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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

The Shepherdstown Observer, Inc.
Plaintiff,

vs

Civil Action # **09-C-169**

Jennifer Maghan,
Clerk of the County Commission
Of Jefferson County
Defendant.

RECEIVED
AUG 21 2009
JEFFERSON COUNTY CIRCUIT COURT

ORDER OF DISMISSAL

This matter came before the court upon the Motion to Dismiss filed by the Defendant. After considering the briefs and arguments of the parties, those of the Plaintiff represented by Stephen G. Skinner and the Defendant by Stephanie F. Grove, the Court makes the following findings.

FINDINGS OF FACT

1. In October of 2008, the County Commission of Jefferson County enacted a traditional zoning ordinance, which ordinance was intended to replace the County's non-traditional zoning ordinance.

2. Shortly thereafter, a petition drive in accordance with the provisions of W.Va. Code 8A-7-13, was instituted by a citizen group to bring the newly enacted ordinance to a referendum.

3. The group collected signatures and presented them to Jennifer Maghan, the

County Clerk of the County Commission of Jefferson County (*hereinafter "County Clerk" or "Clerk"*).

4. After reviewing each and every signature on the petition and eliminating those signatures that were determined to be invalid, the Clerk certified that the petition contained the requisite number of signatures to bring the ordinance to referendum.

5. On March 30, 2009, Stephen Skinner, Esq., on behalf of the Shepherdstown Observer, requested the petition documents pursuant to the West Virginia Freedom of Information Act ("FOIA"). In his correspondence, Mr. Skinner asked the Clerk to provide him copies of any and all certification for the current proposed zoning referendum, including all petitions and petition forms that were delivered to the Clerk's office for certification for the current proposed zoning referendum.

6. The Clerk provided Mr. Skinner a certified copy of "Certification of Valid and Invalid Signatures on the Zoning Petition 2008," but refused to provide any other documents listed in the request, relying in part upon advice from the West Virginia Secretary of State's Office that the signatures and petitions should be kept confidential. After the Clerk denied the request, the Shepherdstown Observer filed a complaint in this Court in an attempt to enforce Mr. Skinner's FOIA request.

CONCLUSIONS OF LAW

1. Rule 12(b)(1) of the West Virginia Rules of Civil Procedure allows a party to challenge subject matter jurisdiction by pre-answer motion.

2. Due process of law requires that a court assuming to determine the rights of

parties must have jurisdiction over the subject matter. *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc. 158 W.Va. 492, 211 S.E.2d 705 (1975).* Any judgment or decree rendered without such jurisdiction is utterly void. *Easterling v. American Optical Corp., 207 W.Va. 123, 429 S.E.2d 588 (2000).*

3. Whenever it is determined that a circuit court has no jurisdiction to entertain the subject matter of a civil action, the court must take no further action in the case other than to dismiss it from the docket. *See Hanson v. Board of Educ. of Mineral County, 198 W.Va. 6, 479 S.E.2d 305 (1996).*

4. Rule 12(b)(6) of the West Virginia Rules of Civil Procedure "permits a party to file a motion in the circuit court, prior to filing an answer, to dismiss a claim for failure to state a cause of action." *Shaffer v. Charleston Area Medical Center, 199 W.Va. 428, 485 S.E.2d 12 (1997).* Rule 12(b) is designed to test the formal sufficiency of the complaint. *Mandolidis v. Elkins Indus., Inc., 161 W.Va. 695, 246 S.E.2d 907 (1978).* A motion under Rule 12(b)(6) enables a court to weed out unfounded suits. *Harrison v. Davis, 197 W.Va. 651 n.17, 478 S.E.2d 104 n.17 (1996).*

5. For the purposes of a motion to dismiss, the allegations contained in the Plaintiff's Complaint must be accepted as true and construed most favorably in his behalf. *See Wiggins v. Eastern Associated Coal Corporation, 178 W.Va. 63, 357 S.E.2d 745 (1987); Harless v. First National Bank in Fairmont, 162 W.Va. 116, 246 S.E.2d 270 (1978).* If it appears beyond doubt that the Plaintiff can prove no set of facts in support of a claim which would entitle him to relief, the motion to dismiss should be granted. *Owen v. Board of Educ., 190 W.Va. 677, 441 S.E.2d 398 (1994).*

6. Because the records requested were not prepared by the public body, they do not qualify as public record within the meaning of the Freedom of Information Act, and the Plaintiff has failed to state a claim upon which relief may be granted.

