

/s/ Michael Lorenson
Circuit Court Judge
Ref. Code: 21VY4HPG

E-FILED | 6/23/2021 11:14 AM
CC-02-2021-C-14
Berkeley County Circuit Clerk
Virginia Sine

In the Circuit Court of Berkeley County, West Virginia

Berkeley County Council, Martinsburg,)
Plaintiff,)
)
vs.))
)
City of Martinsburg,)
Defendant)

Case No. CC-02-2021-C-14

Final Order Granting Injunction

On February 3, 2021, the Plaintiff, Berkeley County Council (hereinafter "the County") appeared by counsel, Anthony Delligatti and Jeffrey Mauzy, and the Defendant, the City of Martinsburg ("the City") appeared by counsel, Floyd McKinley Sayre III. This matter came on to be heard for an injunction following the issuance of a temporary restraining order announced in court on January 22, 2021 and confirmed by order January 26, 2021.

This case arises from a Verified Petition for Injunctive Relief and Amended Complaint filed January 22, 2021, challenging the City's authority to issue a citation and notice of violation for a construction project undertaken by the County on the County's property within the City. The County has been in the process of rehabilitating a building to be used as a community treatment center since July 2020. The building is located at 520 South Raleigh Street in the City limits of Martinsburg.

When the construction project began in July 2020, the City's Engineer emailed the County's administrative staff. By email dated July 23, 2020, the City's Engineer offered to meet with representatives of the County, including the County's Engineer, regarding "the necessary permits that must be issued by the city of Martinsburg in accordance with state law to begin the project." (2/3/21 Hearing Stipulated Exhibit 2). The City's position was that its MS4 (stormwater management) permitting procedures

applied to the project, as well as the International Building Code section 105, as adopted by the State, the County, and the City. The City offered to meet with the County regarding the areas of concern raised in the email.

By letter dated July 24, 2020, the attorney for the County, Norwood Bentley, responded to the email and explained that the construction project at issue does not disturb more than 5,000 square feet and assured the City that the County would adhere to the County's MS4 permitting requirements, as well as its own building code. (2/3/21 Hearing Stipulated Exhibit 3). The County also advanced the position that the City did not have any permitting authority over the project pursuant to West Virginia Code § 8-12-14. Finally, the County offered to provide the City a copy of its plans. It was later stipulated at the hearing on February 3, 2021, that the construction project, in regard to the excavation of the parking lot, is over 5000 square feet.

The construction continued and the City took no further action until January 2021. On January 6, 2021, Alan Davis, County Administrator, sent an email to Mark Baldwin with the City. (2/3/21 Hearing Stipulated Exhibit 1). The purpose of the email was to respond to a telephone discussion from January 5, 2021 and to explain that the County's position regarding the construction project had not changed since the July 24, 2020 letter from the County attorney. Mr. Davis further explained that the County intended to comply with the requirements of its own MS4 permit regarding the resurfacing and excavation of the parking lot at 520 S. Raleigh Street.

On January 12, 2021, Jared Tomlin, Stormwater Coordinator for the City issued a Notice of Violation of Land Disturbance Permit in Berkeley County Building Redevelopment, SWM Case Number: 2021-1016-001, providing notice that the County was in violation of the City's Stormwater Management Ordinance 2013-17 at 520 S. Raleigh Street building redevelopment because the site does not have a Land Disturbance Permit, Stormwater Management Plan, or an Erosion and Sediment

Control Plan. (2/3/21 Hearing Stipulated Exhibit 4). The County was put on notice that if the documents were not received with ten (10) days, a stop work order would be issued and that other civil and criminal penalties could be assessed against the County.

On January 15, 2021, the Legal Director for the County, Anthony Deligatti, sent a letter to the City Manager and the City Stormwater Coordinator reiterating the County's position that pursuant West Virginia Code § 8-12-14, the County is not required to apply for or obtain City permits for construction projects within the City limits. (2/3/21 Hearing Stipulated Exhibit 5). The County further notified the City that it intended to seek injunctive relief to prevent the issuance of a stop work order or any other penalty from the City.

