

B. McAuliffe

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JEFFERSON COUNTY
CIRCUIT CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

BORYS M. TKACZ
Petitioner,

v.

CIVIL ACTION NO. 12-C-434

**BOARD OF ZONING APPEALS OF
THE TOWN OF SHEPHERDSTOWN**
Respondent.

ORDER

THIS MATTER came on this 4th day of June, 2013, upon the papers and proceedings formerly read and had herein; upon the appearance of Boryz M. Tkacz by J. Michael Cassell, Esq., Cassell & Prinz, PLLC, and upon the appearance of the Board of Zoning Appeals of the Town Shepherdstown by Brian McAuliffe, Esq. In consideration of the pleadings, exhibits, Certified Record and the Memoranda of counsel, the Court does make the following Findings of Fact:

1. Boryz Tkacz, (hereinafter "TKACZ") is a resident of Shepherdstown, West Virginia. Mr. Tkacz resides as 211 E. High Street. The Tkacz residence is adjacent to and shares a common boundary with the property owned by Patrinka Kelch (hereinafter "KELCH").
2. The Board of Zoning Appeals (hereinafter BZA) of the Town of Shepherdstown is the duly appointed BZA for the Municipal Corporation of Shepherdstown.
3. Kelch constructed a fence adjacent to the property owned by Tkacz without a permit. The Shepherdstown Municipal Ordinance requires a Building Permit before the construction of a fence.
4. The Shepherdstown Planning Commission conducted a hearing on an

application for a Building Permit for a fence filed by Kelch on June 18, 2012. On June 29, 2012, the Planning Commission finalized its written Decision in the case (Fence Application for Building Permit No. 12 - 31 - 207 E. High Street) and denied the Application.

5. Kelch filed an Appeal with the BZA on August 10, 2012, forty-two (42) days after the Planning Commission rendered its Decision to deny the Application of Kelch.

6. Tkacz appeared at the hearing conducted by the Planning Commission to oppose the Application for a Building Permit for a fence filed by Kelch. The BZA conducted a hearing upon the appeal filed by Kelch on September 27, 2012. The hearing was continued and reconvened on October 2, 2012. Tkacz attended the hearing to oppose the Appeal.

7. Throughout this time, Kelch maintained the fence adjacent to the property line with Tkacz without a permit. Photographs of the fence are included in the record on Appeal. The fence is constructed of "reed" materials without any substantial support.

8. The BZA finalized its Decision and Order on October 16, 2012. The BZA granted a Variance for the height and material of the fence.

9. Neither the BZA nor the Planning Commission granted an Application for a Permit to construct the fence.

10. Tkacz filed the Complaint and Petition for Writ of Certorari and Declaratory Relief in the case at bar on November 13, 2012.

11. By agreement of the parties, this Court ordered the BZA to file a Certified Record and this Court ordered the parties to file their respective Memoranda of Law and Fact.

12. Counsel for the BZA filed a "Certificate of Filing and Statement of Counsel" on

January 29, 2013 to comply with the Court's Writ of Certiorari.

13. The Planning Commission found that the reed fence does not follow the provision of the Shepherdstown Ordinance (hereinafter the "ORDINANCE").

14. The Commission found that the event for which the screening was originally proposed was over. The Commission further found that the Zoning Officer made a determination that a Permit was not required but the Planning Commission is not obligated to abide by that determination if the fence does not meet the requirements of the Ordinance.

15. The Commission found that the Zoning Officer had not approved the reed fence.

16. The Commission found that there is no provision in the Ordinance pertaining to temporary fencing/screening.

17. Kelch constructed the reed fence without a Permit by claiming that the fence was "temporary" and therefore she did not need a Permit. There is no provision in the Ordinance for a Temporary Fence.

18. In its Decision dated October 16, 2012, (Exhibit 2 attached to the Complaint) the BZA states in Conclusion of Law No. 3, page 6, that the standard of proof for a Variance is "clear and convincing evidence".

19. In its Decision, the BZA states on page 1 of its Decision (Exhibit 2 attached to the Complaint) that the Board must find "beyond a reasonable doubt" that all of the elements of a Variance have been proven by the Applicant pursuant to the Shepherdstown Municipal Ordinance, Section 1008.

20. The BZA admits that the Planning Commission Decision dated June 29, 2012, was the Decision on Appeal before the BZA.

21. The BZA found in its Decision that the “requested fence is necessary for insurance purposes” (Finding of Fact No. 3, page 5, Exhibit 2 attached to the Complaint).

22. There is no evidence in the Record on appeal that the fence in question would have any effect upon the insurance premiums of Kelch or would have any effect whatsoever with regard to her insurance.

