IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 092272

JIMMIE D. JENKINS, DIRECTOR,
FAIRFAX COUNTY DEPARTMENT OF PUBLIC WORKS AND ENVIRONMENTAL SERVICES,

Appellant,

v.

RAJ MEHRA AND URVASHI MEHRA,

Appellees.

REPLY BRIEF OF APPELLANT

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IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

JIMMIE D. JENKINS, DIRECTOR, DEPARTMENT OF PUBLIC WORKS,	:	
Appellant,	:	
v.	:	**RECORD NO. 092272**
RAJ MEHRA, *et al.*,	:	
Appellees.	:	

REPLY BRIEF OF APPELLANT

Appellant, Jimmie D. Jenkins, Director ("Director"), Fairfax County Department of Public Works and Environmental Services ("DPWES"), by counsel, submits this Reply Brief of Appellant in response to the Brief of Appellees[1] and asserts, for the reasons set forth herein and in the Opening Brief of Appellant, that the Circuit Court of Fairfax County, Virginia, the Honorable Marcus D. Williams presiding ("Circuit Court"), erred when it failed to enforce the September 12, 2008, Final Order ("Final Order") by declining to hold Appellees Raj Mehra and Urvashi Mehra ("Mehras") in

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

contempt of court for their admitted failure to comply with the terms of the Final Order that required them to clear the violations of the Chesapeake Bay Preservation ("CBay") Ordinance of The Code of Fairfax County, Virginia ("Fairfax County Code"), the Erosion and Sediment Control ("E&S") Ordinance of the Fairfax County Code, and the Fairfax County Public Facilities Manual ("PFM") from their property.

ARGUMENT

The Mehras assert in their Brief that (1) the Director does not have standing under Va. Code Ann. § 8.01-670(A)(3) (2007) to appeal the Circuit Court's June 26, 2009, Order, which became final on August 10, 2009, because he is not an aggrieved party (Br. at 2), (2) if the Director does have standing to appeal, this appeal should be governed by Va. Code Ann. § 19.2-318 (2008) (Br. at 5), and (3) the Circuit Court did not err in dismissing the Rule to Show Cause (Br. at 7, 9). For the reasons set forth below, none of these assertions have merit.

I. THE DIRECTOR IS AN AGGRIEVED PARTY AND HAS STANDING UNDER VA. CODE ANN. § 8.01-670(A)(3) TO CHALLENGE THE CIRCUIT COURT'S JUNE 26, 2009, ORDER DECLINING TO HOLD THE MEHRAS IN CONTEMPT OF COURT.

Va. Code Ann. § 8.01-670(A)(3) provides, in relevant part, that, "any person may present a petition for an appeal to the Supreme Court if he believes himself aggrieved . . . [b]y a final judgment in any other civil case." The Mehras have not disputed that the June 26, 2009, Order was a final order. They only assert that the Director does not have standing to appeal under Va. Code Ann. § 8.01-670(A)(3) because he is not an aggrieved party as to the Court's June 26, 2009, Order. (Br. at 2.)

The word "aggrieved," in the context of determining who may seek court relief from an adverse decision, means a "denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally." *Virginia Beach Beautification Comm'n v. Bd. of Zoning Appeals*, 231 Va. 415, 419-20, 344 S.E.2d 899, 902-03 (1986). The Director has standing under Va. Code Ann. § 8.01-670(A)(3) to pursue this

appeal because he was uniquely harmed by the Court's June 26, 2009, Order dismissing the Rule.

The Director, as the official charged with enforcing the E&S Ordinance, the CBay Ordinance, and the PFM, has a statutorily recognized interest in the proper and uniform application of the E&S Ordinance, the CBay Ordinance, and the PFM and a governmental obligation to ensure compliance with such legislative enactments. *See Bd. of Supervisors v. Bd. of Zoning Appeals*, 268 Va. 441, 450, 604 S.E.2d 7, 11 (2004) (holding that the Board of Supervisors had standing to appeal based on its strong interest in the valid implementation of the County's zoning authority). The Final Order made a specific finding that the Mehras' property, which is located at 7736 Lewinsville Road, McLean, Virginia (Tax Map No. 29-2((1)) parcel 19) ("the subject property"), is in violation of the E&S Ordinance, the CBay Ordinance, and the PFM. (App. at 51.) The Final Order included mandatory injunctions requiring the Mehras to clear the violations from the subject property. (App. at 52-53.)

