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,

Appellees.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

CONCLUSION 10

CERTIFICATE 11

TABLE OF AUTHORITIES

Page(s)

CASES

Gwinn v. Alward,
235 Va. 616 (1988) 6

Lilly v. Caroline County,
259 Va. 291 (2000) 6

McLane v. Clark,
2010 Va. Cir. Lexis 66 (Fairfax Co., 2010) 6

Waterfront Marine Constr. v.
N. End 49ers Sand Bridge Bulkhead Groups a,
251 Va. 417 (1996) 5

RULE

Va. Sup. Ct. R. 5:29 1

REPLY BRIEF

The Appellant, Debra Chilton-Belloni, by counsel, respectfully submits this Reply Brief pursuant to Rule 5:29 of the Rules of the Supreme Court of Virginia.

The City of Staunton (the City) argues that Ms. Belloni should be barred from accessing the Board of Zoning Appeals (the BZA) because the issue of whether Ms. Belloni's wall violated its ordinances was *res judicata*. At the same time the City asserts that it was entitled to file a direct action in the trial court where it presented evidence and testimony to prove that Ms. Belloni's wall violated its ordinances. If *res judicata* precludes Ms. Belloni from returning to the BZA, then the City should have been barred from relitigating the alleged zoning violation anew in the trial court. If the issue was not *res judicata* (as Ms. Belloni has asserted in her brief), then Ms. Belloni was entitled to a hearing on her appeal and variance request before the Staunton Board of Zoning Appeals (the BZA). These anomalous positions maintained by the City were adopted in the trial court's final orders. The trial court was in error in illogically holding that the City was entitled to prove its injunction case by relitigating the earlier case while at the same time holding that *res judicata* barred Ms. Belloni's access to the BZA.

In recognition that these illogical positions cannot simultaneously exist, the City puts as much distance between the BZA and the injunction issues as possible. It cannot, however, escape the immutable fact that both have a common origin—the construction of the wall and the zoning administrator's 2007 citation of a zoning violation. The City prefers to focus on the filing of the 2014 injunction complaint against Ms. Belloni. (Br. of Appellees, 2). The City's argument ignores the fact that the controversy actually began in 2006 when one of the City's zoning officials gave the Belloni's permission to build the wall in front of their home. (J.A. 54–55, 81–82). Additionally, after the 2009 order[1], the City failed to take any action for two years until it filed criminal charges in 2011 against Ms. Belloni's now deceased husband. (J.A. 91, 94). After those criminal charges were dismissed for the City's failure to take action within the period allowed by the statute of limitations the City again did nothing for two years. (J.A. 91, 94, 96). The City only raised the issue of the wall in late 2013 after a truck collided with it, at which time the City sent a letter informing Ms. Belloni that any attempt to repair her wall would be treated as a new violation—further undermining its argument now that the issue was *res judicata*. (J.A. 96).

[1] This is the same order upon which the City's relies to support its argument that *res judicata* applies to bar Ms. Belloni's access to the BZA.

The City ignores this history and astonishingly asserts that this controversy began when it filed suit against Ms. Belloni on July 10, 2014.[2] (Br. of Appellees, 2). The City further conflates the historical record by stating that "roughly coinciding with the filing of the Complaint, on May 9, 2014" Ms. Belloni filed an appeal with the BZA. (Br. of Appellees, 3). Ms. Belloni's appeal filing and the City's election to sue her in the trial court were not contemporaneous acts—in fact, the filing of the Complaint by the City appeared to be a reaction to the BZA appeal. The City's mischaracterization of the filings as "roughly coinciding" with one another demonstrate the City's recognition that the factual record does not accrue in its favor and more specifically shows that the object of its filing of a direct injunction action in the trial court was to prevent Ms. Belloni from pursuing her right to an appeal before the BZA. Government action of this nature should be impermissible where interposed to block a citizen's access to a due process right.

The central argument underpinning the City's assertion and the trial court's holding that Ms. Belloni was not entitled to a hearing before the BZA was that the 2009 Order rendered the issue of whether Ms. Belloni's wall violated the City's ordinances *res judicata* and not subject to re-litigation.

