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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

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



Petitioners,

v.

**CIVIL ACTION NO. 05-C-316
JUDGE WILKES**

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

Respondent,

and

THORNHILL, LLC,

Intervenor.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This matter came before the Court this 5 day of ^{March} ~~February~~ 2009, pursuant to Petitioners' Petition for Writ of Certiorari and the hearing held on February 19, 2009. Upon the appearance of Petitioners Jane Rissler, Patricia Rissler, Susan Rissler-Sheely, Mary Macel Wee, Richard Latterell, and Sherry Craig, by counsel David Hammer, Esq., upon the appearance of the Respondent the Jefferson County Board of Zoning Appeals (BZA), by counsel Stephanie Grove, Esq., and upon the appearance of the Intervenor Thornhill, LLC, by counsel, Richard G. Gay, Esq. and Nathan P. Cochran, Esq.

“While on appeal there is a presumption that a BZA 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.” *Corliss v. Jefferson County Bd. Of Zoning Appeals*, 214 W. Va. 535, 591, S.E.2d 93, 97-98, (2003) (citing *Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E.2d 899 (1975)).

II. The BZA correctly interpreted Section 6.4 of the Zoning Ordinance.

Petitioners allege that the BZA misinterpreted Section 6.4(g) of the Ordinance, by concluding the developer proposed a central sewer service rather than finding that public sewer service was available or that a private sewer disposal system would be utilized.¹

By finding that the developer proposed a central sewer service, the Zoning Administrator rendered three (3) LESA points rather than eleven (11) points for a private sewer disposal system. At the time the Zoning Administrator determined the LESA points, there was no public sewer service available to the site. In Conclusion of Law No. 3, the BZA correctly concluded

¹ See Section 6.4(g) of the Jefferson County Zoning Ordinance (“(g) Public Sewer Availability (11 points). This criterion assesses the availability of existing public sewer service with available capacity that is approved by the County Health Department and /or Public Service District to the site at the time of the development proposal application. If there is no public sewer service available, a central sewer system or private sewer disposal system can be used. The value for a proposed central sewer system is assigned to a development application recognizing that the system with adequate capacity to serve the development will be approved by the Public Service District, County Health Department and the Department of Natural Resources before the preliminary plat or site plan approval occurs.

If neither a public or central sewer system can be utilized, assign the point value for a private sewer disposal system.

<u>AVAILABILITY</u>	<u>POINTS</u>
Existing Public Sewer Service is available or public sewer will be built to the site	0
Central Sewer Service is Proposed	3
Private Sewer Disposal System must be Utilized	11

that where there is no public sewer available, then central sewer or private disposal systems may be built subject to other requirements. The BZA further concluded that "central sewer service" meant a central disposal system used by a subdivision by means of collection lines which connect individual residences with a central treatment plant.

Section 6.4(g) provides no requirement for an approval by the county Health Department and/or the Public Service District prior to the LESA score for a central sewer system or a private sewer disposal system. In addition, Section 6.4(g) of the Ordinance contemplates conditions that will exist at the time of construction of the project. The first criterion of availability via "Public Sewer Service" contains the possibility that "public sewer will be built to the site." This language clearly contemplates that the conditions could exist 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. Section 6.4(g) also offers a second possibility of Central Sewer Service by stating "Central Sewer Service is Proposed" suggesting the applicant may propose a central sewer system that is not yet available but will be available by the time the project is constructed. 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.

These interpretations are entirely reasonable in light of the meaning of Section 6.4(g) of the Ordinance. The BZA has the authority and discretion to make these determinations pursuant to West Virginia Law, and its interpretation is not clearly erroneous within the meaning of West Virginia law. Petitioners have failed to demonstrate that the interpretations of Section 6.4(g) by the BZA in this case are clearly erroneous. Further, the Petitioners have failed to provide evidence that the BZA's interpretations of the definitions of "subdivision", "Private Sewer

Disposal System”, and “Central Sewer Service” were clearly erroneous. Accordingly, the Court upholds the BZA’s decision.

III. BZA Members Weigand and Rockwell, and former County Attorney Cassell did not have a Conflict of Interest.

The West Virginia Supreme Court of Appeals has held that:

“In the absence of evidence to the contrary public officers will be presumed to have properly performed their duties and not to have acted illegally, but regularly and in a lawful manner.”

Brammer v. West Virginia Human Rights Commission, 183 W.Va. 108, 394 S.E.2d 340, 343 (1990). See also *State ex rel. Coryell v. Gooden*, 193 W.Va. 461, 457 S.E.2d 138, 146 (2005) (“As we stated in syllabus point 2 of *State ex rel. Stanley v. County Court*, 137 W.Va. 431, 73 S.E.2d 827 (1952), ‘In the absence of evidence to the contrary public officers will be presumed to have properly performed their duties and not to have acted illegally, but regularly and in a lawful manner.’”); *State ex rel. Bache & Co., Inc. v. Gainer*, 154 W.Va. 499, 177 S.E.2d 10, 17 (1970) (“the well established rule that in the absence of evidence to the contrary public officials will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner.”)