23. The BZA found in its Decision that the fence is not “visible from the street” (Finding of Fact No. 4, page 5, Exhibit 2 attached to the Complaint).

24. In the Staff Memo for the Planning Commission, the Staff states that the fence is “partially visible from the gate on High Street”.

25. Section 8A-9-5(a), WV Code as Amended, requires that the Secretary of the BZA shall file a Certified Record when a Decision of the BZA is on Appeal in the Circuit Court. Section 8A-8-10(b) requires any person wishing to file an Appeal before the BZA shall do so within thirty (30) days of the day of the Decision appealed.

26. Shepherdstown Ordinance Section 1008 requires that the Standard of Proof for a Variance is “beyond reasonable doubt”.

27. Section 8A-5-10(a)(1) & (2) requires that an Appeal of a Planning Commission Decision must be filed in Circuit Court or before a Board of Subdivision and Land Development Appeals. Shepherdstown has not appointed a Board of Subdivision and Land Development Appeals.

In consideration of the foregoing Findings of Fact the Court does make the following

Conclusions of Law:

1. Venue is proper in this Court and this Court has jurisdiction of the subject matter and parties in this Civil Action.
2. Borys M. Tkacz is an aggrieved person pursuant to Section 8A-1-2(b)(2).
3. Mr. Tkacz filed his Complaint and Petition for Writ of Certiorari and Declaratory Relief on November 13, 2012, within thirty (30) days of the Decision of the BZA (October 16, 2012) in Compliance with Section 8A-9-1(b), WV Code as Amended.
4. The Complaint and Petition for a Writ of Certiorari adequately specifies the grounds of the alleged legality of the Decision made by the BZA, pursuant to Section 8A-9-1(b)(2), WV Code as Amended.
5. The Standard of Review in this case is defined by Syllabus Point No. 5, Wolfe v. Forbes 217 SE 2d 899 (159 WV 34) (1975):

“While on Appeal there is a presumption that a BZA acted correctly. The reviewing Court should reverse the Administrative Decision where the Board has applied an erroneous Principal of Law was plainly wrong in its Factual Findings, or has acted beyond its jurisdiction.”
6. The Court concludes that all three (3) elements of Syllabus Pt. No. 5 are present in the case at bar.
7. It is normal practice for the BZA to record its hearings. In the case at bar, the recording is not present in the Record. There is no explanation regarding this omission. The Court must decide this case by reference to the documents, drawings and photographs contained in the Record.

8. There is no evidence in the Record to support the Board's Finding of Fact No. 3, page 5, BZA Decision dated October 16, 2012. This Findings of Fact relates to a claim that the fence was necessary "for insurance purposes to contain visitors to the Mill".

9. The photographs of the fence demonstrate that the fence is a flimsy plastic reed fence which is unattractive and unsuitable for the purposes described in Finding of Fact No. 3.

10. The BZA also found that the fence was not visible from the Street. (Finding of Fact No. 4, page 5) In a Staff Report made to the Historic Landmark Commission and Planning Commission (attached as Exhibit B to Petitioner's Memorandum of Law and Fact). The Staff clearly states that the fence is "partially visible from the gate on High Street".

11. The Staff also recommended that solid fences in the front yard of properties "are not appropriate for use in front yards and should be avoided". As a result of the configuration of Kelch's property, both the Planning Commission and the BZA concluded that the fence was located in the front yard of the Mill property. (See Planning Commission Finding of Fact No. 2 in Decision dated June 29, 2012, attached to the Complaint as Exhibit 1).

11. The Planning Commission found that the fence did not meet the requirements of the Shepherdstown Ordinance.

12. The Planning Commission concluded as a matter of Law that the fence did not meet the requirements for the type of material used or the height of the fence as required by Ordinance Section 9-803.

13. The Tkacz and Kelch properties are both located in the Historic District of Shepherdstown. The Ordinance, Section 9-100(n) requires that the BZA give consideration to

the Planning Commission Decision.

14. The BZA Decision only mentions the Planning Commission proceedings by incorporating those proceedings into the Record before the BZA. (See last paragraph on page 2 and 4th paragraph on page 4, BZA Decision dated October 16, 2012)

15. In Finding of Fact No. 11, page 6, BZA Decision, the Board summarily states that it considered the guidelines in Ordinance Section 9-1009 but found that these guidelines did not “warrant concern regarding this Section of the Ordinance”.

16. This Finding directly contradicts the requirements of Ordinance Section 9-1009 which states that:

“In deciding such matters, the Board shall give consideration, among other things, to the following:

(n) The recommendation of the Planning Commission when such matters are located within the Historic District.

