

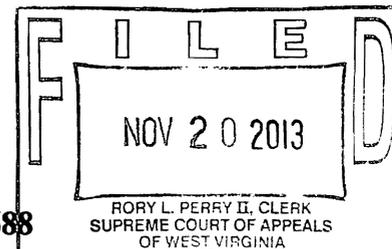
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BOARD OF ZONING APPEALS OF THE
TOWN OF SHEPHERDSTOWN,
Appellant/Respondent,**

vs.

Petition Number 13- 0688



**BORYS M. TKACZ
Appellee/Petitioner.**

**APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
THE HONORABLE DAVID H. SANDERS
CIVIL ACTION NO. 12-C-434**

BRIEF OF APPELLEE /PETITIONER, BORYS M. TKACZ

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I. Table of Contents.

Table of Authorities.....	iii
Appellee’s Response to the Assignment of Error.....	1
(1) The Appellant claims that the Circuit Court “erred” in finding an award of Attorney’s Fee appropriate.....	1
(2) The Appellant/BZA claims that the Circuit Court failed to exercise proper judicial restraint.	1
(3) The Appellant claims that the statutory appeal period is not jurisdictional.....	1
(4) The BZA took jurisdiction of the matter which is not within the Statutory Jurisdiction for Zoning Appeals in the case at bar.	2
(5) The Circuit Court reversed the Decision of the BZA based upon the Standard of Review set forth in Wolfe v. Forbes.....	2
(6) Pursuant to the West Virginia cases which follow “Dillon’s Rule” the Circuit Court concluded that the Ordinance enforced and applied by the BZA was in direct contradiction to State Enabling Legislation contained in Chapter 8A.....	2

(7)	The BZA applied a “Clear and Convincing Evidence” standard in their Decision.....	2
	Statement of the Case.....	3
(A)	Omissions and errors contained in Appellants Statement of the case.....	3
(B)	Appellant failed to include Assignments of Error set forth in the Notice of Appeal.....	4
	Summary of Argument.....	5
	Argument.....	7
(A)	The Standard of Review applied by the Circuit Court is set forth in Syllabus Point No. 5 <u>Wolfe v. Forbes</u> , 159 WV 34, 217 SE 2d 899 (1975).....	7
(B)	Standard of Review for An Award of Attorney’s Fees.....	8
(C)	The Circuit Court properly awarded attorney’s fees in the case at bar.....	8
(D)	Appellant mistakenly relies on Decisions in Mandamus cases.....	12
(E)	Appellants’ reliance on the <u>Burgess</u> case is misplaced.....	12
(F)	The Appellants argue “failure to exercise judicial restraint” without a request for or justification of a remand.....	13
(G)	The thirty day Appeal period set forth in Section 8A-8-10(b) is a Mandatory appeal requirement and is jurisdictional in nature.....	14
(H)	The BZA does not have concurrent jurisdiction with the Planning Commission in the case at bar as claimed by Appellants.....	16
(I)	The BZA erroneously attempts to bootstrap its authority by Means of the language in the Planning Commission Decision.....	18
(J)	The Circuit Court identified provisions of the Shepherdstown Ordinance which directly contradict Chapter 8A.....	18

Statement regarding Oral Argument.....	21
Conclusion.....	21

II. Table of Authorities.

Cases

<i>Sally – Mike Properties v. Yokum</i> , 179 WV 48, 365 SE2d 246 (1986).....	1, 8
<i>The Corporation of Harpers Ferry v. Taylor</i> , 711 SE 2d 571 (2011).....	1, 8
<i>Wolfe v. Forbes</i> , 159 WV 34 217 SE 2d 899, Syllabus Pt. No. 5, (1975).....	2, 7, 13
<i>American Tower Corp. v. Common Counsel of the City of Beckley</i> , 557 SE 2d 752 (2001).....	2, 6, 8, 19
<i>State ex. rel. Board of Governors of WVU v. Sims</i> , 55 SE 2d 505 (1949).....	2, 19
<i>State ex. rel. Dillon v. County Court</i> , 55 SE 2d 382 (1906).....	2, 6, 11, 13
<i>Calabrese v City of Charleston</i> , 204 WV 650 661 515 SE 2 nd 814 825 (1999).....	5, 6, 19
<i>American Tower Corp. v. Common Counsel of the City of Berkeley</i> , 557 SE 2d 752, 756 (2001).....	2, 6, 19
<i>Vector Company v. BZA</i> , 184 SE 2d 301, 304 (1971).....	6, 11, 19
<i>Muscatell v. Cline</i> , 196 WV 588, 474 SE 2d 518 (1996).....	7
<i>Wickland v. American Travelers Life Insurance Company</i> , 204 WV 430, 513 SE 2d 657 (1998).....	8
<i>Beto v. Stewart</i> , 213 WV 355, 359, 582 SE 2d 802, 806 (2003).....	8
<i>Highland Conservancy, Inc. v West Virginia Division of Environmental Protection</i> , 193 WV 650, 458 SE 2d 88.....	12

