

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF STAUNTON

**IN RE: JUNE 12, 2018 DECISION OF THE BOARD OF ZONING APPEALS OF
THE CITY OF STAUNTON, VIRGINIA**

CITY OF STAUNTON, VIRGINIA, a municipal corporation, *et al.*

Petitioners

v.

Case No. CL 18000404-00

DEBRA CHILTON-BELLONI

Respondent.

**PETITIONERS' MEMORANDUM IN RESPONSE TO
RESPONDENT'S MOTION TO DISMISS**

Petitioners, City of Staunton, Virginia, City Council of the City of Staunton, Virginia and Rodney S. Rhodes, Zoning Administrator, respectfully submit this memorandum in response to the Motion to Dismiss (herein, the Motion) filed by Respondent, Debra Chilton-Belloni, and request the Court deny the Motion, as the matter before the Court is not moot.

History

Without ploughing through all of the detailed history in this dispute, which has continued without resolution for about twelve years, a few relevant facts are worth consideration. In 2007 Respondent and her late husband constructed a Wall (herein, the Wall) on their property in the City of Staunton (herein, the City), despite hand-delivered notice from the City that the Wall violated the City's Zoning Ordinances. Since that time Respondent has refused to lower or remove the Wall, and though the City repeatedly sought for her to bring the Wall into legal compliance without the necessity of litigation, she instead used various legal and procedural

maneuvers and intransigence for over a decade to evade compliance with the same laws to which her neighbors adhere and expect observance.

In a 2009 judgment order, this Court reversed an erroneous variance granted by the Staunton Board of Zoning Appeals (“the BZA”), which enabled Respondent to keep the Wall in its present state, notwithstanding the BZA’s finding that the Zoning Administrator’s interpretation was correct that the Wall contravened the Zoning Ordinances. Nevertheless, and despite numerous City efforts to achieve cooperation and compliance, Belloni steadfastly refused to follow the law.

In 2014, Sharon E. Angle (“ZA Angle”), as then Zoning Administrator for the City, filed suit to enjoin compliance with the Zoning Ordinances, noting the continuing illegality of the Wall, a reality which Respondent did not contest. ZA Angle therefore requested a mandatory injunction compelling compliance with the Ordinances, the removal and remediation of the non-compliant parts of the Wall, and other relief.

Roughly coinciding with the filing of that Complaint, on May 9, 2014 Respondent sought a “modification” from the Zoning Ordinances from ZA Angle in order to permit the Wall to remain. ZA Angle responded by letter, dated May 30, 2014, stating that she lacked authority to make any such modification, and that the Circuit Court had previously rejected Respondent’s position that application of the Zoning Ordinances to the Wall constitutes an undue hardship. A week later, on June 5, 2014, Respondent again applied to the BZA for a variance as to the “size, height, location or features” of the Wall, asserting that enforcement of the zoning ordinance would subject her to “an undue hardship warranting a variance.” However, she cited no hardship at all, and the issue presented was essentially the same issue was adjudicated by the Circuit Court some five years earlier, in 2009, when it overruled the prior BZA grant of a variance to Belloni with

respect to the very same Wall. The present case stems from that renewed, and essentially repetitive application.

On June 12, 2018, the BZA conducted a hearing on Respondent's renewed application, at which time it, by a slim 3-2 vote (three of the two in the majority having also been among the majority granting the variance previously overturned in 2008), unlawfully purported to grant Ms. Chilton-Belloni the variance she so persistently demanded. Following authorization from City Council, on July 3, 2018 Petitioners filed the Petition presently before the Court, appealing the BZA's illegal act and seeking to require of Respondent compliance with the same laws to which her neighbors in the City regularly comply.

After at least six motions filed by Respondent's counsel for a continuance due to his status as a State Senator, Petitioners were finally permitted to schedule this case for trial at the motions day of April 9, 2019, more than nine months after the Petition was filed. On July 8, 2019, however, in an effort to avoid trial, Respondent filed a Motion to Dismiss Petition as Moot (the Motion), arguing that passage of an uncoded Act during the 2019 General Assembly, when considered in conjunction with statutory amendments adopted into law in 2017, combine to render the present controversy moot. The trial was therefore continued to October 8, 2019, and a hearing for argument on the Motion is now scheduled for the previous trial date of September 3, 2019.

