

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BOARD OF ZONING APPEALS OF THE
TOWN OF SHEPHERDSTOWN,

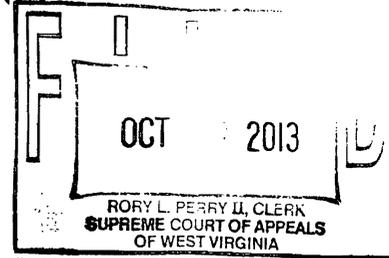
Respondent-Appellant,

vs.

Petition Number 13-0688

BORYS M. TKACZ,

Petitioner-Appellee.



APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
THE HONORABLE DAVID H. SANDERS
CIVIL ACTION NUMBER 12-C-434

BRIEF OF APPELLANT

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I. TABLE OF CONTENTS

Table of Authorities 2

Assignment of Error 3

Statement of Case 4

Summary of Argument..... 6

Statement Regarding Oral Argument..... 7

Argument

A. Standard of Review..... 7

B. Argument

(1) The Circuit Court Erred in Finding an Award of Attorney's Fees Appropriate. 7

(2) The Circuit Court Failed to Exercise Proper Judicial Restraint In Its Decision. 11

(3) The Circuit Court Erred in Finding that the Thirty Day Appeal Period in Section 8A-8-10(b) (2) of the West Virginia Code is Jurisdictional and that the Town of Shepherdstown Lacked the Authority to Adopt A Forty-Five Day Appeal Period in Shepherdstown Ordinance Section 9-1006. 12

(4) The decision of the Board of Zoning Appeals in the Kelch case is not an impermissible exercise of concurrent jurisdiction nor did the Board of Zoning Appeals exceed its authority. 13

(5) The Circuit Court Failed To Recognize that the Decision of the Board of Zoning Appeals Granting a Variance Was Specifically Contemplated By The Planning Commission Decision. 16

(6) The Circuit Court Erred in Concluding that the Corporation of Shepherdstown Exceeded and Expanded the Powers, Duties and Jurisdiction of the Board of Zoning Appeals and the Planning Commission Beyond Powers and Authority Specifically Described in Chapter 8A of the West Virginia Code..... 16

(7) The Circuit Court Erred in Finding that the Board of Zoning Appeals Failed To Apply a Reasonable Doubt Standard.	18
Conclusion	19

II. TABLE OF AUTHORITIES

Cases

<i>Muscattell v. Cline</i> , 196 W. Va. 588, 474 S.E.2d 518 (1996)	7
<i>Jefferson Utilities, Inc. v Jefferson County Board of Zoning Appeals</i> , 218 W. Va. 436, 624 S. E. 2d 873 (2005)	17
<i>State ex rel. State Line Sparkler v. Teach</i> , 187 W.Va. 271, 275, 418 S.E.2d 585, 589 (1992)	17
<i>State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection</i> , 193 W. Va. 650, 458 S.E. 2d 88 (1995)	9, 10
<i>Sally-Mike Properties v. Yokum</i> , 179 W. Va. 48, 365 S.E.2d 246 (1986)	7, 8
<i>Wolfe v Forbes</i> , 217 SE 2d 899, 159 W. Va. 34 (1975)	5, 7

Statutes

West Virginia Code Chapter 8A	3,4
West Virginia Code 8A-1-2	14
West Virginia Code 8A-4-2	17
West Virginia Code 8A-4-2(b)(6)	17
West Virginia Code 8A-5-1	14, 15
West Virginia Code 8A-5-2	15
West Virginia Code 8A-5-3	15
West Virginia Code 8A-5-4	15
West Virginia Code 8A-5-5	15
West Virginia Code 8A-5-6	15
West Virginia Code 8A-5-7	15
West Virginia Code 8A-5-8	15
West Virginia Code 8A-5-9	15
West Virginia Code 8A-5-10	14
West Virginia Code 8A-7-1	13
West Virginia Code 8A-7-2(a)	14
West Virginia Code 8A-7-2(b)	14
West Virginia Code 8A-7-2(b)(8)	14
West Virginia Code 8A-7-2(b)(10)	14
West Virginia Code 8A-7-2(c)(1)	13
West Virginia Code 8A-7-2(c)(4)	13

