In The

Supreme Court of Virginia

RECORD NO: 090906

KATHRYN SHILLING,

Petitioner - Appellant,

v.

BRIAN C. BAKER, LISA S. SIMMONS, DAVID R. KELLY and THE BOARD OF ZONING APPEALS FOR ROCKINGHAM COUNTY, VIRGINIA,

Respondents - Appellees.

BRIEF OF APPELLEES

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ASSIGNMENT OF CROSS-ERROR 5

QUESTION PRESENTED 6

STATEMENT OF THE FACTS 6

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES 13

I. THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED BECAUSE SHILLING FAILED TO FURNISH A COMPLETE RECORD THAT INCLUDES A TRANSCRIPT OR WRITTEN STATEMENT OF THE FINAL HEARING HELD IN THE CIRCUIT COURT FOR BOTH THE BZA APPEALS AND THE LEGAL ACTION FOR INJUNCTIVE RELIEF. 13

II. THE CIRCUIT COURT ERRED BY NOT DISMISSING SHILLING'S PETITION FOR APPEAL OF THE BZA DECISION, CASE NO. CL08-607, ON THE GROUNDS THAT THE BZA WAS NOT NAMED AS A PARTY DEFENDANT AS REQUIRED UNDER VA. CODE § 15.2-2314. 16

III. THE CIRCUIT COURT APPLIED THE PROPER STANDARD OF REVIEW FOR AN APPEAL OF A DECISION OF THE BOARD OF ZONING APPEALS. 21

A. The BZA's decision improperly expanded upon the definition of a cemetery as provided by the Rockingham County Code, the consequence of which imposed a significant burden on the subject real property. 22

B. The BZA did not present sufficient evidence to the circuit court to render the BZA's decision fairly debatable nor is there evidence in the record that indicates the BZA's decision as such. Had this evidence been present, the circuit court would have been required to sustain the decision of the BZA. 27

IV. THE RECORD IS DEVOID OF EVIDENCE SUPPORTING THAT THERE WAS AN INTENT IN 1949 OR 1950 THAT THE PROPERTY IN QUESTION BE USED FOR THE INTERNMENT OF HUMAN REMAINS. 31

V. THE DOCTRINES OF LACHES AND ESTOPPEL HAVE NO BEARING ON WHETHER A CEMETERY WAS ESTABLISHED. 34

CONCLUSION 38

RELIEF SOUGHT 39

CERTIFICATE 42

TABLE OF AUTHORITIES

Page(s):

Cases:

Ames v. Painter,
239 Va. 343, 389 S.E.2d 702 (1990).....21-22, 27

Berryman v. Shiloh Baptist Church,
Ch. No. 393, 1993 WL 94618
(Va. Cir. Ct. July 19, 1993).....31

Board of Supervisors of Fairfax County v.
Board of Zoning Appeals of Fairfax County,
225 Va. 235, 302 S.E.2d 19 (1983).....17, 18

Commonwealth v. Washington Gas Light Co.,
221 Va. 315, 269 S.E.2d 820 (1980).....37

Dick Kelly Enterprises v. City of Norfolk,
243 Va. 373, 416 S.E.2d 680 (1992).....37

Lawrence v. Nelson,
200 Va. 597, 106 S.E.2d 618 (1959).....14-15

Masterson v. Bd. of Zoning Appeals,
233 Va. 37, 353 S.E.2d 727 (1987).....21

McDonald v. National Enterprises, Inc.,
262 Va. 184, 547 S.E.2d 204 (2001).....13, 15

Price Seating Corp. v. Rabideau,
275 Va. 468, 659 S.E.2d 305 (2008).....14

Towler v. Commonwealth,
216 Va. 533, 221 S.E.2d 119 (1976).....13, 14

Statutes:

Rockingham County Code § 17-6 ..... 22, 24, 30

Rockingham County Code § 17-27 ..... passim

Rockingham County Code § 17-161 35

Va. Code § 15.2-2314 ..... 6, 16

Va. Code § 54.1-2310 ..... 23, 29

Va. Code § 57-27.1 ..... 2, 39

Va. Code § 57-27.1(A) 25

Va. Code § 57-27.1(B) 26

Supreme Court Rule:

5:11 ..... 13, 14, 15

STATEMENT OF THE CASE

Appellees Brian C. Baker ("Baker"), Lisa S. Simmons ("Simmons"), and David R. Kelly ("Kelly") disagree with the Statement of the Case presented by Appellant, Kathryn Shilling ("Shilling"). Accordingly, Appellees present the Statement of the Case to be as follows.

This case involves the single decision of the circuit court regarding three cases that were consolidated for argument: (1) case number CL08-262, a complaint for injunctive relief filed by Shilling against Baker, Simmons, and Kelly, (2) case number CL08-596, an appeal of the Rockingham County Board of Zoning Appeals ("BZA") decision filed by Baker, Simmons and Kelly, and (3) case number CL08-607, an appeal of the BZA decision filed by Shilling.

