In The

Supreme Court of Virginia

RECORD NO. 171030

PRINCE WILLIAM BOARD OF COUNTY SUPERVISORS, PRINCE WILLIAM COUNTY ZONING ADMINISTRATOR,

***Appellants*,**

v.

HENRY ARCHIE, JR.,

Appellee.

BRIEF OF APPELLEE

Jason E. Hickman (VSB No. 73645)
Heather R. Steele (VSB No. 75473)
COMPTON & DULING, L.C.
12701 Marblestone Drive, Suite 350
Prince William, Virginia 22192
(703) 583-6060 (Telephone)
(703) 583-6066 (Facsimile)
jeh@comptonduling.com
hrs@comptonduling.com

Counsel for Appellee

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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A. STATEMENT OF THE CASE

In response to the Statement of the Case offered by the Prince William County Board of County Supervisors (hereinafter "the County"), wherein the County argues that the Rules of the Supreme Court of Virginia at Rule 5:11 do not permit the filing of an "alternate statement of facts", Henry Archie, Jr. (hereinafter "Henry") states that he had no choice but to file an amended statement of facts as the County filed its written statement of facts without any citations to the record.(See St of Facts, 6/21/17).

Because of the failure by the County to submit a written statement with citations to the record, including the transcript from the underlying administrative hearing, Henry had to file its objections which included a revised written statement of facts that did include citations to the record. (See Obj to St of Facts, 7/6/17 and subsequently entered by Judge Farris on 7/10/17).

Therefore, the written statement of facts adopted by the Trial Court was adopted in accordance with the Rules of the Supreme Court of Virginia at Rule 5:11.

B. STATEMENT OF FACTS

As the Statement of Facts offered by the County is a mere restatement of the written statement of facts adopted by the Trial Court, Henry does not have any modifications thereto. However, Henry does offer the following additional facts from the record:

On or about May 24, 1991, the trial court in a prior zoning litigation matter involving the County and Henry (hereinafter "the Prior Zoning Litigation") entered a Final Decree finding that "Henry Archie, Sr. carried on the business of operating an automobile graveyard known as Penny's Auto Parts and located at 2421 Davis Ford Road, Woodbridge, Virginia, as defined in the Prince William County Zoning Ordinance prior to the adoption of the County Zoning Ordinance on September 1, 1958 and that the operation of the business has been continuous since that date," and that

the business was carried on upon Parcels 20 and 20B, which parcels are on either side of and adjacent to Parcel 20A-access to Parcel 20A is through either Parcel 20 or Parcel 20B. (See JA No. 4, Writ of Cert, Ex. A-13). Parcel 20A was not addressed because it was not before the court.

From 1995 to 2015, the County of Prince William and its officials took no action against Henry, concerning the alleged nonconforming status of Parcel 20A, permitting Henry's business to operate and pay taxes on Parcel 20A. The overall operations on Parcels 20, 20A and 20B continued from prior to the 1950's to the present. (See JA No. 6).

As noted in the County's Statement of Facts, twenty (20) years after the 1995 zoning matters were resolved, the County Zoning Administrator issued a determination denying Henry his status as a lawful, non-conforming use. (See JA No. 2). Thereafter, Henry appealed that determination. (See JA No. 1). During Zoning Appeals Hearing (hereinafter "BZA"), on March 28, 2016, Henry

presented uncontroverted evidence that Henry stored automobiles and auto parts on Parcel 20A at all times relevant to this matter. (See JA Nos. 4 and 6, Writ of Cert Ex. A, Tr. at pgs. 50-52).

Henry further presented uncontroverted testimony at the BZA Hearing that neither Land Management Groupe nor anyone else took any steps at any time to remove the automobiles and auto parts from Parcel 20A. (See JA Nos. 4 and 6, Writ of Cert Ex. A, Tr. at pgs. 41-42; 45-51). Henry and those testifying added that Henry did not remove them either. (*Id.*). In fact, his business operations continued on all three (3) parcels as they had since prior to the 1950's.

