IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gary D. Godfrey	:	
	:	
v.	:	No. 1229 C.D. 2010
	:	Argued: March 8, 2011
Loganville Borough Zoning Hearing Board and Loganville Borough	:	
	:	
Appeal of: Loganville Borough	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: April 13, 2011**

Appellant Loganville Borough (Borough) appeals from an order of the Court of Common Pleas of York County (trial court), which reversed an order of the Loganville Zoning Hearing Board (ZHB). The Board dismissed an appeal filed by Gary Godfrey (Godfrey) from a zoning enforcement notice on the basis that the appeal was untimely. The trial court reversed the ZHB's determination and remanded the matter to the ZHB for a hearing on the merits of Godfrey's appeal of the enforcement notice. The ZHB and Borough appealed the trial court's remand order. We reverse.

The facts and procedural history as revealed in the record are as follows. The Borough's zoning officer, John Gervais (zoning officer), sent a zoning enforcement notice (Notice), dated July 2, 2009, to Godfrey, advising him that he had violated Section 701(a) and (b) of the Borough's zoning ordinance

(Zoning Ordinance) "by improving and occupying a detached structure as a dwelling without a Zoning Permit or a Use Certificate." (Reproduced Record (R.R.) at 25a.) The Notice directed Godfrey to discontinue the use of the structure as a dwelling and to notify the zoning officer when he discontinued the use so the zoning officer could perform an inspection. The Notice further directed Godfrey to disconnect the sewer line from the septic system. (*Id*.) Finally, the Notice advised Godfrey that he had the right to appeal the Notice within thirty days of the date of the Notice "in accordance with the procedures stated in the . . . Borough Zoning Ordinance," and that appeal forms were available from the zoning officer. (*Id*.)

Godfrey sent a letter to the zoning officer, dated July 17, 2009, in which he stated:

> This letter is in response to you [sic] notice dated July 2, 2009 (see attached copy).
>
> I do plan to appeal this action, and have retained counsel. Because of my attorney's schedule, I cannot meet with him until the first week of August. We will be in touch immediately after this meeting.

(R.R. at 28a.)

The zoning officer replied to Godfrey's July 17th letter in a letter dated July 24, 2009. The zoning officer included in his letter an "Application for Hearing to the Zoning Hearing Board." In the letter, the zoning officer stated that "[t]he signed application should be returned to me with an application fee of $400.00 . . . If desired, your attorney may contact the Borough Solicitor . . . ." (R.R. at 29a.) The form includes a section stating "[t]he above-named applicant requests a hearing before the [ZHB] and a determination on the following matter." (R.R. at 26a.) Below this sentence, the form provides three choices to applicants to

describe the particular matter for which they are seeking a hearing. (*Id.*) Those choices are (1) Appeal, (2) Special Exception, and (3) Variance. (*Id.*) For persons selecting "Appeal," the form directs them to fill out section 1 of the form, which is captioned "Request for Appeal of the Zoning Officer[s] determination dated ____." (*Id.*)

Godfrey met with his attorney on August 4, 2009, and that same day submitted to the zoning officer a completed Application for Hearing (Application) dated August 4, 2009 (R.R. at 26a-27a), seeking to challenge the Notice. In his Application, Godfrey asserted the following: (1) his use of the structures as dwellings predates the existing zoning ordinance and the use should be "grandfathered;" (2) the dwellings had been the subject of at least two previous applications that had been approved; and (3) laches precluded the Borough from seeking to enforce the terms of the zoning ordinance. (*Id*.)

The ZHB conducted a hearing on the Application on August 25, 2009. The hearing, however, focused on the question of whether Godfrey had filed a timely challenge to the Notice. Following sworn testimony, executive sessions, and some colloquy, a member of the ZHB made a motion to dismiss Godfrey's appeal based upon the ZHB's position that the appeal was untimely. The Board voted two-to-one in favor of dismissing the appeal. The ZHB issued a written order on December 2, 2009, noting that the thirty-day appeal period arises under the Pennsylvania Municipalities Planning Code (MPC)[1] and is jurisdictional in nature. The ZHB calculated the last day for a timely appeal to be August 3, 2009, one day before Godfrey filed his appeal. Godfrey argued briefly and

[1] Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101 - 11202.

unsuccessfully to the ZHB that his July 17 letter constituted the date of his appeal, but the ZHB rejected that argument, concluding that the letter did nothing other than signal Godfrey's intent to appeal in the future. Godfrey appealed to the trial court.

