

**IN THE WEST VIRGINIA
SUPREME COURT OF APPEALS**

ROBERT L. SAMS,

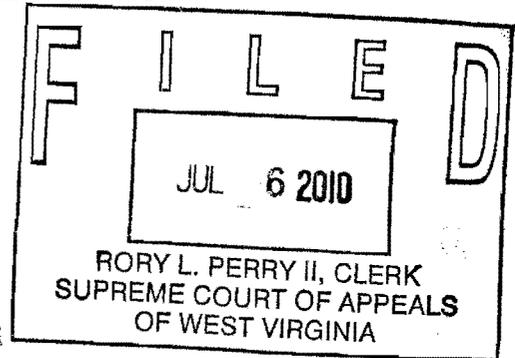
APPELLEE

V.

CASE NO. 35531

**CITY OF WHITE SULPHUR SPRINGS,
BOARD OF ZONING APPEALS,**

APPELLANT



**RESPONSE BRIEF ON BEHALF OF THE APPELLEE
ROBERT L. SAMS**

**Barry L. Bruce, State Bar ID #511
Barry L. Bruce and Associates, L. C.
P. O. Box 388
101 West Randolph Street
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NATURE OF PROCEEDINGS

Pursuant to Notice this matter came on for hearing on July 15, 2008 before the Board of Zoning Appeals (BZA) for the City of White Sulphur Springs. The following members were present: Ralph Hanna, Kathy Glover, Donald Reed; Richard Leach, and G. P. Parker, Chairman.

The City was represented by Counsel, J. Steven Hunter, and the Petitioner, Robert L. Sams appeared in person, represented by Counsel, Barry L. Bruce.

The matter came to the BZA upon the appeal from a citation issued to Robert L. Sams, being Citation No. 1001, issued by the City's duly appointed zoning officer, Cary Shrewsberry, on June 4, 2008 for nonconforming use at 25 Drewery Avenue, White Sulphur Springs, West Virginia, 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 is very important for the Court to understand that prior to the BZA hearing on this matter, it was agreed that counsel on both sides would proffer testimony and certain evidence, including documents properly marked and identified and made a part of the record. After hearing all the proffered and other testimony, the BZA approved the citation and ordered Mr. Sams to within six months stop using the property for his lawn care business.

After the hearing the BZA made minutes of said meeting. See page 17 of the record. In said minutes they made Findings of Facts. Findings of Facts 7, 8, and 9 stated

***Mr. Sams' attorney, Barry Bruce, offered testimony by proffer that Robert and Martha Sams purchased their property on 25 Drewery Avenue, WSS on June 15, 1985 as is of record in the Office of the Clerk of the County Commission in Deed Book 368 at page 335 (a copy of which is submitted into evidence as Petitioner's Exhibit No. 1). See Transcript of BZA Hearing - page 9, lines 17-22**

***Barry Bruce stated Mr. Sams had operated a business from this location beginning in the Spring of 1998 and continuing to present as Mr. Bruce indicated is evidenced by business licenses and tax returns. See Transcript of BZA Hearing - page 13, lines 22-23; page 14, line 1; page 15, lines 1-14; page 17, lines 15-23; page 18, lines 1-4; page 38, lines 17-23**

***Barry Bruce further stated it was his client's position that his business should be grandfathered in as the official City Ordinance Map was not properly submitted for record until April 12, 1999. See Transcript of BZA Hearing - page 14, lines 18-22; page 15, lines 16-19; page 33, lines 2-4; page 39, lines 1-6**

However, in the Order that was entered, which was not made a part of the official record and which is attached to this brief as Appellee's Exhibit No. A, in Finding of Fact No. 5 states,

The Petitioner failed to show by any evidence that the commercial operation was in existence at the time of the adoption of the zoning ordinance by the City on April 19, 1999. See Transcript of BZA Hearing regarding adoption of zoning ordinance - page 10, lines 12-19; page 13, lines 15-21

which is in contradiction to the Findings of Facts made in the minutes of said meeting by the BZA. In addition Finding of Fact Nos. 11 and 12 of the minutes of the July 15, 2008 meeting state,