The West Virginia Supreme Court of Appeals 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 official 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 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).

Petitioners allege that BZA member David Weigand should have recused himself from the BZA proceedings related to Thornhill because Petitioners claim that 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.” Petitioners further allege that “This business was quite lucrative, as, for instance, during the period of September 29, 2005 through August 2, 2006, Specialized Engineering billed the Jefferson County Public Service District \$32,010.00.”

Petitioners’ argument that Weigand could potentially make profit from inspecting developments in the future is too tenuous and de minimus; this Court cannot find that this causes a conflict of interest. If the possibility of prospective employment was a factor in determining conflicts of interests of BZA members, than hypothetically everyone should recuse themselves.

Petitioners also allege that Doug Rockwell’s affiliation with the Law Firm of Crawford & Keller, PLLC disqualifies him from participating in any proceeding before the BZA related to Thornhill, LLC. However, the Court disagrees with this contention. Rockwell was only employed to conduct residential real estate closings on a piece meal basis. The Petitioners have failed to indicate that Rockwell was involved in the day-to-day operations of Crawford & Keller. Thus, Rockwell’s involvement with Crawford & Keller as a closing attorney is too remote to create even an appearance of conflict of interest.

Further, the May 20, 2004 BZA meeting minutes show that both Rockwell and Weigand stated they could be fair and impartial. The meeting minutes state in relevant part that:

...Motion for Dismissal by James Campbell of the appeal by Richard Latterell, et al. of the LESA Point Assessment, Support Data and Administrative Decision for the Thorn Hill Subdivision (DPZE File Z03-05/Appeal File #AP04-02). Mr. Rockwell stated that he practiced law with both Mr. Campbell and Mr. Hammer

and represented Thorn Hill on an adverse possession case and that he drives past the property in question daily. Mr. Rockwell stated that he could be fair and impartial in hearing the appeal. Mr. Weigand stated that several years ago his firm worked for Mr. Capriotti and that he had no financial interest in the matter pending before the Board and that he too could be fair and impartial.

Petitioners have failed to provide any evidence that Weigand's or Rockwell's August 22, 2005 vote was tainted due to Weigand's affiliation with Specialized Engineering or Rockwell's relationship with Crawford & Keller, PLLC. The Court would also like to point out that, if there in fact was a conflict of interest that tainted the decisions at issue, why would the BZA remand the LESA ~~scope~~ to the Zoning Administrator? Also, *Jefferson Utilities v. Jefferson County Board of Zoning Appeals*, 218 W. Va. 436, 446 (2005) allows the BZA to defer to the Zoning Administrator's LESA determinations. Thus, it seems that a BZA member's conflict of interest could not possibility affect the outcome of the alleged tainted decisions, since the Petitioners are not even entitled to have the Zoning Administrators' decision reviewed.

With regard to Cassell's participation, Petitioners make numerous allusions and suggestions of wrongdoing, but they offer no evidence to support their claims. The Petitioners have failed to show the Court that Cassell was somehow involved in negotiations with Campbell, Miller, and Zimmerman at that time of this action. Since no other evidence exists to prove Petitioners' allegation, the Court rejects this argument.

IV. The BZA procedures were not a denial of the Petitioners' due process rights

Petitioners' argument regarding the denial of due process regarding the time they were allowed to present their case, as well as not being able to argue certain factual matters, the ability to review documents, and the ability to cross-examine certain witnesses also fails. The West Virginia Supreme Court of Appeals has clearly stated in *Jefferson Utilities, Inc. v. Jefferson County Bd. Of Zoning Appeals*, 218 W. Va. 436, 624 S.E.2d 873, 884 (2005):

The determinations made by the zoning administrator clearly do not involve the type of issues that require due process protections such as evidence production; cross-examination; document inspection; and sworn testimony. *See Mecklenburg County*, 434 S.E.2d at 612. 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 by the zoning administrator from the administrative realm.

Thus, the BZA did not have to afford the Petitioners with full due process protections.

CONCLUSION

According, the Court DENIES the Petitioners' Petition for Writ of Certiorari.

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

The Court directs the Circuit Clerk to 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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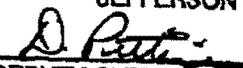
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CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY COUNTY, WEST VIRGINIA

A TRUE COPY
ATTEST:

LAURA E. RATTENNI
CLERK, CIRCUIT COI
JEFFERSON COUNTY.

BY 
DEPUTY CLERK