PIATT TOWNSHIP,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 02-01,805
	:	
SHEDDY FAMILY TRUST,	:	
LOUIS & BEATRICE SHEDDY,	:	
	:	
Defendants	:	PRELIMINARY OBJECTIONS

Date: November 19, 2003

OPINION and ORDER

Before the Court for determination are the Preliminary Objections of Plaintiff Piatt Township to the New Matter of Defendants Sheddy Family Trust, Louis Sheddy, and Beatrice Sheddy (collectively "Sheddy") filed August 15, 2003. The Preliminary Objections seek to have Paragraphs 21 through 48 of Sheddy's New Matter stricken as being impertinent and legally insufficient. Piatt Township asserts that a land owner's failure to appeal a zoning violation to the zoning hearing board renders the violation notice unassailable and limits a court to imposing the appropriate fine. Piatt Township argues that Sheddy is impermissibly trying to defend the zoning violation and attack the enforcement notice in the allegations asserted in New Matter allegations. Consequently, Piatt Township asserts that the Paragraphs 21-48 should be stricken.

This case arises out of a zoning violation. Piatt Township served Sheddy with an enforcement notice on May 9, 2002 and June 18, 2002 for violating the Township's zoning ordinance by operating a junkyard on property located at 500 Sams Road, Jersey Shore, Pennsylvania. Sheddy did not appeal the violation to the Piatt Township Zoning Hearing

Board within thirty days of receiving the notice. On August 7, 2002, Piatt Township initiated enforcement proceedings in District Justice Court. The June 18, 2002 enforcement notice is the subject of the current enforcement proceeding. On September 5, 2002, a District Justice Court judgment was entered against Sheddy. Sheddy filed an appeal on October 4, 2002. Pursuant to a Rule to File a Complaint, Piatt Township filed a Complaint on October 22, 2002. On December 4, 2002, Sheddy filed preliminary objections to the Complaint. On December 13, 2002, Piatt Township filed an Amended Complaint.

Sheddy filed preliminary objections to the Amended Complaint on March 25, 2003. On April 9, 2003, Piatt Township filed preliminary objections to Sheddy's preliminary objections. On May 8, 2003, this Court entered an Opinion and Order denying the preliminary objections of Sheddy filed March 25, 2003. On June 3, 2003, Sheddy filed an Answer with New Matter to the Amended Complaint. On June 13, 2003, Piatt Township filed a Second Amended Complaint. Sheddy filed an Answer with New Matter to the Second Amended Complaint on July 28, 2003. The allegations made in New Matter assert that the enforcement notice was deficient and invalid, Sheddy has not committed a violation of the Piatt Township zoning ordinance, and that the filling fees for the appeal to the Piatt Township Zoning Hearing Board ("ZHB") are illegal. The preliminary objections presently before the Court are to that Answer with New Matter.

The main issue before the Court is whether Sheddy can, as a matter of law, raise the affirmative defenses they have asserted in the New Matter when they failed to appeal the enforcement notice to the Piatt Township ZHB. The Court holds that Sheddy cannot assert a majority of the allegations they have made in their New Matter. The failure to appeal to the

ZHB has resulted in a conclusive determination that they violated the zoning ordinance and renders the enforcement notice unassailable.

A preliminary objection in the nature of a demurrer should only be granted when it is clear from the facts that the party has failed to state a claim upon which relief can be granted. ***Sunbeam Corp. v. Liberty Mut. Ins. Co.***, 781 A.2d 1185, 1191 (Pa. 2001). The Court must admit as true all well pleaded material, relevant facts and any inferences fairly deducible from those facts. ***Willet v. Pennsylvania Med. Catastrophe Loss Fund***, 702 A.2d 850, 853 (Pa. 1997). If the pleaded facts set forth a claim for relief, which may be granted under any theory of law, then the demurrer should be denied. ***Ibid***.

The procedures and framework set forth in the Municipalities Planning Code are the exclusive means of appealing a zoning decision. 53 P.S. § 10615; ***Snyder v. Zoning Hearing Bd.***, 782 A.2d 1088, 1090 (Pa. Cmwlth. 2001). The zoning hearing board has exclusive jurisdiction to hear appeals from the determination of zoning officers. 53 P.S. §10909.1(a)(3); *see*, ***Borough of Latrobe v. Pohland***, 702 A.2d 1089, 1095 (Pa. Cmwlth. 1997). The only way to appeal the determination of a zoning officer that there was a violation is to appeal to the municipality's zoning hearing board. ***City of Erie v. Freitus***, 681 A.2d 840, 842 (Pa. Cmwlth. 1996), *appeal denied*, 690 A.2d 238 (Pa. 1997).