***Barry Bruce offered copies of business licenses mailed to Mr. Sams from the City to his address of 25 Drewery Avenue, WSS beginning with the 2003/2004 year. See Transcript of BZA Hearing - page 14, lines 22-23; page 15, lines 1-9**

***Barry Bruce again referenced tax records to indicate that Bobby's Lawn Care was a business beginning in 1998 with equipment and contracted employees. See Transcript of BZA Hearing - page 15, lines 9-14; page 17, lines 15-23**

This Court should not be confused as to the issue about a building on the subject property. The building referred to on the subject property has never been used by the lawn care business. It was a building used as a personal hobby shop for dealing with antique cars and trucks. As Cary Shrewsberry testified at the hearing the permit was granted for a hobby shop. On page 3 of the transcript of the hearing, Mr. Shrewsberry indicated he had given Mr. Sams the

permit for the hobby shop and that is what the building had been used for and is not a part of this dispute. Mr. Shrewsberry also testified that he talked with Bobby Sams about his use of the land for a lawn care business which was not proper, and Mr. Sams initially agreed with him and had considered moving the business. Cary Shrewsberry's testimony is on pages 3, 4, and 5 of the transcript of the hearing. On behalf of Mr. Sams, Barry L. Bruce proffered to the BZA as indicated on page 6 of the transcript, that Mr. Sams initially thought he needed to move from the property but had other citizens come to him and encourage him not to move. Mr. Sams then contacted the law firm of Barry L. Bruce to represent him in the matter.

It became clear that Mr. Sams started his lawn care business prior to the official zoning map being adopted on April 19, 1999. When Mr. Sams made his statement to Mr. Shrewsberry, he was not aware when the zoning regulation actually became effective.

As a result of the decision by the BZA, specifically Finding of Fact No. 5 from the July 15, 2008 hearing, that "The Petitioner 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", Appellee believed said finding was plainly wrong. In addition, in the Order from the July 15, 2008, hearing in its Conclusions of Law, the BZA found that "The Petitioners present use of his property violates the city's duly adopted zoning Ordinance and the map." The whole issue presented to the BZA was whether Mr. Sams' business was started prior to April 19, 1999. Pursuant to said conclusion, the Appellee believed that the BZA was plainly wrong in its factual findings and filed a Writ of Certiorari in the Circuit Court of Greenbrier County.

It should be noted that the BZA did not provide a transcript of the tape for the Circuit Court to review and a copy of the tape was given to the court. The Circuit Court reversed the

decision of the BZA, and Appellants appealed this matter to the West Virginia Supreme Court of Appeals.

STANDARD OF REVIEW

This Court in *State ex rel Kanawha County Prosecuting Attorney v. Bayer Corporation*, 223 W. Va. 146, 672 S.E.2d 282 (2008), found that “This Court applies an abuse of discretion standard in reviewing a circuit court’s certiorari judgment.”

In *Maplewood Estates Homeowners Assoc. V. Putnam County Planning Commission*, 218 W. Va. 719, 629 S.E. 2d 778 (2006), the Court applied an abuse of discretion standard and determined the Circuit Court had abused its discretion because there was substantial evidence presented to support the planning commission’s decision, and the Court should not have reversed same.

West Virginia Code §8A-9-1, *et seq*, also provides the procedure for the Court to follow in handling a Petition for Writ of Certiorari. Clearly, West Virginia Code §8A-9-6 (b) “allows that the circuit court may take evidence to supplement the evidence and facts disclosed by the petition...”

ARGUMENT

The Circuit Court did not abuse its discretion by reversing the decision of the BZA and by allowing one exhibit to supplement the evidence and facts disclosed by the petition. The only issue presented was whether the Appellee’s business was started prior to April 19, 1999 when the zoning map was officially adopted and the zoning ordinance became effective.