All three (3) of these cases concern a small portion of a 67-acre tract of unimproved real property whereupon, in or about 1950, a plaque was erected to commemorate the sprinkling of the cremated remains of the deceased owner, Oliver Edwin Baker. (App. 13, 14,

67-68, 290.) Inscribed on the plaque is the following statement: "Scattered near here are the ashes of Oliver Edwin Baker 1883 – 1949." (App. 13.) At issue is whether the installation of a plaque in the ground in 1950 and the sprinkling of cremated remains nearby established a cemetery at that time and place. If a cemetery was so established, then another issue to be addressed is the boundary of the cemetery in 1950 and today in light of the installation of subsequent plaques and fencing. A further issue that would arise if a cemetery is found to exist is the scope of the rights of relatives and others to access the purported cemetery under Va. Code § 57-27.1.

Shilling contends that a cemetery was created in 1949 and that its boundaries are now defined by the area within a wrought-iron fence that she subsequently installed. At some point in time in or after 1999, Shilling buried an urn containing the cremated remains of her deceased mother within the area that she seeks to have defined as a cemetery. (App. 92.) This urn is

the only item buried at the site, although a few other plaques were installed to commemorate the scattering of cremated remains of other family members. (App. 410.)

Appellees Baker, Simmons, and Kelly all own a legal or equitable interest in the real property in question or adjoining land where the plaques were to be relocated. Appellees contend that a lawful cemetery does not exist. Appellees note that Shilling has made numerous misrepresentations in her Statement of the Case, all of which appear to have been made in an attempt to persuade this Court to reverse the decision of the circuit court. These misrepresentations include the following:

> [The purported cemetery] is the final resting place of the remains of Shilling's parents and grandparents. (Br. of Appellant 1.)
>
> The Defendants sought a declaratory judgment . . . that they could dispose of the Property in any manner they deemed appropriate, and could deny Shilling access to the Property. (Br. of Appellant 3.)
>
> [G]iven that the Defendants had at all times recognized the Baker Cemetery as

> a proper place for the disposal of human remains up until the filing of the Original Action. (Br. of Appellant 4.)

In addition, Shilling makes repeated, erroneous references that the burial of the urn occurred in 1989. (Br. of Appellant 2, 3, 4.) The record is clear that this occurred in 1999. (App. 410.)

On March 11, 2008, Shilling filed a law suit against Baker, Simmons, and Kelly seeking to enjoin them from removing any of the plaques and fencing from the area that she seeks to have defined as a cemetery. (App. 1-21.) Baker, Simmons, and Kelly filed a counterclaim seeking a declaration that the subject area is not a legal cemetery. (App. 23-26.)

During the pendency of the aforementioned litigation, the BZA made its decision that a cemetery was created in 1949 or 1950, but that its boundaries were limited to a ten (10) foot by two (2) foot area within a chain-rope fence. (App. 345.) A plaque memorializing Oliver Edwin Baker, who died in 1949, is within this chain-rope fence. (App. 11, 13, 284, 290).

Baker, Simmons, and Kelly appealed the BZA determination. (App. 339.) By separate appeal, Shilling challenged the BZA determination. (App. 331.)

The parties agreed to consolidate the two BZA appeals with the closing arguments from the other litigation. (App. 354-360, 404, 409, 413.) Following a hearing at which the BZA appeals were heard and closing argument was heard in the law suit for injunctive relief filed by Shilling, the trial court reversed the BZA and ruled that a cemetery was not created on the subject property in 1949 or 1950, such finding also being determinative of the suit for injunctive relief. (App. 393-400, 403-423.)

ASSIGNMENT OF CROSS-ERROR

In addition to the assignments of error presented by Appellant, Appellees Baker, Simmons, and Kelly assert the following assignment of cross-error:

1. The circuit court erred by not granting Appellees' demurrer and thereby not dismissing Shilling's Petition for Appeal of the BZA

determination, Case No. CL08-607, on the grounds that the BZA was not named as a party defendant as required under Va. Code § 15.2-2314.

QUESTION PRESENTED

In regards to the assignment of cross-error, the question presented is as follows:

1. Is a Board of Zoning Appeals a necessary party to a petition filed in the circuit court under Va. Code § 15.2-2314 that challenges one of its decisions?

STATEMENT OF THE FACTS

Baker, Simmons, and Kelly disagree with Shilling's contention that the material facts are not in dispute. Although many of the facts are not in dispute, there are certain material facts that are in dispute and others that are not in the record. Furthermore, Shilling has improperly characterized many of the facts in the Brief of Appellant, the most notable being repeated references to remains being buried, deposited, or interned in the ground when in fact the cremated

remains were scattered to the wind. Accordingly, the facts are being set forth herein.

Baker is the former owner of the real property at issue in this case, and he is under contract to reacquire the land pending the outcome of this dispute. (App. 14-19, 265.) The real property consists of 67 acres that was previously owned by Baker's father. (App. 15.) Baker's step-mother, who had inherited the land after the death of Baker's father, gave the land to Baker by deed of gift dated May 30, 1991. (App. 14-17.) Baker's step-mother is the mother of Shilling. (App. 80.) Baker and Shilling share the same father. Id.

