

TWENTY-FIFTH JUDICIAL CIRCUIT
OF VIRGINIA

CHARLES L. RICKETS, III
~~CHIEF JUDGE~~
GEORGE M. COCHRAN JUDICIAL CENTER
113 EAST BEVERLEY STREET
STAUNTON, VIRGINIA 24401



STAUNTON
PHONE (540) 332-3870
FAX (540) 332-3873
WAYNESBORO
PHONE (540) 942-6616
FAX (540) 942-6774

COUNTIES
ALLEGANY, AUGUSTA, BATH
BOTETOURT, CRAIG, HIGHLAND ROCKBRIDGE

CITIES
BUENA VISTA, COVINGTON
LEXINGTON, STAUNTON AND WAYNESBORO

December 2, 2019

Victor M. Santos, Esq.
John C. Wirth, Esq.
Nelson, McPherson, Summers & Santos, L.C.
P.O. Box 1287
Staunton, VA 24402

Mark D. Obenshain, Esq.
Justin M. Wolcott, Esq.
420 Neff Avenue
Suite 130
Harrisonburg, VA 22801

In re: June 12, 2018, Decision of the Board of Zoning Appeals of the City of Staunton
City of Staunton, Virginia, *et al.* v. Debra Chilton-Belloni
CL18000404-00

Gentlemen:

This matter came before the Court on the City of Staunton's appeal of the June 12, 2018, decision of the Board of Zoning Appeals of the City of Staunton ("BZA") and Debra Chilton-Belloni's Motion to Dismiss Writ of Certiorari and Appeal ("the Motion"). Oral argument on the Motion was held on September 3, 2019. The Court issued a letter opinion on September 17, 2019, addressing part of the Motion. The rest of the Motion was taken under advisement until further evidence could be heard. The Motion was grounded on the passing of HB 2420 ("the Uncodified Act") in the 2019 Session of the Virginia General Assembly, which, if applicable, would cause the issue in this case to be moot. A hearing on the City's appeal was held on October 8, 2019, at which evidence regarding the Motion was also heard.

This letter opinion addresses the remaining issues from the Motion as well as the City's appeal. For the following reasons, this Court finds that the Uncodified Act does not apply to the

wall at issue in this case. Ms. Chilton-Belloni's Motion to Dismiss is denied. The Court also finds that the BZA did not apply erroneous principles of law. However, the Court finds that the City of Staunton has rebutted the presumption of Virginia Code Ann. § 15.2-2314, and the BZA erred in its decision to grant a variance in this case.

MS. CHILTON-BELLONI'S MOTION TO DISMISS

The Motion's remaining issue is whether the Uncodified Act applies to the wall at issue in this case. For the following reasons, the Uncodified Act does not apply in this case, and the Motion is denied.

ANALYSIS

The Uncodified Act was passed in the 2019 Session of the Virginia General Assembly. The Uncodified Act states:

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 owner 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.

Ms. Chilton-Belloni must meet these five requirements for the Uncodified Act to apply to the wall at issue. Requirements (i), (ii), (iii), and (iv) of the Uncodified Act are easily met or uncontested. Accordingly, the Court will briefly discuss these elements together. Requirement (v) will be discussed separately below.

Uncodified Act Requirements (i), (ii), (iii), and (iv)

The evidence in this case establishes that the Bellonis were residential property owners of the home located at 1403 North Augusta Street, Staunton, Virginia ("the Property"), prior to 2008. The wall at issue in this case was constructed in 2007, and the events that form the focus of this dispute occurred between 2006 and 2007. While the parties dispute exactly who the Bellonis did or did not speak with regarding approval to build the wall, it is undisputed that they sought approval from the City of Staunton prior to 2008. Accordingly, Ms. Chilton-Belloni has shown that she and her husband were residential property owners and sought local government approval prior to 2008 for construction of the wall on their property.