West Virginia Code 8A-8-1 through 8A-8-12	13
West Virginia Code 8A-8-9(1)	13
West Virginia Code 8A-8-9(4)	12, 13
West Virginia Code 8A-8-9(5)	12
West Virginia Code 8A-8-9(6)	12, 13
West Virginia Code 8A-8-9(6)(b)	12, 13
West Virginia Code 8A-8-10(b)	12
West Virginia Code 8A-8-10(b)(2)	3

Ordinances

Shepherdstown Ordinance Section 9-803	14
Shepherdstown Ordinance Section 9-1006	13
Shepherdstown Ordinance Section 9-1008	17
Shepherdstown Ordinance Section 9-1009	17

Other Authorities

<i>Donald R. Burgess and Patricia E. Burgess v Board of Zoning Appeals of the Town of Shepherdstown, Civil Action 12-C-23, decided May 1, 2013.</i>	8, 9
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III. ASSIGNMENTS OF ERROR

- (1) The Circuit Court Erred in Finding an Award of Attorney's Fees Appropriate.
- (2) The Circuit Court Failed to Exercise Proper Judicial Restraint In Its Decision.
- (3) The Circuit Court Erred in Finding that the Thirty Day Appeal Period in Section 8A-8-10(b)(2) of the West Virginia Code is Jurisdictional and that the Town of Shepherdstown Lacked the Authority to Adopt A Forty-Five Day Appeal Period in Shepherdstown Ordinance Section 9-1006.
- (4) The Circuit Court Erred in Concluding that the Board of Zoning Appeals Lacks Authority Under Chapter 8A of the West Virginia Code to Hear Appeals from the Planning Commission or to Hear Appeals which are Within the Jurisdiction of the Subdivision Ordinance as Administered by the Planning Commission.

- (5) The Circuit Court Failed To Recognize that the Decision of the Board of Zoning Appeals Granting a Variance Was Specifically Contemplated By The Planning Commission Decision.
- (6) The Circuit Court Erred in Concluding that the Corporation of Shepherdstown Exceeded and Expanded the Powers, Duties and Jurisdiction of the Board of Zoning Appeals and the Planning Commission Beyond Powers and Authority Specifically Described in Chapter 8A of the West Virginia Code.
- (7) The Circuit Court Erred in Finding that the Board of Zoning Appeals Failed To Apply a Reasonable Doubt Standard.

IV. STATEMENT OF CASE

This is an appeal from the decision of the Circuit Court of Jefferson County, West Virginia, reversing the decision of the Board of Zoning Appeals of the Town of Shepherdstown, West Virginia.

The Petitioner in the Circuit Court, Borys M. Tkacz, an aggrieved party under the Shepherdstown Zoning Ordinance, appealed a decision of the Board of Zoning Appeals granting on appeal, a variance, to a another resident of Shepherdstown, Patrinka Kelch, an adjoining property owner.

In granting the variance, the Board of Zoning Appeals reversed an adverse decision of the Planning Commission of Shepherdstown denying to Ms. Kelch a building permit to make permanent some reed fencing ("reed screening") that had been erected on her property. The basis of the Planning Commission decision, to deny the request of Ms. Kelch, resulted from materials from which the reed fencing was constructed, and the height of the fencing. (*Notice of Decision,*

Planning Commission, Paragraph 12, Appendix. Vol. 1, p. 172)

The variance granted to Ms. Kelch by the Board of Zoning Appeals applied only to the composition of the fencing and to the height of the fencing, the same basis upon which Planning Commission had denied the application of Ms. Kelch. (*Decision and Order, Board of Zoning Appeals, Appendix Vol. 1, pp 156-161*).

Mr. Tkacz appealed the decision of the Board of Zoning Appeals to the Circuit Court. In his writ to the Circuit Court, the petitioner asserted that the decision of the Board of Zoning Appeals decision should be reversed and vacated, and that the decision of the Planning Commission denying a building permit to Ms. Kelch should stand. (*Complaint and Petition For Writ of Certiorari and Declaratory Relief, Appendix Vol. 1., pp 1-31*). The Board of Zoning Appeals filed an Answer in response to the complaint of the Petitioner. (*Answer of the Board of Zoning Appeals of the Town of Shepherdstown, Appendix Vol. 1, pp. 32- 37*).

