In The

Supreme Court of Virginia

RECORD NO. 160612

DEBRA CHILTON-BELLONI,

Appellant,

v.

SHARON E. ANGLE, Zoning Administrator for and on behalf of the City of Staunton, Virginia, a municipal corporation and THE BOARD OF ZONING APPEALS OF THE CITY OF STAUNTON and THE CITY OF STAUNTON, VIRGINIA ,

Appellees.

BRIEF OF APPELLEES SHARON ANGLE, ZONING ADMINISTRATOR AND THE CITY OF STAUNTON, VIRGINIA

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STATEMENT OF THE CASE

In 2007 Appellant Debra Chilton-Belloni ("Appellant"/"Belloni") and her late husband constructed a wall ("the Wall") on their property in the City of Staunton ("the City), despite hand-delivered notice from the City that the Wall violated the City's Zoning Ordinances. Since that time Belloni has refused to lower or remove the Wall, and though the City repeatedly sought for Belloni to bring the Wall into legal compliance without the necessity of litigation, she instead used various legal and procedural maneuvers and intransigence over nine years to evade compliance with the same laws to which her neighbors adhere and expect observance.

In a 2009 judgment order, the Circuit Court had reversed an erroneous variance granted by the Staunton Board of Zoning Appeals ("the BZA"), which enabled Belloni to keep the Wall, notwithstanding the BZA's finding that the Zoning Administrator's interpretation was correct that the Wall contravened the Zoning Ordinances. (J.A., 53, 54.) Belloni has never appealed the zoning determination, upheld by the BZA, that the Wall was illegal, nor did she appeal the more recent BZA determination not to grant her renewed request for a variance. Nevertheless, and despite numerous City efforts to achieve cooperation and compliance, Belloni steadfastly refused to follow the law.

Zoning Administrator Sharon E. Angle ("ZA Angle") filed suit to enjoin compliance with the Zoning Ordinances and to defend this appeal from a second Circuit Court determination in favor of the City. ZA Angle and the City of Staunton ask this Court to bring finality to this long-standing matter and uphold enforcement. A contrary decision by this Court for Belloni would invite perpetual litigation of BZA and Circuit Court decisions across the Commonwealth, and create instability in the public confidence in local zoning laws.

The Brief of the Appellant scrambles and confuses the prior proceedings in an attempt to demonstrate that Belloni has not received due process, so as to require yet another proceeding at the Circuit Court. While spanning almost a decade, the prior proceedings can be readily recounted, and support Appellees' position that it is time for Belloni to comply with the City Zoning Ordinances.

This current case came before the City of Staunton Circuit Court on a Complaint, filed July 10, 2014, by ZA Angle, seeking enforcement of the City Zoning Ordinances as they applied to land owned by Belloni in a residential area. (J.A., 104-107.) The Complaint asserted that a wall ("the

Wall") constructed on her lot violates the City Zoning Ordinances.[1] At no point before or at trial did Belloni contest the illegality of the Wall. ZA Angle, therefore, requested a mandatory injunction compelling compliance with the Ordinances, the removal and remediation of the non-compliant parts of the Wall, and other relief.

Roughly coinciding with the filing of the Complaint, on May 9, 2014 Belloni sought a "modification" from the Zoning Ordinances from ZA Angle in order to permit the Wall to remain. (J.A., 142-145.) ZA Angle responded by letter, dated May 30, 2014, stating that 1) she lacked authority to make any such modification, and 2) the Circuit Court had previously rejected Belloni's position that application of the Zoning Ordinances to the Wall constitutes an undue hardship. (J.A., 146, 225.) A week later, on June 5, 2014, Belloni again asked the Board of Zoning Appeals ("the BZA"), for a variance as to the "size, height, location or features" of the Wall, essentially the same issue was adjudicated by the Circuit Court some five years earlier, in 2009, when it overruled the prior BZA grant of a variance to Belloni with respect to the very same Wall. (J.A., 7, 117, 126, 135-138,

[1] As stated specifically in the Complaint, the Wall unlawfully obstructed the line of sight at the intersection of two streets which lay on the approximately south and west sides of the Belloni property, and exceeded the maximum permitted height of 3 ½ feet. (Complaint, para. 3.) At trial, ZA Angle and the City introduced the testimony of Howard Vance, a licensed surveyor, as to these issues. (J.A., 31-60.)

143, 207-211, 217, 227-228, 464.) That Circuit Court Order was never appealed by Belloni.

Even after the Complaint for an injunction was filed, Belloni tried to further delay the City's enforcement of the Ordinances. With her Answer she pled several alleged affirmative defenses which she never pursued at trial.[2] (J.A., 108-112.) Further, on July 30, 2014, Belloni filed a Motion to Stay the proceedings filed by ZA Angle until the second variance request to the BZA was heard. (J.A., 113-124.) After each party filed a legal memorandum with respect to the issue, the Court denied the Motion to Stay by letter opinion dated November 25, 2014 and incorporated into an Order of December 15, 2014, finding that *res judicata* applied in the context of Belloni's latest BZA foray, given the prior ruling of the Circuit Court. (J.A., 216-220.)

