In the

Supreme Court of Virginia

At Richmond

Record No.

Court of Appeals Record No. 0815-22-4

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.

PETITION FOR APPEAL

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The Virginia Court of Appeals erred in reversing the Fairfax County Circuit Court's ("trial court") decision upholding the Fairfax County Board of Zoning Appeals' ("BZA") decision, which upheld the Zoning Administrator's notices of violation issued to Rita M. Leach-Lewis, Trustee of the Rita M. Leach-Lewis Trust 18MAR13 ("Trustee"). The Court of Appeals simply ignored well-established precedent and the Trustee's failure to meet her burden of proof in finding that the BZA should have considered whether Code Compliance Investigator John Enos violated her Fourth Amendment rights. The Court of Appeals further erred by failing to affirm the trial court's conclusion that the Zoning Administrator correctly determined that the Trustee was using her properties in violation of the Zoning Ordinance.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

The central issue in this appeal is whether the BZA should have made factual findings and conclusions related to the Trustee's spurious allegations that Code Compliance Investigator John Enos violated her Fourth Amendment rights during a zoning investigation.

On August 21, 2019, Investigator Enos inspected 6209 and 6211 Knoll View Place, Centreville ("the [6209 and 6211] properties") as part of an investigation into reported violations of the Zoning Ordinance.[1] Having

[1] R. at 166–70, 180–83.

found unpermitted office uses on both properties, Investigator Enos issued notices of violation to the Trustee on behalf of the County Zoning Administrator.[2] The Trustee appealed those notices to the BZA on the grounds that (1) the administrative offices of her church do not constitute an "office" under the Zoning Ordinance because her church is not a business and (2) Investigator Enos violated her Fourth Amendment rights in the conduct of his investigation.[3]

On September 23, 2020, after a nearly three-hour hearing, the BZA upheld the Zoning Administrator's determination that the Trustee was operating offices on the properties in violation of the Zoning Ordinance.[4] It also concluded that the Trustee's Fourth Amendment arguments were not properly before it for consideration.[5] The Trustee timely petitioned for writs

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[2] R. at 166–70, 180–83.

[3] R. at 171–74, 184–87. The Trustee alleged in the trial court that Investigator Enos's inspection violated Zoning Ordinance § 18-901(4), which states that "[n]othing in [the Zoning] 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." *See* R. at 8, ¶ 45; Suppl. R. at 8, ¶ 45. (The clerk of the trial court supplemented the record to include pleadings filed in Circuit Court case CL-2020-16509, the companion case pertaining specifically to the 6209 property.)

[4] R. at 513, 546–47.

[5] R. at 546–47; *see also* R. at 766, n.4 (citing the video recording of the BZA hearing).

of certiorari under Virginia Code § 15.2-2314, appealing the BZA's decisions.[6]

At trial, the Trustee presented additional testimony and other evidence.[7] The trial court ultimately issued an order upholding the BZA's decisions and concluding that, among other points:

- "The properties . . . are an 'office' as the term is defined" in the Zoning Ordinance.
- "[T]he BZA was proper in upholding the Notice of Violation, as the use of the property as an office violates Zoning Ordinance § 3-C02 and C04(4)(F)."
- The Trustee failed to prove, by a preponderance of the evidence, that the BZA erred.
- The BZA was not required to make any finding or decision concerning the Trustee's claim of an unconstitutional search.[8]

The Trustee then appealed to the Court of Appeals. On June 13, 2023, the Court of Appeals issued a memorandum opinion holding, in

[6] R. at 1; Suppl. R. at 1 (The trial court record was supplemented to include the pleadings filed in CL-2020-16509. References to that supplementation to the record are cited hereinafter as "Suppl. R.").

[7] See R. at 896, 997–1251.

[8] R. at 896.

relevant part, that (1) "the BZA had a duty to interpret and apply [Zoning Ordinance] § 18-901(4) in adjudicating [the Trustee's] claim and that the BZA's failure to do so is appealable under Code § 15.2-2309(1)" and (2) the matter should be remanded to the BZA for findings (and possibly additional evidence) regarding the Trustee's consent to the inspections and the scope of a subsequent inspection on August 22, 2019.[9]

STATEMENT OF THE FACTS

The events relevant to this case occurred on August 21, 2019.[10] On that date, Investigator Enos discovered that the Trustee operates the administrative offices of the New World Church of the Christ, Inc., from two single-family detached homes located at 6209 and 6211 Knoll View Place, Centreville.[11] The Trustee owns the properties, which are zoned to the R-C (Residential–Conservation) District.[12] On September 13, 2019, Code Compliance Investigator John Enos issued notices of violation to the

