81-82

IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

ROBERT L. FORD and DOROTHEA R. FORD,
husband and wife,

Plaintiffs,

v.

Civil Action 02-C-54
Judge Wilkes

MORGAN COUNTY PLANNING COMMISSION, a public corporation; and, THE COUNTY COMMISSION OF MORGAN COUNTY, WEST VIRGINIA, a public corporation,

Defendants.

ORDER

This matter came on for consideration of the Court this 30 day of June 2005, upon the Parties' Joint Submission to the Court as to the Remaining Issues and Positions ("Joint Submission").

Upon the appearance of Plaintiffs Robert L. Ford and Dorothea R. Ford ("Plaintiffs") by their counsel Michael L. Scales and the appearance of Defendants Morgan County Planning Commission, a public corporation, ("Planning Commission") and the County Commission of Morgan County, a public corporation ("County Commission") by counsel Richard G. Gay.

The Court carefully considered the pleadings, motions, and memoranda with attached exhibits and affidavits; the record and memoranda of the Morgan County Planning Commission; and the stipulations, testimony, exhibits, and argument of counsel; the entire record of this case; and relevant legal authority; and find as follows:

1. The Court takes judicial notice of all ordinances and minutes of meetings of the Morgan County Planning Commission and in the absence of any other ordinances; Morgan County has not enacted any other ordinances.

2. The Court takes judicial notice of the October 4, 2003 *Order* in *Morgan County Commission and Morgan County Planning Commission v. Emmett Capper and Capper Broadcasting Company*, Morgan County Case Number 03-P-15, which addresses certain issues raised in the case *sub judice*.

3. The Court takes judicial notice that Thomas Swaim is a member of both the Morgan County Planning Commission and County Commission.

FINDINGS OF FACT

The relevant facts are as follows, in chronological order:

1. On July 29, 1999, Plaintiffs submitted a Commercial and Industrial Improvement Location Permit ("Commercial ILP") for Phase I, under the name of BBB Campground. The purpose of the improvement was recreational rental space for 500 weekly customers, and the estimated costs were $700,000.
2. On September 28, 1999, the Planning Commission approved Phase I, as long as the design met the requirements of the Subdivision Regulations.
3. On September 26, 2000, the Planning Commission approved the changes to Phase I, under the name of Triple B (formerly BBB Campground).
4. On June 7 2001, Plaintiffs completed an agriculture survey, showing that the total gross value of sales for all livestock grossed $1,000 to $2,499 for the year 2000.
5. In 2002, Morgan County assessed Mr. Ford's livestock at $6,744.
6. On March 8, 2002, Plaintiffs submitted a Commercial ILP application for a 20' x 200' horse arena under the name of their business, Triple B Arena. The purpose of the horse arena was for rodeos and horse shows.

7. On March 13, 2002, Professional Engineer Thomas J. Cronin recommended approval, contingent upon acceptable storm water management.
8. On March 14, 2002, Plaintiffs modified the horse arena to 20' x 149' to avoid storm water management.
9. On March 18, 2002, Mr. Cronin approved Plaintiffs' proposal but cautioned the planning commission that the horse arena would still cause significant runoff.
10. On March 24, 2002, Plaintiffs' neighbor, Lori E. Shaffer, complained to the Planning Commission that Plaintiffs cause runoff on her property.
11. On March 26, 2002, Mr. Cronin reported that Plaintiffs Phase I development is strikingly different than presented on prior and current plans. The Planning Commission voted to approve Plaintiffs' Commercial ILP application, provided they address the runoff issue.
12. On March 27, 2002, Plaintiff Robert L. Ford submitted an Improvement Location Permit ("ILP") application for a 20' x 149' pole barn under his name, and the estimated building costs were $14,000.
13. On March 27, 2002, the Planning Commission denied Mr. Ford's request for a pole barn ILP because of his pending Commercial ILP for the exact same building.
14. On March 29, 2002, Mr. Ford wrote to the Planning Commission to retract his Commercial ILP for the horse arena, previously submitted under the name of Triple B Arena. Mr. Ford wrote that he would now be using the horse stall barn for personal agriculture use.
15. On April 17, 2002, Ms. Shaffer again wrote the Planning Commission regarding Plaintiffs. She complained of noise from a rodeo and seeing, hearing, and smelling Plaintiffs' animals during their stay on Plaintiffs' property.
16. On April 23, 2002, the Planning Commission denied Mr. Ford's request for a farm use exemption, requiring Mr. Ford to comply with the requirements for a Commercial ILP.

