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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

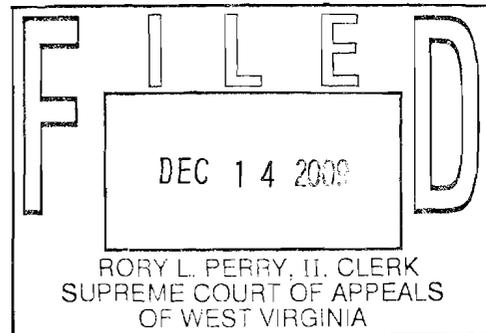
v.

Supreme Court Docket No. 35274

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

AND

**THORNHILL, LLC
Intervener.**



**JEFFERSON COUNTY BOARD OF ZONING APPEALS'
AND THORNHILL'S JOINT RESPONSE TO BRIEF ON APPEAL**

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Come now, the Jefferson County Board of Zoning Appeals (hereinafter "BZA"), by counsel, Stephanie F. Grove, Assistant Prosecutor, and Thornhill, LLC, by counsel Richard Gay, Esq. to respond to the Petitioners' Brief on Appeal. The Petitioners claim that the lower court's ruling denied them due process and incorrectly interpreted the BZA's own ordinance.

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I. Statement of the Facts

Thornhill applied for a conditional use permit (hereinafter “CUP”) pursuant to the Jefferson County Zoning and Land Development Ordinance to construct a subdivision in the rural zone of Jefferson County. Initially, Thornhill was given a passing LESA Score, which score is a requirement to proceed through the CUP process. The Petitioners’ appealed this score to the BZA, arguing that the zoning administrator had erred in granting Thornhill a passing LESA score in part because the development was not proposing the type of sewer system for which they were given credit by the zoning administrator. The developer was proposing building its own central sewer system to the development. However, the system had yet to be built, but the developer represented that the system would be in place by the time any homes were built on the property.

On October 6, 2004, the BZA decided all of the issues that were appealed except one. The BZA remanded the issue of sewer availability to the zoning administrator for further consideration based upon new evidence presented at the hearing. On August 22, 2005, the BZA decided the sewer issue. The BZA deferred to the Zoning Administrator and found that the developer was proposing central sewer service for a total of three LESA points rather than a private sewer system, which system would have received a total of eleven LESA points.

The Petitioners appealed this decision to the Circuit Court, arguing that the developer was not entitled to the points awarded by both the BZA and the Zoning Administrator because the sewer system was not in existence at the time the development was before the BZA. In addition, the Petitioners argued that two members had conflicts of interest and should have recused themselves from deciding the Thornhill CUP. However, both members stated they could be fair and impartial. In addition, the evidence presented below demonstrates that neither

member had a conflict. Mr. Weigand, a BZA member whose company has been employed by the Public Service District (hereinafter "PSD"), was not currently employed by the PSD to inspect Thornhill at the time the Thornhill proposal was before the BZA. Mr. Rockwell, a local attorney and BZA member, had performed real estate closings on a piece meal basis for the law firm of Crawford & Keller, but neither Mr. Rockwell or the firm had represented Thornhill or any of its affiliated companies before any agency of Jefferson County.

III. Points and Authorities Relied Upon

Caselaw

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701 (1972).

Cunningham v. County Court of Wood County, 148 W. Va. 303, 305, 134 S.E.2d 725, 727 (1964).

Henry v. Jefferson County Planning Commission, 148 F. Supp.2d 698, 711 *aff'd in part, vacated in part* 34 Fed. Appx. 92 (4th Cir. W.Va.2002), *cert. denied*, (U.S. Mar. 31, 2003).

In re Tax Assessments of Foster Foundation's Woodlands Retirement Community, 223 W.Va. 14, 672 S.E.2d 150 (2008).

Jefferson Utilities, Inc., v. Jefferson County Board of Zoning Appeals, 218 W.Va. 436, 624 S.E.2d 873 (2005).

Montgomery County Board of Appeals v. Walker, 180 A.2d 865, 868 (Md. 1962).

Roe v. M&R Pipeliners, Inc. v. Keystone Acceptance Corp., 157 W.Va. 611, 202 S.E.2d 816, 821 (1974).

