NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 9, 2020

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Re: ***Leslie B. Johnson, Fairfax County Zoning Administrator v. David Morgan, et. al.***
Case No. CL-2019-13580

Dear Counsel:

This is an action to enforce an unappealed Order of the Board of Zoning Appeals ("BZA"). The issue before the Court is whether a property owner may, in a post-adjudication enforcement action, collaterally attack the BZA's adjudication or argue a subsequent correction of the violation. This Court holds a property owner may not collaterally attack an adjudication of the BZA during a subsequent action to enforce the BZA's finding. However, a property owner may argue correction of the previously adjudicated zoning violation as an affirmative defense in the enforcement action. The property owner seeking to do this has the implicit burden of proving the correction. In the present case, the property owner failed to prove correction of the zoning problem, so an injunction against the property owner shall issue.

OPINION LETTER

I. A STATIONARY TRUCK PARKED IN A RESIDENTIAL NEIGHBORHOOD.

Defendants David and Nyaint Morgan (the "Morgans") own the property located at 12513 Easter Lane, Fairfax, Virginia 22030, in a residential neighborhood. When a neighbor complained that the Morgans appeared to operate an HVAC business from their property, Ronald Gibson ("Mr. Gibson") of the Fairfax County Department of Code Compliance investigated. Mr. Gibson issued the Morgans a Notice of Violation on March 6, 2019. (Pl. Ex. 1.) It identified a "green step van/box truck type vehicle" on the property in apparent violation of zoning prohibitions against parking commercial vehicles on residential property. (*Id.*) To give a clearer picture, the vehicle is the same type as the familiar brown delivery trucks UPS uses. (Tr. Test. Gibson.) The Notice directed the Morgans to remove the vehicle from their property. (Pl. Ex. 1.)

David Morgan ("Mr. Morgan") appealed the Notice to the BZA on March 15, 2019. (Pl. Ex. 2.) There is no evidence Nyaint Morgan ("Ms. Morgan") appealed. During the BZA hearing, Mr. Morgan sought to prove that the truck at issue was a recreational vehicle ("RV") which he was entitled to park on his property as an exception to the ban on commercial vehicles. He offered photographs to show he converted the truck into an RV by installing a hot plate, refrigerator, sink and holding tank for potable water, outside spigot, and inverter. (Def. Ex. 3.) He conceded at the hearing that he added all but two of these features after receiving the Notice of Violation. (Pl. Ex. 4.) He testified the conversion items all worked, but he refused to show Mr. Gibson. (*Id.*).

The BZA denied the appeal on June 26, 2019 during a public hearing that was played in its entirety during the present trial. (Pl. Ex. 4.) Based on Mr. Morgan's own admission, the BZA determined that the Notice of Violation was true at the time Mr. Gibson issued the Notice, so the BZA affirmed the Notice and did not conclude whether Mr. Morgan converted the truck into an RV prior to the hearing. A letter from the BZA repeating its conclusion was issued July 3, 2019. The Morgans did not appeal the BZA decision.

To enforce the BZA ruling, Leslie B. Johnson, Fairfax County Zoning Administrator ("Administrator"), filed a Complaint for Declaratory Judgment and Injunctive Relief in the Circuit Court on October 2, 2019. She seeks an injunction ordering the Morgans to remove the truck from their property and to stop storing prohibited vehicles there. The Morgans assert the truck is now an RV and, therefore, complies with the zoning law. However, they still will not permit the Administrator to inspect the truck.

The trial evidence closely incorporated the evidence from the BZA hearing, adding little additional information. The Administrator maintained the unappealed BZA decision was a "thing decided." The Administrator's position is that the BZA already ruled the truck violated the Zoning Ordinance of Fairfax County, Virginia (the "Ordinance"), so she wants the Morgans to remove the truck from their property. She objects to the Morgans' gambit to collaterally attack the decision in the present enforcement action. The Morgans introduced into evidence the same photos offered to the BZA. Mr. Morgan added a video, made prior to the BZA hearing, which showed the inside of the truck. (Def. Ex. 1.) The video did little to amplify the photos; neither the

photos nor the video depicted any of the purported RV additions in working condition. It is impossible to confirm their working condition simply by looking at the photos and video. Mr. Morgan conceded this in his testimony. (Tr. Test. Morgan.)