Statutes

WV Code Section 8A-8-10(b)(2)..... 1, 9

WV Code Section 8A-8-9(1).....2, 10, 15

WV Code Section 8A-4-2(14).....2, 10, 17

WV Code Section 8A-5-1.....10, 16, 18

WV Code Section 8A-9-1(b).....3

WV Code Section 8A-9-5(a).....3

WV Code Section 8A-8-9(6).....4

WV Code Section 8A-7-11(b)(1-4).....9

WV Code Section 8A-8-10(b)(2).....1, 9

WV Code Section 8A-5-10.....10, 17, 18

WV Code Section 8A-4-2(14).....2, 10, 17

WV Code Section 8A-7-2.....10

WV Code Section 8A-8-9.....10, 16

WV Code Section 8A-8-9(1).....2, 10, 15

WV Code Section 8A-8-10(b).....14

WV Code Section 8A-4-12(14).....15, 16

WV Code Section 8A-8-9(4).....15

WV Code Section 8A-8-9(5).....15

WV Code Section 8A-4-2.....18

WV Code Section 8A-4-2(a)(1-17).....18

Shepherdstown Ordinance

Ordinance Section 9-1006.....4, 9, 10
Ordinance Section 1008(b)9, 20
Ordinance Section 1008(b) (1-4).....9

III. Appellee's Response to the Assignments of Error.

The following is a summary of the Responses to each of the Assignments of Error in the Appellant's Brief. The subparagraph numbers of Appellant's Assignments of Error are set forth below with a Summary of Appellee's Responses.

(1) The Appellant claims that the Circuit Court "erred" in finding an award of Attorney's Fee appropriate. The Circuit Court properly exercised its discretion and awarded attorney's fees in the case at bar. The Court relied on Sally – Mike Properties v. Yokum 179 WV 48, 365 SE2d 246 (1986), Syllabus Pt. No. 3. The Standard of Review for an Award of Attorney's Fees in an Abuse of Discretion Standard. The Corporation of Harpers Ferry v. Taylor, 711 SE 2d 571 (2011).

(2) The Appellant/BZA claims that the Circuit Court failed to exercise "proper judicial restraint." The entire argument of the Appellant on this issue relates to the possibility of a remand back to the BZA to correct the errors and omissions in the record. The Appellant/BZA never asked for a remand of this case in its Answer or in its Memorandum before the Circuit Court. There is no obligation for a remand unless a party expressly requested and justifies the remand. There is no remand request in the case at bar and no justification presented in the Record.

(3) The Appellant claims that the statutory appeal period is not jurisdictional. The thirty (30) day Appeal period required by Section 8A-8-10(b)(2) is a requirement which must be met before the BZA or any Court may take jurisdiction in a case. The statutory requirement for a thirty (30) day Appeal period cannot be amended, expanded or changed by the local Shepherdstown Ordinance. The Appellant enforced and expanded the Appeal period to a forty-five (45) day time frame. This expanded Appeal period is invalid and the Circuit Court declared it so in its Decision dated June 4, 2013 (attached as Exhibit 1).

(4) The BZA improperly took jurisdiction in this case which is not within the Statutory Jurisdiction for Zoning Appeals Section 8A-8-9(1). The Appeal to the BZA in the case at bar is exclusively a Building Permit issue. Building Permits or Improvement Location Permits are expressly described in Section 8A-4-2(14) which provides that a Subdivision and Land Development Ordinance shall include an Improvement Location Permit Process. All matters of subdivision control are exclusively within the jurisdiction of the Planning Commission pursuant to Section 8A-5-1. The BZA has no jurisdiction to decide issues pertaining to Subdivision regulation.

(5) The Circuit Court reversed the Decision of the BZA based upon the Standard of Review set forth in Wolfe v. Forbes, 159 WV 34 217 SE 2d 899, Syllabus Pt. No. 5, (1975). The Circuit Court considered the presumption of correctness and concluded that the numerous statutory violations committed by the BZA constitutes errors of law and exceeded its jurisdiction in addition to a finding that there were substantial mistakes of fact in the BZA Decision.

(6) Pursuant to the West Virginia cases which follow “Dillon’s Rule” the Circuit Court concluded that the Ordinance enforced and applied by the BZA was in conflict with Chapter 8A. The BZA claimed that Shepherdstown had the power and authority to expand or amend provisions of Chapter 8A in their sole discretion. The Circuit Court found that Local Ordinances cannot expand upon the authority given by the State Legislature. Municipal Ordinances are inferior to Statutes and subordinate to Legislative Acts. American Tower Corp. v. Common Counsel of the City of Beckley, 557 SE 2d 752 (2001). State ex. rel. Board of Governors of WVU v. Sims, 55 SE 2d 505 (1949). State ex. rel. Dillon v. County Court, 55 SE 2d 382 (1906).

