

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

MIROSLAW E. KOSTYSHYN,	:	
	:	
Appellant,	:	
	:	
	:	C.A. No. 05A-05-014
v.	:	
	:	
THE COMMISSIONERS OF THE	:	
TOWN OF BELLEFONTE	:	
	:	
Appellees.	:	

Date Submitted: September 12, 2005
Date Decided: January 6, 2006

MEMORANDUM OPINION

Upon Consideration of Appellees' Motion to Dismiss Appellant's Appeal
REVERSED.

Mirosław E. Kostyshyn, *Pro Se* Appellant.

David J. J. Facciolo, Esq., Minster & Facciolo LLC, Wilmington, Delaware,
Attorney for Appellees.

SCOTT, J

BACKGROUND

Before this Court is a Motion to Dismiss Appellant's, Miroslaw E. Kostyshyn ("Kostyshyn"), Appeal. Appellees, The Commissioners of the Town of Bellefonte ("Commissioners"), argue that Kostyshyn's appeal is untimely and must be dismissed. This is the Court's decision.

FACTS

The Town of Bellefonte is located in New Castle County. Bellefonte has a Town Charter and has adopted various ordinances, including, The Building Zone Ordinance for the Town of Bellefonte. The Building Zone Ordinance regulates the Town and incorporates by reference the State Enabling Act which governs the Town. The State Enabling Act is in compliance with Title 22 of the Delaware Code. On April 23, 2004, Cindi Anker ("Anker"), a resident of Bellefonte, submitted a request to the Bellefonte Board of Adjustment (the "Board") for a variance to subdivide her property located at 1123 Brandywine Blvd. into two 6225 square feet lots for the purpose of new construction. Each new lot would be 275 square feet under the existing minimum lot size requirement of 6500 square feet. Notice was served on all interested parties on May 7, 2004 and public notice was given in the News Journal on May 8, 2004.

On May 10, 2004, the Commissioners held their monthly meeting. The regular meeting was adjourned and reconvened as a board of adjustment hearing in order to consider Anker's request for a variance to the building code. However, since the Town of Bellefonte had neglected to maintain a board of adjustment, the president of the Commissioners, Michael McGrath ("McGrath"), nominated himself, Commissioner Kathy MacDonough ("MacDonough"), and the Town Building Inspector, Joe Finocchiaro ("Finocchiaro"), to the Board of Adjustment. The record is in dispute as to whether there was a chief engineer and city solicitor for the Town of Bellefonte at the time of this appointment. Kostyshyn contends that Mr. Carmine Casper was the chief engineer and Mr. John E. Sullivan, Esquire, was the city solicitor. Therefore, he asserts that they should have been appointed to the Board. The Commissioners, however, allege that there was no city engineer or city solicitor. Nonetheless, McGrath later recused himself from voting on the variance due to his marriage to Anker being a conflict of interest. Commissioners MacDonough and St. Clair approved the variance.

On April 24, 2005, Kostyshyn, the owner of 1127 Brandywine Blvd., property that is adjacent to Anker's, served a Notice of Appeal on the Commissioners requesting that the Building Inspector or Board of

Adjustment issue a temporary restraining order. On April 28, 2005, the Bellefonte Town Commission denied Kostyshyn's Appeal as untimely. On May 7, 2005, Kostyshyn served on the Commission a document entitled "Answer to Bellefonte Town Commission's Letter to Plaintiff's Notice of Appeal" in which he asked which ordinance the Commission had based their decision upon. The Secretary of the Bellefonte Town Commission replied in a letter dated May 17, 2005, and cited to the Building Zone Ordinance for the Town of Bellefonte and 22 *Del. C.* §328(a) both of which stated that an appeal must be filed within thirty days from the date that the decision was filed in the office of the board. Kostyshyn then filed a Notice of Appeal with the Superior Court on May 31, 2005. It is Kostyshyn's Appeal that the Commissioners assert is untimely under the provisions of 22 *Del. C.* §328(a).