17. The Court notes that the Planning Commission rendered a written Decision in this case which was on Appeal to the BZA. A written Decision of the Planning Commission would carry much more weight than a recommendation. The BZA was under a legal obligation to consider the Planning Commission Decision and articulate its reasons for deciding the case in a different fashion.

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 Requirements of this Ordinance shall be authorized by the Board unless it finds, beyond reasonable doubt, that all of the following Facts and Conditions exist.” (Emphasis added)

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. This Court also notes that Ordinance Section 1008(b)(1-4) contains the 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.

21. To grant the Variance the Board is required to find, beyond reasonable doubt, that all four of the elements in Ordinance Section 1008(b) are present in the case. In its Conclusions of Law the Board makes mention of Ordinance Section 9-1008, but the Board did not articulate Findings of Fact or Conclusions of Law to demonstrate that all four elements had been proven by Kelch. The Court concludes that the BZA Decision on this issue is inadequate as a matter of law.

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 within 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 had 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 in thirty (30) days after the Decision appealed.

26. The Shepherdstown Ordinance provides that a Decision made by the Planning Commission must be filed with the BZA, Ordinance Section 9-1006, which is in direct contradiction to the quoted Statute.

27. The Court concludes that there is no authority for Decisions of the Planning Commission to be appealed to the BZA. The Court concludes that the BZA lacked jurisdiction to hear the Appeal filed by Kelch on this basis.

28. Kelch failed to file an Appeal from the Planning Commission Decision with this Court or with a “Board of Subdivision and Land Development Appeals” within thirty (30) days after the Planning Commission Decision. The Court concludes that the Planning Commission Decision is final and binding upon the parties since no Appeal was filed pursuant to Section 8A-5-10.

29. Section 8A-4-2(14) provides that a Subdivision and Land Development Ordinance shall include (14) 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 matter pertaining to Zoning and not Subdivision Control. Section 8A-7-2 describes the required contents 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.

33. The State Legislature has authority to delegate its lawmaking power to municipal corporations and counties as to matters of local concern. Chapter 8A is a delegation of the police power to the counties and cities for Land Use Regulation. State ex rel State Line Sparkler of West Virginia Ltd. v. Teach, 187 WV 271, 418 SE2d 585 (1992). But a delegation of power by the State Legislature is strictly construed. State ex rel Dillon v. County Court, 55 SE2d 382, 386 (1906).

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

35. 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. American Tower Corp v. Common Council of the City of Beckley, 557 SE2d 752, 756 (2001), quoting Vector Company v. BZA of the City of Martinsburg, 184 SE2d, 301, 304 (1971).

36. As a general principal, the powers of subordinate agencies should be limited to those expressly granted by the legislature. State ex rel Board of Governors of WVU v. Sims, 55 SE2d 505, 509 (1949).

37. The Court concludes that the Shepherdstown Ordinance is subordinate to Chapter 3A 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 upon the powers, 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 of the City of Martinsburg, 184 SE2d 301, 304 (1971).

40. The Court concludes that a general principal Municipal Corporation may not enact Ordinances in conflict with the Enabling Legislation in the West Virginia Code (Section 8-1-6, WV Code as Amended)

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.

42. The Court further concludes that the BZA and the Municipality of Shepherdstown have no authority to enlarge or expand the powers, duties and jurisdiction of either the BZA or the Planning Commission beyond those Powers and Authority specifically described in Chapter 8A.

43. The Court notes that the BZA has had counsel retained throughout the administrative process and in this Appeal. The Court further notes that there is a practicing attorney on the Board. The Court concludes that the adherence of the BZA to practices and procedures which are in direct violation of State Law constitutes oppressive misconduct in the case at bar.

44. The Court further concludes that this case is appropriate for an award of attorney's fees, expenses and costs for the Petitioner as a result of the above-described misconduct.

THEREFORE it is hereby ADJUDGED and ORDERED that the Decision of the Shepherdstown Board of Zoning Appeals dated October 16, 2012 is hereby REVERSED and VACATED; it is further

ORDERED that the Petitioner may file a Motion for Attorney's Fees within thirty (30)

days of the date of the entry of this Order.

2 cc's:

M. Cassell

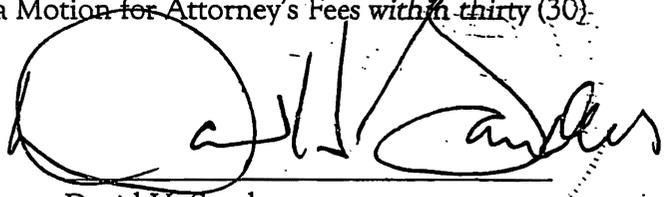
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David H. Sanders,
Judge of the Circuit Court of
Jefferson County, West Virginia

A TRUE COPY
ATTEST:

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

BY B. Chalk
DEPUTY CLERK