17. On April 24, 2002, Plaintiffs submitted a Commercial ILP application for a 22' x 150' horse stall building under their names, and the estimated building costs were $16,000. The purpose of the building was for stall space rental.

18. On June 10 2002, Plaintiffs completed an agriculture survey, showing that the total gross value of sales for all livestock grossed $5,000 to $9,999 for the year 2001.

19. On July 23, 2002, the Planning Commission rejected the proposed Triple B Arena project site plan, required that Triple B Arena submit an as-built plan for Phase I, and fined Triple B Arena $100 per day, commencing the same day.

20. On August 21, 2002, Plaintiffs commenced this suit for Declaratory Relief, complaining of Six (6) Counts against Defendants. Count I of Plaintiffs' Complaint says that Plaintiffs are exempt from the Morgan County Commercial and Industrial Improvement Location Permit Ordinance ("Ordinance") because of agricultural use. Count II states that the Ordinance does not conform to Morgan County's Comprehensive Plan ("Comprehensive Plan"). Count III alleges that Defendants illegally required as-built plans for Triple B Arena. Count IV argues that the Ordinance appellate procedure is invalid. Count V alleges violations of the Open Governmental Proceedings Act. Count VI states that the Planning Commission failed to make adequate findings of fact and conclusions of law to support its decision.

21. On March 5, 2003, Defendants moved for a Protective Order, arguing that Plaintiffs could only appeal the Planning Commission's decision via a petition for writ of certiorari.

22. On April 28, 2003, the Court denied Defendants' Motion for a Protective Order, deciding that Plaintiffs can file a Declaratory Judgment. However, the Court is limited to consideration of Plaintiffs' claims that (1) the Ordinance does not comport with the enabling legislation and that (2) state law does not authorize the appeals process adopted under the Ordinance.

23. On June 5, 2003, Plaintiffs completed an agriculture survey, showing that the total gross value of sales for all livestock grossed $5,000 to $9,999 for the year 2002.

24. On March 11, 2004, Plaintiffs' moved for Partial Summary Judgment as to Counts I & VI.

25. On June 1, 2004, Defendants moved for Partial Summary Judgment as to Count V.

26. On July 28, 2004, the Court granted Defendants' Motion for Partial Summary Judgment as to Count V.

27. On February 16, 2005, the Court denied Plaintiffs' Motion for Partial Summary Judgment as to Counts I & VI.

28. On March 7, 2005, Plaintiffs and Defendants filed the Joint Submission.

CONCLUSIONS OF LAW

With due consideration to the facts of this case and the current law in this State, the Court finds as follows as to each issue the parties addressed, in their Joint Submission:

I. The Planning Commission correctly applied the Commercial ILP in rejecting Plaintiffs' request for a farm exemption.

"The Supreme Court may disturb decision of board of zoning appeals where board has applied an erroneous principle of law, was plainly wrong and in its factual findings, or acted beyond its jurisdiction...There is a presumption that the board of zoning appeals acted correctly." *Wolfe v. Forbes*, 217 S.E.2d 899, 159 W.Va. 34 (1975). "Enactment of zoning ordinance is a legislative function to which all reasonable presumptions in favor of validity attach." *G-M Realty, Inc. v. City of Wheeling*, 120 S.E.2d 249, 146 W.Va. 360 (1961). With these presumptions in mind, the Court considers the arguments opposed to the Planning Commission, the County Commission, and the Ordinance.