Security National Bank & Trust v. First W.Va, Bancorp, 166 W.Va. 775, 277 S.E.2d 613 (1981).

State Deputy Sheriff's Association v. County Commission of Lewis County, 180 W.Va. 420, 422, 376 S.E.2d 626, 628 (1988).

State ex rel. Jefferson County Bd. Of Zoning Appeals v. Wilkes, 221 W.Va. 432, 655 S.E.2d 178 (2007).

Tumey v. State of Ohio, 273 U.S.510, 47 S.Ct. 437 (1927).

Van Itallie v. Borough of Franklin Lakes, 146 A.2d 111, 116 (N.J. 1958).

Wolfe v. Forbes, 159 W.Va. 34, 217 S.E.2d 899 (1975).

Constitutional Provisions

W.Va. Const., Art. 3. § 10.

Ordinance

Jefferson County Zoning and Development Review Ordinance § 3.2

Jefferson County Zoning and Development Review Ordinance § 6.4

IV. Standard of Review

“Interpretations of statutes by bodies charge with their administration are given great weight unless clearly erroneous.” Syl. Pt. 4, *Security National Bank & Trust v. First W.Va. Bancorp*, 166 W.Va. 775, 277 S.E.2d 613 (1981). “While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction.” Syl. Pt. 5, *Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E.2d 899.

V. Memorandum of Law

A. **The BZA Correctly Interpreted the Ordinance.**

The BZA correctly interpreted the Jefferson County Zoning and Development Ordinance, deferring to the zoning administrator’s determination. The West Virginia Supreme Court has made it clear that the BZA has the ability to defer to the zoning administrator, and it is not required to review the zoning administrator *de novo*. “The provisions of West Virginia Code § 8-24-55, which set forth the authority and power of the board of zoning appeals, do not expressly or implicitly prevent that administrative body from utilizing principals of deference typically employed in administrative proceedings in reviewing determinations reached by a zoning administrator.” Syl. Pt. 5, *Jefferson Utilities, Inc., v. Jefferson County Board of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d 873. “While we certainly recognize the review mechanism established by West Virginia Code § 8-24-55 plays a vital role with regard to challenged zoning matters, there is no basis for concluding that this review process mandates that the Board is required to start from scratch in conducting its review of a matter before it. Moreover, we decline to label the powers of review set forth in West Virginia Code § 8-24-55 for zoning boards of

appeal as entailing *de novo* review.” *Id.* at 448. In this instance, the Zoning administrator assessed Thorn Hill a score 3 points for its sewer capacity and type of sewage system proposed. The BZA agreed with this score assessed by the zoning administrator and deferred to that determination. Pursuant to the holding in *Jefferson Utilities*, the BZA is not required to review the administrator’s findings and has within its discretion the ability to defer to the administrator’s expertise. The Court explained, “It is the Court’s opinion that the statutory powers of review extended to the Board by West Virginia Code § 8-24-55 place the decision of when, or if, to defer to a specific decision reached by a zoning administrator within the prerogative of the Board. Consequently, the fact that the Board adopts a finding reached by the zoning administrator. . . is not fatal with regard to a Board’s review of a zoning matter.” *Id.* at 448.

Further, Mr. Raco and the BZA, by deferring to his findings, correctly applied the ordinance to the Thornhill development. The Petitioners claim that because Thorn Hill did not have a system with available capacity at the time the application was filed, then they should have received a score of eleven instead of three. However, a CUP applicant is required to comply with the application as it is presented when constructing a project. If an applicant constructs the project that differs from those representations that earned the project a valid LESA score, the project would violate the issued CUP and would be revoked. Thus, an applicant is required to comply with those representations it makes regarding LESA components.

In addition, Section 6.4(g) of the Ordinance, the section that addresses public sewer availability contemplates conditions that will exist at the time of construction of the project. For example, the first criteria of public sewer contains the possibility that “public sewer *will be* built to the site.” Ordinance 6.4(g) emphasis added. This language clearly contemplates that the conditions could change between the time of the filing of the application and the

commencement of construction, allowing the applicant to propose a system that will be available in the future. Further, the second Ordinance possibility of central sewer service provides “central sewer service is *proposed*.” *Id.* emphasis added. Again, the Ordinance uses the language of proposed to suggest that the applicant can propose a central sewer system that is not yet available but will be available by the time the project is constructed. If the system is not available, the applicant cannot begin the project until it is and the CUP is contingent upon those representations presented at the application phase. However, the Ordinance permits the applicant to propose a system that will exist when the project commences and therefore receive the LESA score for future conditions.

