

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MARK MORGENFRUH, : CV-22-00277
Plaintiff :
vs. :
LARRY W. DEREMER and DENNIS L. PAULHAMUS :
and JEFFREY S. WAGNER, Supervisors of :
Lycoming Township, Lycoming County, and :
JAMI NOLAN in his capacity as Sewage Enforcement :
Officer for Lycoming Township, Lycoming County, :
Defendants :

OPINION AND ORDER

AND NOW, this 28th day of December 2022, the Court hereby issues the following OPINION and ORDER regarding Defendants' Preliminary Objections to Plaintiff's Complaint.

BACKGROUND

Plaintiff commenced this action by filing a Complaint in Mandamus on March 16, 2022. Plaintiff alleges that he owns real property in Cogan Station, Lycoming County (the "Premises") with an existing septic tank. Plaintiff constructed a detached garage (the "Garage") on the premises, for which he obtained a permit from Lycoming Township. Plaintiff avers that he contacted Defendant Jami Nolan ("Nolan"), Sewage Enforcement Officer for Lycoming Township, regarding his plan to install a bathroom in the garage and attach the bathroom to his existing septic tank, but that Nolan "insists that Plaintiff secure an entirely new sewage system permit, and construct an entirely new sewage system, for the Garage Construction."

Plaintiff also avers that Nolan unnecessarily required “two new successful percolation tests,” and that he complied with this request.

Plaintiff avers that in light of Nolan's insistence that he obtain a new sewage system permit, he contacted the other named Defendants (the “Supervisors”) to obtain such a permit, paying all relevant fees, but the Supervisors refused to issue the permit because the construction of the bathroom would render the garage a “second residence” at the premises. Plaintiff disputed this conclusion, and the Lycoming Township Zoning Hearing Board (the “ZHB”) held a hearing on November 17, 2021 to address the issue. The ZHB ultimately granted Plaintiff's request to construct a bathroom in the Garage as long as he complies with certain additional conditions. Neither party appealed from this determination.

Plaintiff alleges that despite the ZHB determination, Defendants still refuse to issue the permit to install the second septic system. Plaintiff contends that in light of the ZHB's decision, Defendants do not have discretion to refuse the issuance of the requested permit, but are instead to take the “ministerial act” of issuing the permit as directed by the ZHB. Plaintiff ultimately asserts that Defendants' refusal to issue the sewage permit constitutes a violation of 35 P.S. § 750.7, the section of the Pennsylvania Sewage Facilities Act (“PSFA”) dealing with permits. Plaintiff asks the Court to issue a writ of mandamus directing Defendants to issue a sewage permit in accordance with the ZHB determination.

PRELIMINARY OBJECTIONS

On April 5, 2022 Defendants filed Preliminary Objections to the Complaint. Defendants' first preliminary objection asserted that Plaintiff failed to exercise all available statutory remedies as a prerequisite to bringing this action in the court of common pleas.¹ Defendants highlight § 750.16 of the PSFA, which states that "[a]ny person aggrieved by an action of a local agency or sewage enforcement officer in granting or denying a permit... shall have the right within thirty days after receipt of notice of the action to request a hearing before the local agency." Defendants contend that Plaintiff's action is improper because he did not request a hearing before the Supervisors concerning their refusal to issue the permit he seeks.

Defendants' second preliminary objection is a demurrer,² asserting that Plaintiff did not sufficiently plead that he had applied for a sewage permit from the Supervisors, and therefore could not seek the issuance of that permit until he demonstrated that he had applied for it.

The Court scheduled argument on Defendants' Preliminary Objections for June 22, 2022.

On April 12, 2022, Plaintiff filed an Answer to Defendants' Preliminary Objections. With regard to the exhaustion of statutory remedies, Plaintiff referred to a letter that Plaintiff's counsel sent to counsel for Defendants on April 6, 2022. This

¹ Pa. R.C.P. 1028(7) permits preliminary objections for "failure to exercise or exhaust a statutory remedy...."

² Pa. R.C.P. 1028(4) permits preliminary objections for "legal insufficiency of a pleading (demurrer)...."

letter first indicated that Plaintiff had in fact applied for a permit, as “it was undisputed that [Plaintiff] was granted a permit for construction of a garage with a bathroom... but that Jami Nolan refused to issue him the required permit for an on lot septic system.” Counsel for Plaintiff next indicated his position that “the purpose of the [ZHB] Hearing was to appeal [the] decision of the Supervisors [not to issue the permit]. Never, before [the filing of] Preliminary Objections, has anyone ever suggested that the proper forum is the Board of Supervisors.” Counsel for Plaintiff concluded by asking counsel for Defendants to “accept this letter as an appeal of the decision” of Defendants not to issue the permit and offering to immediately pay any associated fee.

Regarding the second preliminary objection, Plaintiff asserted that he had “satisfied all requirements for seeking a permit for a septic system,” as evidenced by correspondence received from Defendants indicating that “despite Plaintiff’s application, the permit would not be issued.”

Also on April 12, 2022, Plaintiff filed a Motion seeking leave of court to present testimony at the June 22, 2022 hearing in order to “build a record regarding the [ZHB] proceedings.” The Court granted this Motion, allowing both parties to present testimony and evidence related to Defendant’s Preliminary Objections on June 22, 2022.³

³ Pa. R.C.P. 1028(c)(2) states that “[i]f an issue of fact is raised” in preliminary objections, “the court shall consider evidence by depositions or otherwise.” The note to Pa. R.C.P. 1028(c)(2) indicates that “[p]reliminary objections raising an issue under subdivision [(a)(7)] cannot be determined from facts of record....” Defendants’ first preliminary objection raises an issue under Pa. R.C.P. 1028(a)(7).

At the hearing on June 22, 2022, Plaintiff submitted eighteen exhibits, including:

- A January 9, 2021 Application for an On-Lot Sewage Disposal System Permit (Exhibit 1);
- The permit for the Garage, issued December 15, 2020 (Exhibit 3);
- A May 28, 2021 letter from Lycoming Township to Plaintiff indicating the "Supervisors have reason to believe that" Plaintiff is impermissibly "finishing the second story of the garage as a living quarter" (Exhibit 7);
- A September 16, 2021 letter from Plaintiff's Counsel to Defendants' Counsel asserting that Nolan has "complete[ly] resisted" Plaintiff's efforts to resolve any dispute and requesting that Lycoming Township agree to certain proposed resolutions (Exhibit 11);
- An October 14, 2021 letter supplementing Plaintiff's application for a hearing before the ZHB, including the attached Hearing Request Application (Exhibit 14);
- The ZHB's December 30, 2021 Opinion and Order (Exhibit 15);
- The March 7, 2022 letter from counsel for Defendants indicating that Defendants would not issue the permit to install the septic system (Exhibit 16);
- The April 6, 2022 letter from Plaintiff's counsel indicating Plaintiff wished to appeal Defendants' determination before the Supervisors (Exhibit 17); and
- An April 13, 2022 letter from counsel for Defendants to Plaintiff's counsel indicating that the Supervisors would schedule a hearing should Plaintiff discontinue this action (Exhibit 18).

The parties presented no additional testimony or evidence beyond the exhibits admitted by Plaintiff.

At argument, Defendants conceded that Plaintiff's presentation of his permit application rendered their second preliminary objection in the nature of a demurrer moot, as Plaintiff had produced evidence that he applied for the required permit and thus had legal grounds to appeal its denial.

Regarding the preliminary objection premised on a failure to exhaust statutory remedies, Defendant first argued that the ZHB hearing explicitly did not apply to the septic tank issue. Defendant pointed out that Exhibit 15, the ZHB Opinion and Order, included the following language:

"This Order does not address any septic requirements, which are not within the purview of this Board and Applicant shall obtain any septic permits or approvals required to locate the bathroom allowed by this Order on the second floor of the detached garage."

Defendant argued that the ZHB's acknowledgment that "septic requirements" are outside of its purview rendered invalid Plaintiff's contention that the ZHB hearing was among his statutory remedies for the denial of the *septic* permit presently at issue, as opposed to the permit to construct the Garage. Defendant suggested that Plaintiff's procedural steps satisfied the requirements generally applicable to zoning ordinances, but failed to satisfy the PSFA's clear requirement that denials of sewage permits be appealed to the "local agency," which is the Lycoming Township Board of Supervisors rather than the ZHB.