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[9] *Leach-Lewis v. Bd. of Supervisors*, No. 0815-22-4, 2023 WL 3956770, at *3, 5–7 (Va. Ct. App. June 13, 2023). The constitutionality of the August 22, 2019, inspection was raised for the first time by the Court of Appeals. It was not cited in the notices of violation, in the Trustee's appeal to the trial court, or in her petition for appeal to the Court of Appeals. R. at 7, ¶ 36, 166–70, 180–83; Suppl. R. at 7, ¶ 36; Pet. App. at 3, 16 (referring only to the August 21 inspection).

[10] *See* R. at 166–70, 180–83.

[11] R. at 166–70, 180–83.

[12] R. at 2, ¶ 1, 3, ¶ 4, 171–72, 184–85; Suppl. R. at 2, ¶ 1, 3, ¶ 4.

Trustee for, in relevant part, operating offices on the properties in violation of Zoning Ordinance § 2-302(5).[13]

Investigator Enos's inspection of the properties

Police executed search warrants on the properties in August 2019 as part of a child pornography investigation.[14] Before the search, they alerted the County's Department of Code Compliance ("DCC") about a suspected unlawful office use on the properties.[15] DCC investigators, including Investigator Enos, went to the properties, waited until the police were concluding their investigation, and then requested the Trustee's consent to inspect the suspected zoning violations.[16]

The DCC investigation began with Code Compliance Investigator Chip Moncure meeting with the Trustee at the 6209 property.[17] As Investigator Enos has consistently testified, he entered the 6209 property only after Investigator Moncure advised him that the Trustee had

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[13] R. at 166–70, 180–83. The Zoning Ordinance was amended and recodified effective May 9, 2023. All citations in this brief are to the Zoning Ordinance in effect when the relevant notices of violation were issued. Archived versions of the Zoning Ordinance are available for reference at: https://online.encodeplus.com/regs/fairfaxcounty-va/index.aspx.

[14] R. at 423; *see also* R. at 1046, 1049.

[15] R. at 515, 519; *see also* R. at 1146–47.

[16] R. at 515, 520, 522, 526; *see also* R. at 1147–48.

[17] R. at 526, 1148.

consented for him to do so.[18] Investigator Enos was greeted at the door by a woman, apparently a church member, who accompanied him to the sunroom.[19] There he met the Trustee, seated in her easy chair.[20] Investigator Enos identified himself as being from DCC, explained the reason for his visit, and obtained her consent to inspect both the 6209 and 6211 properties.[21]

Investigator Enos concluded his search of the properties but still needed to investigate three other nearby dwellings owned by the Trustee.[22] In light of the police activity on the properties, Investigator Enos scheduled an inspection for the following day with the Trustee, where he was accompanied by a group of church members.[23] During that inspection,

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[18] R. at 526–27, 1148.

[19] R. at 527, 1148.

[20] R. at 527, 530. In the trial court, the Trustee testified that her dogs were with her at the time she met Investigator Enos. R. at 1150. Reverend Christian Sulger, Vice President and Primary Deacon of the church, testified that when he arrived at the 6209 property, he saw that church members, including the Trustee, were free to move around, not detained as alleged by the Trustee. R. at 1120.

[21] R. at 520–21, 1149, 1152.

[22] R. at 521–22, 1156.

[23] R. at 522, 1156–57.

church members even invited Investigator Enos to conduct a second inspection of the 6211 property.[24]

Investigator Enos's findings about church operations on the properties

The church is a nonprofit corporation that funds its operations through donations.[25] It does not host regular worship services but, instead, distributes spiritual materials and hosts conferences.[26] The Trustee attested to the BZA that seven individuals, each paid a stipend for their efforts, regularly report to work on the properties.[27]

Investigator Enos's inspections revealed that the Trustee operates the church's administrative offices on the properties.[28] He saw all of the trappings of an office—"large areas of each structure devoted to office spaces and storage[,] several non-resident employees[,] the operation of [a] server . . . networking both properties, and signage indicating offices

[24] R. at 522, 1156:14–21. The church members present during the August 22 inspection included Reverend Sulger. R. at 1156:14–17.

[25] R. at 528 ("The Church receives its money through what they call donations or what they precisely call love gifts."), 532, 535–36, 1058:10–11, 1078, 1235, 1238.

[26] R. at 532, 537, 1026:18–22, 1027:1–6, 1057:21–22, 1058:1–8.

