Pertinent Case Law

Singer v. Davenport (April 4, 1980), Sup Court of Appeals of WV

Approval of subdivisions confined to two questions

> The Circuit Court concluded that when a plat is presented to the Planning Commission for approval the applicable state statutes and subdivision regulations confine the Commission's inquiry to two questions:
>
> 1) is the proposed subdivision in harmony with the comprehensive plan, and 2) does the proposed subdivision plan violate any of the subdivision regulations of Jefferson County?
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> The Supreme Court agreed with the Circuit Court's interpretation of the statutory scheme, namely that comprehensive plan is to be used by the Planning Commission to aid them in drawing up their subdivision ordinances. The comprehensive plan was never intended to replace definite, specific guidelines; instead it was to lay the groundwork for the future enactment of zoning laws.
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> Subdivision regulations which are permitted under W.Va.Code, 8-24-28 through 35 [1969] should be distinguished from zoning ordinances. The purpose of zoning is to provide an overall comprehensive plan for land use, while subdivision regulations govern the planning of new streets, standards for plotting new neighborhoods, and the protection of the community from financial loss due to poor development. Shoptaugh v. Board of County Commissioners of El Paso County, 37 Colo.App. 39, 543 P.2d 524 (1975); Smith v. Township *641 Committee of Township of Morris, 101 N.J. Super. 271, 244 A.2d 145 (1968). Thus while zoning can prohibit certain uses of property for subdivision purposes, regulations are designed to govern the manner in which unrestricted property is developed. Board of Supervisors v. Georgetown Land Co., 204 Va. 380, 384, 131 S.E.2d 290, 293 (1963).

Largent v Zoning Board of Appeals for the Town of Paw Paw (Dec 10, 2008), Sup Court of Appeals of WV

Zoning Ordinance is required to have a comp plan prior to adoption

> If a municipality then decided not to enact a comprehensive plan and we were to interpret the applicable statutes as allowing the municipality, nevertheless, to exercise zoning powers provided therein, we would have the anomaly of a municipality having been authorized to exercise zoning powers, but without the powers respecting subdivision control, approval of plats and replats, and of regulating structures and their location through the issuance of improvement location permits all of which statutorily require "a comprehensive plan .[to] have been adopted[.]"

Weston V Mineral Co (June 29, 2006), Sup Court of Appeals of WV

A CC cannot adopt a ord pertaining to exotic entertainment if they have a pc

> The District Court thereafter certified the following question of law to this Court:
>
> Is a county commission, which has created a planning commission pursuant to Chapter 8, Article 24 of the West Virginia Code, precluded from adopting a county ordinance limiting the areas of the county in which a business may offer exotic entertainment pursuant to Chapter 7, Article 1, Section 3jj(b) of the Code?

Looking to the statute in question, W.Va.Code, 7-1-3jj(b) [2002] states that "[i]n the event a county has not created or designated a planning commission ., a county commission may . adopt an ordinance that limits the areas of the county in which a business may offer 'exotic entertainment' ."

Mineral County argues that W.Va.Code, 7-1-3jj(b) [2002] does not have a limiting effect on the authority of counties that have a planning commission to enact ordinances of the type authorized by W.Va.Code, 7-1-3jj(b) [2002].

To accept Mineral County's argument would render the limiting words of W.Va.Code, 7-1-3jj(b) [2002] meaningless.

We hold that a county commission that has created a planning commission pursuant to W.Va.Code, 8-24-1, et seq. does not have authority under W.Va.Code, 7-1-3jj(b) [2002] to adopt a county ordinance limiting the areas of the county in which a business may offer exotic entertainment.

Therefore, we answer the District Court's certified question:

Is a county commission, which has created a planning commission pursuant to Chapter 8, Article 24 of the West Virginia Code, precluded from adopting a county ordinance limiting the areas of the county in which a business may offer exotic entertainment pursuant to Chapter 7, Article 1, Section 3jj(b) of the Code?

Answer: Yes.

Jefferson Utilities v Jefferson Co (Nov 30, 2005), Sup Court of Appeals of WV
Ruling on Issues of qualification of "public" vs "private" utility

Jefferson Utilities appeals from the lower court's dismissal of its writ of certiorari and continues to seek a ruling on the issue of whether it qualifies as a "public utility," or more specifically, as a provider of "public water" within the meaning of the law.

