

AMMON SWAREY	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Appellant	:	
	:	
vs.	:	NO. 03-00,495
	:	
	:	
LIMESTONE TOWNSHIP ZONING, HEARING BOARD	:	
	:	
Appellee	:	MOTION FOR EVIDENTIARY HEARING

*Date: June 25, 2003*

**OPINION and ORDER**

**Facts/Procedural Background**

The motion before the Court for disposition is the Appellant Ammon Swarey’s (Swarey) Motion for Limited Additional Evidence to be Received by the Court or a Referee Pursuant to 53 P.S. §1105A filed March 27, 2003. Swarey wants this Court to schedule a hearing and take limited evidence to supplement the Limestone Township Zoning Hearing Board’s (ZHB) record. Specifically, Swarey wants to have made part of the record the contention that he did not have a copy of the zoning ordinance until December 13, 2002 and documentary evidence, which contradicts the testimony of Limestone Township Zoning Officer Dale Winter that he was unable to respond to Attorney Drier’s requests until December 6, 2002. A non-record conference/argument of involved counsel was held before the Court on May 27, 2003. From the documents filed of record and acknowledgements of counsel, certain procedural facts are clear and without dispute.

On October 29, 2002, Limestone Township Zoning Officer Dale Winter sent a Zoning Code Violation Enforcement Notice to Swarey for allegedly violating Article 3, §304 and Article 4, §437 of the Limestone Township Zoning Ordinance. Swarey received the enforcement notice on October 30, 2002. Swarey deposited five hundred dollars with his attorney, Marc. S. Drier, Esquire, on November 25, 2002 to cover any filing fees regarding the challenge of the alleged violation.

On November 27, 2002, Attorney Drier faxed a cover letter and document entitled Notice of Appeal of Ammon Swarey to the Township's fax number care of Dale Winter. Also on that date, Attorney Drier sent the same set of documents to the township secretary's home at 1408 Quarry Road, Jersey Shore, Pennsylvania 17740 via U.S. mail. (This apparently is the Township's designated mailing address, *see* N.T. pp. 14, 17, 18.) The documents were also sent on November 27<sup>th</sup> to the township solicitor, John A. Smay, Esquire, by fax and U. S. mail. The cover letter stated that a Notice of Appeal was enclosed and stated that Attorney Drier attempted to obtain a copy of the Townships' zoning ordinance and any forms required for the appeal. The cover letter also requested any information on the required fees and stated that as soon as the amount was disclosed the fee would be sent. No fee accompanied the documents.

November 27, 2002 was the Wednesday before Thanksgiving. The Limestone Township Office was unoccupied and no one was able to accept Swarey's appeal. Mr. Winter, the Zoning Officer, took vacation from Thanksgiving, the 28<sup>th</sup> through the first week of deer season and returned to work on the second Monday of December, the 9<sup>th</sup>. Swarey's appeal from the enforcement notice of October 29<sup>th</sup>, which he had received on October 30<sup>th</sup>, needed to

be filed within thirty days of receipt, that is, by November 30<sup>th</sup>. As November 30<sup>th</sup> was a Saturday the appeal would be deemed timely if filed as late as Monday, December 2<sup>nd</sup>.

On December 9, 2002, Winter faxed Attorney Drier a document stating that he would send a copy of the appeal form and a fee explanation to Attorney Drier. Winter also told Attorney Drier that a copy of the Township zoning ordinance could be obtained at the township building on Monday nights between 6:00 and 7:00 or by calling and making an appointment. In the letter, Winter told Attorney Drier that he had been unable to respond sooner because he was on vacation.

Attorney Drier prepared the township form and check for the filing fee on the following Monday, December 16, 2002. The check and the completed appeal application were mailed to the township, specifically to the Township's secretary's home address. They were alternately received by Mr. Winter on December 20, 2002. A hearing before the ZHB was scheduled for February 5, 2003. The Township ZHB failed to give notice of the hearing to Swarey. Due to this defective notice, the hearing was rescheduled for February 26, 2003.

At the beginning of the February 26, 2003 hearing, Swarey's counsel made an on-the-record motion asserting the proposed hearing for that date was invalid because it was not being timely held. (*See* N.T., 2/26/03, pp. 3, 4) Then an objection to the timeliness of the enforcement notice appeal was made by Julieanne E. Steinbacher, Esquire, who represented the Concerned Citizens of Nippenose Valley. (N.T., pp. 5-6) Thereafter, a lengthy questioning of the Zoning Officer, Dale Winter, was conducted by the ZHB attorney, Mr. Mussina and Swarey's attorney, Mr. Drier. (N.T., pp. 6-24) It does not appear in the record that Mr. Winter was ever sworn in as a witness. At the argument before this Court, however, no one contested

the accuracy of Mr. Winter's "testimony" concerning the procedural events which had preceded the February 26, 2003 ZHB meeting. Those events have been summarized in the above factual statement.

