

12-1278

L. Gutsell

**IN THE CIRCUIT COURT OF JEFFERSON
COUNTY, WEST VIRGINIA**

**DONALD R. BURGESS and
PATRICIA E. BURGESS,**

Petitioners,

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JUL 30 2012

**JEFFERSON COUNTY
CIRCUIT CLERK**

V.

CIVIL ACTION NO. 11-C-421

**CORPORATION OF SHEPHERDSTOWN,
a municipal corporation and
ARTHUR J. AUXER, III, Mayor, in his
individual and official capacity,
and JOHN DOE I-X,**

Respondents.

ORDER DISMISSING PETITION

ON JUNE 22, 2012, this matter came on for the continuation of the final evidentiary hearing, originally begun on June 15, 2012. The Court noted the appearance of the Petitioner Donald R. Burgess, in person and by counsel Linda M. Gutsell, Esq., and the Respondent Arthur J. Auxer III, individually and for the Corporation of Shepherdstown, in person and by counsel Patrick J. Nooney, Esq., and Julie R. Shank, Esq.

WHEREUPON, the Court continued to hear testimony from witnesses and closing arguments from counsel. At the close of the evidence and argument, the Petitioners strongly urged and requested the Court to make a ruling from the bench so that the Petitioners should not have additional delay. The Court granted said request of the Petitioners, DENYING the Petition in whole. The Court now makes the following findings of fact and conclusions of law in support of said ruling.

1. The Petitioners filed this action seeking extraordinary remedies based on allegations that the Respondents unlawfully prohibited the Petitioners from operating a short-term rental property in the R-1 District of Shepherdstown, and making certain repairs, improvements, or changes to said property. The property in question is located at 202 East High Street. The Petitioners purchased this property on or about June 24, 2011, and later, began operating the Riverfall Guesthouse, a short-term vacation rental property, at the subject property.

2. Specifically, the Petitioners seek various forms of relief for the alleged improper enactment and enforcement of the planning and zoning code of the Corporation of Shepherdstown. The Petition contains seven counts, as follows: Count I seeks a writ of mandamus compelling the Respondents to allow the Petitioners to complete renovations on property within the R-1 Residential area, to remove a section from the Codified Ordinances, and compelling the Corporation of Shepherdstown to revoke any authority to administer the "building code." Count II seeks a writ of mandamus compelling the issuance of a building permit. Count III seeks a writ of mandamus compelling the Corporation of Shepherdstown to issue written confirmation that the subject property is exempt from the business license requirement. Count IV seeks a writ of mandamus compelling issuance of a business license. Count V seeks a writ of prohibition prohibiting the Corporation of Shepherdstown from enforcing the zoning ordinance on the basis that the same was improperly adopted. Count VI seeks an injunction and a writ of mandamus requiring the Corporation of Shepherdstown to

prohibit the destruction or deletion of e-mails, require disclosure of certain e-mails, and require compliance with a state law freedom of information act request. The Court notes that Count VI is intertwined with each of the Petitioners' other claims, as this portion of the Petitioners' claim is based on requests for information regarding ordinances and documents related to the Town's ordinances. Finally, Count VII contains a claim under 42 U.S.C. § 1983, and is the only claim for which has been stayed by the United States District Court for the Northern District of West Virginia.¹

3. The West Virginia Supreme Court of Appeals has stated that “[t]he rationale behind a Writ of Prohibition is that by issuing certain orders the trial court has exceeded its jurisdiction, thus making prohibition appropriate. As such, writs of prohibition provide a drastic remedy to be invoked only in extraordinary situations. More specifically, a court will use prohibition to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” *State ex rel. Thrasher Eng’g, Inc. v. Fox*, 2005 W. Va. Lexis 124 (2005).

¹ This case was removed to the United States District Court for the Northern District of West Virginia. Subsequently, Counts 1 through VI were remanded to this Court for its consideration. However, the District Court retained jurisdiction over Count VII pending determination of the state-court claims.