On April 3, 2015, Belloni filed a separate Petition for Writ of Mandamus to compel the BZA to "conduct a hearing on [her] appeal".

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[2] For example, Belloni asserted defenses of statutory and common law estoppel, despite the fact that Virginia law is clear that "estoppel does not apply to the government in the discharge of its governmental functions." *Gwinn v. Alward*, 235 Va. 616, 621 (1988) (rejecting a defendant's assertion of the defense of estoppel in the context of a zoning administrator's suit to enforce Zoning Ordinances); see also *Dick Kelly Enterprises v. City of Norfolk*, 243 Va. 373 (1992) (also holding that estoppel does not apply against the government's enforcement of a zoning Ordinances).

Although the BZA was the named defendant in that Petition, she never served it or its members. (J.A., 221-232.) The City and ZA Angle filed a Motion to Intervene on April 13, 2015, and the Court granted that Motion on June 30, 2015. (J.A., 234-237.) In the interim, and as acknowledged by both parties' counsel at trial, the BZA convened a hearing on Belloni's latest variance request, ruling that the matter was *res judicata* due to the 2009 Order. (J.A., 340-347.) Belloni never appealed that action.

Circuit Court Judge Charles L. Ricketts, III tried the case brought by ZA Angle, and the Petition brought by Belloni, on June 30, 2015. The Court issued a letter opinion, granting ZA Angle the relief she sought, on September 23, 2015. (J.A., 483-484.) That letter opinion was incorporated into a Final Order on November 5, 2015. (J.A., 485-487.) Belloni filed a Notice of Appeal to this Court on December 4, 2015. (J.A., 491-492.) The deadline for the filing of Belloni's Petition for Appeal was extended after her counsel asserted the right to such an extension per Code § 30-5, and that Petition was filed with this Court on April 20, 2016.[3]

[3] Belloni lists only ZA Angle and the BZA as Appellees on the cover of her Brief. However, the undersigned counsel does not represent the BZA, and in this matter represents only Ms. Angle and the City, both of whom intervened as parties defendant in the mandamus case.

STATEMENT OF FACTS

In this case the pertinent facts are largely the same as those set forth in the Statement of the Case. This alignment is for two key reasons: the Circuit Court properly found that *res judicata* applied with respect to the 2009 Order and further because Belloni did not appeal either the Circuit Court's 2009 denial of her variance request or the BZA's more recent denial of her later application for a variance. This Statement of Facts will therefore supplement the Statement of the Case. The essential facts are quite clear.

In 2007, John Glover, then Zoning Administrator for the City of Staunton, notified Belloni and her late-husband in writing that the Wall, which was under construction on their property at 1403 North Augusta Street in Staunton ("the Property"), violated the City's Zoning Ordinances. (J.A., 7, 28-29, 117, 126, 130, 143, 164-165, 203-204, 268-269, 402-403.) As indicated in the Statement of the Case, the Bellonis appealed that determination to the BZA. They also sought a variance from the BZA, to permit the continued presence of the Wall. (J.A., 245-247, 256-295.) Meanwhile, and despite the written notice from Glover, the Bellonis completed construction of the Wall. (J.A. 68, 71, 307, 310 .)

Though the BZA upheld Glover's determination that the Wall violated the Zoning Ordinances, its chairman audaciously referred to this Court's ruling in *Cochran v. Fairfax Co. Bd. Of Zoning Appeals*, 267 Va. 756 (2004) as "dumb" and its vice chairman complained that the BZA "almost cannot do anything unless we violate" *Cochran*. In this vein, the BZA illegally granted the Bellonis a variance "even though it may run afoul of the *Cochran* law." (J.A., 53-55, 293-295.) The Bellonis chose not to appeal the BZA's ruling upholding Glover's zoning determination that the wall violated the Zoning Ordinances. Instead, the City noted the only appeal to that ruling, challenging the BZA's grant of a variance contrary to Virginia law.

Extensive litigation then ensued in Staunton Circuit Court, and Circuit Court Judge Michael S. Irvine rendered a letter opinion incorporated into the Final Order of June 17, 2009. (J.A., 7, 117, 126, 135-138, 143, 207-211, 217, 464.) That Order overturned the decision of the BZA and rejected the variance application. Belloni did not appeal that final judgment order of nearly seven (7) years ago.

Despite the final ruling and correspondence from the City encouraging her compliance without the need for further litigation, Belloni did not modify the Wall or otherwise bring it into compliance with the Zoning Ordinances. (J.A., 419, 456-457.) ZA Angle, therefore, filed a Complaint in

Circuit Court on July 10, 2014, seeking a mandatory injunction to compel compliance with the Zoning Ordinances, the removal and remediation of the non-compliant parts of the Wall, and other relief. (J.A., 104-107.)

At trial ZA Angle introduced abundant evidence that the same Wall which existed at the time of the previous litigation years ago still remains in violation of the Zoning Ordinances. (See, e.g., J.A., 363-426.) Evidence was introduced that Belloni and her husband had been notified of the violation, and yet for years failed to come into compliance. (J.A., 402-403, 406-407, 419-420.) Belloni introduced into evidence a transcript of the 2008 BZA hearing at which Belloni and her late husband were granted a variance, subsequently overturned on appeal in Circuit Court in the 2009 Order. (J.A., 14-55, 256-295.)