[27] R. at 19, ¶ 3, 536; Suppl. R. at 18, ¶ 3.

[28] R. at 517, 1152, 1154.

and men's and women's restrooms."[29] Photographs taken by Investigator Enos during his inspections reveal that substantial portions of the homes had been converted to office use.[30]

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in ruling that the BZA should have considered the constitutionality of Investigator Enos's inspection because:

   a. His inspection of the properties was an act that did not constitute a decision under Virginia Code §§ 15.2-2309 and -2311.

   b. Zoning Ordinance § 18-901(4) merely restates the Zoning Administrator's obligation to abide by the Fourth Amendment.

   c. The exclusionary rule is a remedy that is not available in a civil matter such as an appeal from the BZA.

[29] R. at 517; *see also,* R. at 1152:19–21, 1192–1210. These facts are not in dispute. The Trustee's affidavit to the BZA states that the church uses the properties for "spiritual study[,] research[, and] analysis, receipt of charitable monetary donations or 'love gifts,' creating spiritual material, [and] organizing off-site conferences." R. at 6, ¶ 25; Suppl. R. at 6, ¶ 25.

[30] R. at 471–97; *see also* R. at 1192–1210.

The Court of Appeals erred in Part I of its June 13, 2023, Memorandum Opinion, which decided the Trustee's first assignment of error in her appeal to the Court of Appeals. *See Leach-Lewis,* 2023 WL 3956770, at *3–5, *7 n.12; Appellant's Opening Br. at 2, *Leach-Lewis,* 2023 WL 3956770. The Board of Supervisors preserved error in Part II(A) of its Brief of Appellee and in oral argument. Br. Appellee at 9–13, *Leach-Lewis,* 2023 WL 3956770.

2. The Court of Appeals erred in remanding the case to the BZA, because the Trustee failed to meet her burden of proof before both the BZA and the Circuit Court, additional evidence would not further illuminate the issues, and remand is not an available remedy under Virginia Code § 15.2-2314.

The Court of Appeals erred in Part II of its June 13, 2023, Memorandum Opinion, which decided the Trustee's second assignment of error in her appeal to the Court of Appeals. *See Leach-Lewis,* 2023 WL 3956770, at *5–7; Appellant's Opening Br. at 3, *Leach-Lewis,* 2023 WL 3956770. The Board of Supervisors preserved error in Parts II(B) and III(A) of its Brief of Appellee and in oral argument. Br. Appellee at 13–21, *Leach-Lewis,* 2023 WL 3956770.

3. The Court of Appeals erred in failing to affirm the trial court's decision because it declined to consider whether the Trustee was using the properties as an office in violation of the Zoning Ordinance.

The Court of Appeals erred in its June 13, 2023, Memorandum Opinion by declining to decide the Trustee's third assignment of error in her appeal to the Court of Appeals. *See Leach-Lewis,* 2023 WL 3956770, at *7; Appellant's Opening Br. at 3, *Leach-Lewis,* 2023 WL 3956770. The Board of Supervisors preserved error in Part III(B) of its Brief of Appellee and in oral argument. Br. Appellee at 21–27, *Leach-Lewis,* 2023 WL 3956770.

STANDARD OF REVIEW

The three assignments of error present pure issues of law for the Court to decide—whether a BZA may consider the constitutionality of a Zoning Administrator's investigation, whether remand to the BZA is available under Virginia Code § 15.2-2314, and the interpretation of a provision of the Zoning Ordinance. These assignments are properly reviewed *de novo.*[31] The second assignment of error also presents mixed questions of law and fact—whether the Trustee met her burden of proof

[31] *Cain v. Lee*, 772 S.E.2d 894, 896 (Va. 2015) (holding that all questions of law are reviewed *de novo*). *See also*, *Renkey v. Cnty. Bd.,* 634 S.E.2d 352, 354–55 (Va. 2006) (holding that the interpretation of a zoning ordinance is subject to *de novo* review by the appellate court).

before the BZA and whether the additional evidence requested by the Court of Appeals would further illuminate the issues—which are also reviewed *de novo*,[32] but the Court is to "give deference to the trial court's factual findings and view[s] the facts in the light most favorable to . . . the prevailing parties below."[33]

AUTHORITIES AND ARGUMENT

I. The Court of Appeals erred in ruling that the BZA should have considered the constitutionality of Investigator Enos's inspection. (First Assignment of Error)

The only issue properly before—and decided by—the BZA was the correctness of the Zoning Administrator's determination, not any ancillary constitutional question. The Trustee nonetheless asked the BZA, and later the trial court, to find that Investigator Enos violated her Fourth Amendment rights. Both the BZA and the trial court correctly recognized that the constitutionality of the Zoning Administrator's investigation is outside the scope of appeals to and from the BZA under Virginia Code §§ 15.2-2311 and -2314. But the Court of Appeals erred in finding that the BZA should

[32] *Caplan v. Bogard*, 563 S.E.2d 719, 722 (Va. 2002).