4. In *State ex rel. Hoover v. Berger*, the West Virginia Supreme Court held that courts should consider certain factors when determining whether to entertain and issue the Writ of Prohibition:

In determining whether to entertain and issue the Writ of Prohibition for cases not involving an absence of jurisdiction, but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

199 W. Va. 12, 483 S.E.2d 12 (1996).

5. "A writ of mandamus will not issue unless three elements coexist-(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

6. In the present case, the Petitioners cannot meet the factors set out in *Hoover* and *Kucera* because (1) the Petitioners have other adequate legal remedies for the building permit issue; (2) the Petitioners will not be damaged or prejudiced in a way that is not correctable on appeal regarding the

building permit issue; (3) the lower tribunal's order is not clearly erroneous as a matter of law for the short-term rental issue; and (4) the lower tribunal's decision is not an oft repeated error and does not manifest persistent disregard for either procedural or substantive law regarding the short-term rental issue.

7. The Petitioners argue that the Corporation of Shepherdstown's zoning ordinances prohibit specified uses and permits all others not specified in the ordinances. The Petitioners reason that since the zoning ordinances do not specifically prohibit the operation of short-term rental properties that said use is permitted. The Respondents argue that Shepherdstown's zoning scheme is the opposite; that is, the uses specified in the ordinances are permitted and all others that are not specified are prohibited. Accordingly, the Respondents disagree with the argument that operation of a short-term rental property operation is permissible in the R-1 Residential District.

8. The Petitioners concede that Town Code Sections 9-501, 9-502, and 9-503 are valid zoning ordinances.

9. Section 9-501, entitled "Declaration of public purpose" states:

(a) The Park-Residential District is to support the existing pattern of single family dwellings on large lots and to provide protection for and transition to the Conservation Open Space District.

(b) The R-1 (low density) District is intended to preserve and encourage the development of single family residential neighborhoods free

from land usage which might adversely affect such development.

(c) The R-2 (medium density) District is intended to provide an attractive, pleasant living environment at a sufficient density to maintain a high standard of physical maintenance and the optimum utilization of land appropriate for residential use.

(emphasis added).

Section 9-502, entitled, "Uses permitted in the PR (Park Residential) District" states that:

(a) Uses (a) through (d) permitted in the COS District

(b) A single family residence per existing lot as presently recorded with no construction on a slope greater than twelve (12) percent, or below the base flood level as determined by H.U.D.

Section 9-503 Uses permitted in the R-1 (low density) District states that:

(a) Any use permitted in the PR District.

(b) Single family, duplex dwellings, and/or single family dwellings of no less than one thousand five hundred (1,500) square feet with one (1) apartment of no less than one thousand (1,000) square feet, which apartment shall contain not more than three (3) additional persons not members of the family residing in the dwelling unit.

(c) Townhouses, each having its own lot and housing no more than one family.

(d) Accessory uses and buildings.

(emphasis added).

Moreover, Town Code § 9-505 specifies that the following businesses may operate only by special exception in the R-1 district: 1) home occupations; and 2) the offices of resident physicians, dentists, architects, engineers, attorneys, or similar professional persons operating in their homes, provided that certain requirements are met.

10. West Virginia Code § 8A-7-2(b) states that a municipal zoning ordinance may specific permitted or prohibited uses. "A zoning ordinance may include the following: (1) Regulating the use of land and designating or prohibiting specific land uses. . . ." The Petitioners concede that the use of the word "designating," as stated in § 8A-7-2, has the same meaning as "permissive."

11. It is clear from the evidence presented that Shepherdstown's zoning ordinances permit only those uses which are specifically named. Shepherdstown has clearly defined the R-1 Residential area as a low density district intended to preserve and encourage the development of single-family residential neighborhoods free from land usage which might adversely affect such development. Further, 9-503, in part, allows "[s]ingle family, duplex dwellings, and/or single family dwellings of no less than one thousand five hundred (1,500) square feet with one (1) apartment of no less than one thousand (1,000) square feet, which apartment shall contain not more than three (3) additional persons not members of the family residing in the dwelling unit." This language shows a clear intent that the R-1 district is zoned to foster a single-family residential community and to preserve the historic nature of

Shepherdstown. Further, the Court finds that these ordinances prohibit short-term rentals in the R-1 Residential District.

