
IN THE
Supreme Court of Virginia

RECORD NO. 090328

W&W PARTNERSHIP,
A VIRGINIA GENERAL PARTNERSHIP,
Appellant,

v.

PRINCE WILLIAM COUNTY
BOARD OF ZONING APPEALS
and
PRINCE WILLIAM COUNTY ZONING
ADMINISTRATOR, JOHN NICK EVERS,
Appellees.

BRIEF OF APPELLEES

ANGELA LEMMON HORAN
Virginia State Bar No. 26075
County Attorney
JEFFREY R. B. NOTZ
Virginia State Bar No. 41755
Assistant County Attorney
One County Complex Court
Prince William, Virginia 22192
(703) 792-6620
(703) 792-6633 (Facsimile)
jnotz@pwcgov.org

Counsel for Appellees

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
QUESTIONS PRESENTED	5
STANDARD OF REVIEW	5
ARGUMENT	6
1. THE WOODSIDES DID NOT LEGALLY SUBDIVIDE THEIR PROPERTY AND CREATE TWO LOTS ON THE NORTH SIDE AND SOUTH SIDE OF ROUTE 234 WHEN THEY CONVEYED 1.4 ACRES TO THE COMMONWEALTH IN 1940	7
The North Side Is Not A Lawfully Nonconforming Lot Because It Was Never Shown On A Plat of Record or Considered As a Unit of Property And Described By Metes And Bounds Prior to 1982	8
It is Well Settled that Physically Separating Lots Does Not Automatically Subdivide Them	11
2. THE ZONING ADMINISTRATOR HAD THE POWER TO DETERMINE THE ZONING STATUS OF THE NORTH	16
The Original Request to the Zoning Administrator Was Not Made A Part of The Record And Therefore Is Not Properly Before The Court	17

The Zoning Administrator Has Authority to Determine The Zoning Status Of Any Lot In The County, Even Without Being Asked To Make Such A Determination	18
CONCLUSION	19
CERTIFICATE	22

TABLE OF AUTHORITIES

STATE CASES

<i>Chesterfield County v. Stigall</i> , 262 Va. 697, 554 S.E.2d 49 (2001).....	11, 12, 13, 14, 15, 16
<i>Masterson v. Board of Zoning Appeals</i> , 233 Va. 37, 353 S.E.2d 727 (1987).....	11
<i>Scruby v. Board of Zoning Appeals</i> , 2004 Va. Cir. LEXIS 78, 65 Va. Cir. 89 (2004).....	15

STATE STATUTES

Virginia Code § 15.2-2314	<i>passim</i>
Prince William County Code § 32-200.11	18
Prince William County Zoning Ordinance § 32-601.10.....	7
Prince William County Zoning Ordinance § 32-601.20.....	7
Prince William County Zoning Ordinance of 1958.....	8-9, 16

STATEMENT OF THE CASE

The Appellee agrees with the Appellant's "Statement of the Case and Material Proceedings."

STATEMENT OF FACTS

The Appellant, W&W Partnership, ("W&W"), owns a parcel of property in Prince William County. The Woodsides originally owned the property. It consisted of 48 acres.

In 1940, the Woodsides conveyed approximately 1.44 acres of the property to the Commonwealth of Virginia for the construction of Route 234. (JA. 3) After conveying the road to the Commonwealth, the remaining property consisted of approximately 5 acres to the north of Route 234 ("North Side"), and 40 acres to the south ("South Side"). A diagram showing the property *before* the conveyance to the Commonwealth is on Page 32 of the Joint Appendix. A diagram showing the property *after* the conveyance is on Page 33 of the Joint Appendix.

The deed conveying the land to the Commonwealth contains a metes and bounds description only of the strip of land conveyed to the Commonwealth. (JA. 3) The deed does not contain a metes and bounds description of the North Side or South Side, and no plat

showing the remaining property to the north or south of Route 234 was entered into the land records. Nothing in the 1940 official record indicates any legal act or intent by the owners to subdivide the property or otherwise create two separate parcels of property on each side of the road.