STANDARD OF REVIEW

The Superior Court's scope of review on appeals from the Board of Adjustment is limited to correction of errors of law and to determining whether or not substantial evidence exists on the record to support the Board's findings of fact and conclusions of law.¹ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate

¹ *Janaman v. New Castle Cty. Bd. Of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. Ct. 1976), *aff'd*, 379 A.2d 1118 (Del. Supr. 1977).

to support a conclusion.² The Superior Court may not remand the Board's decision for further proceedings. It may only "reverse or affirm, wholly or partly, or may modify the decision brought up for review."³

DISCUSSION

Kostyshyn appeals the decision granting the variance on the basis that the Bellefonte Town Commission abused its discretion when: 1) it permitted a request for a variance to be heard when public notice was given in the News Journal only two days prior to the meeting;⁴ 2) McGrath appointed the Board of Adjustment and ignored Section Seven of the State Enabling Act of 1923;⁵ 3) it refused to readdress the decision granting the variance on June

² *Oceanport Indus., Inc. v. Wilmington Stevedores Inc.*, 636 A.2d 892, 899 (Del. 1994).

³ 22 Del. C. §328(c).

⁴ Kostyshyn asserts that the Bellefonte Town Commission did not abide by Ordinance No. 91-1 which reads in pertinent part: (2) No owner(s) of real property situate in the Town of Bellefonte, nor their heirs, assigns, agents, attorneys or any other person acting in the stead of such owner(s) nor any other person or entity acting on behalf of any person or entity shall be permitted to seek subdivision of any existing parcel of real estate without first providing forty-five (45) days written notice of an intent to do so sent by certified mail to the Building Inspector of the Town of Bellefonte... Failure to provide such written notice shall be deemed a waiver of the equitable defenses of laches and/or estoppel where applicable.

⁵ Section 7 reads in pertinent part: The Board of Adjustment shall consist of the Chief Engineer of the Street and Sewer Department, the City Solicitor, and the Mayor. If the city or town has no City Engineer or City Solicitor, then the Mayor or chief executive of such city or town shall appoint two members, each to be appointed for a term of three years and removable for cause by the appointing authority, upon written charges and after public hearing, who with the presiding officers of the Zoning Commission shall constitute the Board of Adjustment for such city or town. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant.

14, 2004, and July 12, 2004;⁶ 4) it refused to abide by ordinance No. 91-1, an ordinance setting a minimum lot size of 6500 square feet; and 5) McGrath refused to answer Kostyshyn's demand to know the legal owner of 1123 Brandywine Blvd.

As a threshold issue, this Court will consider whether Kostyshyn possesses standing to bring this action. 22 *Del. C.* §328(a) provides:

(a) Any person or persons, jointly or severally aggrieved by any decision of the board of adjustment, or any taxpayer or any officer, department, board or bureau of the municipality may present to the Superior Court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the Court within 30 days after the filing of the decision in the office of the board.

This Court finds that Kostyshyn is an “aggrieved person”⁷ within the meaning of Title 22, Section 328(a) of the Delaware Code, because he is the

⁶ At the June 14, 2004, monthly meeting Dorothy Marx (“Marx”) stated that the variance should not have been granted because a hardship was not involved. Furthermore, at the July 12, 2004, meeting Marx questioned the legality of the variance due to the composition of the Board of Adjustment.

⁷ See e.g., *Healy v. Bd. of Adjustment of the City of New Castle*, 2003 WL 21500330, at *2 (Del. Super.)(stating that in cases previously addressing Section 328 individuals owning land in some form have fallen within the definition of an “aggrieved person”); *Brandywine Park Condominium Council v. Members of the City of Wilmington Zoning Board of Adjustment*, 534 A.2d 286, 288-89 (Del. Super. Ct. 1987)(holding that condominium owners located on adjacent land, who were not residents in the city, had standing to seek review of city zoning board of adjustment); *Bethany West Recreation Assoc. Inc., v. ECR properties, Inc.*, 1995 WL 1791084, at *2 (Del.Ch.)(stating that “[t]here is no question that, as property owners adjoining the land being developed by defendant, plaintiffs would have standing to contest a building permit granted to defendant”).

owner of property that is adjacent to Anker's. Thus, Kostyshyn has standing to bring this appeal.

