NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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December 27, 2010

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Re: *Eileen M. McLane, Fairfax County Zoning Administrator v. Rosa E. Martinez*
Case No. CL- 2010-11285

Dear Counsel:

This matter came before the Court on December 10, 2010. After considering the pleadings, memoranda, and arguments of counsel, the Court took the matter under advisement. The following embodies the Court's ruling.

PROCEDURAL HISTORY

On August 6, 2010, Plaintiff, the Zoning Administrator, filed a Complaint for Declaratory Judgment and Injunctive Relief ("Complaint"). The Complaint asked that the court grant a mandatory and a preliminary injunction against the Defendant, Rosa E. Martinez ("Martinez"), based on her violation of the Fairfax

County Zoning Ordinance on property located at 3041 Westfall Place, Falls Church, Virginia ("Property").

FACTS

Martinez owns the subject property. On April 7, 2010, she was served with a Notice of Violation issued by the Zoning Administrator. The Violation asserted that Martinez was:

- Maintaining a Rooming House on the Property, where at lease five unrelated persons were occupying the single-family dwelling in exchange for payment for such accommodations, in violation of Zoning Ordinances §§ 2-302(4) and (5);
- Maintaining more than one dwelling unit in the single-family dwelling on the Property in violation of Zoning Ordinance § 2-501; and
- Letting rooms for rooming and/or boarding purposes in the dwelling on the Property in exchange for payment without a Home Occupation Permit in violation of Zoning Ordinances §§ 2-302(6) and (8) and 10-302(7).

The Notice of Violation directed Martinez to correct the violations of Zoning Ordinances §§ 2-302(4), (5) and 2-501 within thirty days. It also directed her to clear and correct the violations of Zoning Ordinances §§ 2-302(6) and (8) and 10-302(7) within ten days. It further informed Martinez of her right to appeal to the Board of Zoning Appeals ("BZA").

Martinez never appealed the Notice of Violation to the BZA. The Zoning Administrator asserts that the time for filing an appeal has expired. Martinez contends that she never received notice of a violation, but that, regardless, the language contained on the notice, namely, that the time for which an appeal must be taken, was erroneously stated to be thirty days rather than ten days, and renders any service improper.

The Zoning Administrator now moves for Summary Judgment.

ANALYSIS

Standard On Summary Judgment

Summary judgment should be granted when no trial is necessary because no evidence could affect the result. *Shevel's Inc. v. Southeastern Assoc.*, 228 Va. 175, 181, 320 S.E.2d 339, 342 (1984). In considering the motion, the court is required to

draw all inferences in the light most favorable to the plaintiff, as the non-moving party, unless such inferences would be "strained, forced, or contrary to reason." *Slone v. General Motors Corp.*, 249 Va. 520, 522, 457 S.E.2d 51, 53 (1995), quoting *Bloodworth v. Ellis,* 221 Va. 18, 23, 267 S.E.2d 96, 101 (1980).

I. The Notice Of Violation Was Properly Served.

The Notice of Violation was served on Martinez pursuant to authority granted by the General Assembly in Va. Code Ann. § 15.2-2311(A), which states in relevant part:

> A written notice of a zoning violation or a written order of the zoning administrator that includes such statement sent by registered or certified mail to, *or posted at*, the last known address of the property owner as shown on the current real estate tax assessment books or current real estate tax assessment records *shall be deemed sufficient notice to the property owner and shall satisfy the notice requirements of this section.*

(emphasis added).

The Notice of Violation served on Martinez bears a Sheriff's stamp that shows a Deputy Sheriff served the Notice of Violation by posting on April 7, 2010. Martinez cannot rebut the presumption of service that is established by the Sheriff's stamp that shows the return of service of the Notice. *See* Va. Code Ann. § 8.01-326 ("No return shall be conclusive proof as to service of process. The return of a sheriff shall be prima facie evidence of the facts therein stated").

II. Martinez Has Failed To Appeal The Notice Of Violation.

Martinez admits that she has not appealed the Notice of Violation to the BZA. She claims that because the time in which to appeal was erroneously stated, the Notice of Violation is null and void and no appeal period has begun to run.

Although there was a plain error in the Notice of Violation, *notice* was still given to Martinez through proper service.

Moreover, the time in which to appeal was erroneously stated to Martinez's advantage, namely, by giving her more time than rather than less. But no appeal was ever filed. If Martinez had attempted to file an appeal within the time shown, due process would have required an extension of the time. *Mennonite Bd. of*

Missions v. Adams, 462 U.S. 791, 800 (1983) ("notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party"). Yet here, no appeal was ever filed.

II. Partial Summary Judgment May Be Granted On The Prohibitory Injunction But Is Denied On The Mandatory Injunction.

A. Mandatory Injunction

A mandatory injunction functions to "undo an existing wrongful condition; but its use is justified only when it appears that, if it is not applied, the wrongful condition is likely to continue." *WTAR Radio-TV Corp. v. City Council*, 216 Va. 892, 894, 223 S.E.2d 895, 898 (1976).