Defendant argued that *Millstone Enterprises, Inc. v. Com., Dept. of Environmental Resources* applies to the instant action.⁴ In *Millstone*, the plaintiff

⁴ *Millstone Enterprises, Inc. v. Com., Dept. of Environmental Resources*, 516 A.2d 814 (Pa Cmwlth. 1986).

constructed a building with a septic tank, but did not apply for sewage permit.⁵ When the township learned of the tank's installation, it directed the plaintiff to apply for a permit, and eventually informed him that the township's zoning ordinances forbid the issuance of a permit because the property was in a flood plain.⁶ The trial court granted the township an injunction requiring the plaintiff to disconnect the septic tank and vacate the building until he had obtained a valid permit, but stayed the injunction pending the plaintiff's exhaustion of administrative remedies.⁷

In response, the plaintiff sought (among other remedies) the issuance of a writ of mandamus, asking the Commonwealth Court to direct the township and Pennsylvania Department of Environmental Resources to issue some sort of permit or inform the plaintiff what type of sewage system would be permitted.⁸ The Commonwealth Court first noted that "where a statutory remedy is provided, the procedure prescribed therein must be strictly pursued to the exclusion of other methods of redress."⁹ The Court held that because § 750.16 of the PSFA required "a permit denial by a municipality... to be appealed [to the municipality] under the provisions of the Local Agency Law," and required "any action taken by [the Department of Environmental Resources]... to be appealed pursuant to the Administrative Agency Law," the plaintiff's failure to take such appeals precluded the

⁵ *Id.* at 816.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 818-19.

⁹ *Id.* (quoting *Jackson v. Centennial School District*, 501 A.2d 218, 220 (Pa. 1985)).

issuance of a writ of mandamus.¹⁰ Ultimately, the Court explained, “[w]e cannot now entertain a proceeding in mandamus to accomplish what may have been accomplished by an appeal.”¹¹

In response, Plaintiff here first argued that he *has* applied for a sewage permit, but Nolan has never actually *denied* his application; rather, Plaintiff contends, Defendants have been holding the application without taking action. Plaintiff argued that the only evidence in the record that could arguably be construed as a denial of Plaintiff’s sewage permit application is counsel for Defendant’s March 7, 2022 letter in which he indicated that “under the current circumstances, Mr. Nolan will not be issuing a permit for a new septic system.”

Plaintiff suggested that in light of Defendants’ position suggesting that they believed they had denied Plaintiff’s permit application, it would be appropriate for this Court to stay this action and direct the Supervisors to schedule a hearing on the permit. Plaintiff asserted that if the Supervisors granted the permit, he would of course withdraw this action. Plaintiff contended that if the Supervisors still denied the permit after hearing, however, the instant action for a writ of mandamus would inarguably constitute the appropriate remedy, and therefore it could be immediately reinstated. Plaintiff ultimately noted, however, that all correspondence from Defendants’ counsel indicated that the opposition to the permit was not solely Nolan’s but was shared equally by the Supervisors, as laid out in great detail. Thus,

¹⁰ *Id.*

¹¹ *Id.*

Plaintiff questioned whether it would be productive or, conversely, futile to seek an appeal before a Board of Supervisors that had already considered and rejected Plaintiff's arguments and the relevant determinations of the ZHB.

ANALYSIS

As noted above, § 750.16 of the PSFA states that “[a]ny person aggrieved by an action of a local agency or sewage enforcement officer in granting or denying a permit... shall have the right within thirty days after receipt of notice of the action to request a hearing before the local agency.” Although § 750.16 does not state that this is the *sole* remedy for such a grievance, Pennsylvania Courts have long required strict exhaustion of statutory remedies.

At least one case suggests, however, that mandamus may be appropriate in certain situations even in the absence of an appeal to the board of supervisors. In *In re Subdivision of Marie Crowley Lands*, landowners proposed a subdivision of lands to the McKean County Planning Commission, which indicated it would approve the plan if they completed a “Department Form B” – a form allowing the waiver of sewage requirements in certain situations – for each proposed lot.¹² The township’s sewage enforcement officer, however, refused to accept the waiver, and the Commission denied the proposed subdivision for the sole reason that the board of supervisors would not sign the waiver.¹³ The landowners filed a petition for a writ

¹² *In re Subdivision of Marie Crowley Lands*, 736 A.2d 40, 41 (Pa. Cmwlth. 1999).