In his appeal, Kostyshyn contends that the appointment of a Board consisting of McGrath, MacDonough, and Finocchiaro was improper. This Court agrees and finds that the Board of Adjustment lacked jurisdiction⁸ to make a decision regarding the request for a variance because the Board was not composed in accordance with 22 *Del. C.* §322.⁹ At the time that the request for the variance was submitted the Town of Bellefonte did not have a board of adjustment. Therefore, in order to consider the request, the May 10, 2004, monthly meeting of the Commissioners was adjourned and reconvened as a board of adjustment hearing. McGrath, the president of the Commissioners and also Anker's husband, appointed himself, Commissioner MacDonough, and the Town Building Inspector, Finocchiaro, to the Board. There is no evidence in the record that McGrath was in fact

⁸ This Court notes that the question of jurisdiction may be raised at any time. *East Coast Resorts, Inc. v. Board of Adjustment of Bethany Beach*, 1989 WL 124880, at *2 (Del. Super.).

⁹ 22 *Del. C.* §322(c) states "in the event that a city or incorporated town qualifying under subsection (b) of this section fails to establish a board of adjustment as permitted in subsection (b) of this section, the board of adjustment shall consist of those persons designated in subsection (a), of this section." 22 *Del. C.* §322(a) states that the board of adjustment "shall consist of the chief engineer of the street and sewer department, the city solicitor and the mayor or an authorized agent of the mayor. If the city or incorporated town has no city engineer or city solicitor, then the mayor or chief executive of such city or town shall appoint 2 members, each to be appointed for a term of 3 years and removable for cause by the appointing authority upon written charges and after public hearing, who, with the presiding officer of the zoning commission, shall constitute the board of adjustment for such city or town."

the Mayor or chief executive officer of Bellefonte, which would thereby have given him the authority to appoint two other members to the Board. However, assuming that Kostyshyn's assertion is true, that the position of Mayor was usually filled by the president of the commissioners, McGrath's nomination of himself was not in itself improper. Rather, it was the appointment of MacDonough and Finocchiaro that violated 22 *Del. C.* §322. Specifically, the appointment of these individuals was improper under 22 *Del. C.* §322(a) because neither MacDonough nor Finocchiaro were the chief engineer or city solicitor of Bellefonte. MacDonough was a fellow Commissioner and Finocchiaro was the Town Building Inspector. Moreover, even if the Appellees are correct in their assertion that the Town did not have a city engineer or city solicitor, the appointment of MacDonough and Finocchiaro still violated 22 *Del. C.* §322(a). 22 *Del. C.* §322(a) requires, in the event that a town does not have a city engineer or city solicitor, that the mayor appoint two members for a term of three years. In the present case, the record is void of any indication that McGrath appointed MacDonough and Finocchiaro for a term of three years. Additionally, the appointment violated 22 *Del. C.* §322(d)(1) which prohibits a board of adjustment from consisting of members of the

legislative body or employees of the town.¹⁰ Commissioner MacDonough was a member of the legislative body and Finocchiaro was an employee of the Town. Furthermore, there is no evidence that these appointments were confirmed by a majority vote. Accordingly, this Court finds that the Board was improperly constituted at the time it considered the variance, its jurisdiction was improper, and its decision must be reversed.

In addition to the improper composition of the Board, the meeting violated 22 *Del. C.* §323, which states in pertinent part:

All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings showing the vote of each member upon each question or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

The meeting was improper because it was held in closed session, was not open to the public, and minutes were not kept. Individuals who had attended the monthly meeting of the Commissioners were not permitted to

¹⁰ 22 *Del. C.* §322(d)(1) reads in pertinent part:

...Any city or town, by its legislative body, may establish a board of adjustment consisting of not less than 3 nor more than 5 members who shall be residents of the city or town and who shall have knowledge of the problems of urban and rural development and who, at the time of appointment and throughout the term of office, *shall not be candidates nor members of the legislative body nor employees of the city or town* (emphasis added). The mayor or chief executive officer of such city or town shall appoint such members of the board of adjustment, and all such appointments shall be confirmed by a majority vote of the elected members of the legislative body.

participate in the Board hearing and all comments and questions were solicited when the regular meeting reconvened.

Moreover, the Commissioners' assertion that Kostyshyn's appeal to the Superior Court is therefore untimely is without merit.¹¹ The only evidence in the record of the Board's alleged written decision and filing in the office of the board is a letter "To Whom It May Concern," dated May 12, 2004. The Superior Court of Delaware has previously held that the final decision of the board from which an appeal is taken must be from the board's written decision rather than from the oral vote taken by the board at its hearings.¹² In *Schmalhofer v. Bd. of Adjustment of the City of Newark*,¹³ a verbatim written transcript of a board of adjustment hearing and a letter notifying appellant of the board's decision was found sufficient to satisfy the writing requirement because the verbatim transcript contained each board members' on the record reasoning for their vote.¹⁴ This Court, however, finds the present facts distinguishable from those in *Schmalhofer*.

¹¹ Specifically, 22 *Del. C.* §328, the statute which sets forth the procedure for an appeal to the Superior Court from a decision of the Board, provides that "[s]uch petition shall be presented to the Court within 30 days after the filing of the decision in the office of the board." 22 *Del. C.* §328. This Court further notes that the Board is required to file its decision immediately pursuant to 22 *Del. C.* §323.

¹² See *McDonald's Corp. v. Zoning Bd. of Adjustment for the City of Wilmington*, 2002 WL 88944, at *1 (Del. Super.) (stating that the "decision" language referenced in Section 328 applies to a written decision by the Board rather than an oral vote).

¹³ 2000 WL 703510 (Del. Super.).

¹⁴ *Id.* at *3.

Unlike *Schmalhofer*, the Board did not keep “verbatim minutes”¹⁵ of the hearing nor did they provide Kostyshyn with a transcript that contained each board member’s on the record reason for their vote. The May 12, 2004, letter alone does not satisfy the writing requirement of 22 *Del. C.* §328. The Court finds that the Board has yet to issue a written decision setting forth its reasons for granting the variance and has thus failed to produce a record of the proceedings below for purposes of this appeal. Furthermore, even if this Court were to find, which it does not, that the May 12, 2004, letter did constitute the written decision of the Board, there is no evidence in the record that it was filed in the office of the board as contemplated by Section 328. Without any evidence indicating that the Board’s decision has been filed, the thirty day statutory period for “aggrieved persons” to appeal a decision of the Board to the Superior Court has yet to commence.¹⁶ In conclusion, the Court cannot find Kostyshyn’s appeal untimely when the Board has failed to issue a written decision and has failed to file this decision in the office of the board.

Because the Board was improperly constituted and its meeting was held in closed session, its decision is illegal and must be reversed. In the absence of the power of remand, “such a reversal vacates the Board’s

¹⁵ *Id.*

¹⁶ *Town of Bethany Beach v. Bethany Beach, Inc.*, 1994 WL 469194, at *1 (Del. Ch.).

decision and the applicant may re-apply with the proceedings before the Board beginning anew.”¹⁷ For the above reasons, the decision of the Board is **REVERSED**.

IT IS SO ORDERED.

Judge Calvin L. Scott, Jr.

¹⁷ *Hellings v. City of Lewes Bd. of Adjustment*, 734 A.2d 641 (Del. 1999)(Table), 1999 WL 624114, at *3(citing *New Castle Cty. Bd. of Adjustment v. White*, 1990 WL 84693, at *2 (Del. Supr.); *Miller v. Bd. of Adjustment of the Town of Dewey Beach*, 1994 WL 89022, at *3 n.2 (Del. Super.); *Miller v. Bd. of Adjustment of the Town of Dewey Beach*, 1995 WL 465183, at *1 n.1 (Del. Super.); *Fairwinds Shopping Ctr., Inc. v. Bd. of Adjustment of New Castle County*, 1993 WL 258801, at *8-9 (Del. Super.).