7. A public record is defined as "any writing containing information in relation to the conduct of the public's business, prepared, owned and retained by a public body" W.Va. Code 29B-1-2(4) *(emphasis added)*.

8. The West Virginia Supreme Court has stated that it finds the definition of a public record in W.Va. Code 29B-1-2 to be "plain and unambiguous." *Ogden Newspapers, Inc. v. City of Williamstown, 192 W.Va. 648, 650, 453 S.E.2d 631, 633 (1994)*. Further, in *Daily Gazette Company, Inc. v. Withrow, 177 W.Va. 110, 350 S.E.2d 738 (1986)*, the Court argued that "[i]n addition to containing information 'relating to the conduct of the public's business,' a writing must have been 'prepared, owned and retained by a public body' in order to be a 'public record' under W.Va. Code 29B-1-2(4)." *Id. at 116*. Finally, in another decision addressing the definition of a public record, *State v. Nelson, 189 W.Va. 778, 434 S.E.2d 697 (1993)*, the Court found that "[a]ccording to this legislative definition, the nature of a 'public record' is not based upon public availability . . .but rather it is based upon whether a public body prepares, owns and retains the record." *Id. at 787*.

9. The West Virginia Supreme Court has plainly interpreted the definition contained in the West Virginia Code, finding that a public record must not only relate to the public's business, but also must have been a record that was created by the public body in the first instance.

10. It is clear that the petition and signatures do not fall within the definition of a public record as the document was not prepared by or on behalf of the public body but rather was prepared by a private citizen group that was neither affiliated with nor under the control of the County Commission.

11. Accordingly, the petition does not comply with the requirements of a public record as articulated by both the West Virginia Code and the West Virginia Supreme Court, and as such the petition is not subject to the provisions of the West Virginia Freedom of Information Act. Therefore, the County Clerk was under no obligation to provide the petition and signatures that were requested under authority of the Act, and the plaintiff has failed to state a claim upon which relief can be granted.

12. The Supreme Court has ruled that "[i]n the absence of evidence to the contrary, public officers will be presumed to have properly performed their duties." *Daily Gazette Company v. Bailey, 152 W.Va. 521, 528, 164 S.E.2d 414, 418 (1968) see also Syl. Pt: 3, West Virginia Human Rights Commission and Tidewater Grill v. West Virginia Human Rights Commission, 183 W.Va. 108, 394 S.E.2d 340 (1990) quoting Syl. Pt. 2 State ex rel. Staley v. County Court, 137 W.Va. 431, 73 S.E.2d 827 (1952).*

13. In Bailey, which case addressed a certificate of nomination, the petitioners contended that failure to publish the names on the certificate would encourage forgery or other types of fraud or irregularity. The Court found that the chief election officer took steps to insure that only valid signatures would be counted in the total required by the statute.

14. Similar to the Bailey case, the County Clerk is the chief election officer of the

county, and as such she is vested with the duty to determine that the signatures presented complied with all statutory requirements. There is no reason to believe that the Clerk did not properly perform her duty to certify each and every signature presented or that a newspaper is in a better position to verify the signatures than those deputy clerks who are trained by and use the methods prescribed by the West Virginia Secretary of State.

15. Furthermore, as the Supreme Court stated in *Bailey* "many signers of the certificates indicated that they would not have signed had they believed their names would be published." This Court finds that making the names of those individuals who signed the petitions would have a chilling effect on the ability of citizens to petition the government.

16. The Court further finds that there are several checks on the County Clerk's verification of the signatures.

17. West Virginia Code § 53-3-2 provides in relevant part "in every case, matter or proceeding before a county court. . the record or proceeding may, after judgment or final order therein, or after any judgment...be removed by writ of certiorari to the circuit court of the county in which such judgment was rendered."

18. West Virginia Code 8A-7-13(j), which section provides the manner in which the voters may petition for an election on replacing a non-traditional ordinance with a traditional ordinance, indicates that "a petition, signed by at least ten percent of the eligible voters. . .may be filed with the governing body of the county. ." The County Clerk is the Clerk of the County Commission, whose duty it is to assist the

Commission with its statutorily assigned duties. W.Va. Const. art. IX § 12.