Section 5.2 of the Ordinance states "[a] farm equal to the following definition shall be exempt from this ordinance: Farm shall mean and include land currently being used *primarily* for farming

purposes...during the year preceding the then current tax year" (emphasis added). Plaintiffs failed to produce evidence that Defendants incorrectly applied the Ordinance in regards to the farm exemption. The evidence establishes that the Planning Commission has the authority to apply the Ordinance. The Planning Commission found that Plaintiffs' building did not meet the farm exemption. The Planning Commission relied on its own investigations, the Professional Engineering report, letters submitted from Plaintiffs' neighbor, Plaintiffs' tax records, Plaintiffs' statements, and permit applications. The Planning Commission has the authority to determine what buildings qualify for the farm exemption. The Planning Commission did not violate any statutes by determining that Plaintiffs did not meet the farming exemption.

II. This civil action is properly before the Court on a Declaratory Judgment action.

W.VA. CODE § 8A-9-1 (2005) states, "Every decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals is subject to review by certiorari." The recently revised CODE does not preclude the possibility of other actions besides a writ of certiorari. In addition, in *Shannondale, Inc. v. Jefferson County Planning and Zoning Commission*, 199 W.Va. 494, 485 S.E.2d 438 (1997), the West Virginia Supreme Court of Appeals affirmed, in part, and reversed, in part, an Action for Declaratory Relief. Therefore, Plaintiffs can lawfully bring an Action for Declaratory Judgment.

III. The Commercial ILP Ordinance conforms to the Comprehensive Plan.

"The county comprehensive plan is to aid the county planning commission in drawing up subdivision ordinances and is merely the foundation for future development and growth in county" *Singer v. Davenport*, 264 S.E.2d 637, 164 W.Va. 665 (1980). The County Commission lawfully adopted the Comprehensive Plan in 1986. W.VA. CODE § 8A-7-1 (2005) provides that "[t]he governing body of a municipality or county may regulate land use within its jurisdiction by: (1) adopting a comprehensive

plan; (2) working with the planning commission and the public to develop a zoning ordinance; and (3) enacting a zoning ordinance." The County Commission adopted the Ordinance in 1996 in accordance with the CODE. Since the Comprehensive Plan is merely a guide for the Ordinance, it is relatively easy for the Ordinance to conform to the Comprehensive Plan.

IV. Defendants may compel Plaintiffs to produce as-built drawings.

W.VA. CODE § 8A-1-1(b)(8) (2005) states that "[b]ased upon a comprehensive plan, governing bodies may: (A) enact a subdivision and land development ordinance; (B) require plans and plats for land development; (C) issue improvement location permits for construction; and (D) enact a zoning ordinance." Plaintiffs pre-submitted plans differed from the completed project for Phase I. Based on the CODE, the Planning Commission can require plats and adopt ordinances. Therefore, the Planning Commission can require a revised plat (as-built) from Plaintiffs. Section 5.7 of the Ordinance permits the Planning Commission to conduct "...whatever action it considers necessary...in the event the Permit Officer discovers that the work does not comply with the permit application..." In this case, the Planning Commission required as-built plans because the work did not comply with the permit application, which is fully permissible under its authority.

Plaintiffs argue that the Planning Commission is requiring the plans under the authority of the Subdivision Ordinance. Section 3.2 of the Ordinance states that "[t]he site plan format and informational requirements shall be the same as that of a preliminary subdivision plat (Article 13, Section 13.1 of the Morgan County Subdivision Regulations) for residential subdivisions...additional information shall be addressed before site plan approval of commercial, industrial...sites". The Ordinance refers to the Subdivision Ordinance in how to format the plans, regardless whether or not the subject property is in a subdivision.

V. The Ordinance's optional appellate procedure is valid.

Section 6.1 of the Ordinance specifies: "...the decision of the Planning Commission *may* be further appealed to the Morgan County Commission" (emphasis added). The Ordinance appellate procedure is purely discretionary. An aggrieved party may choose to file an appeal with the Morgan County Commission or directly to Circuit Court. In *Henry v. Jefferson County Planning Commission*, 201 W.Va. 289, 291, 496 S.E.2d 239, 241 (1997), the appellant appealed Jefferson County's planning commission decision to the Jefferson County Board of Zoning Appeals before appealing to Circuit Court. This intermediary appeal process is similar to the appeals process outlined in the Ordinance.

