NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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August 31, 2021

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Re: ***Jeffrey V. Reynolds, et. al. v. Board of Supervisors of Fairfax, County***
Case No. CL-2020-18282

Leslie B. Johnson, Fairfax County Zoning Administrator v. Jeffrey Vernon Reynolds, et. al.,
Case No. CL-2021-2840

Dear Counsel:

In this appeal from the Board of Zoning Appeals ("BZA"), the distilled issue before the Court is the definition of the term "construction vehicles" contained in the Zoning Ordinance of Fairfax County, Virginia (1978 as amended) ("Zoning Ordinance"). The legal issue is whether the Fairfax County Department of Zoning Administration ("Zoning Administrator") and, in turn, the BZA correctly defined the term and applied it to the vehicles of the landowners appealing the case.

OPINION LETTER

The Court holds the Zoning Administrator and the BZA each applied the wrong definition of the term "construction vehicles" in the enforcement action against the landowners in this case. It will reverse this portion of the Zoning Administrator's enforcement action.[1]

I. FACTUAL OVERVIEW.

On March 4, 2020, the Zoning Administrator issued Notices of Violation ("NOV") against Jeffrey V. Reynolds, Mark J. Lane, Drainage & Erosion Solutions, LLC, and Custom Stonescaping, LLC ("Landowners") for, *inter alia*, storing and parking "construction vehicles" on their commercial-zoned property in violation of § 4-805(5) of the Zoning Ordinance. (R. at 387.)[2]

The term "construction vehicles" is undefined in the Zoning Ordinance. The NOV contained no objective standard for determining that the Landowner's trucks were impermissible construction vehicles, and there was no reference to a definition of "construction vehicles" in it. (R. at 390-91). Instead, the NOV referenced an email from Saundra O'Connell of the Zoning Administrator with her unexplained, conclusory ruling that the trucks at issue are "construction vehicles." (R. at 397.) The Landowners appealed to the BZA, which affirmed the Zoning Administrator on October 21, 2020. (R. at 1458-59). The Landowners filed a Writ of Certiorari to this Court to appeal the BZA's judgment.

The offending vehicles at issue are huge Ford F550 pickup-style trucks with modified beds. Most pickup-style trucks, have a "cab" where the driver and passengers sit with a "bed" behind it. (R. at 398). The walls forming the bed are much lower than the cab in these trucks. The Landowners' modified the beds by raising the walls of the bed so that they are a bit taller than the roof of the cab. (R. at 398.) The BZA referred to this modification as "a dumpster thing." (R. at 1448.) The Zoning Administrator and, in turn, the BZA classified these trucks as "construction vehicles" that may not be stored on property zoned "commercial," as Landowners' property is zoned. (R. at 1458-59.) The Zoning Administrator contrasted the Ford F550s, which are referenced as "landscaping" vehicles, with other, smaller, unmodified pickup trucks of the Landowners, which are referenced as "owner" vehicles. (R. at 397-98.) The Zoning

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[1] The Court considered an erroneous version of § 4-805(5) of the Zoning Ordinance in its bench ruling in this appeal despite the parties' mutual oral affirmation that the Court had recited the correct version on the record. This was first raised to the Court July 28, 2021, in the parties' dueling sketch orders they submitted to memorialize the Court's ruling from the bench. In light of this, the Court disavows its bench ruling. This Opinion Letter is the complete version of the Court's ruling in this appeal.

[2] The Court cites to the administrative record of the BZA hearing in this case as "R. at ___," as did the Board of Supervisors in its brief.

Administrator classified the "landscaping" vehicles as "construction vehicles" and classified the "owner" vehicles as permissible "commercial vehicles."[3] (R. at 397.)

