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.

BRIEF OF APPELLANT

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This case has a history dating back to 2006 when the City of Staunton (hereinafter "the City") claims that one of its zoning officials erroneously granted Dr. and Ms. Belloni permission to build a wall in front of their home. (J.A. 54–55, 81–82). Since then the City has claimed the wall violates its zoning ordinances. (J.A. 104–107). This chapter began in 2014 when the City's Zoning Administrator demanded the removal of the wall and in response, Ms. Belloni requested a variance. (J.A. 6–11). When Ms. Belloni attempted to appeal the denial of her variance, the City bypassed and ignored the appeal and instead it filed a complaint seeking an injunction. (J.A. 1–4, 104–107, 221–224). Ms. Belloni requested a stay so that her pending variance request could be heard and decided. (J.A. 113–115). The trial court denied the motion for a stay. (J.A. 216–220). Ms. Belloni filed a petition for a writ of mandamus to compel the Staunton Board of Zoning Appeals (hereinafter "BZA") to hold a hearing and decide the variance request. (J.A. 221–224). The trial court denied the writ request. (J.A. 483–484, 488–490). A consolidated trial was held and an order granting the city injunctive relief and denying the writ was entered on November 5, 2015. (J.A. 483–490).

STATEMENT OF THE FACTS

In 2006 Dr. and Ms. Belloni bought an historic home on Augusta Street (Route 11) in Staunton. (J.A. 26, 35). Because of heavy traffic they wanted to build a wall in front to block the road noise. (*Id*.). There was no application process for the approval of such a wall and no permit to issue, but the Bellonis nonetheless consulted city zoning officials and after a site visit they were told that the wall they planned to build would comply with the City's zoning ordinances. (J.A. 81–82).

After the wall was nearly complete, on September 20, 2007, the City Zoning office issued a notice to the Bellonis telling them that the wall actually violated the zoning ordinances. (J.A. 28, 104). In response, the Bellonis citing hardship, asked the City's BZA to grant a variance. *(*J.A. 205–206). After considering the circumstances, on February 20, 2008 the BZA voted unanimously in favor of the variance. (J.A. 55).

The City then appealed the variance, arguing that the BZA had exceeded its authority. (J.A. 135–138). The City cited *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004), in which this Court held that the only hardships sufficient to justify the grant of a variance are those that are Constitutional in dimension—those that approach

confiscation. (J.A. 210–211). The Staunton City Circuit Court agreed and reversed the BZA's grant of a variance. (J.A. 135–138).

After those proceedings, nothing happened for 2 years. (J.A. 78). The City took no action and the Bellonis took no steps to remove the wall. (*Id.)*. In 2011, the City filed criminal charges against Dr. Belloni citing the wall as violating its zoning ordinances. (J.A. 94). That case was dismissed at trial for the City's failure to take action within the period allowed by the statute of limitations. (J.A. 91).

Once again, nothing happened for two more years. (J.A. 96). The Bellonis reasonably believed that the City had exhausted its efforts. (J.A. 98). Then in late 2013, after a truck damaged a part of the wall, the City once again renewed its efforts to secure the removal of the wall. (J.A. 96). It sent a letter stating that the repair of the damage to the wall would be viewed as a new violation of the zoning ordinances and the City again demanded the removal of the wall. (*Id*.).

Since the beginning of this process, and after the reversal of the 2008 variance by the Circuit Court, the Code of Virginia provisions defining a hardship sufficient to justify the award of a variance had been changed. (J.A. 6–9). The 2009 statutory amendment eliminated the *Cochran* requirement that hardship justifying a variance must be one that is

confiscatory in favor of language allowing a variance if it will "alleviate a clearly demonstrable hardship." Va. Code § 15.2-2309. Given that the BZA had voted unanimously in favor of the variance in 2007 and that it would have stood but for the *Cochran* requirement, Ms. Belloni made her new 2014 request for a variance citing the code change as a significant change of circumstance. (J.A. 6–9).