[2] Even in its July 10, 2014 complaint, the City recites the earlier history and the 2009 Order of the Circuit Court.

Yet, despite its Complaint asserting it as the basis for its claim, the 2009 Order was never entered into evidence at trial nor did the trial court take judicial notice of it. In light of this failure, the City forsook the idea that the issue was *res judicata* and proceeded to present evidence anew that the wall in front of Ms. Belloni's property violated City ordinances. (J.A. 362, 375, 403–405). When Ms. Belloni, however, attempted to refute these assertions the trial court sustained the City's objections citing *res judicata*. (J.A. 434–439).

If the issue was in fact *res judicata*, then the City should have been barred from presenting any evidence beyond the 2009 Order on the nonconformity of the wall. Instead, the City failed even to seek admission of the zoning administrator's initial violation determination or even the 2009 Order affirming that determination. The trial court erred in finding that *res judicata* applied to bar Ms. Belloni's access to the BZA while allowing the City to cure its failure to offer an initial determination from the zoning administrator or the 2009 Order by offering new evidence to relitigate the same issue in the injunction proceeding.

The City argues that even though it failed to introduce or even offer into evidence the 2009 Order or any other zoning violation determination the trial court could take judicial notice of its own rulings. (Br. of Appellees,

17). However, the City can point to no place in the record where it asked or where the trial court actually did take judicial notice of its ruling. Instead the City argues that

> [b]ecause 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 judic[ ]ata*.

(Br. of Appellees, 18). The mere existence of the Order without more is not effective to save the City from its error.

Moreover, even if the City had introduced the Order or if the trial court had taken judicial notice of it, all the 2009 Order did was reverse the BZA's grant of the Belloni's variance request. (J.A. 137). It is axiomatic that courts speak through their orders. *Waterfront Marine Constr. v. N. End 49ers Sand Bridge Bulkhead Groups a*, 251 Va. 417, 427 fn.2 (1996). The 2009 order did nothing to force the removal of the wall or hold that it violated the Staunton city ordinances. (J.A. 137).

In spite of, and in contravention of, the City's repeated assertions that the 2009 Order rendered the matter *res judicata*, the City argues again in its brief that the Zoning Administrator has the power to enforce zoning ordinances by filing a direct injunction action in a circuit court. In support of this assertion the City alleges that Ms. Belloni has misapprehended and

misconstrued this Court's decision in *Lilly v. Caroline County*, 259 Va. 291 (2000). It is the City, however, that ignores this Court's statement in *Lilly* that "a person aggrieved by any decision of the zoning administrator has the right to appeal to the board of zoning appeals." *Lilly*, 259 Va. at 296. Here, the procedural path selected by the City was calculated to deny Ms. Belloni that appellate right.

In addition the City cites *Gwinn v. Alward*, 235 Va. 616 (1988) and *McLane v. Clark*, 2010 Va. Cir. Lexis 66 (Fairfax Co., 2010). However, both of these cases are distinguishable from the case now before this Court because in both of those cases, the citizen aggrieved by the decision of the BZA failed to file or exercise her right to an appeal before the BZA. In fact, in *McLane*, the Fairfax Circuit Court expressly stated that "the [landowners] did not appeal the notice of violation." *McLane*, 2010 Va. Cir. Lexis 66 at *2. These cases do nothing but to highlight this Court's statement in *Lilly* that a landowner has a right to appeal a determination from a zoning administrator to the BZA. If a landowner chooses not to exercise that right, as did the landowners in *Gwinn* and *McLane*, then a City may file an injunction action, but where a landowner has elected to exercise her right to an appeal, then a City may not deprive her of that right by filing a direct injunction action with a Circuit Court.