The focus of the February 26, 2003 hearing then shifted to whether or not Swarey's appeal from the enforcement notice was required to be sustained as a matter of law because the Township had not held a hearing on the appeal within sixty days. (N.T., pp. 24-42) This primarily involved a discussion between attorneys Mr. Mussina and Mr. Drier. The timeliness of the hearing issue also included a discussion as to when, if at all, the appeal of the enforcement notice had been perfected and if it was timely. On behalf of the interview at the ZHB proceeding, Attorney Steinbacher asserted the appeal was not timely. (N.T., pp. 42-45) After further discussion of counsel, Swarey, through Mr. Drier, clarified his position as being that he had perfected his appeal of the October enforcement notice by the FAX delivery of the appeal documents on November 27<sup>th</sup> and mailing of the original on the same date. (N.T., pp. 50-52)

The Township Solicitor, Mr. Smay, then presented some options to the ZHB as to the conclusion they might draw from those procedural events, including that the appeal was untimely filed or that the appeal was not timely filed until the fee was paid on December 20<sup>th</sup> and therefore was untimely. (N.T., pp. 52-54) The ZHB then voted that the fee must be paid before the appeal was perfected; therefore, Swarey's appeal of the October enforcement notice was untimely. (N.T., pp. 54-55) The hearing was then adjourned. (N.T., p. 55) Swarey then filed his appeal to this Court and the motion for a limited evidentiary hearing simultaneously on

March 27, 2003. Thereafter, a written “Memorandum, Findings, Opinion and Order” dated March 31, 2003 was entered by the Zoning Hearing Board.

**Discussion**

While there is no motion before the Court questioning the timeliness of Swarey’s appeal to the ZHB, it is necessary for this Court to decide the issue before ruling on the motion presently before the Court. If the appeal to the ZHB was untimely, then there is no need for a further evidentiary hearing, as the alleged violation would be deemed a conclusive violation. Also, the Court must decide the timeliness issue because it is a jurisdictional matter. In evaluating the ZHB’s conduct as would relate to the timeliness issue, the Court is limited in its scope of review to a determination of whether the ZHB committed a manifest abuse of discretion or an error of law, since no additional evidence has been taken. *Yost v. Zoning Hearing Bd.*, 694 A.2d 384, 386 n.4 (Pa. Cmwlth. 1997); *Teazers v. Zoning Bd. of Adjustment*, 682 A.2d 856, 858 n.3 (Pa. Cmwlth. 1996).

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 Bd. of Adjustment*, 277 A.2d 166, 167 (Pa. Cmwlth. 1971). Even if there is a question as to whether the issue of timeliness was properly raised before the zoning hearing board, the Court can raise the issue *sua sponte*. *Vanderlin v. City Council of Williamsport*, 821 A.2d 1287 (Pa. Cmwlth. 2003); *Pennhurst Medical Group v. Dep’t of Public Welfare*, 796 A.2d 423, 425 n.2 (Pa.

Cmwlth. 2002)(Questions of jurisdiction can never be waived, and may be raised at any time by the parties or the court *sua sponte*).

The only way to appeal the determination of a zoning officer 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). A failure to appeal to the zoning hearing board "renders the zoning officer's determination of violation unassailable." *Borough of Latrobe v. Pohland*, 702 A.2d 1089, 1096 (Pa. Cmwlth. 1997); *Freitas*, 681 A.2d at 843. The property owner's failure to appeal the zoning hearing officer's determination makes the alleged zoning violation a conclusive violation. *Moon Township v. Cammel*, 687 A.2d 1181, 1184 (Pa. Cmwlth. 1997). Consequently, a District Justice nor a Court of Common Pleas may not conduct a *de novo* review of a zoning violation on the merits where no appeal was taken to the zoning hearing board. *Freitas*, 681 A.2d at 824.

That is why determining the timeliness issue is of paramount importance. If the appeal was untimely, then the violation becomes conclusive and unassailable. All that would be left is the imposition of the appropriate fine. Consequently, there would be no need for a further evidentiary hearing, since the merits of the alleged violation would be determined.

With this in mind, the Court now takes up the timeliness issue. The Court holds that the appeal was timely filed and the Limestone Township ZHB had jurisdiction to hear it; therefore, it should not have dismissed the appeal. Although dealing with an appeal to the Superior Court and the Pennsylvania Rules of Appellate Procedure, the case *sub judice* is analogous to *First Union National Bank v. F.A. Realty Investors Corp.*, 812 A.2d 719 (Pa. Super. 2001). In *First Union*, the issue arose of whether an appeal was timely taken when the

notice of appeal was filed within the prescribed time period, but the filing fee was not paid until three months later. The Superior Court held that the appeal was timely. Citing to Pa.R.A.P. 905(a), which states that “Upon receipt of the notice of appeal the clerk shall immediately stamp it with the date of receipt, and that date shall constitute the date when the appeal was taken, which date shall be shown on the docket,” the Superior Court reasoned that the day the appeal was taken was the day it was filed and that the appeal was perfected by the filing. *First Union*, 812 A.2d at 722.

