Record No. 230491

In the Supreme Court of Virginia

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, Petitioner-Appellant

v.

RITA M. LEACH-LEWIS, TRUSTEE OF THE RITA M. LEACH-LEWIS TRUST 18MAR13, Respondent-Appellee

BRIEF IN OPPOSITION TO PETITION FOR APPEAL

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STATEMENT OF THE CASE

This is a petition for appeal by the Board of Supervisors of Fairfax County, Virginia (the "Board") from a decision of the Court of Appeals of Virginia (the "Court of Appeals") which correctly determined that the Fairfax County Board of Zoning Appeals (the "BZA") must address whether a provision of the Fairfax County Zoning Ordinance (the "Zoning Ordinance") was violated. The decision by the Court of Appeals was issued upon the appeal of the Appellee, Rita M. Leach-Lewis, Trustee of the Rita M. Leach-Lewis Trust 18MAR13 ("Ms. Leach-Lewis") from the final judgment of the Fairfax County Circuit Court (the "Trial Court").

The Trial Court reviewed two decisions by the BZA that upheld Notices of Violation issued to Ms. Leach-Lewis. The Notices of Violation issued by the Fairfax County Department of Code Compliance ("DCC") asserted that Ms. Leach-Lewis's neighboring residential properties located at 6209 and 6211 Knoll View Place, Centreville, VA (the "Properties") are utilized as office uses for The New World Church of The Christ, Inc. (the "Church") in violation of the Zoning Ordinance.

The case was tried on March 17, 2022. The Trial Court heard argument of counsel and testimony from Christian R. Sulger, Vice

President and Primary Dean of the Church (R. 1018-64), Ms. Leach-Lewis, President and Matriarch of the Church (R. 1065-1105), and DCC Investigator, John Enos ("Mr. Enos") (R. 1145-61). On March 19, 2022, the Trial Court entered judgment upholding the BZA's decisions. R. 896-97.

The BZA intentionally avoided making a decision on whether § 18-901(4) of the Zoning Ordinance was violated, which is intended to protect citizens from unconstitutional searches by county officials and requires adherence to the principles contained in the Fourth Amendment of the United States Constitution. The Trial Court compounded this error and abdication of duty by the BZA to decide this issue by ruling that the BZA could decline to make a finding pursuant to Va. Code § 15.2-2309. R. 896. Rather than allow the matter to be remanded to the BZA so that this important issue regarding constitutional protections for citizens can be addressed, the Board has petitioned this Court for an appeal of the decision by the Court of Appeals.

STATEMENT OF FACTS

On August 21, 2019, the Fairfax County Police Department ("FCPD") unexpectedly searched the Properties as part of an unrelated criminal investigation into one of the Church's volunteers of which Ms. Leach-Lewis was unaware. R. 274-77. Mr. Enos entered 6209 Knoll View Place during

FCPD's search to investigate the zoning violations alleged in the Notices of Violation. *Id.*

Ms. Leach-Lewis testified that, while she was detained by FCPD during its search, Mr. Enos was already in the house. R. 1088. She also testified that when she inquired with Mr. Enos as to whether her lack of consent would stop his search, he confirmed it would not. R. 1088-89.

Mr. Enos testified that when he searched the Properties on August 21, 2019, he was not relying on the FCPD's search warrant and was already in the house when he first spoke with Ms. Leach-Lewis about his search which was used to obtain evidence in support of the Notices of Violation. R. 1147, 1158, and 1160.

The Notices of Violation issued on September 13, 2019, alleged that a large portion of the Properties have been re-appropriated from a single-family dwelling into an office for the Church, with personnel, in violation of § 2-302(5) of the Zoning Ordinance. R. 166-170 and 180-83. This conclusion is supported by allegations that: (1) the upper floors are used for Church offices; (2) the lower floors contain offices, storage/file areas, and a computer server; and (3) there are office personnel working in these areas. *Id.*

The Zoning Ordinance defines "Office" as follows:

