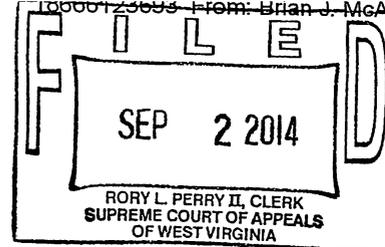


2014-09-02 20:55:51 (GMT)

ARGUMENT DOCKET



Office of the Clerk
Supreme Court of Appeals of West Virginia
State Capitol Building, Room E-317
1900 Kanawha Blvd. East
Charleston, West Virginia 25305

NOTICE OF INTERVENING MATTERS

Re: *Board of Zoning Appeals of the Town of Shepherdstown v. Borys M. Tkacz*
Case No. 13-0688
(Appealed from the Circuit Court of Jefferson County)
Civil Action No. 12-C-434)

Dear Clerk Perry:

Pursuant to Rule 10(i) of the West Virginia Rules of Appellate Procedure, the Board of Zoning Appeals of the Town of Shepherdstown (“the BZA”) gives this *Notice of Intervening Matters*. Specifically, this Notice outlines certain amendments to the Town Code of the Corporation of Shepherdstown (“the Town”) pertaining to the powers, duties, and jurisdiction of the BZA. The amendments to Chapter 10, Title 9 of the Code of Shepherdstown were adopted on February 11, 2014. See enclosed amendments to Chapter 10, Title 9 of the Code of Shepherdstown. Said amendments directly related to the BZA’s Assignments of Error Nos. 3, 4, and 6.¹

The underlying decision in this case is the Circuit Court of Jefferson County’s June 4, 2013 Order entered in *Tkacz v. Board of Zoning Appeals of the Town of Shepherdstown*, Jefferson County Civil Action No. 12-C-434. In said Order, the trial court found that Town Code § 9-1006 is invalid because it conflicts with W. Va. Code §§ 8A-5-10 and 8A-8-10. Specifically, Town Code § 9-1006 required a person to file an appeal to the BZA within forty-five (45) days. The trial court found that the forty-five (45) day time frame set forth in § 9-1006 directly conflicted with the thirty (30) day time frame in W. Va. Code 8A-8-10(b)(2). In response to the trial court’s findings, the Town amended Town Code § 9-1006. Now, an appeal to the BZA must be filed within thirty (30) days. Assignment of Error No. 3 argues that the

Assignment of Error No. 3 states that “[t]he Circuit Court Erred in Finding that the Thirty Day Appeal Period in Section 8A-8-10(b)(2) of the West Virginia Code is Jurisdictional and that the Town of Shepherdstown Lacked the Authority to Adopt A Forty-Five Day Appeal Period in Shepherdstown Ordinance Section 9-1006.”

Assignment of Error No. 4 states that “[t]he decision of the Board of Zoning Appeals in the Kelch case is not an impermissible exercise of concurrent jurisdiction nor did the Board of Zoning Appeals exceed its authority.”

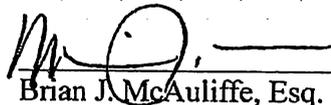
Assignment of Error No. 6 states that “[t]he Circuit Court Erred in Concluding that the Corporation of Shepherdstown Exceeded and Expanded the Powers, Duties and Jurisdiction of the Board of Zoning Appeals and the Planning Commission Beyond Powers and Authority Specifically Described in Chapter 8A of the West Virginia Code.”

forty-five day requirement to file an appeal to the BZA does not deprive the BZA of jurisdiction. Accordingly, Assignment of Error No. 3 is now moot.

Additionally, in its June 4, 2013 Order, the trial court also found that the BZA lacks authority to hear appeals from the Town's Planning Commission. As such, the trial court found that the appellate provision set forth in Town Code § 9-1006 is invalid because it conflicts with W. Va. Code §§ 8A-5-10 and 8A-8-10. In response to this finding, the Town of Shepherdstown amended Town Code § 9-1006. Now, the BZA can no longer hear appeals from the Planning Commission. This amendment is relevant for the Court's consideration of Assignments of Error Nos. 4 and 6.