Pursuant to statutes enacted to govern the public health system, a "public water system" is defined as

any water supply or system that regularly supplies or offers to supply water for human consumption through pipes or other constructed conveyances, if serving at least an average of twenty-five individuals per day for at least sixty days per year, or which has at least fifteen service connections, and shall include: (1) Any collection, treatment, storage and distribution facilities under the control of the owner or operator of such system and used primarily in connection with such system; and (2) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

This Court has previously held that the key to determining whether a "public utility" is involved is not the issue of the ownership of the entity providing the service, but instead whether that specific entity has dedicated or held out its services, such as gas; oil; electricity; or water, to the public in a manner that suggests that it is in the business of supplying the public, rather than a limited class of individuals, with a particular service. See Wilhite v. Public Serv. Comm'n, 150 W.Va. 747, 149 S.E.2d 273 (1966). In ruling that all public utilities, whether publicly or privately owned, are subject to the same treatment and supervision of the Public Service Commission in State ex rel. City of Wheeling v. Renick,

145 W.Va. 640, 651, 116 S.E.2d 763, 769 (1960), this Court interpreted West Virginia § 24-1-2 to apply to privately owned suppliers of public services, such as Jefferson Utilities.

Jefferson Utilities is regulated by the Public Service Commission in connection with its provision of water to citizens of Jefferson County, West Virginia, and clearly qualifies as a "public utility" under the laws of this State.

City of Charlestown v County Commission of Jefferson County (Oct 26, 2007), Sup Court of Appeals of WV

Annexation by a muni from a county

On March 8, 2007, a proposed order was provided to the County Commission of Jefferson County approving and confirming the annexation of the seventeen parcels of land. On April 12, 2007, a proposed order was provided to the County Commission of Jefferson County approving and confirming the annexation of the six parcels of land. Both orders were provided to the County Commission for entry in accordance with the provisions of W.Va.Code §§ 8-6-3 and 8-6-4.[5] Thereafter, the County Commission refused to enter the orders. On May 1 and 2, 2007, these petitions for a writ of mandamus were filed with this Court.

The issue presented in this case is whether a county commission has authority to refuse to enter an annexation order presented to it by a municipality pursuant to W.Va.Code § 8-6-4.

[The] annexation statutes, now contained in article six of chapter eight of the Code of West Virginia, provide three methods for properly altering municipal boundaries by annexation of additional territory. Section 2 provides for annexation upon an election initiated by a petition. Section 4 provides for annexation without an election upon petition of sixty percent of the voters and freeholders of the additional territory.[9] Section 5 authorizes annexation "by minor boundary adjustment."

As set forth above, the petitioners sought to annex property in this case pursuant to W.Va.Code § 8-6-4. The statute provides, in pertinent part:

If satisfied that the petition is sufficient in every respect, the governing body shall enter that fact upon its journal and forward a certificate to that effect to the county commission of the county wherein the municipality or the major portion of the territory thereof, including the additional territory, is located. The county commission shall thereupon enter an order as described in the immediately preceding section [§ 8-6-3] of this article. After the date of the order, the corporate limits of the municipality shall be as set forth therein.

We reject the Commission's argument that it has a duty to determine whether or not the annexation complies with the applicable statutes. As we explained in City of Morgantown, "Article six sufficiently identifies those who have an interest in annexations as including the governing body of the municipality and the qualified voters and freeholders of the municipality and of the territory to be annexed." 159 W.Va. at 794, 226 S.E.2d at 904. "A county commission . has no interest, personal or official, in the municipal annexation matters which come before it other than to administer the law [.]" Syllabus Point 5, in part, City of Morgantown. Thus, the County Commission of Jefferson County should have entered the Annexation Orders presented to it by the City of Charles Town.