On the contrary, after the conveyance to the Commonwealth in 1940, the owners of the property have always treated the North Side and South Side as one parcel of property. Various deeds in the property's chain of title refer to the North Side and South Side as *one* parcel of property. For example, a deed recorded in 1985 expressly stated that, "all the residue of land, lying on the north and south sides of Route 234 . . . containing 48 acres" were being conveyed in the 1985 deed as a "second" tract of land. (JA. 47) A deed recorded in 2000 included a plat that showed the North Side and South Side with a connector symbol, indicating that both sides were part of one property. (JA. 38, Same image but enlarged at JA. 44) The plat also showed each side having the same tax map number.

Indeed, since the conveyance to the Commonwealth in 1940, both the North Side and South Side have been taxed as one parcel. The tax maps from 1987 and 1990 clearly show the North Side and

South Side connected. (JA. 49, 50) The property was conveyed to W&W in 2005. Every owner of the subject property, including W&W, received the benefit of having the property taxed as one lot. W&W will not contest that the subject property has been taxed as one parcel for the last 69 years.

After W&W took ownership of the property, W&W subdivided the property three times and conveyed each of the three parcels to other parties.

In 1958, Prince William County adopted a Zoning Ordinance. Pursuant to the 1958 Zoning Ordinance, lots in the A-1 (Agricultural) zoning district had to contain at least 1 acre. In 1982, the Prince William County Zoning Ordinance was amended to require lots in the A-1 zoning district to contain at least 10 acres. The new zoning requirement prohibited land subdivisions of less than 10 acres in the A-1. In accordance with the 1982 Zoning Ordinance, each time W&W subdivided a parcel, each parcel was 10 or more acres in size.

Today, the subject property consists of approximately 10 acres to the south of Route 234, and 5 acres to the north. In total, the subject property is approximately 15 acres. A diagram showing the property as it exists today is on Page 37 of the Joint Appendix.

In response to a request by W&W, the Zoning Administrator issued a determination stating that the North Side and South Side constituted *one* 15 acre lot. (JA. 1) The Zoning Administrator also stated that the North Side was only 5 acres, it did not meet the 10 acre minimum lot size for the A-1 zoning district established in the 1982 Zoning Ordinance, and therefore it could not be subdivided from the South Side. *Id.*

W&W appealed the Zoning Administrator's decision to the Board of Zoning Appeals ("BZA"). In its application for appeal, W&W told the BZA that the subject of the appeal was:

Failure of the Zoning Administrator to acknowledge lot existed in 1940 as a result of the realignment of Route 234 in the same configuration and size as it is today and lot should be legal nonconforming lot since 1982 Zoning Ordinance change.

(JA. 5) W&W wanted the BZA to acknowledge that the North Side was a nonconforming lot. After a hearing, the BZA found that the North Side was not a stand alone, nonconforming lot, because it was not shown on a plat of record or considered as a unit of property and described by metes and bounds prior to 1982. (JA. 29) The Circuit Court affirmed the BZA's decision. (JA. 97)

QUESTIONS PRESENTED

1. Did the Woodsides automatically create two lots, the North Side and South Side, when they conveyed 1.4 acres to the Commonwealth in 1940, but did not include a metes and bounds description or plat showing the North Side or South Side, and the deed to the Commonwealth did not include any statement whatsoever indicating an intent to create the North Side and South Side as independent lots? (Assignment of Error #1 and #2)

2. If W&W asked the Zoning Administrator for a GPIN and address for the North Side, was the Zoning Administrator prohibited from addressing the zoning status of the North Side? (Assignment of Error #3)

STANDARD OF REVIEW

Findings and conclusions of a board of zoning appeals on questions of fact shall be presumed to be correct. § 15.2-2314 VA Code Ann. The appealing party may rebut that presumption by proving by a preponderance of the evidence that a board of zoning appeals erred in its decision. *Id.*

The reviewing court must hear any arguments on questions of law *de novo*. *Id.*

The BZA's decision in the instant case was based on its factual finding that the Woodsides did not intend to create a new lot on the north side of Route 234. The lack of intent was evidenced by the fact that the North Side was never shown on a plat of record or considered as a unit of property and described by metes and bounds. The BZA's determination of the Woodsides' intent was a finding of fact. Pursuant to Section 15.2-2314 VA Code Ann., the Court must presume the BZA's finding was correct. *Id.* To prevail, W&W must show by a preponderance of the evidence that the BZA erred in its decision. *Id.*

ARGUMENT

W&W claims that the North Side is a "lot" and is entitled to its own GPIN and address. *Brief of Appellant* p. 6, 16. W&W argues that the North Side became a lot when the Woodsides conveyed 1.4 acres to the Commonwealth in 1940.