Relying upon *Wolfe v Forbes, 217 SE 2d 899, 159 W. Va. 34 (1975)*, Mr. Tkacz asserted that the Board of Zoning Appeals should be reversed, arguing that the Board of Zoning Appeals applied an erroneous principal of law, was plainly wrong in its factual findings, and had exceeded its jurisdiction. The Board of Zoning Appeals denied that the standard of *Wolfe, supra*, has been met.

After an exchange of memoranda prepared by counsel for the petitioner and the respondent, (*Appendix Vol. 1 pp 54-68, 69-84, and 87-101*) the Circuit Court agreed with the position of Mr. Tkacz. (*Decision of the Circuit Court, Appendix Vol. 1., pp 102-115*).

In its decision, the Circuit Court reversed and vacated the decision of the Board of Zoning Appeals, reinstated the decision of the Planning Commission and declared, that the Board of

Zoning Appeals lacked jurisdiction to consider the appeal of Ms. Kelch specifically, and moreover, lacked jurisdiction to hear appeals from the Planning Commission in general, that power residing solely with the Circuit Court in the absence of an appointed Board of Subdivision and Land Development Appeals. (*Decision of the Circuit Court, Appendix Vol. 1., pp 102-115*).

The Circuit Court further determined that the adherence of the Board of Zoning Appeals to the practices and procedures in the Ordinance were in direct violation of state law, constituted oppressive misconduct in the case before it, and concluded that an award of attorney's fees, expenses and costs was appropriate. (*Decision of the Circuit Court, Appendix Vol. 1. p 113*).

This is an appeal from the decision of the Circuit Court of Jefferson County, entered on June 4, 2013.

VI. SUMMARY OF ARGUMENT

The Board of Zoning Appeals denies that it applied an erroneous principal of law, was plainly wrong in its factual findings, and exceeded its jurisdiction, and objects to the decision of the Circuit Court which improperly substituted its judgement for the judgment of the Board of Zoning Appeals. The Board of Zoning Appeals further denies that the standard of *Wolfe, supra*, has been met by Mr. Tkacz.

The Board of Zoning Appeals acted lawfully, applied the Shepherdstown Ordinance (Shepherdstown Planning and Zoning, Title 9) in good faith, did not engage in any oppressive conduct, and should not be subject to payment of attorney's fees to the Mr. Tkacz.

While the Board believes that the decision of the Circuit Court should be reversed, at worst, the matter should be remanded to the Board of Zoning Appeals for further proceedings to consider the decision of the Circuit Court, which decision if sustained at all, should be applied

prospectively.

VII. STATEMENT REGARDING ORAL ARGUMENT

The Appellant, Board of Appeals does not request oral argument and does not believe that oral argument is necessary.

VIII. ARGUMENT

A. Standard of Review

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. *Syl. Pt. 5, Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975)*.

In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*. *Syl. Pt. 2, Muscatell v. Cline, 196 W. Va. 588, 474 S.E.2d 518 (1996)*.

B. Argument

(1) The Circuit Court Erred in Finding an Award of Attorney's Fees Appropriate.

As a general rule, each party bears his own attorney's fees absent a contrary ruling of the court or an express statutory or contractual authority for reimbursement. *Syl Pt. 2, Sally-Mike Properties v. Yokum, 179 W. Va. 48, 365 S.E.2d 246 (1986)*. However, there is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as costs without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for

oppressive reasons. *Syl Pt 3, Sally-Mike Properties, supra.*

In this instance, the Circuit Court's decision concludes that the Board of Zoning Appeals adherence to practices and procedures specifically contained in the Shepherdstown Ordinance constitutes oppressive misconduct, because of the presence of a practicing attorney on the Board and because the Board had access to counsel. *Paragraph 43, Circuit Court Decision, Appendix Vol. One, P. 134.* This finding is unfounded, where the Board of Zoning Appeals acted pursuant to a validly enacted municipal ordinance, did not engage in unauthorized acts under that Ordinance, did not act contrary to established law, and did not engage in intentionally abusive, negligent, reckless or injurious behavior, and had no authority to alter or amend the provisions of the Ordinance.

Moreover, in the *Burgess*¹ case decided by Judge Sanders slightly more than one month prior to the decision in this case, the Court found that the Board of Zoning appeals failed to grant a building permit to the Petitioners on appeal from the Planning Commission, ordered it to do so, and further ordered it to grant a building permit.