In his Notice of Appeal to the trial court, Godfrey did *not* mention the July 17 letter as a basis for his appeal to the trial court. Rather, Godfrey noted the following: (1) he filed an Application for appeal of the Notice; (2) he appealed the Notice on August 4, 2009; (3) the ZHB accepted the appeal and fee; and (4) the ZHB, after accepting the appeal form and fee, later denied the appeal as being one day late. Godfrey's Notice of Appeal to the trial court urged that his "appeal being untimely by one (1) day is a de minimis infraction and being that [the ZHB] accepted [the] filing fee [the ZHB] received this issue," and, that, in denying his appeal on this basis, the ZHB acted arbitrarily, capriciously, contrary to law, and abused its discretion.

In his brief to the trial court, Godfrey argued that although the zoning officer's Notice identified the thirty-day appeal period, when the zoning officer replied to Godfrey's July 17 letter on July 24, the zoning officer should have also provided some affirmative comment regarding the appeal period so that Godfrey knew that the clock began to run on the date of the Notice and was not extended based upon the content of Godfrey's July 17 letter regarding his intent to appeal. The Borough argued that (1) Godfrey had waived the equitable issues because he did not raise them before the ZHB or in the Notice of Appeal to the trial court, and (2) the ZHB correctly concluded that the appeal was untimely and thereby divested the ZHB of jurisdiction.

The trial court reversed and remanded the matter to the ZHB. In its decision in support of its order, the trial court stated: "[N]otwithstanding the concerns raised by the parties . . . the real issue here is whether Godfrey's July 17, 2009 letter constitutes an appeal." (R.R. at 196a.) In the view of the trial court, "[t]hat letter informed the [ZHB] in writing that Godfrey was appealing the Notice." (*Id*.) The trial court reasoned that Godfrey submitted his letter to the zoning officer well within the thirty-day appeal period. The trial court took issue with the Borough's Zoning Ordinance, which provides that zoning officers must provide a form approved by the Borough Solicitor for Appeals, in this case the "Application for Hearing," to which the zoning officer referred in his July 24 letter. In this vein, the trial court observed that an appeal is different from a request for a hearing. Thus, it appears the trial court viewed as confusing the mechanism for appeals set forth in the Zoning Ordinance, and it viewed the zoning officer's reference to the Application for Hearing in his follow-up letter as creating additional confusion.

The trial court concluded that although the MPC dictates that municipalities must provide forms for certain types of zoning applications (like variances), the MPC is silent as to a requirement that a municipality provide particular forms for an appeal of this type. The trial court further opined that requiring an appellant to use a form was particularly confusing in light of Section 705 of the Zoning Ordinance, which provides that persons aggrieved by a decision of a zoning officer may appeal in the manner set forth in either Article IX[2] or X-A[3] of the MPC, whichever is applicable. Therefore, the trial court concluded that a

[2] 53 P.S. §§ 10901 – 10918.

[3] 53 P.S. §§ 11001-A – 11006-A.

party could take an appeal by letter form and that as long as Godfrey filed an appeal in writing within thirty days of the Notice, he had timely appealed. The trial court construed Godfrey's July 17 letter as sufficient. (R.R. at 189a-200a.)

The Borough filed a Notice of Appeal with this Court and consequently filed a statement of matters complained of on appeal with the trial court, focusing on the following assertions: (1) the question of whether Godfrey's July 17 letter constituted an appeal was not before the trial court; (2) the trial court's act of deciding the matter based on an issue that Godfrey never raised in his Notice of Appeal to the trial court or in his brief prevented the Borough from briefing and arguing the issue; (3) the trial court erred in concluding that the Borough had no authority to create and implement the use of a form for appeals from enforcement notices; (4) the trial court erred in construing the July 17 letter as an appeal; and (5) even if a municipality may not prescribe a form for appeals and the July 17 letter was sufficient to satisfy the requirement for a written appeal, the failure to include the fee with such a written notice rendered the appeal unperfected. (R.R. at 202a-06a.)