> OFFICE: Any room, studio, clinic, suite or building, wherein the primary use is the **conduct of a business** such as accounting, correspondence, research, editing, administration or analysis; or the conduct of a business by salesmen, sales representatives or manufacturer's representatives; or the conduct of a business by professionals such as engineers, architects, land surveyors, artists, musicians, lawyers, accountants, real estate brokers, insurance agents, certified massage therapists in accordance with Chapter 28.1 of The Code, dentists or physicians, urban planners and landscape architects.
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> In addition, any use shall be deemed an office use which: (a) involves the administration, examination or experimentation, but which does not include the operation of laboratory facilities, pilot plants, prototype production, or the assembly, integration, testing, manufacture or production of goods and products on site; or (b) involves prototype production limited to computer software development, demographic and market research, technical or academic consulting services, and data processing facilities. Office shall not involve manufacturing, fabrication, production, processing, assembling, cleaning, testing, repair or storage of materials, goods and products; or the sale and/or delivery of any materials, goods or products which are physically located on the premises. An office shall not be deemed to include a veterinary clinic.

(Emphasis added). Zoning Ordinance, Article 20, Part 3.

The activities at the Properties consist of spiritual study/research/analysis, receipt of charitable monetary donations or "love gifts", creating spiritual literature, organizing off-site conferences, all of

which are strictly related to spreading the Church's mission (evangelizing). R. 1027-1032, 1036-1046.

No products or services are sold from the Properties. No customers or business invitees visit the Properties. There are no employees on the Properties. No volunteers commute to the Properties other than to walk across the street from other homes owned by Ms. Leach-Lewis. No public religious services are held at the Properties. *Id.*

STANDARD OF REVIEW

The first and third assignments of error alleged by the Board are issues of law which are subject to *de novo* review by this Court. *See Renkey v. Cnty. Bd.*, 272 Va. 369, 634 S.E.2d 352, 354-55 (Va. 2006). The second assignment of error presents a mixed question of law and fact which requires this Court is to give deference in the light most favorable to Ms. Leach-Lewis regarding the decision of the Court of Appeals to remand the case to the Circuit Court with instructions to further remand to the BZA to fully develop the record on the issue of the search conducted by Mr. Enos. *See Collins v. First Union Nat. Bank*, 272 Va. 744, 749, 636 S.E.2d 442, 446 (Va. 2006).

ARGUMENT

I. The Court of Appeals correctly ruled that the BZA and Circuit Court erred in not deciding the appeal of the administrative decision to issue the Notices of Violation in contradiction to Zoning Ordinance § 18-901(4).

Zoning Ordinance § 18-901(4) provides that, "[n]othing in this Ordinance may be construed to authorize an unconstitutional inspection or search. All searches or inspections authorized by this Ordinance require a warrant, court order, consent, or another exception to the warrant requirement." Virginia Code § 15.2-2309 imposes the following "powers and duties" on Virginia boards of zoning appeals:

> 1. To hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration and enforcement of this [Article 7, Zoning] or of any ordinance adopted pursuant thereto…The board *shall consider any applicable ordinances*, laws, and regulations in making its decision. For purposes of this section, determination means any order, requirement, decision or determination made by an administrative officer.

[*Emphasis Added*].

Zoning Ordinance § 18-901(4) was adopted as part of the Fairfax County Zoning Ordinance pursuant to the enabling authority set forth in Title 15.2, Chapter 22, Article 7, Zoning. Mr. Enos, an administrative officer charged with making decisions about the issuance of zoning violation notices, made a decision in the administration and enforcement of the

Zoning Ordinance, namely the decision to issue the Notices of Violation even though his searches supporting them did not comply with the provisions of § 18-901(4). Under Virginia Code § 15.2-2309, therefore, the BZA had the power and duty to decide Ms. Leach-Lewis' appeals challenging the Notices of Violation for failure to comply with § 18-901(4).

The Circuit Court, it its review, wrongly characterized the issue as an abstract "constitutional issue" or "constitutional dispute"[1] as if it were somehow divorced from the zoning ordinance; however, the appeal concerned a violation of a zoning ordinance provision that happens to incorporate Fourth Amendment protections. Mr. Enos's administrative decision to violate this zoning ordinance provision was every much as deserving of a resolution by the BZA as any other appealed alleged violation of the zoning ordinance. There is no authority in Virginia Code § 15.2-2309 that Virginia boards of zoning appeals can choose which challenged administrative zoning enforcement decisions they will decide. Virginia Code § 15.2-2309 specifically provides that the BZA "shall consider any applicable ordinances…in making its decision."