Shilling, as well as many other members of Baker's family, was aware that Baker was trying to sell the subject real property. (App. 94.) In 2007, Baker sold the subject real property to Kelly. (App. 18-21, 257-264.) A condition of the sale was that Baker would relocate the plaques, fencing and other indicia of the purported cemetery. (App. 181, 208.)

Shilling and Baker reached an agreement that the purported cemetery would be relocated to adjacent land owned by Baker and Simmons. (App. 178-182.) Shilling obtained a special use permit authorizing a portion of the adjoining land to be used as a cemetery, the intent being that family members could be buried in the newly created cemetery. (App. 272-276.) The location that is subject to the special use permit is approximately 200 to 300 yards from the location of the purported cemetery at issue on this appeal. (App. 205, 209.)

Baker closed on the sale of the 67-acre tract to Kelly before completing the relocation of the purported cemetery. (App. 257-265, 403-423.) Shilling then changed her mind about relocating the purported cemetery, and she filed a law suit seeking to enjoin the relocation. (App. 2-22, 178-182, 213.) Thereafter, Baker agreed with Kelly that the conveyance of the 67-acre tract would be reversed if a court ruled that the purported cemetery could not be removed or relocated. (App. 265.)

The purported cemetery consists of five (5) plaques, one (1) buried urn, a chain-rope fence that surrounds four (4) of the plaques, and a wrought-iron fence that surrounds all of the plaques, the chain-rope fence, and the urn. (App. 394, 398.) The first plaque was installed in or around 1950, and it states "Scattered near here are the ashes of Oliver Edwin Baker 1883 – 1949." (App. 13, 290.)

Although the exact dates that subsequent plaques were installed is not known, they reference dates of death of 1986, 1990, 1997, and 1999. (App. 12-13, 289-290.) All of the plaques except one reference that ashes were scattered "near here" or "on the hilltop" where the plaques are located. Id. A plaque that memorializes Nancy Whitmore Baker, who died in 1999, references that an urn containing her cremated remains is buried nearby. (App. 12, 289.) The plaque is within the chain-rope fence. (App. 394, 398.) The urn is outside the chain-rope fence, but within the wrought-iron fence. Id. Nancy Whitmore Baker is the mother of Shilling and the step-mother of Baker. (App. 80.)

In 1950, there were no state or local laws that prohibited, restricted, or governed the establishment of a family cemetery on private land in Rockingham County. (App. 410.) The Rockingham County Board of Supervisors first adopted ordinances that governed the establishment of cemeteries in 1984. See Rockingham County Code § 17-27. With respect to land that is zoned A-2 Agricultural, the Rockingham County Code requires that a special use permit be obtained prior to establishing a cemetery. Id. The 67-acre tract in question is zoned A-2 Agricultural. (App. 272-273.) As of the date on which this ordinance was enacted in 1984, there was only one monument on the subject property, and that was the 1949 plaque memorializing Oliver Edwin Baker. (App. 12-13, 289-290.)

In the chain of title for the subject real property, there are no deeds, plats, or other instruments that identify, reference, or dedicate a cemetery. (App. 188.) In addition, a special use permit has never been issued by Rockingham County that

allows any portion of the subject real property to be used as a cemetery. (App. 247.)

It is also important to note that Shilling has misstated numerous facts in an apparent attempt to sway this Court into reversing the decision of the circuit court. Those "facts," all of which are false, include the following:

> [T]he Baker Cemetery was established in 1949 . . . (Br. of Appellant 3.)
>
> Shilling's grandparents decided to set apart a portion of the Baker Property . . . for the purpose of establishing a family cemetery. (Br. of Appellant 9.)
>
> A memorial plaque was chosen to mark the place of the internment of Oliver Edwin Baker's remains, which area was also cordoned off by fencing. (Br. of Appellant 11.)
>
> Brian C. Baker . . . persuad[ed] Nancy Whitmore Baker, his step-mother, to sell [the Baker Property] to him for the sum of $1.00. (Br. of Appellant 13.)
>
> It was always understood that this portion of the Baker Property belonged to the family, and not to Brian Baker. (Br. of Appellant 14.)

As previously noted, a cemetery was never formally established, and nothing is buried or interned at the site except for one urn that was buried well after the

enactment of an ordinance requiring a special use permit for such burial. (App. 410-411.)

Shilling also makes repeated references to the subject location being a "final resting place," when in fact, and except for the aforementioned urn that contains cremated remains, the other cremated remains are resting at the location where the wind, rain, snow, and other elements took them. In short, except for any references to the urn that is interned or buried in the subject real property, every reference in the Brief of Appellant that concerns remains of deceased persons being interned, buried, or laid to rest is inaccurate. If the facts were as stated by Shilling, then counsel for Appellees has no doubt that the circuit court would have ruled differently, especially given its reliance on the need for an actual internment as the basis for its ruling.

