

The Sheddy Family Trust is a revocable living trust that owns property at 500 Sams Road, Jersey Shore, Pennsylvania. Louis and Beatrice Sheddy are trustees of the Sheddy Family Trust who reside at 1545 Devils Elbow Road, Jersey Shore Pennsylvania (hereafter the Appellants are referred to collectively as “Sheddy”). It is alleged that the property located at 500 Sams Road is zoned as agricultural. It is also alleged that a junkyard was operated on that land.

Piatt Township Zoning Officer, David Hines, served Sheddy an enforcement notice on May 9, 2002 and June 18, 2002 for allegedly violating the zoning ordinance by operating a junkyard on the Sams Road property. Both notices state that if Sheddy wanted to appeal the zoning officer’s determination, they had thirty days to file an appeal with the zoning hearing board of Piatt Township. Sheddy contends that they contacted the zoning officer and were told that “they were not to appeal the determination, but rather they were to file for a variance.” Both Louis and Beatrice Sheddy had served on the Zoning Hearing Board of Piatt Township and admittedly knew that if the use was a non-conforming use, then they did not need to apply for a variance. Sheddy did not appeal to the Zoning Hearing Board within thirty days of the date of the enforcement notice. Subsequently, on or about October 30, 2000, Sheddy requested that the Zoning Hearing Board of Piatt Township hear their appeal *nunc pro tunc*. The Zoning Hearing Board denied that request by letter of November 27, 2002, having been advised that it did not have jurisdiction to entertain an appeal after the expiration of the thirty-day time period.

The Township commenced an enforcement proceeding against Sheddy in a District Justice Court on August 7, 2002, due to the zoning violation. On September 5, 2002 a

District Justice Court judgment was entered against Sheddy. Sheddy filed an appeal on October 4, 2002 under the case number 02-01,805. Pursuant to a Rule to File a Complaint that was issued, the Township filed a Complaint in that action. The enforcement notice at issue was the June 18, 2002 notice. On December 4, 2002, Sheddy filed preliminary objections to the Township's Complaint. On December 13, 2002, the Township filed an amended complaint, which alleges that Sheddy operated a junkyard in violation of the Township Zoning Ordinance and had failed to appeal the decision of the township zoning officer.

On December 4, 2002, Sheddy filed a Notice of Appeal and a Petition To Appeal *Nunc Pro Tunc* under this case number, 02-02,226. The enforcement notice claimed to be at issue was the May 9, 2002 notice. On December 20, 2002, the Township filed preliminary objections to the Notice of Appeal and Petition to Appeal *Nunc Pro Tunc* and a Motion to Quash Appeal. On February 7, 2003, this Court issued an order, based on the agreement of counsel, that the enforcement notice, which was the subject of the Notice of Appeal and Petition to Appeal *Nunc Pro Tunc*, was the June 18, 2002 notice, the same notice, which is the subject of the appeal in the enforcement action, #02-01,805.

There are four issues before the Court. The first is whether Sheddy's appeal is properly before the Court. This issue relates to the Township's Motion to Quash and Preliminary Objections to the Notice of Appeal. This issue will be addressed first. The remaining issues relate to Sheddy's Petition to Appeal *Nunc Pro Tunc*. Of these three issues the Court must first decide if it has jurisdiction to entertain a petition to appeal *nunc pro tunc* a determination of a zoning officer when no appeal to the zoning hearing board was timely made. Secondly, the issue is whether the petition to appeal *nunc pro tunc* alleges a valid claim for

such relief. Finally, the Court must decide whether Shedly is entitled to appeal *nunc pro tunc* to the zoning hearing board when it is alleged that a zoning officer told them they did not have to appeal, but rather should file for a variance.

