

FILE COPY

IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

ROBERT DONADIEU, RITA DONADIEU,
GEORGE NELSON SPARKS, PATIENCE
T. SPARKS, DONNA FALLIN and
MARTHA ANN MacNAMARA,

Petitioners,

v.

MORGAN COUNTY PLANNING
COMMISSION,

Respondent.

CIVIL ACTION NO.: 15-C-
JUDGE _____

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PETITION FOR WRIT OF MANDAMUS AND/OR CERTIORARI

INTRODUCTION

The Morgan County Planning Commission appears to have approved a subdivision application and seven (7) waivers to permit Cross Development to develop a Dollar General Store on 7.78 residential acres in Oakland Overlook, at the corner of Route 522 and Oakland Road. Your Petitioners, all residents and/or landowners near or adjacent to the proposed Dollar Store site, seek a Writ of Mandamus and/or Certiorari from this Honorable Court to 1) strike any approval already granted and mandate that the Respondent, Morgan County Planning Commission, follow its own Subdivision Ordinance procedures and/or 2) issue an Order granting Petitioners' appeal and declaring that the recent actions of the Planning Commission as to the proposed commercial site are void ab initio. The decision of the Morgan County Planning Commission is illegal as further set out herein.

PARTIES

1. Robert and Rita Donadieu are residents of Morgan County whose home is 1000 feet or less from the proposed Dollar General site.

2. George Nelson Sparks and Patience T. Sparks are residents of Morgan County whose home is less than ¼ mile from the proposed Dollar General site.

3. Donna Fallin is a resident of Morgan County whose home sits on land contiguous with the proposed commercial development.

4. Martha Ann MacNamara is the owner of 2.6 acres directly across Oakland Road from the proposed Dollar General site. Every customer who enters the subject property will drive right past Ms. MacNamara's property. Ms. MacNamara is a resident of the Commonwealth of Pennsylvania.

5. Each of the resident landowners is an aggrieved person because their homes are located adjacent to, contiguous with, or near the proposed commercial development. They will therefore suffer injury, prejudice or inconvenience from light, noise, traffic congestion and diminution of the value of their real estate, which is beyond that which other residents of Morgan County may suffer.

6. The non-resident landowner, Petitioner Martha Ann MacNamara, will suffer diminution of the value of her real estate and a limitation on its use as a site for a home in the future, as the light, noise and traffic congestion of the proposed commercial site injures the quiet enjoyment of her property. She is also injured, prejudiced or inconvenienced beyond that suffered by other county residents. She is therefore an aggrieved person with standing to file certiorari.

7. All of the Petitioners, as landholders in Morgan County, also have standing to seek Mandamus to require the Respondent to accord them due process by following the Subdivision Ordinance. At a minimum, every landholder should have the right to orderly process and a complete record of proceedings.

8. The owner of the subject property is Cacapon Associates Limited Partnership.

9. The developer of the subject property is Cross Development, LLC.

10. Jurisdiction and venue are proper in the Circuit Court of Morgan County.

LEGAL BACKGROUND

11. The Morgan County Planning Commission at a meeting on February 17, 2015, appears to have approved a re-plat of the Oakland Overlook Subdivision, along with several waivers of requirements of the Morgan County Subdivision Ordinance.¹

12. The proposed re-plat and granting of the waivers will allow the developer, Cross Development, to combine four of the existing twelve lots into a single lot of approximately two and a half acres to be used for the construction of the proposed Dollar General store. The remaining eight lots will be available for construction of single family housing. Prior to the February 17th action by the Planning Commission, the Subdivision was approved only for single family housing. The granting of the re-plat and waiver requests now changes this to a Planned Unit Development (PUD) and allows for mixed commercial and residential use.

13. Petitioners believe that the action taken by the Commission was in contravention of its own rules as contained in the Morgan County Subdivision Ordinance and that the Commission failed to adequately establish a proper record of the information it considered when reaching its decision. The incomplete record is also a violation of West Virginia Code, § 8A-5-7(a).

14. The failure of the Commission to follow its own rules or to establish an appropriate record for its actions represents an overreach of authority by the Commission and thus violates the due process clauses of the United States Constitution and the West Virginia Constitution. Accordingly, Petitioners request that this Court grant a Writ of Certiorari to hear this case and also grant an accompanying Writ of Mandamus ordering the Commission to follow the applicable rules of the Subdivision Ordinance.

¹ At the time of this filing Petitioners are not aware of any meeting minutes or other official record of the action taken by the Planning Commission. Petitioners have been told by the Commission that the minutes of the meeting will be available after the Commission approves them and that their next meeting is scheduled for March 24, 2015. Under West Virginia Code §8A-9-1 Petitioners must file a petition for a writ of certiorari "[w]ithin 30 days after a decision or order by the Planning Commission . . ." Accordingly, in order to preserve their rights, Petitioners are filing within 30 days of the February 17th meeting.

FACTUAL BACKGROUND

The Subdivision Application and Supporting Information is Deficient Under the Morgan County Subdivision Ordinance

15. Pursuant to the authority of the West Virginia Code §8A-1-1 to 11-2 et seq., Morgan County adopted the Morgan County Subdivision Ordinance. Since adoption of this ordinance in 1983, it has been amended several times, most recently in 2008.

16. In addition to authorizing establishment of Planning Commissions in the various counties, Chapter 8A lays out a set of rules under which the Planning Commissions must operate. Under these rules the development plat and plan submitted by developers seeking action by the Commission "must include everything required by the governing body's subdivision and land development ordinance." (§ 8A-5-7 (a))

17. § 4.3 of the Morgan County Subdivision Ordinance lists requirements to be included in the subdivision application and plan, as follows:

- a. The name, address, & telephone number of the developer;
- b. The name of the proposed subdivision;
- c. The type of subdivision selected; (Note: The type of subdivision selected is entirely up to the developer);
- d. The name of any attorney, professional surveyor, or professional engineer licensed by the State of West Virginia to be involved in the subdivision;
- e. Total area of the subdivision;
- f. A letter of transmittal setting forth the purpose of the application, the materials being submitted for review, and the number of copies being submitted shall accompany the application.

18. § 4.4 of the Morgan County Subdivision Ordinance requires that the following be provided:

- a. Phased Preliminary Plat approval if applicable;
- b. A Preliminary Plat as described in Article 13 of this Ordinance;
- c. A letter from the owner, if different from the developer, authorizing the developer to act as his agent with full authority;

- d. Copies of existing and proposed deed restrictions or protective covenants;
- e. Written provisions for the property owners association to eventually take over responsibility for the maintenance and operation of community facilities, especially roads, within the subdivision. The Planning Commission can provide suggested forms for these provisions;
- f. Profiles of the center lines of each road within the subdivision, and typical cross sections;
- g. Septic system permits for all lots unless the subdivision is to be serviced by central system. All lots shall contain a minimum on-site disposal septic area of 10,000 square feet, which shall be set aside for the installation of septic system-soil absorption systems. Each area shall have a minimum width of 80 feet, and no development or structures shall be permitted on this on-site disposal area other than the septic system-soil absorption systems. Area consisting of land sloping in excess of 25%, land in an existing or proposed public road, or land within a 25 year flood plain shall not be utilized in establishing this minimum area.
- h. If an application for a waiver of the central sewer/water requirements of the West Virginia Department of Health has been made, include copies of all data furnished to the State;
- i. A proposed plan for control of erosion and sediment during and after construction. A plan shall be prepared and approved in accordance with standards and specifications of the Eastern Panhandle Soil Conservation District and in accordance with all requirements of the Morgan County Stormwater Management Plan.
- j. State road entrance permits as applicable.
- j.(sic) A copy of the Morgan County Plan Review Checklist, which may be amended from time to time, with each item on the list being initialed as being completed or not applicable. The checklist shall be signed by the Professional Surveyor or Engineer in responsible charge of the project.

19. § 4.5 of the Morgan County Subdivision Ordinance says, in pertinent part, "the subdivision Preliminary Plat Public Hearing and Evaluation *shall not be scheduled and advertised* until all material is submitted." (Emphasis added). This is mandatory language. The Morgan County Planning Commission

not only scheduled and advertised the hearing without all the documents, they *approved* it without all the required documents.

20. In addition to the requirement of § 4.4 that the deed restrictions must be attached to the application, § 13 of the Ordinance states that "a proposed re-plat of an existing subdivision shall include the name of the existing subdivision and the place where it is recorded in the deed books or map books, *and contain a statement that the plat complies with all restrictive covenants for the existing subdivision.*" (Emphasis added. Ordinance, § 13.2 b. 7). This statement was not included as required. Indeed, the proposed plat *violates* the existing subdivision covenants.

21. It is undeniable that on the date of the legal advertisement, at least five (5) of the enumerated items were not in the file. The Subdivision Ordinance mandates that the materials be in the file *before* the hearing is scheduled. This matter was not ripe for hearing on February 17, 2015.

22. Indeed, even now, *after* the decision has apparently already been made, at least four (4) of the requirements have still not been met. See §§ 4.3(f), 4.4(c), 4.4(d) and 4.4(e). The matter is still not ripe for advertisement or hearing today.

23. None of the above items were ever provided by the developer, nor is there any evidence in the record that they were even requested by the Commission. In fact, the Commission failed to request the information despite being asked to do so both verbally and in writing on behalf of the Petitioners and others opposed to construction of a Dollar General store at the Oakland Overlook location.

24. All of this information was relevant to the concerns of the Petitioners and directly impacted upon the rights of the Petitioners and other members of the community to full and complete information, and was required by the Ordinance to be in the file on or before January 28, 2015. The failure of the Commission to require this information violated the due process rights of the Plaintiffs and unfairly impaired their ability to offer reasoned opposition to the proposed re-plat of the Oakland Overlook subdivision.

25. The application is also deficient because the Commission did not require the developer and the seller of the property to adequately identify their respective roles in the proposed development. The Subdivision Ordinance requires that the developer submit the subdivision application (Morgan County Subdivision Ordinance, § 4.3). However, during the application process Cacapon Associates, being the owner/seller of the property, seemed to represent itself as also responsible for developing the property making it difficult to determine which party will be held responsible for commitments and representations made to the Commission.

WAIVER REQUESTS

26. The Oakland Overlook application requested seven waivers of the Subdivision Ordinance regulations. Attached to the basic application in support of these waiver requests were two "Application for Waiver" requests. One waiver request was for "PUD approval without all state and county permits." (See Subdivision Application)

27. The second waiver request was for a waiver of the one-acre minimum lot size requirement for single family housing serviced by a central or public water and septic system.² (See Ordinance § 11.2.1.b and § 11.5.2)

28. The Subdivision Ordinance clearly grants the Commission authority to waive provisions of the Ordinance under certain circumstances. Under § 6 of the Ordinance those circumstances require a finding of "Extraordinary Hardship." The Ordinance states:

[t]he Planning Commission shall determine extraordinary hardship only if it finds the following facts in regard to the proposed subdivision or land development unit:

- a. That the land is of such shape and size, or is affected by such topographical conditions, or is subject to such title limitations of record that it is impossible or

² Various dates and signatures appear on both waiver request forms. They appear to have been submitted and then resubmitted at various times and in some cases verbally over the phone despite the requirement of the Ordinance that waiver requests be submitted in writing. [Ordinance, § 6] It is unclear whether the developer, Cross Development or Cacapon Associates is submitting the waiver requests. At times the requests appear to be from Cross Development and at others they seem to be from Cacapon Associates. Since the Commission did not require that an agency agreement be filed with the application (as required by § 4.4 of the Ordinance), there is no evidence that either party was authorized to act on behalf of the other.

impractical for the subdivision to comply with all the regulations of the Ordinance;

- b. That the granting of the waiver shall not be detrimental to the public welfare or injurious to other property in the vicinity of the subject property. (Ordinance, § 6.0)

29. No such findings were ever made by the Commission in reaching its February 17th decision regarding Oakland Overlook, nor could they have been since neither of the two waiver requests submitted by the Applicant even claims to meet this "extraordinary hardship" standard. Since there is no claim or evidence in the record that "extraordinary hardship" as defined in the Ordinance exists, and since the Commission made no findings on this matter, there was no basis upon which it could properly grant the requested waivers.

30. In particular the findings required by the Ordinance regarding property values could not be made by the Commission because the residential lots currently owned by Plaintiffs and others in the immediate vicinity of the proposed Dollar General store clearly will be devalued if the store is constructed. This is evidenced by the fact that the current covenants for Oakland Overlook, in order to maintain property values, specifically prohibit any commercial development and contain other restrictive covenants designed to provide a homogenous and residential look for Oakland Overlook. (See Oakland Overlook Covenants, Conditions and Restrictions, Article VII §§ 1 and 3 as recorded in Morgan County Deed Book 228-34 on January 14, 2008) These restrictions were included because Cacapon Associates knew that such commercial development would devalue nearby lots. (See third "Whereas" clause of the Covenants)

31. The Applicant's second waiver request covering minimum lot size was needed because the lots in Oakland Overlook were initially approved in 2007 as approximately half-acre lots. The Subdivision Ordinance was subsequently modified and now requires a minimum lot size of one acre for single family housing of the type proposed for Oakland Overlook.

32. However, any claim of hardship relating to lot size for housing development contradicts the applicant's claim that "[n]o housing will be provided in this development." And in response to a question about their plans for marketing the lots, units or commercial space, the Applicant's response is "not applicable." If the Applicant has no plans to build houses or market the lots, how could the one acre minimum size requirement result in any hardship (let alone extraordinary hardship) to them? The Applicant failed to make the required showing. The Planning Commission had no legal basis to approve the waivers.

FAILURE TO PROVIDE INFORMATION TO PLAINTIFFS

33. On several occasions members of the community have requested a copy of the Oakland Overlook application and supporting information that was to be considered by the Commission in reaching its decision. While some of this information was provided, other information, including two memos from Cacapon Associates and a proposal for modifying the existing covenants, were withheld from Petitioners.

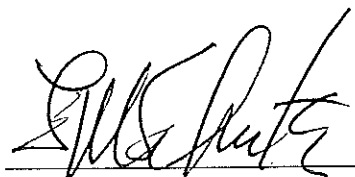
34. The Ordinance mandates that "[a]ll information received shall become a part of the official record for the subdivision under consideration." Moreover, all the documents required by §§ 4.3 and 4.4 of the Ordinance must be filed before the advertisement of the meeting. Members of the public requested the documents after the advertisement, yet did not receive all the documents required by §§ 4.3 and 4.4. Some of the required documents have never been filed.

35. The Subdivision Ordinance at issue here imposes certain duties on developers and landowners seeking approvals and waivers. Those duties correspond with the rights of the public. Documents must be timely filed. Where a document must be filed, it must be available for inspection by those who oppose the request. If the Planning Commission is going to consider a document or fact, that document or fact must be available to those who oppose the proposed action by the Commission at or around the time the legal advertisement runs. This is the nature of orderly and open governmental proceedings.

36. Your Petitioners were denied the right to know what the developer was seeking *before* the hearing. The failure to file the documents stripped Petitioners of their rights.

WHEREFORE, your Petitioners hereby request relief as follows:

- 1) That this Honorable Court require Respondent to show cause, if any there be, within twenty (20) days, why certiorari should not be issued in this case;
- 2) That this Honorable Court permit written discovery and depositions to be taken to clarify the factual bases alleged in this Petition;
- 3) That this Honorable Court issue a stay of work upon the project pursuant to the permits granted until such time as the Court has determined this appeal;
- 4) That this Honorable Court, upon review of the evidence, reverse the decision of the Morgan County Planning Commission and deny the requested permits and waivers;
- 5) That this Honorable Court issue a Writ of Mandamus requiring the Morgan County Planning Commission to follow the Morgan County Subdivision Ordinance in all respects with regard to the Dollar General project, including a grant of attorney fees and costs to the Petitioners; and
- 6) Such other and further relief as justice and the law may require.



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ROBERT DONADIEU, RITA DONADIEU,
GEORGE NELSON SPARKS, PATIENCE
T. SPARKS, DONNA FALLIN and
MARTHA ANN MacNAMARA
By Counsel

IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

ROBERT DONADIEU, RITA DONADIEU,
GEORGE NELSON SPARKS, PATIENCE T.
SPARKS and MARTHA ANN McNAMARA,

Petitioners,

v.

CIVIL ACTION NO.: 15-C-_____
JUDGE _____

MORGAN COUNTY PLANNING
COMMISSION,

Respondent.

VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF BERKELEY, to wit:

Robert Donadieu, being first duly sworn, says that he is a Petitioner named in the foregoing civil action filed in Morgan County, West Virginia, and as such is familiar with the contents of the foregoing, that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief, and so far as they are therein stated to be upon information and belief, he believes them to be true.



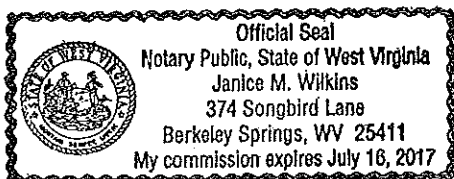
ROBERT DONADIEU

Taken, subscribed and sworn to before me, a Notary Public in and for said County and State, this
13th day of March, 2015.



NOTARY PUBLIC

My Commission Expires: July 16, 2017



IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

ROBERT DONADIEU, RITA DONADIEU,
GEORGE NELSON SPARKS, PATIENCE T.
SPARKS and MARTHA ANN McNAMARA,

Petitioners,

v.

CIVIL ACTION NO.: 15-C-_____
JUDGE _____

MORGAN COUNTY PLANNING
COMMISSION,

Respondent.

VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF BERKELEY, to wit:

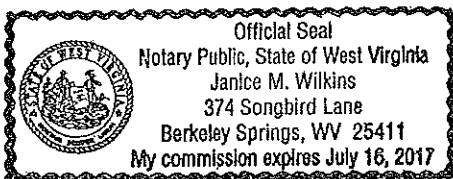
Rita Donadieu, being first duly sworn, says that she is a Petitioner named in the foregoing civil action filed in Morgan County, West Virginia, and as such is familiar with the contents of the foregoing, that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief, and so far as they are therein stated to be upon information and belief, she believes them to be true.


RITA DONADIEU

Taken, subscribed and sworn to before me, a Notary Public in and for said County and State, this
13th day of March, 2015.


NOTARY PUBLIC

My Commission Expires: July 16, 2017



IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

ROBERT DONADIEU, RITA DONADIEU,
GEORGE NELSON SPARKS, PATIENCE T.
SPARKS and MARTHA ANN McNAMARA,

Petitioners,

v.

CIVIL ACTION NO.: 15-C-_____
JUDGE _____

MORGAN COUNTY PLANNING
COMMISSION,

Respondent.

VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF BERKELEY, to wit:

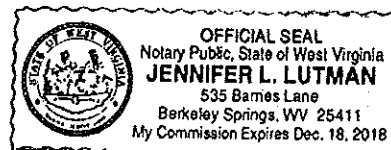
George Nelson Sparks, being first duly sworn, says that he is a Petitioner named in the foregoing civil action filed in Morgan County, West Virginia, and as such is familiar with the contents of the foregoing, that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief, and so far as they are therein stated to be upon information and belief, he believes them to be true.

George Nelson Sparks
GEORGE NELSON SPARKS

Taken, subscribed and sworn to before me, a Notary Public in and for said County and State, this
13 day of MARCH, 2015.

Jennifer L. Lutman
NOTARY PUBLIC

My Commission Expires: 12/18/2018



IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

ROBERT DONADIEU, RITA DONADIEU,
GEORGE NELSON SPARKS, PATIENCE T.
SPARKS and MARTHA ANN McNAMARA,

Petitioners,

v.

CIVIL ACTION NO.: 15-C-_____
JUDGE _____

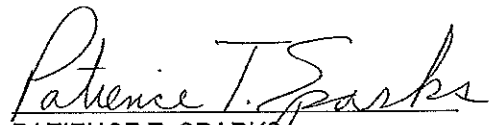
MORGAN COUNTY PLANNING
COMMISSION,

Respondent.

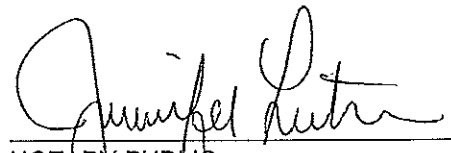
VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF BERKELEY, to wit:

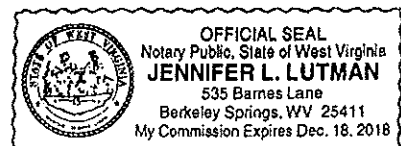
Patience T. Sparks, being first duly sworn, says that she is a Petitioner named in the foregoing civil action filed in Morgan County, West Virginia, and as such is familiar with the contents of the foregoing, that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief, and so far as they are therein stated to be upon information and belief, she believes them to be true.


PATIENCE T. SPARKS

Taken, subscribed and sworn to before me, a Notary Public in and for said County and State, this
13 day of MARCH, 2015.


NOTARY PUBLIC

My Commission Expires: 12/18/2018



IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

ROBERT DONADIEU, RITA DONADIEU,
GEORGE NELSON SPARKS, PATIENCE
T. SPARKS, DONNA FALLIN and
MARTHA ANN MacNAMARA,

Petitioners,

v.

CIVIL ACTION NO.: 15-C-_____
JUDGE _____

MORGAN COUNTY PLANNING
COMMISSION,

Respondent.

VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF BERKELEY, to wit:

Donna Fallin, being first duly sworn, says that she is a Petitioner named in the foregoing civil action filed in Morgan County, West Virginia, and as such is familiar with the contents of the foregoing, that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief, and so far as they are therein stated to be upon information and belief, she believes them to be true.

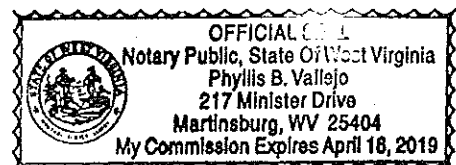
X Donna Fallin
DONNA FALLIN

Taken, subscribed and sworn to before me, a Notary Public in and for said County and State, this

17th day of March, 2015.

P B Vallejo
NOTARY PUBLIC

My Commission Expires: 4-10-2019



IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

ROBERT DONADIEU, RITA DONADIEU,
GEORGE NELSON SPARKS, PATIENCE T.
SPARKS and MARTHA ANN McNAMARA,

Petitioners,

v.

CIVIL ACTION NO.: 15-C-_____
JUDGE _____

MORGAN COUNTY PLANNING
COMMISSION,

Respondent.

VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF BERKELEY, to wit:

Martha Ann McNamara, being first duly sworn, says that she is a Petitioner named in the foregoing civil action filed in Morgan County, West Virginia, and as such is familiar with the contents of the foregoing, that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief, and so far as they are therein stated to be upon information and belief, she believes them to be true.

Martha Ann J. MacNamara
MARTHA ANN McNAMARA

Taken, subscribed and sworn to before me, a Notary Public in and for said County and State, this
12th day of March, 2015.

Carla J. Toth
NOTARY PUBLIC

My Commission Expires: 10/7/2015

NOTARIAL SEAL
Carla J Toth, Notary Public
Yardley, Bucks County
My Commission Expires October 07, 2015