

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Red Lion Borough :
 :
 v. : No. 14 C.D. 2010
 :
 Mark R. Holloway, a/k/a : Submitted: October 29, 2010
 Mark Robert Holloway, :
 Appellant :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
 HONORABLE PATRICIA A. McCULLOUGH, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY SENIOR JUDGE KELLEY

FILED: December 22, 2010

Mark R. Holloway, a/k/a Mark Robert Holloway (Holloway) appeals from the decision and order of the Court of Common Pleas of York County (trial court) finding that Holloway violated Section 215-21 of the Red Lion Borough Zoning Ordinance¹ (Zoning Ordinance), imposing a fine for said violation, awarding attorney's fees to Red Lion Borough (Borough), and enjoining Holloway from maintaining an outdoor sign on his property without zoning approval by the Borough. We affirm.

Holloway owns property in the Residential-Town Zone of the Borough. On August 7, 2008, the Borough sent Holloway a Zoning Enforcement

¹ Section 215-21 of the Zoning Ordinance governs outdoor signs.

Notice notifying him that his property at 31 W. Gay Street, was in violation of the Zoning Ordinance as it pertains to outdoor signs. Reproduced Record (R.R.) at 52-53. The Zoning Enforcement Notice further informed Holloway that, pursuant to Section 215-21(5) of the Zoning Ordinance which governs the type, location and size of signs,² the business sign posted on his garage was prohibited in the Residential-Town Zone. Id. Holloway was notified that he had until September 8, 2008, to remove the business sign from the garage.

The Zoning Enforcement Notice also advised Holloway that he had the right to appeal the enforcement notice to the Red Lion Borough Zoning Hearing Board (Zoning Hearing Board) no later than thirty days from the date of the notice by filing an appeal on a form available at the Borough office and paying the applicable filing fee. Id. In addition, the Zoning Enforcement Notice informed Holloway that failure to comply with the notice within the time specified, unless extended by an appeal to the Zoning Hearing Board, constituted a violation, with possible sanctions of a civil penalty in the amount of not more than \$500.00 per day for each day the violation continued. Holloway did not file a written appeal of the Zoning Enforcement Notice with the Zoning Hearing Board.

On September 12, 2008, the Borough filed a civil complaint with the Magisterial District Justice alleging that Holloway was in continuous violation of Section 215-21(5) of the Zoning Ordinance for having an unlawful sign. R.R. at 80. Following a hearing, the District Justice entered judgment on November 12, 2008, in favor of the Borough and against Holloway in the amount of \$8,146.35. Certified Record (C.R.), Item No. 44. Holloway appealed the judgment and the

² The Zoning Enforcement Notice set forth the provisions of Section 215-21(5) of the Zoning Ordinance.

Borough filed a civil complaint with the trial court. Therein, the Borough sought a judgment against Holloway in the amount of \$500.00 per day for each day that the violation has continued since August 7, 2008, together with attorney's fees plus costs of the suit. The Borough also requested that the trial court enter an injunction ordering Holloway to remove the business sign from his property.

A bench trial was held before the trial court on December 22, 2009.³ Pursuant to the trial court's September 3, 2009, pre-trial order, the December 22, 2009, bench trial would be for the purposes of determining what fines, if any, should be imposed for Holloway's alleged violation of the Zoning Ordinance. See C.R., September 3, 2009 Order Preliminary to Non-Jury Trial of Civil Case, Item

³ A pre-trial conference was held before the trial court on June 2, 2009, to resolve several pre-trial *pro se* motions that had been filed by Holloway. Specifically, Holloway filed the following pre-trial motions between January 16, 2009, and May 21, 2009:

1. Void Judgment;
2. Civil Action of Common Law;
3. Motion Request for Void Judgment, Hearing to be Heard;
4. Motion for Certiorari;
5. Notice to Produce Document;
6. Demand for Jury Trial;
7. Motion to Dismiss for Lack of Standing;
8. Affidavit of Truth;
9. Motion to Claim and Exercise Rights; and
10. Judicial Failure to Expedite the Duties of his Office.

At the conclusion of the pre-trial conference, the trial court entered a pre-trial conference order outlining, *inter alia*, the issues to be decided and the respective parties' rights to file additional motions, supporting legal memorandum, expert reports and witness lists, and any objections to any witnesses or exhibits. See C.R., Transcript of June 2, 2009 Pre-Trial Conference, Item No. 7; C.R., September 3, 2009 Order Preliminary to Non-Jury Trial of Civil Case, Item No. 16; C.R., September 15, 2009 Order Amending Order Preliminary to Non-Jury Trial of Civil Case, Item No. 14.