[33] *Id.*

have ruled on whether the zoning investigation comported with the Fourth Amendment.[34]

A. Investigator Enos's inspection of the properties was an act that did not carry the finality of a decision as contemplated by Virginia Code §§ 15.2-2309 and -2311.

Most fundamentally, the Court of Appeals erred by conflating Investigator Enos's inspection with the Zoning Administrator's decision contained in the notices of violation.[35] Under Virginia Code §§ 15.2-2309 and -2311, the BZA may "hear and decide appeals from any order requirement, decision or determination" of an administrative officer enforcing a zoning ordinance. While the inspection was an act performed to effectuate the Zoning Administrator's obligation to enforce the Zoning Ordinance, it was not a "decision" as that term is used in Virginia Code §§ 15.2-2309 and -2311.[36]

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[34] *Leach-Lewis*, 2023 WL 3956770, at *5.

[35] *Leach-Lewis*, 2023 WL 3956770, at *3.

[36] *See* Zoning Ordinance § 18-102(2) (imposing on the Zoning Administrator a duty to "[c]onduct inspections of buildings, structures and sues of land *to determine compliance* with the provision of this [Zoning] Ordinance" (emphasis added)).

This Court has consistently held that an "order, requirement, decision, or determination" is something more than a mere act; it requires "finality."[37] By its very nature, an investigation itself has no finality; to suggest otherwise would presume the conclusions to be drawn from the investigation before it has begun. What was properly before the BZA for consideration was the substance of the notices of violation—i.e., the zoning determination and order to comply—not the underlying investigation.

While the Court of Appeals acknowledges that the "'decision' or 'determination' [the Trustee] appealed from [was] the notice[s] of violation,"[38] the Trustee argued that her challenge regarding Zoning Ordinance § 18-901(4) stemmed from the "decision" to *issue* the notices of violation.[39] This argument fails, because it is not simply issuing a document that constitutes a "decision"; rather it is the binding substance of the "order, requirement, decision, or determination" that is appealable to the BZA.[40]

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[37] *See James v. City of Falls Church,* 694 S.E.2d 568, 575 (Va. 2010) (holding that an "'interpretation' lacked the finality of an 'order, requirement, decision, or determination'"); *see also Norfolk 102, LLC v. City of Norfolk,* 738 S.E.2d 895, 903 (Va. 2013) (holding that a "'Cash Receipt' was not a specific determination by the zoning administrator or any other City official").

[38] *Leach-Lewis*, 2023 WL 3956770, at *3.

[39] *See* R. at 899–900, ¶¶ 6–8; 1135:4–13.

[40] *See* Va. Code §§ 15.2-2309, -2311; *cf. James,* 694 S.E.2d at 575.

Under Virginia Code § 15.2-2309(1), the decision on an appeal to the BZA "shall be based on the board's judgment of whether the administrative officer was correct." Here, the BZA did just that. Properly reviewing the Zoning Administrator's final decision, it concluded that she was correct in determining that the Trustee was operating an office use on the properties in violation of the Zoning Ordinance.[41]

Therefore, the Court of Appeals erred by conflating the preliminary act of investigating a potential violation with the Zoning Administrator's final decision contained in the notices of violation.

B. Zoning Ordinance § 18-901(4) does nothing more than restate the Zoning Administrator's obligation to abide by the Fourth Amendment.

The Court of Appeals erroneously decided that the BZA had to make a finding regarding Zoning Ordinance § 18-901(4)—a restatement of the Zoning Administrator's obligation to comply with the Fourth Amendment.[42] In fact, the plain language of that ordinance—stating that "[n]othing in this Ordinance may be construed to authorize an unconstitutional inspection or search"—makes evident that no new requirement is imposed on the Zoning

[41] R. at 546–48.

[42] Zoning Ordinance § 18-901(4).

Administrator. Rather it merely states the truism that the Zoning Ordinance cannot be interpreted to violate the Constitution.

