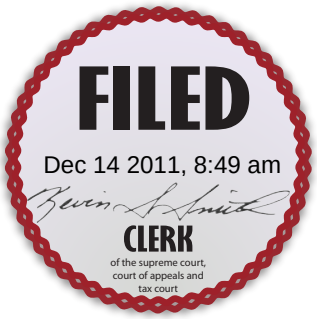

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IN THE
COURT OF APPEALS OF INDIANA

THE JEFFERSON COUNTY BOARD OF ZONING APPEALS,	)	
Appellant,	)	
vs.	)	No. 39A01-1012-CC-664
HARRY AND EVA ELBURG,	)	
Appellees.	)	

APPEAL FROM THE JEFFERSON CIRCUIT COURT
The Honorable John D. Mitchell, Senior Judge
Cause No. 39C01-1008-CC-501

December 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

The Jefferson County Board of Zoning Appeals ("BZA") appeals the trial court's denial of its motion to dismiss the petition of Harry and Eva Elburg. The BZA raises one issue which we revise and restate as whether the trial court erred in denying the BZA's motion to dismiss. We affirm in part, reverse in part, and remand.

The relevant facts follow. On August 3, 2010, the BZA met to consider the application of Allyene Wilson, the title holder, and Little Creek Properties LLC, for variances and a conditional use.[1] At the meeting, the Elburgs were present, argued against the variance, and expressed their disagreement with the BZA's grant of the variance. The BZA's Findings of Fact and Decision stated that the BZA met "to consider the application of of [sic] Allyene C. Wilson, 114 Elmhurst Drive, Madison, Indiana as title holder and Little Creek Properties LLC, DBA Little Creek Storage, as proposed purchaser, 7622 W S.R. 256, Madison, IN 47250 . . . for a variance from developmental standards from setbacks."[2] Plaintiffs' Exhibit 1. The Findings of Fact also stated that the applicant was requesting "a variance for setback from roads of 60 feet from the center of State Road 256 and 50 feet from center of road (800W) for the front of the buildings" and "a variance from the 3 feet height for fences allowed in the ordinance to a 6 feet high fence for security purposes plus 2 rows of barbed wire." Id. The Findings of Fact also stated:

[1] The record does not contain a copy of any request for variances or conditional use.

[2] The Findings of Fact state that the BZA met on July 6, 2010 to consider the application. Plaintiffs' Exhibit 1. At the hearing, Alana Gay Jackson, the secretary to the BZA, stated that this document "says July 6th, but it was actually signed August 3rd," because "we had two meetings." Transcript at 8.

> The [BZA], having heard the testimony and being duly advised, finds:
>
> 1. The approval . . . will not be injurious to the public health, safety, morals and general welfare of the community because: this is compatible with other area in Kent.
>
> 2. The use and value of the area adjacent to the property included in the variance . . . will not[3] be affected in a substantially adverse manner because these will be an improvement.
>
> 3. The strict application of the terms of the zoning ordinance will[4] . . . result in practical difficulties in the use of the property because the setbacks are not compliant with county standards.
>
> DECISION
>
> The [BZA] voted to grant/denies[5] the application for a variance from developmental standards in this matter with 0 members voting to grant the variance and 5 members voting to deny the variance.

Id. The BZA also issued a Findings of Fact for Conditional Use which granted the conditional use.

On August 26, 2010, the Elburgs filed a Verified Petition for Declaratory Judgment and Writ of Certiorari with the trial court. The Elburgs alleged that the BZA "on or about August 12, 2010 granted a conditional use permit to Allyene C. Wilson and Little Creek Properties, LLC for the said 7622 W. State Road 256, Madison, Jefferson County, Indiana real estate for the construction of mini storage warehouses and pole barn storage for RVs and boats . . . ." Appellant's Appendix at 8. The Elburgs also alleged that the BZA "denied a variance on this subject property on the grounds that the setbacks

[3] Findings 2 and 3 state "will/will not" and the words "will not" are circled.

[4] Finding 3 states "will/will not" and the words "will" are circled.

[5] Neither the word "grant" nor the word "denies" are circled.