B. Mr. Rockwell and Mr. Weigand Were Not Required to Recuse Themselves

The Petitioners claim that two members, Mr. Rockwell and Mr. Weigand, should have recused themselves from the Thornhill matter because of possible bias. However, both members asserted they could be objective. The petitioners argue that the standard asserted by both members would not pass any acceptable standard for any person who is going to sit in judgment of appeal. However, there is nothing that would have required either member to recuse themselves from hearing the Thornhill appeal.

The Petitioners claim that Mr. Weigand should have recused himself because he is the president of a company that provides construction inspection services for the Jefferson County PSD. It appears from an examination of the evidence below that Wiegand’s company has been employed at times as an inspector who contracts to inspect sewage line installation for the PSD. However, Mr. Weigand was not a PSD inspector for the developments in this case at the times the BZA voted in this case. Based upon affidavits presented to the lower court, Mr. Weigand’s company was not employed as a contractor for either Sheridan’s or Old Standard’s

developments until May 30, 2006. (both developments are affiliated with Intervener's developers in some way.) Mr. Weigand's company has never conducted PSD installation inspections for the Thornhill or Highland Farm developments. Accordingly, neither Mr. Weigand nor his company were employed as a contractor for the PSD in matters related to this case.

Further, the Petitioners assert that Mr. Rockwell should have recused himself because he had been providing legal services for a law firm that had provided services to Thorn Hill. Mr. Rockwell was contracted on a piece meal basis to perform real estate closings for the law firm of Crawford and Keller. There is no evidence in the record below to indicate that Mr. Rockwell ever represented Thorn Hill, and neither Mr. Rockwell, nor the law firm of Crawford and Keller have ever represented Thorn Hill before an agency of the Count Commission.

If the Petitioners' unrealistically high standard is utilized, then no person who works in the construction industry would ever be able to serve on the BZA or the Planning Commission or any other board that sits in judgment of development in the County. Such a standard is untenable and would prevent qualified individuals with expertise in the areas addressed by these boards on a routine basis from being appointed. Further, it is important to note that municipal officials are presumed to have "acted honestly and in good faith."

Cunningham v. County Court of Wood County, 148 W. Va. 303, 305, 134 S.E.2d 725, 727

(1964); accord *Morris v. City of Danville, Virginia*, 744 F.2d 1041, 1044 (4th Cir. 1984)

("Administrative decision makers, like judicial ones, are entitled to a 'presumption of honesty and integrity.'") (quoting *Withrow*, 421 U.S. at 47); *Withrow*, 421 U.S. at 55 ("Without a showing to the contrary, state administrators are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."). "Whether, in a particular case, a disqualifying interest exists, is a factual

question and is governed by the circumstances of that case, and the enunciation of a definitive rule is not possible." *Montgomery County Board of Appeals v. Walker*, 180 A.2d 865, 868 (Md. 1962); accord *Anderson v. Zoning Comm'n of the City of Norwalk*, 253 A.2d 16, 20 (Conn. 1968); *Van Itallie v. Borough of Franklin Lakes*, 146 A.2d 111, 116 (N.J. 1958). In addition, it must be noted that

Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion.

Van Itallie, 146 A.2d at 116; accord *Anderson*, 253 A.2d at 20 (citing *Van Itallie*).

In addition, this Court has also held that:

Under West Virginia Case law this Court will indulge the presumption of regularity of official duties in the strongest possible form where the party seeking to challenge the presumption can demonstrate no injury to himself save the loss of the advantage which would have accrued to him by virtue of the court invalidating a particular proceeding. The presumption is far weaker, and accordingly, far less evidence is required, as a matter of law, to rebut the presumption, when the party challenging a formal requirement can demonstrate a direct injury to himself.