By dismissing the Rule and declining to enforce the Final Order, the Circuit Court has authorized the Mehras to continue violating the E&S Ordinance, the CBay Ordinance, and the PFM on the subject property. The Director is aggrieved by this denial of his legal right to the benefit of the injunctive relief awarded to him in the Final Order and his ability to enforce the E&S and CBay Ordinances, and the PFM on the subject property.

The Mehras cite *Virginia Employment Comm'n v. City of Virginia Beach*, 222 Va. 728, 284 S.E.2d 595 (1981) in an effort to support their assertion that the Director is not aggrieved by the Court's June 26, 2009, Order. (Br. at 3.) The Mehras' reliance upon *Virginia Employment Comm'n* is misplaced. In that case, the Employment Commission appealed from three orders entered by the circuit court reversing the Employment Commission's decisions as to three claims for unemployment benefits. *Id.* at 731-32, 284 S.E.2d at 596-97. This Court held that the Employment Commission was not an aggrieved party within the purview of Va. Code Ann. § 8.01-670 because, unlike the employees who receive or are denied benefits and their

employers, the Employment Commission did not have a direct or pecuniary interest in the subject matter of the circuit court cases. *Id.* at 734, 284 S.E.2d at 598.

Unlike in the Employment Commission in *Virginia Employment Comm'n,* the Director has a direct interest in the subject matter of this case: he has a statutory obligation to enforce the E&S Ordinance, the CBay Ordinance, and the PFM. The Mehras recognize and concede the Director's authority to enforce these laws. (Br. at 3.) Nonsensically, they simultaneously assert that the Director has no interest when the injunctive relief he was awarded is ignored by the Mehras and the Circuit Court. The Director continues to have a direct interest in the case because, three years after filing the Complaint, the violations still have not been cleared from the subject property despite the Final Order expressly directing their abatement.

The Mehras also assert that the Court's June 26, 2009, Order did not amount to a denial of a right owed to the Director because the underlying Final Order is still in effect and the Director is free to move forward with another Rule to Show Cause

or to pursue other (unidentified) means to enforce the Final Order. (Br. at 4.) This assertion is without merit. Although the Mehras blithely suggest that the Director simply could have moved for another Rule to Show Cause against the Mehras on the same grounds and seeking the same relief as he sought in the Rule that was dismissed on June 26, 2009, likely the Mehras would have moved to preclude the Director from relitigating these issues a second time absent some change in circumstances. In short, the Circuit Court has deprived the Director of any means of enforcing the Final Order and, as such, he is aggrieved by the Circuit Court's dismissal of the Rule.

Further, the Mehras contend that the Director does not have standing to appeal the June 26, 2009, Order because the E&S Ordinance and the CBay Ordinance only give him authority to apply for injunctive relief and do not give him standing to pursue a finding of contempt. (Br. at 4-5.) Obviously, the injunctive relief is meaningless if the Circuit Court declines to enforce the injunction. Further, the Circuit Court did not dismiss the Rule based on a finding that the Director does not have the authority

to enforce injunctions that are entered at his request, nor was that argument even raised during the contempt proceedings. Rather, the Circuit Court based its ruling solely on its finding that the Mehras' conduct was not willful – a basis that has no merit.

With respect to enforcement of the relevant ordinances of the Fairfax County Code, the Director is similarly situated to the Fairfax County Zoning Administrator, who is charged with enforcing the Fairfax County Zoning Ordinance and has the authority to seek injunctive relief and to enforce such injunctions through contempt proceedings. For example, in *McLane v. Vereen*, 278 Va. 65, 69, 677 S.E.2d 294, 297 (2009), the Zoning Administrator appealed from a circuit court decision declining to fully enforce a consent decree containing injunctive relief granted in favor of the Zoning Administrator. This Court reversed the Circuit Court and entered an Order imposing a judgment against the defendants in the full amount required by the consent decree. *Id.* at 74, 677 S.E.2d at 299. Just as the Zoning Administrator in *McLane*, the Director is entitled to enforce the Final Order in this case through contempt proceedings.