The Zoning Administrator's Staff Report dated October 14, 2020, claims the Landowners offer services including installation of retaining walls, outdoor fireplaces, decks, columbaria and cemetery stonework, large stone patios, water features, structures such as gazebos and pergolas, French drains, streambed stabilization, building projects, and carpentry. (R. at 1077.) However, the Staff Report does not address whether the "landscaping" vehicles at issue were used for any of those services—or that those vehicles were used any differently than the smaller "owner" vehicles that the Zoning Administrator approved for storage on the property. The only difference appears to be their size and the modification with a "dumpster thing"—built up sides in the pickup truck beds to permit increased hauling volume.

The Zoning Administrator did not define "construction vehicles" prior to issuance of the NOV to Landowners. After the Landowners protested, the Zoning Administrator—apparently for the first time—declared in its Staff Report that the definition of "construction vehicles" is one it found on LawInsider.com.[4] (R. at 1077).

II. STANDARD OF REVIEW.

On an appeal from a decision of the BZA on the enforcement of an ordinance, a circuit court hears argument on questions of law *de novo*. VA. CODE ANN. § 15.2-2314 (2021). The circuit court presumes correct the BZA's findings and conclusions on questions of *fact*. *Id.*; *See also Board of Supervisors of Loudoun County v. Town of Purcellville*, 476 Va. 419, 439 (2008).

This standard is a significant change in the law, effective July 1, 2007. Before the amendments, the law directed circuit courts to presume a BZA's *decision* correct. 2006 VA. ACTS 446. Thus, pre-2007 decisions of the Supreme Court of Virginia interpreting the pre-amended statute are no longer good law, as the high court recognized. *See, e.g., Trustees of Christ and St. Luke's Episcopal v. Board of Zoning Appeals*, 273 Va. 375, n.3 (2007). The statutory amendment affected BZA appeals from most actions of a Zoning Administrator. However, confusingly, it retained the standard that circuit courts must presume BZA decisions correct for appeals of variances or special exceptions. VA. CODE ANN. § 15.2-2314 (2021).

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[3] To make this determination, Ms. O'Connell looked at a photo array of some of Landowner's trucks. Without explanation, she declared the "landscaping" vehicles to be "construction vehicles" and the "owner" vehicles to be "commercial vehicles."

[4] The Zoning Administrator told the BZA that the BOS would likely define the term "construction vehicles" consistent with its LawInsider.com definition in an imminent amendment to the Zoning Ordinance. (R. at 1446.) However, the BOS appears to have left the term undefined in its zMod revisions adopted March 23, 2021, and effective July 1, 2021.

Therefore, when reading post-2007 cases, one must be sure to note the subject matter of the zoning issue for the correct standard of review.

Based on the pre-2007 law, the Supreme Court of Virginia long held that a zoning administrator's consistent administrative construction of an ordinance is entitled to "great weight" by the circuit court on appellate review. *Masterson v. Board of Zoning Appeals of Cty of Virginia Beach*, 233 Va. 37, 44 (1987). The high court has not repeated this principle in the context of BZA appeals for zoning administrator decisions based on actions other than variances or special exceptions since the 2007 amendments to Virginia Code § 15.2-2314. This Court concludes that the 2007 legislative grant to circuit courts to hear matters of law *de novo* in BZA appeals removes this requirement. It holds the law no longer grants the Zoning Administrator's consistent administrative construction of an ordinance "great weight." Instead, the General Assembly now directs circuit courts to apply ordinary statutory construction principles of Virginia law by dint of the *de novo* grant. Even if the Court were to apply "great weight," this does not mean "unquestioned deference." And in the context of this case, the Zoning Administrator's chosen administrative construction is arbitrary and capricious - whether the Court uses the "great weight" standard or not.