Notwithstanding the *Burgess* decision, one month later, the Court found that “*there is no authority for Decisions of the Planning Commission to be appealed to the BZA. The Court concludes that the BZA lacked jurisdiction to hear the Appeal filed by Kelch on this basis.*” *Paragraph 27, Circuit Court Decision, Appendix Vol. One, P. 131.* The Circuit Court further found *inter alia* that decisions concerning building permits are solely within the jurisdiction of the Planning Commission and the Board of Zoning Appeals lacked jurisdiction to hear appeals

¹ *Donald R. Burgess and Patricia E. Burgess v Board of Zoning Appeals of the Town of Shepherdstown, Civil Action 12-C-23, decided May 1, 2013.*

concerning building permits. *Paragraphs 29-32, Circuit Court Decision, Appendix Vol. One, P. 131-132.*

It is difficult to see how the *Burgess* case and the case at bar can be reconciled, particularly in light of the daunting standard for the award of attorney's fees. Moreover, it is even more difficult to see how the Board engaged in oppressive practices in this case while being ordered to engage in the same practice by the same Court in the *Burgess* case.

Even applying the standard applied in mandamus cases in *State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection*, 193 W. Va. 650, 458 S.E. 2d 88 (1995) an award of attorney's fees would be unwarranted.

Costs and attorney's fees may be awarded in mandamus proceedings involving public officials because citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed nondiscretionary duties. *Syl Pt 1, Highland Conservancy, supra.*

Attorney's fees may be awarded to a prevailing petitioner in a mandamus action in two general contexts: (1) where a public official has deliberately and knowingly refused to exercise a clear legal duty, and (2) where a public official has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command. *Syl Pt 2, Highland Conservancy, supra.*

Where a public official has deliberately and knowingly refused to exercise a clear legal duty, a presumption exists in favor of an award of attorney's fees; unless extraordinary circumstances indicate an award would be inappropriate, attorney's fees will be allowed. *Syl Pt 3, Highland Conservancy, supra.*

Where a public official has failed to exercise a clear legal duty, although the failure was

not the result of a decision to knowingly disregard a legal command, there is no presumption in favor of an award of attorney's fees. Rather, the court will weigh the following factors to determine whether it would be fairer to leave the costs of litigation with the private litigant or impose them on the taxpayers: (a) the relative clarity by which the legal duty was established; (b) whether the ruling promoted the general public interest or merely protected the private interest of the petitioner or a small group of individuals; and (c) whether the petitioner has adequate financial resources such that petitioner can afford to protect his or her own interests in court and as between the government and petitioner. *Syl Pt 4, Highland Conservancy, supra.*

In this case, there is no specific finding that the Board has deliberately and knowingly refused to exercise a clear legal duty under the Shepherdstown Ordinance. Nor is there a finding that there was relative clarity with regard to the Board's permissible and impermissible practices. Moreover, one would not be possible in light of the *Burgess* decision. Nor is there a finding that the ruling promoted a general public interest. In fact the Circuit Court decision appears limited to protecting the private interest of the Petitioner in not being burdened by a neighbor's fence that is distasteful to him. It is hard to see how the public interest is served by relegating appeals from Planning Commission decision solely to the Circuit Court. Finally, there is no finding as to whether the Petitioner has adequate financial resources such that petitioner can afford to protect his or her own interests in court.

The Circuit Court's award of attorney's fees is all the more striking in light of the fact that the Circuit Court took no testimony on this issue, nor remanded the matter to the Board for further finding as to the Court's decision as to the interrelation between the West Virginia Code and Shepherdstown Planning and Zoning, Title 9.

(2) The Circuit Court Failed to Exercise Proper Judicial Restraint In Its Decision.

The Circuit Court failed to exercise judicial restraint when it failed to return the Kelch appeal to the Board of Zoning Appeals for further consideration of the narrow jurisdictional issue raised with regard to the forty-five day appeal period contained in the appeal provisions of the Ordinance, and for the creation of a new record where testimony could be preserved by a new audio recording. The Court further failed to exercise judicial restraint by failing to afford the Corporation of Shepherdstown a period of time to undertake remedial measure to address the Court's concerns.

