

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

ROBERT L. SAMS
Petitioner

v.

CIVIL ACTION NO. 08-AA-2-(O)

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

ORDER

This matter came for hearing on the 12th day of May, 2009, before the Court Joseph C. Pomponio Jr., presiding, upon Writ of Certiorari. The Petitioner, Robert L. Sams, is represented by counsel, Barry L. Bruce. The Respondent, the Board of Zoning Appeals of White Sulphur Springs (BZA), is represented by counsel, J. Steven Hunter. The motion, memorandums, and correspondence were reviewed by Joseph C. Pomponio, Jr., Circuit Court Judge.

History:

1. The Petitioner seeks a review of decision of the BZA for the city of White Sulphur Springs, which determined that the Petitioner's use of the property located at 25 Drewery Avenue was a non-conforming use, as the property is zoned residential and the Petitioner operates a commercial business at the location.
2. The parties agreed the only issue was whether the Petitioner's use was exempt under the Grandfather clause of the ordinance previously passed and the zoning map adopted by the city April 19, 1999.
3. The Respondent filed a reply.

Findings of Fact

1. A hearing was held before the City of White Sulphur Springs Board of Zoning

Appeals ("BZA") on July 15, 2008.

2. The hearing was held to gather information regarding the sole, agreed-upon issue: 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 ("Ordinance"). If the Petitioner's business had been in operation at the time of the adoption of the Ordinance, then the Petitioner's business will have been "grandfathered" into compliance with the Ordinance which prohibits such uses from coming into existence after its adoption.
3. By Order dated August 11, 2008, the BZA ruled that Plaintiff's business has only been in operation since 2004 and 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."
4. At the hearing on July 15, 2008, Petitioner's counsel represented to the BZA that the Petitioner has operated his business at 25 Drewery Ave. prior to the adoption of the Ordinance. The Petitioner himself never testified as such, but did state that in 1998, he had just purchased a new "walkbehind" and had a couple weed-eaters in his possession for the use of the business.
5. At the hearing in the Circuit Court upon the Petition for Writ of Certiorari, the Petitioner provided the Court with a copy of a business license ("business license") issued by the City of White Sulphur Springs on July 21, 1998, which gives the Petitioner permission to operate a business—Bobby Sams Lawn Care—at the address of 25 Drewery Ave., White Sulphur Springs, West Virginia 24986.

6. The Plaintiff did not produce the business license at the July 15, 2008, hearing in front of the BZA.

Conclusions of Law

1. This Court has jurisdiction over this Petition for Writ of Certiorari by way of W. Va. Code § 8A-9-1.
2. This Court can only overturn a decision of the BZA where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or acted beyond its jurisdiction. Kaufman v. Planning & Zoning Comm'n, 171 W. Va. 174, 298 S.E.2d 148 (1982).
3. "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." W. Va. Code § 8A-9-6(b).

Discussion

At the outset, this Court finds that it has the power to take new evidence in appeals from zoning boards of appeals by way of W. Va. Code § 8A-9-6(b). The Court is allowed to take in new evidence "to supplement the evidence and facts disclosed by the petition...." However, the Court would not be allowed to conduct a trial de novo on appeal. As such, this Court will consider the evidence provided this Court at oral arguments on this petition even though it was not provided to the BZA at the time of the July 15, 2008, hearing.

Although the evidence was not presented before the BZA, the business license clearly reflects that the Petitioner's business was licensed by the city of White Sulphur

Springs on July 21, 1998. As such, the Petitioner's business necessarily must have existed on that date, and therefore, prior to the adoption of the Ordinance in April of 1999.

Further, although the Petitioner himself never testified as such, Petitioner's attorney represented to the BZA that the Petitioner would testify that his business was in operation before the adoption of the Ordinance. Some of the testimony the Petitioner provided the BZA clearly implies that the business was in operation at 25 Drewery Ave. prior to 1999. Therefore, the BZA was plainly wrong in its finding of fact that "[t]he 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."

It is, therefore, **ORDERED** that

1. The Petitioner's use of the property located at 25 Drewery Ave. was EXEMPT under the Grandfather clause of the Ordinance adopted by the city April 19, 1999.
2. The Order of the White Sulphur Springs Board of Zoning Appeals dated August 11, 2008, which found the Petitioner's use of the property located at 25 Drewery Ave. to be non-conforming with the Ordinance is VACATED.

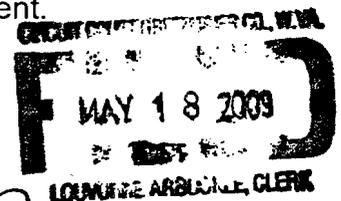
The Clerk is directed to forward a copy of this Order to Barry L. Bruce, counsel for the Petitioner, and to, J. Steven Hunter, counsel for the Respondent.

A True Copy:
ATTEST:

Louonne Arbuckle
Clerk, Circuit Court
Greenbrier County, WV

Entered: May 15, 2009

J. C. Pomponio, Jr.
Joseph C. Pomponio, Jr.



By _____ Deputy