In acknowledgment of these deficiencies, the City goes on to argue that Ms. Belloni received a hearing at the BZA on May 28, 2015—after the City filed suit against her, and after the trial court issued a letter opinion (shared with the BZA by the City) on Ms. Belloni's motion to stay holding that the matter was *res judicata*. (J.A. 341–342, 347). At trial, the City in characterizing this hearing, stated that "the board of zoning appeals took the same position that Ms. Angle has taken – the matter was *res judicata* and that they couldn't hear the motion for a variance." (J.A. 340). The trial court went on to characterize the stipulation between the parties as follows: "[t]he board of zoning appeals met and adopted the opinion that the Court had issued in its letter opinion that the matter was *res judicata*. . . . And that was – and that's the only action the board took." (J.A. 347). Ms. Belloni maintains that she never received a hearing before the BZA because the BZA held that it could not even entertain her request, but even if this Court were inclined to hold that this was a hearing, the City had already deprived Ms. Belloni of her procedural due process right to a hearing before the BZA.

If the City or other local governments are permitted to bypass the statutorily prescribed process for enforcing zoning violations by filing direct injunction actions in circuit courts, then local governments will be provided

a process that would deprive citizens of their due process rights to an appeal before the BZA with such direct filings. This process would allow local governments to deprive citizens of their ability to obtain a variance at all. Authority to grant a variance is statutory and it is given to the BZA and not to the courts. Such a practice is in violation the statutory scheme set up by the General Assembly and would provide local governments with a mechanism to obfuscate the power and utility of BZAs as appellate bodies.

The filing of a direct injunction action with the circuit court and introduction of the court's pre-trial *res judicata* ruling to the BZA deprived Ms. Belloni of her right to a hearing and also prejudiced the BZA's ability to decide the matter in a fair and impartial fashion. In this sense, the well was already poisoned by the City's civil suit and its introduction of the trial court's pre-trial letter opinion to the BZA. Such prejudicial contamination was demonstrated by the BZA's refusal to take any action on Ms. Belloni's appeal.

Last, the City makes a policy argument that if this Court agrees with Ms. Belloni that the change in law was a change in circumstance significant enough to allow Ms. Belloni to request a variance from the BZA, "localities and their residents could never have any finality about court decisions on land-use matters . . ." (Br. of Appellees, 30, fn. 10). This assertion is rooted

in the City's transposed and selective recitation of the factual background in this case. Such a recitation is in an attempt to recast Ms. Belloni as a wrongdoer who was recalcitrant in her willingness to comply with the law. This is simply untrue—Ms. Belloni was the subject of the City's selective pursuit and non-pursuit of enforcement in relation to a wall in front of her home. Her deceased husband was even the subject of a criminal prosecution. There is no parade of horribles the City warns of in its brief if the City had acted in 2009, seven years ago, rather than electing to prosecute Dr. Belloni criminally, and filing an injunction action in response to Ms. Belloni's exercise of her right to an appeal in 2014. Had the City timely sought and obtained an injunction, it would have had finality. The change of circumstances here flowed from the passage of time. The City's policy argument is only made possible by its dilatory enforcement efforts.

The logical and legal inconsistencies the City articulates in its brief demonstrate the error committed by the trial court in this case. Where a citizen exercises her right to an appeal before the BZA, a City cannot file a direct injunction action with a circuit court to deprive her of access to the BZA and the issue of whether Ms. Belloni's wall violated the City's zoning ordinances was not *res judicata* as demonstrated by the City's litigation of the very same issue at trial.

CONCLUSION

This Court should reverse the trial court's denial of Ms. Belloni's request for an appeal in her mandamus action and also reverse the award of an injunction in the City's favor and dismiss the action with prejudice.

Respectfully Submitted,

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CERTIFICATE

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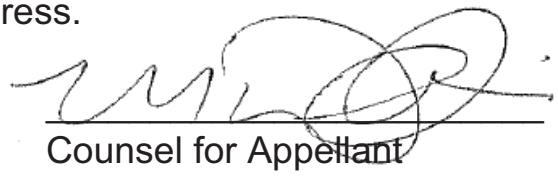
In compliance with Rule 5:26(h), I certify that 10 bound copies of this Reply Brief of Appellant, were hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Reply Brief of Appellant was filed, via VACES, on this 27th day of March, 2017. On this same day, an electronic copy of the Reply Brief of Appellant was served, via email to counsel for Appellee at the above address.



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