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

I. THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED BECAUSE SHILLING FAILED TO FURNISH A COMPLETE RECORD THAT INCLUDES A TRANSCRIPT OR WRITTEN STATEMENT OF THE FINAL HEARING HELD IN THE CIRCUIT COURT FOR BOTH THE BZA APPEALS AND THE LEGAL ACTION FOR INJUNCTIVE RELIEF.

The appellant has the burden to present a sufficient record from which this Court can determine whether the circuit court erred as the appellant contends. McDonald v. National Enterprises, Inc., 262 Va. 184, 195, 547 S.E.2d 204, 210 (2001). Pursuant to Rule 5:11 of the Rules of the Supreme Court, "when the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues, any assignments of error affected by the omission shall not be considered."

The requirements set forth in Rule 5:11 are jurisdictional in nature. See Towler v. Commonwealth, 216 Va. 533, 221 S.E.2d 119 (1976). In Towler, this Court found that Rule 5:11 (then Rule 5:9) provides "simple, easily understood rule provisions [that] are jurisdictional and failure to comply therewith will result . . . in dismissal either before or after appeal is awarded." Id. at 535, 221 S.E.2d at 121. Accordingly, "dismissal will continue to be the price

of failure to comply with mandatory rule provisions." Id.

In Price Seating Corp. v. Rabideau, an appeal was recently dismissed where the appellant failed to comply with the provisions of Rule 5:11. 275 Va. 468, 659 S.E.2d 305 (2008). This Court noted that

> an appellant who seeks the reversal of a decree . . . has the primary responsibility of presenting to this [C]ourt, as part of the printed record, the evidence introduced in the lower court, or so much thereof as is necessary and sufficient for us to give full consideration to the assignment of error . . . . [W]here the evidence on which the decree is based has not been made a part of the record to be considered by us, it is impossible for us to pass on the point that the decree is contrary to the law and the evidence.

Id. at 470-71, 659 S.E.2d at 307 (quoting Lawrence v. Nelson, 200 Va. 597, 598-99, 106 S.E.2d 618, 620 (1959)). (Emphasis added). This impossibility stems from the position that without a transcript of the hearing at issue in the record, this Court will not know what evidence, position, and argument that the appellant presented to the circuit court. McDonald, 26 Va. at 195, 547 S.E.2d at 211.

In this case, Shilling has failed to include in the record a transcript or written statement of the hearing held on December 8, 2008 at which oral argument was heard on the BZA appeals, and closing argument was heard in the suit for injunctive relief. The only time in which the BZA explained the factual and legal basis for its decision was at this hearing, thus, there is nothing in the record that sets forth the basis for the BZA's decision. Shilling, however, assigns error to the final decision of the circuit court, which was rendered from the December 2008 hearing. Pursuant to Rule 5:11, Shilling's assignments of error should not be considered because her assignments of error are affected by her omission of a transcript or written statement of this December 2008 hearing.

Baker, Simmons, and Kelly contend that this Court cannot determine whether the circuit court erred without knowing the arguments that were made to the circuit court, especially with respect to the BZA appeals. In short, it is not possible for Shilling to

preserve arguments for appeal if she cannot point to the record and show that the argument was made. This Court should therefore dismiss the present appeal and thereby affirm the judgment of the circuit court.

II. THE CIRCUIT COURT ERRED BY NOT DISMISSING SHILLING'S PETITION FOR APPEAL OF THE BZA DECISION, CASE NO. CL08-607, ON THE GROUNDS THAT THE BZA WAS NOT NAMED AS A PARTY DEFENDANT AS REQUIRED UNDER VA. CODE § 15.2-2314.

In pertinent part, Va. Code § 15.2-2314 states as follows:

> Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the clerk of the circuit court for the county or city a petition specifying the grounds on which aggrieved within 30 days after the final decision of the board.
>
> Upon the presentation of such petition, the court shall allow a writ of certiorari to review the decision of the board of zoning appeals and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than 10 days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on

> application, on notice to the board and on due cause shown, grant a restraining order.

On its face, this statute is ambiguous as to the necessary parties on a petition for appeal of a decision of a board of zoning appeals. In Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, this Court held that the necessary parties to a petition for certiorari filed under the aforementioned Code section to be the petitioner and the board of zoning appeals. 225 Va. 235, 302 S.E.2d 19 (1983). This Court further stated:

> No party other than the aggrieved person and the board of zoning appeals is mentioned in connection with the petition, and no action other than the filing of a proper petition within the prescribed period is declared necessary to complete the institution of the proceeding. . . . When issued, the writ is directed to the board of zoning appeals alone, and the writ requires the board's performance of a function that is purely ministerial.

Id. at 238, 302 S.E. 2d at 21. Thus, until return on the writ of certiorari is made by the board of zoning appeals, the only necessary parties are the aggrieved person and the board. Id.

Shilling filed a petition for appeal of the BZA decision, which held that only the area within the chain-rope fence was a cemetery. In her Petition for Appeal (Case No. CL 08-607), Shilling named as the party defendants Baker, Simmons, and Kelly, but not the BZA. Appellees demurred to Shilling's petition on the ground that it failed to name the BZA as a defendant when the BZA was clearly a necessary party to the petition. Accordingly, the circuit court should have dismissed Case No. CL08-607 and proceeded to hear only the BZA appeal brought by Baker, Simmons, and Kelly (Case No. CL08-596) and the case filed by Shilling against Baker, Simmons, and Kelly requesting injunctive relief (Case No. CL 08-262). If the demurrer had been granted, Shilling would have been time barred from refilling a petition for appeal of the BZA decision.

