliance with the Zoning Ordinance within 60 days after the date of entry of the Consent Decree by removing all items comprising the junk yard from the subject property to a lawful site. (App. at 20.) At the Vereens' request, the Zoning Administrator extended the 60-day compliance period for an additional 30 days to allow the Vereens until September 2, 2007, to bring the subject property into compliance with the Zoning Ordinance. (App. at 86.)

The Consent Decree provides that if the Vereens fail to comply with any of its terms and conditions, they must pay the County $100 per day for each day the Court finds a violation. (App. at 20.) The Vereens expressly agreed to this provision and all other provisions in the Consent Decree. (App. at 22.) Paragraph 5 of the Consent Decree expressly provides that the amount of any sanction payable under the Consent Decree is in addition to any sanction the Court may impose upon a finding of contempt for any violation of the Consent Decree. (App. at 20.) Paragraph 7 of the Consent Decree expressly states, on its face, that the terms of the Consent Decree are reasonable and that they shall not be modified without the written consent of the parties to the Consent Decree with the approval of the Circuit Court. (App. at 21.) When the Circuit Court entered the Consent Decree, it expressly found in paragraph 7 of the Consent Decree that the terms of the Consent Decree are reasonable. (App. at 21.)

Despite being given an additional 30 days to comply with the Consent Decree, the Vereens made no effort to clear the

zoning violation from the subject property. Therefore, the Zoning Administrator was required to file a Motion for Rule to Show Cause to enforce the terms of the Consent Decree and require the Vereens to bring the subject property into compliance with the Zoning Ordinance. (App. at 23.) In response to this motion, Fairfax County Circuit Court Judge Charles J. Maxfield issued Rules to Show Cause to each of the Vereens on January 16, 2008, which required the Vereens to appear in Court on February 15, 2008, to show cause, if any, why they should not be held in contempt of court for violating the terms of the Consent Decree. (App. at 38, 40.)

On February 15, 2008, at the hearing on the Rules to Show Cause, the Vereens, by counsel, requested a continuance of the hearing so that the Vereens could confer with their counsel. In response, the Circuit Court entered an order that continued the hearing on the Rules to Show Cause to March 14, 2008, and directed the Vereens to appear before the Circuit Court on that date to show cause, if any, why they should not be held in contempt of court for failing to comply

with the Consent Decree. (App. at 42.) On February 15, 2008, although counsel for the Zoning Administrator did not object to continuing the hearing on the Rules to March 14, 2008, the Zoning Administrator's counsel stated in open court that it was the Zoning Administrator's position that any such continuance would not stay the accrual of the $100-per-day sanction required to be imposed on the Vereens under paragraph 5 of the Consent Decree and that such sanctions would continue to accrue until the zoning violation was cleared from the subject property. At no time during the hearing on February 15, 2008, did counsel for the Zoning Administrator ask the Court to incarcerate the Vereens or take any other action in lieu of enforcing the express provisions of the Consent Decree.

At the hearing on March 14, 2008, at the Vereens' request, the Circuit Court again continued the hearing on the Rules to Show Cause, this time to April 4, 2008. On March 27, 2008, after failing to comply with the Consent Decree for 206 days (September 2, 2007, to and including March 26, 2008),

the Vereens finally brought the subject property into compliance with the Zoning Ordinance. (App. at 86.) Under the clear, unambiguous, agreed-upon terms of the Consent Decree, after finding the Vereens in violation of the Consent Decree, the Circuit Court was required to award the Zoning Administrator $20,600. Even so, the Vereens filed a Motion Opposing the Zoning Administrator's Request for Sanctions, arguing that the Consent Decree was merely a contract, and that the previously agreed-upon sanctions constituted an unenforceable penalty, despite the fact that the parties had agreed and the Circuit Court had expressly found that the terms of the Consent Decree were reasonable. (App. at 44.)

On June 13, 2008, the Circuit Court heard argument on the issue of whether the Vereens should be required to pay the $20,600 sanction required by the Consent Decree for their admitted failure to comply with the Consent Decree for 206 days. (App. at 69.) During the course of that hearing, the Circuit Court correctly stated that the parties' agreement had been reduced to an order and correctly acknowledged

that the Circuit Court no longer had jurisdiction over the Consent Decree. (App. at 73.)[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, or $17 per day, for their failure to comply with Consent Decree for 206 days, and it entered an order imposing sanctions in that amount on the Vereens. (App. at 85.) On July 9, 2008, the Circuit Court denied the Zoning Administrator's motion for reconsideration of the June 18, 2008, Order. (App. at 109.) On July 9, 2008, the Zoning Administrator timely filed her Notice of Appeal in this case to the Supreme Court of Virginia.

