

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

JANE RISSLER, PATRICIA RISSLER,  
SUSAN RISSLER-SHEELY, MARY  
MACELWEE, RICHARD LATTERELL,  
And SHERRY CRAIG,

Appellants,

v.

Case # 35274

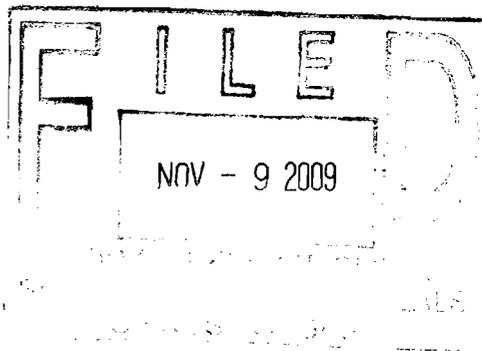
THE JEFFERSON COUNTY BOARD  
OF ZONING APPEALS,

Appellee,

AND

THORNHILL, LLC,

Intervener.



**APPELLANTS' BRIEF**

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I. Kind of Proceeding and Nature of the Ruling Below

Your Appellants appeal from a decision of the Circuit Court of Jefferson County, West Virginia entered March 5, 2009 denying their Petition for Writ of Certiorari from the decisions of the Jefferson County Board of Zoning Appeals. Appellants complained below of a denial of their Due Process right to a fair and impartial tribunal because two of the three members of the Jefferson County Board of Zoning Appeals [“JCBZA”] who had serious conflicts of interest and the legal counsel for the JCBZA failed to disqualify himself from participation as required by the *West Virginia Rules of Professional Conduct* as previously determined by this Court in *Jefferson County Bd. Of Zoning Appeals v. Wilkes*, 221 W. Va. 432, 655 S.E.2d 178 (2007). Appellants allege that the JCBZA was so tainted by impropriety that the ordinary presumption that public officers have acted legally is overcome by the public’s interest in the fair administration of justice.

II. Statement of the Facts

The developer below, Thorn Hill, proposed to develop a massive housing subdivision consisting of nearly 600 houses on more than 500 acres of land nearby the Shenandoah River that had been zoned rural. The developers subverted the land zoning system by patching together numerous parcels of rural land until it was sufficiently large that some borders touched upon more developed areas. Then, Thornhill, by and through its sister limited liability company, Highland Farm, claimed that although public sewer was not currently available, public sewer would eventually be built to serve the site.

Before the JCBZA this case presented fundamental questions regarding the correct interpretation of § 6.4(g) of the Jefferson County Zoning Ordinance. The JCBZA

chose not to read § 6.4(g) literally as it is written but instead usurped the role of the County Commission by erroneously substituting its opinion as to a) the meaning of the phrase “available capacity” existing to the site and, b) as to the type of sewer system proposed. Specifically, there should be no dispute that the developer below, Thornhill was proposing a public sewer system, not a central system. *Decision*, 8/22/05, p. 5, ¶ 10. However, there is also no dispute that at the time of the development proposal application, which is the measuring date defined by § 6.4(g), no public sewer service with “available capacity” to serve the site was in existence. Indeed, the Jefferson County Public Service District had not in any official action entered into a legal agreement for public sewer service nor had the developer obtained a certificate of necessity and convenience from the Public Service Commission as required by then current West Virginia law to locate or construct a public sewer system that could serve the proposed development.

The determination of the correct interpretation of § 6.4 (g) was critical to the decision that confronted the JCBZA and which directly affected the rights of the various parties to the JCBZA appeal. All parties had a right to have this issue decided by a fair and impartial tribunal. However, that was not to be the case for three reasons which the Petitioners here address in turn: 1) Legal counsel’s failure to disqualify himself from participation; 2) JCBZA member Weigand’s failure to recuse himself; and 3) JCBZA member Rockwell’s failure to recuse himself from this matter.

Attorney J. Michael Cassell actively participated during one of the hearings before the JCBZA and met privately with the JCBZA during its deliberations over the issues presented. Mr. Cassell’s failure to comply with the West Virginia Rules of

Professional Conduct **in this very same matter** has already been decided by this Court in *Jefferson County Bd. Of Zoning Appeals v. Wilkes*, 221 W. Va. 432, 655 S.E.2d 178 (2007). His failure to disqualify himself so taints the administrative law process and impairs the public's perception of the fair administration of justice as to warrant reversal by itself.