At issue is excavation of an existing parking lot directly adjacent to the building at 520 South Raleigh Street. On January 12, 2021, the City issued a citation and a notice of violation to the County for this construction project as the result of a January 6, 2021, inspection. The notice of violation states a stop work order would issue unless the City's demands were met within ten days. The citation states that failure to correct the violations "shall result in the issuance of additional citations." The notice of violation further threatens civil and criminal penalties. The citation states that if the City corrects the violations because of the County's failure to do so, that the City may file a lien on the County's property for any costs incurred. The citation acknowledges an appeal process through the City of Martinsburg Planning Department.

The County filed the instant action on January 22, 2021 in the form of a Verified Petition and Amended Complaint seeking an injunction against the City from seeking civil or criminal penalties against its employees and contractors in regard to the excavation of the parking lot adjacent to the renovated building at 520 South Raleigh Street. The Court issued an order temporarily restraining the City from taking any further action on Stormwater Management Case number 2021-0106-001 or 2021-0106-004 or

to otherwise stop or impede the work at issue at 520 South Raleigh Street. The Court held a hearing on February 3, 2021 for the purpose of taking testimony and submitting evidence and legal argument regarding the requested injunctive relief. During the February 3, 2021 hearing, counsel for the City and the County agreed and submitted seven (7) stipulated exhibits, as well as oral argument supporting their positions, and this Court took the issue under advisement. Counsel for the City requested a status hearing regarding the issuance of a permanent injunction and said hearing was held on June 2, 2021. At that time, Counsel for the City indicated his intention to file an Answer to the County's Amended Complaint.

Counsel for the City filed the Answer on June 10, 2021. The City alleges in its Answer that the County has refused to provide the City with plans for the building project and information that the plans comply with all building codes. A review of the stipulated exhibits from the February 3, 2021 hearing do not show any refusal on the part of the County. The County offered copies of the plans for the review of the City in its letter from June 24, 2020. No evidence was submitted at the hearing supporting the allegation that the County refused to provide the plans. The City further reiterates its position that the City has legal authority to require permits on construction projects within the City limits and that the County failed to satisfy the requirements for the issuance of a temporary restraining order and injunctive relief. The Court notes that the construction project at 520 South Raleigh Street, including the excavated parking lot at issue in the instant controversy, has been completed.

The County alleges that it cannot be subject to municipal permitting requirements for construction of a building and adjacent structures, such as a parking lot. The County bases its argument on West Virginia Code § 8-12-14, which provides:

The governing body of every municipality has plenary power and authority to require a permit as a condition precedent to the erection, construction, repair or alteration of any

structure or of any equipment or part of a structure which is regulated by state law or municipal ordinance: Provided, That no such permits may be required of the state, a county or other governmental entity, its contractors, agents or employees for the erection, construction, repair or alteration of any structure or of any equipment or part of a structure designated for use by the state, a county or other governmental entity.

The International Building Code defines "structure" as that which is built or constructed. Additionally, counsel for the County has stated that the County is required to implement stormwater management and sediment control through its own ordinance and has informed the City that it would follow its own MS4 permitting requirements.

The City contends the authority to regulate land use as found in West Virginia Code § 8A-7-1, as opposed to building permits, comes within the City's zoning statute and is implied in its authorization to regulate within its entire jurisdiction. The City appears to argue that this language means that its zoning statute necessarily applies to all regulation within the City limits (including regulation of county and/or state land), when it is clear upon plain reading that the use of the word "entire" means that a city's zoning ordinance "shall cover a municipality's entire jurisdiction" as opposed to a county's zoning ordinance, which "may cover a county's entire jurisdiction or parts of a jurisdiction." *See* W.Va. Code § 8A-7-1(b) and (c). The City contends that its authority regarding stormwater management derives from its authority to enact land use regulations pursuant to the statutes found in Chapter 8A of the West Virginia Code. The City further contends that the zoning statute, West Virginia Code § 8A-10-3, authorizes the appropriate official to seek an injunction against a "government unit" defined as including county government. The City urges that the Court should infer that it has the power to regulate the County's building activity in furtherance of its land use and zoning ordinance. Contrary to the City's position that its authority to regulate the County's land use in this instance comes from its zoning ordinances, the West Virginia Supreme Court

of Appeals has explained that the, "distinguishing factor between the two types of permits is that a building permit involves how that use is undertaken, while a zoning permit concerns whether a certain area may be used for a particular purpose." *Bittinger v. Corporation of Bolívar*, 183 W. Va. 310, 314, 395 S.E.2d 554, 558 (1990). The construction and excavation of the parking lot at issue clearly involves the question of how the use of the land is "undertaken", and not whether the area may be used for a particular purpose.