STANDARD OF REVIEW

The standard of appellate review in Virginia is well established. The Circuit Court's judgment is presumed to be correct, and its judgment will not be set aside unless it

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[2] "THE COURT: I mean, my view of these types of sanctions is very well known. But I'm not sure - - I'm not sure that I have any authority over that decree now." (App. at 73.)

appears from the record that the judgment is plainly wrong or unsupported by the evidence. Va. Code Ann. § 8.01-680 (2007); *City of Suffolk v. Bd. of Zoning Appeals,* 266 Va. 137, 143, 580 S.E.2d 796, 798 (2003).

ARGUMENT

For the reasons set forth below, the Circuit Court's judgment in this case, namely, that the Zoning Administrator is entitled to only $3,500 for the Vereens' violation of the Consent Decree for 206 days, is plainly wrong.

I. THE CIRCUIT COURT COMMITTED ERROR WHEN IT ENTERED A JUDGMENT AGAINST THE VEREENS IN THE AMOUNT OF $3,500 AND FAILED TO ENTER A JUDGMENT AGAINST THEM IN THE AMOUNT OF $20,600 BECAUSE DOING SO, IN EFFECT, MODIFIED THE TERMS OF THE CONSENT DECREE MORE THAN 21 DAYS AFTER IT WAS ENTERED, AND SUCH MODIFICATION THEREFORE VIOLATED RULE 1:1 OF THE RULES OF THE SUPREME COURT OF VIRGINIA.

In its June 18, 2008, Order, after finding the Vereens in contempt of court for violating the Consent Decree for 206 days, the Circuit Court entered a judgment against the Vereens for only $3,500. (App. at 89.) In effect, 380 days after the

Circuit Court entered the Consent Decree, the Circuit Court modified the terms of the Consent Decree to provide that the sanction for violating the terms of the Consent Decree would be $17 per day for every day the Court finds a violation, instead of the $100-per-day amount provided for by the express terms of the Consent Decree. It was plain error for the Circuit Court to do this.

Under Rule 1:1 of the Rules of the Supreme Court of Virginia (2008), the Circuit Court did not have authority to modify the terms of the Consent Decree or refuse to enforce the terms of the Consent Decree. Rule 1:1 provides that "[a]ll final judgments, orders, and decrees . . . shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, *and no longer*." (Emphasis added.) Thus, whether a court has any authority to alter an order or decree more than 21 days after it was entered depends on whether that order or decree was "final." It is beyond dispute that the Consent Decree in this case is a final order. It is well established that a

final order is one that disposes of the entire dispute, gives all of the relief contemplated, and leaves nothing to be done in the case other than to administer its terms. *Daniels v. Truck and Equip. Corp.,* 205 Va. 579, 585, 139 S.E.2d 31, 35 (1964). If the order or decree is final and more than 21 days have elapsed since its entry, "the court rendering the judgment loses jurisdiction of the case, and, absent a perfected appeal, the judgment is final and conclusive." *Rook v. Rook,* 233 Va. 92, 95, 353 S.E.2d 756, 758 (1987).

The Consent Decree fully resolved all issues in the lawsuit filed by the Zoning Administrator against the Vereens, gave all the relief contemplated, and left nothing to be done in the case other than to administer its terms. It was a final order. *See* Consent Decree, p. 3, where the Consent Decree states "THIS CAUSE IS ENDED." (App. at 21.) The Vereens never challenged or appealed the Consent Decree after it was entered. Therefore, under Rule 1:1, on June 25, 2007, 21 days after the Consent Decree was entered, the Circuit Court lost jurisdiction over the Consent Decree, and it was no longer

subject to modification by the Circuit Court. It necessarily follows that the Circuit Court had no authority to modify the terms of the Consent Decree by reducing the amount payable under the Consent Decree for violations of its terms from $100 per day to $17 per day, which is what the Court did when it entered the June 18, 2008, Order and imposed a sanction of only $3,500 against the Vereens for their violation of the Consent Decree for a period of 206 days.

The Zoning Administrator is not suggesting that the Consent Decree deprives the Circuit Court of its inherent power of contempt. The Consent Decree expressly provides that the sanctions due under the Consent Decree are *in addition to* "any additional sanctions the [Circuit] Court may impose upon a finding of contempt," and such amounts due under the Consent Decree are therefore wholly separate and distinct from sanctions imposed by the Circuit Court under the Court's contempt authority. (App. at 20.) Nor does the Zoning Administrator contend that the Circuit Court is required to impose a fine for contempt in addition to the terms of the

Consent Decree. Rather, the Zoning Administrator maintains only that the terms of the Consent Decree cannot be modified or waived unless it is done by the parties in writing with the approval of the Circuit Court, and that did not happen in this case. This is why the sanctions under the Consent Decree are not a penalty; rather, the sanctions under the Consent Decree are a prospective incentive to ensure compliance with the terms of the Consent Decree in a timely manner. In addition, the sanctions required to be paid under the Consent Decree cannot be an unenforceable penalty because the Circuit Court expressly found in paragraph 7 of the Consent Decree that the provisions and terms of the Consent Decree are reasonable. (App. at 21.) Therefore, the Circuit Court's judgment in this case, by which it modified in substance the terms of the Consent Decree more than 21 days after it was entered, is plainly wrong.