By letter opinion incorporated into a Final Order dated November 5, 2015, Judge Ricketts held that the Wall

> . . .violates the Staunton Zoning ordinance; that Ms. Belloni received proper notice of the non-conformity; that Ms. Belloni has exhausted her administrative remedies and did so in the proceedings which began in 2007 and concluded by the Order of the Staunton Circuit Court entered on June 17, 2009, reversing the Staunton Board of Zoning [A]ppeals decision to grant she and her husband a variance. (J.A., 483-487.)

In short, the Court ruled again in favor of ZA Angle and the City, and Belloni must take down or otherwise bring the Wall into compliance with the Zoning Ordinances.

STANDARD OF REVIEW

This Court's consideration of Belloni's Assignment of Error I, in which she argues that the trial court lacked authority to issue an injunction after she noted an appeal to the BZA, is legal in nature and may be considered on a *de novo* basis. However, her contention that certain documents were not in evidence, and that there was no evidence of an initial adverse determination by the Zoning Administrator, are questions of fact, and such findings from the trial court cannot be set aside unless plainly wrong or without evidence to support them. Va. Code § 8.01-680.

This Court's consideration of Belloni's argument that the doctrine of *res judicata* was misapplied by the trial court is a mixed question of law and fact. The nature and specifics of the previous proceedings in the BZA and the trial court, and the rulings of the same, as well as the question of what evidence was before the trial court, are findings of fact which should not be set aside unless plainly wrong or without evidence to support them. Va. Code § 8.01-680. The question of whether *res judicata* applies in the context of BZA hearings, and whether amendments to the Virginia Code

relating to variances constitute a "material change in circumstances" relevant to consideration of *res judicata*, is a legal question which may be considered *de novo*.

ARGUMENT AND AUTHORITIES

I. Belloni was not denied any right to a hearing before the BZA.

In her Petition for Writ of Mandamus Belloni asked the Circuit Court to issue a writ "demanding and compelling [the BZA] to conduct a hearing on [her] appeal". At trial her counsel noted that the BZA "finally, after about a year, they did what we asked; they convened a hearing" (J.A., 341). Indeed, the BZA heard arguments from both counsel (J.A., 10-11). Further, Belloni's counsel expressly stipulated that the BZA had, in fact, convened and addressed her appeal:

> THE COURT: Okay. All right. Well, where does that leave us, then, this morning?
>
> MR. OBENSHAIN: Your Honor, I think that, this morning, I think if we can simply stipulate that, pursuant to the Court's letter opinion, the board of zoning appeals has declined – has elected not to take action one way or the other on the variance, I think that with that stipulation we're ready to go.
>
> THE COURT: Okay.
>
> MR. SANTOS: Well, they – they acted, but they chose to follow the ruling of the Court in determining --
>
> THE COURT: Can you stipulate that the board of zoning appeals met and adopted the opinion that the Court had issued

> in its letter opinion that the matter was res judicata? Is that the --
>
> MR. OBENSHAIN: Yes, Your Honor.
>
> THE COURT: And that was – and that's the only action that the board took.
>
> MR. OBENSHAIN: Yes, Your Honor.
>
> THE COURT: Okay.

(J.A., 346-347.) Belloni never appealed that action of the BZA. That the BZA did, in fact, conduct the hearing on Belloni's variance appeal makes her Petition, and her appeal of the Court's ruling on it, moot, at the very least.

Further, Belloni's emphasis in her Brief that she had a right to seek a variance from the BZA ignores the reality that she sought what was the same variance in 2007 and again in 2014 as to the <u>same property</u> with the <u>same Wall</u> with the <u>same features</u> still in contravention of the Zoning Ordinances. Belloni *was granted*, *and participated in*, *such a hearing and civil litigation years ago*, having sought a variance following the initial 2007 determination by the Zoning Administrator that her Wall was in violation of

the City Code[4]. In fact, at the 2015 trial, Belloni introduced, without objection from ZA Angle, a transcript of that earlier 2007 hearing, at which time she was granted a variance (albeit illegally, as the transcript reflects that the BZA also found the Wall to be non-compliant with the Zoning Ordinances). (J.A., 256-295, 414-415.) Belloni actively participated in the BZA hearing on that variance request, and in the subsequent appeal from that BZA decision by the City to the Circuit Court, which in 2009 reversed the BZA.

Belloni's Brief is, therefore, wholly incorrect in stating that the City "circumvented the statutory structure under which Belloni should have been able to access her right to request a variance". (Brief of Appellant, 7.) As previously noted, Belloni failed to note an appeal to this Court of the 2009 Circuit Court ruling. Nor did she note an appeal of the aforementioned more recent BZA ruling to the Circuit Court. Having chosen not to note such appeals, her argument that the City somehow has deprived her of

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[4] Contrary to Belloni's inexplicable references in her Brief to an alleged lack of any "initial determination" by the Zoning Administrator, the evidence at trial was clearly that Belloni and her husband were informed that the Wall was in violation of the Zoning Ordinances. (J.A., 203-204, 268-269, 402-403, 406-407, 419-420; Transcript of 2/20/08 BZA Hearing, Defendant's Exhibit A at trial, J.A. 256-295.) They continued to construct the Wall despite the written notice of violation to them.

statutory rights is misguided. Belloni has had her proverbial "day in court." Now is the time for her to finally come into compliance with the law.