III. THE TERM "CONSTRUCTION VEHICLES" IS UNDEFINED.

The Zoning Ordinance does not define the term "construction vehicles." Thus, the Court must determine if the BZA and Zoning Administrator correctly did so. "When reviewing the interpretation of a zoning ordinance, "the words of the ordinance are to be given their plain and natural meaning," and the "purpose and intent of the ordinance should be considered but the ordinance should not be extended by interpretation or construction beyond its intended purpose." *Prince William Board of Supervisors v. Archie*, 296 Va. 1, 9 (2018) (citing *Donovan v. Board of Zoning Appeals,* 251 Va. 271, 274 (1996)). Determining the definition of a word in an ordinance is a question of law. *See, e.g., Uninsured Employer's Fund v. Gabriel*, 272 Va. 659, 662 (2006). This Court will consider the definition of the term "construction vehicles" *de novo*. VA. CODE ANN. § 15.2-2314 (2021).

The Zoning Ordinance limits the types of vehicles that may be parked on the Landowners' commercially zoned properties. The relevant portion of the Zoning Ordinance reads:

> The outdoor storage or parking of construction equipment, construction vehicles, construction machinery or vehicles such as solid waste collection vehicles, dump trucks, cement mixers, tractors and/or trailers of tractor-trailer trucks shall not be permitted.

Zoning Ordinance § 4-805(5).

Because the term "construction vehicles" is undefined in the Zoning Ordinance, the Zoning Administrator could not simply look to the Zoning Ordinance for the definition. The Zoning Administrator selected a definition of "construction vehicles" it found on the website "LawInsider.com," apparently after the Landowners challenged the NOV. The Zoning Administrator's selected definition reads,

> Construction vehicles means private or commercial vehicles or heavy equipment actively involved in the construction process or in the delivery or storage of tools or supplies.

The BZA record provides no information as to why the Zoning Administrator chose LawInsider.com as a source or why it chose its preferred definition from others on that website. Undefined terms in an ordinance—such as "construction vehicles"—are generally understood by their ordinary meaning. *Otey v. Commonwealth*, 61 Va. App. 346, 350 (2012). Often, such meaning is gleaned by resorting to dictionaries in common usage. *See id.* However, in the BZA record, there is no evidence or argument that LawInsider.com is a dictionary in common usage, nor does the BZA take judicial notice that it is in common usage. *See, e.g.*, VA. SUP. CT. R. 2:201. Therefore, the record shows that the selection of the definition is arbitrary—that is, based on random choice or personal whim, rather than any reason or system. [5] It is also capricious—that is, subject to sudden and unaccountable changes.[6]

IV. THE BZA'S DEFINITION OF THE TERM "CONSTRUCTION VEHICLES" IS INCONSISTENT WITH THE PLAIN MEANING OF THE TERM.

The BZA argues it has long barred vehicles like those of Landowners from storage on commercial-zoned properties. However, the BZA record contains only a single undated email from "Lorrie Kirst," whose title or role in government is unclear from the email, responding to an inquiry to her dated July 1, 2005. (R. at 1425-26.) Ms. Kirst looked at a photo lineup of various trucks supplied to her and, in a conclusory manner, without citing to any definition of "construction vehicles"—much less the LawInsider.com definition the Zoning Administrator now embraces, or by citing any criteria—declared some trucks from the lineup to be "construction vehicles" and others to be "commercial vehicles." (*Id.*) It is arbitrary and capricious for a single person to make a ruling without any stated guiding principles. An *ex-post* search for a definition to justify the arbitrary act cannot save the arbitrary act. As a well-known Latin proverb states: *quod gratis asseritur, gratis negatur* ("what is asserted without reason may be denied without reason"). So, if the Zoning Administrator simply declares some trucks

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[5] NEW OXFORD AM. DICTIONARY, 80 (3d ed. 2010).
[6] *Id.* at 259.

"construction vehicles," without any guiding principles, a landowner may logically respond by declaring the vehicles not "construction vehicles."

Nonetheless, the BZA accepted this single arbitrary example as a longstanding interpretation of the Zoning Ordinance and a good definition. (R. at 1458). The Court assumes correct, as it must, the BZA's factfinding. Thus, it accepts the BZA's factual determination that the Landowner's "landscaping" vehicles are similar to the trucks Ms. Kirst previously deemed to be "construction" vehicles in her 2005 photo array. VA. CODE ANN. § 15.2-2314 (2021). However, the Court does not presume the Zoning Administrator or the BZA correctly defined the term "construction vehicles."