During the BZA Hearing, Henry put forth uncontroverted testimony through himself and numerous witnesses that the automobiles and auto parts were never removed from Parcel 20A and thus the use as an automobile graveyard on Parcel 20A had continued and was uninterrupted since 1958, including during the period of Land Management Groupe's ownership of Parcel

20A. (See JA Nos. 4 and 6, Writ of Cert Ex. A, Tr. at pgs. 28-52; 61-64; 65-67; 68-70; 71-72; 73-74; 75-78; 79-80; 81-84).

The Assistant County Attorney representing the County admitted during the BZA Hearing that the Zoning Administrator and other County officials had obtained no evidence that the nonconforming use was abandoned on Parcel 20A apart from the County Attorney and Zoning Administrator's interpretation of the court record. (See JA Nos. 4 and 6, Writ of Cert Ex. A, Tr. at pgs. 18, 115, 116). The testimony provided in this record is the only testimony before a court as to the **use of Parcel 20A**, as the previous trial courts noted that Parcel 20A was not before them.

C. STANDARD OF REVIEW, ARGUMENT AND AUTHORITIES

1) STANDARD OF REVIEW

Henry agrees with the County as to the Standard of Review on questions of law. Henry adds the following:

The Virginia Supreme Court has found: "The principles relevant to the construction of a zoning

ordinance are well established. The words of the ordinance are to be given their plain and natural meaning. The purpose and intent of the ordinance should be considered but the ordinance should not be extended by interpretation or construction beyond its intended purpose." Donovan v. County of Zoning Appeals, 251 Va. 271 (1996).

2) SUMMARY OF ARGUMENTS

The County is not and has not argued that the "**use**" of Parcel 20A ever ceased. Instead, the County has argued that the use by Henry was not lawful, and therefore cannot be "counted" as use under their ordinance. This confusion of terms should be closely examined as the County attempts to artfully change the definitions without changing the actual ordinances.

In fact, the Zoning Ordinances of Prince William County at § 32-601.11 specifically state "[t]he nonconforming status of any nonconforming use, lot or structure shall adhere **solely to the use of the land**, and **not to the owner**, tenant, **or other holder of any**

legal title to the property **or the right to make use thereof**" (emphasis added). The ordinance directs the County to the use, not to the right to make use thereof. Thus, the entire argument of the County is premised upon an application that is contra to the language of its own ordinance.

The County's argument is further compounded by a second misapplication of its ordinance where it argues that the owner of the property did not use the property in the nonconforming manner, so the ordinance does not apply. However, the ordinance clearly states that what matters is the actual use of the property (Henry places junk automobiles and auto parts onto the property), and not the use by the person with legal title to the property.

Lastly, the County attempts to twist its ordinance defining a lawful, nonconforming use by stating that a use that is declared unlawful in 1991 cannot be the basis for a lawful, nonconforming use. While Henry would agree that he could not establish a use as a

lawful, nonconforming use in 1991, Henry reiterates that his use commenced prior to 1958 and continued uninterrupted until the present. The artful play on words by the County should not be utilized to modify the plain meaning of the ordinances.

3) ARGUMENTS

RESPONSE TO ASSIGNMENT OF ERROR I: THE TRIAL COURT CORRECTLY HELD THAT HENRY HAD A LAWFUL, NONCONFORMING USE TO CONTINUE AN AUTOMOBILE JUNKYARD ON 13065 MINNIEVILLE ROAD BECAUSE HENRY CONTINUOUSLY USED THE PROPERTY AS AN AUTOMOBILE JUNKYARD IN CONFORMANCE WITH PRINCE WILLIAM COUNTY ORDINANCE § 32-601.11.

As noted above, the Zoning Ordinances of Prince William County at § 32-601.11 specifically state "[t]he nonconforming status of any nonconforming use, lot or structure **shall adhere solely to the use of the land**, and **not to the owner**, tenant, **or other holder of any legal title** to the property **or the right to make use thereof**". (Emphasis added). Regardless of whether Henry owned the property or had any legal right to use it, the ordinance merely requires that the use continue, which it has since prior to 1958.