The trial court, in its opinion pursuant to Pa. R.A.P. 1925(a), rejected the Borough's arguments, concluding that its standard of review permitted it to review the ZHB's factual findings to determine whether those findings were supported by substantial evidence and to review the legal conclusions in a plenary fashion. (R.R. at 207a-214a.) The trial court stated: "[The Borough] is incorrect that this Court is without jurisdiction to make a conclusive determination of the legal effect of Godfrey's July 17 letter." (R.R. at 209a.) The trial court also rejected the Borough's contentions relating to the impact of the MPC on the Borough's right to prescribe a form for appeals, asserting again the distinction

between a form that refers to appeals and the form in this case that, at least in the heading portion of the form, refers to hearings. The trial court reiterated its concern that the present structure of the Borough's appeal process treats "a request for a hearing the same as or a necessary prerequisite to the filing of an appeal [and] is inconsistent with the MPC." (R.R. at 213a.) Finally, the trial court expressed its belief that the Borough's approach seemed fundamentally unfair because Godfrey was "true to his word," completing and submitting the Application as soon as he could meet with his attorney and the Borough had constructive notice that he planned to appeal. (R.R. at 214a.)

In its appeal,[4] the Borough raises the following issues:

> 1. Whether the trial court erred in concluding that it had the power to address an issue sua sponte, namely whether a letter Godfrey sent to the ZHB indicating that he *planned* to appeal the enforcement notice was sufficient to fall within the enforcement notice appeal period, and, thus, render his appeal timely?
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> 2. Whether the MPC and the Borough's ordinances authorize the Borough to prescribe the form and manner for appealing a zoning enforcement notice?
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> 3. Notwithstanding the answer to Issues No. 1 & 2, (a) whether the trial court erred in concluding that Godfrey's letter was sufficient to perfect his appeal of the enforcement notice, when the letter only indicated that Godfrey *planned* to appeal, and (b) whether a

[4] When a trial court takes no additional evidence, our standard of review is limited to determining whether the zoning hearing board committed an error of law or abused its discretion. *Diversified Health Assocs., Inc. v. Zoning Hearing Bd. of the Borough of Norristown*, 781 A.2d 244, 246-47 (Pa. Cmwlth. 2001). This Court will find an abuse of discretion only where the Board's findings are not supported by substantial evidence. *Valley View Civic Ass'n v. Zoning Bd. of Adjustment*, 501 Pa. 550, 555, 462 A.2d 637, 640 (1983). "Substantial evidence" is "such relevant evidence as a reasonable mind must accept as adequate to support a conclusion." *Id.*

municipality may require payment of an appeal fee in order to perfect an appeal?

1. Did the Trial Court Improperly Raise an Issue Sua Sponte?

We conclude that the trial court erred in considering the issue of whether Godfrey's July 17 letter constituted an appeal. We begin by focusing upon the nature of Godfrey's claims before the ZHB and his Notice of Appeal to the trial court. As this Court stated in *Department of Transportation v. Malone*, 520 A.2d 120 (Pa. Cmwlth. 1987), "while it is among the functions of the trial court to clarify the issues, that function does not cast it in the role of advocate. Accordingly, [our Supreme Court in *Hrivnak v. Perrone*, 472 Pa. 348, 372 A.2d 730 (1977)] held that it was error for a trial judge to introduce [issues] not raised by the parties." *Malone*, 520 A.2d at 122. Similarly, this Court has held that a trial court errs by raising non-jurisdictional issues, such as standing, sua sponte. *Society Created to Reduce Urban Blight v. Zoning Bd. of Adjustment of the City of Phila.*, 682 A.2d 1, 3 (Pa. Cmwlth. 1996).