(lines) are not compliant with county standards . . . ." Id. at 9. The Elburgs requested a declaratory judgment and that the court:

> determine that there is a case in controversy, order a remand back to the [BZA] for premature findings, or find that the determination of the granting of a conditional use for the subject property is inconsistent and improper because of the specific reason the request for variance on the same subject property was denied, for reasonable damages, if same is applicable, for reasonable attorney fees, if same is applicable, and for all other and proper relief in the premises.

Id. at 10.

On September 10, 2010, the chairman of the BZA revised the Findings of Fact related to the variances. Specifically, the BZA issued Findings of Fact on the request for variances which is similar to the earlier Findings but includes a line through "July 6" which the initial Findings indicated had been when the BZA met, and a handwritten notation of August 3. Plaintiffs' Exhibit 3. Handwritten notations also placed a line through the original numbers indicating the voting members so that the decision stated: "The [BZA] voted to grant/denies the application for a variance from developmental standards in this matter with 5 members voting to grant the variance and 0 members voting to deny the variance." Id. A handwritten notation of September 10, 2010 is included by each change of the number of votes.

On September 24, 2010, the BZA filed a motion to dismiss the Elburgs' Petition of Certiorari and Petition for Declaratory Judgment and argued that the court lacked subject matter jurisdiction, that the Elburgs failed to join the applicant and landowner, that there was no basis in law for a declaratory judgment or jury trial, that the Elburgs failed to

provide statutory notice of request for injunctive relief, and that the Elburgs failed to state a claim against a party named as respondent.[6]

On September 27, 2010, the Elburgs filed a motion to include Allyene C. Wilson and Little Creek Properties, LLC. The Elburgs stated that "[t]he addition of Allyene C. Wilson, the title holder, and Little Creek Properties, LLC, the proposed purchaser fit within Indiana Trial Rule 21 in that parties may be dropped or added at any stage of the action or on any terms that are just and will avoid delay." Appellant's Appendix at 32. That same day, the Elburgs filed a First Amended Complaint which listed Wilson and Little Creek Properties, LLC as respondents.

On September 28, 2010, the Elburgs filed a "Third Motion to Include Respondents" which moved to include Wilson and Little Creek Properties.[7] The Elburgs alleged that "[t]he addition of Allyene C. Wilson, the title holder, and Little Creek Properties, LLC, the proposed purchaser fit within Indiana Trial Rule 21, et al, in that the Jefferson County Board of Zoning Appeals on September 10, 2010, (see Exhibit '3') by the actions of Robert J. Jacobson, Chairman, changed the vote against the variance request from 0 members voting to 5 members voting for same." Id. at 35.

That same day, the Elburgs filed a "3rd Amended Verified Petition for Declaratory Judgment and Writ of Certiorari."[8] Id. at 37. The Elburgs alleged that Little Creek

[6] The Board of Commissioners of Jefferson County, Indiana joined in the motion to dismiss, and they were later dismissed by the Elburgs.

[7] The record does not appear to contain a Second Motion to Include Respondents.

[8] The record does not contain a second verified petition for declaratory judgment and writ of certiorari.

Properties, LLC was the owner of the property in question. The Elburgs alleged that the BZA "on August 3, 2010 denied by a vote of five (5) to nothing a variance of said real estate in question" and "the BZA granted a variance by a vote of 5 to 0 on September 10, 2010." Id. at 38. The Elburgs alleged that "the strict application of the terms of the zoning ordinance *will result in practical difficulties in the use of the property because the setbacks are not complient (sic) with county standards*." Id. at 38-39. The Elburgs alleged that "*[t]he variance allegedly approved on September 10, 2010, is not consistent with the zoning ordinance of Jefferson County, Indiana and is violative of Indiana law;* said conditional use permit and variance are premature and lacking foundation; said determinations are unsupported by substantial evidence, arbitrary and capricious and contrary to Indiana law." Id. at 39.

