NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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July 20, 2017

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Re: Douglas A. Cohn and Kathryn J. Cohn v. Board of Supervisors for the County of Fairfax, Virginia; CL-2017-4596

Dear Counsel:

This matter is before the Court on the Petition for Writ of Certiorari filed by Appellants Douglas A. and Kathryn J. Cohn seeking review of the Notice of Violation rendered by the Board of Zoning Appeals and Board of Supervisors of Fairfax County. In accordance with Virginia Code § 15.2-2314, the Court has reviewed all memoranda submitted and the record of the BZA proceedings and has fully considered the oral argument presented by counsel. For the following reasons the decision of the Board of Zoning Appeals is reversed and the Court finds in favor of the Appellants.

Background

Douglas A. and Kathryn J. Cohn ("Appellants/ the Cohns") are the residents and owners of 6601 Georgetown Pike in McLean, Virginia ("the Property"). The Cohns first resided on the Property as tenants and then as owners beginning in 1998. Throughout the entirety of the nineteen-year period that the Cohns have lived on the Property, three separate structures have existed on the Property and those same three structures have been occupied as dwelling units.

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From the time the Cohns acquired the Property in 1998, they paid taxes on the Property as assessed by Fairfax County. The Cohns first received a Notice of Violation from the Fairfax County Zoning Administrator on August 4, 2016 indicating that two of the three dwellings on the Property violated Fairfax Zoning Ordinance 2-501, as the Property was located in an R-1 district which prohibits the existence of more than one dwelling on a single property.

Between 1998 and 2008, while the Cohns were paying taxes to Fairfax County, there was no indication that the three separate structures on the Property were subject to separate tax assessments. In 2008, the Department of Tax Administration ("DTA") sent an assessor to the Property to assess the detached garage and garden shed, personally known to the Cohns as the "Carriage House" and "Garden House," respectively. For the first time since the Cohns became owners of the Property, the DTA issued a separate tax card for the Carriage House and specifically indicated that due to water damage, the Garden House was "unusable" and therefore remained on the tax card of the main dwelling. The DTA returned to the Property in 2010 and indicated that the Garden House was now usable and therefore eligible to be taxed separately. 2010, therefore, was the first year that the County indicated that the three structures were to be taxed separately.

Shortly thereafter the Cohns received the Notice of Violation. In the decision regarding the Notice of Violation, the Zoning Administrator indicated, and the Cohns conceded, that the Carriage House and Garden House were not constructed with requisite building permits nor were they issued a "use permit." As a result, the Zoning Administrator ordered the Cohns to remove, "on a permanent basis," the illegal improvements to the Carriage House and Garden House within fifteen days. The Zoning Administrator also required the Cohns to obtain a demolition permit to remove all electrical circuits, plumbing fixtures, and piping, but did not require the removal of the actual structures.

The Cohns appealed under Virginia Code §15.2-2307(D)(ii) which grants vested rights to owners of property who have paid taxes on a nonconforming structure for a period of 15 years. After the Cohns first appealed the Notice of Violation, the Fairfax County Board of Zoning Appeals ("BZA") determined that Virginia Code §15.2-2307(D) did not protect the Property due to the fact that the Cohns have not been paying taxes on each separate structure for a period of 15-years and moreover, the statute does not protect the unlawful use of a structure in violation of a zoning ordinance.

After the BZA denied the Cohn's appeal and affirmed the Notice of Violation, Appellants filed a Writ of Certiorari with the Circuit Court to determine if the Property falls under the protection afforded by Virginia Code §15.2-2307(D)(ii).

The County argues that since separate tax cards were not issued until 2008 and 2010, it is impossible for the Cohns to have paid taxes on the nonconforming structures

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so as to be protected by §15.2-2307(D)(ii), and even if they did pay the requisite taxes, the zoning ordinance does not permit nonconforming structures to be used in the manner in which the Cohns have used their property. This Court disagrees.

Standard of Review

Virginia Code §15.2-2314 requires this Court to review a BZA decision for errors of law *de novo*. The findings and conclusions of the BZA on any question of fact shall be presumed correct, however, the appealing party may suggest the BZA erred in its decision and rebut that presumption by a preponderance of the evidence. Any party may introduce evidence during the appeal, and as such, the court is not bound by the record below. *In re November 20, 2013 Board of Zoning Appeals for Fairfax County*, 89 Va. Cir. 345 (2014).

Analysis

The factual findings in this case are not in dispute and the Court will review the issues of law raised under Virginia Code §15.2-2307 *de novo*. Va. Code §15.2-2307 addresses "vested rights not impaired; nonconforming uses" and subsection (D)(ii) reads in relevant part:

> "Notwithstanding any local ordinance to the contrary, if . . . the owner of the building or structure has paid taxes to the locality for such building or structure for a period of more than the previous 15 years, a zoning ordinance shall not provide that such building or structure is illegal and subject to removal solely due to such nonconformity."
>
> Va. Code §15.2-2307

The Court believes the issues in this case are twofold: first, does §15.2-2307 require property owners to pay separate taxes on each nonconforming structure based only on its use and second, if it does, is it the property owner's responsibility to determine that a dwelling on his or her property requires the payment of a separate tax assessment?