The City Zoning Administrator summarily rejected the 2014 variance request and Ms. Belloni again appealed that ruling to the BZA. (J.A. 1–4, 11). Instead of scheduling a BZA hearing, the City blocked Ms. Belloni's access to the BZA and her ability to obtain a variance by filing a civil action seeking an injunction requiring the removal of the wall. (J.A. 104–107). Ms. Belloni asked for a stay pending the outcome of the BZA appeal in order to see whether she would succeed in her efforts to secure a variance. (J.A. 113–115). The City argued and the trial court held that, notwithstanding the passage of time and the statutory changes, the 2014 variance request would be barred by the doctrine of *res judicata* and the request for a stay was denied. (J.A. 216–220).

Even though the trial court had held in the injunction case that *res judicata* would bar the grant of a variance, Ms. Belloni's 2014 appeal to the BZA remained pending with the City refusing to even schedule a hearing,

so Ms. Belloni filed a petition for a writ of mandamus seeking to have the trial court order the City and the BZA to do something with her appeal. (J.A. 221–224). Thereafter, on May 28, 2015 the BZA held a hearing in which it cited the trial court's ruling on the motion to stay and it declined to take any action, either to grant or deny Ms. Belloni's variance request. (J.A. 340–342, 344–347). The trial court ultimately entered an order denying the requested writ of mandamus citing the 2009 Circuit Court ruling and *res judicata* again as the basis for its ruling. (J.A. 488–490).

At trial in the injunction action, the City never introduced in evidence the finding of the Zoning Administrator from September 20, 2007, which it alleged in its Complaint as the finding and notice of a zoning violation it was asking the Court to enforce. (J.A. 104, 403). The City instead asked the trial court to find on its own accord that the wall violated the Staunton City Code. (J.A. 362, 375, 403–405). The trial court, however, relying on *res judicata* refused to allow Ms. Belloni to offer evidence to rebut the City's allegations of a current violation. (J.A. 434–439).

ASSIGNMENTS OF ERROR

I. The trial court erred in depriving Ms. Belloni of her statutory and procedural due process rights by granting the City's injunction in a civil action after Ms. Belloni had exercised her statutory right to an appeal to the Staunton Board of Zoning Appeals. (J.A. 219–220, 427, 485–487).

II. The trial court erred in finding that the doctrine of *res judicata* barred Ms. Belloni's writ of mandamus action and in relying on the doctrine of *res judicata* to deny Ms. Belloni's motion to stay the injunction proceeding. (J.A. 125–134, 219–220, 488–490).

STANDARD OF REVIEW

Assignment of Error I involves the interpretation of statutory language found in the Code of Virginia. Assignment of Error II involves the interpretation of statutory language found in the Code of Virginia along with the common law principles surrounding the doctrine of *res judicata*. Such interpretations are pure question of law reviewed by this Court *de novo*. *Bd. of Supervisors v. Crucible*, *Inc.*, 278 Va. 152, 158 (2009), *Caperton v. A.T. Massey Coal Co.*, 285 Va. 537, 548 (2013). Further this Court has stated that "the one asserting the defense of *res judicata*-bar . . . must show by a preponderance of the evidence that the claim or issue should be precluded by the prior judgment." *Caperton*, 285 Va. at 548 (quoting *Bates v. Devers*, 214 Va. 667, 671 (1974).

AUTHORITIES AND ARGUMENT

The Code of Virginia in Title 15.2, Subtitle II Chapter 22 provides a statutory structure through which a local government may enforce its zoning ordinances. Central to this process is the right of a citizen to seek a variance. Under this scheme when a citizen receives notice from a zoning administrator that she is in violation of an ordinance, she may appeal that

determination to the board of zoning appeals. Va. Code § 15.2-2311(A). The Code of Virginia then grants her the right to request a variance from the board of zoning appeals. Va. Code § 15.2-2309(2), Va. Code § 15.2-2311(A). If such variance request is granted, then her non-conforming use is deemed conforming. Va. Code § 15.2-2309(2).

The Code of Virginia in § 15.2-2309(2) – Powers and Duties of Boards of Zoning Appeals explicitly vests with BZAs the power to grant a variance and a citizen's only avenue through which to obtain a variance is a BZA. *Id*., *see also* Staunton City Code 18.200.010(3)(a) identifying the BZA as the tribunal through which a citizen may access her right to a variance.