No. 16. The trial court noted in the September 3, 2009, pre-trial order that Holloway acknowledged that he did not appeal the decision of the Zoning Code Enforcement Officer to the appropriate administrative agency of the Borough. Id.

Before the trial court, the Borough presented the testimony of its Zoning Code Enforcement Officer, Daniel Shaw. Holloway appeared *pro se* and testified on his own behalf.⁴

Shaw testified with respect to the Zoning Enforcement Notice provided to Holloway on or about August 7, 2008, and the itemization of attorney's fees in this matter. The Zoning Enforcement Notice was submitted into evidence as Plaintiff's Exhibit 1 without objection. Holloway objected to the submission into evidence of Plaintiff's Exhibit 2, the statement of attorney's fees incurred by the Borough; however, the trial court overruled Holloway's objection.

Holloway testified that after he received the Zoning Enforcement Notice, he called the Borough twice to speak with Shaw. See C.R., Transcript of December 22, 2009 Bench Trial at 18-19, Item No. 4. Holloway testified that the first time he phoned, Shaw was on vacation and the second time he was referred to the Borough Manager because Shaw was not in the office. Id. Holloway testified that the Borough Manager told him that this was going to turn into a litigating or legal matter and hung up on him ending the conversation. Id.

Holloway testified that he then sent a letter to Shaw objecting to the Zoning Ordinance and informing Shaw that he felt as though his constitutional

⁴ At the June 2, 2009 pre-trial conference, Holloway requested a continuance because he had just secured an attorney on June 1, 2009, to appear on his behalf and represent him in this matter; however, the attorney was unable to be present at that pre-trial conference. C.R., Item No. 44. The trial court denied Holloway's request for a continuance because the attorney had not entered an appearance and due to the fact that Holloway waited until the last minute to obtain representation. Id.

rights were being violated. Id. Holloway testified that the next thing he knew, he was appearing at a District Justice's hearing where he was denied the opportunity to even try to find out what the violation was in the Zoning Enforcement Notice. Id. Holloway testified that he believed the Zoning Ordinance was vague and ambiguous and that the Borough denied his attempts to try to find out the exact violation of the Zoning Ordinance. Id.

Holloway testified further that when he approached the Borough's solicitor after the District Justice's hearing, the solicitor told him that he should have gone to the Zoning Hearing Board to find out what Zoning Ordinance Holloway had violated. Id. at 19-20. Holloway testified that the problem with going to the Zoning Hearing Board was that he would not have known how to frame an argument and an appeal to find out exactly what he violated. Id. Holloway testified that since he did not know what he had violated, he would have been put on the spot before the Zoning Hearing Board, and would not have been able to figure out how to defend the alleged violation with that kind of preparation. Id.

Holloway testified that he drove through the Borough's Residential-Town Zones and took pictures of thirty-three other business signs. Id. at 20. Holloway testified that the pictures show that the Borough was not applying the Zoning Ordinance equally to all residents. Id. Holloway offered the pictures to the trial court for review; however, the trial court sustained the Borough's objection that the pictures were not relevant to the issues before the trial court. Id. at 20; 28.

Holloway testified on cross-examination that he never filed an appeal from the Zoning Enforcement Notice using the appeal forms provided by the Borough. Id. at 21. Holloway testified further that his business sign is still on his garage and has not been taken down. Id.

In response, Holloway explained to the trial court that taking the sign down would be an admission of guilt for something he did not even understand. Id. at 22. Holloway testified that the Borough failed to clarify all parts of the violation on the Zoning Enforcement Notice in violation of the rules of court. Id. Holloway again explained to the trial court that he could not file an appeal with the Zoning Hearing Board because he had no clue what he would have been filing especially since he was not a lawyer.⁵ Id. at 23.

At the end of the hearing, the trial court found that the Borough had issued Holloway a Zoning Enforcement Notice on August 7, 2008, which Holloway did not timely appeal to the Zoning Hearing Board. The trial court found further that the testimony established that the business sign is still at Holloway's property and has not been removed. The trial court determined that since Holloway did not follow the procedures for appealing the Zoning Enforcement Notice that issue was no longer before the court. The trial court found that the action before it was an action to determine whether or not a fine should be appropriate.