Considering each in turn, the purpose of Va. Code §15.2-2307 is to "provide for the vesting of a right to a permissible use of property against any future attempt to make the use impermissible by amendment of the zoning ordinance." *Town of Leesburg v. Long Lane Assocs Ltd P'tship*, 284 Va. 127 (2012). Moreover, Dillon's Rule expressly provides that "municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." *Lamar Co , LLC. v City of Richmond*, 287 Va. 348, 352

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(2014) (quoting *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 417 (2010) (internal quotation marks omitted)).

In *Lamar Co., LLC. v. City of Richmond*, the Supreme Court clearly indicated that §15.2-2307, when read in accordance with Dillon's Rule, prohibits local governments from "declaring an existing building or structure illegal after taxes have been paid for 15 years or more." *Id.* The property at issue in that case was a billboard which has dual functions as both a structure and use. While the *Lamar* court had different factual issues before it, this Court believes the holding remains applicable. The Supreme Court made no reference to the specifics on how taxes are to be paid to fall within the statute's protection and the statute itself is silent as to this issue.

In *Town of Leesburg v. Long Lane Assocs Ltd P'tship*, above, the Supreme Court's reasoning suggests that the purpose §15.2-2307 is to cover permissible *use* of property, rather than a permissible structure. In *Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448 (2007), the court stated that a vested right under §15.2-2307 is acquired by a landowner if the nonconforming use was in existence on the effective date of a zoning ordinance. Both cases consider the actual use of the property rather than the existence of the structure alone.

While those cases address §15.2-2307 under different circumstances, it is clear that the statute covers both the structure and its use when considering vested rights. Section 15.2-2307(d)(i) specifically mentions the word "use" and while §15.2-2307(ii), the provision upon which Appellants rely in this case, does not raise "use," this Court will read the statute in its entirety and will not separate the two portions of §15.2-2307 to require different things. *Herndon v. St Mary's Hospital, Inc.*, 266 Va. 472, 476 (2003) (stating that the Court will not single out a particular term or phrase of a statute when determining legislative intent).

The question then becomes if it was the Appellants' burden to determine that the use of their property was in violation of a Fairfax County Zoning Ordinance 2-501 and then disclose that information to the proper authority while also determining the amount of taxes to be paid on each separate structure. No reading of §15.2-2307 or any other statute in the Commonwealth that addresses property tax could reasonably come to that conclusion. Appellants have been owners of the Property for two decades and had undergone the appropriate title and records searches prior to purchasing the Property. No encumbrances or liens were discovered nor were any zoning violations. The burden the County would place on a homeowner by and through their interpretation of the statute is neither reasonable nor workable.

Virginia Code §58.1-3252 requires a general reassessment of real estate every four years. Counties may choose the annual or biennial method. §58.1-3275

clearly directs the county to conduct that reassessment. In *County of York v. Peninsula Airport Com* , 235 Va. 477 (1988), the Supreme Court found that the county's incorrect tax assessment of the property at issue was not a justification to require the Peninsula Airport Commission to pay more taxes than required. The Court stated that the county could not "ignore the procedures and safeguards mandated by statute without offending due process principles." *Id.* at 483-84. The Code is clear when it indicates that it is the responsibility of the County alone to assess, reassess, or correct any erroneous assessments regarding taxation of property.

The DTA, choosing to tax the Appellants' property at different times and for different reasons does not render meaningless the fact that the Cohns paid taxes to Fairfax County in the manner the County determined. This is made clearer by the fact that the DTA assessor indicates during the review hearing that the taxes would have been "much higher" if the Cohns had only revealed to the County that the Carriage House and Garden House were being used as rental properties. While perhaps there is a question about good faith on part of the Appellants, that issue is not before the Court at this time.

Conclusion

Section 15.2-2307(d)(ii) protects individuals with nonconforming structures from future zoning amendments so long as taxes have been paid on the property. The Cohns have paid taxes to Fairfax County since they became owners of the Property in 1998. Fairfax County may have erred when failing to classify the Carriage House and Garden House as separate structures at the time the Cohns purchased the Property, but that does not remove the Appellants from the protection afforded under §15.2-2307(d)(ii) and §15 2-2307(d)(ii) certainly does not require the Appellants to destroy or otherwise modify the structures.

In accordance with §15.2-2314 and §15.2-2307(d)(ii), the decision of the BZA is reversed and the court finds that the Cohns' property, including all three nonconforming structures, are protected under 15.2307(d)(ii). I have entered an Order reflecting this ruling.

Very truly yours,

[redacted]

Thomas P. Mann
Judge, Circuit Court of Fairfax County

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re: March 1, 2017, Decision of the Board of Zoning Appeals of Fairfax County, Virginia	)	
DOUGLAS A. COHN,	)	**Law No. CL-2017-4596**
And	)	
KATHRYN J. COHN **Appellants,**	)	
v.	)	
BOARD OF SUPERVISORS FOR THE COUNTY OF FAIRFAX, VIRGINIA **Respondent**	)	

ORDER

IT APPEARING to the Court that, due to the reasons set forth in its Letter Opinion attached hereto, it is:

ORDERED, ADJUDGED, AND DECREED that in accordance with §15.2-2314 and §15.2-2307(d)(ii), the decision of the BZA is reversed and the Cohns' property, including all three nonconforming structures, are protected under 15.2307(d)(ii). As well, the County's Plea in Bar is overruled with prejudice.

ENTERED this 20 day of July, 2017.

[redacted]

Thomas P. Mann
Judge, Circuit Court of Fairfax County

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA