PIATT TOWNSHIP,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 02-01,805
	:	
SHEDDY FAMILY TRUST,	:	
LOUIS & BEATRICE SHEDDY,	:	
	:	SUPPLEMENTAL
Defendants	:	1925(a) OPINION

Date: June 18, 2004

SUPPLEMENTAL ORDER ISSUED IN SUPPORT OF THIS COURT'S ORDER OF FEBRUARY 18, 2004 AS DIRECTED BY THE ORDER OF THE COMMONWEALTH COURT DATED MAY 17, 2004 UNDER THEIR DOCKET NUMBER 441CD2004.

This Opinion is issued in order to comply with the Commonwealth Court's Order of May 17, 2004 in Docket 441CD2004, which involves the appeal of Sheddy Family Trust, Louis and Beatrice Sheddy, from this Court's Order of February 18, 2004. By their May 17, 2004 Order the Commonwealth Court directed this Court to further explain its rationale for the Order of February 18, 2004.

The Order of February 18, 2004 entered in this case denied the Motion for Reconsideration filed by Defendants/Appellants, Sheddy Family Trust, Louis and Beatrice Sheddy on February 3, 2004 (hereafter collectively "Sheddy"). That Motion for Reconsideration requested this Court to modify and reverse its decision denying Sheddy's Post-Verdict Motions. Post-Verdict Motions had been filed challenging this Court's Order of January 21, 2004 assessing a fine and other penalties against the Sheddy after a non-jury trial of a zoning enforcement action brought by Piatt Township (hereafter "Township"). This appeal is taken under two civil actions, case nos. 02-01,805 and 01-02,234. Both cases involve Sheddy

operating a junkyard in violation of the Township Zoning Ordinance, which resulted in Sheddy being fined and directed to close the junkyard operation in the non-jury trial disposition Order of January 21, 2004..

The February 18, 2004 Order of this Court denied reconsideration of the post-verdict motions following the January 30, 2004 Order denying post-verdict motions, because there were no new contentions of fact nor legal argument raised in either the Motion for Reconsideration nor in the prior Post-Verdict Motion of Sheddy.

Many of the issues raised in this appeal as set forth in Sheddy's Concise Statement of Matters Complained of on Appeal, filed March 12, 2004 (hereafter "Concise Statement") relate to this Court's various rulings, which preceded the non-jury trial. The rationale expressed in those rulings provides the basis for the non-trial disposition reached on January 21, 2004. Therefore, it may be helpful to the Commonwealth Court, as well as to counsel and the parties, for a specific setting forth of those prior rulings as would relate to the matters raised in the Concise Statement.

The 23 paragraphs of the Concise Statement raise three separate appeal issues:

First, was Sheddy legally estopped from challenging the underlying zoning enforcement violation notices when Sheddy had not taken an appeal of those violation notices to the Zoning Hearing Board?

Second, did Sheddy's failure to comply with discovery orders justify Sheddy being precluded from denying Sheddy had operated a junkyard on the property in question?

Third, was the imposition of a fine for violation of the Zoning Ordinance and assessment of attorney's fees against Sheddy a just disposition of this case?

The Complaint filed by Piatt Township to case No. 02-01,805 sought the assessment of a $500/day penalty for each day after a zoning enforcement order had become final from July 14-29, 2002, plus attorney's fees and costs as a penalty for Sheddys' violation of the Township Zoning Ordinance by the continued maintenance of a Junk Yard on Agriculturally Zoned land, known as 500 Sams Road, Jersey Shore, Pennsylvania. The Complaint filed to No. 02-02,224 is similar to the first, seeking the same penalty plus attorney's fees and costs from the date of July 29, 2002 through the date of trial, or, for such a period of time as Sheddys are shown to have continued the operation of the Junk Yard in violation of the enforcement notice.

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 an adjacent property known as 1545 Devils Elbow Road, Jersey Shore Pennsylvania (hereafter the Defendants/Appellants are referred to collectively as "Sheddy"). Louis and Beatrice Sheddy are also the owners and/or operators of a junkyard located on the Devils Elbow Road property. This litigation arose after Sheddy began using the Sams Road land as a junkyard without a zoning permit.

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.

The Township commenced an enforcement proceeding against Sheddy in a District Justice Court on August 7, 2002, due to the zoning violation as noticed in the June 18, 2002 enforcement notice. 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 on October 22, 2002. On or about October 30, 2002, 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.

On December 4, 2002, Sheddy filed preliminary objections to the Township's Civil Complaint in case #02-01,805. 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.

The case under 02-00,224 also was initiated on December 6, 2002 in this Court by Sheddy's Appeal from a District Justice judgment for the post-July 29, 2002 ongoing violations. The Township filed its complaint on December 12, 2002.

On December 4, 2002, Sheddy had filed a Notice of Appeal and a Petition To Appeal *Nunc Pro Tunc* under Lycoming County 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. By that action Sheddy sought to appeal the zoning enforcement notice of June 18, 2002 notice, the same notice, which is the subject of the appeal in the enforcement action, #02-01,805.

This Court quashed Sheddy's appeal and sustained the Township's preliminary objections to Sheddy's *Nunc Pro Tunc* appeal petition, by an Opinion and Order of March 3, 2003 in Case No. 02-02,226. That decision states the essential rationale for this Court's finding in these cases under appeal that the zoning enforcement notice was valid and that Sheddy lacked legal standing to challenge its validity in these proceedings. In reaching that conclusion we stated:

> ***I. The Motion to Quash the Appeal/Preliminary Objections to the Notice of Appeal...***
>
> 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. Freitus***, 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; ***Freitus***, 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 Sheddy's appeal. Sheddy was given notice that it had thirty days from the date of the enforcement notice to appeal to the Township zoning hearing board. Sheddy failed to make a timely appeal to the zoning hearing board. Sheddy'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*....

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)....

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 (seeking to appeal the zoning enforcement notices) 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.

Opinion of March 7, 2003, #02-02,226, pp. 2-11.

Sheddy has not appealed this Order of March 7, 2003, so it has become final.

On March 25, 2003 Sheddys filed preliminary objections to both Complaints, in cases #02-01,805 and #02-00,224, which are the subject of this appeal. Sheddys also on that date filed a motion to join the two actions and to toll the per diem fine. On April 9, 2003 Piatt Township filed preliminary objections to Sheddys' preliminary objections. This Court's Opinion and Order of May 8, 2003 provides further rationale, which goes to the issue on appeal as to

whether Sheddy was precluded from challenging the validity of the zoning enforcement notices; this Opinion also supports the levying of a per diem fine. At that time we entered the following:

> At argument, Sheddys also withdrew their preliminary objection to the complaints asserting that Sheddys are individually responsible for damages. Sheddys also withdrew the preliminary objection that asserted the Township could not pursue penalties over and above that which they had initially sought from an action brought before District Justice Lepley. Sheddys were well advised to withdraw those preliminary objections as they were in fact without merit. The preliminary objections that remain before this Court for decision are whether or not the complaints are sufficient as matters of law. Sheddys object that the complaints are not divided into separate counts, allege conclusions of law, do not allege material facts, and altogether do not state a cause of action. Sheddys also have preliminarily objected to lack of appropriate verification to the complaints inasmuch as they are verified by the Township Zoning Officer, rather than by a supervisor.
>
> Also for resolution by this Court is whether or not to grant Sheddys' request to toll the per diem fine. Sheddys argue that it is excessive and that the Court's failure to toll the per diem fine acts to frustrate their ability to seek relief by asserting their legal rights to defend the action since the per diem fine would be an unbearable penalty considering the lengthy time anticipated for the litigation. In this regard, Sheddys assert that the Municipalities Planning Code 53 P.S. §10617.2(b) authorizes this Court to toll the per diem fines until a judgment of a violation is entered.
>
> The Township seeks to strike the preliminary objections on the basis that the preliminary objections were not filed until after a notice of intent to enter a default judgment was served and filed. The Township asserts that while it may have impliedly agreed to an extension of time to file an answer to the complaints until such time as this Court entered its ruling on Sheddys' Petition to Appeal *Nunc Pro Tunc*, the Township had contemplated and agreed to an answer being filed and not preliminary objections. The Township asserts that once the notice of intent to file default action was filed of record and served the only way to prevent a default judgment from being entered would be for Sheddys to file an answer to the complaint. The Township also objects to tolling the per diem fine on the basis that a final determination has been made that a violation has occurred, and, as such, the statute, and the reasons behind the statute