Further, the County misapplies the Zoning Ordinances of Prince William County at § 32-601.10(1), which section defines a nonconforming use as "any use that was lawful on the date of the enactment of this chapter…". As testified to by the Henry and confirmed by the County, when the Nonconforming Use section of the Zoning Ordinances of Prince William County were adopted in 1958, the use of the subject property as an automobile salvage was lawful. In fact, the County had previously issued a certificate confirming this. The uncontroverted testimony was that this "use" continued from prior to 1958 until the current time.

The fundamental errors of the County in its argument demonstrate that the County is not applying its own ordinances. The County attempts to argue that the "lawful nonconforming use" designation commences after the determination in a prior litigation, which is not accurate. The lawful nonconforming use of the property was established prior to 1958, when the zoning

code was enacted, and merely continued through the present.

Further, the County argues the application of several different court cases, which clearly have no application to the case *sub judice*, stand for the proposition that Henry does not have a valid nonconforming use because Henry's use became not "legal" in 1991 after the finding in the Prior Zoning Litigation. To the contrary, the instant appeal involves <u>a use on a property that is clearly one that predates zoning and that obviously has continued uninterrupted since prior to the inception of zoning.</u> The caselaw cited by the County addresses factual situations wherein the use commenced after the zoning laws were in place, and, thus, those uses were not "legal" uses, which is not the case in this matter.

In fact, the County argues "while Archie began the use when it was legal to have an automobile junkyard on the property, it became illegal when Archie no longer had the legal right to use 13065 Minnieville Road as an

automobile junkyard."(See The County's Petition for Appeal, page 19). The facts underlying The County's argument are the essence of the definition of a lawful, nonconforming use as found at Zoning Ordinances of Prince William County § 32-601.10(1), which section defines a non-conforming use as "any use that was lawful on the date of the enactment of this chapter…".

Therefore, regardless of the attempts by the County to bootstrap caselaw that is entirely, factually distinguishable from the instant case, the lawful, nonconforming use of the subject property: (1) existed at the time of the enactment of the zoning ordinance; and (2) continued from that time prior to the enactment of the zoning ordinance until the present, uninterrupted. These are the uncontroverted facts.

The "use" of the property has never changed as to all times relevant to this matter. The Zoning Ordinances of Prince William County at § 32-601.11 address the use of the property – not ownership, not

legal rights, just the use. Therefore, the Henry has had a lawful, nonconforming use on his property.

RESPONSE TO ASSIGNMENT OF ERROR II: THE TRIAL COURT CORRECTLY HELD THAT HENRY HAD A LAWFUL, NONCONFORMING USE WHICH WAS NOT DISCONTINUED FOR A PERIOD OF TWO YEARS BECAUSE THE USE WAS CONSISTENT, DID NOT CEASE, AND WAS IN COMPLIANCE WITH PRINCE WILLIAM COUNTY ORDINANCE § 32-601.11.

The entirety of the County's argument relative to Assignment of Error II completely ignores the Zoning Ordinances of Prince William County at § 32-601.11. Instead, The County seeks to argue for the application of § 32-601.21, which provides for the determination that a discontinued use on a property for a period of two (2) years results in the loss of the lawful, nonconforming status. The County argues that the discontinuation occurred in the case *sub judice* because of the Court Order in the Prior Zoning Litigation, while, at the same time, agreeing that the "use" has continued. In other words, the County argues that because a 1991 Prior Zoning Litigation finding to have the parties remove automobiles, which was later cured

by payment of a fine and subsequent settlement of a case whereby no automobiles were removed, should bring about the application of § 32-601.21.