Baker, Simmons, and Kelly note that they do not object to the circuit court’s ultimate ruling in Case No. CL08-607, such ruling being identical to the ruling in their BZA appeal that was before the circuit court as Case No. CL08-596. (App. 393-400.) However, should this Court determine that the circuit court erred by not dismissing Shilling’s BZA appeal, such a ruling

will limit the issues raised by Shilling in this appeal as well as impact the arguments that were preserved by Shilling on the appeal that is before this Court on the other two cases, Case Nos. CL08-262 and CL08-596.

Shilling filed nearly identical objections of the final order in each of the three (3) cases. (App. 424-435.) However, the issues in each case are different. The case for injunctive relief filed by Shilling against Baker, Simmons, and Kelly (Case No. CL 08-262) presumed that a cemetery existed on the subject property and asked the circuit court to grant an emergency injunction to enjoin Appellees from removing the plaques. (App. 2-22.) The BZA appeal filed by Appellees (Case No. CL 08-569) appealed the BZA decision only to the extent that it found that a cemetery did exist and its boundaries were limited to the chain-rope fence. (App. 339-346.) The appeal filed by Shilling (Case No. CL08-607), however, appealed the BZA decision on the grounds that it erred by not finding that a cemetery existed within the entire area within the wrought-iron fence. (App. 331-335.)

This Court should find that the circuit court erred by not dismissing Shilling's petition for appeal of the BZA decision. Shilling's arguments preserved for appeal to this Court should in turn be limited to her arguments against the circuit court's denial of an injunction and its decision that the area within the chain-rope fence is not a cemetery. Consequently, the issue as to whether a cemetery exists in the area outside the chain-rope fence yet within the wrought-iron fence should not be at issue in this appeal.

III. THE CIRCUIT COURT APPLIED THE PROPER STANDARD OF REVIEW FOR AN APPEAL OF A DECISION OF THE BOARD OF ZONING APPEALS.

The standard of review for a BZA decision was set forth by this Court in Masterson v. Bd. of Zoning Appeals, 233 Va. 37, 353 S.E.2d 727 (1987). In Masterson, this Court held as follows:

> [T]he decision of the board of zoning appeals is presumed to be correct on appeal to a circuit court; the appealing party bears the burden of showing that the board applied erroneous principles of law or that its decision was plainly wrong and in violation of the purpose and intent of the zoning ordinance.

Id. at 44, 353 S.E.2d at 732-33. Furthermore, if the BZA presents evidence to make the issue "fairly debatable," then the BZA's exercise of a legislative or administrative function is to be sustained by the circuit court. Ames v. Painter, 239 Va. 343, 348, 389 S.E.2d 702, 704-5 (1990). Under the foregoing standard of review, the circuit court correctly determined that the BZA's decision was plainly wrong and in violation of the purpose and intent of the applicable zoning ordinance.

A. The BZA's decision improperly expanded upon the definition of a cemetery as provided by the Rockingham County Code, the consequence of which imposed a significant burden on the subject real property.

The subject zoning ordinance, Rockingham County Code § 17-27, allows land zoned A-2 Agricultural to be used as a "cemetery" provided that a special use permit is obtained. Section 17-6 of the Rockingham County Code defines the term "cemetery" as follows:

> Land used for the **burial** of the dead, and dedicated for cemetery purposes, including columbariums and mausoleums

> when operated in conjunction and within the boundary of such cemetery.

(emphasis added). The General Assembly has also addressed the creation of and rights associated with cemeteries in regards to religious and charitable matters. Accordingly, Va. Code § 54.1-2310 defines cemetery as:

> any land or structure used or intended to be used for the internment of human remains. The sprinkling of ashes or their burial in a biodegradable container on church grounds . . . shall **not** constitute the creation of a cemetery.

(emphasis added). Internment is further defined as:

> all forms of final disposal of human remains including, but not limited to, earth burial, mausoleum entombment and niche or columbarium inurnment.

Id. Thus, in order to establish a cemetery in Rockingham County, Virginia, there must be a burial or other internment of human remains.

There is no dispute that the subject real property was not used as a mausoleum. There is no above ground burial chamber or any above ground tombs at the site in

question. Arguably, a columbarium was created when the urn was buried at the subject location. However, the urn was buried in 1999, which is well after the enactment of Rockingham County Code § 17-27 in 1984, which requires a special use permit to be obtained in order to use land zoned A-2 Agricultural as a cemetery.

However, pursuant to the above definitions, the circuit court correctly found that no cemetery exists on the subject real property because neither the burial of an urn nor the placement of plaques without human remains buried, entombed, or inured nearby is sufficient to create a cemetery. To find that the mere scattering of ashes constitutes a cemetery would, as the circuit court noted, "allow the creation of adverse property interests at any location and in any direction the wind blows." (App. 395, 399.)