The Board argues in its Petition that the search of the Properties was merely an act performed to effectuate the Zoning Administrator's obligation

[1] *Id.*

to enforce the Zoning Ordinance and not a "decision" under Virginia Code §§ 15.2-2309 and 2311. Pet. at 12. The Board's argument is contradicted by the plain language of Virginia Code §§ 15.2-2309 and 2311. Neither statute limits the BZA's jurisdiction to the review of decisions whether particular uses are permitted. Virginia Code § 15.2-2309(1) provides that *"any*" decision by the Zoning Administrator or other administrative officer in the administration or enforcement of the Zoning Ordinance is appealable. Virginia Code § 15.2-2309(1). (Emphasis added). It also states: "For the purposes of section, determination means *any* order, requirement, decision or determination made by an administrative officer." *Id.* (emphasis added). Virginia Code § 15.2-2311 likewise allows an appeal of *any* decision by the Zoning Administrator or from *any* decision made by any other administrative officer in the administration or enforcement of the Zoning Ordinance. In using such expansive language about the BZA's jurisdiction, the General Assembly included the decision of a zoning administrator or other administrative officer to issue a violation in the first place, including in contradiction to the protections of Zoning Ordinance § 18-901(4). Code § 15.2-2309(1) requires the BZA to "consider any appliable ordinance, laws, and regulations in making its decision" whether the Zoning Administrator or other administrative officer is correct. As noted by the Court of Appeals "it

would be particularly ironic if a statute or ordinance striving to ensure constitutional compliance was exempted from application of the same efforts." 2023 WL 3956770 at *4 & n. 7.

The Board also argues in its Petition that § 18-901(4) merely acknowledges the requirements of the Fourth Amendment or "merely states the truism that the Zoning Ordinance cannot be interpreted to violate the Constitution." The Board again attempts a re-write, this time of its own ordinance. The plain language of Section 18-901(4) does not merely acknowledge or merely state a truism. It mandates: "All searches or inspections authorized by this Ordinance require a warrant, court order, consent or another exception to the warrant requirement." Zoning Ordinance § 18-901(4). As the Court of Appeals ruled, the fact that an ordinance imports constitutional requirements, or otherwise protects constitutional interests, does not mean that the BZA must — or may — ignore it." 2023 WL 3956770 *4 (*citing United States v. Kozminski*, 487 U.S. 931, 942 (1988); *Schleifer v. City of Charlottesville*, 159 F. 3d 853-54 (4th Cir. 1998). By making it a part of the Zoning Ordinance, the Board legislated that any violation of § 18-901(4) must be appealed to the BZA or the decision will become a thing decided, not subject to collateral attack under this Court's precedent. *See Dick Kelly Enterprises, Virginia*

Partnership, No. 11 v. City of Norfolk, 243 Va. 373, 416 S.E.2d 680 (Va. 1992); *Rinker v. City of Fairfax*, 238 Va. 24, 318 S.E.2d 215 (Va. 1989); and *Gwinn v. Alward*, 235 Va. 616, 369 S.E.2d 410 (Va. 1988).

The Board further argues that the BZA had no authority to adjudicate the constitutionality of Mr. Enos's search of the Properties. Pet. at 16-17. The Board continues to misstate Ms. Leach-Lewis' argument. As found by the Court of Appeals, "Leach-Lewis did not ask the BZA to declare any ordinance *unconstitutional* . . . She does not ask the BZA to do anything more than interpret and apply its own ordinance—precisely what the General Assembly envisioned and requires." 2023 WL 3956770 at *4 (emphasis in original). *City of Emporia Bd. of Zoning Appeals v. Mangum*, 263 Va. 38, 556 S.E.2d 779 (Va. 2002) and *Board of Zoning Appeals v. Univ. Square Assocs.*, 246 Va. 290, 435 S.E.2d 385 (Va. 1993), cited by the Board, are thus inapposite. As found by the Court of Appeals, Leach-Lewis is not challenging the constitutionality of the Zoning Ordinance but, on the contrary, invoking its explicit protection in § 18-901 (4) against Fourth Amendment violations. The BZA, and Circuit Court on appeal, had a duty to apply that zoning ordinance provision just as it had a duty to apply other applicable zoning ordinance provisions.