In this case, Ms. Belloni exercised her right to an appeal before the BZA and sought a variance for her non-conforming wall. (J.A. 1–4). The City, rather than allowing Ms. Belloni's appeal to be heard by the BZA, sued Ms. Belloni in circuit court. (J.A. 104–107). This tactic circumvented the statutory structure under which Ms. Belloni should have been able to access her right to request a variance, as a circuit court lacks the power or authority to grant variance requests. Thus, the City's actions as sanctioned by the trial court deprived Ms. Belloni of her statutory due process property right to an appeal and a hearing on her variance request before the BZA.

If the City of Staunton or other local governments are permitted to bypass the statutorily prescribed process for enforcing zoning violations by filing direct actions in circuit courts, then citizens will lose their right to seek a variance. This practice is in violation of the statutory scheme set up by the General Assembly in Virginia code Title 15.2, Subtitle II Chapter 22 and deprives citizens of their statutory and due process rights.

Further, in these two cases, the trial court inconsistently applied the doctrine of *res judicata*. In Ms. Belloni's mandamus action the trial court invoked the doctrine of *res judicata* to block Ms. Belloni's access to the BZA. (J.A. 434–439). The trial court's reliance on the doctrine of *res judicata* is highlighted in its letter opinion and Final Decree in the mandamus action. (J.A. 483–484, 488). Moreover, the trial court's invocation of *res judicata* and resultant holding is based on allegations that were pled, but not proven at trial.

Conversely, in the City's injunction action the trial court chose not to rely on the doctrine of *res judicata*, relying instead on new evidence in granting the City's request for an injunction. (J.A. 485–487). In reaching this conclusion, the trial court erred in adopting the City's argument, made for the first time at trial, that the trial court should sit as a court of original

jurisdiction and make its own determination that Ms. Belloni's wall violated the Staunton City Code. (*Id*., J.A. 362).

These inconsistent holdings were a direct result of the City's failure to introduce two critical pieces of evidence it relied on in its pleadings; a 2007 violation letter and a 2009 Final Order. (J.A. 104, 362, 403).

Even if the City had not failed to introduce the 2007 letter and 2009 Final Order, the trial court erred in holding that Ms. Belloni's pending BZA appeal was barred by *res judicata* because the doctrine of *res judicata* has limited to no application to variance requests—inherently legislative actions. Had the prior BZA appeal been filed seeking a finding of fact, or an interpretation of a zoning ordinance, or the application of a zoning ordinance to particular facts, the action might properly have been labeled a judicial act. Instead, the 2007 BZA appeal involved a requested variance, a legislative function of the BZA. Thus, the doctrine of *res judicata* has limited application to the facts of this case.

This Court's precedent makes clear that a citizen has a right to seek a variance in an appeal of a determination of a Zoning Administrator. Ms. Belloni elected to exercise that right, and in response, the City filed suit against her in an attempt to deprive her of a statutorily prescribed due process right. (J.A. 1–4, 104–107). The trial court erred in sitting as a court

of original jurisdiction and in relying on *res judicata* to sanction the City's conduct.

I. The trial court deprived Ms. Belloni of her statutory and procedural due process rights by granting the City's injunction after Ms. Belloni had exercised her statutory right to an appeal to the Staunton Board of Zoning Appeals. (Assignment of Error I)

A. Ms. Belloni has a statutory right to an appeal before the Board of Zoning Appeals seeking a variance and she has elected to exercise that right.

Virginia Code Section 15.2-2311 states that

> [a]n appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the locality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article, any ordinance adopted pursuant to this article, or any modification of zoning requirements pursuant to § 15.2-2286.

In interpreting this statute, this Court has stated that a "landowner ha[s] the opportunity, as a matter of right, to appeal to the BZA and then to the circuit court . . . ." *Dick Kelly Enters. v. City of Norfolk*, 243 Va. 373, 379 (1992), *see also Lilly v. Caroline Cty.*, 259 Va. 291, 296 (stating that "a person aggrieved by any decision of the zoning administrator has the right to appeal to the board of zoning appeals.").