II. THE COURT'S JUNE 26, 2009, ORDER WAS AN ORDER DECLINING TO FIND CIVIL CONTEMPT AND, THEREFORE, THIS APPEAL IS NOT GOVERNED BY VA. CODE ANN. § 19.2-318.

Va. Code Ann. § 19.2-318 provides, in relevant part, that an appeal may be taken to the Court of Appeals "[f]rom a judgment for any civil contempt of court." Va. Code Ann. § 19.2-318, as written, is plain and unambiguous and, as such, courts are required to give it its plain meaning. *Jackson v. Fidelity & Deposit Co. of Maryland*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005). When the language of a statute is plain, it is not the function of courts to alter or amend the enactment under the guise of construing it. *Carter v. Nelms*, 204 Va. 338, 346, 131 S.E.2d 401, 406 (1963) (declining to construe a statute in such a way that would amount to rewriting the statute).

The phrase "judgment for any civil contempt," given its plain meaning, refers to a finding of civil contempt of whatever kind. It does not include a judgment *failing* to find a party in contempt. If the legislature wanted to provide for an appeal to the Court of Appeals whether or not there was a finding of civil contempt, it would have said so. The Virginia Court of Appeals therefore does

not have jurisdiction over an appeal from a judgment declining to find a party in civil contempt (with the exception of an appeal governed by Va. Code Ann. § 17.1-405, which is inapplicable in the present case).

Based on dicta in *Virginia Beach Beautification Comm'n*, 231 Va. 415, 344 S.E.2d 899 (1986) the Mehras contend that it is illogical to construe Va. Code Ann. § 19.2-318 to mean that the Court of Appeals has jurisdiction over appeals from a finding of civil contempt, but not over appeals declining to find civil contempt. (Br. at 6.) In *Virginia Beach Beautification Comm'n,* this Court decided that the board of zoning appeals is not considered an administrative agency for purposes of appeals pursuant to Va. Code Ann. § 17-116.05(1) and, therefore, jurisdiction of the appeal was proper in the Supreme Court under Va. Code Ann. § 8.01-670(A)(3). *Id.* at 417, 344 S.E.2d at 901. The Court's interpretation of Va. Code Ann. § 17-116.05(1) in *Virginia Beach Beautification Comm'n* is not relevant to this appeal. Here, the meaning of Va. Code Ann. § 19.2-318 must be

determined from the plain language of the statute, not from the interpretation of an entirely different statute.

The Mehras argue that it can be inferred from Va. Code Ann. § 19.2-318 that there is no right to appeal from a judgment declining to find civil contempt. (Br. at 6.) The plain language of the statute trumps any inferences that the Mehras might make. Moreover, if an appeal did not lie from a judgment declining to find civil contempt, the Final Order would be rendered meaningless and unenforceable. Virginia Code Ann. § 19.2-318 is not the only statute in the Virginia Code that provides the basis for an appeal and the determination that an appeal does not lie should only be made if no other statute or Constitutional provision provides a basis for an appeal. Indeed, for the reasons previously set forth herein, the basis for an appeal does lie in this case pursuant to Va. Code Ann. § 8.01-670(A)(3).

III. THE CIRCUIT COURT'S DISMISSAL OF THE RULE TO SHOW CAUSE WAS AN ABUSE OF DISCRETION AND PLAIN ERROR.

The Mehras' Brief reflects a fundamental misunderstanding of the purpose of the contempt proceeding in this case. The

Mehras argue that the imposition of a fine in this case affords no remedial relief to the Director because the Director had the ability to obtain relief sought by DPWES by utilizing conservation funds to complete the work as stated in the Notices of Violation before bringing suit for the injunction. (Br. at 7.) However, the fundamental purpose of the contempt proceeding filed by the Director was to secure the enforcement of the Final Order and compel the Mehras' compliance with the E&S Ordinance, the CBay Ordinance, and the PFM. The Final Order granting the Director injunctive relief became final more than 1½ years ago and is not subject to being modified or vacated. Rule 1:1 of the Rules of the Supreme Court of Virginia (2009). The Director is entitled to the enforcement of the mandatory injunctions in the Final Order, regardless of whether the Mehras think that the Director could have originally obtained compliance by means other than litigation.