1. THE WOODSIDES DID NOT LEGALLY SUBDIVIDE THEIR PROPERTY AND CREATE TWO LOTS ON THE NORTH SIDE AND SOUTH SIDE OF ROUTE 234 WHEN THEY CONVEYED 1.4 ACRES TO THE COMMONWEALTH IN 1940

Prince William County amended its Zoning Ordinance in 1982 to require lots in the A-1 zoning district to contain at least 10 acres. W&W claims that the 5 acre North Side, which is in the A-1 district, is a lawful “stand alone” lot capable of being developed, even though it does not meet the 10 acre minimum lot size. In order for the North Side to be a lawful lot, capable of development, and not restricted by the 10 acre minimum lot size, it must be “nonconforming.” Pursuant to Section 32-601.20 of the Prince William County Zoning Ordinance, “A nonconforming use, lot or structure may continue as it existed when it became nonconforming.” Therefore, the issue in this case is whether the North Side is a nonconforming lot, such that it may be developed despite the current 10 acre minimum lot size.

Section 32-601.10 of the Zoning Ordinance defines a nonconforming lot as follows:

Nonconforming lot. Any lot that was lawful on the date of enactment of this chapter, or amendment thereto, which has been continued in existence although otherwise rendered unlawful by such enactment or amendment thereto. Any lot that was unlawful on the date of enactment of this chapter, or amendment thereto, shall remain unlawful and shall not be a

"nonconforming lot". A lot is nonconforming if one or more of the following standards are not met as a result of enactment or amendment of this chapter:

Lot area.

Lot width/frontage.

In sum, to be nonconforming the "lot" must have been "lawful on the date of enactment of this chapter, or amendment thereto."

The 10 acre minimum was enacted in 1982. Therefore, for the North Side to be a nonconforming lot, it needed to be a "lot" just prior to when the Zoning Ordinance was adopted in 1982.

Prior to 1982, the 1958 Zoning Ordinance was in effect. So, in order to be a nonconforming lot under the 1982 Zoning Ordinance, the North Side would have to have been a "lot" under the 1958 Zoning Ordinance.

It was not.

The North Side Is Not A Lawfully Nonconforming Lot Because It Was Never Shown On A Plat of Record or Considered As a Unit of Property And Described By Metes And Bounds Prior To 1982

The 1958 Zoning Ordinance defined a "lot" as follows:

A parcel of land occupied or to be occupied by a main building or group of main buildings and accessory buildings, together with such yards, open spaces, lot width and lot area as are required by this ordinance, and having frontage upon a street, *either shown on a plat of record or considered as a unit of property and described by metes and bounds.* [emphasis added]

According to the express terms of the 1958 Zoning Ordinance, in order for the North Side to be a “lot,” it must have been “either shown on a plat of record or considered as a unit of property and described by metes and bounds.”

The BZA and the Circuit Court found that the North Side was not, in fact, shown on a plat of record or considered as a unit of property and described by metes and bounds prior to 1982. These factual determinations were based, in whole or in part, on the following evidence.

The only metes and bounds description recorded prior to 1982 for any part of the subject property was of the sliver of land granted to the Commonwealth in 1940 for Route 234. There was no description of 5 acres to the north, or 40 acres to the south, by metes and bounds, plat, or otherwise. Absolutely nothing in the property’s chain of title prior to 1982 ever described the North and South Sides as being separate lots.

On the contrary, there is substantial evidence that the owners of the property intended that the North Side and South Side remain as one parcel of property. For example, a deed recorded in 1985, a deed in which one of the original owners was a party, expressly

stated that, “all the residue of land, lying on the north and south sides of Route 234 . . . containing 48 acres” were being conveyed as a “second” tract of land. (JA. 47) Clearly, this deed considered the North and South Sides as being part of one parcel, otherwise the deed would have referred each side as a “second” and “third” tract of land.

A deed recorded in 2000 included a plat that showed the North Side and South Side with a connector symbol, indicating that both sides were part of one property. (JA 38, Same image but enlarged at JA 44) The plat also showed each side having the same tax map number.