The Board's discussion of whether the exclusionary rule is a remedy is not ripe due to the Court of Appeals expressly declining to resolve the issue of the constitutionality of the search because it remanded the matter for further proceedings. *See Leach-Lewis v. Board of Supervisors*, No. 0815-22-4, 2023 WL 3956770, at *7 n. 12. Further, the Board mischaracterizes the consequences from the notice of violation as only civil, when the evidence showed, and the Board here acknowledges, that it allows for future criminal penalties. See Pet. at 17.

II. The Court of Appeals did not err in remanding the case to the Trial Court with instructions to remand to the BZA for further proceedings.

The Board relies on the language in Virginia Code § 15.2-2314 to argue that remand is not available under these circumstances. The Board notes that the statute lists the power of a circuit court to reverse, affirm, or modify the BZA's decisions. Pet. at 19. But an appellate court has inherent power to remand unless there is a specific mandate to the contrary. *See Leach-Lewis*, 2023 WL 3956770, at *6 (citing *Jones v. Willard*, 224 Va. 602, 606-07, 299 S.E.2d 504) (1983). This case presents a defect in the record due to the BZA failing to make a decision about compliance with Zoning Ordinance § 18-901(4). The Court of Appeals was therefore correct

that a remand to the BZA is necessary so that the issue can be fully developed and considered.

Further, the Board's argument that the Court of Appeals "effectively concluded that the Trustee failed to carry her burden of proof" (such that a remand is not allowed) mischaracterizes the Court of Appeals' decision. *See* Pet. at 21. The Court of Appeals made no such finding. The issue with the record is that the BZA did not even consider whether § 18-901 (4) of the Zoning Ordinance was violated. Ms. Leach-Lewis's appeal to the Court of Appeals alleged error by the Trial Court and BZA in not considering the issue, thus empowering remand to the BZA for consideration of the issue.

III. The Court of Appeals did not err in declining to rule on whether the Properties are "Offices" as the term is defined in the Zoning Ordinance.

The Court of Appeals exercised appropriate judicial discretion in not ruling on the issue of whether the Properties are "Offices" because the threshold issue which must first be decided on remand to the BZA is whether the search supporting the Notices of Violation was illegal. To the extent this Court disagrees, the Board, in its Petition, reasserts the same misguided arguments to conclude that the Properties should be deemed "Offices" under the Zoning Ordinance.

Article 20 of the Ordinance defines the term "OFFICE" as:

> Any room, studio, clinic, suite or building wherein the primary use is the **conduct of a business** such as accounting, correspondence, research, editing, administration or analysis; or the conduct of a business by salesmen, sales representatives or manufacturer's representatives; or the conduct of a business by professional such as engineers, architects, land surveyors, artists, musicians, lawyers, accountants, real estate brokers, insurance agents, certified massage therapists in accordance with Chapter 28.1 of The Code, dentists or physicians, urban planners and landscape architects.
>
> In addition, any use shall be deemed an office use which: (a) involves the administration and conduct of investigation, examination or experimentation, but which does not include the operation of laboratory facilities, pilot plants, prototype production, or the assembly. integration, testing, manufacture or production of goods arid products on site; or (b) involves prototype production limited to computer software development, demographic and market research, technical or academic consulting services, and data processing facilities. Office shall not involve manufacturing, fabrication, production, processing, assembling, cleaning, testing, repair or storage of materials, goods and products; or *the* sale and/or delivery of any materials, goods or products which are physically located on the premises. An office shall not be deemed to include a veterinary clinic**.** [bold emphasis added]

The DCC determined that the Properties qualified as offices under Article 20 because significant portions of each single-family dwelling were converted to office space and accompanying storage/filing areas. R. 166-170 and 180-83. DCC Investigator John Enos observed the following in

these areas: people working at desks, commercial signage, a commercial-grade computer server, and filing cabinets. R. 166-170 and 180-83. The Staff Report asserted that Article 20's term "such as" merely denotes the introduction of examples of activities consistent with office use, not an exclusive list void of flexibility. R. 413. Therefore, Staff alleged that the activities similar to those listed, such as soliciting outside funds, researching, and performing administrative tasks, even to advance a spiritual mission, are also examples of business conduct captured by Article 20's flexible definition of "office." R. 413-14.