Beyond this, the Circuit Court substituted its judgment for that is the Board of Zoning Appeals in its findings that there is no evidence that the Kelch fence was necessary for insurance purposes, *Paragraph 8, Circuit Court Decision, Appendix Vol. One, P. 128*, despite the existence of specific references to insurance concerns in the attachment to the Board of Appeals Hearing Request, *Appendix Vol. One, P. 164*, and by discounting the Board's findings that the testimony before the Board concerned the insurance issue.

The Circuit Court further substituted its judgment for that of the Board in taking issue with the Board's Findings of Fact Number 2, Number 4, Number 5. *Board Decision, Appendix P. 160. See Paragraph 9, 10, 11, and 12, Circuit Court Decision, Appendix Vol. 1, P. 128.* The Circuit further substituted its judgment for that of the Board as to the import of the Planning Commission Decision. *Paragraph 17, Circuit Court Decision, Appendix Vol. 1, P. 128.*

On balance, the Circuit Court afforded little or no deference to the decision of the Board, and throughout reached different conclusions than those of the Board based upon the same

evidence in the record considered by the Board. The Circuit Court further discounted the findings of the Board as to testimony taken by the Board, although it is undisputed that testimony was in fact taken, including the testimony of the Petitioner, nor was the fact that testimony was taken disputed by the Petitioner. Moreover, despite the lack of an audio record, no evidence was taken by the Circuit Court as to factual matters nor was the matter returned to the Board for the taking of testimony.

(3) The Circuit Court Erred in Finding that the Thirty Day Appeal Period in Section 8A-8-10(b) (2) of the West Virginia Code is Jurisdictional and that the Town of Shepherdstown Lacked the Authority to Adopt A Forty-Five Day Appeal Period in Shepherdstown Ordinance Section 9-1006.

Section 8A-8-10(b) requires that an appeal to the Board shall be filed within thirty (30) days of the date of the decision appealed. Ms. Ketch filed her appeal with the Board on August 10, 2012. The date of the decision on appeal with the Board is June 29, 2012. However, the statute is not jurisdictional in nature. The failure to file an Appeal within thirty (30) days does not deprive the Board of jurisdiction. The reading by the Petitioner of Section 8A-8-10(b) is too restrictive and does not take into account the power of the Board to grant variances under Section 8A-8-9(4), to exercise all of the powers and authority of the Planning Commission under Section 8A-8-9(5) and to fashion rules and regulations concerning applications for variances under Section 8A-8-(6)(b). Taken together, the Board has the authority to proceed with an appeal filed beyond the thirty day limit. This is a common sense reading of the appeals process when applied to a the case before the Court. Nor is there any authority cited by the Petitioner, either in case law or the statute itself, for the proposition that Section 8A-8-10(b) is jurisdictional. Rather, it is a procedural rule which the Board may choose to depart from, or rely upon, in its sound discretion.

Moreover, since the Board is entitled to a presumption of correctness, absent such authority the Petitioner cannot overcome his burden in this regard.

In addition, Section 9-1006 of the Ordinance permits appeals to be filed within 45 days of the decision and this requirement is incorporated in the decision of the Planning Commission. This is a permissible extension of the appeal period under the rule making powers of the Board under Section 8A-8-9(6).

Finally, this objection to proceeding before the Board was not raised by the Petitioner at the time of hearing. To the extent that it was not raised before the Board, the objection of the Petitioner based upon the thirty (30) day requirement was not before the Board, was not preserved for appeal, and it is waived on appeal before the Circuit Court, and should not have been considered by the Circuit Court.

(4) The decision of the Board of Zoning Appeals in the Kelch case is not an impermissible exercise of concurrent jurisdiction nor did the Board of Zoning Appeals exceed its authority.

The Board has specific authority under the Chapter 8A of the West Virginia Code to hear appeals and to grant variances.

Chapter 8A-7-1 which contains the authority for the enactment of zoning ordinances (Section 8A-7-1) mandates the creation of a zoning board of appeals, (Section 8A-7-2(c)(1)) and requires that the zoning ordinance adopt procedures and requirements for variances (Section 8A-7-2(c)(4)). Sections 8A-8-1 through Section 8A-8-12 specifically govern the activities of boards of zoning appeals created under the mandate of Section 8A-7-2(c)(1). Among the specific powers of a board of zoning appeals is the power to hear appeals (Section 8A-8-9(1)) and to grant variances. (Section 8A-8-9(4)).