(7) The BZA applied a “Clear and Convincing Evidence” standard in their Decision. The Shepherdstown Ordinance requires a “Reasonable Doubt Standard” to be applied in all Variance

Decisions. The BZA decided the case using the wrong Standard of Proof which is clear error.

IV. Statement of the Case.

A. Omissions and errors contained in Appellants Statement of the Case.

Mr. Borys M. Tkacz (Appellee/Petitioner, pronounced “Koch”) timely filed an Appeal with the Circuit Court of Jefferson County to challenge the ruling of the Shepherdstown Board of Zoning Appeals (hereinafter “BZA”). Mr. Tkacz sought a review of the BZA Decision dated October 16, 2012. The Appellee/Petitioner filed a Complaint and Petition for a Writ of Certiorari and Declaratory Relief in the Circuit Court on November 13, 2012 within 30 days as required by Section 8A-9-1(b).

The Shepherdstown Board of Zoning Appeals filed an Answer admitting that venue and jurisdiction over the subject matter and the parties are proper in the Circuit Court of Jefferson County.

One glaring factual omission that must be corrected by this Brief is the failure of the BZA to reveal to this Court that Mr. Tkacz appeared in the BZA, *pro se*, without benefit of Counsel. Mr. Tkacz retained the undersigned after the BZA ruled.

The BZA filed a Certified Record pursuant to the Order of the Circuit Court through Counsel for the BZA. The BZA failed to file a Certified Record pursuant to Section 8A-9-5(a), West Virginia Code, which requires that when a Writ of Certiorari is granted “the return must be verified by the Secretary of the Planning Commission, Board of Subdivision Land Development Appeals or BZA”. The BZA merely filed its record without the benefit of an appointment of a Secretary as required by the Statute.

The parties fully briefed all issues before the Court below. The Circuit Court entered its Decision by Order dated June 4, 2013, a copy of which is attached as Exhibit 1 and included in Appendix Volume I, page 102 – 114.

Another important omission in the Appellants Statement of the Case is the failure of Appellant to inform this Court that the BZA failed to preserve the audio record of the hearing conducted in this case. The BZA admits in the Notice of Appeal (filed on or about July 3, 2013) that the “audio record of the Appeal of Ms. Kelch transcribed on a Sony IC MP3 Recorder has not been included in the record filed with the Court, as it has been inadvertently erased.” (Emphasis added) Therefore, the only record which the Circuit Court could review was the record of documents filed before the BZA. (See Conclusion of Law No. 7, page 5 of Order entered by the Circuit Court on June 4, 2013)

B. Appellant failed to include Assignments of Error set forth in the Notice of Appeal.

The Notice of Appeal filed in this Court contains ten (10) Assignments of Error. Three of these Assignments of Error are not included in the Brief filed by the Appellant. The following Assignments of Error from the Notice of Appeal should be deemed to be waived by the Appellant as a result of the failure to raise these Assignments of Error in the Brief:

1. Assignment of Error No. 1 in the Notice of Appeal - This Assignment of Error is concerned with the failure of the BZA to preserve the audio record in this case.
2. Assignment of Error No. 5 - This Assignment of Error concerns the Shepherdstown Enactment of a forty five day Appeal period. (Shepherdstown Ordinance Section 9-1006) which is in clear violation of the (Section 8A-8-9(6)) which requires that an Appeal to the BZA shall be filed within thirty (30) days.
3. Assignment of Error No. 7 – This Assignment of Error pertains to the Circuit Court’s Ruling that the BZA lacks authority under Chapter 8A to hear Appeals from the Planning

Commission or to hear Appeals which are in the jurisdiction of subdivision control as administered by the Planning Commission.

All three of these Assignments of Error are set forth in the Notice of Appeal. The Appellant failed to raise these Assignments of Error in the Brief filed with this Court. Therefore, the Assignments of Error that the Appellant failed to raise in his Brief should be considered waived.

V. Summary of Argument.

The BZA may only exercise those powers set forth in Chapter 8A, Article 8, West Virginia Code. The Decision on Appeal and the Memorandum of Law and Fact filed by the Appellee/Petitioner outline numerous direct violations of Chapter 8A, committed by the BZA. In response to these enumerated Statutory Violations, the BZA asserts that it may choose to depart from or expand upon the Statutory Enabling Legislation (Chapter 8A, Article 8) in its sole discretion. Assignments of Error No. 2, 3, 4, 5, 6, and 7 are all based upon the erroneous belief that the BZA need not comply with the express provisions of Chapter 8A, Article 8. The BZA asserts it has inherent discretionary authority to act beyond the authority granted in Chapter 8A. The BZA states (in its Memorandum filed in Circuit Court) that it can expand its powers beyond those expressly granted in Chapter 8A if the BZA chooses to do so as an exercise of its inherent discretion.

In its Brief, the BZA fails to address the fundamental Rule of Law which is controlling in this case:

“A municipal corporation has only the powers granted to it by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. If any reasonable doubt exists as to whether a Municipal Corporation has a power, the power must be denied.” Calabrese v City of Charleston, 204 WV 650 661 515 SE 2nd 814 825 (1999).

This basic principal is referred to as "Dillon's Rule". The Rule is so named for the case of State ex. rel. Dillon v. County Court, 55 SE 382, 386 (1906). The Fundamental Rule above-described in the Calabrese case is restated throughout West Virginia Law in many other cases including American Tower Corp. v. Common Counsel of the City of Berkeley, 557 SE 2d 752, 756 (2001) and Vector Company v. BZA, 184 SE 2d 301, 304 (1971).

The Central theory of the Appellee/Petitioner's case may be stated as follows:

"Local Ordinances cannot expand upon the authority given by the State Legislature. Municipal Ordinances are inferior in status and subordinate to legislative acts." American Tower Corp. v Common Counsel of City of Beckley, Supra and

"Where an Ordinance is in conflict with the State Law the former is invalid." Vector Company v. BZA City of Martinsburg, 184 SE 2d 301, at page 304 (1971).

The provisions of the Shepherdstown Ordinance which are directly in conflict with Chapter 8A must be declared invalid. The enforcement of invalid Municipal Ordinances constitutes misconduct and plain error as described in the Decision of the Circuit Court. (Exhibit 1)

The Award of Attorney's Fees directly flows from the BZA's enforcement of invalid Ordinances which are directly in conflict with State Law. The BZA and the Shepherdstown Planning Commission have separate counsel. There is also a practicing attorney sitting on the BZA. The Shepherdstown BZA certainly should understand the basic concept of Dillon's Rule in light of the availability of two separate counsel and an attorney for the BZA.

Neither the Notice of Appeal, nor the Brief filed by the BZA attempts to analyze or address the long line of cases on the subject of Dillon's Rule. This Court should conclude that the cases interpreting Dillon's Rule remain unchallenged in the case at bar.

VI. Argument.

A. The Standard of Review applied by the Circuit Court is set forth in Syllabus Point No. 5, Wolfe v. Forbes, 159 WV 34, 217 SE 2d 899 (1975).

There are three elements in the Wolfe case which require a reversal of the Decision of the BZA:

1. Application of Erroneous Principals of Law.
2. Plainly wrong in its Factual Finding.
3. The BZA acted beyond its jurisdiction.

All three elements of the standards set forth in Wolfe v. Forbes (Supra) are present in the case at bar.

The Circuit Court concludes in its Order (Exhibit 1) in Conclusion of Law No. 6:

“The Court concludes that all three elements of Syllabus Point No. 5 (Wolfe v. Forbes) are present in the case at bar.” (Order dated June 6, 2013 – Appendix Vol. 1, page 102 – 114) (also attached as Exhibit 1)

The Petitioners cite the case of Muscatell v. Cline, 196 WV 588, 474 SE 2d 518 (1996). The Muscatell case is an Appeal of a case decided under the Administrative Procedures Act. The Muscatell case is an Appeal from a DMV Decision.

The case at bar is an Appeal pursuant to the statutory appeal process in Chapter 8A, Article 8 and Article 9, WV Code. The actions and errors of the BZA must be analyzed within the context of Chapter 8A and not within the context of the Administrative Procedures Act in a DMV Appeal.

B. Standard of Review for an Award of Attorney's Fees.

The Appellant mistakenly argues that the review of an Award of Attorney's Fees is based upon an "error" committed by the Circuit Court. The review of an Award of Attorney's Fees is based upon an Abuse of Discretion Standard. Corporation of Harpers Ferry v. Taylor 711 SE 2d 571 (2011). In the Taylor case, this Court discusses the Abuse of Discretion Standard at page 574. This Court cites several cases including Wickland v. American Travelers Life Insurance Company, 204 WV 430, 513 SE 2d 657 (1998) and Beto v. Stewart, 213 WV 355, 359, 582 SE 2d 802, 806 (2003). The following quoted language is the correct Standard of Review for an Award of Attorney's Fees and Costs as stated in the Taylor case at page 574:

"The Trial Court... is vested with a wide-discretion in determining the amount of ...Court costs and counsel fees and the Trial Court's ...determination of such matters will not be disturbed upon Appeal to this Court unless it clearly appears that it had abused its discretion."

"The decision to award or not to award attorney's fees rests in the sound discretion of the Circuit Court and the exercise of that discretion will not be disturbed on Appeal except in cases of abuse."

The Appellants argue that plain error is the Standard of Review for an Award of Attorney's Fees. This is an incorrect statement of the law. The above-quoted language in the Taylor case is the standard of review: This Court will review the Award of Attorney's Fees and will not disturb the same unless it "clearly appears" that the Circuit Court has abused its discretion.

C. The Circuit Court properly awarded attorney's fees in the case at bar.

The Circuit Court relied upon Sally-Mike Properties v. Yokum,(Supra). The Decision of the Circuit Court specified numerous violations of State Law committed by the BZA. The Order of the Circuit Court makes the following Conclusions of Law (in these numbered paragraphs) in its

Decision starting on page 7 of the Order (Exhibit 1):

18. The BZA applied the wrong standard of proof in the case at bar. In Conclusion of Law No. 3, page 6, the BZA erroneously concludes that the “Applicable Standard of Proof is clear and convincing evidence.” The Ordinance, Section 1008(b) states as follows regarding Variance Applications:

“No such Variance in the provisions or requirements of this Ordinance shall be authorized by the Board unless it finds, beyond reasonable doubt, that all of the following Facts and Conclusions exist.”

19. The Application of the wrong standard of proof constitutes reversible error in and of itself. The Court notes that the above-quoted language from the Ordinance is contained in the Decision made by the BZA, yet the BZA applied the wrong standard of proof in its Conclusions of Law.

20. The Court also notes that Ordinance Section 1008(b) (1-4) contains three elements necessary for approval of a Variance. These elements are completely different from the elements described in Section 8A-7-11(b)(1-4), WV Code as Amended.

22. The Court concludes that there are several provisions of the Shepherdstown Ordinance which are in direct conflict with State Statutes contained in Chapter 8A.

23. Section 8A-8-10(b)(2) requires that an Appeal to the BZA must be filed within thirty (30) days of the original Order appealed from. Ordinance Section 9-1006 states that an Appellant has forty-five (45) days to file an Appeal from the Planning Commission to the BZA.

24. The failure to file the Appeal to the BZA within thirty (30) days as required by State Statute is jurisdictional. Therefore, the BZA has no jurisdiction to hear the Appeal.

25. Section 8A-5-10, WV Code as Amended requires that any Appeal from the Planning Commission must be filed with the Circuit Court or a Board of Subdivision and Land Development Appeals within thirty (30) days after the Decision Appealed.

26. The Shepherdstown Ordinance provides that an Appeal of a Decision made by a Planning Commission must be filed with the BZA, Ordinance Section 9-1006, which is in direct contradiction to the quoted statute. (8A-5-10, WV Code)

29. Section 8A-4-2(14) provides that a Subdivision and Land Development Ordinance shall include (14) the Improvement Location Permit Process including a requirement that a structure or development of land is prohibited without an Improvement Location Permit. An Improvement Location Permit is a Building Permit. This Provision of the West Virginia Code places exclusive jurisdiction over Building Permits with the Planning Commission and not the BZA.

30. Matters of subdivision control are exclusively within the jurisdiction of the Planning Commission pursuant to Section 8A-5-1. The BZA only has jurisdiction over matters pertaining to Zoning and not subdivision control. Section 8A-7-2 describes the required content of a Zoning Ordinance. This Statute does not contain concurrent jurisdiction over matters pertaining to Building Permits.

31. Section 8A-8-9 contains the Powers and Duties of the BZA. Section 8A-8-9(1) limits the jurisdiction of the BZA to hear and review matters pertaining to the enforcement of a Zoning Ordinance. There is no authority in Section 8A-8-9 which would allow the BZA to hear Appeals from the Planning Commission or to hear Appeals regarding matters exclusively within the jurisdiction of the Subdivision Ordinance.

32. The Court concludes that the BZA lacks authority as set forth in Chapter 8A to hear Appeals from the Planning Commission Decisions or to hear Appeals which are exclusively within the jurisdiction of the Subdivision Ordinance as administered by the Planning Commission.

34. The Court concludes that the Authority granted to Shepherdstown in Chapter 8A must be strictly construed as required by the Dillon case (Supra).

37. The Court concludes that the Shepherdstown Ordinance is subordinate to Chapter 8A and all Provisions of the Shepherdstown Ordinance must be in conformity to State Law.

38. The Court concludes that the Shepherdstown Ordinance may not expand the Power, Duties and Jurisdiction granted to the BZA and the Planning Commission by the legislature in Chapter 8A.

39. To the extent that the Provisions of the Shepherdstown Ordinance are in conflict with Chapter 8A, those Provisions of the Ordinance are invalid. Vector Company v. BZA the City of Martinsburg, 184 SE2d 301, 304 (1971).

41. The Court concludes that there is no authority which would allow the Municipality of Shepherdstown to exercise discretion to enact Ordinances in conflict with Chapter 8A.

The long list of Statutory Violations committed by the BZA in the case at bar demonstrates that the Decision of the Circuit Court is fully supported by the law in West Virginia and the Violations of Law committed by the BZA.

The numerous violations cited by the Appellee/Petitioner are summarized in the Rebuttal Memorandum filed on or about April 24, 2013 in Section II beginning on page 2 of the Rebuttal Memorandum and continuing through page 12. This summary is contained in the Appendix, Volume 1, page 87- 100.