The trial court relied upon this Court's decision in *Daley v. Zoning Hearing Board of Upper Moreland Township*, 770 A.2d 815 (Pa. Cmwlth. 2001), which involved a church's request for a dimensional variance from a buffer requirement. The church acquired two lots adjacent to its own property in the hope of using the lots for overflow parking, which had become a problem. The ZHB granted the variance, concluding that the church had demonstrated that the *parking situation* prevented the church from making reasonable use of its property (a stretch under variance law), and a neighbor appealed. The trial court, after reviewing the factual findings, concluded that the church's new parcels had merged with the original property and that the church had established a right to a variance under the relaxed standards for dimensional variances. On appeal to this

Court, we rejected the objector's argument that the trial court had improperly raised an issue sua sponte, stating that the trial court had not raised a new issue but only applied the proper law to the issues presented to it by the parties. The Court phrased the issue before the trial court in that case as whether the church had established the requisite unnecessary hardship to support the ZHB's grant of a dimensional variance. "The legal rules concerning merger of adjoining properties [which the parties had not presented to the trial court] and the lessened burden for dimensional variances both relate to the issue [before the trial court]." *Id*. at 818.

In this case, however, the issue Godfrey raised to the trial court was not whether he had appealed in a timely manner, but rather whether the ZHB abused its discretion or erred as a matter of law by rejecting his admittedly late appeal from the Notice when the ZHB accepted the form and Godfrey's payment of the appeal fee. Unlike *Daley*, where the issue before that trial court was whether the appellant had satisfied its burden to establish hardship, and the trial court looked at the evidence and the elements necessary to demonstrate a hardship, in this case, the question before the trial court related solely to the ZHB's decision to reject Godfrey's *late* appeal. In a sense, Godfrey was really asserting that the ZHB erred in failing to grant a nunc pro tunc appeal, and the legal standards applicable to that issue are distinct from the issue of whether the letter Godfrey sent to the zoning officer constituted a timely appeal. Accordingly, because we believe the trial court raised a non-jurisdictional issue sua sponte, we conclude that the trial court erred in considering the question of whether Godfrey's July 17, 2009 letter constituted an appeal.

2. Did the Trial Court Err in Concluding that Godfrey's July 17th Letter Constituted an Appeal of the Enforcement Notice?

Assuming for purposes of argument only that the issue of whether the July 17th letter constituted an appeal from the Notice was properly before the trial court, the trial court erred in concluding that the letter constituted a timely appeal.[5] We agree with the Borough that the July 17th letter only signaled Godfrey's state of mind as to how he *intended* to act in the future and did not reflect a state of mind indicating a then-present intent that he meant his letter to act as an appeal. Again, in the July 17th letter, Godfrey stated only: "I do *plan* to appeal this action, and have retained counsel. Because of my attorney's schedule, I cannot meet with him until the first week of August. We will be in touch immediately after this meeting." (R.R. at 28a (emphasis added).) The letter, which indicates only a simple intent, is so insufficient that we may not even characterize it as suggesting an incipient action preceding Godfrey's formal attempt to appeal. For example, Godfrey did not state: "I am appealing your notice and will follow up this letter properly when my attorney is available."[6] Godfrey's statement that he planned to

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[5] The trial court reasoned that:

> "[The July 17, 2009] letter informed the [ZHB] in writing that Godfrey was appealing the Notice. The letter included a copy of the Notice showing the violations alleged by [the zoning officer]. The Borough received the letter no later than July 24, 2009, twenty-two (22) days after Godfrey received the Notice. On these facts, Godfrey has satisfied the MPC's requirements for appealing a decision of a zoning hearing officer: he appealed the decision in writing within thirty days of the Notice."

(R.R. at 196a.)

[6] We do not opine that such language could satisfy a party's appeal requirements, but offer this hypothetical as reflecting language that, comparatively, indicates more than an intention to do something in the future.

appeal is not substantively the equivalent of saying "I appeal" the Notice, which would affirmatively reflect a present intent to appeal. The Borough, therefore, is correct in asserting that the substance of the letter was insufficient to constitute an appeal, and the trial court erred in concluding that Godfrey's statements in the July 17th letter were sufficient to satisfy the requirements for an effective and timely appeal.