The Court of Appeals nonetheless found that, merely by acknowledging the requirements of the Fourth Amendment, Zoning Ordinance § 18-901(4) made those requirements applicable law governing the Zoning Administrator's investigation.[43] In coming to this conclusion, the Court of Appeals ignores the obvious—the United States Constitution is the law. But with or without express recognition in the Zoning Ordinance, the constitutional underpinnings of a Zoning Administrator's decision are not *applicable law* for the BZA to consider.

On multiple occasions, this Court has rejected constitutional challenges to a BZA decision because they exceeded the scope of a BZA's statutory powers and a court's review on certiorari. In *City of Emporia Bd. of Zoning Appeals v. Mangum*, the owner of a nonconforming mobile home park claimed that, by restricting his right to use his property, a zoning determination violated his due process rights.[44] *Board of Zoning Appeals v. University Square Assocs.* involved a zoning administrator's determination

[43] *Leach-Lewis*, 2023 WL 3956770, at *4–5.

[44] *See City of Emporia Bd. of Zoning Appeals v. Mangum*, 556 S.E.2d 779, 782–783 (Va. 2002).

that a site plan violated a special use permit condition; the landowner challenged the site plan denial based, in part, on the constitutionality of that condition.[45] The common thread in these cases is the recognition that a BZA's statutory limits preclude it from resolving constitutional questions.

The Court of Appeals misreads *Mangum* and *University Square* as applying only where a BZA is being asked to declare an ordinance unconstitutional.[46] In *Mangum* the constitutional challenge was not to an ordinance, but to the application of that ordinance with respect to the landowner's property rights.[47] And while *University Square* involved a challenge to a legislatively approved special use permit condition, it was not an ordinance *per se*. Certainly, a landowner should not be subject to the unconstitutional application of an ordinance. But this Court has consistently held that an appeal to the BZA is not the correct vehicle to challenge the constitutional basis for a zoning determination.[48]

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[45] *Bd. of Zoning Appeals v. Univ. Square Assocs.*, 435 S.E.2d 385, 388 (Va. 1993).

[46] *See Leach-Lewis*, 2023 WL 3956770, at *8.

[47] 556 S.E.2d at 782–83. *See also* Br. of Appellee*, City of Emporia v. Mangum*, 556 S.E.2d 779 (Va. 2002) (No. 010027), 2001 WL 34831775, at *10 (arguing that landowner's due process rights were violated by an arbitrary application of the zoning ordinance).

[48] *Mangum,* 556 S.E.2d at 782-83; *Univ. Sq. Assoc.*, 435 S.E.2d at 388.

Here, the Trustee asked the BZA to consider the constitutional underpinnings of the Zoning Administrator's decision by way of her evidentiary investigation.[49] Applying this Court's prior holdings, the Trustee could have challenged that investigation in a number of ways—for example, under 42 U.S.C. § 1983 or as a defense in the unlikely event of a criminal prosecution. But an appeal to the BZA is not the appropriate path. Because Zoning Ordinance § 18-901(4) does nothing more than restate law applicable to a zoning investigation, the BZA had no authority to consider the constitutionality of that investigation. It was merely obliged to consider whether the Zoning Administrator correctly applied the Zoning Ordinance to the facts.[50] Therefore, the Court of Appeals erred in holding that the BZA was required to make findings regarding Zoning Ordinance § 18-901(4).

C. The exclusionary rule is a remedy that is not available in a civil matter such as an appeal from the BZA.

Indeed, any alleged Fourth Amendment violation was not only outside the scope of the BZA's authority, but also irrelevant to its decision. It is well

[49] R. at 173, 186–87.

[50] Va. Code § 15.2-2309(1) ("The decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct.").

settled that the exclusionary rule does not extend to civil cases.[51] Proceedings before the BZA are civil.[52] Even if the BZA could have considered the Trustee's constitutional complaint—and even if, theoretically, the investigation had violated the Fourth Amendment—the BZA still could have considered evidence acquired unlawfully.[53] The Trustee's "fruit of the poisonous tree" argument is simply inapplicable. The Court of Appeals not only misconstrues Zoning Ordinance § 18-901(4) to somehow import additional requirements on the Zoning Administrator, but it also imports a remedy that this Court has long held does not apply in the context of a civil proceeding such as this.[54] Therefore, the Court of Appeals must be reversed in its decision to require the BZA to consider the constitutionality of the zoning investigation, because any such finding by the BZA would leave its decision to uphold the Zoning Administrator unchanged.

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[51] *Cnty. of Henrico v. Ehlers*, 379 S.E.2d 457, 462 (Va. 1989); *see also Logan v. Commonwealth*, 688 S.E.2d 275, 278 (Va. 2010) (holding that the exclusionary rule "is a judicially-created remedy, not an individual's constitutional right").