D. Appellant mistakenly relies on Decisions in Mandamus cases.

The BZA relies upon an analysis of a Mandamus case which is inapplicable to the case at bar. Highland Conservancy, Inc. v West Virginia Division of Environmental Protection, 193 WV 650, 458 SE 2d 88. The case at bar is a statutory appeal based on Chapter 8A. In this Appeal Appellee/Petitioner discovered numerous violations of State Law enforced and perpetuated by the BZA. These violations of State Law have a direct bearing on this case. A thorough review of the Shepherdstown Ordinance would reveal many other instances where the Shepherdstown system fails to comply with State Law. The attorney for Shepherdstown should conduct a review and correct these inconsistencies immediately. Apparently, there is a movement to correct these errors, but there is no evidence that a full review of the Ordinance has been conducted.

Attached is a copy of the draft changes which are under consideration. (Exhibit 2) Exhibit 2 specifically mentions the Tkacz case in Circuit Court (Civil Action No. 12-C-434). These attempts demonstrate that there is recognition that there are inconsistencies with State Law that must be removed from the Local Ordinance. This attempt to correct the Ordinance fails to address the violations of State Law. There are certainly other problems in the Shepherdstown Ordinance which are not corrected by the attached draft Amendment to the Ordinance. Apparently the Town will drag its feet unless a Court Orders a full review and correction of inconsistencies.

E. Appellants' reliance on the Burgess Case is misplaced.

The BZA also mistakenly places an emphasis in their Brief regarding a different case decided by the Circuit Court of Jefferson County. The "Burgess case" has completely different facts, different parties and different requests for relief. The Burgess case is not precedent for the Circuit Court.

Counsel for Mr. and Mrs. Burgess specifically cited various errors committed by the BZA in contradiction with its own Municipal Ordinance. The numerous errors and inconsistencies are fully set forth in that case. These numerous inconsistencies committed by the BZA are further evidence that the Appellants in this case have little or no concern with the requirements of law which they must follow.

In the case at bar, the numerous violations of State Law are recognized by the Circuit Court in its Order (Exhibit 1). These violations of State Law contradict the Long Standing Case Law in West Virginia which are described as cases pursuant to "Dillon's Rule".

F. The Appellants argue "failure to exercise judicial restraint" without a request for or justification of an remand.

Assignment of Error No. 2 is a claim that the Circuit Court failed to exercise judicial restraint. The argument presented by the Appellants is a request for remand to the BZA to allow the BZA correct their errors. At no time did the Appellant request a remand to the BZA during the appeal in Circuit Court. The Answer filed by the BZA and the Memorandum of Law requests only one form of relief: The BZA merely requested that the Court dismiss the Appeal filed by Mr. Tkacz with no other relief stated.

The Circuit Court reversed the Decision of the BZA based upon the criteria set forth in Wolfe v. Forbes (Supra). The Decision of the Circuit Court is fully supported by extensive Findings of Fact and Conclusions of Law. (Exhibit 1) The only reason presented by the Appellant to justify a remand is the failure of the BZA to preserve the audio recording of its hearing. This is the fault of the BZA itself and should not be used as an excuse for the BZA to conduct a new hearing in order that the

BZA has second opportunity to correct its errors of law.

G. The thirty day Appeal period set forth in Section 8A-8-10(b) is a mandatory appeal requirement and is jurisdictional in nature.

Section 8A-8-10(b) states as follows:

“(b) The Appeal shall:

1. Specify the grounds of the Appeal.
2. Be filed within thirty (30) days of the original Order, Requirement, Decision, or

Determination made by an Administrative Official or Board charged with the enforcement of a Zoning Ordinance.”

This Section is clear and unambiguous. The thirty day Appeal period is mandatory and jurisdictional. There is no discretion or authority granted in this Section or any other Section of Chapter 8A, which provides to the municipality an opportunity to amend, change or ignore the Requirements of the State Statute.

This Statute stands for both propositions asserted by Mr. Tkcaz in his Brief before the Circuit Court as follows:

1. The thirty day Appeal period described in Section 8A-8-10(b) is mandatory and jurisdictional.
2. The BZA has the authority to hear Appeals pertaining to the enforcement of a Zoning Ordinance, not the Subdivision Ordinance. Section 8A-8-10(b)(1)

The BZA has no jurisdiction to review matters which are exclusively matters of subdivision control. In the case at bar, the matter before the BZA was an Appeal of a Building Permit which is

expressly within the exclusive jurisdiction of the Planning Commission pursuant to Section 8A-4-12(14) and 8A-5-1, WV Code as Amended. Appellant cites Section 8A-8-9(4) as authority for the BZA to review building codes matters. This section of the code states as follows:

“(4) Authorize, upon Appeal in specific cases a Variance to the Zoning Ordinance.”

The BZA fails to recognize that the BZA’s authority pertains to Zoning issues. The exclusive jurisdiction of the Planning Commission is regulation of Building Permits or Improvement Location Permits. Section 8A-4-12(14)

Appellant also sites 8A-8-9(5) which provides the BZA with authority to hear and decide Appeals from Officials or Boards from which an Appeal was taken. This must be read in *pari materia* with Section 8A-8-9(1). This provides that the BZA may only hear Appeals upon the enforcement of a Zoning Ordinance or Rule and Regulation adopted pursuant thereto. The provisions for the regulation of Building Permits or Improvement Location Permits is exclusively within the jurisdiction of the Planning Commission, not the BZA.

