

DAVE COOK, : IN THE COURT OF COMMON PLEAS OF  
Plaintiff : LYCOMING COUNTY, PENNSYLVANIA  
 :  
vs. : NO. 99-00,575  
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CITY ZONING HEARING BOARD, : CIVIL ACTION  
Defendant :

**OPINION AND ORDER**

This matter is before the Court based upon the appeal filed by Plaintiff, Dave Cook, on April 15, 1999, from a decision of the Zoning Hearing Board of the City of Williamsport, which decision was rendered by the Board on October 28, 1998. Several conferences have been held by the Court in this matter. The last conference was held on July 26, 1999, in the way of a pretrial conference, which was attended by the Plaintiff and his wife, Norman Lubin, Esquire, Solicitor for the City of Williamsport, and also by Respondent Natalie Kerbacher, the individual who had made the initial application to the Zoning Hearing Board for a zoning permit.

The brief factual background of the matter is that Natalie Kerbacher is a tenant of property situate at 506 Thomas Avenue in the City of Williamsport. She desired to open a daycare center at that address. To do so, she was advised she would need approval for the use of the property as a special exception. She made an initial application to the Williamsport Zoning Hearing Board for special exception October 28, 1998. The Zoning Hearing Board held a hearing on the initial application on November 19, 1998 and denied the request. Thereafter, Ms. Kerbacher renewed her request for special exception and a second hearing was held by the Zoning Hearing Board on March 18, 1999. At the

conclusion of that hearing, the Zoning Hearing Board announced its decision, granting the special exception by a 3-2 vote. Thereafter, on April 15, 1999, Plaintiff Dave Cook filed the within appeal.

The transcript of the March 18, 1999, proceedings before the Zoning Hearing Board was filed July 6, 1999. It does not contain any indication that a written decision of the Zoning Hearing Board was entered.

The record submitted by the City of Williamsport, as filed July 6, 1999, does not indicate any stenographic record of the proceedings of March 18, 1999, was made. The record submitted includes a transcription, apparently made from a tape recording, without identification as to who made the tape recording or who prepared the transcription. Norman Lubin, Solicitor for the City of Williamsport, has acknowledged at conference that the transcript was made from a tape recording and was not prepared by a stenographer. There are many “inaudible” indications in the transcript as submitted by the City. The Court cannot ascertain from those indications the substance of what might have been said and whether the referenced inaudible portion would be a matter that relates to a word or to a substantial statement. It is clear from the transcript, however, that the Zoning Hearing Board asked whether anybody in attendance at the hearing favored the application. Three individuals were identified who spoke in favor of granting this special exception. The Zoning Hearing Board then asked if anyone was opposed to granting this “variance.” Two persons, including the Plaintiff, Appellant, Dave Cook, opposed the granting of the zoning permit and gave testimony in support of their objections. It is clear that the grant of the permit was contested.

Based upon the foregoing and the record submitted by the Zoning Hearing Board, this Court reluctantly finds that it must grant the appeal, insofar as directing this matter shall be remanded to the Zoning Hearing Board of the City of Williamsport for the purpose of holding a new hearing to determine whether or not the zoning permit should be granted.

The Court is compelled to remand this matter to the Zoning Hearing Board for two reasons. First, a stenographic record of the proceedings was not made (or at least not submitted to this Court). Such a record is required by the State Municipalities Planning Code, 53 P.S. §10908(7). The language of the subsection is mandatory. Any record kept by any other party or person present at a proceeding such as the one at issue may be properly rejected by the trial court as evidence of an official stenographic record. *Colarossi v. Clarks Green*, 623 A.2d 424, 428 (Pa.Cmwlth. 1993).

The obvious purpose of this transcript is so the Court can make a determination whether the Zoning Hearing Board did or did not abuse its discretion in granting the permit. The necessity of preparing a transcript does not impose an additional cost upon the City or the Zoning Hearing Board; rather, the State Statute directs the cost of preparing a transcript of the proceedings should be paid by the Appellant.<sup>1</sup>

The second reason the remand of this matter is required, in order to comply with the State Municipalities Planning Code, is that on the record submitted, the Zoning Hearing Board did not make a written decision nor did it accompany that decision by findings of fact, conclusions and reasons for the

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<sup>1</sup> The initial expense of the appearance of the stenographer is to be shared equally by the applicant and the Board as directed by the State Statute. This Court presumes that the fees charged for such permits would include a sufficient amount of money to cover the typical expenses of the City in this regard.

decision. Such is clearly required by the plain language of the Municipalities Planning Code. 53 P.S. §10908(9) provides (in relevant part) as follows:

(9) The board or the hearing officer, as the case may be, shall render a written decision or, when no decision is called for make written findings on the application within 45 days after the last hearing before the board or hearing officer. Where the application is contested or denied, each decision shall be accompanied by findings of fact and conclusions based thereon together with the reasons therefor. (emphasis added).

Here, the application was clearly contested by Plaintiff at the hearing. Both the statute and case law require that the Zoning Hearing Board issue an opinion which sets forth the essential findings of fact and sufficient of the Board's reasoning to show its action was reasoned rather than arbitrary. *Transguch v. Zoning Hearing Board*, 505 A.2d 410 (Pa.Cmwlth. 1986).

Accordingly, the following Order is entered.

**ORDER**

*AND NOW*, this 23<sup>rd</sup> day of August 1999, the permit granted to Natalie Kerbacher by the Zoning Hearing Board is VACATED. The matter is remanded to the Zoning Hearing Board for hearing to be conducted consistent with this Opinion.

BY THE COURT,

William S. Kieser, Judge