IN THE WEST VIRGINIA
SUPREME COURT OF APPEALS

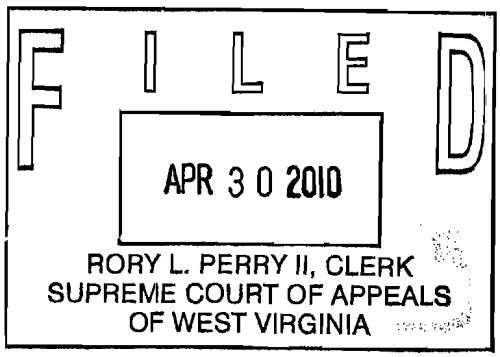
ROBERT L. SAMS

APPELLEE

v. Case Number 35531

CITY OF WHITE SULPHUR SPRINGS,
BOARD OF ZONING APPEALS

APPELLANT



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BRIEF ON BEHALF OF THE APPELLANT
CITY OF WHITE SULPHUR SPRINGS

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J. Steven Hunter
Counsel for Appellant
Steve Hunter Associates, LC
209 North Court Street
Lewisburg, WV 24901
304-645-4622

I. NATURE OF PROCEEDINGS BELOW

Pursuant to Notice this matter came on for hearing on the 15th day of July, 2008 before the Board of Zoning Appeals in and for the city. The following members were present, to-wit: Ralph Hanna, member; Kathy Glover, member; G. P. Parker, Chairman; Donald Reed, member, and; Richard Leach, member.

There appeared the City by it's Counsel, J. Steven Hunter and the Petitioner Robert L. Sams, in person and with his counsel Barry L. Bruce.

The matter came to the BZA on upon the appeal from a citation issued to Mr. Sams being Citation Number 1001 issued by the City's duly appointed zoning officer, Cary Shrewsbury, on the 4th day of June 2008 for nonconforming use at 25 Drewery Avenue, being a commercial business located in an area zoned R-1. The appeal was in the form of a letter from Mr. Sams' legal counsel.

It was agreed by the parties that the sole issue was whether the Petitioners use of his property was exempt under the Grandfather clause of the Ordinance previously passed and the zoning map adopted by the city on April 19, 1999.

Whereupon, the parties agreed the matter would be presented by proffer and counsel for both sides proffered certain testimony and evidence including certain documents properly marked, identified and made a part of the record.

Upon the matters presented the board found and ordered upon a unanimous vote as follows:

1. The City of White Sulphur Springs by an Ordinance and zoning map adopted

on April 19, 1999 enacted a zoning plan for the City of White Sulphur Springs.

2. The Appellee resides at 25 Drewery Avenue in the City of White Sulphur Springs which is within an area Zoned R-1 which calls for single family residential usage.

3. The Appellee, Robert L. Sams is currently operating a commercial landscaping business at the 25 Drewery Avenue location.

4. That the business has been in operation since 2004 as shown by business license applications filed by the Petitioner.

5. The Appellee failed to show by any evidence that the present commercial operation was in existence at the time of the adoption of the zoning map by the City on April 19, 1999.

6. The current use of the property as a commercial landscaping business operation with mulch, trucks, equipment and employees is in violation of the usage restriction and is a commercial enterprise.

7. The Citation issued by the city's zoning officer Cary Shrewsbury was a proper citation for a violation of the City's Zoning Ordinance.

8. That the Appellee would have a period of six months to correct the violation.

9. Thereafter, Sam's filed for Writ of Certiorari on the 5th day of September, 2008 with the Circuit Court of Greenbrier County. A reply was filed by the City on the 23rd day of September 2008.

10. After a passage of time, the matter was set for hearing on May 12, 2009. The record was submitted for the courts consideration.Counsel for Sams at a hearing on

May 12, 2009 represented he had the right to and submitted "new evidence" at the hearing held by the Circuit Court on May 12, 2009.[1] The circuit court over the objection of the city permitted the same without any foundation or prior notice, despite the fact that this matter had been pending for over eight months.

11. By Order of the circuit court filed on the 18th day of May 2009, the Circuit Court reversed the BZA based solely on evidence that was not before the BZA, thus this became a trial *de novo* and it is this Order that the Appellant seeks reversal.

II. Standard of Review

Pursuant to W.Va. Const. Art. VIII, § 6, circuit courts shall have original and general jurisdiction of proceedings in *certiorari* and such other jurisdiction as may be prescribed by law. *See, W.Va. Code,* 53-3-1 (1923), *et seq.* (confirming circuit court jurisdiction in certiorari proceedings). With regard to circuit court jurisdiction in certiorari as a reviewing tribunal, syllabus point 3 *of Harrison v. Ginsberg,* 169 W.Va. 162, 286 S.E.2d 276 (1982), holds: "On certiorari, the circuit court is required to make an independent review of both law and fact in order to render judgment as law and justice may require." Syl. pt. 2, *Wysong ex rel. Ramsey v. Walker,* 224 W.Va. 437, 686 S.E.2d 219 (2009). *See,* syl. pt. 5, *Humphreys, Adm. v. Monroe County Court,* 90 W.Va. 315,

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[1] The Appellee filed as Exhibit 1 an application to operate a lawn care business and a license issued by the City to operate "Bobby Sams Lawn Care". This was a typical home office type business. This application nor the license was produced in the original hearing.

110 S.E.701 (1922) (indicating that, upon certiorari from the action of a county court, the circuit court has jurisdiction to hear and determine the matter in controversy, "upon the record made in the county court," and enter such judgment as the county court should have entered.). In *State ex rel. Kanawha County Prosecuting Attorney v. Bayer Corporation,* 223 W.Va. 146, 672 S.E.2d 282 (2008), the court observed, and now holds: "This Court applies an abuse of discretion standard in reviewing a circuit court's certiorari judgment."