On October 5, 2010, the Elburgs filed a Verified Emergency Petition for Immediate Temporary Restraining Order Under Indiana Trial Rule 65. The Elburgs alleged that construction had begun on the property in question and that "any further work on the premises in question will make it impossible for the restoration of the land . . . ." Id. at 56. That same day, the court held a hearing and denied the Elburgs' petition for a temporary restraining order.

On October 15, 2010, the BZA filed a second motion to dismiss and alleged that the Elburgs' "failure to have the Sheriff of Jefferson County serve notice upon (1.) the applicant (2.) the land owner and (3.) the [BZA] within the time required by the statute is fatal to their application" and deprived the court of jurisdiction. The court held a hearing on all pending motions on October 21, 2010.

On November 1, 2010, the court entered the following order:

The Court hears evidence and finds:

* * * * *

4. The statutes, IC 36-7-4-1005, 1003 and 1006, specify that a Petition for a Writ of Certiorari is the exclusive remedy in appealing a decision of a Board of Zoning Appeals;

5. The [BZA's] Motions to Dismiss the complaints for Declaratory Judgment and Injunctive Relief should be granted;

6. The statute, IC 36-7-4-1005, requires notice of the filing of a Petition for a Writ of Certiorari be served by the Sheriff of the county in which a Board of Zoning appeals has jurisdiction;

7. The Petition for Writ of Certiorari was served by certified mail return receipt requested.

8. Pursuant to Trial Rule 5 service by certified mail return receipt requested is permitted;

9. The provisions of Trial Rule 5 of the Indiana Rules of Procedure are exclusive as to statutes setting forth methods of serving summons;

10. The Motion to Dismiss and the Second Motion to Dismiss as to the Petition for a Writ of Certiorari should be denied;

11. The Motion to Include Allyene C. Wilson and Little Creek Properties, LLC, as party Respondents should be permitted;

12. The [Elburgs] should be permitted to file an amended Petition for a Writ of Certiorari as to said Allyene C. Wilson and Little Creek Properties, LLC, are interested parties;

13. The original decision of the [BZA] was made on August 3, 2010, but was corrected on September 10, 2010, such that the decision was consistent with the findings;

14. The [Elburgs] on September 27, 2010, filed a Motion to Amend their Petition and make Allyene C. Wilson and Little Creek Properties, LLC, as Respondents which was within thirty (30) days of the correction of the decision of the [BZA];

15. The Motion to Amend Petition filed by [the Elburgs] should be granted;

16. A rule to show cause should issue requiring the Respondents to respond as to why the Petition for Certiorari should not issue;

17. The Motion of the Respondents for Extension of Time in which to Plead should be granted;

18. The Petition for a Writ of Certiorari is not a frivolous cause of action; and

19. The Motion for Recovery of Attorney's Fees filed by Respondents should be denied.

CONCLUSIONS OF LAW. The issue as to service by certified mail rather than service by the sheriff as to a Motion for Certiorari was litigated in Phillips et.al. v. Board of Zoning Appeals for the City of New Albany, 661 NE2d 903 ([Ind. Ct. App.] 1996). In that case the Petitioner caused the Respondents to be served by certified mail return requested. The Court of Appeals stated that the trial rules take precedence over conflicting statutes. The case states as follows: "the notice requirement of IC 36-7-4-1005(a) is jurisdictional and mandatory. However, Ind. Trial Rule 5 provides that written notice may be served by certified mail. Further, Ind. Trial Rule 1 provides that the trial rules govern the procedure and practice in all civil suits in Indiana. Therefore the trial rules take precedence, and conflicting statutes shall have no force and effect." Therefore the Court in this [sic] deny the Motions to Dismiss the Petition for a Writ of Certiorari.

IT IS NOW ORDERED, ADJUDGED, AND DECREED by the Court:

* * * * *

2. The Motion to Dismiss the Petition for Declaratory Judgment is granted;

3. The Motion to Dismiss the Petition for a Writ of Certiorari is denied;

4. The Motion to Amend the Petition for Writ of Certiorari and to include as parties, Allyene C. Wilson and Little Creek Properties, LLC, filed by Petitioners is granted;

5. The [BZA] is granted an extension of time to plead responsively to the Petition for Writ of Certiorari until November 21, 2010;

6. A Rule to Show Cause shall issue whereby the Respondents shall be required to respond to the Petition for Writ of Certiorari and to show cause as to why the Writ of Certiorari should not issue by November 21, 2010; and

7. The Motion for Recovery of Attorney's Fees filed by Respondents is denied.

Id. at 66-68.