19. As such, any decision of the county clerk, which decision is necessarily performed on behalf of the County Commission, is subject to review by certiorari.

20. If the Plaintiff or any member of the public feels that the County Clerk has acted improperly in the manner in which she certified the petitions, the West Virginia Secretary of State has a Fraud Unit formed to investigate any type of election fraud. Such a unit is authorized pursuant to W.Va. Code 3-1A-8.

21. Accordingly, it is clear that there are several checks on the County Clerk's authority, and a FOIA request for a document that does not meet the definition of a public record should not be used as a substitute for the remedies already available by law.

22. Because of these checks on the powers of the County Clerk, there is no valid public purpose in making the signatures public.

23. Furthermore, FOIA is a Federal enactment it is instructive to look to the decisions of United States Courts on this subject. Federal Courts have prohibited the dissemination of names from a petition in circumstances very like that in this case upon grounds very similar to the West Virginia Supreme Court's rationale in *Bailey* (*as referenced above in Point 15*) - "that making the names of those individuals who signed the petitions would have a chilling effect on the ability of citizens to petition the government."

24. The United States Supreme Court has recognized that the secret ballot is of paramount importance to our system of voting. In Burson vs Freeman, *504 U.S. 191, 206, 112S.Ct. 1846, 119 L.Ed.2d 5 (1992),* the Court found a "widespread and time-tested consensus" that the secret ballot is necessary to prevent voter intimidation and election fraud.

25. In a subsequent decision recognizing a First Amendment interest in anonymous political advocacy, the Supreme Court described the secret ballot as "the hard-won right to vote one's conscience without fear of retaliation. *McIntyre vs Ohio Elections Comm'n, 514 U.S. 334, 343, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995).*

26. In prohibiting the disclosure of the names and addresses of persons signing a petition seeking a referendum to terminate a controversial program (*circumstances very like the instant case*) and referencing the two Supreme Court cases recited above, the U.S. Court of Appeals for the 8th Circuit held that "there is a strong and clearly established privacy interest in a secret ballot and that this privacy interest is no less compelling in the context of FOIA's personal privacy exemption *[5 U.S.C.A. § 552(b)(6)]* than it is in other contexts. We also believe that in the circumstance of this case the privacy interest in a secret ballot is severely threatened. Releasing this petition, which contains a clear declaration of how the petitioners intend to vote in the referendum, would substantially invade that privacy interest." *Campaign For Family Farms vs Glickman, 200 F.3d 1180, 1188, (2000)*

27. Protecting the integrity of the secret ballot is more than just a personal privacy issue, it is a matter of great and vital public interest that our electoral process be free of the possibility of voter intimidation or fear of retaliation.

CONCLUSION

ACCORDINGLY: this complaint must be dismissed, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, because the Plaintiff has failed to state a claim under the provisions of the Freedom of Information Act. The records requested were not public records as defined by W.Va. Code 29B-1-2(4), and the Clerk never had an obligation to provide the documents to the Plaintiff. Further, pursuant to Federal statute and case-law the requested records are covered by FOIA's personal privacy exemption. Accordingly, the Plaintiff has failed to state a cognizable claim pursuant to the provisions of the West Virginia Freedom of Information Act.

WHEREFORE, it is hereby ORDERED that the Defendant's Motion to Dismiss is hereby GRANTED.

It is further ORDERED that the Clerk of this Court shall transmit an attested copy of this Order, once entered, to all counsel of record and retire this case from the active docket.

ENTERED: **August 21, 2009**

2 cc's

S. Skinner
S. Grove

8-21-09
BC

David H. Sanders

Chief Judge of the Twenty-Third Judicial Circuit

A TRUE COPY
ATTEST:

LAURA E. RATTENNI
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY Becky Clark
DEPUTY CLERK

CERTIFICATE REGARDING FACTS AND SERVICE

I, Stephen G. Skinner, of SKINNER LAW FIRM, do hereby certify that the facts alleged are faithfully represented and they are accurately presented to the best of my ability and that I have served a true copy of the attached PETITION FOR APPEAL, DESIGNATION OF RECORD AND DOCKETING STATEMENT, upon the Respondent by mailing the same to her counsel Stephanie Grove, Esq., Jefferson County Assistant Prosecuting Attorney, PO Box 729, Charles Town, WV 25414 this September 29th, 2009.

Stephen G Skinner