JCBZA member David Weigand, despite questioning from the Petitioner's counsel at the second appeal argument conducted on June 16, 2005, would not disclose the extent to which the for-profit company, of which he is president, provides construction services to numerous developers in Jefferson County. Instead, Mr. Weigand concluded that he could be "fair and objective, in [his] opinion." Dave Weigand was a BZA member who participated in deliberations and voted at both of the BZA hearings at issue in this proceeding that lead to the BZA decisions of October 6, 2004 and August 22, 2005. Mr. Weigand was one of the three BZA members present who voted at the August 22, 2005 meeting. That vote was 2-1 in favor of Thornhill (Weigand and Rockwell). It had been rumored amongst the appellants at the time that Mr. Weigand had some connection with the development industry in Jefferson County but the extent of that interest was not known to the Petitioners.

At the outset of the hearing on June 16, 2005, legal counsel for the Petitioners requested that Mr. Weigand publicly disclose whatever that connection was; public trust and the fair administration of justice require no less. Mr. Weigand refused and instead, claimed that he could be fair and objective:

Mr. Hammer: My first motion is that Commissioner Weigand recuse himself from this matter for the reason that he is very much involved in the construction industry locally....

\* \* \* \*

Mr. Weigand: I have not recused myself in the past because I have no relationship with this project at all. I can be fair and objective, in my opinion, and I don't feel there's a need to recuse myself.

\* \* \* \*

Mr. Hammer: But your company does it [referring to studies in Jefferson County] and, just so the record is clear, will you state how many developers and which ones you provide the service to?<sup>1</sup>

Mr. Weigand: I do not know off the top of my head and I believe this line of questioning is inappropriate. I'll only respond to anything in writing in the future.

Transcript of June 16, 2005 proceedings held beginning at 3:28 p.m., pp. 4 – 5.

Subsequently, but without the opportunity for any discovery, it has been learned that Mr. Weigand is the co-founder and president of DIW Group Inc., doing business as Specialized Engineering. For all of 2005 and 2006, Specialized Engineering had the exclusive contract to provide "Construction Inspection Services" for the Jefferson County Public Service District. Essentially, the JCPSD is responsible for ensuring that developers such as Thornhill and Highland Farm install sewer lines in accordance with the JCPSD's construction standards. The JCPSD contracted (and still contracts) with Specialized to provide inspection services while the developer installs sewer lines. Specialized then bills the JCPSD for those inspection services which bills are then passed-through to the developers themselves for payment.

This business was quite lucrative as, for instance during the period of September 29, 2005 through August 2, 2006<sup>2</sup>, Specialized billed the JCPSD \$32,010.00. It is

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<sup>1</sup> For example, Messrs. Yonkers and Capriotti are involved in numerous development projects in Jefferson County through limited liability companies that they have created just like Highland Farm, LLC and Thorn Hill, LLC. Thus, it was important to know the names of those companies.

<sup>2</sup> This time period was selected because it roughly equates with what Mr. Weigand was anticipating for the coming year at the time the time that a BZA decision was entered on August 22, 2005.

apparent that Mr. Weigand could connect two points to make a straight line: if the sewer system proposed to be constructed at Highland Farm was built to serve at least<sup>3</sup> the nearly 600 houses proposed to be built by Thornhill, there would be tens of thousands of dollars of sewer line inspection work to be performed by his company -- Specialized Engineering. Thus, far from a generalized interest in Jefferson County in which every citizen volunteer on the BZA must be presumed to share, Mr. Weigand had a direct pecuniary interest in the outcome of the BZA vote on Thornhill that he refused to disclose.

The appellants do not doubt that Mr. Cassell, then serving as Jefferson County's legal counsel for all matters involving land use and development, was well-aware of Specialized Engineering's contract with the JCPSD. Whether Mr. Cassell discussed that obvious conflict of interest in executive session with the BZA is not known to these appellants; however, he did not offer any information to the appellants or the public about this conflict of interest.