I. The Motion to Quash the Appeal/Preliminary Objections to the Notice of Appeal

The issue of whether an appeal of a zoning decision is timely is of significance, because it is “well settled that the timeliness of an appeal is a jurisdictional question.” *Monroe County Bd. of Assessment Appeals v. Miller*, 570 A.2d 1386,1388 (Pa. Cmwlth. 1990); *Tarlo v. Univ. of Pittsburgh*, 443 A.2d 879, 880 (Pa. Cmwlth. 1982). “The timeliness of an appeal and compliance with the statutory provisions which grant the right of appeal go to the jurisdiction of a court and its competency to act.” *Big Bear Oil Co. v. Zoning Board of Adjustment*, 277 A.2d 166, 167 (Pa. Cmwlth. 1971). With this in mind, it is important to remember that courts do not have the power to enlarge or extend the statutory time frame for taking an appeal. *Ibid.* If the appeal is not timely, then the court does not have jurisdiction to hear it.

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

§10909.1(a)(3); *see, Borough of Latrobe v. Pohland*, 702 A.2d 1089, 1095 (Pa. Cmwlth. 1997).

Since the zoning hearing board has exclusive jurisdiction, a landowner's failure to appeal the zoning officer's determination to the zoning hearing board is fatal. *Freitus*, 681 A.2d at 842. A property owner's failure to appeal the zoning officer's determination makes the alleged zoning violation a conclusive violation. *Moon Township v. Cammel*, 687 A.2d 1181, 1184 (Pa. Cmwlth. 1997). This failure to appeal to the zoning hearing board "renders the zoning officer's determination of violation unassailable." *Pohland*, 702 A.2d at 1096; *Frietus*, 681 A.2d at 843.

The failure to appeal the determination of the Township zoning officer to the Township zoning hearing board renders the zoning officer's determination unassailable and leaves the Court without jurisdiction to hear Shedly's appeal. Shedly was given notice that it had thirty days from the date of the enforcement notice to appeal to the Township zoning hearing board. Shedly failed to make a timely appeal to the zoning hearing board. Shedly's failure to appeal the zoning officer's determination resulted in a conclusive determination that a zoning violation existed and foreclosed the right of review on direct appeal. Therefore, the Motion to Quash Appeal must be granted.

II. Petition to Appeal Nunc Pro Tunc/Preliminary Objections

First, this Court determines it does have jurisdiction to hear the Petition to Appeal *Nunc Pro Tunc*. A court has an "inherent and well established power where proper circumstances exist to entertain an appeal or petition *nunc pro tunc*." *Pottsville Referendum Case*, 70 A.2d 651, 655 (Pa. 1950). This power is discretionary and may be exercised on the

“proper occasion.” *Baker v. City of Philadelphia*, 630 A.2d 686, 689 (Pa. Cmwlth. 1992); *Appeal from Zoning Ordinance of Upper St. Clair Twp.*, 94 A.2d 91, 92-3 (Pa. Super 1953). A court should only exercise that power under the proper circumstances because an appeal *nunc pro tunc* is “ ‘intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain extraordinary circumstances.’” *Union Elec. Corp. v. Bd. of Prop. Assessment*, 746 A.2d 581, 584 (Pa. 2000) (quoting *Commonwealth v. Stoch*, 679 A.2d 760, 764 (Pa. 1996); *Nixon v. Nixon*, 989 A. 154, 157 (Pa. 1938).

This Court has jurisdiction to hear a petition seeking allowance to appeal *nunc pro tunc* to a zoning hearing board a zoning officer’s determination. It is appropriate for the Court to use its inherent power to hear the petition and determine if Shedly lost their appeal rights because of some extraordinary circumstances. If such circumstances did exist and the Court could not hear the petition, then there would be no forum to address the wrong and the value of *nunc pro tunc* relief would be diminished.

The Court also believes that the Township zoning hearing board could consider the *nunc pro tunc* petition. See *Weiman v. City of Philadelphia*, 564 A.2d 557 (Pa. Cmwlth. 1989). *Weiman* dealt with the *nunc pro tunc* appeal petition jurisdiction issue involving an appeal from the Court of Common Pleas to the Commonwealth Court, but its rationale is applicable in considering an appeal from a zoning hearing board to the Court of Common Pleas. The petitioner in *Weiman* first sought permission to an appeal *nunc pro tunc* from the Court of Common Pleas, but the court dismissed the petition because it believed it lacked jurisdiction as more than thirty days had passed from the issuance of the court’s order granting summary judgment. The petitioner appealed the Court of Common Pleas’ order denying his