The record reflects that the Bellonis met with Earl Thompson, a deputy building official, prior to construction of the wall. In a 2008 BZA hearing regarding the wall, Dr. Belloni testified that he met with Mr. Thompson at the Property sometime in the fall of 2006. At that time, Mr. Thompson walked the property along Ridgeview Road and North Augusta Street. According to Mr. Thompson, wall construction had not begun at that time.

Regarding construction of the wall, Dr. Belloni testified that Mr. Thompson told the Bellonis that they could “have at it.” In an October 12, 2011, criminal proceeding against the Bellonis regarding the wall, Mr. Thompson testified that he told the Bellonis that he “felt it would be okay” to build the wall behind the existing hedge. Mr. Thompson further stated that his “intent was that they could build a wall no taller than the hedge where the hedge was existing.”

While Mr. Thompson may not have explicitly told the Bellonis that a permit was not required, the evidence establishes that he met with the Bellonis, reviewed their property, and informed them that, in his opinion, they could build the wall to the height of the existing hedge without any type of approval. The evidence shows that Ms. Chilton-Belloni and her husband were informed by a local official that their wall required no permit and that the wall would comply with the zoning ordinance if it was built no taller than the existing hedge.

The Bellonis received a notice of violation from the City of Staunton in late September 2007, after construction of the wall had begun and was near completion, and well after Mr. Thompson had met and discussed the wall with the Bellonis. Given the above, the Court finds that Ms. Chilton-Belloni has met requirements (i) through (iv) of the Uncodified Act.

Uncodified Act Requirement (v)

The fifth requirement of the Uncodified Act states that, “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.”

The reference to the year 2017 is important because Virginia Code Ann. § 15.2-2307, governing nonconforming uses, was amended in 2017. The amendment to subsection (D) added the following language:

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.

Va. Code Ann. § 15.2-2307(D). Accordingly, § 15.2-2307 sets the standard for a “valid nonconforming use not subject to removal” that is required by the Uncodified Act. The relevant part of § 15.2-2307(D) in this case is whether the wall at issue was a structure that required no permit. Thus, the Court must look to the Staunton City Code to determine whether a permit was required for the wall.

Nothing in the Staunton City Code states that a permit is required for a wall. However, Section 15.10.010 provides that the “Virginia Uniform Statewide Building Code . . . is hereby adopted and incorporated herein as fully as if set forth at length herein and the provisions thereof shall be controlling in the construction and maintenance of buildings and structures within the area of jurisdiction of the city.” Because the Staunton City Code incorporates the Virginia Uniform Statewide Building Code (VUSBC), the Court must review the VUSBC to determine if it requires a permit for the construction of a wall.

Ms. Chilton-Belloni argues that the 2000 edition of the VUSBC applies because the 2003 edition, which went into effect on November 16, 2005, allows a *permit applicant* during the one-year period after November 16, 2005, to “choose whether to comply with the provisions of this code or the provisions of the code in effect immediately prior to November 16, 2005.” VUSBC, § 103.2. The 2000 edition was in effect immediately prior to November 16, 2005.

Ms. Chilton-Belloni cannot choose to comply with the 2000 edition because she is not a permit applicant. Section 103.2 of the VUSBC states that, “[c]onstruction for which a *permit application* is submitted to the local building department after November 16, 2005, shall comply with the provisions of this code, except for *permit applications*” that are submitted during the one-year period following November 16, 2005 (emphasis added). Only construction for which a permit application was submitted is entitled to comply with the 2000 edition of the VUSBC. Ms. Chilton-Belloni did not apply for a building permit for the wall, so she was not a permit applicant. Accordingly, the Court finds that the 2003 edition of the VUSBC applies to this case because Ms. Chilton-Belloni was not a permit applicant and the 2003 edition was in effect when the wall was constructed in 2007.

Section 108.1 of the 2003 edition of the VUSBC states that, “[a]pplication 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 . . . 1. Construction or demolition of a building or structure . . .” Section 108.2 of the 2003 edition exempts from application for permit, “fences and privacy walls not part of a building, structure or of the barrier for

a swimming pool, provided such fences and privacy walls do not exceed six feet in height above the finished grade.”