In the context of land use planning and zoning, circuit court jurisdiction in certiorari to review the decisions and orders of various local entities is described in *W.Va. Code*, 8A-9-1 (2004), *et seq*. Relevant to the circumstances herein is *W.Va. Code*, 8A-9-6 (2004), which states:

(a) The Court or judge may consider and determine the sufficiency of the allegations of illegality contained in the petition without further pleadings and may make a determination and render a judgment with reference to the legality of the decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals on the facts set out in the petition and return to the writ of certiorari.

(b) If it appears to the court or judge that testimony is necessary for the proper disposition of the matter, the court or judge may take evidence to supplement the evidence and facts disclosed by the petition and return to the writ of certiorari, but no such review shall be by trial de novo.

(c)In passing upon the legality of the decision or order of the planning commission, board of subdivision and land development appeals, or board of

zoning appeals, the court or judge may reverse, affirm or modify, in whole or in part, the decision or order.

See, *Maplewood Estates Homeowners Assoc. v. Putman County Planning Commission*, 218 W.Va. 719, 629 S.E.2d 778 (2006) (applying an abuse of discretion standard in the context of W. Va. *Code*, 8A-9-6 (2004)); *Jefferson Utilities, Inc. v. Jefferson County Board of Zoning Appeals,* 218 W. Va. 436, 448, 624 S.E.2d 873, 885 (2005) (A circuit court's review of a zoning matter shall not be by trial *de novo).*

III. ARGUMENT

THE CIRCUIT COURT ERRED IN ALLOWING THE ADMISSION OF NEW EVIDENCE AT THE CERTIORARI HEARING AND FAILING TO REMAND THE MATTER TO THE BZA FOR FURTHER HEARING

With respect to decisions of a board of zoning appeals, this Court has held that, "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." Syllabus Point 5, *Wolfe v. Forbes,* (1975).

It is noted by your Appellant that this court will not generally consider arguments raised for the first time on appeal. Syllabus Point 4, Browning, supra. See also State v. Marple, 197 W.Va. 47, 51, 475 S.E.2d 47, 51 (1996) ("It is a fundamental

proposition of law that an appellate court generally will not entertain an alleged trial error unless it has been properly preserved at trial."); *State v. Miller,* 194 W.Va. 3, 17, 459 S.E.2d 114, 128 (1995), *quoting United States v. Calverley,* 37 F.3d 160, 162 (5th Cir.1994) (*en banc*), *cert. denied,* 513 U.S. 1196, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995) ("'One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court will result' in the imposition of a procedural bar to an appeal of that issue.").

Relevant to the circumstances herein is *W.Va. Code*, 8A-9-6(b) (2004) which provides that If it appears to the court or judge that testimony is necessary for the proper disposition of the matter, the court or judge may take evidence to supplement the evidence and facts disclosed by the petition and return to the writ of certiorari, but no such review shall be by trial *de novo*.

By allowing the filing of the exhibits by the Appellee, the Circuit Court converted the matter to a trial *de novo*. No finding was made by the court hat testimony was necessary for the proper disposition of the case.

If in fact, the circuit court felt that "testimony" was necessary the proper findings should have been made by the court and the opportunity given to the Appellant to supplement it's filings. Such was not done and thus the work of the BZA was rendered moot by the Circuit Court. The opportunity for the Appellee to have presented the evidence introduced at the hearing on the Writ of Certiorari was at the BZA hearing for

which adequate notice was given.[2]

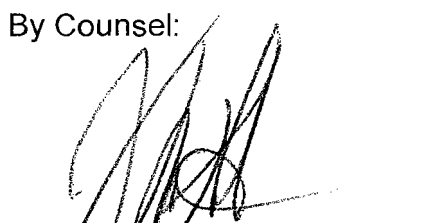
CONCLUSION

The May 18, 2009 Order of the Circuit Court should be reversed and the decision of the Board of Zoning Appeals affirmed. There was no clearly erroneous decision by the BZA based on the record before it and the court should not have allowed the filing of new matters at the hearing without proper notice and due process.

Respectfully submitted this 29th day of April, 2010.

City of White Sulphur Springs
Board of Zoning Appeals

By Counsel:



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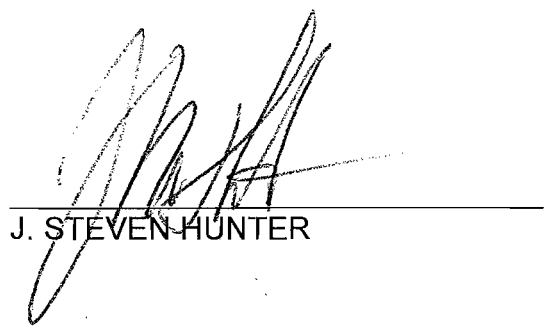
[2] In the nearly eight months that had elapsed from the filing of the Writ to hearing (September 5, 2008 to May 12, 2009) no mention or offer of the new evidence had been forthcoming from the Appellee or his counsel. No motion was filed to permit the offer of new testimony. This was an ambush tactic that should not be permitted or condoned by any court and violated the concept of procedural due process.

CERTIFICATE OF SERVICE

I, J. STEVEN HUNTER, do hereby certify that a true and exact copy of the foregoing **APPELLANT"S BRIEF** was served upon Counsel on April 29, 2010, by United States Mail, First Class prepaid to:

Barry L. Bruce, Esq
Barry Bruce and Associates
PO Box 388
Lewisburg, WV 24901



J. STEVEN HUNTER