Likewise, the law firm representing the developers (and in which Mr. Cassell was soon to be a partner) Campbell, Miller & Zimmerman ["CMZ"] extensively represents developers in Jefferson County, and along with its clients, Mr. Jonkers and Mr. Capriotti, certainly knew on June 16, 2005 that Mr. Weigand had a direct pecuniary interest in the placement of a sewer system at Highland Farm because those developer clients are billed for Specialized Engineer's inspection services; yet, they too all remained silent and apparently unconcerned about the public's trust and the fair administration of justice where a voting advantage on the BZA could be gained by their silence.

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<sup>3</sup> We say "at least" because the sewer plant proposed to be built at Highland Farm could readily be sized to allow for many, many more houses to connect beyond Thornhill given its location at a low point in Jefferson County near the Shenandoah River.

### III. Assignments of Error and the Manner in which they were Decided Below

#### A. Due Process Requires that the Tribunal in an Administrative Hearing be Fair and Impartial.

##### 1. J. Michael Cassell's Disqualification

The Court below essentially avoided the question of J. Michael Cassell's disqualification by not citing to or distinguishing *Jefferson County Bd. Of Zoning Appeals v. Wilkes*, 221 W. Va. 432, 655 S.E.2d 178 (2007) in its March 5, 2009 decision even though that decision arose specifically from this very case. Instead, the lower court used an incorrect standard and cites a lack of evidence of wrongdoing, choosing to ignore this Court's finding of a breach of the *West Virginia Rules of Professional Conduct*.

##### 2. Failure of JCBZA member Weigand to Recuse Himself

The lower court found that member Weigand's pecuniary interest was too "tenuous and de minimus" because if the "possibility of prospective employment was a factor in determining conflicts of interest of BZA members, then hypothetically everyone should recuse themselves." Order Denying Petition for Writ of Certiorari, p. 6. Instead, the Court relied upon the professed statement of Weigand that he can be "fair and objective."

##### 3. Failure of JCBZA member Rockwell to Recuse Himself

The lower court found that the Petitioners failed to present evidence regarding the extent of Mr. Rockwell's involvement in the "day-to-day operations of Crawford & Keller" and that his association with that firm in the performance of real estate closings was "too remote" to create "even an appearance of conflict of interest."

B. The Lower Court's Interpretation of § 6.4 (g) of the Jefferson County Zoning Ordinance Transforms the Verb Tense "Will Be" into "Could Be" and thus Fundamentally Alters the Function of the Ordinance

The lower court dramatically altered the meaning and function of Jefferson County's Zoning Ordinance by holding, in effect, that 6.4 (g)'s use of the phrase "public sewer will be built to the site" means that if there exists even the remotest speculative possibility of public sewer being built at some time in the indefinite future, than a proposed housing project in a rural zone should receive a score of zero points and the land previously zoned rural is thus well on its way to being rezoned for development.<sup>4</sup>

Thus, the lower court transformed a verb tense that provides a measure of certainty, particularly when taken in the context of the explanatory text which explains this criterion as assessing "the availability of existing public sewer service with available capacity that is approved...to the site at the time of the development proposal application" into a speculative future verb tense that completely ignores the contextual explanation in 6.4 (g) itself.

IV. Points and Authorities Relied Upon and Discussion of Law

A. Due Process

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

No State shall...deprive any person of life, liberty, or property, without due process of law....

U.S. Constitution, amendment XIV, § 1.

Petitioners had a constitutional right to a panel of "neutral and detached judge[s]" to decide their appeal before the JCBZA. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). JCBZA members Weigand and Rockwell were required to recuse themselves not

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<sup>4</sup> Like in golf, a lower score is better for the developer seeking to overturn the County's zoning process by which the land was zoned rural.

only upon proof of actual bias, but also when confronted with an objective “probability of actual bias.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). This objective recusal standard is required to ensure that litigants receive a “fair trial in a fair tribunal” because, in most cases, it is extraordinarily difficult to prove that a judge harbors a subjective bias against a litigant. *In re Murchison*, 349 U.S. 133, 136 (1955). This case presents an exemplar of the difficulty of developing evidence of actual bias: Weigand refused to answer any questions about his business’ involvement in various Jefferson County development projects that apparently included projects with which Thornhill’s developers were actively involved. Likewise, Rockwell, did not disclose his current affiliation with a law firm then representing Thornhill.

Moreover, because a writ of certiorari from the decision of a board of zoning appeals must be presented within thirty days of the decision complained of, there is no opportunity for discovery into the bias of the panel. Thus, the duty upon members of an administrative body to recuse themselves where there is a probability of actual bias is of special importance.