Since the zoning hearing board has exclusive jurisdiction, a landowner's failure to appeal the zoning violation notice to the zoning hearing board is fatal. ***Freitus***, 681 A.2d at 842. The failure to appeal to the ZHB results in a conclusive determination of a violation. ***Moon Township v. Cammel***, 687 A.2d 1181, 1184 (Pa. Cmwlth. 1997); ***Freitus***, 681 A.2d at 843. The failure to appeal also renders the zoning violation notice unassailable. ***Lower***

Southampton Twp. v. Dixon, 756 A.2d 147, 150 (Pa. Cmwlth. 2000); ***Twp. Of Penn v. Seymour***, 708 A.2d 861, 864 (Pa. Cmwlth. 1998). As such, the failure to appeal the zoning violation notice bars the district justice and the court of common pleas from conducting a *de novo* review of the violation. ***Freitus***, 681 A.2d at 843. At that point, a court's inquiry is limited to the assessment of the appropriate penalties. ***Ibid***.

It is clear that the failure to appeal the zoning violation notice results in a conclusive determination of a violation and precludes an attack on the merits of the underlying violation. ***Pohland***, 702 A.2d at 1096; ***Freitus***, 681 A.2d at 843. The failure to appeal the enforcement notice also forecloses challenges to issues outside of the merits of the enforcement notice. In ***Township of Penn v. Seymour***, the Superior Court held that a party waives a challenge to the constitutionality of the zoning ordinance when he fails to appeal the ZHB. 708 A.2d 861, 865 (Pa. Cmwlth. 1998). In ***Lower Southampton Twp v. Dixon***, the Superior Court held that an individual waived the right to challenge the constitutionality of the filing fee for appeal to the ZHB by failing to appeal to the ZHB and raise the issue there. 756 A.2d 147, 150 (Pa. Cmwlth. 2000).

Contrary to the argument of Sheddy, ***Freitus,*** *supra,* does not hold that a landowner can challenge the validity of the enforcement notice despite failing to appeal to the ZHB. Sheddy asserts that ***Freitus*** stands for the proposition that only after the municipality proves that it sent a *valid* enforcement notice and the landowner fails to appeal to the ZHB is the court limited to determining the appropriate penalties. (Emphasis added.) ***Freitus*** does not limit its holding in this manner.

The validity of the notice in ***Freitus*** was not at issue in the case and was not addressed by the Commonwealth Court. The Commonwealth Court held that the failure to appeal the enforcement notice to the ZHB was fatal because the ZHB had exclusive jurisdiction over ordinance violation determinations. ***Freitus***, 681 A.2d at 842 (citing ***Johnston v. Upper Macungie Twp***., 638 A.2d 408 (Pa. Cmwlth. 1994)). The conclusive effect of the failure to appeal had nothing to do with the validity of the enforcement notice.

The validity of the enforcement notice, like the merits of the underlying violation, is not an issue this Court can adjudicate when no appeal is taken to the ZHB. That is because the Court lacks subject matter jurisdiction.

> Jurisdiction is the capacity to pronounce a judgment of the law on an issue brought before the court through due process of law. It is the right to adjudicate concerning the subject matter in a given case…. Without such jurisdiction, there is no authority to give judgment and one so entered is without effect. The trial court has jurisdiction if it is competent to hear or determine controversies of the general nature of the matter involved *sub judice*. Jurisdiction lies if the court had the power to enter upon the inquiry, not whether it might ultimately decide that it could not give relief in the particular case.

Aronson v. Sprint Specvtrum, L.P., 767 A.2d 564, 568 (Pa. Super. 2001) (quoting ***Bernhard v. Bernhard***, 668 A.2d 546, 548 (Pa. Super. 1999)). It is subject matter jurisdiction that gives a court the ability to decide a controversy. ***Hughes v. Pennsylvania State Police***, 619 A.2d 390, 393 (Pa. Cmwlth. 1992).