The truck itself has been parked in the same location for over a decade. (Tr. Test. Gibson.) The RV conversion additions appear slapdash at best. The truck interior is filthy and rusty. There are various exposed wires and pipes depicted in both the photos and the video. The water tank appears to be a common, white, plastic bucket that commercial painters often use. The spigot is a garden-style outdoor hose spigot. Looking at the photos and video, one cannot tell how water gets into the truck, and there was no credible testimony presented as to how it does. Mr. Morgan testified the conversion additions all worked. (Tr. Test. Morgan.) However, he steadfastly declines to permit the Administrator to inspect the truck for compliance.

II. A PARTY MAY NOT COLLATERALLY ATTACK AN UNAPPEALED BOARD OF ZONING APPEALS DECISION IN A SUBSEQUENT ENFORCEMENT ACTION.

When the Morgans chose not to appeal the BZA decision declaring the truck to be a commercial vehicle, they gave up the right to contest that decision.[1] The issue as to the status of the truck was "a thing decided" and not subject to attack by the Morgans. *Bragg Hill Corp. v. City of Fredericksburg*, 297 Va. 566, 583-84 (2019); *Gwinn v. Alward*, 235 Va. 616, 621 (1988). In *Bragg Hill*, the Court wrote:

> "To allow [the Morgans] to independently seek a [conforming] rights determination in circuit court, beyond the 30-day appeal period following the BZA's determination, would render Code § 15.2-2314 meaningless. This would defeat the purpose of the administrative determination authorized by Code § 15.2-2286(A)(4) because any final decision of a zoning administrator, affirmed by the BZA, would be eternally subject to collateral attack in a future circuit court proceeding."

297 Va. at 583-84. Virginia Code § 15.2-2314 sets forth a scheme wherein the BZA decision enjoys the status of a trial court, and in appeals, the circuit court takes on the role of an appellate court—the BZA's findings and conclusions on questions of fact are presumed correct and its rulings of law are subject to de novo review. If the Morgans could collaterally attack the BZA's finding of a zoning violation, it would effectively strip the Circuit Court of its appellate jurisdiction. The Court would have to hear the BZA's case anew. The Morgans had their opportunity to appeal; they forfeited it. They argue that appeals from the BZA are discretionary, and they opted out. They assert that they may argue the violation in Circuit Court. However, the Supreme Court of Virginia squarely rejected that argument. *Bragg Hill Corp*, 297 Va. at 580-81.

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[1] Since Ms. Morgan did not appeal the Notice of Violation to the BZA, the pre-BZA violation finding determination is final as to her.

Because the Morgans did not appeal the BZA decision, the BZA's decision that the truck constitutes a zoning violation is a "thing decided." As of the date of the Notice of Violation, the truck was an impermissible commercial vehicle and not an RV. Thus, the Morgans cannot collaterally attack the BZA's decision that there was a violation. The violation is decided.

III. SUBSEQUENT CORRECTION OF AN UNDERLYING VIOLATION MAY BE A DEFENSE IN AN ENFORCEMENT ACTION.

The Morgans do not really dispute their violation prior to the Notice of Violation. Rather, their position is they complied with the Ordinance after the Administrator issued the Notice of Violation. They claim they did so by successfully converting their impermissible commercial truck into a permissible RV. They object to an injunction due to their current compliance. Assuming, arguendo, the Morgans' truck is now a successfully converted RV in full compliance, can they assert this as a defense in the enforcement hearing? The Court holds they can.

Nothing in the Ordinance bars a property owner from bringing his property into compliance, nor should there be—it is self-evident that the government's goal is compliance with the Ordinance. This is probably why the Administrator seeks an injunction and not a civil fine. However, without a curative provision in the Ordinance, it is unclear who has the burden of proof of a correction. In the present case, the Administrator expects the property owner to carry this burden and prove compliance. In oral argument, she asserted that, if the Morgans would only open their truck for inspection to the Administrator, she would approve the correction if the Morgans really converted the truck into an RV. The Morgans appear to argue that the Administrator must prove the violation continues once they claim the violation is corrected.