The Court is unpersuaded that the product of the Zoning Administrator's last minute Internet search for a definition supports its obviously arbitrary ruling. In any event, resorting to LawInsider.com is unnecessary where, here, the term "construction vehicles" has a readily accessible, plain meaning. "Construction" is commonly defined as "the building of something, typically a large structure." NEW OXFORD AM. DICTIONARY, 373 (3d ed. 2010). "Vehicle" is defined as "[a] thing used for transporting people or goods." *Id.* at 1918. Thus, a construction vehicle is a thing used for transporting people or goods for the building of something, typically a large structure.

Further, "construction vehicles" are particularly large vehicles that are actively used in construction. This is clear from reading the Zoning Ordinance § 4-805(5) in full. In addition to "construction vehicles," the ordinance prohibits from storage on commercial lots "solid waste collection vehicles, dump trucks, cement mixers, tractors and/or trailers of tractor-trailer trucks." "[A]ccording to the maxim *noscitur a sociis* (associated words) when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words." *Martin v. Commonwealth*, 224 Va. 298 (1982) (*citing Commonwealth v. United Airlines, Inc.*, 219 Va. 374, 389 (1978) ("The meaning of doubtful words in a statute may be determined by reference to their association with related words and phrases")). Therefore, the named heavy equipment in the ordinance gives context to the term "construction vehicles." The term "construction vehicles" is followed by the terms "solid waste collection vehicles, dump trucks, cement mixers, tractors and/or trailers of tractor-trailer trucks." Zoning Ordinance § 4-805(5). Therefore, the term, in association with the other heavy machinery in the ordinance, cannot mean ordinary "passenger cars," or other, smaller vehicles even if they are operated by construction workers and are laden with construction materials and tools.[7]

[7] To be clear, the Court is relying on *noscitur a sociis* and not the doctrine of the last antecedent in this case. *See, e.g., Alger v. Commonwealth*, 267 Va. 255, 259-260 (2004). The latter doctrine is inapplicable to the relevant portion of the Zoning Ordinance. The string of examples starting with "solid waste collection vehicles" clearly modifies the word "[other] vehicles" in the ordinance, not "construction vehicles." "Construction vehicles" are,

Naturally, there will be some single-use vehicles that may be classified as "construction vehicles" under this definition just based on what they are—such as bulldozers. One need not see a bulldozer engaged in construction to conclude, under this plain meaning definition, that it is a "construction vehicle." Bulldozers do nothing except construction. Other vehicles, such as the "landscaping" vehicles at issue could be "construction vehicles," or a different classification depending upon their size and use.

This is the plain meaning consistent with the purpose and intent of the Zoning Ordinance. There are five reasons why this definition makes sense in the context of this case.

First, this is the meaning gleaned from the dictionary and from the context of the Zoning Ordinance. By contrast, the Zoning Administrator's unexplained, chosen definition from LawInsider.com is extremely overbroad. Its definition is not limited to commercial vehicles. It expressly includes everything from "private or commercial vehicles" to "heavy equipment." Its definition would, therefore, classify ordinary passenger cars containing small construction equipment and tools as "construction vehicles." Nor is the definition limited to vehicles actively involved in the construction process—it expressly includes vehicles merely delivering or storing tools or supplies.

Therefore, the Zoning Administrator's expansive definition includes every class of motor vehicle in the County. A private passenger vehicle owned by a construction worker containing tools in its trunk could be deemed a "construction vehicle" under this definition, but this could not have been the intended purpose of the Ordinance. Even the Board of Supervisors ("BOS") argued at the hearing that this would be a ridiculous result. The Court agrees—albeit in a different manner. It is ridiculous for the Zoning Administrator to select a definition from an unknown source on the Internet so broad that any motor vehicle could be classified as a "construction vehicle" if a contractor puts some tools in it.