Roe v. M&R Pipeliners, Inc. v. Keystone Acceptance Corp., 157 W.Va. 611, 202 S.E.2d 816, 821 (1974).

The Petitioners have failed to demonstrate any direct injury to themselves by Wiegand or Rockwell performing their duties as members of the BZA. This Court has made it clear that the presumption that public officials have acted in a lawful manner will trump an unsupported allegation that they have not, as is the case here.

To support their position that Mr. Wiegand should have recused himself, the Petitioners rely upon the case of *Tumey v. State of Ohio*, 273 U.S.510, 47 S.Ct. 437,. However, the facts of that case differ dramatically from the case, *sub judice*. In *Tumey*, there was no question as to whether the mayor would benefit monetarily from convictions. The Court stated, “[t]he mayor of the village of North College Hill, Ohio, has a direct personal pecuniary interest in convicting the defendant who came before him for trial, in the \$12 of costs imposed in his behalf, which he would not have received if the defendant had been acquitted.” Thus, there was no doubt that the mayor would receive a monetary benefit if he found a defendant guilty.

Unlike the mayor in *Tumey*, Mr. Wiegand did not have any guarantee of monetary gain. While he has performed work on behalf of the PSD, there was no certainty that his company would have been contracted to perform the inspections on the sewage lines in the developments in question. Furthermore, before the development was even constructed, the developers would have to complete the planning process, which final plat approval from the Planning Commission. In addition, pursuant to the Jefferson County Zoning and Land Development Ordinance, an applicant has eighteen months before commencing construction on the property. Ordinance § 3.2. This time may be extended for an additional eighteen months. *Id.* As such, even if Mr. Wiegand’s company were guaranteed to receive the contract, which it was not, the monetary benefit could have been delayed over a three year period and accordingly, there was no danger of immediate personal monetary gain.

This Court recently addressed the *Tumey* case in *In re Tax Assessments of Foster Foundation’s Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150

(2008). In *Foster*, the Court provided a simple explanation of several United States Supreme Court Cases that discuss when a tribunal exhibits a bias that will merit disqualification. This Court, relying in part upon the *Tumey* case stated that “[w]hen faced with cases questioning the impartiality of a hearing tribunal, the United States Supreme Court generally has found a hearing tribunal to be partial when there exists **a direct pecuniary interest in the outcome of the litigation.**” *Tax Assessments of Foster*, 672 S.E.2d at 159 (emphasis added). The Court went on to state that “when no such pecuniary interest is present, the United State Supreme Court typically has found the tribunal to satisfy the requirement of due process.” *Id.* at 160. It is clear that Mr. Wiegand did not have a direct pecuniary interest in the outcome of the issuance of the conditional use permit as his company had no guarantee of being awarded a contract to inspect the proposed subdivisions.

Accordingly, the sole basis for the Petitioners’ due process issue is their conclusory allegations that both men were biased and otherwise partial against them because of their occupations: one in the construction industry and one an attorney. However, the Appellants do not suggest exactly how Mr. Weigand and Mr. Rockwell were influenced by their associations. And for good reason: The details of the Mr. Rockwell’s and Weigand’s loose affiliation with the law firm and construction industry, respectively, clearly demonstrate that due process was not implicated.

C. Mr. Cassell Did Not Have a Conflict While He Was Employed by Jefferson County Government

At the time the Thorn Hill CUP was before the BZA in 2004, Mr. Cassell was employed by the Jefferson County Prosecutor’s Office to represent the BZA. The Petitioners’

would like this Court to believe that the aforementioned case indicated that Mr. Cassell had a conflict at the time the Thorn Hill CUP was before the BZA. This is simply not the case. The Jefferson County case that was before this Court, *State ex rel. Jefferson County Bd. Of Zoning Appeals v. Wilkes*, 221 W.Va. 432, 655 S.E.2d 178 (2007), addressed Mr. Cassell's representation of Thorn Hill after leaving the employ of the Jefferson County Prosecutor's Office, and the rule at issue was Rule 1.11(a) of the West Virginia Rules of Professional Conduct, which rule addresses successive government and private employment. There was never a conflict for Mr. Cassell while he was still employed by the Prosecutor's Office and had not begun working for the firm Campbell, Miller, Zimmerman. In addition, there is not a scintilla of evidence in the record below that Mr. Cassell had even begun to negotiate with the firm before leaving the employ of Jefferson County. The Petitioners rely upon pure speculation to suggest that Mr. Cassell engaged in any violation of the rules while he was employed by the Jefferson County Prosecutor. Accordingly, the *Wilkes* decision is not even applicable in this case as it addresses a conflict that arose because of Mr. Cassell's representation of Thorn Hill after terminating his employment with the Jefferson County Prosecutor's Office. The conflict and violation of the rule did not arise until Mr. Cassell accepted employment in the private sector. Thus, Mr. Cassell never had an obligation to recuse himself from the Thorn Hill proceedings while he was still employed by the BZA.