II. The trial court had authority to issue an injunction to enforce the Zoning Ordinances, regardless of a pending BZA appeal.

Virginia Code § 15.2-2208(A) permits the restraint, correction or abatement of any violation or attempted violation of a duly adopted zoning ordinance "by an injunction or other appropriate proceeding." Additionally, Va. Code § 15.2-2286(A)(4) specifically grants the Zoning Administrator

> *all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance. His authority shall include* (i) ordering in writing the remedying of any condition found in violation of the ordinance; (ii) insuring compliance with the ordinance, *bringing legal action*, *including injunction*, abatement, or other appropriate action or proceeding subject to appeal pursuant to § 15.2-2311; and (iii) in specific cases, making findings of fact and, with concurrences of the attorney for the governing body, conclusions of law regarding determinations of rights accruing under § 15.2-2307 or subsection C of § 15.2-2311.

(Emphasis supplied.)

Further, the clear authority of ZA Angle to pursue an enforcement action directly with the Circuit Court is evidenced by the statute's reference to the Zoning Administrator's right to institute "*legal action*, including injunction ..." to enforce the Zoning Ordinances. ZA Angle's Complaint was, of course, filed for the very purpose of seeking an injunction, and was plainly in compliance with the Virginia Code. Belloni makes much of the

statute's reference to the Zoning Administrator's right to also bring "other appropriate action or proceeding subject to an appeal pursuant to § 15.2-2311" – but that provision is a simple acknowledgment of the right of the Zoning Administrator to take administrative action against the property owner. It does not foreclose the right to directly pursue an injunction–a right, as referenced above, which § 15.2-2208(A) also authorizes.

Belloni fails to cite any case law which supports her proposition, at odds with these statutes, that the Court somehow "may not sit as a court of original jurisdiction in deciding whether a zoning violation has occurred." (Brief of Appellant, 14.) This Court's decision in *Lilly v. Caroline County*, 259 Va. 291 (2000), misapprehended and misconstrued by Belloni, simply provides that a *citizen* aggrieved by a Zoning Administrator's decision must exhaust administrative remedies prior to pursuing legal action against the Zoning Administrator. The decision does not prohibit the Zoning Administrator from seeking enforcement directly from the court.

In *Gwinn v. Alward*, 235 Va. 616 (1988), Fairfax County denied a property owner's application for a trash-hauling permit on the basis of zoning violations at the property. The property owner filed suit to compel the county to issue the permit, and the County and the Zoning Administrator filed a cross-bill, seeking an injunction against the violations.

Despite clear evidence that the property owner's use of the property was unlawful, the Trial Court refused to grant the injunction, partially on the basis that the Zoning Administrator's decision "had not been issued in the regular course of his office, but had been given as part of the permit application approval process." *Id.* at 621.

On appeal, this Court reversed, ruling that the injunction should have been granted. The Court held that the Trial Court was in error when it

> suggest[ed] that there is some sort of formalized manner and method through which the zoning administrator must reach a decision regarding violations and a formalized manner and method by which a decision that a violation has occurred must be enforced. We find no such requirements in the relevant statutes.

Id. Noting that the Virginia Code gives the Zoning Administrator "all necessary authority" to enforce the zoning laws, the Court remanded the case to the Trial Court with instructions to enter the injunction. *Id.* at 623.

McLane v. Clark, 2010 Va. Cir. Lexis 66 (Fairfax Co., 2010) involved another situation in which the Trial Court's statutory authority to enforce the Zoning Ordinances through the issuance of an injunction was exercised. The Court noted that the same statutes referenced on pages 14-15, *supra*, "expressly provide for injunctive relief for the violation of the zoning ordinance" and that "all that is required by the County in this case is [therefore] proof of a violation." *Id.* The Court therefore found that the

County had "shown all that is required for entry of a prohibitory injunction." *Id.*

Nor does the Court's statutory authority to grant an injunction deprive a property owner of the right to pursue a variance application to the BZA, especially where, as here, no appeal from the BZA's ruling on her 2014 application was noted by the property owner and the Court had previously entered an unappealed final order against Belloni's position. If Belloni takes exception to the original jurisdiction of the Circuit Court to determine factual issues involving the Wall and enter and injunction to stop violations, she should seek legislation from the General Assembly, not ask this Court, in effect, to rewrite the statute.

III. The evidence presented at trial was consistent with the Complaint and appropriately considered by the Trial Court.

ZA Angle objects to this Court's consideration of Belloni's assertion, on pages 16-17 of Appellant's Brief, that the "City's arguments advanced at trial were not consistent with the allegations in its Complaint". Such assertion does not relate to the two Assignments of Error found on pages 5 and 6 of the same Brief. While preserving and without waiving this objection, ZA Angle addresses Belloni's argument as follows.