Plaintiffs argue that Commissioner Swaim cannot decide an appeal from his own ruling. "In view of the conflict between the challenged commissioner...the challenged commissioner should recuse himself from the discussion and vote. In order to avoid the appearance of impropriety, the challenged commissioner or any other recused person should absent himself or herself physically from the discussion by leaving his or her customary seat and the general discussion area" *Shannondale*, 199 W.Va. at 500, 485 S.E.2d at 444. Accordingly, Commissioner Swaim should physically absent himself from hearing any appeals by the Planning Commission, so long as he remains a member of both commissions.

VI. The Planning Commission's decision contains sufficient findings of fact and conclusions of law for a meaningful appeal.

"Where the power to pass upon special exceptions or conditional uses allowable by a zoning ordinance has been delegated to an administrative body, the body must set forth the factual basis of its determination so that a reviewing court may ascertain whether the administrative decision conforms to the standards in the ordinance for the particular action taken." *Harding v. Board of Zoning Appeals of City of Morgantown*, 159 W.Va. 73, 219 S.E.2d 324 (1975). The Planning Commission recorded the factual basis to deny Plaintiffs' permit throughout its minutes. The Planning Commission approved Plaintiffs'

Commercial ILP application, subject to storm water management. Subsequently, the Planning Commission denied Plaintiffs' request for a farming exemption because Plaintiffs had a commercial application pending for the same building. Plaintiffs originally applied for the building under the business name. According to Plaintiffs' agriculture survey, Plaintiffs grossed less than $10,000 per year from agriculture in 2002. Ms. Shafer complained to the Planning Commission regarding Plaintiffs' rodeo. Hence, the Planning Commission did not establish farming as Plaintiffs' primary use.

VII. Defendants may fine Plaintiffs a maximum of $300.00 according to W.VA. CODE § 8-24-68 (2004).

"Any person who violates any provision of this article shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten dollars nor more than three hundred dollars" W.VA. CODE § 8-24-68 (2004). Defendants desire to fine Plaintiffs $100 per day for an interminable amount of time, but the CODE does not permit this remedy for Defendants. Article 10 of Chapter 8 outlines the possible remedies for Defendants, such as bringing a nuisance action or an injunction. In 2004, the state legislature repealed W.VA. CODE § 8-24-68 and replaced it with W.VA. CODE § 8A-10-2 (2005), which raises the maximum fine to $500. However, legislature did not insert a "per day" violation. In contrast, the Surface Coal Mining and Reclamation Act states "If a violation is not abated within the time specified or any extension thereof, or any cessation order is issued, a mandatory civil penalty of not less than seven hundred fifty dollars *per day per violation* shall be assessed" W.VA. CODE § 22-3-17 (2005) (emphasis added). Evidently, if legislature chose to assess land use planning violations per day, it would have done so in its recent 2004 amendment. Section 6.3 of the Ordinance reads "Any person who fails to comply with any of the...provisions of this Ordinance...shall be guilty of an offense and, upon conviction, shall pay a fine to the Morgan County Planning Commission of not less than $100 or more than $500 plus cost of prosecution...Each day during which any violation of this Ordinance continues shall constitute a

separate offense." To the extent that this portion of the Ordinance conflicts with W.VA. CODE § 8A-10-2, it is invalid.

Accordingly, it is hereby **ADJUDGED** and **ORDERED** that

I. The Planning Commission correctly applied the Commercial ILP in rejecting Plaintiffs' request for a farm exemption.

II. This civil action is properly before the Court on a Declaratory Judgment action.

III. The Commercial ILP Ordinance conforms to the Comprehensive Plan.

IV. Defendants may compel Plaintiffs to produce as-built drawings.

V. The Ordinance's optional appellate procedure is valid.

VI. The Planning Commission's decision contains sufficient findings of fact and conclusions of law for a meaningful appeal.

VII. Defendants may fine Plaintiffs a maximum of $300.00 according to W.VA. CODE § 8-24-68 (2004).

The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court, having decided the rights and duties of the parties under the ordinances and statutes in question, ORDERS that the Circuit Clerk shall retire this matter from the docket. The Circuit Clerk shall distribute attested copies of this order to the following counsel of record:

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CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT

A TRUE COPY, ATTEST:
Kimberly J. Jackson
Clerk of the Circuit Court
of Morgan County, West Virginia
By Helen H. Moore