Most cases implicating an interpretation of Virginia Code Section 15.2-2311 reach this Court where landowners have failed to, or elected not to, exercise the right to an appeal to the BZA after an adverse determination from a zoning administrator or other administrative officer. *See e.g.*, *Gwinn v. Alward*, 235 Va. 616, 621 (1998), *Dick Kelly Enters.* 243 Va. at 375, 378 (stating that a landowner failed to pursue an available administrative remedy in appeal to the BZA after he received a letter and such failure rendered the decision a "thing decided").

When a landowner fails to appeal such a determination, it becomes a "thing decided" and is not subject to attack. *Gwinn*, 235 Va. at 621, *see also McLane v. Wiseman*, 84 Va. Cir. 10, 12 (Fairfax County Cir. Ct. Nov. 9, 2011) (stating that "[i]f a party does not pursue mandatory appeal to the BZA before turning to [a Circuit Court], the issue in question becomes a 'thing decided.'"). This requirement is rooted in the "principle that courts do not address issues based on circumstances which may never materialize." *Dail v. York County*, 259 Va. 577, 582 (2000).

In *Dick Kelly Enterprises*, this Court discussed its finding in *Gwinn* that the failure to appeal a determination became "a thing decided" and not subject to judicial attack because the landowner "'never appealed the various decisions [against him].'" *Dick Kelly Enters.*, 243 Va. at 378

(quoting *Gwinn*, 235 VA. at 621). The Court explained that the principle "stems from the settled rule that exhaustion of administrative remedies where zoning ordinances are involved is essential before a judicial attack may be mounted . . . ." *Dick Kelly Enters.*, 243 Va. at 378.

In cases where a landowner has failed to exhaust available administrative remedies, that failure is fatal to a landowner's challenge to a zoning administrator determination, as it has become a "thing decided." Thus, not only does a landowner have a right to appeal a zoning administrator's determination, but the landowner has an obligation to appeal such a determination in order to preserve the ability to attack the determination in a trial court or on appeal. A landowner who elects not to appeal a determination does so at her own peril.

In contrast to earlier cases before this Court, Ms. Belloni is not a landowner who failed to exercise her due process right to an appeal, but rather, Ms. Belloni is a landowner who asserted her due process right to an appeal (as she was required to do to prevent the determination from becoming a "thing decided"), and she was deprived of that right when the City bypassed her BZA appeal and instead filed an injunction action to require removal of the wall. It was not permissible for the City to deprive Ms. Belloni of her right to an appeal by filing an injunction action and the

trial court was in error in applying *res judicata* principles to sanction such conduct.

B. The Code of Virginia does not permit a trial court to adjudicate zoning violations as an issue of first impression.

1. A zoning administrator must first make a determination that there is a violation before filing an action in a circuit court.

Although a trial court may award an injunction pursuant to Virginia Code § 15.2-2208(A) in certain circumstances, it may not do so in a case such as this; one with an appeal pending before the BZA requesting a variance, and with no prior violation determination before it.

The trial court incorrectly found that Virginia Code § 15.2-2208(A) permits the restraint, correction, or abatement of any violation of a zoning ordinance "by an injunction or other appropriate proceeding" and that Virginia Code § 15.2-2286(A)(4) allows a zoning administrator without first making a violation determination to enforce zoning ordinances by "bringing legal action, including injunction, abatement, or other appropriate action or proceeding . . . ." (J.A. 485). However, the Code of Virginia, by including the reference to the appeal process in § 15.2-2311, indicates that a zoning administrator may not skip the step of making an initial determination and thereby deprive an aggrieved party of her statutory right to an appeal

before the BZA and access to a variance by filing a direct injunction with a circuit court. Rather, it is clear that under the Code of Virginia a zoning administrator must first make a determination that there is a zoning ordinance violation and then give an aggrieved citizen the right to appeal that determination to the BZA to access her right to a variance.