It defies the reality of the record and the requirements of the law for Belloni to argue that the Trial Court could not apply the doctrine of *res*

judicata in this case because its own Final Order of July 17, 2009 was not formally introduced into evidence. Though not necessary to consideration of the issues in this case, Belloni referenced the Court's Order of July 17, 2009 in her Memorandum of Law in Support of Motion to Stay, and she attached said Order as Exhibit 1 to that pleading. (J.A., 135-138.) Also attached by Belloni to that same pleading as Exhibit 3 is the November 21, 2007 letter of then Zoning Administrator John Glover ("Glover") advising her and her former husband that the Wall was in violation of the Zoning Ordinances. (J.A., 203-204 .)

Further, Va. Code § 8.01-386 permits the Trial Court to take judicial notice of its own previous ruling:

> A. Whenever, in any civil action it becomes necessary to ascertain what the law, statutory or otherwise, of this Commonwealth ... or of any political subdivision or agency of the same is, or was, at any time, the court shall take judicial notice thereof whether specially pleaded or not.
>
> B. The court, in taking such notice, may consult any book, record, register, journal, or other official document or publication purporting to contain, state, or explain such law, and may consider any evidence or other information or argument that is offered on the subject.

The Revisers' Note to this Virginia Code section further clarifies that "[t]he word 'law,' as used in this section includes statutes, Ordinances, resolutions, *judicial decisions*, and administrative rulings and regulations of

the respective jurisdictions." (Emphasis supplied.) Section 8.01-386 was incorporated into present Rule 2:202, as well. Because the 2009 Order *was* in the record, and, pursuant to the statute and Rule, the Court had the right to take notice of its own previous ruling, there is no basis to conclude that the Court improperly consulted that Order in determining that the matter at issue before it was *res judiciata*.

Further, Belloni's intractable focus on the September 20, 2007 letter from Earl Thompson, a Staunton Building Official, is misplaced. Although that letter is cited in the Complaint, it was not from the Zoning Administrator, as she mistakenly states in her Brief (p. 5). That letter was an early notification to the Bellonis that the Wall was illegal, but, as acknowledged by Belloni in her Brief, the Bellonis were additionally so notified, in writing, by the Zoning Administrator. (Brief of Appellant, 22-23; J.A. 203-204; 402-403, 406-407, 419-420; see also Transcript of 2/20/08 BZA Hearing, introduced as Defendant's Exhibit A at trial, J.A. 256-295.)

Regardless, the Complaint was not filed to enforce any such administrative determination by the Building Official. As plainly stated in the Complaint, the case was brought pursuant to the Virginia Code to enforce the Zoning Ordinances. This is clear and unmistakable from a simple examination of the Complaint, such as:

¶ 11, citing Va. Code §§ 15.2-2208 and 15.2-2286;

> ¶ 13: "Entry of an injunction order in this case is necessary to ensure *compliance with the Staunton Zoning Ordinance.*"
> ¶ 15: "Entry of an injunction order in this case, *compelling Defendant's compliance with the Staunton City Code* and removal and remediation of the non-compliant parts of the Wall, would be an effective, appropriate and enforceable means of redressing Defendant's violation of law, as well as one which is envisioned and *permitted under the express terms of the Code* and in the public interest."

(Emphasis supplied.)

In sum, the evidence presented at trial was consistent with the Complaint, and the Trial Court properly considered it as part of its decision-making process. The Court's findings are supported by the evidence.

IV. The Trial Court correctly applied the doctrine of *res judicata*.

A. *Res judicata bars relitigation of Belloni's application for a variance.*

Virginia courts, like those throughout the nation, apply the doctrines of collateral estoppel and *res judicata* to prevent eternal re-litigation of matters previously adjudicated, and to give finality to those decisions.[5] A review of some of those decisions makes clear that *res* judicata applies in

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5. *Res judicata* "protects not only the individual litigant from the weariness of trying the same case twice, but also society from having to pay for it. The incremental cost of sustaining redundant litigation is itself a reason for insisting upon finality." Hon. D. Arthur Kelsey, The Thing Decided: Rule 1:6's Rediscovery of Res Judicata in Virginia. VBA News Journal, XXXIV (2), 18.

this case. In *State Water Control Bd. v. Smithfield Foods*, 261 Va. 209 (2001) this Court held:

> Under the common law doctrine of *res judicata*, a final judgment on the merits of a claim precludes the parties from further litigation based on that claim. *The doctrine protects litigants from multiple lawsuits*, *conserves judicial resources*, *and fosters certainty and reliance in legal relationships. The doctrine applies unless specifically abrogated by statute.* ... To establish the defense of *res judicata*, the proponent of the doctrine must establish identity of the remedies sought, identity of the cause of action, identity of the parties, and identity of the quality of the persons for or against whom the claim is made.

Id. at 214 (Internal citations omitted) (Emphasis added.). A brief review of several prior decisions[6] of this Court confirms and illustrates the application of the doctrine in ways that support the Trial Court's ruling:

> [The] effect of a Final Decree is not only to conclude the parties as to every question actually raised and decided, but as to every claim which properly belonged to the subject of litigation and which the parties, by the exercise of reasonable diligence, might have raised at the time.