Here, the Zoning Administrator has not yet proved an existing wrongful condition. Martinez denies the allegations that she has failed to cure the violations. She asserts that if there were any violations, they have been remedied.

There is an obvious factual dispute as to the existence of an ongoing wrongful condition. Since the existence of an ongoing wrongful condition is material, the Zoning Administrator's Motion for Summary Judgment is denied as to entry of a mandatory injunction.

B. Prohibitory Injunction

"The function of the prohibitory injunction is not to repair or penalize a wrong previously consummated, but either to maintain the status quo, to restrain the continued commission of an on-going wrong, or to prevent the future commission of an anticipated wrong." *WTAR Radio-TV Corp. v. City Council*, 216 Va. 892, 894-95, 223 S.E.2d 895, 898 (1976).

Even if the violation was cured after receipt of the Notice of Violation, the cessation of illegal conduct does not moot the case. *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). This Court still has jurisdiction in cases where the underlying dispute is capable of repetition but evades review. *Commonwealth v. Delta Air Lines, Inc.*, 257 Va. 419, 427, 513 S.E.2d 130, 134 (1999).

The Zoning Administrator seeks a prohibitory injunction in order to prevent the future commission of an anticipated wrong. According to *Delta Air Lines*, a prohibitory injunction is not warranted simply because a Notice of Violation was previously issued to Defendants. "When there is reasonable cause to believe that the wrong is one that would cause irreparable injury and the wrong is actually threatened or apprehended with reasonable probability, there is good cause for entry of a prohibitory injunction." *WTAR Radio-TV Corp.*, 216 Va. at 895, 223 S.E.2d at 898.

The entry of a prohibitory injunction traditionally involves the analysis of two factors: (1) irreparable injury and (2) that the wrong is actually threatened or apprehended with reasonable probability. Neither showing is required, though, when a statute or ordinance expressly empowers a court to grant injunctive relief against its violation. *Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170, 176, 409 S.E.2d 446, 449 (1991). In such a case, "[a]ll that is required is proof that the statute or regulation has been violated." *Va. B. SPCA v. S. Hampton Rds.*, 229 Va. 349, 354, 329 S.E.2d 10, 13 (1985); *Carbaugh v. Solem*, 225 Va. 310, 315, 302 S.E.2d 33, 35 (1983).

Va. Code Ann. § 15.2-2286(A)(4) states:

> A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters: (4) For the administration and enforcement of the ordinance including the appointment or designation of a zoning administrator who may also hold another office in the locality. The zoning administrator shall have all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance. His authority shall include (i) ordering in writing the remedying of any condition found in violation of the ordinance; (ii) insuring compliance with the ordinance, bringing legal action, including injunction, abatement, or other appropriate action or proceeding subject to appeal pursuant to § 15.2-2311; and (iii) in specific cases, making findings of fact and, with concurrence of the attorney for the governing body, conclusions of law regarding determinations of rights accruing under § 15.2-2307 or subsection C of § 15.2-2311.

Va. Code Ann. § 15.2-2208(A) states: "Any violation or attempted violation of this chapter, or of any regulation adopted hereunder may be restrained, corrected, or abated as the case may be by injunction or other appropriate proceeding."

All that is required by the Zoning Administrator is proof of a violation. A Notice of Violation was issued to Martinez on April 7, 2010. It was not appealed. That results in Martinez being in violation of a zoning ordinance as "a thing decided." *See Gwinn v. Collier*, 247 Va. 479, 484, 443 S.E.2d 161, 163 (1994). Yet, whether that is still the case is unclear.

CONCLUSION

It is disputed by the parties that the zoning ordinance violations continue to exist. For this reason, a Mandatory Injunction is not appropriate and summary judgment must be denied. The violations, though, consist of ones that are capable of evading review. A Notice of Violation was issued to Martinez. For this reason, a Prohibitory Injunction is appropriate. Partial summary judgment is granted on that basis alone.

An Order is enclosed.

Very truly yours,

R. Terrence Ney

Enclosure

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

EILEEN MCLANE, FAIRFAX COUNTY ZONING ADMINISTRATOR,	)	
Plaintiff,	)	
v.	)	
	)	**CL-2010-11285**
ROSA E. MARTINEZ,	)	
Defendant.	)	

ORDER

This matter came before the Court on December 10, 2010, upon Plaintiff's Motion for Summary Judgment;

IT APPEARING TO THE COURT that the Motion for Summary Judgment should be granted in part for the reasons stated in the December 23, 2010 Opinion Letter, which is incorporated herein and made part hereof; it is hereby

ORDERED that the Motion for Summary Judgment is **GRANTED** in part;

ENTERED this 27th day of December, 2010.

JUDGE R. TERRENCE NEY

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE VIRGINIA SUPREME COURT.