The BZA in its Findings of Fact No. 5 in the Order from the July 15, 2008 hearing found that “The petitioner failed to show by any evidence that the commercial operation was in

existence at the time of the adoption of the zoning Ordinance by the City on April 19, 1999.” This finding was plainly wrong. An examination of the record, the transcript, and the BZA published minutes clearly indicates that there were proffers clearly stating that tax records referred to showed Mr. Sams’ business was started in 1998 and Mrs. Sams’ own testimony was that his business started in the spring of 1998. Mr. Sams had business licenses back to 2003 but could not find records prior to that time. If you examine the transcript of the BZA hearing and the minutes of the BZA meeting, there was no evidence presented by the Appellant contradicting Mr. Sams’ testimony that he started his business in the spring of 1998. The only testimony was that Ms. Lewis, the zoning officer prior to 2004, had talked with Mr. Sams concerning his property not being zoned for his business but there was no testimony contradicting Mr. Sams’ testimony that his business started in the spring of 1998. The Court did not abuse its discretion in reversing the decision of the BZA because the evidence presented to BZA by Mr. Sams and his attorney through proffer was that the business started in the spring of 1998. This evidence was uncontroverted by the Appellant.

The Appellant further argues that Appellee attempted to present evidence before the Circuit Court for the first time regarding when the business started. This argument is, likewise, unfounded because the record is clear that Mr. Sams presented evidence and testimony that his business began in the spring of 1998. Thus, this argument is clearly wrong. West Virginia Code §8A-9-6(b) “allows that the circuit court may take evidence to supplement the evidence and facts disclosed by the petition...” Obviously, this exhibit meets that requirement. The exhibit (Exhibit 1) is a Municipal License Application and License issued July 21, 1998, by the very city that was trying to assert Mr. Sams did not start his business prior to the adoption of the zoning map on

April 19, 1999. The court determined this document was probative of that issue. The application and license clearly indicates the business location to be 25 Drewery Avenue, White Sulphur Springs, West Virginia, and shows the name of the business as Bobby Sams Lawn Care. It is hard to imagine how the city that took the application and issued the license could be prejudiced by same because it was in their records the entire time.

The Appellant asserts that allowing one exhibit exactly on point equals trying the case de novo. This is ludicrous. The court had the record of BZA, the tape, the petition in response, and this exhibit certainly complies with West Virginia Code §8A-9-6(b). It does supplement the evidence and facts disclosed by the parties. Mr. Sams testified he started the business in 1998 and this exhibit certainly is fundamental proof of that.

It is also important for this court to consider Exhibit 2 to the circuit court hearing which was not included in the record and is attached hereto. It is Article V, Section 13-501: Nonconforming Use, Structures and Lots provision of the White Sulphur Springs Zoning Ordinance. Section 13-501-1. Provides that "The lawful use of any building, structure or land existing on the effective date of this Ordinance...may be continued, although such use does not conform with the provisions of this Ordinance." Although this Section 13-501 2. a) b) and c) addresses that new structures that are nonconforming may not be increased in size which increases its nonconformity, the ordinance does not indicate that the use of the land may not be increased in size; therefore, the normal growth of business over time is not prohibited by the ordinance, just structures.

This case is very clear. The circuit court in no way abused its discretion in reversing the BZA decision because the evidence when Mr. Sams started his business was uncontroverted at

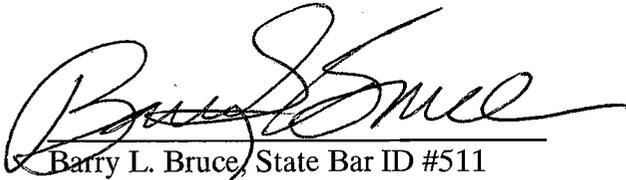
the BZA hearing as the transcript and minutes of said meeting by the BZA itself indicates. The addition of one exhibit, that being the application and license, does not in any way create a “trial de novo.” This exhibit was anticipated by West Virginia Code §8A-9-6(b). This added language is a supplement to the petition and is contemplated by said Code section.