Based on the evidence presented and Shaw's testimony, the trial court found that Holloway was in violation of the Zoning Ordinance and that a fine should be imposed. The trial court found that it was appropriate for the court to impose a penalty for the violation of the Zoning Ordinance; however, said penalty should run from September 8, 2008, until such time as the sign has either been removed or Holloway is in compliance with the Zoning Ordinance by obtaining the appropriate zoning approval for the disputed sign. Thus, the trial court imposed a

⁵ We point out that a *pro se* litigant must to some extent assume the risk that his lack of legal training will prove his undoing. Vann v. Unemployment Compensation Board of Review, 508 Pa.

(Continued....)

fine in the amount of \$5.00 per day from September 8, 2008, until December 22, 2009.

The trial court found further that the Borough was entitled to recover attorney's fees. The trial court found that the itemized statement of attorney's fees submitted by the Borough charging \$105 per hour was fair and reasonable. Accordingly, the trial court ordered Holloway to pay attorney's fees to the Borough in the amount of \$5,512.50, as well as court costs.

Finally, the trial court granted the Borough's request for injunctive relief. Therefore, the trial court enjoined Holloway from maintaining the business sign on his property at 31 West Gay Street, Red Lion Borough, without zoning approval by the Borough.

Accordingly, the trial court entered an order finding that Holloway violated Section 215-21 of the Zoning Ordinance, imposing a fine for said violation, awarding attorney's fees to the Borough, and enjoining Holloway from maintaining an outdoor sign on his property without zoning approval by the Borough. This counseled appeal by Holloway followed.⁶

Herein, Holloway raises three issues: (1) Whether the Borough made out a prima facie case before the trial court; (2) Whether Holloway should fail for

139, 148, 494 A.2d 1081 (1985).

⁶ Our review of a trial court's decision in a zoning enforcement action is limited to determining whether the trial court committed an abuse of discretion or made an error of law. Borough of Bradford Woods v. Platts, 799 A.2d 984, 988 n.5 (Pa. Cmwlth. 2002); Johnston v. Upper Macungie Township, 638 A.2d 408 (Pa. Cmwlth. 1994). On appeal from a grant or denial of a preliminary injunction, the Court's review is limited to determining whether there were any apparently reasonable grounds for the trial court's decision or whether the rules of law relied upon were erroneous or misapplied. Shaeffer v. City of Lancaster, 754 A.2d 719 (Pa. Cmwlth. 2000).

lack of filing an appeal form to the Zoning Hearing Board; and (3) Whether the trial court failed to address Holloway's timely raised constitutional objections.

In support of the issues presented for this Court's review, Holloway offers a brief argument for each issue. First, Holloway contends that the Borough failed to meet its burden. Holloway essentially argues that the Zoning Enforcement Notice was not specific enough to enable him to determine what portion or part of the Zoning Ordinance Holloway violated, or how, or in what way. Thus, Holloway argues, the Borough only made bald summary accusations resulting in the Borough failing to make out a violation.

Second, Holloway argues that although he did not use the Borough's appeal form to appeal the Zoning Enforcement Notice to the Zoning Hearing Board, the record shows he did substantially comply. Holloway contends that since the Zoning Enforcement Notice was a faulty deficient summary notice of enforcement, his efforts to inquire via the telephone and by letter indicates substantial compliance.

Finally, Holloway argues that the trial court erred by not addressing his equal protection claims. Holloway contends that the trial court accepted into the record, without objection, the pictures of other signs in the Borough; therefore, the trial court should have ruled on his claim that the Zoning Ordinance was applied to him unequally and unfairly.

We begin with Holloway's assertion that the Zoning Enforcement Notice was deficient. It is true that the Township could not initiate a civil enforcement proceeding absent prior service of an enforcement notice that complied with the requirements of Section 616.1 of the Pennsylvania

Municipalities Planning Code (MPC).⁷ Township of Lower Milford v. Britt, 799 A.2d 965 (Pa. Cmwlth. 2002); City of Erie v. Freitus, 681 A.2d 840 (Pa. Cmwlth. 1996)(Municipalities that fail to comply with Section 616.1(c)(3) of the MPC are precluded from seeking enforcement remedies for alleged zoning violations.); Township of Maiden Creek v. Stutzman, 642 A.2d 600 (Pa. Cmwlth. 1994). However, in the present case, the enforcement notice, which appears in the record, conforms in every respect with the requirements of Section 616.1 of the MPC.