A copy has been served upon counsel of record. Thank you for your assistance in this matter.

Respectfully Submitted:



Brian J. McAuliffe, Esq.
Law Office of Brian J. McAuliffe
114 S. Maple Ave.
Martinsburg, WV 25401
Tel. (304) 596-6036
Fax (866) 612-3693

Attorney For Appellant
Board of Zoning Appeals
Town of Shepherdstown, West Virginia

cc: J. Michael Cassell, Esq.
Cassell & Prinz, PLLC
120 N. Charles Street - Suite 200
Charles Town, WV 25414
and
By Fax to (304) 728-2881

Attorney For Appellee
Borys M. Tkacz

10000125693 From: Brian J. McAuliffe

AN ORDINANCE TO AMEND
CHAPTER 10, TITLE 9 OF THE CODE OF SHEPHERDSTOWN IN ACCORDANCE
THE CODE OF THE STATE OF WEST VIRGINIA.

THE SHEPHERDSTOWN TOWN COUNCIL ORDAINS:

Chapter 10, Title 9 of the Code of Shepherdstown is hereby amended by revising Sections 9-1005, 9-1006, 9-1007, 9-1009, and 9-1011. Such revisions are necessary because of the Circuit Court's ruling in *Tkacz v. The Board of Appeals of the Corporation of Shepherdstown*, Jefferson County Civil Action No. 12-C 434, that several of the Corporation of Shepherdstown's planning and zoning ordinances directly conflict with the West Virginia Code, making them invalid. In response to the *Tkacz* ruling, the Corporation of Shepherdstown is undergoing a survey of the Town Code so that it be amended in order to comply with the West Virginia Code. Accordingly, Chapter 10, Title 9 of the Code of Shepherdstown is amended to read as follows:

Section 9-1005: Bond

In order to defray the costs, a fee of \$100.00 shall be paid by each applicant or person who files a notice of appeal to the Board of Appeals, which includes, but is not limited to, special exceptions including flood plain, variances including flood plain, and continuations of non-conforming use. Such fee will go in the general revenue fund and will not be refunded.

Reference: W. Va. Code § 8A-8-9.

Section 9-1006: Appeals to the Board of Appeals; applications for special exceptions

As provided in Chapter 8A-8-10 of the West Virginia Code, appeals to the Board of Appeals may be made by any person, board, association, corporation, or official allegedly aggrieved by the grant or refusal of a building or use or occupancy permit, or by any other administrative decision based or claimed to be based, in whole or in part, upon any of these zoning ordinances or rules and regulations adopted pursuant thereto, as set forth in Title 9 of the Town Code, or the Zoning Map.

An appeal relating to a Variance shall be filed with the board only after refusal of issuance of a permit by an enforcement official or after the issuance of a permit in cases where it is alleged that said permit has been issued erroneously.

An application for a Special Exception may be made only by a person or persons with a financial, contractual basis, or proprietary interest in the property for which a Special Exception is requested.

An appeal may be taken only by filing a notice of appeal with the Town Clerk within 30 days of the date appearing on the written order, requirement, decision, notice of decision, or determination. An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the Board of

Appeals to act as it considers appropriate, including, but not limited to, requesting additional information or dismissing the appeal.

The notice of appeal must: (1) provide the names, addresses, and telephone numbers of each party taking the appeal, (2) have attached to it a copy of the order, requirement, decision, notice of decision, or determination being appealed, and (3) contain a statement of the grounds for the appeal. The appealing party shall submit the notice of appeal on the application form obtained from the Town Clerk, attaching additional pages as necessary to complete the application.