Both the BZA and the circuit court correctly recognized that the primary focus of this case is on the plaque that was installed in 1950 that memorializes Oliver Edwin Baker. However, the BZA improperly

expanded the definition of “cemetery” contained in Rockingham County Code § 17-6 to include the mere placement of a plaque that commemorates the scattering of cremated remains, notwithstanding that nothing was buried where this plaque is located and the real property was never dedicated for cemetery purposes. The BZA used this expanded definition to determine that a valid noncomforming use of the property as a cemetery was established in 1950. The BZA went on to define the boundaries of the cemetery as a two (2) feet by ten (10) feet area within a chain-rope fence that contained four (4) plaques. (App. 345.)

In finding that this two (2) feet by ten (10) feet area is a cemetery, the BZA inadvertently gave all heirs of the deceased memorialized by the plaques and other persons the right to go onto and view the purported cemetery. Under Va. Code § 57-27.1(A),

> [o]wners of private property on which a cemetery or graves are located shall have a duty to allow ingress and egress to the cemetery or graves by (i) family members and descendants of deceased persons buried there; (ii)

> any cemetery plot owners; and (iii) any person engaging in genealogy research . . . .

These rights of ingress and egress are limited to “the purposes of visiting graves, maintaining the gravesite or cemetery, or conducting genealogy research.” Va. Code § 57-27.1(B).

The BZA decision thus created an issue of great concern for current and future owners of the subject real property. The identity and quantity of all present and future descendents of the decedent’s honored by the plaques are unknown. The BZA’s decision ultimately granted such persons the right to visit the subject real property, notwithstanding the undisputed fact that no persons were buried there nor was this property ever dedicated for cemetery purposes.

The BZA's decision clearly presented a significant burden to current and future owners of the subject real property when such persons do not otherwise have the right to access this property. Pursuant to the definitions set forth above, there is no cemetery for

such persons to visit within the chain-rope fenced area because there are no human remains buried, entombed, or inurned in this area. As such, the circuit court correctly found that a "mere sprinkling of ashes at some point in time is insufficient to create such a perpetual duty in all future owners of the land in question." (App. 395-96, 399-400.)

Thus, the circuit court correctly found that the BZA's decision was plainly wrong and in violation of the applicable definitions provided by the Rockingham County Code. This Court should therefore affirm the circuit court's decision on the BZA appeals.

B. The BZA did not present sufficient evidence to the circuit court to render the BZA's decision fairly debatable nor is there evidence in the record that indicates the BZA's decision as such. Had this evidence been present, the circuit court would have been required to sustain the decision of the BZA.

In Ames, this Court noted that "the 'fairly debatable' standard cannot be established by a silent record." Ames, 239 Va. at 350, 389 S.E.2d at 706. As in Ames, the BZA record that was before the circuit

court, and that is now before this Court, is silent in regards to findings by the BZA that render the issue fairly debatable as to whether a cemetery was established in 1950.

The record on appeal from the BZA is very limited, especially regarding the basis for the BZA's decision. The BZA's decision is set forth in a letter dated June 5, 2008, which states in relevant part as follows:

> On Tuesday, June 3, 2008, the BZA affirmed in part and modified in part the prior decision of the Rockingham County Zoning Administrator. The BZA affirmed that a cemetery, or memorial garden, had been established on tax parcel 41-(A)-78 during 1949 or 1950, prior to the initial passage of the Rockingham County Ordinance, and was therefore a preexisting, non-conforming use. However, the BZA found that the boundary of the cemetery was as delineated by the chain and four metal posts that have been in place for more than twelve years. The chain and four posts describe a rectangle approximately ten feet by two feet, which rectangle encompasses the four oldest memorial markers.

(App. 345.) Neither Shilling nor her attorney attended the aforementioned June 3, 2008 hearing.

Appellees dispute that this ten (10) feet by two (2) feet area constitutes a cemetery for reasons set forth in Section (A) above. However, the BZA determined that a cemetery **or** a memorial garden had been established. Id. There are no Rockingham County ordinances that define "memorial garden" or regulate memorial gardens. While there is no Virginia statutory authority that directly addresses this issue, a memorial is defined in regards to religious and charitable matters as an "object(s) used to identify the deceased and is considered personal property." Va. Code § 54.1-2310. The factual and legal basis for the decision that the subject area is a cemetery or memorial garden is not in the record, notwithstanding that the Rockingham County attorney stated the basis at the December 8, 2008 oral argument before the circuit court. However, as previously stated, there is no transcript or written statement of that oral argument.

Although there is an insufficient record to make the BZA's determination fairly debatable, there is more

than sufficient evidence to support the circuit court's ruling. The BZA erroneously concluded that in 1949 or 1950 the subject location was "land used for the burial of the dead and dedicated for cemetery purposes." See Rockingham County Code § 17-6. However, it is undisputed in the record before the circuit court and now this Court that there were no remains of any dead person buried at the site at any time prior to the enactment of Rockingham County Code § 17-27 in 1984. (App. 393-400.) Likewise, it is undisputed that the subject location was never dedicated for cemetery purposes before or after the enactment of Rockingham County Code § 17-27. (App. 35.)