Indeed, since the conveyance to the Commonwealth in 1940, both the North Side and South Side have been taxed as one parcel. The tax maps from 1987 and 1990 clearly show the North Side and South Side connected. (JA 49, 50) The property was conveyed to W&W in 2005. Every owner of the subject property, including W&W, received the benefit of having the property taxed as one lot. W&W will admit that the subject property has been taxed as one parcel for the last 69 years.

Not only did the Woodsides fail to show the North Side on a plat of record or describe it by metes and bounds, but the evidence suggests that the Woodsides actually wanted the North Side and South Side to remain as one parcel.

Pursuant to Virginia Code Section 15.2-2314, the BZA's factual determination is presumed correct.

The Zoning Administrator's position comports with his office's long standing interpretation of how lots may be created. Evidence was presented to the BZA that showed many lots in the County that were physically divided by roads but remained single lots despite the physical separation. (JA 14) A consistent administrative construction of an ordinance by the officials charged with its enforcement is entitled to great weight. *Masterson v. Board of Zoning Appeals*, 233 Va. 37, 44, 353 S.E.2d 727, 733 (1987).

It is Well Settled that Physically Separating Lots Does Not Automatically Subdivide Them

The 1958 Zoning Ordinance definition of "lot" is almost identical to the black letter law established by the Virginia Supreme Court in *Chesterfield County v. Stigall*, 262 Va. 697, 554 S.E. 2d 49 (2001). In *Stigall*, a roll-back tax case, the Court concluded that a property was not automatically subdivided when it was physically separated by

Powhite Parkway, because at the time the property was taken for the road, the property owner did not record a subdivision plat or otherwise affect a legal separation of the parcel into two separate tracts. *Id.* at 700, 701, 705, 554 S.E. 2d at 50, 51, 54.¹ The Court held that the creation of new lots only results from, “action by the owner and involves, *at a minimum*, a change in the legal description of the property, by either a metes and bounds or by plat, which is duly recorded in the appropriate land records.” [emphasis added] *Id.* at 705, 554 S.E. 2d at 54. When the Commonwealth took the property in *Stigall*, the owner did not record a description of the remaining property and show it as two separate lots. Therefore, the Court concluded that only one lot existed despite the physical separation.

W&W believes that the rule in *Stigall* controls the instant case, but argues that the facts require an opposite result. *Brief of Appellant* p. 9.

Stigall establishes a two part process for establishing new lots. The Court held that the creation of new lots results from, (1) “action by the owner” and (2) “involves, *at a minimum*, a change in the legal

¹ The *Stigall* case involved two conveyances. One was to the Commonwealth by eminent domain, the other was to an *inter vivos* trust. The Court concluded the eminent domain taking did not create a subdivision of land, but the conveyance to the trust did.

description of the property, by either a metes and bounds or by plat, which is duly recorded in the appropriate land records.” [emphasis added] *Stigall* at 705, 554 S.E. 2d at 54. W&W argues that there was both an action by the owner and a change in the legal description in the instant case.

W&W argues that the first prong of the *Stigall* test is met because its predecessors in title “took action” when they *conveyed* the property to the Commonwealth in 1940, as opposed to having the property taken by eminent domain as was done in *Stigall*. This argument ignores the fact that the conveyance to the Commonwealth in 1940 was likely done under the threat of condemnation. In other words, the Commonwealth was going to get the property for Route 234 one way or the other. The property owner simply took the path of least resistance.

W&W claims that the second prong of the *Stigall* test was met when the deed conveying the land to the Commonwealth in 1940 was recorded. W&W argues that the deed to the Commonwealth changed the legal description of the property as required by *Stigall*. See *Brief of Appellant* p. 8. There are two problems with this argument.

First, if the description of the land taken or given to the Commonwealth was itself enough of a legal description to create a legal subdivision of land, there would be no need for the rule set out in *Stigall* in the first place. All conveyances recorded in the land records that result in physical separations of property would be legal separations or subdivisions. But *Stigall* stands for the exact opposite proposition: not all physical separations of land are legal separations. The Court in *Stigall* made clear that subdivisions do not happen by accident. The property owner must take action and show an intent to create separate lots. This leads to the second problem with W&W's argument.