The Court agrees with the Administrator. After being found in violation of the Ordinance, the burden of proving a subsequent correction must lie with the property owner alleging the correction. Such a burden is implicit as there is no language in the Code of Virginia or Ordinance explicitly placing such a burden on the property owner. However, a subsequent correction is clearly an affirmative defense.[2] Defendants have the burden of proof for most affirmative defenses.[3] If the burden of proving a purported correction did not shift to the property owner after being found in violation of the Ordinance, then a property owner's bald assertion of "I fixed it" would require the Administrator to relitigate a case she already won when the judicial body agreed with her initial claim of a violation. This could result in an endless loop of allegations and claims of correction. Logically, the property owner must, post-violation, come forward with evidence proving the correction.

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[2] An "affirmative defense" is a "new matter which, assuming the complaint to be true, constitutes a defense to it." BLACK'S LAW DICTIONARY, 55 (5th ed. 1979).

[3] *See, e.g., Northrop Neurosurgical Specialists, Inc. v. Huntington Ingalls, Inc.*, 2020 WL 3966848 (Va. App. 2020) (citing *Grumman Shipbuilding, Inc. v. Wardell Orthopaedics, P.C.*, 67 Va. App. 420, 434 (2017) (accord and satisfaction is an affirmative defense with burden shifting)); *see also Duggin v. Adams*, 234 Va. 221, 229 (1987) (justification or privilege is an affirmative defense with burden shifting).

The parties disagree as to when a property owner may try to prove compliance with a zoning ordinance after being found in violation of it. The Morgans claim they may do so during the post-violation enforcement action. The Administrator maintains it must occur at some point after an enforcement action, and a property owner is barred from raising the subsequent compliance as an affirmative defense.

The Court agrees with the Morgans. It makes no sense that a property owner who corrects a zoning violation after a violation finding must wait to prove correction in a third lawsuit.[4] As long as the property owner bears the burden of proof of any correction after being found in violation, there is no good reason to make a property owner wait to offer that proof. Considering the Ordinance is silent as to barring the affirmative defense of a subsequent correction in an enforcement action, the property owner can raise this defense. The distinction is important, however. There is a difference between the Morgans challenging the BZA's violation finding in the enforcement action versus offering proof that they submitted to the BZA's finding by correcting the violation. The Morgans are not doing the former; they seek to do the latter.

IV. THIS UPS-STYLE TRUCK IS NOT AN RV.

Unfortunately for them, the Morgans failed to carry their burden of proving a successful conversion of their impermissible commercial truck into a permitted RV. While they could, and did, present evidence of their affirmative defense—their alleged conversion—the Court did not believe they really converted their truck.

An RV, or technically, a "motor home,"

> "must contain contains at least *four* of the following permanently installed independent life support systems that meet the National Fire Protection Association standards for recreational vehicles: (i) a cooking facility with an onboard fuel source; (ii) a potable water supply system that includes at least a sink, a faucet, and a water tank with an exterior service supply connection; (iii) a toilet with exterior evacuation; (iv) a gas or electric refrigerator; (v) a heating or air conditioning system with an onboard power or fuel source separate from the vehicle engine; or (vi) a 110-125 volt electric power supply."

VA. CODE ANN. § 46.2-1500 (emphasis supplied). The Morgans claim their vehicle has: (1) a cooking facility in the form of an electric "hot plate;" (2) a potable water supply; (3) a refrigerator; and, (4) a 110-125 volt electric power supply. The Court disagrees.

As an initial point, the Morgans failed to prove *any* of the four conversion items actually work. While Mr. Morgan testified they all worked, the Court is not bound by the bare assertion of a party. The familiar factors a factfinder uses to weigh the credibility of a witness include:

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[4] The Court considers the three lawsuits as follows: (1) the finding of the violation; (2) the enforcement action; and, (3) the action to prove the correction.

> "the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of that case, their bias, and if any has been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case."

Williams v. Auto Brokers, 6 Va. App. 570, 574 (1988) (citing Virginia Model Jury Instructions, No. 2.020).

Here, the Court considered Mr. Morgan's obvious interest in the outcome of the case in weighing his credibility. He is clearly exasperated with the Administrator. The Court also considered (1) that his photos and video suspiciously failed to show the purported conversion items actually working; (2) that the truck had been in the same place for over a decade, indicating it may have been inoperable; (3) the slapdash condition of the alleged conversion and the filthy condition of the interior; and, (4) Mr. Morgan's consistent refusal to permit an inspection of the vehicle even after the BZA determined it was not an RV. Combined, the Court did not believe Mr. Morgan's uncorroborated claim that his conversion items worked and the truck was really an RV.