Smith v. Holland, 124 Va. 663, 666 (1919). *Res judicata* precludes claims "made or tendered by the pleadings," in addition to those "incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered." *Lofton Ridge*, *LLC v. Norfolk So. Ry.*, 268 Va. 377, 371 (2004).

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6. See, generally, Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure* (LexisNexis, 2014), Sec. 14.11[B][1].

> The true test of the conclusiveness of a former judgment with respect to particular matters is identity of issues. If a particular point or question is an issue in the second action, and the judgment will depend on the determination of the particular point or question, a former judgment between the same parties will be final and conclusive in the second [action] if that same point was an issue and adjudicated in the first suit.

Storm v. Nationwide Ins. Co., 199 Va. 130, 134 (1957) (citations omitted). An appropriate way to determine the identity of issues involved in former and subsequent actions is "whether the same evidence will support both actions." *Pickeral v. Federal Land Bank*, 177 Va. 743, 751 (1941). Clearly, that is the case now before the Court.

In an additional attempt to avoid the results of application of *res judicata*, Belloni argues in her Brief that BZA proceedings with respect to variance applications are administrative in nature, and that *res judicata* does not operate to bar such proceedings in the same way it would rulings of a court. That observation, even if accurate, would be immaterial to her 2014 application, which asked that the BZA overrule a *Court Order*, not a prior ruling of the BZA. Indeed, in 2008 the BZA had improperly *granted* the same variance Belloni again sought about six (6) years later. However, that BZA decision was overruled by the Trial Court on appeal in 2009, and neither Belloni nor her late husband noted an appeal of that Final Order of the Court.

Giving the BZA to authority to grant a variance under circumstances in which the Court has already ruled that no such authority exists makes no legal sense. It could directly abrogate the principles of judicial review and separation of powers, while failing to show deference to the Court, which has authority under the Virginia Constitution and the Code to make binding determinations of law and fact. Such an action would render the prior Court ruling meaningless, make the prior litigation a waste of time and resources and foster more efforts by Belloni to evade compliance.

Belloni cites *Cosby v. Board of Zoning Appeals*, 7 Va. Cir. 253 (Loudoun Co., 1985), wherein the Circuit Court of Loudoun County considered an application to allow a non-conforming use of a rock crusher, having previously ruled that no special exception would be granted to use and operate a stone quarry on the same property. The Circuit Court held that:

> . . .[e]ven assuming, without deciding, that the act of interpreting an ordinance as part of the review process was such an integral part of the legislative process of reviewing and acting upon the application of the [applicants] as to be a 'legislative act,' nevertheless, the Court would need to find a 'change of circumstances' to justify a contrary opinion.

Id. at 254. Belloni provides no citation for the notion that a "change in circumstances" would suffice in this case to reconsider the prior Court ruling regarding the Wall.[7]

Proceedings relating to an appeal from the BZA of a variance determination are, in fact, adjudicatory, not legislative, in nature. This seems obvious from the nature of the proceedings. *See*, *e.g.*, *Matthews v. Board of Zoning Appeals*, 218 Va. 270, 284 (1977). Further, this Court has expressly held that "[p]ublic officials, passing upon requests for variances, act in an administrative, rather than a legislative, capacity." *Board of Supervisors of Fairfax County v. The Southland Corp.*, 224 Va. 514, 522 (1982). This Court has distinguished a variance from a special exception, such as that which was at issue in *Cosby*, noting that special exceptions are legislative in nature. *Id.* Even in the context of a renewed request for a special exception, however, the *Cosby* court found no reason to re-plow old ground:

> *Decisions of the Board of Zoning Appeals*, *and particularly those appealed to the courts must have about them a sense of finality*. The fact that one regrets having made a decision cannot be the basis for making a new decision where the rights of others can be and are affected. The doctrines of res judicata, collateral estoppel and stare decisis apply to proceedings such as these. Thirty days after the filing of the decision in the office of the Board, it would become final. Had the Petitioners failed to

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[7] See also sub-argument B, *infra*.

> challenge that decision within that time, they would have forfeited their right to appeal. Having challenged a decision, the Board should likewise be bound by its finality.

7 Va. Cir. at 255 (Internal citations omitted) (Emphasis added.).

Belloni's reliance on the Fourth Circuit decision in *Grose v. Cohen*, 406 F.2d 823 (4th Cir. 1969) also is also misplaced and inapposite. In that case the Court ruled that "*res judicata* of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings." However, it did so with citation to <u>specific provisions</u> of the Code of Federal Regulations which "recognize that it is undesirable to attribute finality to every administrative decision." *Id.* at 825. The BZA is a quasi-judicial body, and regulations such as those at issue in *Grose* apply in this instance, which does not seek to give finality to an administrative agency decision but rather to give finality to a prior Order of a Court of record. Moreover, in this case, there was more than just a BZA decision. There was litigation over that 2007 decision and a final Court judgment in 2009. *Res judicata* applies to give that 2009 Court decision, from which no appeal was sought by Belloni, the finality and respect it is due.