If recording a description of land that physically separates a parcel into two pieces is all it takes to create a legal separation or subdivision of land, that would mean grantors need to take some affirmative action making it clear that there is not a subdivision. Such a rule would turn *Stigall* on its head. *Stigall* stands for the proposition that property owners must take action and show an intent to subdivide, not the other way around.

In this case, the BZA found that the owner did not take action and show an intent to create multiple lots. The evidence presented to

the BZA actually showed the contrary. It is far more likely that that the owners wanted both sides of the road to remain a single lot. The deed recorded in 1985 expressly stated that both the North Side and South Side were being conveyed as a single tract of land. (JA. 47) This factual finding of the BZA is entitled to a presumption of correctness.

Clearly, *Stigall* requires grantors to record a legal description of the lots that are claimed to be separate, showing them as legally separate lots. The 1958 Zoning Ordinance requires the same thing. In this case, there was no legal description whatsoever of the North Side and South Side, no description of any kind, yet alone a legal description showing the two to be separate.

The Circuit Court of Albemarle County applied the ruling in *Stigall* to a similar set of facts and found that a parcel of property was not legally separated by Interstate 64. *Scruby v. Board of Zoning Appeals*, 2004 Va. Cir. LEXIS 78, 65 Va. Cir. 89 (2004).

Pursuant to the Prince William County Zoning Ordinance and the black letter law established by the Virginia Supreme Court, W&W must show that a plat or metes and bounds description of the North Side was recorded prior to 1982. It has not, and cannot do so.

The plat referenced by W&W similarly does not meet the standard set forth in the 1958 Zoning Ordinance or in *Stigall*. See *Brief of Appellant* p. 8. The plat only delineates the right-of-way for Route 234. (JA. 31) It does not show the limits of the Woodside property, or the supposed North and South Side lots. In addition, the plat was not “duly recorded in the appropriate land records” as required by *Stigall*. The plat was placed on file with the Virginia Department of Transportation.

In this case, there is absolutely no evidence whatsoever that the owners intended to create two lots. On the contrary, the evidence shows that the owner wanted the lot to remain as a single parcel. The owners could have subdivided the property at any time before 1982, but chose not to.

2. THE ZONING ADMINISTRATOR HAD THE POWER TO DETERMINE THE ZONING STATUS OF THE NORTH

W&W argues that it originally asked the Zoning Administrator to issue a new GPIN and address for the North Side, and that the Zoning Administrator converted the request into a request for re-subdivision. *Brief of Appellant* p. 14.

The Original Request to the Zoning Administrator Was Not Made A Part of The Record And Therefore Is Not Properly Before The Court

W&W's original request to the Zoning Administrator was not made a part of the record. Therefore, we cannot tell from the record precisely what W&W asked the Zoning Administrator to do.

We do know, however, what W&W asked the BZA to do. W&W filed an Application For An Appeal with the BZA. (JA. 5) In its application, W&W told the BZA that the subject of the appeal was:

Failure of the Zoning Administrator to acknowledge lot existed in 1940 as a result of the realignment of Route 234 in the same configuration and size as it is today and lot should be legal nonconforming lot since 1982 Zoning Ordinance change.

Id. W&W wanted the BZA to acknowledge that the North Side was a nonconforming lot. This is precisely what the BZA and the Circuit Court ruled on, albeit to the dissatisfaction of W&W.

W&W cannot now attack the authority of the Zoning Administrator to issue a determination on the zoning status of the North Side. A zoning determination is exactly what W&W has sought from each and every appellate tribunal, including this Court.

The Court should refrain from addressing W&W's third assignment of error because it was not preserved for appeal.

The Zoning Administrator Has Authority to Determine The Zoning Status Of Any Lot In The County, Even Without Being Asked To Make Such A Determination

Even if W&W did ask the Zoning Administrator only to issue a GPIN and Address, the Zoning Administrator was still allowed to issue a determination on the zoning status of the North Side.²

Prince William County Code Section 32-200.11 states:

(a) The Zoning Administrator shall be responsible for the interpretation and administration of this Chapter, and for investigating all complaints of violations of this Chapter, and shall have all necessary authority, on behalf of the Board of County Supervisors to enforce this Chapter to insure compliance herewith, including the issuance of violation notices, injunction, abatement, or other appropriate legal proceeding.