relied upon by Sheddys, is not applicable. Further, the Township asserts it is now entitled to have the Junk Yard cease operations as it is a finally determined violation and that failure to impose a per diem fine will allow the Junk Yard to operate until the litigation is completed without sanction.

The Court finds that the preliminary objections by Sheddys are without merit. Inasmuch as the preliminary objections of Sheddys are to be dismissed, the preliminary objections of the Township become moot. The Court also finds there is no appropriate basis either by statute or reason for the per diem fines to be tolled at this time.

Discussion

The issue to be resolved in this litigation is the appropriate amount of fine to be imposed because of Sheddys' operation of a Junk Yard in contravention of a valid zoning enforcement order, which has become final. The litigation will determine an appropriate fine, up to a $500 per day maximum, and the number of days for which it should be imposed, that is, for what length of time have Sheddys operated the Junk Yard in defiance of the enforcement notice. The litigation will also determine what Sheddys should pay in the way of costs and attorney's fees.

The facts of this case are very similar to the situation brought before the Pennsylvania Commonwealth Court in the case of ***Erie v. Freitus***, 681 A.2d 840 (Pa. Cmwlth. 1996). The decision in that case made it clear that once a landowner was given notice of a zoning violation the violation notice could be contested only by way of appeal to the zoning hearing board. The Court made it clear that the violation cannot be defended when a municipality seeks violation fines before a district justice or a civil action before this Court. ***Id.*** at 842.

The Court in ***Erie*** went on to point out that neither the District Justice nor this Court may conduct a *de novo* review of the merits of a violation notice where an appeal was not taken to the zoning hearing board. 681 A.2d at 842. Both a district justice and this Court are limited to imposing appropriate fines under the Municipalities Planning Code provisions, 53 P.S. §10617.2 when an action, such as that now before us, is brought. This is because the landowner's failure to appeal to the zoning hearing board rendered the violation notice unassailable and thereafter a court's inquiry is

limited only to the assessment of appropriate penalties. ***Erie*** also points out that the determinate factor concerning assessing a fine is whether or not the landowner has complied with the zoning ordinance, and in ***Erie*** the Commonwealth Court indicated that since the landowner had not produced any evidence to demonstrate that he had brought his property into compliance with the ordinance that a per diem fine would be appropriate. ***Id.*** at 843.

Accordingly, the complaints filed in this action state a sufficient cause of action for collection of the appropriate penalties under the Zoning Ordinance. The complaints recite the entry of the enforcement order and assert that the violation has continued to exist after the enforcement order was issued. This, combined with an order that was not appealed and an ongoing violation, sufficiently sets forth a cause of action.

The Court also believes that the verification to the complaints by the zoning officer, David Hines, is valid. A zoning officer is authorized to bring civil enforcement proceedings to enforce the municipality's zoning ordinance. 53 P.S. §10614. It is apparent from the complaints that David Hines was the zoning officer who issued the enforcement notices and would have knowledge of the facts necessary to set forth the cause of action. Hines is an agent of Piatt Township, and his verification on behalf of the township is appropriate. ***Kensington Mfg. Co. v. Thermal Seal Window Corp., Inc.***, 20 Pa. D. & C. 3d 733 (Lehigh Cty. 1981); ***Hess v. Wyoming Valley Cold Storage and Ice Company, Inc.***, 70 Pa. D. & C. 399 (Luzerne Cty. 1949). Sheddys have not cited this Court any case, statute or rule, which supports their claim that the verification by the zoning officer is insufficient.