Board of Zoning Appeals of Shepherdstown v Tkacz (Sep 30, 2014), Sup Court of Appeals of WV
BZA Jurisdiction, Principle of Law, & Factual Findings

The circuit court found that the three reasons for reversing a decision of a board of zoning appeals:

1. Lack of Jurisdiction. The circuit court concluded that the BZA did not have jurisdiction to consider Ms. Kelch's appeal of the Planning Commission's decision for two reasons. First, the circuit court found that Ms. Kelch's request for a building permit was not a zoning matter, which accordingly precluded the BZA from having appellate jurisdiction with respect to the Planning Commission's decision. Second, the circuit court found that the BZA did not have jurisdiction because Ms. Kelch's appeal was not filed within thirty days of the Planning Commission's decision. Consideration of the applicable statutes and relevant case law demonstrates, however, that the circuit court's reasoning was flawed.

The circuit court concluded that Ms. Kelch should have filed her appeal of the Planning Commission's decision pursuant to West Virginia Code § 8A–5–10. The BZA argues that West Virginia Code § 8A–5–10 does not apply and that it had jurisdiction to hear Ms. Kelch's appeal pursuant to the Ordinance and West Virginia Code §§ 8A–8–9(1) (2012) and 8A–8–10

Rejecting the BZA's argument, the circuit court found that building permits do not fall within the ambit of a zoning ordinance, but fall instead into the classification of a subdivision or land development plan. Consequently, the circuit court concluded that because the Ordinance provided that an appeal of a decision of the Planning Commission must be filed with the BZA, it was in conflict with West Virginia Code § 8A–5–10. In reaching that conclusion, the circuit court failed to consider the provisions of West Virginia Code § 8A–7–2 (2012) that set forth what must be considered in enacting a zoning ordinance and what may be included in a zoning ordinance.

While we agree with the circuit court's conclusion that the forty-five-day appeal period set forth in the Ordinance was of no force and effect,[7] we cannot ignore the fact that the Planning Commission specifically advised Ms. Kelch in writing that she had forty-five days to appeal its decision to the BZA.

In this case, Ms. Kelch was not represented by counsel when she appeared before the Planning Commission or later when she filed her appeal with the BZA. She complied with the time frame provided by the Planning Commission. As a pro se litigant, it was reasonable for Ms. Kelch to rely upon the information supplied by the Planning Commission.

2. Application of an Erroneous Principle of Law. The circuit court also found that the BZA applied an erroneous principle of law by utilizing the wrong standard of proof in determining whether to the grant the requested variance. In its decision and order, the BZA noted at the outset that the granting of variances is governed by Section 9–1008 of the Ordinance. Later, in the "Conclusions of Law" section of the decision and order, the BZA stated that "[t]he applicable standard of proof is clear and convincing evidence." As part of its ruling, the circuit court concluded that the BZA applied the wrong standard of proof, which "constitut[ed] reversible error in and of itself."[11]

The BZA maintains that the statement in its decision regarding a clear and convincing standard of proof was simply a typographical error and, under either standard, the outcome would be the same. Upon review, we find that the circuit court erred by summarily concluding that the BZA applied the wrong standard of proof without employing any analysis of the factors considered by the BZA in

granting the variance. It is clear from a review of the record as a whole that Ms. Kelch met the Ordinance's requirements for the granting of a variance under the controlling standard of proof.

3. The BZA's Factual Findings. The circuit court determined that there was no evidence to support the BZA's finding that the fence was necessary for Ms. Kelch to maintain her property insurance. The record indicates, however, that Ms. Kelch presented documentation to the Planning Commission establishing that her "insurance requires some control over visitors."

In granting Ms. Kelch a variance with respect to the material of the fence, the BZA not only considered Ms. Kelch's need for the fence for insurance purposes, but it also relied upon the following summarized findings:

The requested fence is not visible from the street and does not obscure the view of the dwelling from the street.

The ordinance allows adjacent property owners to construct a six foot high solid fence parallel to the location of Ms. Kelch's fence on their property. 13

Mr. Tkacz's easement is not in the same location as the fence.

Mr. Tkacz built his own solid fence adjacent to Ms. Kelch's front yard.

Excluding Mr. Tkacz, no other person spoke either for or against Ms. Kelch's request for a variance.

The materials used for the fence are not on the recommended list of materials; however, they are not prohibited.

Given all of the above, we find that the circuit court improperly substituted its judgment for that of the BZA. The BZA found that Ms. Kelch met all the requirements for the granting of a variance. The BZA's conclusion in that regard satisfied the requisite standard of proof. As such, the circuit court abused its discretion by reversing the BZA's decision