2. A Circuit Court may not sit as a court of original jurisdiction in deciding whether a zoning violation has occurred.

Without an initial determination from a zoning administrator, the trial court sat as a court of original jurisdiction in deciding the factual issue of whether Ms. Belloni's wall violated the Staunton City Code. While Virginia Code § 15.2-2208 states that "[a]ny violation or attempted violation of this chapter, or of any regulation adopted hereunder may be restrained, corrected, or abated as the case may be by injunction or other appropriate proceeding," the Code of Virginia does not confer upon circuit courts the power to sit as a court of original jurisdiction to find a zoning violation. Rather, this is the task of zoning administrators, as the City pled in its complaint, in citing Virginia Code 15.2-2286(A)(4). Virginia Code § 15.2-2286(A)(4) allows a zoning administrator to enforce zoning ordinances by "bringing legal action, including injunction, abatement, or other appropriate action or proceeding *subject to appeal pursuant to § 15.2-2311*." (emphasis

added). Moreover, the Code of Virginia grants circuit courts original jurisdiction over all civil cases, "except such cases as are assigned to some other tribunal." Va. Code § 17.1-513. Virginia Code § 15.2-2286 tasks zoning administrators with enforcing zoning ordinances and making determinations about alleged violations and also tasks BZAs with hearing appeals from zoning administrators' decisions. The Code of Virginia expressly assigns the review of zoning administrator decisions to BZAs. Virginia Code § 15.2-2309. Virginia Code § 15.2-2309(2) confers upon BZAs the power to grant variances and the Staunton City Code in 18.200.010(3)(a) identifies the BZA as the tribunal in which a citizen may obtain a variance. This express grant and identification falls squarely within the "some other tribunal" language of Virginia Code § 17.1-513 prohibiting circuit courts from sitting as courts of original jurisdiction over such matters.

The Code of Virginia, as discussed above, including the reference of the appeal process in § 15.2-2311, coupled with the statutory scheme in Virginia Code Title 15.2, Subtitle II Chapter 22, demonstrates the intent of the General Assembly that zoning administrators decide whether a zoning violation has occurred, and a circuit court as being a tribunal to which a zoning administrator could seek enforcement of that violation. Thus, the Code of Virginia does not permit a zoning administrator to make no initial

determination and then deprive an aggrieved citizen of her statutory right to ask the BZA to grant a variance by filing a direct injunction with a circuit court.

Rather, it is clear that a zoning administrator must first make a determination that there is a zoning ordinance violation and then give an aggrieved citizen the right to appeal that determination to the BZA where she can ask for a variance. A direct injunction action without asserting or introducing as evidence a finding of a zoning violation by the Zoning Administrator not only deprives a citizen of her right to an appeal that finding to the BZA, but it also deprives her of her right to even ask for a variance, as a Circuit Court lacks the power to grant a variance as an issue of first impression. If the City is allowed to proceed in this fashion, then there would be no mechanism or opportunity for a citizen to access a variance. Such a result is in direct contravention of the statutory scheme set up in the Code of Virginia.

C. The City's arguments advanced at trial were not consistent with the allegations in its Complaint.

This Court has stated that "[a] litigant's pleadings are as essential as his proof . . . ." *Jenkins v. Bay House Assocs., L.P.*, 266 Va. 39, 43 (2003), *see also Bd. of Supervisors v. Robertson*, 266 Va. 525, 537 (2003) (quoting *Jenkins*, 266 Va. at 43). This Court has further stated that

> [t]he rationale supporting this basic rule is plain . . . 'every litigant is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense . . . . The issues in a case are made by the pleadings, and not by the testimony of witnesses or other evidence.'

Id. at 43–44 (quoting *Ted Lansing Supply Co.*, 221 Va. 1139, 1141 (1981)).

In its Complaint, the City relied on the September 20, 2007 letter, and further the June 17, 2009 Final Order, as notice of the violation and as the basis for its enforcement action. (J.A. 104). This reliance was abandoned only at trial when the City declined to offer as evidence the 2007 letter it pled as the very basis for notice and its allegation of a zoning violation. (J.A. 362, 403). At trial the City argued for the first time that the trial court could sit as a court of original jurisdiction to find that Ms. Belloni was in violation of the Staunton City Code. (J.A. 362). The trial court was in error in allowing the City to proceed in this fashion, as it failed to comply with the statutory process for enforcing zoning ordinances. Moreover, here it also deprived Ms. Belloni of her due process right to notice in the pleadings and the opportunity to obtain a variance. While the City has argued that this is a harsh result, it is no harsher than the result it seeks to impose on Ms. Belloni.