Finally, the BZA raises an issue which is patently unfair to Mr. Tkacz. As above-stated, Mr. Tkacz represented himself without benefit of counsel before the BZA. In their Brief, the BZA asserts that Mr. Tkacz failed to “preserve” his objection to jurisdiction in the BZA. Mr. Tkacz is not a lawyer. Jurisdiction is an issue which may be raised at any time in any proceeding including on appeal in the Circuit Court or this Court.

H. The BZA does not have concurrent jurisdiction with the Planning Commission in the case at bar as claimed by Appellants.

There is no separation between the Provisions of the Shepherdstown Municipal Ordinance pertaining to Planning and those Provisions pertaining to Zoning. This intermingled Ordinance causes great confusion. Chapter 8A clearly contemplates the enactment of a Subdivision Ordinance and the enactment of a separate Zoning Ordinance. While this issue is not an issue directly addressed by the Circuit Court, the Appellee/Petitioner requests that the Supreme Court identify this as an issue which should be corrected by the Appellants.

Appellee makes reference to the prior section of this Brief for the statutory citations regarding the Planning Commission jurisdiction over Building Permits Section 8A-4-12(14). The Planning Commission has exclusive authority over Planning matters Section 8A-5-1. The BZA has authority to review and decide cases pertaining only to the Zoning Ordinance.

One of the problems that must be raised is the co-mingled nature of the Shepherdstown Municipal Ordinance. This Municipal Ordinance contains all matters related to Planning and Zoning in one Ordinance. There is no separation between Planning and Zoning Regulations in the Shepherdstown Ordinance.

The State Enabling Legislation clearly provides for separate Ordinances and functions for Planning and Zoning. Nonetheless, the Shepherdstown Ordinance makes it very difficult to determine which portions of the Ordinance are related to Planning and which portions are related to Zoning.

The functions of Planning are clearly described in Section 8A-5-1 as the exclusive jurisdiction in the Planning Commission. The BZA has only those powers enumerated in Section 8A-8-9 which

pertain exclusively to enforcement of the Zoning Ordinance or Rules and Regulations adopted pursuant thereto. There is no authority for the BZA to act as a super Appellate body for all issues related to Planning and Zoning.

The express grant of authority over Improvement Location Permits or Building Permits is within Section 8A-4-2(14) which is exclusively within the jurisdiction of the Planning Commission.

Section 8A-5-10 expressly provides how an Aggrieved Person may file an Appeal from any Decision or Ruling of the Planning Commission to:

- “1. The Circuit Court pursuant to the Provisions of Article 9 of this Chapter or
2. A Board of Subdivision and Land Development Appeals if the governing body has established a Board of Subdivision and Land Development Appeals by Ordinance.”

The Town of Shepherdstown has never authorized or enacted an Ordinance creating a “Board of Subdivision and Land Development Appeals”. Therefore, the avenue for Appeal from a Decision of the Planning Commission is directly to the Circuit Court by Certiorari not to the BZA.

The Appellants argue that the only avenue of Appeal for “the height of a reed fence and its composition” is to the Circuit Court. This is not accurate. If Shepherdstown wished to provide an avenue of Appeal in addition to Circuit Court, then the municipality must enact an Ordinance creating a “Board of Subdivision and Land Development Appeals” as required by Section 8A-5-10.

Appellants have not bothered to carefully examine its responsibilities in Chapter 8A and to make every effort to follow the law as it is written even though the BZA is represented by counsel.

I. The BZA erroneously attempts to bootstrap its authority by means of the language in the Planning Commission Decision.

The Appellant relies upon a reference in the Planning Commission Decision to a “Variance”. There is no other authority cited in this portion of the Appellant’s Brief (VIII – Argument – B(5), Page 16 of Appellant’s Brief). The authority granted to both the Planning Commission and the BZA are clearly defined in Chapter 8A. The Planning Commission has no authority to expand or modify the jurisdiction of the BZA to hear Appeals from Planning Commission Decisions. This argument is directly contradictory to Section 8A-5-10 which describes the Appeal process in detail.

J. The Circuit Court identified provisions of the Shepherdstown Ordinance which directly contradict Chapter 8A.

The Appellant mistakenly cites Section 8A-4-2 which describes contents of Subdivision and Land Development Ordinances. The Appellant further argues that this Section of the Code is “not jurisdictional”.

Section 8A-4-2 states as follows:

“A. The Subdivision and Land Development Ordinance shall include the following provisions.” (Emphasis added)

This Section of the Code is mandatory. The Subsections in 8A-4-2(a)(1-17) clearly define those portions of “Subdivision Ordinance” which must be included and therefore define the jurisdiction of a Planning Commission pursuant to the express terms of Section 8A-5-1.