The Court should give no weight to declarations by members of an administrative body to the effect that they can be “fair and objective” because the members own impressions of their own capacity to be neutral is irrelevant where there is a probability of actual bias. In *Tumey v. Ohio*, 273 U.S. 510 (1927) the mayor was only paid for his services if the defendant was convicted and where the village received a share of any fine levied. Even though the Court acknowledged that “[t]here are doubtless mayors who would not allow such a consideration as \$12 costs in each case to affect their judgment in it” *id.* at 532, whether or not the mayor was actually biased against the defendant, due

process prohibited him from presiding over the case because “every procedure which would offer a *possible* temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which *might* lead him not hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.” *Id.* (emphases added). See *Caperton v. A. T. Massey Coal Co.*, 556 U.S. \_\_\_\_\_ (2009) affirming the foregoing principles of law.

The lower court chose to disregard J. Michael Cassell’s failure to disqualify himself. This is a very serious issue affecting the public’s perception of the integrity of the process. Former Jefferson County Commission attorney J. Michael Cassell provided all legal advice to various Jefferson County governmental entities regarding land use, planning and zoning, including the Board of Zoning Appeals, during his twenty years of employment as an Assistant Prosecuting attorney.<sup>5</sup> In fact, “Mr. Cassell participated personally and substantially in connection with the two Thornhill permit applications in question” and at issue in this very appeal. See e.g., footnote 14, *State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes*, 221 W. Va. 432, 655 S.E.2d 178 (2007) (“The BZA’s evidence did show that Mr. Cassell drafted findings of fact and conclusions of law for the BZA after attending its closed sessions, and Mr. Cassell was present for and participated in “spirited discussions” on the correct way to interpret land use regulations, where his opinion as a lawyer was particularly influential.”).

Why Mr. Cassell’s advocacy was so “spirited” behind closed doors and why was he so “personally”, as opposed to professionally, involved in the BZA’s decision making below is not known to your Petitioners here. However, the facts elucidated in *State ex*

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<sup>5</sup> See footnote 3, *State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes*, 221 W. Va. 432, 655 S.E.2d 178 (2007).

*rel. Jefferson County Bd. of Zoning Appeals v. Wilkes* establish that Mr. Cassell gave his employer notice of his resignation on December 10, 2004 – less than a scant two months after Mr. Cassell apparently drafted the October 6, 2004 BZA decision that is part of the appeal herein. Undoubtedly, Mr. Cassell engaged in employment negotiations with CMZ, his future employer, before tendering his resignation. While the Supreme Court decision specifically declines to address whether Mr. Cassell was providing legal counsel to the BZA while he was negotiating with CMZ regarding employment,<sup>6</sup> footnote 6 of that decision establishes that Mr. Cassell continued to direct the BZA regarding Thornhill even after tendering his resignation on December 10, 2004. Thus, the personal and spirited position of Mr. Cassell while “advising” the BZA about this Thornhill matter, when coupled with his continued role in directing the BZA about Thornhill after tendering his resignation, strongly suggests to these appellants and to the public-at-large that the BZA was not being counseled in a manner consistent with the public’s interest; rather, it was being counseled in a manner consistent with Mr. Cassell’s interest in obtaining a partnership with the law firm representing Thornhill and Highland Farm – CMZ.

Contrary to the ethical mandate of *West Virginia Rules of Professional Conduct*, Rule 1.11 (a) and (b), both Mr. Cassell and CMZ failed to screen Mr. Cassell from continuing actual representation in the Thornhill matter. Very much to the contrary, and despite the express written request Jefferson County Prosecuting Attorney, Mr. Cassell and CMZ refused to comply with Rule 1.11 as late as March 21, 2006.<sup>7</sup> Indeed, CMZ

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<sup>6</sup> *Id.*, footnote 15.

<sup>7</sup> *Id.* at footnote 8.

without having first complied with the ethical rules, moved to intervene and requested dismissal of this writ proceeding on November 18, 2005.

The West Virginia Supreme Court has repeatedly held that the *West Virginia Rules of Professional Conduct* serve a vital role in protecting the public's perception of the fair administration of justice. For example, in *State ex rel. Cosenza v. Hill*, 216 W. Va. 482, 488, 607 S.E.2d 811, 817 (2004) the Court wrote:

As the repository of public trust and confidence in the judicial system, courts are given broad discretion to disqualify counsel when their continued representation of a client threatens the integrity of the legal profession:

“ ‘A circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice.’ [Citations omitted].