Even if the conversion items did work, he did not prove all four of his conversion items complied with the statute. First, while he claimed to have a "hot plate" as his "cooking facility," there was no evidence of an onboard power or fuel source for it, as required by Virginia Code § 46.2-1500. He pointed to the inverter next to the hot plate. However, an inverter is not a power supply by itself. Rather, it is "an apparatus that converts direct current into alternating current." NEW OXFORD AM. DICTIONARY, 914 (3d ed. 2010). A power source would be a battery or generator. No evidence was offered at trial that the truck contained either. Since the truck has been in the same location for a decade, the Court doubts it has a functioning battery.

Second, while the truck appeared to have an exterior spigot, there was no evidence it or anything else could be used to supply the interior water tank, meaning it is not a "potable water system" as defined by Virginia Code § 46.2-1500 (requiring an "exterior service supply connection"). Rather, it looked like a common garden hose spigot from which water exits the home, not a connection that could "supply" the potable water tank as required by the statute.

The Court does not believe the commercial vehicle was truly converted into an RV. So, even though Mr. Morgan could present evidence of his subsequent compliance with the Ordinance as a defense in the present enforcement action, he failed to prove his case.

V. INJUNCTIONS ARE APPROPRIATE ZONING VIOLATION REMEDIES.

The Administrator seeks an injunction. She wants the Morgans to remove the commercial vehicle and not bring it back unless it truly has been converted to a permissible use. The Administrator is concerned the Morgans will remove the vehicle only to return it soon thereafter,

forcing the Administrator to start all over with a new enforcement action. The inherently mobile state of a functioning truck makes this a particular concern. The Morgans object to an injunction, arguing an injunction is an extraordinary remedy that is inappropriate in this case.

Injunctions are, indeed, typically extraordinary remedies. The "traditional prerequisites" for one include irreparable harm and lack of an adequate remedy at law. *Virginia Beach S.P.C.A., Inc. v. South Hampton Rds. Veterinary Ass'n*, 229 Va. 349, 354 (1985). However, injunctions for zoning ordinance violations do not fall under the traditional test.

> "Although proof of irreparable harm and proof of the lack of an adequate remedy at law are prerequisites to a grant of injunctive relief under a court's traditional equity jurisdiction, neither showing is required when a statute or ordinance expressly empowers a court to grant injunctive relief against its violation. In that case, *all that is required is proof that the statute or regulation has been violated.*"

Ticonderoga Farms, Inc. v. County of Loudoun, 242 Va. 170, 176 (1991) (internal citations omitted) (emphasis supplied).

The General Assembly expressly permits counties to enact zoning ordinances with injunctive remedies. VA. CODE. ANN. § 15.2-2286(A)(4). With this authority, Fairfax County enacted the Zoning Ordinance of Fairfax County, Virginia §18-101(3) to embrace the power to seek an injunction. As stated in *Ticonderoga Farms*, injunctive relief merely needs a statutory grant of injunctive power. Here, since the Ordinance and enabling legislation create that grant, the Administrator properly seeks it and an injunction will lie.

VI. CONCLUSION.

A property owner may not collaterally attack an adjudication of the BZA during a subsequent action to enforce the BZA's finding. An adjudication of the BZA is a "thing decided." However, as an affirmative defense in a subsequent enforcement action, property owners may present evidence that they subsequently brought their property into compliance with the zoning ordinance, and enforcement is no longer warranted. Even though the Morgans could assert their subsequent compliance as a defense, the evidence did not prove the truck was successfully converted from an impermissible commercial truck into a permissible RV. The Court finds in favor of the Administrator, declares the BZA finding that the truck is an impermissible commercial vehicle as final, rejects the Morgans' affirmative defense that they corrected the violation, and grants the Administrator's request for an injunction.

Mr. Foltz will please prepare a sketch order consistent with and referencing this Opinion Letter, endorse it and note any objections, transmit it to Mr. Dain for his endorsement and opportunity to note objections, and submit it to the Court for entry.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

OPINION LETTER