In the face of a silent BZA record and in the absence of a complete record before this Court that contains a transcript or written statement of the hearing on the BZA appeals, the circuit court ruling is clearly supported by the undisputed facts. This Court should therefore affirm the circuit court's ruling on the BZA appeals. A ruling that affirms the circuit

court decision in the BZA appeals is also dispositive of the suit for injunctive relief filed by Shilling against Baker, Simmons, and Kelly.

IV. THE RECORD IS DEVOID OF EVIDENCE SUPPORTING THAT THERE WAS AN INTENT IN 1949 OR 1950 THAT THE PROPERTY IN QUESTION BE USED FOR THE INTERNMENT OF HUMAN REMAINS.

Shilling relies on a circuit court decision, Berryman v. Shiloh Baptist Church, Ch. No. 393-92, 1993 WL 94618 (Va. Cir. Ct. July 19, 1993) in support of her contention that the internment of remains is not required in order to establish a cemetery. In Berryman, Judge Haley held that all that is required to establish a cemetery is evidence showing that the land in question was intended to be used for the internment of human remains.

Even if this Court assumed that this rule applied in Rockingham County in 1950, a cemetery was still not created on the subject real estate. There is no evidence in the record to support that the location in question was ever intended to be used for the internment of human remains. All that the evidence shows is that a plaque was installed in the ground to commemorate the scattering of Oliver Edwin Baker's ashes. (App. 13, 290.) The next plaque was not

installed until 1986 or thereafter, which was after the enactment of Rockingham County Code § 17-27, which requires a special use permit in order to use land zoned A-2 Agricultural as a cemetery. Id.

Shilling contends that her grandparents decided to set apart a portion of the Baker Property for the purpose of establishing a family cemetery. In support of this contention, Shilling cites to a sonnet that her grandmother wrote in or about 1944. (App. 256.) While this sonnet references her grandmother's intention to have her ashes scattered throughout the subject property, it does not state specifically where she intended to have her ashes scattered. Id. Instead, this sonnet references that "when I'm gone. . . I'll walk upon that pasture . . . if my ashes on the grass you'll fling. . . ." Id. This description does not identify a specific location and could be a location anywhere throughout the property once owned by Shilling's grandparents. Moreover, this sonnet does infer that Shilling's grandmother did not intend to be buried on the property.

The sonnet merely sets forth the wish of Shilling's grandmother, approximately forty-two (42) years before

her death, to be cremated and have her cremated remains scattered about the property that she owned in 1944 with Shilling's grandfather. This sonnet does not indicate the wishes of Shilling's grandfather to have his ashes scattered on the property. Nor does this sonnet indicate a mutual desire and intent of both of Shilling's grandparents to create a cemetery on their real property where they wanted themselves and their descendants to be buried or cremated remains scattered. In fact, nowhere in this sonnet or in the record can it be expressly shown that Shilling's grandparents intended to create a cemetery on their real property in the exact location of the purported cemetery.

Had the Baker family intended to establish a cemetery, it had countless opportunities to do so each time that title to the land passed. Yet, no deed, plat or other instrument contains any reference to the purported cemetery. The plaque memorializing Oliver Edwin Baker speaks for itself. Neither the plaque nor any other evidence supports that there ever was an intent in 1949 or 1950 that the subject location be established as a cemetery. This Court should therefore

find that there was no intent to create a cemetery on the subject property in 1949 or 1950 and thereby affirm the decision of the circuit court.

V. THE DOCTRINES OF LACHES AND ESTOPPEL HAVE NO BEARING ON WHETHER A CEMETERY WAS ESTABLISHED.

In this case, Shilling seeks to establish that a cemetery was created in 1950, and that it was a valid nonconforming use such that she is allowed to continue and expand the purported cemetery. The plaque installed in 1950 was clearly prior to the enactment of any Rockingham County zoning ordinance governing cemeteries on land zoned A-2 Agricultural. See Rockingham County Code § 17-27. The second plaque, however, was installed in or about 1986, which was after the enactment of the Rockingham County ordinance that requires a special use permit to establish a cemetery on land zoned A-2 Agricultural. (App. 13, 290.) When the second plaque was installed, and if it was understood by the owner of the real property that the subject location was already a cemetery, then the owner should have nevertheless sought clarification from the County as to whether a special use permit was needed to expand the cemetery.

However, Shilling contends that Baker sat on his rights, and, therefore, forfeited his right to claim that a lawful cemetery was not established. Shilling also contends that Baker is estopped from denying the existence of the purported cemetery due to his conduct. Baker denies that he knowingly waived any rights in his real property. Furthermore, Baker's acts and omissions cannot form the basis for allowing Shilling to establish a cemetery in violation of Rockingham County zoning ordinances.

