In The

Supreme Court of Virginia

RECORD NO. 180178

RICHARD H. DWYER,

Appellant,

v.

TOWN OF CULPEPER,

Appellee.

REPLY BRIEF OF APPELLANT

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1. This appeal is timely.

The Town insists that the Code mandates that an order vesting title "'shall be final' and is immediately appealable." Brief of Appellee at 20. Only the first three words of this quote are in the statute; the other four constitute the Town's commentary. *See* Code §25.1-239(A).

The statute is directory, not mandatory. *Rickman v. Commonwealth*, 294 Va. 531, 536-38 (2017). To be mandatory, it would have to contain the italicized language shown here:

> A. The order confirming, altering or modifying the report of just compensation shall be final, *and any appeal thereof must be noted within 30 days under Rule 5:9, or it is untimely.*

Thus, the legislature has not curtailed trial courts' inherent power to postpone finality by using a familiar method: retaining jurisdiction.

The Town's position depends on an implicit rescission of that power, since nothing in the statute rescinds it expressly. The courts have – and must have – the power to control their own dockets. If the legislature had intended to take such a drastic step to micromanage trial courts' dockets, it would have done so transparently.

The Town advocates legislative intervention in a core judicial function: docket control. This incursion would violate the separation-of-powers doctrine:

> [W]hile the Legislature has the power to regulate the jurisdiction of circuit, county, and corporation courts, it cannot destroy, while it may confine within reasonable bounds, the authority necessary to the exercise of the jurisdiction conferred.

Carter v. Commonwealth, 96 Va. 791, 816, 32 S.E. 780, 785 (1899).

The September 11, 2017 order would have been final, but for the trial court's use of the phrase *retain jurisdiction*. Regardless of the limited scope of the remaining issues, the effect of this phrase is to postpone finality. *Super Fresh Food Mkts. of Va., Inc. v. Ruffin*, 263 Va. 555, 562 (2002). That postponement, employing the language that this Court has expressly prescribed, means that this appeal is timely.

2. The Town has abandoned its cross-error.

Rule 5:28(e)(2) requires an appellee to set forth in its brief "the standard of review and the argument – including principles of law and the authorities" for each assignment of cross-error. It further requires that these matters "shall be stated in one place and not scattered through the brief."

In its brief, the Town lists its cross-error on p. 19, and adds a footnote describing its relationship to Dwyer's assignment 1. It adds a single case citation – not on the merits of its cross-error, but on the right-for-a-different-reason doctrine. *Id*. n.24. There is no other identifiable mention of the cross-error in the brief.

The failure to present argument and authority is an abandonment of an assignment. *Lafferty v. Fairfax County Sch. Bd*., 293 Va. 354, 365 (2017).

3. The Town's unity-of-use argument is inconsistent with *Glass*.

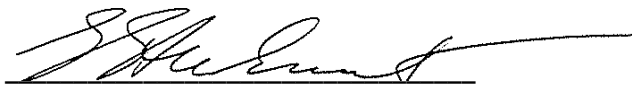
The Town expends considerable effort in arguing that *CTC v. Glass*, 270 Va. 138 (2005), requires a present joint use of parcels to satisfy the unity-of-use doctrine. It contends that this requirement wholly differs from highest-and-best-use analysis. Brief of Appellee at 32-36.

If this were correct legal analysis, the *Glass* opinion would have looked very different. There, the owner's three parcels did not, on the date of take, share a common use. 270 Va. at 142. If the then-current actual use were the only deciding factor, the opinion would have stated that, and ended there.

Instead, this Court analyzed at length the landowner's claim of a joint-development concept, *id*. at 150-52, eventually concluding that the development plan was, as of the date of take, "too remote and speculative to be credible." *Id*. at 153. This demonstrates that a contemplated use may be viable under unity-of-use analysis, as long as it is far enough along to be no longer remote and speculative. As noted in Dwyer's opening brief at 6-8, Dwyer's plans were fully underway when the Town took his property.

Accepting the Town's argument on this issue requires the Court to overrule *Glass* in favor of a simplistic temporal test. The Town offers no reason to make this change. The evidence here, when measured according to *Glass*, created an issue for the jury, and the jury should have been properly instructed on Dwyer's contention.

RICHARD H. DWYER

By: 

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CERTIFICATE

I hereby certify that on this 13th day of December, 2018, pursuant to Rule 5:26, three paper copies of the Reply Brief of Appellant were hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Reply Brief of Appellant was served, via email, upon:

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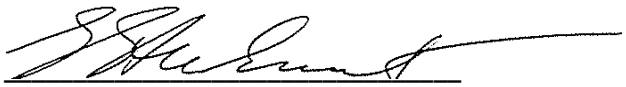

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