[52] *Burkhardt v. Bd. of Zoning Appeals*, 66 S.E.2d 565, 568 (Va. 1951).

[53] *Cf. Gwinn v. Alward*, 369 S.E.2d 410, 413 (Va. 1988) (holding that there is no statutory "limitation on the manner or method by which the zoning administrator is to decide that violations exist").

[54] *Leach-Lewis*, 2023 WL 3956770, at *5.

II. The Court of Appeals erred in remanding the case to the BZA after the Trustee failed to meet her burden of proof, and the additional evidence sought by the Court of Appeals would not further illuminate the issues.[55] (Second Assignment of Error)

The Court of Appeals further erred in holding that the matter should be remanded to the BZA. Virginia Code § 15.2-2314 specifically sets out the actions a circuit court may take in an appeal from the BZA—to "reverse or affirm . . . or [to] modify the decision brought up for review." Further, an appellant is expressly permitted to introduce evidence before the circuit court beyond that contained in the record before the BZA.[56] The General Assembly simply hasn't set out remand as an available remedy under the statute, and by allowing the introduction of evidence not heard by the BZA, has rendered remand unnecessary.[57]

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[55] The Board of Supervisors does not concede that the matter should be remanded to the BZA at all. Remand is unnecessary because the BZA properly declined to reverse the Zoning Administrator on the Fourth Amendment issue. *See supra* part I.

[56] Va. Code § 15.2-2314 ("The appealing party may rebut [the presumption of correctness afforded the BZA] by proving by a preponderance of the evidence, *including* the record before the [BZA], that the [BZA] erred in its decision. Any party may introduce evidence in the proceedings in the Court." (Emphasis added)).

[57] *Cf.* Va. Code § 2.2-4029 (explicitly allowing a remand where the court finds an error of law occurred before the administrative body); *Virginia Bd. of Medicine v. Fetta*, 421 S.E.2d 410 (Va. 1992) (holding that where remand is specifically authorized under the Administrative Process Act, the General Assembly intended such remand to be limited in scope and not a trial *de novo*).

The cases cited by the Court of Appeals support a remand only when the appellant was precluded from establishing a sufficient record—not when the appellant failed to present sufficient evidence to the decision-making body, despite having a full opportunity to do so.[58] In both *Jones v. Willard* and *Hoyle v. Va. Emp. Comm'n,* the statute governing appeals to the trial court precluded the court from taking additional evidence.[59] Thus, unlike in Virginia Code § 15.2-2314, the only means of supplementing a record to avoid an injustice was through remand.[60]

Here, the BZA held a full hearing during which the Trustee presented her case to overturn the Zoning Administrator's decision.[61] Not only did the

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[58] *See Jones v. Willard*, 299 S.E.2d 504, 508 (Va. 1983) (holding that a remand was appropriate where the administrative decision was tainted by intrinsic fraud); *Hoyle v. Virginia Emp. Comm'n*, 484 S.E.2d 132, 133 (Va. Ct. App. 1997) (permitting a remand where the Virginia Employment Commission had been unable to provide full testimony at an administrative appeal due to an ongoing criminal investigation).

[59] *Jones*, 299 S.E.2d at 507; *Hoyle*, 484 S.E.2d at 134 (deciding an administrative appeal under Virginia Code § 60.2-625(A), which confines the jurisdiction of the circuit court "to questions of law").

[60] *See Jones*, 299 S.E.2d at 508 (permitting a remand to the administrative body "[b]ecause we believe that 'justice demands that course'").

[61] Va. Code § 15.2-2309(1) ("[T]he appellant has the burden of proof to rebut [the] presumption of correctness [afforded the Zoning Administrator] by a preponderance of the evidence."); R. at 274–77, 526–38. *See also, Norfolk 102, LLC.*, 738 S.E.2d at 903 (holding that in an

(Continued on next page)

Trustee present such evidence—both through her own testimony and in an affidavit submitted to the BZA ahead of the hearing—but her counsel was also permitted to cross-examine Investigator Enos.[62] Then the trial court held a full trial in the case, taking additional evidence.[63] And nowhere has the Trustee assigned error on the ground that she was precluded from presenting any evidence. In short, the Trustee was provided wide latitude to put the issue before both the BZA and the trial court, and she has no right to a third bite at the apple.