Upon filing a notice of appeal, the appellant must pay the Town Clerk all required fees. The Town Clerk shall forward the completed notice of appeal and all attachments to the officer from which the appeal is taken, and the Board of Appeals. Upon receiving the notice of appeal, the officer from which the appeal is taken shall forthwith transmit to the Board all papers constitute the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from which the appeal is taken certifies to the Board of Appeals after notice of appeal shall have been filed, that by reason of the facts stated in the certificate, a stay would cause imminent peril to life or property. In such case, proceedings shall not be stayed other than by a restraining order which may be granted by the Board or by a Court of Record with notice to the officer from which the appeal is taken

Once a completed notice of appeal has been filed and all applicable fees have been paid, the Board of Appeals shall fix a reasonable time, not to exceed forty-five (45) days, for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing, any party may appear in person, or be represented by agent or attorney.

Reference: W. Va. Code §§ 8A-8-9, 8A-8-10.

Section 9-1007: General powers of Board of Appeals

The Board shall have the following powers:

(a) To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by the by the officer in the enforcement of zoning ordinances or rules and regulations adopted pursuant thereto, or of the provisions of The West Virginia Code.

(b) To hear and decide special exceptions to the terms of this title upon which such Board is required to pass hereunder.

(c) To authorize upon appeal in specific cases a variance from the terms of zoning ordinances or rules and regulations adopted pursuant thereto.

(d) In exercising the above-mentioned powers such Board may, in conformity with the provisions of said West Virginia Code and applicable ordinances, rules, or regulations, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the enforcement officer from whom the appeal is taken.

Reference: W. Va. Code § 8A-8-9.

Section 9-1009: Limitations, guides, and standards

Where, in this title, certain powers are conferred upon the Board it shall study the specific property involved and the neighborhood, cause the property to be posted in a conspicuous place, hold a public hearing, consider all testimony and data submitted, and hear any person for or against the issuance of the permit. However, the application shall not be approved where the Board finds the proposal would adversely affect the public health, safety, security, morals or general welfare or would result in dangerous traffic conditions or would jeopardize the lives or property of people living in the neighborhood. In deciding such matters, the Board shall give consideration, among other things, to the following:

- (a) Decisions of the Circuit Court and the Supreme Court of Appeals.
- (b) The orderly growth of the neighborhood and community.
- (c) The most appropriate use of land and structure.
- (d) Facilities for sewers, water, trash and garbage collection and disposal and the ability of the Town or County to supply such services.
- (e) Availability of firefighting equipment.
- (f) The effect of such use upon the peace of people in their homes.
- (g) The number of people residing, working or studying in the immediate area.
- (h) The type and kind of structures in the vicinity where people are apt to gather in large numbers such as schools, churches, theatres, hospitals and the like.
- (i) Traffic conditions, including facilities for pedestrians, such as sidewalks and safety zones and parking facilities available and the access of cars off highways.
- (j) The preservation of cultural and historic landmarks.

(k) The conservation of property values.

(l) The effect of odors, dust, gas, smoke, fumes, vibrations, glare and noise upon the uses of surrounding properties.

(m) The contribution, if any, such proposed use, building or addition would make toward the deterioration of areas and neighborhoods.

(n) Any findings and recommendations of the Historic Landmark Commission.

Reference: W. Va. Code § 8A-8-9.

Section 9-1011 Temporary Special Exception Use

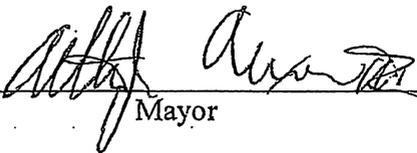
A temporary special exception may be authorized by the Board of Appeals, after a public hearing, for a use which may be necessary for the proper development of the community. Such special exception shall be for a specified length of time not to exceed one (1) year and subject to agreement by the recipient to discontinue such use at the expiration of such special exception or to allow the municipal authorities to remove it without cost to the town.

Reference: W. Va. Code § 8A-8-9.

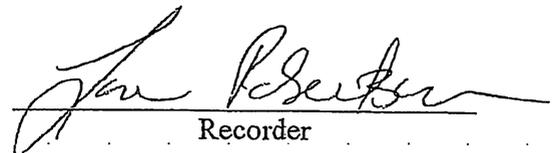
First Reading: January 14, 2014

Second Reading: February 11, 2014

Adopted: February 11, 2014



Mayor



Recorder