At the hearing on the injunction, the City denied that its intent, as set out in the boilerplate language of the citation and notice of violation, was to seek civil or criminal penalties against anyone. The City alleges that it simply wants information to permit it to protect its substantial work done to comply with its MS4/NPDES permit and to understand the County's construction project insofar as it might affect the performance of the City's stormwater management system. Counsel for the City specifically stated at the end of the hearing that the City is simply requesting that the County provide the City with a stormwater management plan and an erosion control plan. The stipulated hearing exhibits support the County's allegation that it offered to provide the plans for the excavation of the parking lot at issue to the City for review, but there is no evidence showing the City ever availed itself of that offer.

Counsel for the City argued that all that the City requested was access to the design and planning documents, and because the County failed to provide this access, the notice of violation was issued. The City disavowed any claim to punitive elements of a notice of violation. The Land Use and Planning chapter of the West Virginia Code provides for governmental cooperation. West Virginia Code § 8A-3-13 provides as follows:

- (a) With a view to coordinating and integrating the planning

of municipalities and/or counties with each other, all governing bodies and units of government within the lands under the jurisdiction of the planning commission preparing or amending a comprehensive plan, all governing bodies and units of government affected by the comprehensive plan, and any other interested or affected governing body, unit of government or planning commission, ***must cooperate, participate, share information and give input when a planning commission prepares or amends a comprehensive plan.***

(b) All planning commissions, governing bodies and units of government are authorized to cooperate and share information with each other and may adopt rules and regulations to coordinate and integrate planning.

(c) All planning commissions, governing bodies and units of government ***must make available, upon the request of a planning commission, any information, maps, documents, data and plans pertinent to the preparation of a comprehensive plan.***

[Emphasis added.]

The remedy for failure to provide documentation is not a citation with civil or criminal penalties attached and the above statute demonstrates that the County and the City must work together and make available appropriate documentation when requested. If the City believes it has a clear legal right to planning documents, remedies exist which would afford it the power to gain the documents demanded. The stipulated evidence presented during the February 3, 2021 hearing does not support the City's position that the County refused to provide the documentation requested and that issue is not currently before this Court.

During the February 3, 2021 hearing, the City also offered the argument that the use of the word "may" in West Virginia Code § 8-12-14 means that the City may decline to impose permit requirements on County projects, but may also choose to impose permit requirements on County projects. The plain reading of the statute reveals that the qualifying use of the word "no" in the phrase, "[t]hat no such permits may be required of a . . . county" makes clear that the prohibition on the City's permitting authority

regarding other governmental entities is not permissive or discretionary.

Regarding the County's request for injunctive relief enjoining the City from stopping the excavation and construction of the parking lot at 520 South Raleigh Street and from requiring the County to obtain certain building permits from the City, Court hereby GRANTS the requested injunctive relief, and finds that the Petitioner has properly shown that the excavation and construction of the parking lot at issue falls within the definition of a structure as found in West Virginia Code § 8-12-14 and that the County has shown a clear legal right to complete this project free from the City's permitting process; that the County will be harmed if the City is not enjoined from exercising any permitting authority over it in regard to the parking lot at 520 South Raleigh Street and that the harm to the County outweighs the harm to the City if it is enjoined from exercising its authority over the County; and that the public interest is best served by permitting the County to complete the building project free from City oversight and by observing the clear division of authority to regulate said project as between the City and the County as envisioned by West Virginia Code § 8-12-14.

The Clerk is directed to transmit a copy of this Order to all counsel of record and all self-represented parties.

/s/ Michael Lorensen
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courts.wv.gov/e-file/ for more details.