II. The trial court erred in finding that the doctrine of *res judicata* barred Ms. Belloni's mandamus action and in relying on *res judicata* as grounds to deny Ms. Belloni's motion to stay the injunction proceeding. (Assignment of Error II)

A. The 2007 determinations of the Staunton BZA were legislative and not judicial actions and thus *res judicata* has no applicability.

Virginia courts have determined that depending upon the issue under consideration a BZA acts in a quasi-judicial capacity, a legislative capacity, or an administrative capacity. *Cosby v. Board of Zoning Appeals*, 7 Va. Cir. 253, 254 (Loudon Cnty. Cir. Ct. July 26, 1985), citing *Bd. of Supervisors v. Southland Corp.*, 224 Va. 514, 522 (1982). In determining the deference to be given to a Board of Supervisors or a BZA decision on a special exception or special use permit, this Court has stated that, "[w]hether a legislative body has reserved unto itself the power to grant or deny special exceptions or use permits, or has delegated the power to a Board of Zoning Appeals, we have consistently held the exercise of that power to be a legislative, rather than an administrative act." *Bd. of Supervisors v. Southland Corp.*, 224 Va. 514, 522 (1982). In speaking directly on the topic of the deference to be given to a BZA on a variance decision, this Court has held that that action is neither quasi-judicial nor legislative, but instead is an administrative act. *Id*. at 522, fn. 2. This Court has further stated that

"[o]nly what is adjudicated can be *res judicata*. Administrative action other than adjudication cannot be *res judicata*." *Appalachian Power Co. v. John Stewart Walker*, *Inc*., 214 Va. 524, 534 (1974).

This Court distinguishes action taken by a BZA on a variance petition by pointing out that a variance authorizes a use which otherwise would be prohibited by ordinance, and that "zoning ordinances usually designate to public officials the power to grant variances where literal enforcement would result in unnecessary hardship." *Bd. of Supervisors v. Southland Corp.*, 224 at 522, fn. 2. This Court has expressly held that "public officials, passing upon requests for variances, act in an administrative, rather than a legislative, capacity." *Id*., *see also*, *Packer v. Hornsby*, 221 Va. 117, 123 (1980); *Hendrix v. Board of Zoning Appeals*, 222 Va. 57, 61 (1981).

In *Cosby*, the court held that the doctrines of *res judicata* and collateral estoppel have some application to quasi-judicial acts of a BZA, but that it is less applicable to "legislative acts" undertaken by a BZA. *Cosby*, 7 Va. Cir. at 254. There, the court concluded with respect to legislative acts, an issue can be presented to the same BZA for reconsideration if there is a "change of circumstance" sufficient to justify a contrary opinion. *Id.*

The application of *res judicata* and collateral estoppel to administrative actions has been addressed at great length by state and federal courts. The United States Court of Appeals for the Fourth Circuit has held that "[*r*]*es judicata* of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings." *Grose v. Cohen*, 406 F.2d 823, 824 (4th Cir. 1969). The Fourth Circuit explained that although the application of the doctrine often serves a useful purpose in "preventing relitigation of issues administratively determined . . . practical reasons may exist for refusing to apply it." *Id*. at 825. It concluded by observing that in connection with administrative actions, "when traditional concepts of *res judicata* do not work well, they should be relaxed or qualified to prevent injustice." *Id.*

In *Appalachian Power Co. v. John Stewart Walker*, *Inc.*, 214 Va. 524 (1974), this Court considered the application of *res judicata* to administrative acts by the State Corporation Commission. Much like a BZA, the Court concluded that the Commission "'has been clothed with legislative, judicial and executive powers.'" *Id.* at 528 (quoting *Clifton Forge-Waynesboro Telephone Co. v. Commonwealth*, 165 Va. 38, 47 (1935)). The actions undertaken by the Commission that were under review in Appalachian Power were determined to be administrative. *Id.* at

534. The Court concluded that "only what is adjudicated can be *res judicata*. Administrative action other than adjudication cannot be *res judicata*." *Id.*

The cases discussed above, and specifically those from this Court, discuss legislative, administrative, and judicial distinctions in the context of levels of deference given to a BZA or Board of Supervisors. It makes sense to give increased deference to a BZA or Board of Supervisors when they act in a judicial capacity. However, such an analysis and resultant distinction makes little sense when attempting to distinguish between legislative, administrative, and judicial actions in the context of the application of *res judicata*. Rather, when determining whether the doctrine of *res judicata* should apply to a particular act of a BZA or Board of Supervisors, the nature of the action undertaken by a BZA or a Board of Supervisors should be analyzed to determine whether the acts are more analogous to the functions of a legislative body, administrative body, or judicial body.