nunc pro tunc petition. The Commonwealth Court held the *nunc pro tunc* petition could have been filed in either the trial court or the appellate court as both had jurisdiction to determine whether an appeal *nunc pro tunc* should be granted. *Id.*, at 559. *Weiman* further indicates the trial court is a more appropriate forum for deciding the *nunc pro tunc* petition if it will involve factual determinations or an evidentiary hearing. If there is no factual dispute the appellate court could entertain the petition. In the case *sub judice*, there is no factual dispute. Hence, we properly have jurisdiction to determine the *nunc pro tunc* petition..

Although this Court has jurisdiction to hear the petition to appeal *nunc pro tunc*, we find that the petition does not sufficiently set forth a claim for the requested relief. The time to take “an appeal cannot be extended as a matter of grace or mere indulgence.” *Union Elec.*, 746 A.2d at 583. “An appeal *nunc pro tunc* may be granted only when the party making the request has shown that the delay in filing the appeal was caused by extraordinary circumstances.” *Weiman, supra.* at 559. Such extraordinary circumstances exist when there “was fraud, a breakdown in the court’s operations, or non-negligent happenstance.” *Freeman v. Bonner*, 761 A.2d 1193, 1195 (Pa. Super. 2000). A fraud can occur when “a claimant is unintentionally misled by an official as to the proper procedures to be followed.” *Monroe County Bd. of Assessment Appeals v. Miller*, 570 A.2d 1386, 1388 (Pa. Cmwlth. 1990). An appeal *nunc pro tunc* is appropriate in that instance so that “it is possible to relieve an innocent party of injury consequent on such [a] misleading act.” *Flynn v. Unemployment Compensation Bd. of Review*, 159 A.2d 579, 580-81 (Pa. Super. 1960); *Marshall v. Unemployment Compensation Bd. of Review*, 111 A.2d 165, 166 (Pa. Super. 1955).

In *Union Electric, supra.*, the Allegheny County Board of Property Assessment, Appeals, and Review issued an order extending time for filing tax assessment appeals from February 29, 1996 to April 1, 1996. The Union Electric Corporation and Kohn, Incorporated filed their appeal on March 27, 1996. Following hearings held by the Board in March and April on their appeal, Union Electric and Kohn appealed to the Court of Common Pleas. *Ibid.* The Pittsburgh School District filed a Motion to Quash the initial appeal to the Board because it was beyond the original deadline. The trial court granted the motion and the Commonwealth Court affirmed because the Board had no authority to extend the deadline. *Id.* at 583.

However, the Supreme Court reversed the decision and held that the tax assessment appeals should be reinstated *nunc pro tunc*. *Union Electric, supra* at 584. The Supreme Court stated that while the Board did not have the authority to change the appeal deadlines, the Board misled Union Electric and Kohn into believing that it had such authority. *Ibid.* (Emphasis added) The “Board was cloaked with the apparent authority to extend the deadlines because it was the governmental reviewing body before which the appeals were filed.” *Ibid.* Union Electric and Kohn were prepared to file the appeal by the original deadline, but relied upon the apparent authority of the Board to change the deadlines and filed their appeal within the new time period. *Ibid.* It is clear in *Union Electric* that the action of the Board misled Union Electric and Kohn and caused them to act in detriment of their appeal rights; therefore, *nunc pro tunc* relief was appropriate.

In *Monroe County Board of Assessment, supra.* at 1387, the notices of the Board of Assessment’s decisions stated that a person had a right to appeal that decision to the court of common pleas within sixty days of the determination. This was in error as an appeal

from a decision of a tax assessment board had to be filed within thirty days after entry of the Board's order. *Ibid.* On appeal to the Commonwealth Court, the Board argued that the Court of Common Pleas had no jurisdiction to hear the appeal from the Board's decision since the appeal was filed after the thirty-day deadline. *Ibid.*

The Commonwealth Court held that it was not an abuse of the lower court's discretion to hear the appeal from the Assessment Board. *Monroe County Board of Assessment, supra*, at 1388. Appellant had relied on the information provided by the Board of Assessment and filed her appeal within the sixty day period. *Ibid.* Under the circumstances, it was permissible for the Court of Common Pleas to hear the appeal even though it was beyond the correct deadline.