...

(c) Unless otherwise provided in this Chapter, the Zoning Administrator shall make all determinations and issue all rulings and orders authorized herein or otherwise necessary in the interpretation and enforcement of this Chapter. This shall include any conclusions of law and findings of fact by the County Attorney in conjunction with the administration, application, and enforcement of this ordinance as well as determinations of accruing vested rights.

² It is important to note that the Zoning Administrator does not issue GPINs or addresses in Prince William County. That function is served by another County agency. Therefore, W&W must be claiming that the Zoning Administrator should have either instructed another County agency to issue a GPIN, or that he should have simply denied the request and ignored the fact that the North Side is not nonconforming.

Pursuant to the Prince William County Zoning Ordinance, the Zoning Administrator has the power to make completely unsolicited determinations about any parcel within the County, as long as the determinations are necessary for the interpretation and enforcement of the Zoning Ordinance.

For example, if the Zoning Administrator drives by what he believes to be a zoning violation, the Zoning Administrator may issue all necessary determinations and notices to enforce the Zoning Ordinance. The Zoning Administrator does not need to wait until someone asks him to make a determination about the violation.

Similarly, if W&W makes a request to the Zoning Administrator, and from the request it is obvious W&W believes it owns a nonconforming lot, the Zoning Administrator has the power to issue a determination clarifying that the lot is not nonconforming. The Zoning Administrator is not required to sit on his hands and wait for W&W to specifically ask for a determination on the status of its lot.

CONCLUSION

W&W claims that the 5 acre North Side is a nonconforming lot. In order to be a nonconforming lot, the North Side must have been a

“lot” prior to 1982. Specifically, the North Side must have been either shown on a plat of record or considered as a unit of property and described by metes and bounds prior to 1982. The Zoning Administrator, the BZA, and the Circuit Court found that the North Side was not lawfully nonconforming. The BZA’s decision was based on its finding that the North Side was never shown on a plat of record or considered as a unit of property and described by metes and bounds. The Woodsides did not intend the North Side to be a separate lot. Because the BZA’s determination was a finding of fact, the BZA’s conclusions must be presumed correct. § 15.2-2314 VA Code Ann. To prevail, W&W must show by a preponderance of the evidence that the BZA erred in its decision. *Id.* W&W cannot do so.

Nothing in the land records of Prince William County shows the North Side as a separate lot on a plat or described by metes and bounds. Instead, a deed recorded in 1985, a deed in which one of the original owners was a party, expressly stated that both sides of the road were being conveyed as a single tract of land. (JA. 47) A deed recorded in 2000 included a plat that showed the North Side and South Side with a connector symbol, indicating that both sides were part of one property. (JA 38, Same image but enlarged at JA

44) The Woodsides and their successors, including W&W, received the benefit of the North Side and South Side being taxed as one single parcel. All of the evidence in this case suggests that the Woodsides actually intended the remainder to be a single parcel.

The BZA and the Prince William County Circuit Court ruled correctly in this case.

Accordingly, the Zoning Administrator respectfully asks the Court to affirm the Circuit Court's ruling.

Respectfully submitted,

Prince William County Zoning
Administrator, John Nick Evers

By Counsel

ANGELA LEMMON HORAN
County Attorney
Virginia State Bar No. 26075



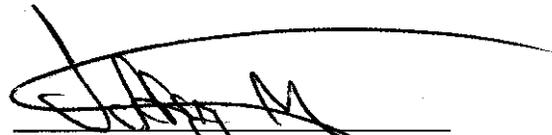
Jeffrey R. B. Notz, Esquire (VSB No. 41755)
One County Complex Court
Prince William, VA 22192
(703) 792-6620 – Telephone
(703) 792-6633 – Facsimile
jnotz@pwcgov.org

CERTIFICATE

I hereby certify that, pursuant to Rule 5:26(d), fifteen paper copies of the foregoing Brief of Appellee have been filed, together with one electronic copy in PDF format by email, with the Clerk of the Supreme Court of Virginia and three paper copies of the same have been mailed, postage prepared this 24th day of July, 2009 to the following:

Counsel for Appellant:

James P. Franca (VSB No. 20775)
9315 Grant Avenue
Manassas, Virginia 20110



Jeffrey R. B. Notz, Esquire