Here, the best evidence regarding the height of the wall is that the wall varies in height between six (6) and seven (7) feet. Tim Hartless has testified several times that he is 6 feet 4 inches tall and that the wall is taller than he is. In addition, photos from the record and hearings on these matters indicate that the wall is taller than Mr. Hartless.

The Court finds that a permit was required before construction of the Belloni’s wall because the 2003 edition of the VUSBC applies in this case; the wall is a structure for which a permit would be required under the 2003 edition; and the City of Staunton has fully incorporated the VUSBC into their city code. In addition, because the wall required a permit, the Court finds that the wall is not a valid nonconforming use not subject to removal under § 15.2-2307(D). Ms. Chilton-Belloni cannot meet the final requirement of the Uncodified Act.

The Uncodified Act does not apply to the wall in this case, and Ms. Chilton-Belloni’s motion to dismiss is denied.

CITY OF STAUNTON’S APPEAL OF THE JUNE 12, 2018, DECISION OF THE STAUNTON BOARD OF ZONING APPEALS

STANDARD

Virginia Code Ann. § 15.2-2314 provides that a circuit court “may reverse or affirm, wholly or partly, or may modify the decision brought up for review.” The board of zoning appeal’s decision denying or granting a variance application is presumed to be correct. Va. Code Ann. § 15.2-2314. The petitioner must show, by a preponderance of the evidence, that the board of zoning appeals erred in its decision. *Id.*

ANALYSIS

Variance Requirements

The parties have disagreed about the proper version of the statutes applicable in this case. The relevant statutes are Va. Code Ann. § 15.2-2201 (defining variance) and § 15.2-2309 (providing boards of zoning appeals the power to grant variances). The parties argued this variance under the 2014 versions at the BZA as well as before this Court during the City’s appeal of the BZA’s decision. Accordingly, the Court will examine this case under the 2014 versions.

A variance is defined as

[A] reasonable deviation from those provisions regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure when the strict application of the ordinance would result in unnecessary or unreasonable hardship to the property owner, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the intended spirit and purpose of the ordinance, and would result in substantial justice being done.

Va. Code Ann. § 15.2-2201. Boards of zoning appeals have the power to grant variance applications when, because of special conditions, literal enforcement of an ordinance will result in unnecessary hardship, provided that the ordinance's spirit is observed and substantial justice done. Va. Code Ann. § 15.2-2309(2).

In observing an ordinance's spirit and ensuring that substantial justice is done, the power to grant a variance under § 15.2-2309(2) requires that:

[A] property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.

Finally, § 15.2-2309(2) limits the power of the board by listing specific findings that must be made before a variance may be granted. A board must find:

[1] [T]hat the strict application of the ordinance would produce undue hardship relating to the property . . . [2] that the hardship is not generally shared by other properties in the same zoning district and the same vicinity[, and] [3] that the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.

The board must also find “that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.” *Id.*

Hardship

While the Virginia Code contains several requirements before a board may grant a variance, the most litigated issue, and the primary issue in this case, is whether the hardship requirement has been met.

Here, the City argues that the BZA erred in its decision because the hardship presented by Ms. Chilton-Belloni is not one which is contemplated by the Virginia Code. Ms. Chilton-Belloni argues that it would be a hardship to require her to bring her wall into compliance for a combination of two reasons. First, Mr. Thompson represented that the wall could be built without a permit, and the Bellonis relied on that representation. According to Ms. Chilton-Belloni, requiring that the wall be taken down after being told to build it is a hardship. June 12, 2018, Tr. at 105. Second, compliance with the ordinance would create a financial hardship because the costs in building and removing the wall would be burdensome. *Id.* at 108–09. Thus, the costs of building and removing the wall combined with the Mr. Thompson’s representation that a permit was not needed creates a hardship which requires a variance.

