SCV: Submitted on 12-12-2016 14:00:41 EST for filing on 12-12-2016

IN THE

Supreme Court of Virginia

RECORD NO. 160813

ROBERT F. HALE, JR.,

Appellant,

v.

TOWN OF WARRENTON,

Appellee.

REPLY BRIEF OF APPELLANT

Richard J. Conrod, Sr. (VSB 35967)
Ryan R. Reyes (VSB 88532)
CONROD & COMPANY LAW FIRM, P.C.
101 North Lynnhaven Road
Suite 104
Virginia Beach, VA 23452
(757) 486-8700
(757) 486-4858 (Facsimile)
rconrod@conrodlaw.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

Table of Authorities ii

A. THE MOTION TO RECONSIDER AND ATTACHMENTS ARE PROPERLY PRESERVED 1

B. THE TOWN'S INTERPRETATION OF THE STATUTES ARE ABSURD 2

Conclusion 6

Certificate of Service 8

TABLE OF AUTHORITIES

CASES

Baker v. Commonwealth,
284 Va. 572, 733 S.E.2d 642 (2012) 3
Boynton v. Kilgore,
271 Va. 220, 623 S.E.2d 922 (2006) 3
Branham by Branham v. Branham,
254 Va. 320, 491 S.E.2d 715 (1997) 2
Dodson v. Shenandoah County,
27 Va. Cir. 479 (Shenandoah County 1983) 6
Garrison v. First Federal Savings & Loan Ass'n.,
241 Va. 335, 402 S.E.2d 25, 7 Va. Law Rep. 1763 (1991) 3, 5
McDaniel v. Commonwealth,
199 Va. 287, 99 S.E.2d 623 (1957) 3
Rockingham Co-Operative Farm Bureau, Inc. v. City of Harrisonburg,
171 Va. 339, 198 S.E 908 (1938) 3

REGULATIONS AND RULES OF COURT

Title 13, Agency No. 5, Chapter 63, Part I, Section 105.1 of the
Virginia Administrative Code 1, 2, 4, 5, 6
Section 105 of the Virginia Construction Code 1, 2, 4, 5, 6
Va. S. Ct. R. 5:25 1

A. THE MOTION TO RECONSIDER AND ATTACHMENTS ARE PROPERLY PRESERVED.

Rule 5:25 of the Rules of the Virginia Supreme Court requires that potential errors be brought to the attention of the trial court before they can be the subject of an appeal.

Hale's objections stem from whether Hale was the Permanent Building Official for the Town of Warrenton as defined in Title 13, Agency No. 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code, and, in the alternative, if Hale should have been held to be the *de facto* permanently appointed building official.

After the Town's demurrer, Hale filed a motion to reconsider and the trial court denied Hale's motion. (Appendix 101-244; 247-248) No discovery had been issued in the case. The Town relied upon Hale's employment application, but did not rely upon any other employment documents in its demurrer. (Appendix 46) Hale objected to the final order in this case by incorporating the objection he had stated in his motion to reconsider. (Appendix 247)

In Branham by Branham v. Branham, 254 Va. 320, 491 S.E.2d 715 (1997) a motion to reconsider based upon a party's subsequent evidence was overruled by the trial court, but was reversed on appeal.

As held in Branham the evidence presented in the motion to reconsider is reviewable. The motion to reconsider included additional evidence, specifically, the Historic District Design Guideline from the Town of Warrenton, which clearly states that Hale was appointed by the Town Manager for the Town of Warrenton. (Appendix 110; 221) The Historic District Design Guideline came out two years after his initial hiring and the Historic District Design Guideline defined Hale as the person appointed by the Town Manager. (Appendix 108; 221)

Therefore, it is clear that Hale was the permanently appointed building official as described in Title 13, Agency No. 5, Chapter 63, Part I, Subsection 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code, and is entitled to the protections requested at trial, thus the trial court's order should be reversed.

B. THE TOWN'S INTERPRETATION OF THE STATUTES ARE ABSURD.

When analyzing a statute, courts must apply its plain meaning "'unless the terms are ambiguous or applying the plain language would lead to an

absurd result.'" Baker v. Commonwealth, 284 Va. 572, 576, 733, S.E.2d 642, 644 (2012)(quoting Boynton v. Kilgore, 271 Va. 220, 227, 623 S.E.2d 922, 926 (2006)). However, if a statute is subject to more than one interpretation, the court must apply the interpretation that will carry out the legislative intent behind the statute. Garrison v. First Federal Savings & Loan Ass'n., 241 Va. 335, 340, 402 S.E.2d 25, 28, 7 Va. Law Rep. 1763 (1991); McDaniel v. Commonwealth, 199 Va. 287, 294, 99 S.E.2d 623, 629 (1957); Rockingham Co-Operative Farm Bureau, Inc. v. City of Harrisonburg, 171 Va. 339, 344, 198 S.E. 908, 910 (1938).