The Mehras also mistakenly assert that the holding of *Frank Shop, Inc. v. Crown Central Petroleum Corp.*, 264 Va. 1, 564 S.E.2d 134 (2002) does not apply to this case. (Br. at 8.) *Frank Shop*, however, is precisely on point. It establishes that a

Circuit Court does not have the authority to find defendants to be in violation of the law, but nevertheless fail to order abatement of the violations. *Frank Shop,* 264 Va. at 7, 564 S.E.2d at 137. Indeed, to do so constitutes an abuse of discretion. *Id.*; *see* Opening Br. of App. at 31-32. Here, the Circuit Court's failure to order the Mehras to comply with the applicable law similarly amounts to an abuse of discretion under *Frank Shop*.

The Mehras also argue for the first time that the Final Order was not sufficiently definite in its terms as to the duties imposed and it left the determination of compliance up to the Director's discretion. (Br. at 8-9.) The express terms of the Final Order belie this contention. The mandatory injunctions in the Final Order were set forth in specific detail. (App. at 50-54.) The Mehras did not post the required bond, obtain the necessary permits, or even take the first step towards implementation of the Grading Plan, all of which were specifically required by the Final Order. (App. at 52-3, 56, 63-4, 87, 121, 136.) After the conclusion of the hearing on the Rule, the Circuit Court independently determined that the Mehras failed to comply with

the Final Order without simply relying on a subjective determination of noncompliance made by the Director. (App. at 83.)

The Mehras further assert that the Circuit Court had the discretion to make a finding of contempt and that the Circuit Court's decision should not be second guessed. (Br. at 9.) However, the Circuit Court abused its discretion when it entered the June 26, 2009, Order and dismissed the Rule to Show Cause solely based on its conclusion that the Mehras did not willfully violate the Final Order. (App. at 83.) As previously discussed, willfulness is not necessary for a finding of civil contempt. See Opening Br. of App. at 29-30; *see also Leisge v. Leisge*, 224 Va. 303, 309, 296 S.E.2d 538, 540-41 (1982); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). After determining that the Mehras had violated the unambiguous terms of the Final Order, the Circuit Court should have ordered the Mehras to bring the property into compliance whether or not it deemed the Mehras' actions willful.

Finally, the Mehras assert that the Director is asking this Court to substitute its judgment for that of the Circuit Court as to

the credibility of the witness and as to the evidence considered by the Circuit Court. (Br. at 10.) This Court does not have to question the credibility of Mrs. Mehra to determine that the Mehras willfully chose not to comply with the Order. Indeed, Mrs. Mehras' testimony and the evidence of the Mehras' income and expenditures conclusively establish that the Mehras chose to spend their money on their own priorities, rather than to comply with the Final Order. (App. at 107, 122.) Thus, even if willfulness were a relevant consideration, which it is not in the civil contempt context, the record shows that the Mehras willfully failed to comply with the Final Order.

CONCLUSION

For the reasons set forth above, the Director respectfully requests that the Court reverse the Circuit Court, vacate its June 26, 2009, and August 10, 2009, Orders, and remand this case to the Circuit Court for further proceedings and the imposition of appropriate remedial relief.

JIMMIE D. JENKINS, DIRECTOR,
DEPARTMENT OF PUBLIC WORKS
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CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d)

I hereby certify that on this 4th day of June 2010, fifteen copies of the foregoing Reply Brief of Appellant were mailed by certified mail, first-class postage prepaid, return receipt requested, to Patricia L. Harrington, Clerk, Supreme Court of Virginia, 100 N. Ninth Street, 5th Floor, Richmond, Virginia 23219, and on the same day, an electronic copy of the same was submitted via email to scvbriefs@courts.state.va.us, and on the same day, three copies of the foregoing Reply Brief of Appellant were mailed, first-class postage prepaid, to:

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