B. *No "changes in circumstances" since 2009 would warrant the granting of Belloni's new variance application.*

Regardless of Belloni's claim to be entitled to litigate her variance application all over again, thus further delaying compliance and rendering

the lengthy consumption of resources in 2008 and 2009 irrelevant, it is plain that no changes in the law[8] from 2009 through the institution of this case would permit her a variance under the circumstances. Belloni cites no changes in the underlying facts, instead relying upon a two word 2009 amendment to a portion of the underlying statute. By building in violation of the Zoning Ordinances, she has a self-inflicted hardship, which whether deliberately or ignorantly incurred, cannot be the basis for granting a variance. See *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502, 507 (1993); accord *Aesy v. Zoning Appeals Board of the City of Salem*, 66 Va. Cir. 382 (Salem, 2005).

The Virginia Code clearly sets forth the standard by which Boards of Zoning Appeals must consider variance applications, stating at § 15.2-2309, which in relevant part at this case was instituted and when tried on June 30, 2015, stated that such variances may only be granted:

> as will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in <u>*unnecessary hardship*</u>; provided that the spirit of the ordinance shall be observed and substantial justice done, as follows:

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[8] Generally, "res judicata does not allow dispensation for intervening changes in the law." *Haag v. Shulman*, 683 F.3d 26, 32 (3d Cir. 2012), citing *Federated Dep't Stores*, *Inc. v. Moitie*, 452 U.S. 394 (1981) ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.")

> When a property owner can show that his property was acquired in good faith and where *by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto*, the strict application of the terms of the ordinance would effectively *prohibit or unreasonably restrict the utilization of the property* or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.
>
> No such variance shall be authorized by the board unless it finds:
>
> a. That the strict application of the ordinance would produce *undue hardship relating to the property*;
>
> b. That the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and
>
> c. That the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.

(Emphasis supplied.) The 2009 amendment referenced by Belloni in her Brief removed the two words "approaching confiscation" which followed the language requiring the showing of a "clearly demonstrable hardship." Otherwise the above terms remained intact since the Bellonis constructed

the Wall through the institution of this case.[9] There is no indication in the statute that amendment, or any subsequent thereto, had retroactive effect or that established a new, independent basis for any cause of action. The amendment to the statute did not give Belloni rights to pursue a claim which did not exist as of the time of the June 17, 2009 Order. Further, application of *res judicata* or collateral estoppel contravenes no public policy of this Commonwealth enshrined by statute.

Even if the General Assembly had purported to make the 2009 amendment retroactive, and even if the Circuit Court had not previously ruled that a variance in this instance is unwarranted, a plain reading of the amended statute makes clear that the amendment would not change the result for Belloni. As a matter of law, she simply does not meet all of the

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9. The statute was further amended effective July 1, 2015, but the statutory language cited herein was applicable both when ZA Angle instituted this proceeding and at the time of the June 30, 2015 trial. See Virginia Code § 1-239 ("No new act of the General Assembly shall be construed … in any way whatever to affect … any claim arising before the new act of the General Assembly takes effect"). "As a general rule, laws existing at the time a suit is filed govern the case." *Shilling v. Commonwealth*, 4 Va. App. 500, 507, 359 S.E.2d 311, 315 (1987). "The general rule is that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits … unless the intention that it shall so operate is expressly declared; the courts will apply new statutes only to future cases unless there is something in the very nature of the case, or in the language of the new provision, which shows that they were intended to have retrospective action." *Gloucester Realty Corp. v. Guthrie*, 182 Va. 869, 875 (1944).

statutory requirements for a variance. Belloni cites no peculiar characteristics of the property and sets forth no reason why enforcement of the Ordinances would "prohibit or unreasonably restrict the utilization of the property" or "produce undue hardship related to the property." This was precisely the problem she faced in the exhaustive litigation concerning her variance request years ago, and the cited amendment to the statute would not make her challenge any less onerous now than it was then.

In *Martin v. City of Alexandria*, 286 Va. 61 (2013), the Virginia Supreme Court addressed the 2009 amendments in concluding that the Alexandria BZA improperly granted a variance. Noting the applicant's point that "approaching confiscation" had been removed from the statute, the Court found that the applicant's argument ignored the fact that the remaining applicable provisions of the City Charter, which contained "virtually identical" language as that found at Va. Code § 15.2-2309(2), remained unaltered. Finding no "undue hardship," the Court held that the BZA's determination was contrary to law, and that no variance should have been granted.

Further, Belloni's assertion in her Brief that the *Cochran* case is "irrelevant to the analysis" is incorrect. At no point in *Cochran* did the Court rely upon the "approaching confiscation" language which she references so

prominently. Indeed, the opinion only mentions that language once, in passing, in the context of quoting the statute, not in construing or applying its meaning. Instead, the focus of the case is on the requirement that the applicant establish "undue hardship relating to the property," a provision which of course remained on the books after the 2009 amendment. In *Packer v. Hornsby*, 221 Va. 117, 122 (1980) the Court ruled that the requirement that an applicant show "unnecessary hardship" "clearly indicates that the General Assembly intended that variances be granted only in cases where application of zoning restrictions would appear to be constitutionally impermissible." In *Cochran* the Court simply applied that same analysis:

> Adhering to the rule in *Packer*, we construe the statutory terms "effectively prohibit or unreasonably restrict the utilization of the property," "unnecessary hardship" and "undue hardship" in that light and hold that the BZA has no authority to grant a variance unless the effect of the zoning ordinance, as applied to the piece of property under consideration, would, in the absence of a variance, "interfere with all reasonable beneficial uses of the property, taken as a whole."

