

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

<b>STEVEN DAYE,</b>	<b>: No. 07-00864</b>
<b>Plaintiff</b>	<b>:</b>
	<b>:</b>
<b>vs.</b>	<b>: CIVIL ACTION – LAW</b>
	<b>:</b>
	<b>:</b>
<b>MARK WILLIAMS,</b>	<b>:</b>
<b>NANCY WILLIAMS,</b>	<b>:</b>
<b>LYCOMING COUNTY,</b>	<b>: Order re Jurisdiction of the Court</b>
<b>PENN TOWNSHIP,</b>	<b>: to hear Plaintiff’s Petition for Preliminary</b>
<b>Defendants</b>	<b>: Injunction</b>

**OPINION AND ORDER**

This matter came before the Court on a Petition for Preliminary Injunction filed by Plaintiff Steven Daye, through his counsel Douglas Engelman. The relevant facts follow:

Mark and Nancy Williams sought a building permit to put a seasonal residence on parcel number 44-336-151. Ultimately, the zoning administrator denied the permit application by sending a letter dated April 27, 2006 to Mr. Williams, because there was no dwelling unit available for Mr. Williams’ parcel. The zoning administrator noted in his denial letter that Mr. Williams could re-apply for a zoning permit if the situation changed.

Mr. Williams filed an appeal to the zoning hearing board on May 25, 2006. Plaintiff was opposed to Mr. Williams’ appeal. He hired Douglas Engelman to represent him. A hearing on the appeal was scheduled for various times and notice was given to Plaintiff or his counsel, but each time the hearing was continued for a variety of reasons.

On January 25, 2007, Lycoming County on behalf of the Planning Commission entered an agreement with Mr. and Mrs. Williams to transfer a building unit

from parcel number 44-336-150A to the Williams' parcel number 44-336-151.<sup>1</sup> In exchange, Mr. and Mrs. Williams agreed to withdraw their appeal to the zoning hearing board and make a new application for a zoning permit. Mr. and Mrs. Williams also agreed to assign any action they had against Darwin Whitmoyer to the County and release any claim or action they may have against the County.<sup>2</sup>

Mr. Williams filed a new application for a permit on or about March 2, 2007. Defendant Williams Exhibit 1. On March 6, 2007, the zoning administrator approved the permit. On March 14, 2007 James Casale, counsel for Mr. and Mrs. Williams, faxed and mailed a letter to counsel for Plaintiff informing him of the agreement with the County and the permit approval. Defendant Williams Exhibit 2. In the letter Mr. Casale also asked Mr. Engelman to advise him whether Plaintiff intended to file an appeal. On March 28 or 29, Mr. Engelman met with Plaintiff to discuss whether he wanted to challenge the approval of the permit. In a letter dated March 30, 2007, a colleague of Mr. Engelman sent a letter on Mr. Engelman's behalf advising Mr. Casale that Plaintiff intended to appeal the approval of the zoning permit. Defendant Williams Exhibit 3. No appeal, however, was ever filed with the zoning hearing board.

On April 3, 2007, Mr. Engelman wrote a letter to Mr. Casale requesting information regarding the assignment of the dwelling unit permit to Mr. and Mrs. Williams. Defendant Williams Exhibit 5. The next day Mr. Casale replied to the letter and provided

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1 At the January 25, 2007 commissioners' meeting, the Lycoming County commissions approved the purchase of a building unit from the owners of parcel number 44-336-150A and the assignment of that building unit to Mr. and Mrs. Williams for parcel number 44-336-151.

2 It was alluded to at the argument, although the details were not placed on the record, that Mr. and Mrs. Williams sought subdivision approval from the Planning Commission in the latter part of 2005 prior to purchasing the parcel in question. The Planning Commission initially approved the application and the Williams' purchased the property. Thereafter, the Planning Commission revoked its approval.

Mr. Engelman with a copy of the agreement between Lycoming County and Mr. and Mrs. Williams. Petition for Injunctive Relief, Exhibit B.

On April 23, 2007, Mr. Engelman filed a petition captioned “Petition for Injunctive Relief Appeal from Decision of a Local Governmental Unit, and Complaint in Equity” on Plaintiff’s behalf. In the Petition, Plaintiff sought to enjoin issuance of the permit to the Williams and to enjoin the Williams from placing any building unit, dwelling or residence on their property because allowing the transfer of the building unit and the issuance of a permit would allow a sixth building unit on the parent tract in violation of the zoning ordinance. The preliminary injunction was scheduled to be heard on April 25, 2007 at 2:00 p.m. At the time scheduled for hearing, counsel for Defendants Williams orally raised a preliminary objection that the Court lacked jurisdiction to hear the preliminary injunction because Plaintiff failed to exhaust his administrative or statutory remedies by failing to file an appeal with the zoning hearing board from the zoning administrator’s approval of the building permit. The remaining defendants concurred in the objection and also argued that jurisdiction was lacking.

Section 909.1(a)(3) of the Municipalities Planning Code, 53 P.S.

§10909.1(a)(3), provides the zoning hearing board with the exclusive jurisdiction to hear and decide appeals from determinations of the zoning officer, including the granting of any permit. An appeal may be filed with the board in writing by any person aggrieved. 53 P.S. §109313.3. No person, however, may file any proceeding with the board later than 30 days after an application for development has been approved if the proceeding is designed to reverse or limit the approval in any manner unless the person alleges and proves that he had no notice, knowledge or reason to believe that such approval had been given. 53 P.S.

§10914.1.

The zoning administrator approved the Williams permit application on March 6, 2007. Therefore, any appeal should have been filed on or before April 5, 2007.

Plaintiff claims that since he did not receive official notice from the County or the zoning administrator, his appeal period has not yet run. The Court cannot agree.

Plaintiff's counsel had notice that the Williams received approval of their permit as of March 14, 2007 when Mr. Casale faxed and mailed a letter stating that an agreement had been reached where the County obtained a building unit and transferred it to the Williams property and that a permit was issued to Mr. Williams. It does not matter that the notice did not come from a county official, so long as the document provided Plaintiff with notice, knowledge or reason to believe that approval had been given, which it did.

Plaintiff next asserts that the appeal period has not yet expired because he personally did not have any reason to believe approval had been granted until he met with Mr. Engelman on March 29. He further argued that Mr. Engelman only represented him on the zoning hearing board appeal that was withdrawn by the Williams and not the new permit approval. Again, this Court cannot agree. The argument that Mr. Engelman did not represent Plaintiff on the new permit approval is disingenuous. Actions speak louder than words. Mr. Engelman's actions show that he was representing Plaintiff. Notably, the reply to Mr. Casale's letter was not that Mr. Engelman did not represent Plaintiff; rather, the reply was he intended to appeal the decision. Defendant Williams Exhibit 3. Mr. Engelman also requested further information from Mr. Casale regarding the assignment of the dwelling unit and the approval of the permit and Mr. Casale promptly provided that information. See Defendant Williams Exhibit 3 and Exhibit B to the Petition for Injunctive Relief,

respectively. Furthermore, the issue remained the same, i.e., whether building on the Williams parcel would violate the zoning ordinance. Plaintiff, through his counsel, had notice, knowledge or reason to believe the permit had been approved by March 14, 2007. At the latest, an appeal needed to be filed by April 13, 2007.

**ORDER**

AND NOW, this \_\_\_\_ day of April 2007, the Court GRANTS Defendants' objection and DISMISSES Plaintiff's Petition for Injunctive Relief. The Court lacks jurisdiction to hear this matter because Plaintiff failed to exhaust his administrative or statutory remedies by failing to file an appeal from the zoning administrator's approval of the permit to the zoning hearing board.

By The Court,

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Kenneth D. Brown,  
President Judge

cc: Douglas Engelman, Esquire (counsel for Plaintiff)  
James Casale, Esquire (counsel for Williams)  
E. Eugene Yaw, Esquire (counsel for Lycoming County)  
J. Michael Wiley, Esquire (counsel for Zoning Administrator)  
Charles F. Greevy, III, Esquire (counsel for Planning Commission)  
Garth Everett, Esquire (counsel for Penn Township)  
Work file  
Gary Weber, Esquire (Lycoming Reporter)