In this case, the Belloni's initial request for a variance and Ms. Belloni's subsequent request for a variance implicate actions from the BZA that are legislative in nature and involved no adjudicative type activity. Adjudication typically occurs in the judicial context and involves the

resolution of a factual dispute, or the application of law to the facts in order to resolve the dispute. Ms. Belloni, in her variance request, simply made a request, akin to a request for a special use exception as discussed in this Court's precedent above. Such a request invoked a request for the exercise of a legislative power of a BZA, rather than a judicial or adjudicative power. Plainly, there was no dispute over the facts of the characteristics of Ms. Belloni's wall. She was simply asking for a legislative exception to a zoning ordinance, and as such, the resultant action of the BZA was legislative in nature and should not be subject to the doctrine of *res judicata*.

B. There are sufficient changed circumstances to warrant BZA consideration of Ms. Belloni's 2014 variance request.

Additionally, even if this Court were disinclined to agree with Ms. Belloni's assertion that the BZA acted in a legislative capacity in regards to her variance request, there have been changes in circumstance sufficient to warrant BZA consideration of Ms. Belloni's new variance application. In 2007, the City's Zoning Administrator ruled that the wall built by Dr. and Mrs. Belloni "appears to violate" Staunton's zoning ordinances, specifically, section 18.120 of the Code of Staunton regulating the placement and height of walls and fences. (J.A. 203).

In his November 21, 2007 letter to Dr. and Ms. Belloni, the Staunton City Zoning Administrator acknowledged that the construction of the wall may have been caused by a "miscommunication with my staff" but in suggesting that they seek a variance, he made a cautionary reference to the decision of the Virginia Supreme Court in *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004). (J.A. 203–204). In that case, the Supreme Court of Virginia relied upon the language of Virginia Code § 15.2-2309(2) in concluding that a variance could be granted for hardship only to "avoid an unconstitutional result." *Cochran*, 267 Va. at 764. At that time, the Code of Virginia specifically defined the type of "undue hardship" that could serve as a predicate for a modification or variance as one "approaching confiscation." *Id*. at 765–66. The Zoning Administrator advised the Bellonis that they could appeal his decision to the Staunton BZA but also told them that "due to the *Cochran* ruling of the Virginia Supreme Court proving a hardship for a variance is very challenging." (J.A. 204).

The members of the BZA echoed the Zoning Administrator's concerns about the hardship imposed on Dr. and Ms. Belloni who they believed had relied on the express permission to build the wall that a member of the zoning staff had given to them. (J.A. 54–55). The BZA

unanimously concluded that the Bellonis had indeed suffered an undue hardship and it awarded a variance. (J.A. 55).

When the City appealed the case to the Staunton City Circuit Court, the court relied upon *Cochran* and Virginia Code § 15.2-2309(2) in ruling that the BZA erred in granting the Bellonis' application for variance. (J.A. 135–138, 210). In rejecting the Bellonis' position, the court held as follows:

> A review of the records shows that at the time the BZA made its decision it recognized that it was not doing so in accordance with the requirements of *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 257 (2004). Although property owners argued then and now, that the effect of the zoning ordinance if applied to their property interferes with "all reasonable beneficial uses of the property, taken as a whole, the Court finds that the BZA did not reach such a conclusion based on the evidence before it, nor is there evidence in the record of the BZA to support such a conclusion. Furthermore, the additional evidence that has been submitted to the Court does not support such a conclusion. In fact, the BZA acknowledged that it applied erroneous principles of law in granting the variance but it did so because of its disagreement with the law.

(J.A. 210).