CONCLUSION

For all the above reasons, the Appellee respectfully requests this Court to deny Appellant’s petition.

ROBERT L. SAMS, APPELLEE

BY COUNSEL



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CERTIFICATE OF SERVICE

I, Barry L. Bruce, Barry L. Bruce and Associates, Counsel for Robert L. Sams, Appellee, certify that I have on this date served upon J. Steven Hunter, Counsel for City of White Sulphur Spring, Board of Zoning Appeals, a true and correct copy of the foregoing Appellee's Response Brief by U. S. Mail, first-class, postage prepaid to 209 North Court Street, Lewisburg WV 24901 on this the 10th day of July, 2010.



Barry L. Bruce

**CITY OF WHITE SULPHUR SPRINGS
BOARD OF ZONING APPEALS**

IN THE MATTER OF AN APPEAL BY ROBERT L. SAMS

ORDER

Pursuant to Notice came this matter 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 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 Petitioner's use of his property was exempt under the Grandfather clause of the Ordinance passed and 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 finds upon a unanimous vote as follows:

FINDINGS OF FACT

1. The City of White Sulphur Springs by an Ordinance and map adopted on April 19, 1999 enacted a zoning plan for the City of White Sulphur Springs.
2. The petitioner resides at 25 Drewery Avenue in the City of White Sulphur Springs which in the area Zoned R-1 which calls for single family residential usage.
3. The Petitioner, Robert L. Sams is 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 petitioner failed to show by any evidence that the commercial operation was in existence at the time of the adoption of the zoning Ordinance by the City on April 19, 1999.
6. The current use of the property as a 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 Petitioner should have a period of six months to correct the violation.

CONCLUSIONS OF LAW

1. The Petitioner's appeal should be denied.

2. The Petitioners present use of his property violates the city's duly adopted zoning Ordinance and the map.

3. The City of White Sulphur Springs by an Ordinance and map adopted on April 19, 1999 enacted a zoning plan for the City of White Sulphur Springs.

4. The Petitioner failed to show that he is protected by any Grandfather clause.

O R D E R

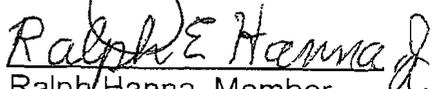
It is according **ORDERED** as follows:

The petition for appeal is denied.

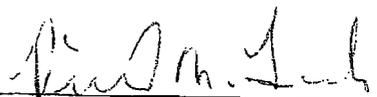
The Petitioner shall have 180 days to cease and desist from any commercial operations at 25 Drewery Avenue.


G. P. Parker, Chair


Kathy Glover, Member


Ralph Hanna, Member


Donald Reed, Member


Richard Leach, Member



ARTICLE V

GENERAL PROVISIONS

Section 13-501: Nonconforming Uses, Structures, and Lots

1. The lawful use of any building, structure, or land existing on the effective date of this Ordinance, or authorized by an improvement location permit issued prior thereto, may be continued, although such use does not conform with the provisions of this Ordinance.

2. Where a lawful structure exists at the effective date of adoption or amendment of this Ordinance that could not be built under the terms of this Ordinance by reason of restriction on area, lot coverage, height, yards, its location on the lot, or other requirements concerning the structure, such structure may be continued so long as it remains otherwise lawful, subject to the following provisions:

a) No such nonconforming structure may be enlarged or altered in any way which increases its nonconformity, but any structure or portion thereof may be altered to decrease its nonconformity.

b) Should such nonconformity structure or nonconforming portion of structure be destroyed by any means to an extent of more than 50 percent of its replacement cost at time of destruction, it shall not be reconstructed except in conformity with the provisions of this Ordinance.

c) Should such structure be moved for any reason for any distance whatever, it shall thereafter conform to zoning regulations.

3. If a nonconforming use has been abandoned, any future use of such land, building or structure shall be in conformity with the provisions of the Ordinance regulating the use in the district in which such land, building or structures may be located; provided, however, that abandonment of any particular agricultural or manufacturing process shall not be construed as abandonment of agricultural or manufacturing use.