While motions to disqualify legal counsel must be viewed with “extreme caution,” (*id.*) CMZ and J. Michael Cassell, Esq. have already been disqualified for their failures to comply with the Rules of Professional Conduct. It is now incumbent upon this Court to act to protect public trust and confidence in the judicial system.

Knowledge of Mr. Cassell's “spirited” and “personal” advocacy efforts at the BZA that occurred so close in time to the public announcement of his decision to resign and join CMZ as a partner with a direct financial stake in the legal fees generated by Thornhill and Highland Farm, has fundamentally eroded and called into question the fair administration of justice for which the only remedy is to order that a fair and impartial BZA hearing be held upon the re-application of Thornhill and Highland Farm, if indeed those entities still desire to develop the property at issue.

Clearly, the public interest in the fair administration of justice is irrevocably sullied when, at a hearing in which three BZA members will vote, and two of the three voting members have undisclosed and substantial conflicts of interest to the point that one member, at least, has a direct pecuniary interest in the outcome of the vote. The vote was 2-1; only the BZA member without a conflict of interest voted for the appellants.

These facts, when added to the unethical conflicts of interest created by Mr. Cassell lead to only one conclusion: the appellants are entitled as a matter of fundamental fairness and Due Process to a fair and impartial hearing by a neutral BZA. The appellants were denied these very basic rights. The only remedy that can restore the appellants' rights and uphold the public's interest in the fair administration of justice is to reverse the orders dated October 6, 2004 and August 22, 2005 and to allow Thornhill and Highland Farm the opportunity to re-apply, if that is their desire.

B. Clear Error in Applying § 6.4(g) of the Jefferson County Zoning Ordinance

Finally, the lower court misunderstood § 6.4 (g) of the Jefferson County Zoning Ordinance by changing the plain meaning of "will be" built into a "could, maybe, someday be built" and in so doing invaded the province of the Jefferson County Commission to promulgate ordinance. Section 6.4 (g) explains the three criteria necessary to assess zero points for the availability of public sewer: public sewer service must be existing<sup>8</sup>; the existing sewer service must have available capacity; that capacity must be approved by either the County Health department and/or the Public Service District to the site at the time of the development proposal application. These criteria exist so that the measured and deliberate public process of zoning Jefferson County is

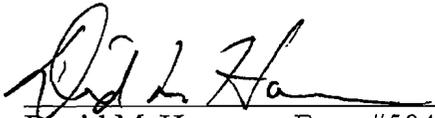
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<sup>8</sup> It was not at the time of the application.

stable and predictable. By so doing, public improvements such as schools, parks, roads, and sewer systems can be planned, designed, and funded to ensure the best use of scarce public resources. None of the criteria were satisfied at the time of Thornhill's application. Despite not satisfying any of these criteria, the lower court adopted a new and unintended meaning of § 6.4 (g) – that “will be” simply means “might” or “could be.” This interpretation not only does violence to § 6.4 (g), but it invades the authority of the executive branch, in this case the County Commission, to promulgate ordinances.

WHEREFORE, your Appellants respectfully request that the lower court's March 5, 2009 decision be reversed and that this matter be remanded to the Jefferson County Board of Zoning Appeals to be decided by a fair and impartial panel.

Dated this the 6<sup>th</sup> day of November, 2009.

  
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**JANE RISSLER, et al.**

**Plaintiffs,**

**vs.**

**Case No. 35274**

**THE JEFFERSON COUNTY  
BOARD OF ZONING APPEALS,**

**Defendant,**

**And,**

**Thorn Hill LLC and Highland Farm, LLC,**

**Intervenors**

**CERTIFICATE OF SERVICE**

I hereby certify that service of a true copy of the foregoing has been made as follows:

Type of Service: United States mail, postage pre-paid

Date of Service: November 6, 2009

Persons served and address: Stephanie Grove, Esq.  
Assistant Prosecutors  
P.O. Box 728  
Charles Town, WV 25414

Richard Gay, Esq.  
Nathan Cochran, Esq.  
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Berkeley Springs, WV 25411

Items Served: Appellants' Brief

  
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