

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Andrew C. Smith,
Petitioner Below, Petitioner**

vs.) **No. 12-0793** (Monongalia County 12-C-367)

**City of Morgantown,
Respondent Below, Respondent**

FILED

July 8, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Andrew C. Smith, *pro se*, appeals the order of the Circuit Court of Monongalia County, entered June 22, 2012, dismissing his petition for a writ of certiorari challenging two decisions of the City of Morgantown Board of Zoning Appeals (“BZA”). Respondent City of Morgantown, by counsel Stephen R. Fanok, filed a summary response. Petitioner filed a reply.

The Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds that petitioner’s appeal is moot. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner owns property at 426 Drummond Street, Morgantown, West Virginia. On May 24, 2012, Petitioner filed a petition for a writ of certiorari, in Civil Action No. 12-C-367, challenging two decisions of the BZA. In each decision, the BZA granted petitioner’s requested variance, but only in the manner recommended by the Morgantown City Planner.

Respondent filed a motion to dismiss the petition on June 14, 2012. On June 22, 2012, the circuit court granted the motion to dismiss because of “[p]etitioner’s failure to comply with proper procedures” as delineated in West Virginia Code §§ 8A-9-1 and 8A-9-2, the West Virginia Land Use Planning Act.

On appeal, petitioner admits that he attempted to file and serve a petition for a writ of certiorari, but that the circuit court dismissed the case because of “[his] failure to comply with proper procedures.” Petitioner argues that because he is a *pro se* litigant, his unintentional mistakes should be forgiven.

Respondent notes that in the petition, petitioner improperly named the City of Morgantown when the correct party, pursuant to West Virginia Code § 8A-9-1, was the BZA and that petitioner

failed to serve a summons as required by Rule 4(c) of the West Virginia Rules of Civil Procedure. Respondent further notes, inter alia, that subsequent to its motion to dismiss, petitioner corrected the procedural deficiencies and filed a proper petition in a new case, Civil Action No. 12-C-411. Respondent attaches a copy of the petition in Civil Action No. 12-C-411 and a copy of a circuit court order setting a briefing schedule to substantiate that petitioner was being allowed to challenge the BZA's decisions in Civil Action No. 12-C-411. Although petitioner filed a reply, he does not dispute that in Civil Action No. 12-C-411, he is being allowed to challenge the variance decisions he previously appealed in the instant case.

We therefore find that this appeal is now moot. “‘Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court.’ Syl. pt. 1, *State ex rel. Lilly v. Carter*, 63 W.Va. 684, 60 S.E. 873 (1908).” Syl. Pt. 1, *State ex rel. McCabe v. Seifert*, 220 W.Va. 79, 640 S.E.2d 142 (2006).

A review of this Court's records reveals that the circuit court has now rendered a decision in Civil Action No. 12-C-411 and petitioner is currently appealing that decision in Supreme Court No. 13-0280. The procedural deficiencies upon which the circuit court relied to dismiss the petition in the instant case, Civil Action No. 12-C-367, are no longer alive between the parties. Therefore, after careful consideration, this Court dismisses as moot petitioner's appeal of the dismissal of Civil Action No. 12-C-367.

Dismissed as Moot.

ISSUED: July 8, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin

Justice Robin Jean Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II