The zoning powers granted to a municipality adopting a zoning ordinance under the Section 8A-7-2(b) are general and expansive, so as carry out the considerations of Section 8A-7-2(a) which are broad statements of policy.² For example, a zoning ordinance may include regulating the use of land and designating specific uses (Section 8A-7-2(b)(1) and authorizes flexibility in planning standards (Section 8A-7-2(b)(2). Section 8A-7-2(b) further permits regulating the height, use and architectural features of buildings, including reasonable exterior architectural features (Section 8A-7-2(b)(8)) and includes such details as landscaping and screening (Section 8A-7-2(b)(10)). See *Shepherdstown Planning and Zoning, Title 9, Section 9-803. Appendix Vol. 2.*

Had the legislature intended that the Board of Zoning Appeals be limited solely to appeals from the Planning Commission in the manner suggested by the Circuit Court, it would not have enacted the statute as it did. Moreover, the Circuit Court's reliance upon the appeal process of Section 8A-5-10 is misplaced and inapplicable to the case at bar. Article 5 of Chapter 8A applies only to subdivision or land development plans and plats. Section 8A-1-2 defines "subdivision and partition" "land development" "plan" and "plat". with which Article 5 of Chapter 8A deals:

(cc) "Subdivision or partition " means the division of a lot, tract or parcel of land into two or more lots, tracts or parcels of land, or the recombination of existing lots, tracts, or parcels.

(q) "Land development " means the development of one or more lots, tracts or parcels of

² Section 8A-7-2(a). The following must be considered when enacting a zoning ordinance: (1) Promoting general public welfare, health, safety, comfort and morals; (2) A plan so that adequate light, air, convenience of access and safety from fire, flood and other danger is secured; (3) Ensuring attractiveness and convenience is promoted; (4) Lessening congestion; (5) Preserving historic landmarks, sites, districts and buildings; (6) Preserving agricultural land; and (7) Promoting the orderly development of land.

land by any means and for any purpose, but does not include easements, rights-of-way or construction of private roads for extraction, harvesting or transporting of natural resources.

(v) "Plan " means a written description for the development of land.

(x) "Plat " means a map of the land development.

The provisions of Section 8A-5-2 through Section 8A-5-9 are therefore limited as they apply to the requirements for a minor subdivision or land development (Section 8A-5-2); the application for a minor subdivision or land development; (Section 8A-5-3); approval of minor subdivision or land development plans or plats; (Section 8A-5-4); recording of a minor subdivision or land development plat (Section 8A-5-5); application for major subdivision or land development (Section 8A-5-6); contents of a major subdivision or land development plan and plat (Section 8A-5-7); approval of major subdivision or land development plans and plats; (Section 8A-5-8); and recording of a major subdivision or land development plat (Section 8A-5-9).

Appeals taken under Chapter 8A-5-10 apply only to decisions of the Planning Commission acting under Section 8A-5-1 reviewing actions taken under Section 8A-5-2 through Section 8A-5-9. Section 8A-5-10 does not apply to this case, and does not limit either Ms. Kelch to Circuit Court relief or limit the power of the Board to consider the Kelch appeal.

Conversely, the Circuit Court's reading of the statutory scheme set out in Section 8A-5-1 et seq. renders any variance granting authority of the Board, a power that the West Virginia Code specifically affords to boards of zoning appeals, subject to challenge, and further renders the variance granting power of the Board, virtually meaningless at worst, and unworkable at best.

In the instant case, the Circuit Court's construction of the West Virginia Code would

leave the only route of appeal as to the height of a reed fence and its composition, matters which do not involve any aspect of subdivision or land planning, not to the Board of Zoning Appeals, but to the Circuit Court. It seems hard to conceive that the West Virginia Code contemplates Circuit Court review *ab initio* of such mundane municipal matters. And, even if Ms. Kelch had pursued a direct appeal to the Circuit Court, rather than an appeal to the Board of Zoning Appeals, the Circuit Court does not appear to have the power to grant variances, as that power is reserved to the Board under the West Virginia Code, and to the Board under the Ordinance adopted by the Town of Shepherdstown.

(5) The Circuit Court Failed To Recognize that the Decision of the Board of Zoning Appeals Granting a Variance Was Specifically Contemplated By The Planning Commission Decision.