On November 24, 2010, the BZA filed a motion to certify the court's November 1, 2010 interlocutory order and to stay the proceedings pending the outcome. On November 29, 2010, the court granted the BZA's motion. On December 29, 2010, the BZA filed a motion for interlocutory appeal, and this court accepted jurisdiction on February 18, 2011.

The issue is whether the trial court erred in denying the BZA's motion to dismiss. The BZA argues that the trial court lacked jurisdiction as a result of the Elburgs' failure to provide statutory notice. Specifically, the BZA argues that the Elburgs failed to file notice to necessary and indispensable parties within thirty days. The BZA argues that "[i]t is undisputed that the Elburgs did not include Wilson, the property owner, or Little Creek, the applicant, as parties to the Petition for Writ filed on August 26, 2010" and "that the Elburgs did not file with the clerk notices to Wilson and Little Creek contemporaneously with the Petition for Writ." Appellant's Brief at 11. The BZA also argues that the trial court's conclusion that the September 10th correction tolled the thirty-day deadline for the Elburgs to file their Petition for Writ was incorrect because: (1) "the Elburgs' original Petition for Writ challenged only the BZA's grant of the

Petition for Conditional Use which contained no scrivener's error and was never corrected;" (2) "the 30 day time limit runs from the time of the BZA actual vote to approve the variance not the time of the writing memorializing the vote;" and (3) the Elburgs still did not file with the clerk notices to all adverse parties within 30 days of the September 10 correction." Id. at 12.

The Elburgs argue that "[t]here was no need on August 26, 2011, to challenge the variance decision since the findings of fact indicated denial of the variance." Appellees' Brief at 13. The Elburgs argue that "[i]t is as if the BZA in bad faith was hiding their correction until important time periods elapsed to the detriment of the Elburgs." Id. They also contend that the September 10, 2010 order by the BZA was entered without notice and that the cases relied upon by the BZA do not "involve a correction of the original decision without notice or hearing prior to the filing of a motion to dismiss and the issues of correction, subsequent amendment of the Writ, and the request to add adverse parties within thirty (30) days of any correction . . . ." Id. at 10-11.

"Decisions by boards of zoning appeals are subject to court review by certiorari." Bagnall v. Town of Beverly Shores, 726 N.E.2d 782, 785 (Ind. 2000) (citing Ind. Code § 36-7-4-1003(a)). "A person aggrieved by a decision of a board of zoning appeals may present to the circuit or superior court in the county in which the premises are located a verified petition setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality." Id. (citing Ind. Code § 36-7-4-1003(b)). "The petition must be presented to the court within 30 days of the board's decision." Id. (citing Ind. Code § 36-7-4-1003(b)). "The court does not gain jurisdiction over the petition until

the petitioner serves notice upon all adverse parties as required by Ind. Code § 36-7-4-1005(a) . . . ." Id. At the time that the Elburgs filed their writ of certiorari, the statute provided:

> (a) On filing a petition for a writ of certiorari with the clerk of the court, the petitioner for the writ of certiorari shall give notice of the petition as follows:
>
> * * * * *
>
> (2) If the petitioner is not the applicant for the use, special exception, or variance and is a person aggrieved by the decision of a board of zoning appeals as set forth in section 1003 of this chapter, the petitioner shall have a notice served by the sheriff of the county on:
>
> (A) each applicant or petitioner for the use, special exception, or variance; and
>
> (B) each owner of the property that is the subject of the application or petition for the use, special exception, or variance.