Second, the Zoning Administrator's LawInsider.com definition is inconsistent with the Zoning Ordinance's definition of "commercial vehicle", which is a vehicle "specifically designed to carry tools and/or specialized equipment, *regardless of capacity*." Zoning Ordinance § 9-9102 (emphasis supplied). The Landowners' vehicles appear to fall squarely under this definition.

Third, the Zoning Ordinance and the Virginia Code elsewhere define large, heavy, and noisy vehicles. If the BOS really wanted to regulate the storage of Landowners' vehicles it could have borrowed the definition of "rental trucks and trailers": vehicles with "two (2) axels, which have a maximum box length of seventeen (17) feet, are not more than twelve (12) feet in height

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therefore, different from vehicles such as dump trucks, cement mixers, and tractor-trailers, but are of the same flavor.

and which do not require a commercial driver's license to operate." Zoning Ordinance § 4-4102.5.MM.3 It could have resorted to Virginia's Department of Motor Vehicles classifications that require a driver to obtain a special commercial motor vehicle operators' license. *See* VA. CODE ANN. § 46.2-341.16 (2021). Thus, the BOS had tools to define "construction vehicles" based on the number of axels, length, height, weight, and operating requirements. Instead, it chose an undefined term with a contrary plain meaning.

Fourth, the plain meaning definition is consistent with the testimony from the Zoning Administrator at the BZA Hearing. When BZA Chairman James R. Hart asked for clarification from the Zoning Administrator as to how it determined what vehicles qualified under its "construction vehicles" definition, Suzanne Gilbert, Staff Coordinator of the Zoning Administrator, replied, "it was [the] modification as well as the way the vehicles were being used." She soon after confirmed Chairman Hart's statement: "[a]nd so its [sic] not just the physical vehicle. It's what it's being used for." (R. at 1149.) Therefore, even the Zoning Administrator's stated position seems consistent with a plain meaning of the term "construction vehicles"—a combination of size and use—and inconsistent with its LawInsider.com definition which does not address size.

Fifth, the plain meaning definition is consistent with the testimony of the nearby residential landowners who want the County to stop the Landowners from storing their "landscaping" vehicles on the Landowners' property. Their concern is not really the size of the vehicles, or the modification of the beds, as the Zoning Administrator appears to emphasize. The neighbors instead complained of the use of the trucks; specifically, the number of trucks, the fact that they drive through their residential streets rather than on the main secondary road, the truck drivers' tendency to speed, their practice of leaving the commercial property in a convoy, and the danger of equipment falling off the trucks. (*See, e.g.*, R. at 1456.) The approved, smaller trucks of Landowners could create identical nuisances, depending on their number and actual use.

Therefore, the plain meaning definition makes sense for all the foregoing reasons.

V. THE ZONING ADMINISTRATOR AND BZA APPLIED A WRONG DEFINITION OF "CONSTRUCTION VEHICLES."

The Zoning Administrator and, in turn, the BZA chose an incorrect definition of the term "construction vehicles." It abused its discretion by applying an overbroad definition from LawInsider.com instead of a plain meaning definition. There may be good reasons why a specialized definition should be used instead of the plain meaning, but there is nothing in the record to support the selection of the LawInsider.com definition. Selecting the LawInsider.com definition without giving any reasons why it was superior to a plain meaning is, therefore, arbitrary and capricious.

The Court hears BZA appeals as a court of appeals and not as a trial court. VA. CODE ANN. § 15.2-2314 (2021). The Court only has the power to reverse, affirm (wholly or partly), or modify a decision. *Id.* There is no express legislative authority to remand a case, unlike the power the Supreme Court of Virginia possesses. The Supreme Court may reverse, modify, or affirm decisions of a lower court. VA. CONST. ART. VI, § 6. It may also remand a case for a new trial. *Id.* In contrast, however, Virginia Code § 15.2-2314 does not give circuit courts the power to remand reversals to the BZA for new hearings. This makes sense when one considers that the General Assembly authorized circuit courts to take additional evidence in BZA appeals, but that the Supreme Court generally lacks this authority when adjudicating its appeals. However, in the present case, neither party offered any evidence beyond the BZA hearing record. *See id.* Therefore, the Court must enter judgment with the record before it from the BZA.