II. IT WAS ERROR FOR THE CIRCUIT COURT TO REFUSE TO IMPOSE SANCTIONS ON THE VEREENS IN THE AMOUNT OF $20,600 BECAUSE THE CONSENT DECREE, ON ITS FACE, CLEARLY AND UNAMBIGUOUSLY REQUIRES THAT SUCH SANCTIONS BE IMPOSED, AND THE CIRCUIT COURT DID NOT HAVE THE AUTHORITY TO IGNORE THIS MANDATE.

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 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 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.

III. THE ZONING ADMINISTRATOR DID NOT WAIVE HER RIGHT TO RECOVER SANCTIONS IN THE AMOUNT OF $20,600 FROM THE VEREENS FOR THEIR FAILURE TO COMPLY WITH THE CONSENT DECREE FOR 206 DAYS.

In its letter opinion dated June 18, 2008, the Circuit Court states on page 2 that "the Zoning Administrator requested sanctions in the amount of $100 per day for each day the Vereens were found to be in violation of the Consent Decree *and/or* incarceration of the Vereens until they complied with the terms of the Consent Decree." (App. at 86.) By this statement, the Circuit Court appears to suggest that the Zoning Administrator waived her rights under the Consent Decree and gave the Circuit Court the option to enforce the Consent Decree or not, and the Circuit Court was therefore free to ignore the Consent Decree in fashioning a remedy in this case. Any such suggestion is completely false. While it is true

that the Zoning Administrator's Motion for Rule to Show Cause states at page 2 that upon a finding of contempt the Zoning Administrator will ask the Court to grant judgment against the Vereens in the amount of "$100 a day for every day they are found to be in violation of the Consent Decree and/or incarcerate them in the Fairfax Adult Detention Center," (App. at 24), in fact, counsel for the Zoning Administrator never requested at any of the hearings in this case that the Circuit Court incarcerate the Vereens or do anything other than simply enforce the terms of the Consent Decree. In other words, when the Circuit Court, on April 4, 2008, finally found that the Vereens were in contempt of court for failing to comply with the Consent Decree for 206 days, counsel for the Zoning Administrator requested, in accordance with the Motion for Rule to Cause, that the Circuit Court strictly enforce the Consent Decree and grant judgment in the amount of $20,600 against the Vereens for their failure to comply with the Consent Decree for 206 days, and, although originally pled in the alternative, counsel never requested any other remedy than

the amount of sanctions required to be paid under the Consent Decree. (App. at 79-80.)

The Circuit Court also states in its letter opinion, at page 3, that the Zoning Administrator did not object to any of the Circuit Court's continuances of the hearing on the Rules to Show Cause. (App. at 87.) By this statement, the Circuit Court appears to suggest that by failing to object to the Circuit Court's continuances of the hearing of the Rules to Show Cause, the Zoning Administrator waived her right to insist that the Consent Decree be strictly enforced. This suggestion is also completely false. The Zoning Administrator was not required to object to the continuances of the hearing on the Rules to Show Cause to preserve her right to recover the sanctions that are owed by the Vereens under the Consent Decree because, by deciding to continue the hearing on the Rules to Show Cause, the Circuit Court did not decide that the Zoning Administrator was not entitled to recover the $20,600 she was entitled to receive under the Consent Decree. If the Circuit Court had made such a ruling at the time it granted the

continuances, which of course it did not, the Zoning Administrator would have objected to that ruling when it was made. However, by granting the continuances, the Circuit Court simply decided to continue the hearing on the Rules to Show Cause, *and it did not decide any other issue*. Rather, it expressly put off deciding any issue in the case to a later date. Therefore, there is no merit to any suggestion that the Zoning Administrator waived her right to recover the $20,600 sanction the Vereens owe under the Consent Decree simply because she did not object to the continuances of the hearing on the Rules to Show Cause.

CONCLUSION

For the reasons set forth above, it is clear that the Circuit Court was plainly wrong when it entered a judgment in favor of the Zoning Administrator and against the Vereens for only $3,500 for their failure to comply with the Consent Decree for 206 days. Therefore, the Zoning Administrator, by counsel, respectfully requests that this Court reverse the Circuit Court, vacate its judgment, and enter judgment in favor of the Zoning Administrator and against the Vereens for $20,600.

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CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d)

I hereby certify that on this 14th day of January 2009, twelve copies of the foregoing Opening Brief of Appellant were mailed by certified mail, first-class postage prepaid, return receipt requested, to Patricia L. Harrignton, 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 Opening Brief of Appellant were mailed, first-class postage prepaid, to:

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