But even if Zoning Ordinance § 18-901(4) could be relevant to a BZA appeal, this is not the case for it. Having found that "the record is insufficient for us, or the circuit court, to determine whether and how § 18-901(4) applies," the Court of Appeals effectively concluded that the Trustee failed to carry her burden of proof.[64] This fact undermines any basis for a remand to the BZA. The Trustee had the burden of proof in her

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appeal under Va. Code § 15.2-2311, the burden of proof rests with the appellant).

[62] R. at 274–77, 526–38. The BZA's by-laws expressly prohibit cross-examination of speakers, except with "permission of the Chair." R. at 238, ¶1(b). Here, Chairman Ribble provided the Trustee's counsel such an opportunity. R. at 526 ("[W]e're not really into cross examination but . . . if you want to come up now and ask Mr. Enos a question, please do.")

[63] R. at 997–1251.

[64] *Leach-Lewis*, 2023 WL 3956770, at *6.

appeal to the BZA.[65] If she failed to put on sufficient evidence to allow the decision-maker to adjudicate the issue, she failed to meet her burden.[66] The remedy is not to remand the case for additional evidence, but to deny her appeal.[67] Regardless of whether the BZA could have made findings regarding the Fourth Amendment, they would serve no purpose, because the Court of Appeals has already determined that the Trustee failed to create a sufficient record to overturn the Zoning Administrator's determination.

Further, the additional evidence sought by the Court of Appeals would do nothing to illuminate the Trustee's arguments. The Court of Appeals questions the scope of the follow-up inspection on August 22, 2019, and the contradictory testimony regarding the Trustee's consent to the August 21 inspection.[68] But the Zoning Administrator's decisions

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[65] Va. Code § 15.2-2309(1) ("At a hearing on an appeal, the administrative officer shall explain the basis for his determination after which the appellant has the burden of proof to rebut such presumption of correctness by a preponderance of the evidence.")

[66] *See* Va. Code § 15.2-2309(1).

[67] *See Goyonaga v. Bd. of Zoning Appeals*, 657 S.E.2d 153, 160 (Va. 2008) (holding that a circuit court properly denied an appeal of a vested rights determination under Virginia Code § 15.2-2311(C), where the landowners failed to meet their burden of proof)

[68] *Leach-Lewis*, 2023 WL 3956770, at *6.

expressly pertained only to the inspection on August 21,[69] and the Trustee had multiple opportunities to present evidence supporting her claimed lack of consent to that inspection.[70] Additional testimony would surely not result in an agreement between the parties on that issue.

The notices of violation refer only to the August 21 inspection.[71] While Investigator Enos testified that he entered the 6211 property at the church members' request on August 22, the primary purpose of that inspection was to see the Trustee's other three houses on Knoll View Place.[72] He did not issue any notice of violation based on his August 22 inspections.[73] That inspection is entirely irrelevant to the Trustee's claims, other than to reinforce the voluntariness of her consent to the first inspection.

The Court of Appeals must be reversed because remand to the BZA is not available under Virginia Code § 15.2-2314 and because it found the Trustee failed to create a sufficient record before the BZA to support its

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[69] R. at 166, 180.

[70] R. at 112–15, 414, 520–22, 526–27, 529–30, 1079–90. Not only did the BZA consider the staff report, but Investigator Enos testified before the BZA regarding the Trustee's consent. R. at 520–22, 526–27.

[71] R. at 166, 180.

[72] R. at 520, 522, 1156:3–21.

[73] *See* R. at 2, ¶ 1; R. at 7, ¶ 36; Suppl. R. at 2 ¶ 1; Suppl. R. at 7, ¶ 36 (identifying only the notices of violation based on the August 21, 2019, inspection and claiming a Fourth Amendment violation only on that date).

allegations. Furthermore, the additional evidence the Court of Appeals seeks was available to the Trustee at the time of the original hearing and would not further illuminate any decision on the Fourth Amendment issue.

III. The Court of Appeals erred in declining even to consider whether the Trustee was using the properties as an office in violation of the Zoning Ordinance. (Third Assignment of Error)

The Court of Appeals erred when it declined to affirm the trial court's holding that the church administrative offices violate the Zoning Ordinance. The BZA has no authority to consider the constitutional underpinnings of a Zoning Administrator's determinations. Moreover, as the Court of Appeals found that the Trustee failed to meet her burden of proof before the BZA on the Fourth Amendment question, a remand would serve no purpose.

Substantively, the Court of Appeals erred because the Zoning Administrator correctly determined that the Trustee was operating an office use on the properties in violation of the Zoning Ordinance. The Zoning Ordinance defined *office*, in relevant part, as "[a]ny 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."[74] The Trustee does not dispute that the church conducts "accounting, correspondence, research, editing, administration or analysis"

[74] Zoning Ordinance § 20-300.

on the properties to advance its evangelical mission, but she instead attempts to reframe those activities as "personal" business.[75] The record does not bear that out, instead plainly showing that the Trustee and the church's multiple staff members make extensive use of the properties to advance the business of the church.

She asserts that the use of the word "business" modifies the *office* definition such that only a for-profit enterprise could maintain an office use.[76] However, *business* is a far more expansive term than the Trustee recognizes. For example, Black's Law Dictionary states that a business may be, among other things, "a particular occupation or employment habitually engaged in for livelihood or gain" or "transactions or matters of a noncommercial nature," such as the business of the Court.[77] Merriam-Webster recognizes that a business may be "a particular field of endeavor."[78] Even Black's Law Dictionary's definition of "commercial" is broader than the Trustee asserts; it recognizes that commercial activity

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[75] Appellant's Opening Br. at 25–26, *Leach-Lewis*, 2023 WL 3956770.

[76] R. at 2, ¶ 2; R. at 5–6, ¶¶ 20–22; R. at 1093:20–22, 1094:1–5, 1096–98. *See also* Appellant's Opening Br. at 26, *Leach-Lewis*, 2023 WL 3956770.

[77] *Business*, Black's Law Dictionary (11th ed. 2019).

[78] *Business,* Merriam-Webster.com, https://www.merriam-webster.com/dictionary/business (last visited July 10, 2023).

results not just from profit, but also from an exchange.[79] "When construing a zoning ordinance and its undefined terms, [the Court must] give such terms their 'plain and natural meaning.'"[80] This the Trustee simply fails to do. Only by cherry-picking an isolated part of a single definition is she able to argue that a "business" must have a profit-generating purpose.[81]

However, Zoning Ordinance § 2-302(1) does not allow for such a rigid construction. It provides that even when "there is not a particular use listed in the Ordinance that corresponds with the use in question, then it shall be interpreted that the use in the Ordinance having the most similar characteristics as the use in question shall govern." The record plainly shows that the Trustee is maintaining either an office use on the properties or a use that is most similar to an office, so her contrived arguments simply do not hold water. The Trustee proposes no alternative use defined in the Zoning Ordinance to which her use is most similar—and certainly not one permitted in the R-C zoning district. The trial court and the BZA were plainly correct in finding an office use on the properties, and the Court of Appeals decision must be reversed.

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[79] *Commercial*, Black's Law Dictionary (11th ed. 2019).

[80] *Adams Outdoor Advert., L.P. v. Bd. of Zoning Appeals,* 645 S.E.2d 271, 275 (Va. 2007).

[81] R. at 5, ¶ 20; Suppl. R. at 5, ¶ 20.

CONCLUSION

The Court of Appeals erred by holding that the BZA had authority to and should have considered the constitutionality of the August 21 inspection. The inspection itself was not a decision or determination of the Zoning Administrator subject to challenge before the BZA, nor does the BZA have statutory authority to consider constitutional questions. The Court of Appeals also erred in remanding the matter to the BZA, because it found that the Trustee failed to meet her burden of proof during her initial appeal and a remand, which is not an available remedy under Virginia Code § 15.2-2314, would only serve to give her a third bite at the apple. Furthermore, the evidence the Court of Appeals seeks would not further illuminate any of the issues raised in the appeal. Finally, the Court of Appeals erred by declining to consider the Trustee's unlawful office use of the properties. Had it done so, it surely would have affirmed the trial court's decision, which upheld the BZA and, by extension, the Zoning Administrator's notices of violation. The record plainly shows that the Trustee is using the properties as offices in violation of the Zoning Ordinance. Therefore, the Court of Appeals' June 13, 2023, decision should be reversed and the trial court affirmed.

Respectfully submitted,

THE BOARD OF SUPERVISORS OF
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CERTIFICATE

I hereby certify that:

1. The Appellant, Board of Supervisors of Fairfax County, Virginia, is represented by:

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3. On July 13, 2023, this Petition for Appeal was filed electronically in the Office of the Clerk of this Court and sent by regular mail and electronic mail to counsel of record for the Appellee.

4. The foregoing Petition for Appeal is typed in 14-point Arial font and contains less than 35 pages, excluding those portions that by rule do not count toward the page limit.

5. The Appellant requests the opportunity to state orally, in person, to a panel of this Court the reasons why this Petition for Appeal should be granted.

/s/ Elizabeth D. Teare
Elizabeth D. Teare