In *Beardsley Appeal*, 24 D. & C. 2d 647, 648 (Chester County, 1961), several individuals filed a petition to appeal *nunc pro tunc* to the Court of Common Pleas an order from the Board of Adjustment of Tredyffrin Township. The board had passed a resolution granting a variance and directed that the township solicitor write the opinion. Following this, a number of the individuals contacted the township manager/zoning officer. He told the individuals that they had thirty days from the date the opinion was filed to appeal to the Court of Common Pleas. *Id.* at 648-49. This was in error as the thirty-day period began to run from the date of decision. *Id.* at 650.

The Court of Common Pleas granted the petition to appeal *nunc pro tunc*. The individuals relied on the information provided by the township manager/zoning officer and filed their appeal within thirty days from the date the opinion was filed. *Beardsley, supra.*, at 652. This was in detriment to the individuals' appeal rights as the thirty-day period from the

date of decision had passed. Having relied on the information provide by the official, granting the requested *nunc pro tunc* relief was appropriate.

Furthermore, we note that in *Union Electric* and *Monroe County Board of Assessment*, the misleading was done by the boards to which the appeal was to be taken. In our situation, the misleading asserted misleading information was not provided by the zoning hearing board but by a zoning officer who had no authority to speak for the board. *cf Beardsley Appeal, supra*, at 652. Regardless, *Union Electric, Monroe County Board of Assessment*, and *Beardsley* demonstrate that to establish a claim for relief to appeal *nunc pro tunc* there must be some sort of reliance upon the misleading information. Sheddy's petition does not allege reliance on the information provided by the township zoning officer. The petition alleges Sheddy contacted the Zoning Officer and "were advised that they were not to appeal the determination, but rather they were to file for a variance." In the next paragraph, the petition alleges that the "individual appellants have each served on the Zoning Hearing Board of the Township and were familiar enough with a variance to realize that if their use was permissible of [sic] it was a pre-existing, nonconforming use, they did not need to apply for a variance."

This indicates that Sheddy did not rely on the information, but in fact disregarded it based on their own knowledge. Had Sheddy filed for a variance instead, it would more likely have demonstrated a reliance on the alleged misleading information. Such reliance is a pre-request to *nunc pro tunc* relief. This position of non-reliance by Sheddy was confirmed by their counsel in oral argument; therefore, having admitted non-reliance there is no basis to permit a re-pleading of Sheddy's allegations. As the petition stands, there is no allegation that

Sheddy relied on the alleged statement by the township zoning officer to the detriment of their appeal rights. Thus, Piatt Township's Preliminary Objections must be granted and the Petition to Appeal *Nunc Pro Tunc* dismissed.

Having granted the Township's Preliminary Objections, the Court need not address the third and ultimate issue of whether Sheddy is entitled to *nunc pro tunc* relief.

ORDER

It is hereby **ORDERED** that Intervener's, Piatt Township, Motion to Quash Appeal filed December 20, 2002 is granted and Appellants' Notice of Appeal is quashed.

Intervener's, Piatt Township, Preliminary Objections to Appellants' Notice of Appeal are moot, as the Motion to Quash Appeal has been granted.

It is also hereby ORDERED that Intervener's, Piatt Township, Preliminary Objections to the Petition to Appeal *Nunc Pro Tunc* filed December 20, 2002 are denied in part and granted in part.

The Preliminary Objection to the jurisdiction of this Court to hear the Petition to Appeal *Nunc Pro Tunc* is denied.

The Preliminary Objection to the legal sufficiency of the Petition to Appeal *Nunc Pro Tunc* is granted.

Appellants' Petition to Appeal *Nunc Pro Tunc* filed December 4, 2002 is denied with prejudice.

BY THE COURT:

William S. Kieser, Judge

cc: Christopher M. Williams, Esquire
Matthew Zeigler, Esquire
Frank Miceli, Esquire
146 East Water Street; Lock Haven, PA 17745
Judges
Christian J. Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)