To the extent that the decision of the Board of Zoning Appeals granted a variance on the narrow issue of the height of the fencing, the Board adopted the decision of the Planning Commission and required that Ms. Kelch reduce the height of the fencing. The Circuit Court fails to take into account this aspect of the Board's decision, which does not overturn the Planning Commission decision. To the extent that the Board of Appeals allowed a variance in the composition of the fencing materials, this approach was specifically suggested by the Planning Commission in its decision. *Notice of Decision Planning Commission, Appendix Vol. 1, pages 171-180 and Draft Minutes Appendix Vol. 1, pages 181-186.*

(6) The Circuit Court Erred in Concluding that the Corporation of Shepherdstown Exceeded and Expanded the Powers, Duties and Jurisdiction of the Board of Zoning Appeals and the Planning Commission Beyond Powers and Authority Specifically Described in Chapter 8A of the West Virginia Code.

West Virginia Code §8A-4-2 describes what must be included in a subdivision and land

development ordinance. It is not jurisdictional. Nor is it an exhaustive enumeration of the contents of the Ordinance as it provides in §8A-4-2(b)(6) for "any other provisions consistent with the comprehensive plan the governing body considers necessary". Thus, the West Virginia Code does not describe the jurisdictional boundaries of the Planning Commission. Rather, the West Virginia Code defines what the contents of the Ordinance must contain in a general way. The Shepherdstown Ordinance does not expand upon the power granted in the West Virginia Code to zoning boards of appeal. And, the Board of Appeals acting within the confines of the Shepherdstown Ordinance is acting well within the power conferred upon it by Section 8A and the zoning powers granted to the Corporation of Shepherdstown under Article 7 of Chapter 8A.

Moreover, an integral part of extending the state's police powers to local governing bodies is the related enforcement powers that are implicitly granted to such bodies for the purpose of carrying out local laws. See *State ex rel. State Line Sparkler v. Teach*, 187 W.Va. 271, 275, 418 S.E.2d 585, 589 (1992) (recognizing that "[t]he general rule is that a grant of the police power to a local government or political subdivision necessarily includes the right to carry it into effect and empowers the governing body to use proper means to enforce its ordinances"). See *Jefferson Utilities, Inc. v Jefferson County Board of Zoning Appeals*, 218 W. Va. 436, 624 S. E. 2d 873 (2005) finding *inter alia* that a Board of Zoning Appeals has implied powers. and cautioning that a Circuit Court should not substitute its interpretation of a zoning ordinance for that of the board of zoning appeals.

(7) The Circuit Court Erred in Finding that the Board of Zoning Appeals Failed To Apply a Reasonable Doubt Standard.

The correct standard to be applied in the appeal before the Board is quoted in the text of the decision:

The granting of variances by the Board is governed by Section 1008 of the applicable ordinance. Section 1008 provides:

“(b) No such variance in the provisions or requirements of this ordinance shall be authorized by the Board unless it finds, beyond a reasonable doubt, that all the following facts and conditions exist: ...” . (Decision and Order Board of Zoning Appeals, Page 1, Appendix Vol.1, P. 156.)

II. Conclusions of Law

4. The following Ordinance Sections are involved in this appeal. Sections 9-1008 and 9-1009. These ordinance sections have been reviewed and the Board concludes that the criteria of these ordinance sections have been satisfied. (Decision and Order Board of Zoning Appeals, Page 1, Appendix Vol. 1, P. 161.)

It is therefore obvious that the statement as to "clear and convincing evidence" found in the *Decision and Order* is a typographical error in the drafting of the decision. And, given that the decision of the Board is entitled to a presumption of correctness, the Board should have received the benefit of the doubt as to the standard applied given the overall context of the decision.

That notwithstanding, whichever standard is applied in this case, the outcome would be the same. The factual determinations made by the Board compels the result reached, regardless of

the standard quoted. Moreover, because the decision is internally inconsistent, the Circuit Court, rather than reversing the decision of the Board, should have remanded the case to the Board for a clarification as to which standard was in fact applied.

XI. CONCLUSION

For the reasons stated, the decision of the Circuit Court should be reversed, or in the alternative, returned to the Board of Zoning Appeals for further proceedings as directed by the Court.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2013, I served the **BRIEF OF APPELLANT** by causing same to be hand delivered to

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