12. Pursuant to well-settled authority, Shepherdstown is clearly permitted to vindicate and preserve single-family residential neighborhoods through the aforementioned zoning ordinances. *See, e.g.*, West Virginia Code § 8-24-39; West Virginia Code § 8A-7-1; West Virginia Code § 8A-1-1; *Bittinger v. Corporation of Bolivar*, 183 W. Va. 310 (1990) (“the purpose of zoning is to provide an overall comprehensive plan for land use, while subdivision regulations govern the planning of new streets, standards for plotting new neighborhoods, and the protection of the community from financial loss due to poor development”) (internal citations omitted). As the West Virginia Supreme Court of Appeals stated in *Stop and Shop, Inc. v. Board of Zoning Appeals of Westover*, “[t]he encroachment of a commercial use into a residential neighborhood is one of the occurrences that zoning laws are enacted to prevent.” 184 W.Va. 168, 170, 399 S.E.2d 879, 881 (1990).

13. The Court finds from the testimony of Mr. Burgess² that the Petitioners intended to purchase property in the R-1 Residential district in April, 2011 to operate a commercial short-term vacation rental business. It is apparent to the Court that the Petitioners were primarily interested in starting a business entity in the R-1 Residential district. The Petitioners inquired of Shepherdstown officials whether short-term rental properties were permitted in

² Mrs. Burgess, also a Petitioner, did not appear at the second part of the final hearing and did not testify.

the R-1 District. The Town clearly responded that such use was not permitted. However, the Petitioners proceeded to purchase the property and use it in such a way that was clearly not permitted by the zoning ordinances of Shepherdstown.

14. The Court also finds that Mr. Burgess is a sophisticated person who is well-versed in planning and zoning, especially as to ordinances related to historical properties. He is regularly engaged in historic preservation activity in *inter alia*, Harpers Ferry, West Virginia, where the Petitioners reside. In fact, Mr. Burgess testified that his reading of Shepherdstown's planning and zoning ordinances was superior to Shepherdstown's reading of the Town Code. He decided very early in the process that he would proceed with purchasing a property in the R-1 District, figuring that his attorney would out-lawyer the Town's attorneys, and he would ultimately prevail. The Petitioners proceeded at their own risk, as the Court finds that they had notice that they could not operate a short-term rental property in the R-1 Residential District before they purchased the subject property.

15. Since the Respondents' actions were not contrary to law, and the Petitioners are not permitted to operate a short-term rental property in the R-1 Residential District, Counts III, IV, and VI are dismissed.

16. With regarding to the remaining issues, mandamus is not an appropriate remedy. The Petitioners concede that another case is currently pending before the Circuit Court of Jefferson County, West Virginia (J. Steptoe), *Donald and Patricia Burgess v. The Board of Zoning Appeals of the Town of*

Shepherdstown, Civil Action No. 12-C-23. Said case was filed on or about January 20, 2012, in which the Petitioners filed a Petition for Writ of Certiorari to appeal the decision of the Board of Zoning Appeals. The decision appealed involves the same issues in this lawsuit.

17. In the Petitioners' Motion to Consolidate filed in the instant case on or about April 5, 2012, they admit that:

20. Petitioners' appeal to the BOA was the final phase of the same regulatory transaction that is in issue in Burgess I [the instant case]; that is, the proceedings before the BOA were but one part of a single administrative process.

21. The appeal of the BOA decision and Count II of the Burgess I Petition revolve around a common set of facts, that being the express language of the relevant provisions of the Town's Ordinances.

18. Based on these facts, it is apparent that mandamus is not proper and must be denied. Here, the Petitioners clearly have another civil action with which to ask for the same relief prayed for in the case *sub judice*. Accordingly, extraordinary relief is not proper, and Counts I, II, and V are dismissed.

RULING

WHEREFORE, for the findings of fact and conclusions of law set forth herein, the Petition is hereby DISMISSED, WITH PREJUDICE.

The Court notes the objections and exceptions of the parties.

It is further ADJUDGED and ORDERED that the Clerk of this Court shall serve an attested copy of this Order on the following counsel of record herein:

3cc

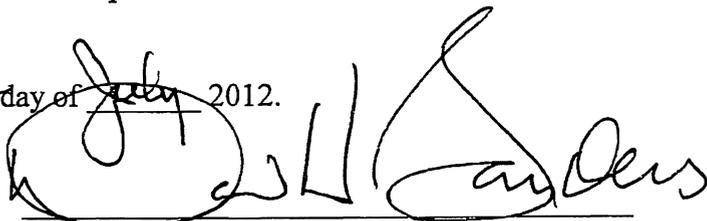
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7/31/12
AW

Entered this 30th day of July 2012.