The Properties here are not used as offices under Article 20 because the principles of statutory construction *ejusdem generis* and *noscitur a sociis* mandate that the listed examples be construed in light of the meaningful phrase "conduct of a business." This phrase cannot be "read out" of the definition to construe the listed examples so broadly to include activities such as personal and/or spiritual correspondence, research, and administrative tasks.

The well-applied principle of *ejusdem generis* provides that a general term be understood in light of the specific terms that surround it. *See Hughey v. United States*, 495 U.S. 411, 419 (1990). Complementing this principle, the principle of *noscitur a sociis* ("a word is known by the

company it keeps") provides that a term be interpreted by the words with which it is associated in context. *See Yates v. United States*, 574 U.S. 528, 543 (2015).

Applying *ejusdem generis* to Article 20, the general phrase "conduct of a business" is narrowed by the specific activities listed: accounting, correspondence, research, editing, administration, analysis, and similar unlisted activities in this same vein. Vice versa, the application of *noscitur a sociis* mandates the example activities, and activities similar to the examples, be construed in light of the accompanying introductory term "business conduct." Both doctrines work together to mandate all terms be read narrowly in reference to accompanying terms, giving effect to each word of Article 20.

The listed activities here should be construed as those activities, and similar activities, that are "conduct of a business." The plain meaning definition of "business" is "commercial enterprise." Business Definition, *Black's Law Dictionary* (11th ed. 2019). Accordingly, accounting, correspondence, research, and similar activities that are unrelated to commercial enterprise are not captured by this "office" definition. The definition of "office" in Article 20 is not so broad to include personal letter writing (which the term "correspondence" alone would), personal

accounting (which the term “accounting” alone would), or personal research (which the term “research” alone would). These example activities must be read narrowly in reference to the accompanying term “conduct of a business” as to avoid an absurd result that deems any space where tasks ordinarily performed in an office setting occur an “office,” even if those tasks are personal.

The activities occurring at these properties are unrelated to commercial enterprise and therefore fall outside of Article 20’s definition of “office.” Ms. Leach-Lewis uses the spaces for the Church’s religious and missionary activities. R. 274-77. Ms. Leach-Lewis does not turn a profit from these activities, sell items from the premises, or welcome business invitees to the premises. *Id.* The activities at the Properties, consisting of spiritual study/research/analysis, receipt of charitable monetary donations, creating spiritual literature, and organizing off-site conferences, are strictly related to spreading the Church’s mission (evangelizing), not an underlying commercial enterprise. *Id.*

Just as one may write a letter or use a file cabinet in her home without her space being deemed an “office” in violation of the Ordinance, the Church’s participation in these same activities does not make the space it uses an “office” absent a nexus to commercial enterprise. In this same

vein, the mere existence of commercialized signs and office-like equipment (desks, computers, file cabinets) on the Properties does not mean the space is used for business purposes. The space is used for "conduct of a business" when it is used to further a commercial enterprise.

None of the nuisances of a residential business are present at the Properties, evidenced by a long history of church operation without any neighborhood complaints. The spaces at issue here are merely home offices employed in evangelical, spiritual, and personal pursuits. Because the Properties are unrelated to commercial enterprise and contain none of the trappings associated with a business use, the spaces should not be treated as "offices" under a proper interpretation of Article 20.

CONCLUSION

For the foregoing reasons, the Appellee, Rita M. Leach-Lewis, Trustee of the Rita M. Leach-Lewis Trust 18MAR13, requests that this Court deny the Petition for Appeal.

Respectfully Submitted,
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CERTIFICATE

I hereby certify that on this 2nd day of August, 2023, an electronic copy of the foregoing Brief in Opposition to Petition for Appeal was filed with the Clerk of the Court of Appeals via VACES. On the same day, an electronic copy was served via email to:

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Counsel for Appellee certifies that this Brief in Opposition to Petition for Appeal complies with the page and word count limit. The actual word count is 3593.

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