Pursuant to Rockingham County Code § 17-161, and with respect to lawful uses that become nonconforming upon enactment or amendment of a zoning ordinance, "no such nonconforming use shall be enlarged or increased nor extended beyond a greater area of land than was occupied at the time of enactment or amendment of this chapter." Thus, assuming the second plaque would also create a cemetery, as argued by Shilling, its installation was in violation of the foregoing ordinance. This same analysis applies for the plaques that were installed in or about 1990, 1997, and 1999.

Shilling argues that the failure to seek clarification of this issue is of no consequence

because Baker allowed her to bury the urn containing the cremated ashes of her mother. (Br. of Appellant 29.) In essence, Shilling contends she has vested rights now that an urn has been buried with Baker's consent, notwithstanding that the burial was in violation of the Rockingham County Code. The circuit court determined that there was no valid nonconforming use that arose in 1950 when the first plaque was installed. (App. 393-400.) Thus, Shilling was not engaged in a lawful use of the real property when she buried the urn under the assumption that such an act would otherwise establish a cemetery. Moreover, there is no authority in Virginia that permits Baker to waive the requirements of a zoning ordinance or other applicable law by having an invalid nonconforming use on his property.

Only Rockingham County can waive the provisions of its zoning ordinances. In order to waive a provision of its zoning ordinance, Rockingham County would have to do so through legislation. Dick Kelly Enterprises v. City of Norfolk, 243 Va. 373, 382, 416 S.E.2d 680, 685 (1992) (citing Commonwealth v. Washington Gas Light Co., 221 Va. 315, 323, 269 S.E.2d 820, 825 (1980)).

Rockingham County, however, has not enacted legislation that waives the requirement that a special use permit must be obtained for land zoned A-2 Agricultural to be used as a cemetery.

In short, both the BZA and the circuit court determined that Shilling was required to obtain a special use permit in order to bury the urn containing her mother’s cremated remains. Baker has no authority to waive that requirement. Baker's conduct is not binding on Rockingham County, the BZA, Simmons, or the current owner of the real property, Kelly. Thus, the doctrines of laches and estoppel have no bearing on whether a cemetery was established in the present appeal. This Court should therefore affirm the decision of the circuit court.

CONCLUSION

The record before this Court is incomplete. Shilling attempts to fill in the gaps by misstating the facts in an apparent attempt to garner the interest of this Court to right an injustice that simply never occurred. Shilling should not be permitted to complain

when she failed to appear before the BZA, failed to name the BZA as a necessary party, and then failed to preserve a record on appeal of the BZA's decision before the circuit court.

On the other hand, Baker and Kelly have important property rights that will be impacted if a cemetery is found to exist on the subject real property. Such a finding would allow Shilling and others to access the property as allowed under Va. Code § 57-27.1, thus greatly diminishing the value of the subject real property. Nothing contained under Virginia law or the Rockingham County Code put them on fair notice that the mere scattering of ashes and installation of a plaque in 1950 could invoke the consequences of Va. Code § 57-27.1. The circuit court correctly recognized that the BZA improperly expanded the definition of a cemetery, and it correctly ruled that a lawful cemetery does not exist on the subject real property.

RELIEF SOUGHT

For the foregoing reasons, Appellees Baker, Simmons, and Kelly respectfully request this Court to affirm the decision of the circuit court in each of the cases on appeal. In such event, the cross-error assigned by Appellees, which only concerns case number CL 08-607 (Shilling's appeal to the circuit court of the BZA decision), will become moot because Appellees will have prevailed in that case.

In the event that this Court does not affirm the circuit court decision in case number CL 08-607, then this Court should nevertheless grant Appellees' cross-error, reverse the circuit court's decision in said case insofar as it overruled Appellees' demurrer, and enter final judgment dismissing Shilling's appeal to the circuit court of the BZA decision. The issue to be decided on this appeal would then be limited to whether a lawful cemetery exists in the two (2) foot by ten (10) foot area, as set forth in Appellees' appeal of the BZA decision in the circuit court. In regards to that issue, Appellees respectfully request that this

Court affirm the decision of the circuit court and find that a lawful cemetery does not exist within the two (2) foot by ten (10) foot area of the subject real property.

Respectfully submitted,

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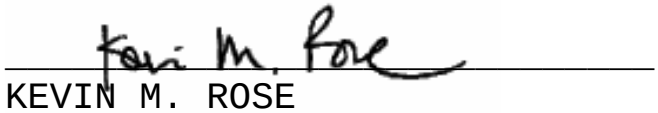
By Counsel



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CERTIFICATE

In accordance with Rule 5:26(d) of the Rules of the Supreme Court, I certify that fifteen (15) copies of this Brief of Appellee, and one (1) electronic copy, were filed with the Clerk of the Supreme Court of Virginia by hand delivery and three (3) copies were sent via first class mail, postage prepaid, to counsel for Appellant and counsel for Appellee Board of Zoning Appeals of Rockingham County on this 2nd day of October, 2009.

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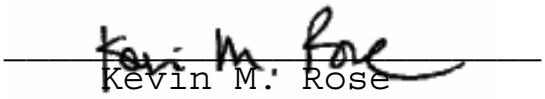

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