The record fails to show the "landscaping" vehicles at issue are large vehicles designed for transporting people or goods for the building of something, typically a large structure, and that the Landowner used them for that purpose. There was almost no evidence of the *use* of the trucks. The focus was on the size of the trucks. The Court lacks the information to know what trucks, if any, carried construction materials, such as concrete, steel beams, masonry, or carpentry materials. It would seem the Landowners used the trucks for landscaping purposes and small-scale drainage and stonework, which fall outside of a "thing used for transporting people or goods for the building of something, typically a large structure." However, the Court is left to speculate about that, too. Based on the record, it is possible that the smaller "owner" vehicles transport construction materials, and the "landscaping" vehicles are reserved for carrying mulch. That would exonerate the "landscaping" vehicles from the enforcement ban. The Zoning Administrator had the burden of proof and failed to prove what the "landscaping" vehicles did sufficient for the Court to classify them as "construction vehicles." Moreover, because the "landscaping" vehicles so neatly fall under the definition for the "commercial vehicles," which are expressly permitted to be stored on commercial zoned property, the Court concludes the Zoning Administrator failed to prove the "landscaping" trucks are "construction vehicles." Therefore, the Court will reverse and dismiss the BZA's affirmation of the portion of the Notices of Violation related to the "construction vehicles."

VI. CONCLUSION.

The Court holds the Zoning Administrator and the BZA each applied a wrong definition of the term "construction vehicles" in the enforcement action against the Landowners in this case. It will reverse the BZA's affirmation of the portion of the Notices of Violation related to the "construction vehicles" in the attached Order.

Kind regards,

[redacted]

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

Enclosure

OPINION LETTER

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE: OCTOBER 21, 2020, DECISION OF THE BOARD OF ZONING APPEALS OF FAIRFAX COUNTY, VIRGINIA

JEFFREY V. REYNOLDS, *et al.*,	:	
	:	
Petitioners,	:	
	:	
v.	:	CL-2020-18282
	:	
BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA	:	
	:	
Respondent.	:	

LESLIE B. JOHNSON, FAIRFAX COUNTY ZONING ADMINISTRATOR,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CL-2021-2840
	:	
JEFFREY VERNON REYNOLDS, *et al.*,	:	
	:	
Defendants.	:	

ORDER

THIS MATTER came before the Court July 16, 2021, for Petitioners' appeal of the October 21, 2020, Decision of the Board of Zoning Appeals ("BZA") in Case No. CL-2020-18282; and, for the reasons set forth in the Court's Opinion Letter dated August 31, 2021, which is incorporated herein by reference, it is

ORDERED the October 21, 2020, decision of the BZA is REVERSED, and the Zoning Administrator's March 4, 2020, Notices of Violation issued to Jeffrey V. Reynolds, Mark J. Lane, Drainage & Erosion Solutions, LLC, and Custom

Stonescaping, LLC, are OVERTURNED in respect to those portions of the Notices of Violation that categorize some of Petitioners' vehicles as "construction vehicles" under the Zoning Ordinance, and it is further

ORDERED that Case No. CL-2020-18282, is ENDED and a FINAL ORDER for that matter; and

ORDERED that Case No. CL-2021-2840 is CONTINUED for further proceedings and THAT CAUSE CONTINUES.

[redacted]

Judge David A. Oblon

AUG 3 1 2021

Entered

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD OF THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA. ANY DESIRED ENDORSEMENT OBJECTIONS ARE DUE WITHIN 10 DAYS.