Shortly after the conclusion of the BZA proceedings—that ran from 2007 into 2009—the General Assembly amended the language of Virginia Code § 15.2-2309 to eliminate the very limitation relied upon by the Supreme Court in *Cochran* and by the Circuit Court of the City of Staunton

in ruling against the Bellonis. This statutory change goes to the heart of this case. The language deleted through the statutory change had provided the sole reason that the BZA was found by the Staunton Circuit Court to be powerless to grant the Bellonis' variance. The 2009 amendment empowered the BZA to do what it could not do in 2008. It rendered the *Cochran* case irrelevant to the analysis and it effectively overturned that decision.

Now the law permits the granting of a modification or variance in cases that "will alleviate a clearly demonstrable hardship." Va. Code § 15.2-2309. It eliminated the two words that had followed that language and upon which the Supreme Court relied in *Cochran* – "approaching confiscation." This statutory change clearly qualifies as a change in circumstance making the application of the *res judicata* doctrine as a bar to Ms. Belloni's mandamus action in error.

Moreover, to rigidly apply the doctrine of *res judicata* as the trial court did is illogical. For example, the application of *res judicata* in such a fashion to a property owner who had a variance application rejected seeking to build a commercial building on a property zoned residential would lead to an absurd result. Adoption of the trial court's *res judicata* analysis would preclude that property owner from coming back and asking

again for a variance after a legislative change in the zoning classification. Adoption of the trial court's *res judicata* application would preclude that same property owner from coming back perhaps years later and even after a change in the law (local or state) to ask for a variance again. Last, consider also a zoning violation that may have been duly cited and a variance denied by a Board of Zoning Appeals, but a local government allows twenty, thirty, or even fifty years to pass without taking any action to seek abatement of that violation. The position taken by the trial court would preclude a later request for a variance even after the passage of decades.

Had the General Assembly not amended the Virginia Code § 15.2-2309(2) after the prior BZA 2007 to 2009 BZA proceedings, Ms. Belloni would not have requested a variance in 2014. *Res judicata* should not have been applied by the trial court to the mandamus action or as a grounds for denying Ms. Belloni's Motion to Stay the injunction action because there had been a change of circumstances in the form of a statutory change that permits the grant of a variance where it was not previously allowed.

C. Application of the doctrine of *res judicata* to the mandamus action is inappropriate given the City's failure to introduce the 2007 violation letter and the 2009 Final Order into evidence.

Last, the City's failure to introduce the 2007 letter and 2009 Final Order was not only counter to its Complaint, and caused the trial court to improperly sit as a court of original jurisdiction, it also rendered the doctrine of *res judicata* inapplicable to Ms. Belloni's appeal. The doctrine of *res judicata* could not have been applied to bar Ms. Belloni's 2014 appeal to the BZA because the allegations pled as proof of *res judicata* were never introduced into evidence. (J.A. 104, 403). In argument, the City even specifically stated that "[t]he July 17, 2009 Order denying the variance and the prior ruling of the BZA in upholding Mr. Glover's interpretation of the Code are *res judicata*." (J.A. 464). Yet again, the City failed to offer as evidence the Final Order reversing the 2008 determination of the BZA, and as a result, it cannot possibly be *res judicata*. (J.A. 241, 351).

CONCLUSION

The history of this case demonstrates that the City engaged in an inconsistent, harsh, and haphazard pursuit and nonpursuit of enforcement of its ordinances in relation to Ms. Belloni's property. To be clear, the 2009 Final Order did nothing to force the removal of Ms. Belloni's wall. It merely denied her request for a variance. Had the City filed for an injunction in

2009, seven years ago, rather than electing to prosecute Dr. Belloni criminally, and filing an injunction action only after Ms. Belloni exercised her right to an appeal in 2014, it would not now be in the situation it finds itself in. 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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I hereby certify that on this 5th day of December, 2016, pursuant to Rules 5:26(h), ten paper copies of the Brief of Appellant and three paper copies of the Joint Appendix have hand-filed with the Clerk of the Supreme Court of Virginia and electronic copies of the Brief of Appellant and Joint Appendix were filed, via VACES. On this same day, an electronic copy of the Brief of Appellant was served, via email, and electronic copies on CD of

the Brief of Appellant and Joint Appendix were served, via UPS Ground Transportation, at the above address.

Counsel for Appellant