Before addressing whether the hardships advanced by Ms. Chilton-Belloni are those contemplated by the Virginia Code, the Court notes that the BZA failed to make specific findings required by the Virginia Code. As noted above, a board is required to make specific findings before granting a variance. In this case, the BZA failed to make these findings. While Ms. Chilton-Belloni submitted proposed findings, the BZA failed to adopt them. For purposes of this appeal, the Court assumes that the BZA’s votes in favor of granting the variance means that the BZA made the findings required in § 15.2-2309(2).

The Supreme Court of Virginia, as well as the General Assembly, have addressed whether erroneous decisions by building officials confer any rights on the affected individual. In *Segaloff v. City of Newport News*, the Court stated that “a building permit . . . issued in violation of law . . . confers no greater rights upon a permittee than an ordinance itself, for the permit cannot in effect amend or repeal an ordinance, or authorize a structure at a location prohibited by the ordinance.” 209 Va. 259, 261 (1968).

In 1995, the General Assembly enacted a vested rights provision to eliminate the hardship property owners may have suffered from their reliance on erroneous or void zoning decisions. See Va. Code Ann. § 15.2-2311(C); *Bd. of Sup’rs of Richmond Cty v. Rhoads*, 294 Va. 43, 51 (2017). The vested rights provision “manifestly creates a legislatively-mandated limited exception to the judicially-created general principle that a building permit issued in violation of applicable zoning ordinances is void.” *Rhoads*, 294 Va. at 52.

Although this case does not involve an erroneously issued building permit, the general principle still applies. According to the evidence, Mr. Thompson, a building official, represented to the Bellonis that a permit was not needed for the construction of the wall. However, as discussed above regarding the Uncodified Act, a permit was required for construction of the wall.

Mr. Thompson, although perhaps meaning well, did not have the authority to grant the Bellonis permission to build the wall in violation of the City's zoning ordinances. Granting a building permit is preceded by the application for and consideration of such permit. It is a process that can take some time. If the general principle is that an erroneously issued building permit does not confer rights upon the applicant, the same can be said for the erroneously delivered verbal statements of a building official. Furthermore, the vested rights exception to the general principle does not apply in this case. This is not a hardship contemplated by the Virginia Code.

The Supreme Court of Virginia has also addressed whether financial considerations create the type of hardship contemplated by the Virginia Code. The Court has made clear that financial considerations alone do not create the type of hardship required by the code.

The Supreme Court of Virginia has held that financial loss alone cannot establish an exceptional hardship approaching confiscation, but that it "is a factor or an element to be taken into consideration and should not be ignored." *Natrella v. Bd. of Sup'rs of Arlington Cty*, 231 Va. 451, 458 (1986). In *Baum v. Lunsford*, the Supreme Court held that financial loss alone cannot establish a hardship, even under a lesser burden of proof of an "undue hardship." 235 Va. 5, 8 (1988).

It is clear, then, that the financial loss Ms. Chilton-Belloni faces if her variance application is denied is, standing alone, not enough to establish a hardship under Virginia Code, but it should be considered. Considering both financial loss and the reliance on Mr. Thompson's statements together, Ms. Chilton-Belloni has failed to establish a hardship contemplated by the Virginia Code. Each of the two hardships claimed by Ms. Chilton-Belloni are hardships that have been held to not meet the requirements for granting a variance.

While this Court sympathizes with Ms. Chilton-Belloni, and without expressing an opinion as to whether the wall should be removed, this Court finds that the City of Staunton has met their burden of showing, by a preponderance of the evidence, that the BZA erred in its decision granting Ms. Chilton-Belloni a variance. No hardship exists which would require or allow the granting of a variance in this case.

CONCLUSION

Ms. Chilton-Belloni's Motion is denied, and the Court finds that the BZA erred in its June 12, 2018, decision granting Ms. Chilton-Belloni a variance. The Court would respectfully

request that Mr. Santos prepare an order consistent with and incorporating this letter opinion and circulate the same for entry.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "CLR, III", followed by a stylized flourish or arrow pointing to the right.

Charles L. Ricketts, III

CLR,III/epl

Cc: Clerk of Court