4. In any district in which single-family dwellings are permitted, a single-family dwelling and customary accessory buildings may be erected on any single lot of record at the effective date of adoption or amendment of this Ordinance, notwithstanding limitations imposed by other provisions of this Ordinance. Such lot must be in separate ownership and not of continuous frontage with other lots in the same ownership. This provision shall apply even though such lot fails to meet the requirements for area or width, or both that are generally applicable in the district, provided that yard dimensions and requirements other than those applying to area or width, or both,

ARTICLE VI

USE REGULATIONS

Section 13-601: R-O Town Low Density Residential Districts

R-O Town Low Density Residential Districts are placed where soil, slope, and access conditions are sufficient to permit one dwelling unit per 20,000 square feet. This density standard provides for the grouping of residences in a relatively compact manner sufficient to permit economical construction of collector streets and water supply systems.

A building may be erected, altered or used and a lot may be used or occupied for any of the following purposes, and no other:

1. One family dwelling.
2. Agriculture (when associated with an existing agricultural operation), forest, or fallow.
3. Schools, churches, hospital.
4. Home occupations.
5. Recreational use (non-commercial).
6. Cemeteries (when authorized by Board of Zoning Appeals).
7. Radio and television transmission aerial or relay tower (when authorized by Board of Zoning Appeals).
8. Any use customarily accessory to the above.

Section 13-602: R-1 Town Medium Density Residential Districts

R-1 Town Medium Density Residential Districts are located where new residential development can be served by extension of existing street and utility systems. Slope conditions in these areas require a minimum lot size of 10,000 square feet per dwelling unit in order to assume a buildable dwelling unit site and to limit the volume of storm water run-off.

A building may be erected, altered or used and a lot may be used or occupied for any of the following purposes, and no other:

1. Any use permitted in R-O Town Low Density Residential Districts.
2. Duplex, multiple dwelling or apartment house, not to include an attached, or row-type structure.
3. Duplex dwellings in R-1 Districts may not be further subdivided.

ARTICLE VII

AREA, HEIGHT AND PARKING REGULATIONS

The following schedules of regulations applying to the area of lots, the height of buildings, the yards and other open spaces to be provided, off-street parking spaces, minimum floor areas and all other matters contained therein, indicated for the various districts established by this Ordinance, are hereby adopted and declared to be a part of this Ordinance.

Section 13-701: Area and Height Regulations for Residential Districts R-0

<u>Minimum Required</u>	Single Family Detached R-0 District
Total lot area	\$20,000 sq. ft.
Lot area per dwelling unit	20,000 sq. ft.
Lot width	80 feet
Lot depth	120 feet
Front Yard	30 feet
Each Side Yard	15 feet
Total, both side yards	30 feet
Rear Yard	30 feet
Habitable ground floor area per dwelling unit	800 sq. ft.
Total floor area	1,200 sq. ft.

Maximum Permitted

Building height	
Stories	2 1/2
Feet	35
Building Coverage	20%

Section 13-702: Area and Height Regulations for Residential District R-1

<u>Minimum Required</u>	<u>R-1 Dist. Detached</u>	<u>R-1 Dist. Duplex</u>	<u>R-1 Dist. Multiple</u>
Total lot area (Sq. ft.)	10,000	15,000	20,000
Lot area per DU (Sq. ft.)	10,000	7,500	3,000
Lot width (ft.)	60	90	120
Lot depth (ft.)	100	100	100
Front yard (ft.)	30	30	30
Each side yard (ft.)	10	20	30
Total Both side yards (ft.)	25	40	50
Rear Yard (ft.)	40	40	40
Habitable floor area per DU (sq. ft.)	800	750	600

Maximum Permitted

Building height			
Stories	2 1/2	2 1/2	2 1/2
Feet	35	35	35
Building Coverage	20%	25%	25%
No. DU in Group of attached buildings or in mltp. dwllg.	-	-	20