Conclusion

For the reasons noted above, as well as the reasoning of the Commonwealth Court in ***Erie***, *supra*, this Court believes it is inappropriate to toll the per diem fine. A final judgment has been made as to Sheddys' actions in maintaining the Junk Yard being a violation of the Township Ordinance. Even though they have not appealed the determination Sheddys allegedly are continuing to operate the Junk Yard in defiance of that determination. If they do so, they are subject to per diem fines for their knowing violation. This is particularly true inasmuch as there is no on-going litigation, which could result in the overturning of the enforcement notice, and

> determination that Sheddys are in violation of the Township Ordinance.

Opinion of May 8, 2003, pp. 2-6.

Despite these rulings Sheddy again sought to raise the issue of the validity of the zoning enforcement notices through their New Matter filed in response to the complaint. This Court's Opinion and Order of November 19, 2003, is relevant to this Court's rationale, which limited the eventual non-jury trial held January 21, 2004 to a determination of the appropriate fine to be assessed against Sheddy. The November 19, 2003 decision provides as follows:

> 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....
>
> 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 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

[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.

> 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.

Opinion of November 19, 2003, pp. 1-7.

The foregoing recitals from the prior decision of this Court address most of the matters raised in the Concise Statement. As for the most part those issues challenge the Court's finding that Sheddy lost the right to contest the legality of the civil enforcement notice when Sheddy failed to take an appeal to the Zoning Hearing Board including any challenges to the constitutionality of the Zoning Ordinance or the filing fees. *See* Concise Statement, Nos. 1 through 10.

In Concise Statement No. 7 the issue of lack of service of the civil enforcement notices raised by Sheddy and this likewise was waived when there was a failure to take an appeal to the Zoning Hearing Board. In addition, it is clear from the testimony introduced by Sheddy at the trial held in this matter that the claims as to lack of service are meritless. The testimony of Louis Sheddy on direct examination established without doubt that the enforcement notice was issued and served on him on June 18, 2002, that he received it and that he understood it and recognized that

he was being advised that he had to remove all junk cars and pieces of cars from the 500 Sams Road property. *See*, N.T. 1/21/04, pp. 64-68.

The Sheddy testimony at trial, particularly that of Louis Sheddy, also demonstrates the lack of merit of the other matters raised in the Concise Statement relating to the matter of the appropriate fine and other penalties assessed by the Court at the conclusion of the trial, Concise Statement paragraphs 12-20 and paragraphs 11 and 21 in which Sheddy also raised the issue of being precluded from presenting certain testimony at the time of trial to the effect that they were not in violation of the zoning ordinance.

At the trial Sheddy further testified he had been using this Sams Road property for 40 solid continuous years as a part of his salvage/junkyard operation with some vehicles being placed on it and some having been removed from the time of the enforcement notice had been issued in June 2002. *See*, N.T. 1/21/04, pp. 69-70. Sheddy also knew he had the right to file an appeal from the Zoning enforcement notice on the basis of this property being a non-conforming use but failed to do so. ***Id.*** Despite Sheddy knowing and understanding that they were being cited for improper use of the Sams Road property as a junkyard, Sheddy continued from 2002 through the date of trial in placing junk cars upon the property, asserting it was integral to and necessary to his salvage yard operation that was carried on legitimately on his Devil's Elbow Road property. In his testimony Sheddy also indicated that in 2002 he had an adjusted gross income of $3,542 but without any of the income from his business. In fact, the Tax Returns submitted at trial do not show Sheddy had any business income after the year 1999 in which the Tax Return showed salvage yard business income of $13,653. *See*, N.T. 1/21/04, p. 96, *et al*.

In addition, at trial the Township introduced testimony and photographic exhibits which demonstrated that the Sams Road parcel of ground was rural farmland-type property with some fencerow woods and other woodland and quite a bit of open field. The testimony also indicated that scattered around this farm (approximately 50 acres, if not larger) was a sporadic arrangement of vehicles grouped at various places particularly along the edges of the fields and woodland. The vehicles varied in number from time to time between 25 and 50. The vehicles were often placed close to the property lines. From this testimony and the exhibits it became clear to the Court that there was no business necessity or compelling reasons of any nature, which would have established that this property was being used as an integral part of any business. There was clearly no necessity, such as growth of business at the Devil's Elbow Road property, requiring that junked cars had to be pushed over onto the adjoining Sams Road property nor any reason whatsoever why the vehicles which were assertedly part of the junkyard business could not have been put at one convenient small section of the property. *See*, Testimony of Zoning Officer Steve Helm, N.T., 1/21/04, pp. 31-34 and Testimony of Dave Hines, N.T. 1/21/04, pp. 14-30. Rather, the evidence demonstrated an intentional act on Sheddy's part to violate the Zoning Ordinance by spreading vehicles out in disarray over a large section of ground while at about the same time preserving the entire tract of ground so it could be used for its regular and appropriate agricultural purposes. The Court determined that on these 50 acres some 35 cars were typically scattered around it. The Court determined that it was necessary to impose a reasonable fine that would encourage Sheddy to remove the 35 vehicles from the lot without delay while at the same time entering an appropriate penalty that recognized the significance of the Zoning Ordinance and Sheddy's flagrant violation of it. Accordingly, the Court chose to levy

a fine of $2 per car, per day for the 570 days that Sheddy was in violation and further provided that if the cars would be removed within 15 days from the day of the Court's Order that the fine would be reduced to $1 per day, per car or a maximum of $15,000 if the cars were removed and the fine paid in full within 60 days of the date. The Court also awarded attorney's fees to the Township as provided by the Zoning Ordinance. *See*, N.T. 1/21/04, pp. 92-102, for further explanation of the Court's rationale for the amount of the fine.

Sheddy's evidence concerning the operation of a junkyard and the amount of the fine to be imposed was not erroneously precluded. The Township had sought through discovery many times to obtain records from Sheddy indicating when and if Sheddy had used the Sams Road property as a junkyard, including when vehicles would have been first placed on the property, what vehicles had been placed on it and what vehicles were removed. Sheddy continually refused to answer the discovery requests. The Township also sought to try and find out the details behind the organization of the Sheddy Family Trust and the relationship of Louis and Beatrice Sheddy to it. An order compelling Sheddy to furnish the requested discovery was entered November 23, 2003. Sheddy failed to comply with that Order.

A discovery sanction hearing was held on January 9, 2004. The Court Order entered on that date found Sheddy in contempt of the discovery order of November 23, 2003 and as a sanction the Court denied Sheddy the opportunity to testify that they did not have junk cars on the Sams Road property or were not operating a junk vehicle business on the property. The foregoing testimony at the January 21, 2004 trial of Sheddy makes clear that this sanction order did not prejudice Sheddy because Louis Sheddy testified to the effect they were operating a junkyard on the Sams Road property and that 35 junk vehicles were located there. The

preclusion of evidence as a discovery sanction was appropriate and did not in fact prejudice Sheddy. Nor was Sheddy prejudiced because the sanction precluded introducing evidence of a non-conforming use of the Sams Road property. As discussed above, the non-conforming use issue evidence was not relevant because Sheddy had not appealed the zoning enforcement violation notice to the Zoning Hearing Board. Sheddy admittedly recognized the non-conforming use intention would have been a defense to the civil enforcement notice, and Sheddy refused to file an appeal from that notice and thus waived his right to introduce any evidence in these proceedings concerning the extent of the non-conforming of the 500 Sams Road property.

Based upon the foregoing, this Court believes its Order of January 21, 2004 is fair and just and legally appropriate and should be affirmed.

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)