The trial court placed undue significance on the language of the zoning officer's Notice, which conveyed the zoning officer's intent to act in the future. The trial court seemed to suggest that because the zoning officer's notice conveyed intent to act in the future, Godfrey's letter of future intent was, therefore, somehow sufficient to satisfy the requirements of a timely appeal. Contrary to the trial court's characterization of the zoning officer's Notice, we observe that in an enforcement notice, a municipality can only (1) identify a property owner's noncompliance with a zoning provision, and (2) indicate that, if the landowner does nothing, the municipality will take action. Thus, in enforcement actions, a municipality really can only *intend* to take action because it must first provide a property owner with the opportunity either to acknowledge that his property does not comply and make corrections or appeal the enforcement notice. In either case, the municipality cannot act until something happens or does not happen. Therefore, the tentative nature of an enforcement notice is perfectly acceptable and distinct from a tentative response such as Godfrey's July 17, 2009 letter.

Furthermore, the trial court erred in referring to Section 705 of the Zoning Ordinance, which relates to appeals in general and identifies Article IX of the MPC, without addressing the distinct language contained in Section 616.1(a) of

the MPC,[7] relating to enforcement notices. Section 616.1(a) of the MPC implicitly provides municipalities with the power to develop procedures for appeals of enforcement notices, including the period for appeal. The pertinent Borough ordinance relating to appeals of zoning violation enforcement notices, Section 702(g)(5) of the Zoning Ordinance, provides: "The recipient of the notice has the right to appeal to the Zoning Hearing Board within fifteen (15) days of the date of this notice, in which case *such appeal* shall be *heard* in accordance with the procedures set forth in Section 502 of this Ordinance."[8]

Thus, Section 616.1 of the MPC provides authority to the Borough to adopt ordinances, creating procedures for enforcement notice appeals. Section 501 of the Zoning Ordinance specifically provides that the ZHB may adopt forms for its procedure consistent with the Zoning Ordinance and the MPC. Section 702 of the Zoning Ordinance, which provides for enforcement appeals, provides that the zoning officer shall supply a form for appeals. Thus, we believe that in accordance with the implied authority described in Section 616.1(a) of the MPC, the Borough adopted procedures requiring appellants to use the Borough-developed form for appeals of enforcement notices.

By virtue of the fact that the General Assembly distinguished enforcement actions from other actions over which a ZHB has jurisdiction, Article IX of the MPC does not have clear application to this aspect of a ZHB's powers

[7] 53 P.S. § 10616.1(a), added by Act of December 21, 1988, P.L. 1329. This Section provides in pertinent part that a municipality's enforcement notice must include the following information: "[T]he recipient has the right to appeal to the zoning hearing board within a prescribed period of time in accordance with procedures set forth in the ordinance."

[8] We point out, without comment, that although Section 702 of the Zoning Ordinance provides that a party seeking to appeal an enforcement notice must do so within fifteen days, the zoning officer's Notice indicated that Godfrey had thirty days to appeal.

and duties. The trial court, rather than looking at Section 705 of the Zoning Ordinance as a section relating to matters other than enforcement, regarded this provision as applying to any appeal, including enforcement appeals. Thus, the trial court perceived a conflict where none exists.

Accordingly, because the trial court incorrectly reasoned that Godfrey's appeal encompassed the question of whether Godfrey's July 17, 2008 letter constituted an appeal of the Notice and, additionally, erred in concluding that (1) the letter constituted Godfrey's appeal and was timely filed and (2) the Borough lacked the power to designate the manner in which a property owner may appeal an enforcement notion, we reverse the trial court's order.[9]

P. KEVIN BROBSON, Judge

Senior Judge Kelley concurs in the result only.

[9] Based upon our conclusions above, we need not address the question of whether the failure to pay the fee the Borough requires to appeal an enforcement notice means that a challenging party has not perfected an appeal.

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O R D E R

AND NOW, this 13th day of April, 2011, the order of the Court of Common Pleas of York County is REVERSED.

P. KEVIN BROBSON, Judge