267 Va. at 766.

Regardless of *Cochran*'s continued viability, however, the General Assembly's excision of two words from the statute in 2009 did not make Belloni's variance application any more compelling from a legal perspective

than it was earlier.[10] In her Brief Belloni asserts that the "language deleted through the statutory change had provided the sole reason that the BZA was found ... to be powerless to grant the Bellonis' variance." (Brief of Appellant, 25.) Given that the Circuit Court's January 14, 2009 opinion letter and the June 17, 2009 Order make no reference to the "approaching confiscation" language at all there is no support for Belloni's assertion in her Brief (p. 25) that the "language deleted through the statutory change had provided the sole reason that the BZA was found ... to be powerless to grant the Bellonis' variance." At the time this case was instituted the statute remained almost entirely the same as it was in 2009, and application of its terms produces the same result–Belloni cannot meet the strict requirements for a variance, including, but not limited to, showing "undue hardship relating to the property".

At trial ZA Angle presented clear evidence of the illegality of the Wall-evidence which Belloni apparently does not contest and has never contested. However, the existence of the July 17, 2009 Order made such evidence unnecessary, and there are no "changed circumstances" which

[10] To accept Belloni's contentions that legislative changes create opportunities for more bites at the litigation apple would effectively mean that with each amendment by the General Assembly to a statute, localities and their residents could never have any finality about court decisions on land-use matters, even where one resulted in a Circuit Court Order never appealed to this Court.

would affect the continued validity and applicability of that Order. The July 17, 2009 Order, denying the variance, and the prior ruling of the BZA, upholding ZA Glover's interpretation of the Zoning Ordinances, are res judicata. Belloni had an opportunity to pursue her remedies at that time and yet, by failing to note an appeal to this Court at that time, she did not pursue them to the fullest. She should not now be permitted to relitigate a matter which she could have litigated further years ago.

CONCLUSION

Since the Wall's construction many years ago Belloni has stubbornly refused to comply with the Zoning Ordinances and has attempted to obstruct the City in its efforts to apply the law in a uniform, just and objective fashion. The Circuit Court has on two occasions upheld the Zoning Administrator's determination that the Wall violates the Zoning Ordinances. Twice Belloni failed to note potential appeals: one to this Court, from the Circuit Court, in 2009, and again to the Circuit Court, from the BZA, in 2015. Ms. Belloni has had her day in court and *res judicata* applies.

Residents of Staunton have the right to expect their neighbors to comply with the law, and there is no reason for Belloni to be treated differently than anyone else. In this case the City simply asks that its

Zoning Ordinances be enforced. Judgment in favor of ZA Angle and dismissal of Belloni's appeal achieves that objective and demonstrates that no citizen is above the law.

WHEREFORE, Appellees, Sharon Angle, Zoning Administrator for the City of Staunton, Virginia, and the City of Staunton, Virginia, by counsel, respectfully pray that this Court affirm the Trial Court's ruling in this case.

Respectfully Submitted,

SHARON ANGLE, ZONING ADMINISTRATOR FOR THE CITY OF STAUNTON, VIRGINIA

CITY OF STAUNTON, VIRGINIA

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CERTIFICATE

Counsel for Appellees Sharon Angle, Zoning Administrator and the City of Staunton, Virginia certifies as follows:

1. The name of Appellant in this case is Debra Chilton-Belloni.
2. Appellant is represented by Mark D. Obenshain, Esq. (VSB No. 27476), whose telephone number is (540) 208-0727 and whose email address is mdo@obenshainlaw.com; and Justin M. Wolcott, Esq. (VSB No. 83367), whose phone number is (540) 208-0727 and email address is jmw@obenshainlaw.com. The address for both of Appellant's counsel is Obenshain Law Group, 420 Neff Avenue, Suite 130, Harrisonburg, Virginia 22801, telephone (540) 2080727 and facsimile (540) 266-3568.
3. Sharon Angle, Zoning Administrator and the City of Staunton, Virginia, are Appellees who are represented by Victor M. Santos, Esq. (VSB No. 16233), whose telephone number is (540) 885-0346 and whose email address is santos@nmsslc.com and John C. Wirth, Esq. (VSB No. 37334), whose telephone number is (540) 885-0346 and whose email address is johnwirth@nmsslc.com. The address for both such counsel is Nelson, McPherson, Summers & Santos, L.C., 12 N.

New Street, Staunton, Virginia 24401, telephone (540) 885-0346 and facsimile (540) 885-2039.

4. Ten paper copies of the Brief of Appellees Sharon Angle, Zoning Administrator and the City of Staunton, Virginia have been hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy was filed, via, VACES. On this same day, an electronic copy of the Brief of Appellees was served, via email, to opposing counsel on December 30th, 2016.

5. This Brief of Appellees Sharon Angle, Zoning Administrator and the City of Staunton, Virginia complies with the page limitation in Rule 5:17(f).

John C. Wirth