Since the Shepherdstown Ordinance mixes Subdivision and Zoning Provisions without distinction, it is very difficult to analyze the lines of authority which are clearly set forth in Chapter 8A. Whether this blurred and confused drafting strategy is intentional or not, no one can tell what is

Planning and what is Zoning unless one carefully studies the provisions of Chapter 8A as it relates to each Section of the Shepherdstown Municipal Ordinance. The Shepherdstown Ordinance contradicts Chapter 8A in numerous instances which are set forth in detail in the Decision of the Circuit Court, Conclusions of Law, paragraph 18 – 42, Exhibit 1. Some of the Conclusions of the Circuit Court are set forth above in this Brief and need not be repeated in this Section.

This Court stated in American Tower Corp. v. Common Counsel of the City of Beckley, (Supra) and Vector Company v. BZA of City of Martinsburg, (Supra),:

“Local Ordinances cannot expand upon the authority given to them by the State Legislature. Municipal Ordinances are inferior in status and subordinate to legislative acts.”

In State ex. rel. Board of Governors of WVU v. Sims, 55 SE 2d 505 (1949) this Court states as follows:

“As a general principal, the powers of subordinate agencies should be limited to those expressly granted by the legislature.”

In Calabrese v. City of Charleston, 515 SE 2d 814, 825 (1999):

“As Municipal Corporation has only the powers granted to it by the legislature and any such power it possess must be expressly granted or necessarily or fairly implied or essential and indispensable. If any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.”

This Court states as follows in Vector Company v. BZA City of Martinsburg, (Supra) at page 304 (1971):

“For an Ordinance and conflict with the State Law the former is invalid.”

The same concepts are in enumerated in the following cases:

The City of Fairmont v. Investors Syndicate of American, 172 WV 431, 307 SE2d 467 (1983).

State ex. rel. Charleston v. Hutchison, 154 WV 585 176 SE 2d 691 (197).

Marra v. Zink, 163 WV 400 256 SE 2d 581 (1979)

Matter of the City of Morgantown 159 WV 788 226 Se 2d 900 (1976)

The Appellant has never denied that there are distinctions, contradictions, and differences between Chapter 8A and the Shepherdstown Municipal Ordinances. Throughout the litigation, the Appellant took the position that the BZA had discretion to expand, amend, and even ignore the express provisions of Chapter 8A. There is no authority in the pleadings filed in Circuit Court or in the Appellant's Brief which supports the proposition that unfettered discretion may be exercised by the BZA. There is also no justification to approve the additional powers of the BZA as a necessary or fairly implied or essential and indispensable power pursuant to the express provisions of Chapter 8A as described in the cases above-cited.

K. The BZA applied the wrong Standard of Proof in the case at bar.

In the Circuit Court's Decision (Exhibit 1) the Court states as follows in the Conclusions of Law, Paragraph 18:

"18. The BZA applied the wrong Standard of Proof in the case at bar. In Conclusion of Law No.3, page 6, the BZA concludes that the "Applicable Standard of Proof is clear and convincing evidence."

The Ordinance, Section 1008(b) states as follows regarding Variance Applications:

"No such Variance in the Provisions or Requirement of this Ordinance shall be authorized by the Board unless it finds, beyond a reasonable doubt, that all of the following facts and conditions exist." (Emphasis added)

The Application of the wrong Standard of Proof constitutes reversible error. The fact that the BZA applied the wrong Standard of Proof may not be ignored or explained by other Provisions of the Decision which are outside the Conclusions of Law made in the case at bar. The BZA made a

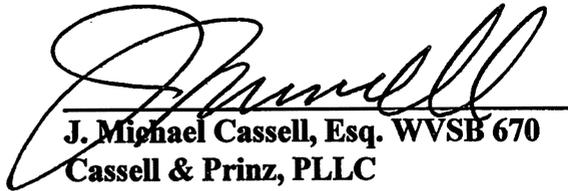
Conclusion of Law regarding the Standard of Proof as clear and convincing evidence. This is inaccurate and a violation of the Shepherdstown Ordinance. It is reversible error.

VII. Statement regarding Oral Argument.

The Appellee/Petitioner does not request Oral Argument and hereby waives the same.

VIII. Conclusion.

Appellee/Petitioner respectfully requests that the Supreme Court affirm the Decision made by the Circuit Court of Jefferson County in its Order date June 4, 2013.



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CERTIFICATE OF SERVICE

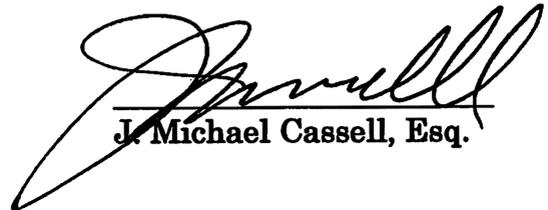
I hereby certify that service of a true copy of the foregoing has been made as follows:

Type of Service: United States Regular Mail

Date of Service: Nov. 18 2013

Persons served Brian McAuliffe
114 S. Maple
Martinsburg, WV 25401

Item Served:


J. Michael Cassell, Esq.

Exhibits on File in Supreme Court Clerk's Office