The Zoning Enforcement Notice was neither unclear nor ambiguous as it specifically stated that Holloway was in violation of Section 215-21(5) of the Zoning Ordinance and it included verbatim the title and text of Section 215-21(5). Moreover, the Zoning Enforcement Notice informed Holloway that the sign that was in violation of the Zoning Ordinance was the business sign posted on his

⁷Act of July 31, 1968, added by Act of December 21, 1988, P.L. 1329, as amended, 53 P.S. § 10616.1, provides in pertinent part:

(c) An enforcement notice shall state at least the following:

(1) The name of the owner of record and any other person against whom the municipality intends to take action.

(2) The location of the property in violation.

(3) The specific violation with a description of the requirements which have not been met, citing in each instance the applicable provisions of the ordinance.

(4) The date before which the steps for compliance must be commenced and the date before which the steps must be completed.

(5) That the recipient of the notice 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.

(6) That failure to comply with the notice within the time specified, unless extended by appeal to the zoning hearing board, constitutes a violation, with possible sanctions clearly described.

garage and that said sign was prohibited in a Residential-Town Zone. From that specific description, Holloway could readily determine that his business sign was prohibited by Section 215-21(5) of the Zoning Ordinance by merely reading the provisions of the Zoning Ordinance set forth in the Zoning Enforcement Notice.

As such, we reject Holloway's contention that his efforts to obtain more specific information as to how he violated the Zoning Ordinance constitute substantial compliance with the requirement that he appeal the Zoning Enforcement Notice to the Zoning Hearing Board within thirty days. While it is true that Holloway may have been able to file his appeal on a form other than the form provided by the Borough, the fact remains that Holloway made no attempt to file any type of appeal directly with the Zoning Hearing Board as advised by the Zoning Enforcement Notice. Holloway admitted throughout the December 22, 2009, bench trial before the trial court that he did not attempt to appeal the Zoning Enforcement Notice to the Zoning Hearing Board. See C.R., Transcript of December 22, 2009 Bench Trial, Item No. 4.

It is well settled that a failure to appeal a Zoning Enforcement Notice to the Zoning Hearing Board conclusively establishes a violation and renders the enforcement notice immune from attack. Township of Penn v. Seymour, 708 A.2d 861, 864 (Pa. Cmwlth.), petition for allowance of appeal denied, 555 Pa. 749, 725 A.2d 1224 (1998) ("If a landowner does not appeal a zoning violation notice to the zoning hearing board, the failure to appeal renders the violation notice unassailable."); see also Woll v. Monaghan Township, 948 A.2d 933, 937 (Pa. Cmwlth. 2008), petition for allowance of appeal denied, 600 Pa. 767, 967 A.2d 962 (2009) ("A landowner's failure to appeal the notice of violation results in a final adjudication that the landowner violated the zoning ordinance. If the landowner fails to appeal, he may not later deny there was a violation."). Simply put,

Holloway cannot, as he has attempted to do, avoid the consequence of his failure to appeal the alleged violation to the Zoning Hearing Board by challenging the contents of the Zoning Enforcement Notice.

Finally, we reject Holloway's contention that the trial court erred by not addressing his claim that his equal protection rights were violated by the Borough's unequal and unfair application of the Zoning Ordinance. Again, Holloway's failure to timely appeal the violation alleged in a facially proper enforcement notice precluded any inquiry into the validity of the alleged violation or any constitutional challenge to the Zoning Ordinance.⁸

Accordingly, the trial court's order is affirmed.⁹

JAMES R. KELLEY, Senior Judge

⁸ As stated previously herein, the Borough did object to the pictures being submitted into the record as evidence and while the trial court did make the pictures part of the record, the trial court sustained the Borough's objections to the pictures based on the purpose for which they were being submitted by Holloway. See C.R., Transcript of December 22, 2009 Bench Trial at 28, Item No. 4.

⁹ We note that Holloway has not challenged the amount of the fine, costs and attorney's fees imposed by the trial court nor has Holloway challenged the granting of injunctive relief by the trial court.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Red Lion Borough	:	
	:	
v.	:	No. 14 C.D. 2010
	:	
Mark R. Holloway, a/k/a	:	
Mark Robert Holloway,	:	
Appellant	:	

ORDER

AND NOW, this 22nd day of December, 2010, the order of the Court of Common Pleas of York County entered in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge