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THE SHEPHERDSTOWN OBERVER, INC.

Plaintiff,

APR 30 2009

JEFFERSON COUNTY  
CIRCUIT COURT

v.

Case No.: 09-C-49  
(Judge Yoder)

JENNIFER MAGHAN,  
Clerk of the County Commission  
Of Jefferson County  
Defendant.

### **Order Granting Motion to Dismiss for Lack of Standing**

On the 22<sup>nd</sup> day of April, 2009, this matter came on for hearing upon the Motion to Dismiss filed by the Defendant, and a request from the Plaintiff for such a hearing. The Shepherdstown Observer, appeared by and through counsel, Stephen Skinner, Esq. and in person by Thomas Harding. Jennifer Maghan appeared in person and by and through counsel, Stephanie F. Grove, Assistant Prosecuting Attorney. At the hearing the Court instructed counsel that they could submit proposed orders within five days of the hearing. After considering the briefs and arguments of the parties, the Court makes the following findings.

#### **FINDINGS OF FACT**

1. In October of 2008, the County Commission of Jefferson County enacted a traditional zoning ordinance, which was intended to replace the County's non-traditional zoning ordinance.
2. Shortly thereafter, a petition drive in accordance with the provisions of West Virginia Code Section 8A-7-13 was instituted by a citizen group to bring the newly enacted ordinance to a referendum.

3. The group collected signatures and presented them to Jennifer Maghan, the County Clerk of the County Commission of Jefferson County (hereinafter "County Clerk" or "Clerk").
4. After reviewing the signatures, the Clerk certified that the petition contained the requisite number of signatures to bring the ordinance to referendum.
5. On January 5, 2009, Stephen Skinner, Esq., requested the petition documents pursuant to the West Virginia Freedom of Information Act ("FOIA"). In his correspondence, Mr. Skinner asked the Clerk to provide him copies of any and all certification for the current proposed zoning referendum, including all petitions and petition forms that were delivered to the Clerk's office for certification for the current proposed zoning referendum.
6. The Clerk refused this request, relying in part upon advice from the West Virginia Secretary of State's Office that the signatures and petitions should be kept confidential.
7. The Clerk, however, did provide Mr. Skinner with a copy of her office's certification of valid signatures.
8. After the Clerk denied the request, the Shepherdstown Observer filed a complaint in this Court in an attempt to enforce Mr. Skinner's FOIA request.
9. The Plaintiff here, the Shepherdstown Observer, never requested the documents at issue. The written request for documents, labeled as Exhibit B and attached to the Plaintiff's complaint, indicates that Stephen G. Skinner, Esq. requested a copy of the certification. This correspondence does not indicate that Mr. Skinner was acting on behalf of any client, including the Shepherdstown Observer, when he delivered this correspondence to the County Clerk.

10. The complaint itself does not allege that the plaintiff ever requested the documents but rather asserts that the Shepherdstown Observer has an interest in obtaining public information and has a right to enforce any FOIA request, including those attached to the complaint.

### CONCLUSIONS OF LAW

1. Rule 12(b)(1) of the West Virginia Rules of Civil Procedure allows a party to challenge subject matter jurisdiction by pre-answer motion.
2. Due process of law requires that a court assuming to determine the rights of parties must have jurisdiction over the subject matter. Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc., 158 W.Va. 492, 211 S.E.2d 705 (1975). Any judgment or decree rendered without such jurisdiction is utterly void. Easterling v. American Optical Corp., 207 W.Va. 123, 529 S.E.2d 588 (2000).
3. Whenever it is determined that a circuit court has no jurisdiction to entertain the subject matter of a civil action, the court makes no further action in the case other than to dismiss it from the docket. See Hanson v. Board of Educ. of the County of Mineral, 198 W.Va. 6, 9, 479 S.E.2d 305, 308 (1996).
4. If the Plaintiff lacks standing, this court does not have the requisite subject matter jurisdiction. "Standing is an element of jurisdiction over the subject matter." State ex rel. Paul B. v. Hill, 201 W.Va. 248, 256, 496 S.E.2d 198, 206 (1997). Further, "[s]tanding is a jurisdictional requirement that cannot be waived, and may be brought up at any time in a proceeding." Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., Litigation Handbook on West Virginia Rules of Civil Procedure, § 12(b), p. 21 (Supp. 2004) (citing Bowyer v. Hi-Lad, Inc., 216 W.Va. 634, 655, 609 S.E.2d 895, 916 (2004)).

5. Only a person who has been denied the right to inspect a public record has standing to pursue a claim under the Freedom of Information Act, codified at West Virginia Code Section 29B-1-1 *et seq.* "*Any person denied the right to inspect the public record of a public body may institute proceedings for injunctive relief or declaratory relief in the circuit court in the county where the public record is kept.*" W.VA. Code Ann. § 29B-1-5 (West 2009) (emphasis added).
6. West Virginia Code Section 29B-1-3(c) requires that a denial of any public record inform the person who has requested the record that there is an opportunity to seek relief in the circuit court of the county. "Such a denial. . .shall afford *the person requesting* [the records] the opportunity to institute proceedings for injunctive or declaratory relief in the circuit court . . ." W.VA. Code Ann. § 29B-1-3(c) (West 2009) (emphasis added).
7. This language clearly indicates that only a person who has actually requested the public record in question has standing to pursue relief in the circuit court and that a request and a subsequent denial is the only manner in which a person may obtain standing to pursue a claim under the Freedom of Information Act.
8. Because the Shepherdstown Observer never presented a FOIA request to the Clerk either on its own or through Mr. Skinner, on its behalf, it does not have standing to bring the present action under the provisions of West Virginia Code Section 29B-1-1 *et seq.*, and consequently, this Court lacks jurisdiction over the subject matter.
9. The Court notes on the record that the Clerk also requests the Court to dismiss a claim for failure to state a cause of action. The Court does not reach that issue, however, since it does not have jurisdiction to address that matter at this time.

CONCLUSION

The Plaintiff's complaint must be dismissed pursuant to Rule 12(b)(1) of the West Virginia Rules of Civil Procedure because this Court lack jurisdiction over the subject matter, as the Plaintiff does not have standing to prosecute a claim under the provisions of W.Va. Code 29B-1-5. The Plaintiff never requested the records in question, which request and denial is necessary to acquire standing.

WHEREFORE, it is hereby ORDERED that the Defendant's Motion to Dismiss is hereby GRANTED.

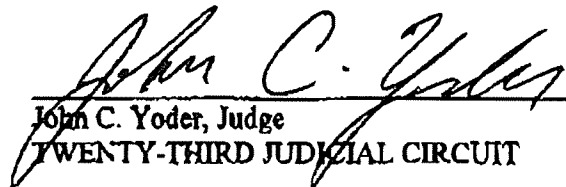
It is further ORDERED that the Clerk of this Court shall transmit an attested copy of this Order, once entered, to all counsel of record and retire this case from the active docket.

2cc's Entered the 30<sup>th</sup> day of April, 2009.

S. Skinner

S. Grove

5-1-09  
BC

  
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John C. Yoder, Judge  
TWENTY-THIRD JUDICIAL CIRCUIT