Ind. Code § 36-7-4-1005.[9] The Indiana Supreme Court has interpreted the phrase, "on filing the petition," in Ind. Code § 36-7-4-1005 as follows:

> We read the language of statutes pursuant to the codified rules of statutory construction, which provide that "[w]ords and phrases shall be taken in their plain, or ordinary and usual, sense." Ind. Code § 1-1-4-1(1) (1998). As the trial court noted, "[t]he plain and ordinary meaning of the word 'on' in the statute's phrase 'on filing the petition' is taken to mean 'at the time of' filing the petition." (R. at 173, quoting Webster's New

[9] At the time the Court decided Bagnall, Ind. Code § 36-7-4-1005(a) provided:

> On filing a petition for a writ of certiorari with the clerk of the court, the petitioner shall have a notice served by the sheriff of the county on each adverse party, as shown by the record of the case in the office of the board of zoning appeals. . . . No other summons or notice is necessary when filing a petition.

726 N.E.2d at 785. Ind. Code § 36-7-4-1005 was repealed by Pub. L. No. 126-2011, § 68 (eff. July 1, 2011).

> Twentieth Century Dictionary 1249 (2d ed.1979) (definition no. 7 of "on")). To comply with the statute, a petitioner must file, with the clerk, notices to adverse parties contemporaneously to the filing of the writ petition.

726 N.E.2d at 785.

As to the conditional use, the record does not reveal that the Elburgs served either Wilson, the title holder, or Little Creek Properties, LLC, the proposed purchaser, notice on the filing of the petition on August 26, 2010 when they filed their Verified Petition for Declaratory Judgment and Writ of Certiorari with the trial court. Indeed, on September 27, 2010, thirty-two days after the filing of their August 26, 2010 petition, the Elburgs filed a motion to include Wilson and Little Creek Properties, LLC. Thus, we conclude that the trial court erred by not granting the BZA's motion to dismiss the Elburgs' petition for writ of certiorari as it related to the BZA's grant of a conditional use. See Bagnall, 726 N.E.2d at 785 (holding that the plaintiffs did not "secure jurisdiction for their respective variance number one and variance number three claims" "[b]ecause 'strict compliance with the requirements of the statute governing appeals from decisions of boards of zoning appeals is necessary for the trial court to obtain jurisdiction over such cases,'" and because certain adverse parties were not served notice "on the filing of the petition").

With respect to the variance, the initial Findings of Fact related to the variance stated that "0 members" voted to grant the variance and "5 members" voted to deny the variance. Plaintiffs' Exhibit 1. The BZA corrected the decision without notice to the Elburgs, and the BZA did not file its motion to dismiss until September 24, 2010. Further, the BZA's motion to dismiss made no reference to the corrected decision and no

notice of the BZA's change of decision was provided to the Elburgs or their counsel until after thirty days of the original filing of the petition.

Just as a court of record speaks through its order book entries, State Farm Mut. Auto. Ins. Co. v. Glasgow, 478 N.E.2d 918, 924 (Ind. Ct. App. 1985), reh'g denied, the BZA speaks through its records and entries. We conclude that the trial court was warranted in using the September 10 correction date to trigger the thirty-day filing deadline that extended the time period for compliance pursuant to Ind. Code § 36-7-4-1003(b). As a result, the Elburgs filed their motion to amend the petition requesting the addition of the other parties in a timely fashion on September 27. In other words, the Elburgs' motion to amend the petition on September 27, 2010, with regard to the variance issue, fell within the thirty days of the BZA's correction of the order. Therefore, the trial court properly denied the BZA's motion to dismiss the Elburgs' petition as it related to the variance.[10]

For the foregoing reasons, we reverse the trial court's denial of the BZA's motion to dismiss the Elburgs' petition for writ of certiorari as it related to the conditional use and affirm the trial court's denial of the BZA's motion to dismiss the Elburgs' petition for writ of certiorari with regard to the variance issue.

Affirmed in part, reversed in part, and remanded.

BAKER, J., and KIRSCH, J., concur.

[10] The petition regarding conditional use was a separate petition and decision from the variance. Indeed, there were no mistakes in recording the votes as to conditional use. Therefore, there is no logical connection between the scrivener's error on the memorialization of the vote granting the variance and the statutory requirements for filing the petition challenging a conditional use in this instance and the BZA's correction concerning the variance had no effect on the timeliness of the petition that pertained to conditional use.