DAVID H. SANDERS, JUDGE
23RD JUDICIAL CIRCUIT, WEST VIRGINIA

Prepared by:

Julie R. Shank, Esq. (WV Bar #10675)
Patrick J. Nooney, Esq. (WV Bar #5593)

ATTEST

BY 
DEPUTY CLERK

L. Gutzell

**IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST
VIRGINIA**

**DONALD R. BURGESS and
PATRICIA E. BURGESS,
husband and wife,
Petitioners,**

v.

CIVIL ACTION NO. 11-C-421

**CORPORATION OF
SHEPHERDSTOWN, a municipal
corporation, and, JIM AUXER,
Mayor, in his individual and official capacity,
and JOHN DOE I-X,
Respondents.**

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**JEFFERSON COUNTY
CIRCUIT CLERK**

**ORDER DENYING PETITIONERS'
MOTION FOR NEW TRIAL**

On this 18th day of September, 2012, the Court, having considered the Petitioners' Motion for New Trial, and the Response thereto, and its file in this matter, is of the Opinion that a new trial should not be granted and that the Petitioners have not shown with reasonable clarity either prejudicial error in the record or that substantial justice has not been done and, therefore, this Court reaffirms its prior Order Dismissing the Petition, entered on July 30, 2012, and the Petitioners' Motion for New Trial is hereby DENIED.

The Court makes the following findings in support of its Order:

1. The Petitioners were afforded adequate time to fully present their argument and evidence. Petitioners did examine numerous witnesses and offered a plethora of documents in support of the Petitioners' claims.

The Petitioners seek to re-argue their case in a manner similar to that offered both at trial and in the alternative Order submitted by Petitioners' counsel as a proposed Order to Dismiss the Petition. The Petitioners are not offering a proper basis for this Court to find, with reasonable clarity, either that there is prejudicial error in the record or that substantial justice has not been done. The law is clear that a new trial should be rarely granted by the trial judge, and should not be granted unless that standard is met. See Morrison v. Sharma, 200 W. Va. 192, 488 S.E.2d 467 (1997).

The Petitioners' counsel was granted by this Court extensive opportunities for argument both at the beginning of the evidentiary trial and at the end of that trial, and a review of the Petitioners' argument reveals they are simply rearguing the same points and authorities and clearly do not even approach carrying the burden necessary for them to shoulder in order to justify a new trial. When the Court offered both counsel to proceed with a scheduling order for further briefings, the Petitioners' counsel objected and requested a ruling on the spot. Now that the Court entered a ruling, Petitioners are attempting to argue the Court did not provide them an opportunity to fully present their arguments.

Except for criticism of this Court's use of language from Michie's Jurisprudence, no new arguments have been presented which would even arguably lead this Court to find either that substantial justice has not been done or that there is prejudicial error in the record.

2. That the fact that the evidentiary hearing was held over two days, a week apart, with sufficient opportunity for the Petitioners' counsel to make and address

any procedural shortcomings which she found with the process, and the fact that Petitioners' counsel was given and took the opportunity to argue at length her views concerning the law, the facts of the case, and her opinion of the Respondents and of opposing counsel's alleged lack of understanding of zoning law, when viewed in light of the extensive witness testimony and documents offered for consideration in this case, a reasonable person is led to the conclusion that the Petitioners had their day(s) in Court in this matter, were unsuccessful, and are now simply looking for a way to repackage the same arguments and work product to try for a different outcome.

ACCORDINGLY, the Court finds that the Petitioners' Motion for New Trial does not meet the standard of demonstrating with reasonable clarity that there was prejudicial error in the record or that substantial justice was not done and, therefore, in accordance with settled West Virginia law, the Petitioners' Motion for New Trial is DENIED.

The Clerk of this Court is directed to enter the Order as of the day and date first above written and to forward attested copies hereof to all counsel of record in this matter.

3 cc's

Entered this 18th day of September, 2012.

L. Gutierrez
J. Shank
P. Noonan

9.18.12 BC



David H. Sanders, Judge of the
23rd Judicial Circuit, West Virginia

— TRUE COPY
ATTEST

LAURA E. STORM
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY B. Chalk
DEPUTY CLERK