It is important to consider that the City's appeal in this case does not seek removal of the entire Wall. The City merely asks, as it has throughout the long history of this protracted litigation, that Respondent *reduce the height* of her Wall and bring it into compliance with the zoning ordinance. Despite repeated offers by the City to reach a compromise resolution of the

dispute, Respondent has rejected all such suggestions and instead demands that she be granted special and separate treatment which will afford to her certain legal privileges and exceptions which her neighbors do not enjoy. The City cannot, and will not, accede to those demands; nor should it. The Wall should be brought into compliance with the law, and Respondent's repetitive requests for a variance should be rejected.

The legislative enactments cited by Respondent in the Motion do not operate to render the present controversy moot. To the contrary, they are inapplicable to the matters at issue in this case, and consideration of their terms makes plain that this case should, and must, finally proceed to trial.

I. The Belloni Uncodified Act is invalid and illegal Special Legislation.

Respondent bases the Motion on the passage of legislation adopted by the General Assembly in its 2019 session and signed by the Governor but never codified. Introduced in the House of Delegates by Del. Richard Bell, R-Staunton, the legislation (herein, the Belloni Uncodified Act) reads, in relevant part:

A Wall built on residential property shall be grandfathered as a valid nonconforming use, and the Wall shall not be subject to removal solely due to such nonconformity, in any instance where (i) a residential property owners sought local government approval prior to 2008 for construction of a Wall on the owner's property, (ii) the property owner ***was informed by a local official that such Wall required no permit*** and that the structure would comply with the zoning ordinance, (iii) the Wall was thereafter constructed, (iv) the locality subsequently informed the property owner that the Wall was illegal, ***and (v) such a Wall, had it been constructed as described in clauses (ii) and (iii) after 2017, would be considered a valid nonconforming use not subject to removal.***

(Emphasis supplied.)

Discussion of the bill which ultimately became the Belloni Uncodified Act is notable in that, at least in the Senate, it was entirely centered around the Wall at issue in this case. Two

videos of those discussions in the Virginia Senate can be found at https://virginia-senate.granicus.com/MediaPlayer.php?view_id=3&clip_id=2570 (introduction in committee) and https://virginia-senate.granicus.com/MediaPlayer.php?view_id=3&clip_id=2592 (floor discussion and vote). Those videos are incorporated into this Memorandum by reference, and Petitioners request that the Court take judicial notice of the same as official state records. In committee, Sen. Stanley asked Del. Bell, who presented the bill:

Sen. Stanley: Wasn't that behind the hedgerow, too?

Del. Bell: It was.

Sen. Stanley: You couldn't even see the ... the Wall.

De. Bell: Exactly.

Sen. Stanley: OK, I think we remember that. Is there anything else you want to say?

Del. Bell: No, sir, just that this has been going on since 2007, and it's time we put an end to it.

Sen. Stanley: I hear you.

Moving adoption of the bill on the floor of the Senate, Sen. Stanley concluded his brief remarks with:

From the annals of what other strange things can happen in Harrisonburg, Virginia, I mean, Staunton, Virginia, I now move once again and make my, renew my motion, that HB 2420 pass so that we can keep the Wall.

It is obvious that the sole focus of the legislation was the controversy at issue in this case, and that the intent of the legislation was to focus like a laser on this specific Wall.

The Virginia Constitution, however, is plain that special legislation is illegal and void. Article IV, Sec. 14 states that the "General Assembly shall not enact any local, special, or private

law ... [g]ranting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity." That is precisely what the Belloni Uncodified Act attempted to do. "Although all legislative enactments are entitled to a presumption of constitutionality, we have not hesitated to invalidate laws found, upon careful consideration, to violate the prohibitions against special laws." *Benderson Development Co. v. Sciortino*, 236 Va. 186, 148, 372 S.E.2d 751, 757 (1988). "The proscriptions against special laws in the Constitution of Virginia "are aimed squarely at economic favoritism, and have been so since their inception." *Id.* at 140, 372 S.E.2d at 756. The reason for the Constitution's prohibition on special legislation, apparently first expressly so prohibited in the Constitution of 1902, "was to correct the perception that the General Assembly, in the nineteenth century, devoted an excessive amount of its time to the furtherance of private interests." *Id.* at 147, 372 S.E.2d at 756. In *Riddleberger v. Chesapeake Western Railway*, 229 Va. 213 (1985), a case which derived from the Circuit Court of Augusta County, the Virginia Supreme Court struck down as special legislation a statute which provided only certain counties in Virginia, west of the Blue Ridge, a presumption that no minerals exist in land. The Court therein cited *Martin's Ex'rs v. Commonwealth*, 126 Va. 603, 102 S.E. 77 (1920), which held:

In doubtful cases, a most useful guide in determining whether a statute is general or special within the meaning of constitutional limitations . . . is to be found in the underlying reasons for such limitations. They are intended, primarily, as a check upon the intentional exercise of legislative power conferring special privileges and immunities, or special restrictions and burdens, upon particular persons or localities to the exclusion of other persons or localities similarly situated. Plain legislative violations, whether expressly intended as such or not, must of course be condemned; but these limitations in the fundamental law had their genesis in a purpose to remedy the mischief of intentionally arbitrary and exclusive legislation.

The Court should not sanction this effort by the General Assembly to implement, via this Belloni Uncodified Act, legislation plainly designed to impact one specific controversy, granting one private individual special rights and immunities that others do not enjoy. The Belloni Uncodified Act is special legislation, and as such should be disregarded.

II. The Belloni Uncodified Act does not have retroactive effect and therefore cannot apply to the Wall at issue in this case.

Though Respondent of course makes much over what the Belloni Uncodified Act says, more notable for purposes of this case is what it does *not* say. Among other things, even if the Belloni Uncodified Act were held applicable to newly constructed structures, its terms do not make it applicable to existing ones. Va. Code §1-239 states:

No new act of the General Assembly shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new act of the General Assembly takes effect; except that the proceedings thereafter held shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture, or punishment be mitigated by any provision of the new act of the General Assembly, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new act of the General Assembly takes effect.

“It is elementary that retrospective statutes affecting past transactions are not generally favored by the courts. A settled rule of construction is that they are not to be construed retrospectively unless plainly so intended. ... There is a presumption that statutes operate prospectively.” *Gloucester Realty Corp. v. Guthrie*, 182 Va. 869, 873. (1944). “The general rule is that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits ... unless the intention that it shall so operate is expressly declared; the courts will apply new statutes only to future cases unless there is something in the

very nature of the case, or in the language of the new provision, which shows that they were intended to have retrospective action." *Id.* at 875.

Even if the Belloni Uncodified Act is held to be otherwise valid, it cannot have application to the Wall at issue in this case because it does not state that it applies to *existing* structures and *existing* controversies. In other words, the Belloni Uncodified Act applies, if at all, only to Walls constructed *after* the date of the Belloni Uncodified Act's adoption. Having no application to the existing Wall constructed for the Respondent over a decade ago, it is irrelevant to resolution of the matters at issue in this case.

III. The Belloni Uncodified Act has no bearing on the question of whether the Respondent is entitled to a variance, which is the sole issue before the court.

The present issue before the Court is whether the passage of the Belloni Uncodified Act renders the Petition for Writ of Certiorari moot. The case presently before the court is of course active and involves a controversy which is justiciable and ready for adjudication. As the Supreme Court of Virginia held in *Charlottesville Area Fitness Club Operators Association v. Albemarle County Board of Supervisors*, citing earlier case law, "a plaintiff must establish a 'justiciable interest' by alleging facts 'demonstrat[ing] an actual controversy between the plaintiff and the defendant, such that [the plaintiff's] rights will be affected by the outcome of the case.'" 285 Va. 87, 98 (2013).

In considering the Motion filed by Respondent, it is important to consider the specific controversy at issue. The present dispute concerns *whether the Respondent may be granted a variance* to permit the continued unremediated existence of the much-litigated Wall constructed on behalf of Respondent and her late husband more than a decade ago. The question, then, is

whether Virginia law permits the issuance of such a variance; it is not whether the Wall should be considered a nonconforming use or even whether the City was right to mandate its reduction in size in the first place. As Petitioners make plain in the Petition, Virginia law permits no such variance, and that reality is not impacted by either the 2017 statutory amendment cited in Respondent's motion or the Belloni Uncodified Act.

A simple examination of the Belloni Uncodified Act reveals that it has no bearing on the question of whether Respondent should be granted a variance, which is defined by the Virginia Code at §15.2-2201:

"Variance" means, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.

"Virginia law defines 'variance' as a deviation from a zoning ordinance." *Tolman v. Board of Zoning Appeals*, 46 Va. Cir. 359, 360, (1998). In contrast, a nonconforming use (which is addressed by the Belloni Uncodified Act) is "a lawful use existing on the effective date of the zoning restriction and continuing since that time in non-conformance to the ordinance." See, e.g., *Bd. of Supervisors v. Bd. of Zoning Appeals*, 271 Va. 336, 348, 626 S.E.2d 374, 381 (2006). Respondent's Wall obviously never met that definition; nor does she contend that it did. Indeed, her application for a variance, which requests an *exception* to the existing zoning ordinance, recognizes that fact that the Wall *violates the law*.

The Belloni Uncodified Act simply provides that certain Walls will be considered "grandfathered as a valid nonconforming use" under certain circumstances. It does not state that

the owners of such Walls are entitled to a *variance*, such as Respondent seeks in her application at issue in this case. The difference is not merely academic. As but one example, Va. Code § 15.2-2307 provides, among other things, that non-conforming use status may be continued only so long as the then existing, or more restricted, use continues and such use is not discontinued for more than two years and that the nonconforming structure must be maintained in its then structural condition. Those requirements do not necessarily apply with respect to a variance.

Because the controversy at issue in this case is Respondent's lack of entitlement to a *variance* rather than the question of whether her Wall qualifies as a nonconforming use, and because the Belloni Uncodified Act does not in any way speak to the legal standards required for a variance to be granted, the Belloni Uncodified Act is irrelevant to this case. It therefore does not serve to make the Petition, or the relief sought therein, moot.

IV. Because Respondent was not told by a "local official" that the Wall required no permit, and because in point of fact one was required, the Belloni Uncodified Act does not apply to this case.

As referenced above, the Belloni Uncodified Act requires, as a condition of its application, that the wall at issue be constructed after the property owner is "informed by a local official that such Wall required no permit and that the structure would comply with the zoning ordinance". The only evidence found in the entire record as to any statement to the effect that no permit would be required being made by anyone who is apparently argued to be "a local official" is Dr. Belloni's testimony before the BZA in 2008 that in 2007 he was told by Earl Thompson, an employee with the City's Zoning Office, that no building permit was "needed". (Record, 35.) It is notable that no such testimony was elicited from Mr. Thompson himself at that hearing. (Record, 41.) Further, at that same hearing, Tim Hartless, at the time the City Zoning Technician, testified that

he told Dr. Belloni, prior to construction of the Wall, that the City Code would not permit him to construct the planned wall above 3 ½ feet. (Record, 27.) Regardless, Petitioners have not, and do not, accept as accurate Dr. Belloni's uncorroborated testimony from 11 years ago.

In point of fact, and as stated in the Reply filed on behalf of Petitioners in this case, the Wall constructed on behalf of Respondent *did* require a permit. Well prior to, and at the time of, construction of the Wall, the Staunton City Code adopted and incorporated by reference the terms of the Virginia Uniform Building Code, which stated, as it applied at the time of the construction of the Wall:

Application for a permit shall be made to the building official and a permit shall be obtained prior to the commencement of any of the following activities, except that applications for emergency construction, alterations or equipment replacement shall be submitted by the end of the first working day that follows the day such work commences. ...

1. Construction or demolition of a building or structure ...

Virginia Construction Code (Part I of the Uniform Statewide Building Code – 2003 Edition), Sec. 108.1. An exception was made for certain fences and “privacy walls”, but only those which did “not exceed six feet in height above the finished grade.” *Id.*, § 108.2. *See also* Staunton City Code § 15.10.010 (Adopting the Virginia Uniform Statewide Building Code.) There is no question that the Wall at issue in this case exceeded six feet in height¹, and as the ordinance makes clear and the City Building Official is ready and willing to testify, a permit was mandated for its construction.

¹ The Record is replete with evidence to this effect. At the trial of this case in the BZA, Tim Hartless of the City Zoning Office testified that Dr. Belloni initially told him that “he assumed [the Wall] would be six to seven feet tall”. (Record, 458.) The Zoning Administrator, Rodney Rhodes, testified that the Wall ranges from six feet in height to a height in excess of eight feet. (Record, 446.) Further, Mr. Hartless testified at the 2008 BZA hearing that the Wall is “approximately 7’ tall in this, in this location” that he is 6’4” in height, and that the Wall is at least 6” taller than he is. (Record, 32.) See also the photos of Mr. Hartless, standing at the Wall, found in the Record at 225 and 226.

The Belloni Uncodified Act would be inapplicable to the Wall even if Respondent *had* been “informed by a local official” that no permit was required because it plainly states that it applies only if the Wall would have been “considered a nonconforming use not subject to removal” had it been built after 2017. The import of that 2017 date is that in 2017 Va. Code § 15.2-2307 was amended to now read, *inter alia*:

If the structure is one that requires no permit, and an authorized local government official informs the property owner that the structure will comply with the zoning ordinance, and the improvement was thereafter constructed, a zoning ordinance may provide that the structure is nonconforming, but shall not provide that such structure is illegal and subject to removal solely due to such nonconformity.

(Emphasis supplied.) That amendment was not given retroactive application, and therefore would not alone affect the outcome of this case, or the City's right to enforce the zoning ordinance.

Regardless, this Court need not look past the first clause of that amendment, because, as stated, the Wall was not a structure which required no permit, or, to put it more affirmatively, a permit was required for construction of the Wall. Therefore, even *if* Respondent had been incorrectly told by “a local official” that no permit was required, and even *if* the Belloni Uncodified Act, or the terms of the 2017 amendment to Va. Code § 15.2-2307, were valid and retroactive in nature, neither the Belloni Uncodified Act nor the 2017 amendment to the statute would have any impact upon this case, because the Wall would nonetheless still not be “considered a nonconforming use not subject to removal”.

V. The Court's grant of a Writ in this case was proper.

When the Petition initiating this appeal was filed on behalf of Petitioners, a Writ of Certiorari was also provided, with a request that the Writ be presented to the Court, for entry. The

Court promptly did so, and did so quite properly, as its issuance of the Writ was essentially ministerial and entirely non-discretionary.

Va. Code § 15.2-2314 states, *inter alia*:

upon the presentation of such petition, the court ***shall allow*** a writ of certiorari to review the decision of the board of zoning appeals and shall prescribe therein the time within which a return thereto must be made and served upon the secretary of the board of zoning appeals or, if no secretary exists, the chair of the board of zoning appeals, which shall not be less than 10 days and may be extended by the court.

(Emphasis supplied.) Nor should the issuance of the Writ on July 11, 2018 be a surprise to Respondent, as her counsel was copied on the July 3, 2018 correspondence to the Clerk submitting the Petition and the Writ to the Court, as well as correspondence from Suzanne F. Simmons, Clerk of Council, dated July 20, 2018, which references her submission of “certified copies of the complete record had before and considered by the Board of Zoning Appeals in the above referenced case” pursuant to “the order issued by Judge Ricketts on July 11, 2018.”

Regardless, issuance of the writ was ministerial and non-discretionary the Court accordingly was well within its authority to grant the Petition for Writ of Certiorari. This case should proceed accordingly, and the motion to dismiss should be denied.

Conclusion

With the Motion Respondent appears to be straining to pursue every effort possible to avoid the City’s right to appeal the illegal ruling of a bare, 3-2 majority of the BZA to grant her a variance. Respondent must be aware of the legal inadequacies of her position, and her efforts to short-circuit this appeal and prevent the City’s consistent and even-handed enforcement of its zoning ordinance should be to no avail. The Motion should be denied, this case should proceed to trial, and the Court should rule that no variance should be granted to Respondent.

Respectfully submitted,

RODNEY S. RHODES, Zoning Administrator
By Counsel

Nelson, McPherson, Summers & Santos, L.C.

By: 

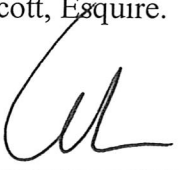
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CERTIFICATE

I certify that a true copy of this Memorandum was mailed and faxed on this 23rd day of August, 2019, to Mark D. Obenshain, Esquire and Justin M. Wolcott, Esquire.



Victor M. Santos