¹³ *Id.* at 41-42.

of mandamus, seeking to compel the board of supervisors to accept and sign the waiver form.¹⁴

The trial court granted a writ of mandamus, finding that the landowners had complied with all waiver requirements and therefore the refusal to sign the waiver constituted an abuse of discretion based on a mistake of law.¹⁵ The board appealed, arguing, *inter alia*, that mandamus was improper because the landowners had not appealed the denial of the entire *subdivision plan* to the McKean County Planning Commission.¹⁶ The Commonwealth Court upheld the trial court's grant of mandamus, noting that the Planning Commission had no authority to overturn the sewage planning and enforcement determinations of the sewage enforcement officer and the board of supervisors.¹⁷ The Commonwealth Court additionally noted that § 750.16 of the PSFA "directs that any appeal was to be before the [board of supervisors] and not before the [Planning Commission]."¹⁸ Despite noting the plain language of § 750.16, however, the Commonwealth Court affirmed the issuance of the writ of mandamus, and did not suggest that the landowners' failure to appeal the sewage determination to the board of supervisors precluded them from obtaining such a writ.¹⁹ However, the Commonwealth Court did not address whether either party raised the issue of exhaustion of administrative remedies.

¹⁴ *Id.* at 41.

¹⁵ *Id.* at 42.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 42-43.

¹⁹ *Id.* 43.

The Court finds that because Defendants have raised the requirement that any adverse decision “of a local agency or sewage enforcement office in granting or denying a [sewage] permit” must be appealed to “the local agency,” this Court is without authority to excuse that requirement. Plaintiff questions why a local agency would be permitted to review its own determination on appeal, arguing any appeal would be futile. That this is required by the statutory language, however, is clear.²⁰ Although it is perhaps unlikely that many local agencies will reverse their own determinations on appeal, such a procedure allows the parties to delineate the scope of their issues, create a record (as opposed to seeking a determination based on correspondence between attorneys), and give the local agency the first opportunity to reconsider its decision and correct any errors.

Here, Defendants clearly believed that they had either *de jure* or *de facto* denied Plaintiff’s application for a septic tank permit, and they have explained their reasoning for doing so. The Court sees no need to order Defendants to “officially” deny Plaintiff’s application before allowing Plaintiff to appeal the denial to the Supervisors in accordance with § 750.16. The Court believes that the exhibits introduced in this matter fully explain Defendants’ reasons for denying the permit application; to the extent that Defendants have not yet fully explained their

²⁰ Originally, § 750.16 directed only that the determinations of sewage enforcement officers should be appealed to the relevant local agency. In December of 1994, the legislature amended § 750.16 to require the determinations of both sewage enforcement officers and local agencies to be appealed to the local agency. *Boudwin v. Great Bend Tp.*, 921 F.Supp. 1326, 1330 (M.D.Pa. 1996). This confirms that the legislature’s true intent is for local agencies to reconsider their own sewage management determinations in the first instance

reasoning, they must do so if they do not reach a different decision following the appeal. Should Defendants again deny Plaintiff's application following appeal, Plaintiff may appeal that denial to this Court in accordance with § 750.16 and Pennsylvania law governing appeals from administrative agencies.

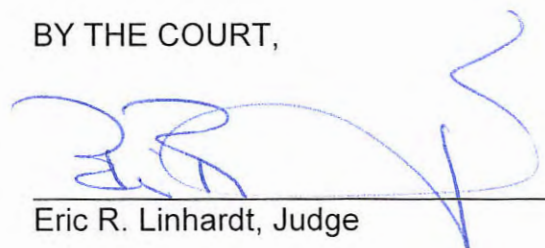
ORDER

For the foregoing reasons, the Court finds that Plaintiff has not exhausted the administrative remedies available under 35 P.S. § 750.16 governing appeals from actions of local agencies or sewage enforcement officers in granting or denying sewage permits. For that reason, the Court SUSTAINS Defendants' first preliminary objection for failure to exhaust administrative remedies and DISMISSES Plaintiff's Petition for Writ of Mandamus. This Order is without prejudice to any party to appeal the Supervisor's appellate determination in accordance with § 750.16 and Pennsylvania law governing appeals from administrative agencies.

The Board of Supervisors of Lycoming Township shall schedule a hearing in accordance with § 750.16 forthwith.

IT IS SO ORDERED this 28th day of December 2022.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/jcr

cc: Thomas Burkhardt, Esq.
Scott T. Williams, Esq.
Gary Weber, Esq. (Lycoming Reporter)