The Superior Court was also mindful of Pa.R.A.P. 905(c), which requires the appellant to pay the applicable fees upon filing the notice of appeal. *First Union*, 812 A.2d at 722. Even so, the Superior Court concluded that the failure to comply with the fee requirement did not “automatically render the appeal invalid.” *Ibid.* “Under Pa.R.A.P. 902, an appeal is perfected merely if it is filed” within the prescribed time period. *Id.* at 723. “[T]he perfection of the appeal does not depend in any way on the payment of the filing fee.” *Ibid.*

The Superior Court did not hold that the filing fee was a mere triviality that could be disregarded without consequence by the appellant. The Superior Court stated that an appellate court has the “authority to dismiss an appeal on the basis of failure to tender the required fee; however, that authority is a discretionary remedy which the appellate court can impose if circumstances warrant.” *First Union*, 812 A.2d at 723. Such circumstances might be when an appellant unduly delays paying the requisite fee, unduly delays seeking *in forma pauperis* status, deliberately fails to pay the fee, or “exhibit[s] a clear pattern of attempting to cause delay in legal proceedings by repeatedly filing appeals, then failing to timely remit the appropriate fees.” *Ibid.* The Superior Court made it clear that it did not endorse the failure to

follow the procedures mandated by the rules and would dismiss an appeal for failing to pay the fee under the appropriate circumstances. *Id.* at 723-24.

Similarly, Swarey's appeal of the enforcement notice was perfected when the township received the notice of appeal. The zoning ordinance requires that an appeal notice form and fee be submitted to the zoning officer within thirty days of receipt of the enforcement notice. The zoning ordinance states that the fee must be paid before the appeal is processed. The critical event is the filing of the notice of intent. The notice of intent declares the intention of the party to assert his appeal rights and puts the Township on notice of that intent, as well as the basis for the appeal. Under the zoning ordinance, the payment of the fee triggers the processing of the appeal, not whether an appeal has been filed. Therefore, the Court concludes that the filing of the notice of appeal on November 27, 2002 perfected the appeal.

To reach this conclusion, the Court determined that the document sent on November 27, 2002 via FAX to the Township was sufficient to perfect the appeal. The zoning ordinance requires that a notice of appeal form be used. The Township did not receive the completed notice of appeal form until December 20, 2002. However, in these circumstances, the Court will not let form prevail over substance.

“[T]he rules of procedure must be liberally construed so as to guaranty that actions . . . one are resolved in a just, speedy and inexpensive manner . . . .” *Delverme v. Pavlinsky*, 592 A.2d 746, 748 (Pa. Super. 1991) (The Superior Court applied a broader interpretation of procedural rules involving an appeal from a district justice decision.). Taking guidance from *Delverme* on how procedural rules should be interpreted, the Court believes that the November 27, 2002 faxed notice of appeal substantially complied with the zoning



ordinance. Upon examining the information requested in the form and that submitted by the faxed notice of appeal, it is clear that the faxed notice of appeal has provided the information that is requested in the form. At argument before this Court the ZHB and Township counsel acknowledged the adequacy of the appeal documents as to supplying all the information required in the appeal form (and more). It would not stand to reason that the appeal should be dismissed solely on the basis that the information requested was not provided in the blank spaces of a prearranged form sheet. Therefore, the faxed document was a valid notice of appeal.

The Court's holding should not be received as endorsing the disregard of the requirements of the Limestone Township zoning ordinance regarding appeals of enforcement notices, especially as to timely payment of the filing fee. Nevertheless, Swarey diligently pursued making an appropriate payment of the fee, especially in view of the delay in the Township's response between November 27<sup>th</sup> and December 9<sup>th</sup>. The payment was not dilatory as it was mailed within a week after the Zoning Officer gave Swarey's attorney notice of the amount due.

The Court also finds that the late payment of the appeal fee does not place the case *sub judice* in one of those circumstances where dismissal of the appeal would be warranted.

### **Conclusion**

The Court concludes that Swarey's appeal of the enforcement notice was timely. Swarey received the enforcement notice on October 30, 2002. Swarey had thirty days from receipt of that notice to file an appeal. Swarey filed within the prescribed time period by faxing

a notice of appeal on November 27, 2002 to the township care of Zoning Officer Dale Winter. Since the appeal was timely, the Limestone Township Zoning Hearing Board erred as a matter of law when it declared the appeal untimely.

The Court concludes that the appeal was timely and should have been heard by the Limestone Township Zoning Hearing Board.

**ORDER**

It is hereby ORDERED AND DIRECTED that the Swarey's appeal of the October 29, 2002 Zoning Code Violation Enforcement Notice be reinstated before the Limestone Township Zoning Hearing Board. The record is remanded to the Zoning Hearing Board of Limestone Township with the direction that the Board conduct an appropriate appeal hearing following proper notice..

It is also therefore ORDERED that Appellant Ammon Swarey's Motion for Limited Additional Evidence to be Received by the Court or a Referee Pursuant to 53 P.S. §1105A filed March 27, 2003 is denied as being moot/irrelevant.

BY THE COURT:

William S. Kieser, Judge

cc: Marc Drier, Esquire  
John A. Smay, Esquire  
Malcolm Mussina, Esquire  
Julianne Steinbacher, Esquire  
Judges  
Christian J. Kalas, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)