The County assumes away the issue by presuming there has been a discontinuance of the use because of the Prior Zoning Litigation, however, the uncontroverted evidence has demonstrated that there has been no discontinuance. The County, again, has a fundamental misunderstanding of the Ordinances of Prince William County. § 32-601.11 provides that the "use" is not defined by ownership or legal right, but is defined by the actual "use" of the property. The "use" has never been discontinued, meaning that § 32-601.21 does not even apply to this matter.

The County presumes, in contradiction of the County Ordinances, that the failure of the owner to "use" the property in conformity with the ordinances results in a loss of the lawful, nonconforming status. However, § 32-601.11 clearly states that the "use" exists regardless of legal right and regardless of whether the

owner or someone else employs that “use”. In this instance, for the brief period wherein the subject property was owned by someone other than family members of Henry, Henry continued to use the property in the same manner but the owner did not actively continue the use. There was no discontinuance of the use.

Additionally, the County misunderstands § 32-601.21. The County argues that because the owner does not use the property in a certain manner, then the property loses its lawful, nonconforming use status. However, this is contrary to the Ordinances. The ordinance (§ 32-601.21) provides for the “use” to be “discontinued for a period of two years” or the “cessation of a nonconforming use”, neither of which exist in the instant case.

A simple review of the record clearly indicates that the only evidence presented on the “use” of the subject property was from Henry and numerous witnesses who all testified that the “use” of the property was consistent and continuous. There was no testimony that

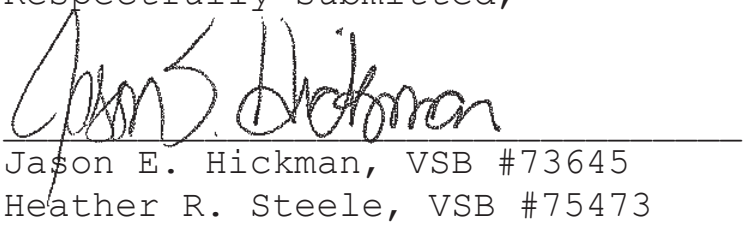
the actual "use" was discontinued or ceased—either twenty-six (26) years ago in 1991 or anytime thereafter.

D. CONCLUSION

As the Zoning Ordinances of Prince William County at § 32-601.11 specifically state **"[t]he nonconforming status of any nonconforming use**, lot or structure **shall adhere solely to the use of the land**, and **not to the owner**, tenant, **or other holder of any legal title** to the property **or the right to make use thereof**" (emphasis added), then Henry has a lawful, nonconforming use on the subject property.

Henry's "use" of the property (1) existed prior to the enactment of zoning; and (2) continued from that time until the present, uninterrupted. The only evidence before the Court is that the use existed and continues to exist on the property. Therefore, Henry respectfully requests that the Appeal of the County be denied.

Respectfully submitted,

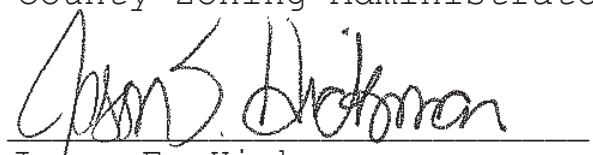


Jason E. Hickman, VSB #73645
Heather R. Steele, VSB #75473
COMPTON & DULING, L.C.
12701 Marblestone Drive, Suite 350
Prince William, Virginia 22192
Tel. (703) 583-6060
Fax (703) 583-6066
jeh@ComptonDuling.com
hrs@ComptonDuling.com
Counsel for Henry, Henry Archie, Jr.

E. CERTIFICATE OF SERVICE

I hereby certify that three paper copies of this Brief of Appellee have been hand-filed with the Clerk of the Court and an electronic copy was filed, via VACES. On this same day, an electronic copy of the Brief of Appellee was served, via email, upon:

Michelle R. Robl, Esq.
Wahaj Memon, Esq.
County of Prince William
One County Complex Court
Prince William, Virginia 22191
wmemon@pwcgov.org
mrobl@pwcgov.org
Counsel for The County
Prince William County Zoning Administrator



Jason E. Hickman
Counsel for Henry