There are three scenarios for a building official under the statute: (1) the Town permanently appoints a building official; (2) the Town appoints an acting building official; or (3) the Town failed to appoint a building official. The first two scenarios are obviously clear and the statute is not ambiguous as to what would happen.

The Town contends that Hale was not the permanently appointed building official and rely upon the employment application. Yet, the Town does not refute the authenticity of the Historic District Design Guideline issued by the Town, which lists Hale as the appointed building official for the Town, but rather states that the evidence should not be reviewed. (Brief of Appellees

3-4) However, the Town's position that municipalities across the Commonwealth of Virginia do not have to appoint permanent building officials is absurd as that reading of Title 13, Agency No. 5, Chapter 63, Part I, Subsection 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code eliminates an entire section of the statutes as no building officials would have the statutory protection.

Additionally, the Town contends that the statutes "do not specify how, when, or even if a local governing body has to make a permanent appointment." (Brief of Appellees 8)

However, that is obviously incorrect under the plain language of the statutes. "**DCHD shall be notified by the appointing authority within 30 days** of the **appointment** or release of a **permanent or acting building official**." Title 13, Agency No. 5, Chapter 63, Part I, Subsection 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code (emphasis added).

Consequently, the Town was required to alert the Virginia Department of Housing and Community Development within thirty days of hiring Hale, as well as indicate Hale's position as permanent or acting. But, there is

nothing in the record that indicates whether the DHCD was alerted to Hale being appointed as a permanent or acting building official.

In this case, it appears that the DHCD was not alerted or that the DHCD was alerted and that additional discovery is necessary to properly determine the outcome of the case. Nevertheless, Title 13, Agency No. 5, Chapter 63, Part I, Subsection 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code do not state what happens if a municipality does not alert the DHCD of the appointment of a building official.

If the Town did not notify the DHCD and Hale is neither an acting or permanent building official then Hale contends that he should be a *de facto* permanent building official as that interpretation would carry out the legislative intent behind Title 13, Agency No. 5, Chapter 63, Part I, Subsection 105.1 of the Virginia Administrative Code and Section 105.1 of the Virginia Construction Code as held in Garrison, 241 Va. 335, 340 (1991). The legislative intent behind the statutes is to restrict the termination of a building official to serve the Commonwealth's interest in the "fair and impartial administration and enforcement of the building code."

Dodson v. Shenandoah County, 27 Va. Cir. 479 (Shenandoah County 1983).

Furthermore, the Town's argument does not hold water. The Town argued that by failing to appoint Hale, the town is entitled to protections from firing Hale without the required full hearing, a protection it would not have if it obeyed the law. The policy from supporting the Town's position would be devastating for the enforcement of the building code as municipalities across the Commonwealth of Virginia could evade the legislative intent by failing to permanently appoint a building official.

CONCLUSION

For the foregoing reasons the actions of the Town of Warrenton are invalid and cannot be sustained, and the decision of the Circuit Court sustaining such action should not be allowed to stand. Hale prays that the final order of the Circuit Court be reversed and that this case be remanded with instructions upholding the Compton Court's ruling in regards to its reading of Title 13, Agency 5, Chapter 63, Part I, Section 105.1 of the Virginia Administrative Code and Section 105.1, *de facto* building officials, and that the writ of mandamus is a proper remedy in this case.

Respectfully submitted,

Richard J. Conrod, Sr.

By *__/s/ Richard J. Conrod, Sr.__*

Richard J. Conrod, Sr. (VSB No. 35967)
Ryan R. Reyes (VSB No. 88532)
Conrod & Company Law Firm, P.C.
101 N. Lynnhaven Road, Suite 104
Virginia Beach, Virginia 23452
(757) 486-8700 Telephone
(757) 486-4858 Facsimile
rconrod@conrodlaw.com

CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify that on December 12, 2016, the correct number of true and accurate copies of this Reply Brief were hand-filed with the Supreme Court of Virginia and an electronic copy filed via VACES in PDF format, and an electronic copy via email in PDF format was served upon counsel for the appellee by first class mail: Heather Bardot, Virginia State Bar No. 37269, 9990 Fairfax Boulevard, Suite 400, Fairfax, Virginia 22030, hbardot@bmhjlaw.com.

__/s/ *Richard J. Conrod, Sr.*___

Richard J. Conrod, Sr. (VSB No. 35967)
Ryan R. Reyes (VSB No. 88532)
Conrod & Company Law Firm, P.C.
101 N. Lynnhaven Road, Suite 104
Virginia Beach, Virginia 23452
(757) 486-8700 Telephone
(757) 486-4858 Facsimile
rconrod@conrodlaw.com