A court does not have subject matter jurisdiction to hear challenges to the validity of the enforcement notice when no appeal was taken to the ZHB. An individual cannot challenge the enforcement notice in the court of common pleas in the first instance. The individual must appeal to the ZHB, because the ZHB has exclusive jurisdiction over zoning

officer determinations. 53 P.S. §10909.1(a)(3); ***Pohland***, 702 A.2d at 1095. In these matters, the court of common pleas functions as an appellate court, not a court of original jurisdiction. The court of common pleas would acquire jurisdiction over these cases pursuant to 53 P.S. §1002-A.[1] When the individual fails to appeal to the ZHB there is a missing step in the procedure. As such, this is not the type of case the court could hear. The issue can only come to the Court as an appeal from the ZHB.

As to Sheddy's assertion that ***Dixon***, *supra*, does not preclude them from raising a challenge to the filing fees, the Court disagrees. Sheddy argues that the decision was wrongly decided since the right to petition, a First Amendment right, is at issue finality is relaxed and the challenge can proceed despite the failure to appeal to the ZHB. For this proposition, Sheddy cites ***Peachlum v. City of York***, 33 F.3d 429 (3rd Cir. 2003)**.** In ***Peachlum***, the Defendants argued that the case was not ripe because there was no administrative finality since the ZHB had not had the opportunity to render a final adjudication of the matter. The Third Circuit disagreed and held that the First Amendment challenge to a zoning ordinance provision that restricts the size, content, and appearance of lawn signs in residential districts was ripe for decision by the District Court even though the ZHB has not heard the Plaintiff's appeal. ***Peachlum*** is not applicable to the case. Whether an issue is ripe and whether an issue is waived are two totally different questions. Ripeness deals with the question of whether the issue is fit for judicial determination. That is not an issue in the case *sub judice*. Under

[1] "All appeals from land use decisions rendered pursuant to Article IX shall be taken to the court of common pleas of the judicial district wherein the land is located and shall be filled within 30 days after entry of the decision as provided in 42 Pa.C.S.A. §5572 (relating to time of entry of order) or, in the case of a deemed decision, within 30 days after the date upon which notice of said deemed decision is given as set forth in section 980(9) of this act." 53 P.S. §11002-A.

Pennsylvania law, if no appeal is taken to the ZHB, then the issue is waived. There is no concern with the ripeness of the issues before this Court; therefore, ***Peachlum*** is inapplicable.

Therefore, the Court will grant Piatt Township's preliminary objections to a majority of the paragraphs in New Matter. The allegations in New Matter that challenge the adequacy and validity of the notice are stricken. The allegations alleging that Sheddy did not commit a violation of the zoning ordinance and the challenge to the constitutionality of the filing fees are also stricken. The failure to appeal the enforcement notice resulted in a conclusive violation of the Piatt Township zoning ordinance and waived the challenges set forth in Sheddy's New Matter. Therefore, Paragraphs 21, 23-43, 45-48, and portions of 22 and 44 are stricken. Paragraph 22 is stricken except for the assertion that Sheddy had ceased operation of the junkyard upon receiving the enforcement notice. Paragraph 44 is stricken except for the allegations that Sheddy are not currently in violation of the enforcement notice. These allegations are permissible because establishing whether an individual has complied with the zoning ordinance is the determinative factor in assessing the appropriate penalty. ***Freitus***, 681 A.2d at 843.

Accordingly, the Preliminary Objections of Piatt Township are granted in part and denied in part.

O R D E R

It is hereby ORDERED that the Preliminary Objections of Plaintiff Piatt Township to the New Matter of Defendants Sheddy Family Trust, Louis Sheddy and Beatrice Sheddy filed August 15, 2003 are granted in part and denied in part.

The Preliminary Objections are granted insofar as Paragraphs 21, 23-43, 45-48, and portions of 22 and 44 are stricken are stricken.

The Preliminary Objections are denied insofar as the portion of Paragraph 22, which asserts that Sheddy had ceased operation of the junkyard upon receiving the enforcement notice, is permissible.

The Preliminary Objections are denied insofar as the portion of Paragraph 44 which asserts that that Defendants are not currently in violation of the enforcement notice

BY THE COURT:

William S. Kieser, Judge

cc: Christopher M. Williams, Esquire
Matthew J. Zeigler, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)