D. The Petitioners Were Not Entitled to Due Process

The *Jefferson Utilities, supra.*, Court confirmed that LESA score determinations are the types of administrative matters that do not require the types of due process protections claimed by the petitioner. The petitioners allege that the BZA violated due process because two

members did not recuse themselves from the hearing. However, this Court has held that the determinations by the zoning administrator, such as the LESA score are administrative matters that do not require due process protections.

[T]he fact that the zoning administrator makes LESA determinations as an initial fact gatherer that are then looked to by the Board and ultimately the Planning Commission in deciding whether to issue a conditional use permit does not elevate the factual determinations reached by the zoning administrator to quasi-judicial in nature. The determinations made by the zoning administrator clearly do not involve the type of issues that require due process protection such as evidence production; cross examination; document inspection; and sworn testimony. Consequently, the fact that some minimal degree of discretion is involved by the zoning administrator in making his/her determinations regarding the LESA score does not remove the decisions reached from the administrative realm. *Id* at 447.

Therefore, because the petitioners were contesting the zoning administrator's LESA score, which is an administrative matter the BZA was not required to provide the type due process protections associated with a quasi-judicial matter.

Further, the Petitioners do not have a vested or legitimate property interest in the CUP process. Article III, Section 10 of the West Virginia Constitution provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law...” Therefore, the procedural due process is only triggered by the existence of a liberty or property interest. *State Deputy Sheriff's Association v. County Commission of Lewis County*, 180 W.Va. 420, 422, 376 S.E.2d 626, 628. “No property interest exists where an individual does not have a legitimate claim of entitlement to the object sought.” *Syl. Pt. 3, State Deputy Sheriff's Association*, 180 W.Va. 420, 376 S.E.2d 626.

The Petitioners do not have a legitimate claim of entitlement to prevent a CUP from being issued. “A person has a legitimate claim of entitlement to a development plan if the

individuals reviewing the plan lack all discretion to deny the issuance of the permit or withhold its approval. Any significant discretion conferred upon the individuals reviewing the plan defeats the claim of a property interest.” *Henry v. Jefferson County Planning Commission*, 148 F. Supp.2d 698, 711 *aff’d in part, vacated in part* 34 Fed. Appx. 92 (4th Cir. W.Va.2002), *cert. denied*, (U.S. Mar. 31, 2003), *quoting Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701. An applicant’s interest in obtaining a conditional use permit under the Jefferson County CUP Process is “at best, a unilateral expectation, and not a protected property interest.” *Henry, supra.* at 714. It is clear that even the applicant who owns the property does not have a legitimate property interest. Accordingly, adjoining property owners, who do not even own any property subject to the CUP certainly do not possess any property interest. As such, it is impossible for the BZA to deprive the Petitioners of any due process protections because they do not have a legitimate property interest because they were never in harm of being deprived of their property.

Relief Requested

The Respondent respectfully requests that the Court: (1) deny the relief requested by the Petitioner; (2) and award any other relief the court may deem appropriate.

BOARD OF ZONING APPEALS
And
THORNHILL, LLC

By Counsel,



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THE JEFFERSON COUNTY BOARD
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CERTIFICATE OF SERVICE

I, Stephanie F. Grove, do hereby certify that on this 9th day of December, 2009, I served a true copy of the foregoing **Jefferson County Board of Zoning Appeals' and Thornhill's Joint Response to Brief on Appeal** upon the following counsel by first class United States Mail addressed as follows:

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