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July 2, 2015

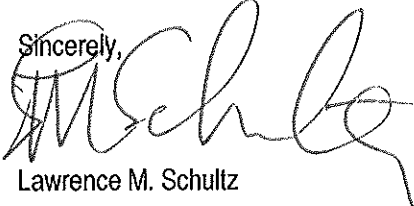
The Honorable Christopher C. Wilkes  
Judge, Morgan County Circuit Court  
Berkeley County Judicial Center  
380 W. South Street  
Martinsburg, WV 25401

Re: **Robert Donadieu, Rita Donadieu, George Nelson Sparks, Patience T. Sparks,**  
**Donna Fallin and Martha Ann MacNamara v. Morgan County Planning Commission**  
Morgan County Civil Action No.: 15-P-15

Dear Judge Wilkes:

Enclosed please find a copy of PETITIONERS' BRIEF IN SUPPORT OF THEIR PETITION FOR CERTIORARI AND IN OPPOSITION TO RESPONDENT'S 12(b)(6) MOTION for your review and consideration in the above referenced matter. By copy of this letter, the original Brief has been forwarded to the Clerk's office for filing.

Thank you for your consideration in this matter.

Sincerely,  
  
Lawrence M. Schultz

LMS/pbv

Enclosure (as stated)

cc: The Honorable Kimberly Hanback (w/encl.) – via **HAND DELIVERY**  
Richard G. Gay, Esquire (w/encl.) – via **E-MAIL and FIRST CLASS UNITED STATES MAIL**

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-P-15  
JUDGE WILKES

MORGAN COUNTY PLANNING  
COMMISSION,

Respondent.

**PETITIONERS' BRIEF IN SUPPORT OF THEIR PETITION FOR  
CERTIORARI AND IN OPPOSITION TO RESPONDENT'S 12(b)(6) MOTION**

COME NOW Petitioners, Robert Donadieu, Rita Donadieu, George Nelson Sparks, Patience T. Sparks, Donna Fallin and Martha Ann MacNamara, by counsel, Lawrence Schultz, BURKE SCHULTZ, HARMAN & JENKINSON, and in Support of their Petition for Certiorari and in Opposition to Respondent's 12(b)(6) Motion, state as follows:

**INTRODUCTION**

On February 17, 2015, the Morgan County Planning Commission approved a re-plat of the Oakland Overlook property, changing its use from residential to commercial and changing the required lot sizes in the subdivision.

This approval was obtained in violation of the Morgan County Subdivision Ordinance and is therefore void. Petitioners, nearby landowners, are aggrieved by this decision and seek to have this Court reverse it on Certiorari, and ask that this Court issue Mandamus to compel the Morgan County Planning Commission to follow its own Ordinance. Respondent convened a hearing before the applicant had

submitted all the materials required for a lawful hearing. Respondent then tried to cure this illegality at the illegally-convened meeting by waiving the requirements. This violates Petitioners' due process rights.

This brief will address the Certiorari issue, pursuant to this Court's Order of May 26, 2015, and the Mandamus issue by way of Opposition to Respondent's Motion to Dismiss.

Pursuant to *West Virginia Code § 8A-9-1(b)*, an aggrieved person may seek review of a planning decision by filing a petition for writ of certiorari. When reviewing a planning decision, a court may disturb the decision only where the relevant body "has applied an erroneous principle of law, was plainly wrong in its factual findings, or acted beyond its jurisdiction." Syl. Pt. 7, *Kaufman v. Planning & Zoning Com'n of City of Fairmont*, 171 W.Va. 174, 176, 298 S.E.2d 148, 150 (1982) (quoting Syl. Pt. 5, in part, *Wolfe v. Forbes*, 159 W.Va. 34, 35, 217 S.E.2d 899, 900 (1975))

This is the standard of law which governs proceedings under Code § 8A-9-1.

As an initial matter, it is beyond dispute that Respondent made no factual findings in this case at all. For example, at page 15 of Respondent's Return, Respondent addresses various random comments by individual commissioners as "Planning Commission findings." Respondent's Return, at 15.

Surely counsel, very experienced in the law, is not attempting to claim that random comments by individual members – at least one of whom voted against the Commission's action that night – constitute "findings" as that term is used in the cases cited above. Surely counsel would agree that factual findings are statements of fact voted upon by the Commission and entered in the record.

Respondent is somewhat trapped here by the desire to put something before this Court which represents a factual finding as that term is used in Article 6.

No such finding of fact has ever been made, and for that reason alone any waiver under Article 6 is the result of legal error.

The Respondent made a host of other clear-cut legal errors in this case as shall be outlined in detail below. This summary is by no means all-inclusive:

- It scheduled and advertised a hearing three (3) different times when "all material" under § 4.5 had not been submitted;
- It granted a waiver of the minimum lot size requirements without a factual finding as required by Article 6;
- Although faced with voluminous e-mail correspondence and a visit to its offices from members of the community seeking all filed documents over two (2) months before the February 17, 2015, hearing, it did not provide them;
- It granted a waiver of all permits under Article 7 without any "good cause shown," as required by § 7.3 of its own Ordinance;
- It waived the document submission requirements of § 4.5 under Article 7 when that provision did not apply;
- It scheduled and advertised a hearing on three (3) separate occasions without having the Preliminary Plat which was the subject of the developer's application in hand; and
- At a hearing convened in violation of § 4.5 it purported to "waive" the requirements the developer had to meet to get a hearing before the Commission.

In several of the instances cited above, the Commission acted in excess of its jurisdiction. Just one example: Respondent is required by its own Ordinance to advertise the hearing on the Preliminary Plat in a certain way (public posting and newspaper advertisement). See, § 4.5.

Without such advertisement, the Respondent has no jurisdiction to lawfully convene the hearing or decide the matter. Respondent's Ordinance, § 4.5, says the hearing "shall not be...advertised" until all material is submitted. Respondent violated this pre-condition. It therefore acted in excess of its authority and beyond its jurisdiction in even advertising the hearing, let alone convening it and taking official action. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Trimboli v. Board of Education, 163 W.Va. 1, 254 S.E.2d 561 (1979); Hutchison v. City of Huntington, 198 W.Va. 139, 474 S.E.2<sup>nd</sup> 659 (1996).

## **THE RECORD PROVIDED BY RESPONDENT IS BOTH OVERBROAD AND INCOMPLETE**

Respondent claims it "had before it" some listed documents when it made its decision. This is false for two reasons. First, the record is overbroad. It contains documents which could not have been considered because they were not in the file on February 17, 2015.

Second, the claim is false because the record is incomplete in a way which raises questions about whether anyone should rely upon it. For example, with regard to Item No. 16, the e-mail exchange between Mr. Stern and Ms. Gorse commenced in December 2014, not on January 28, 2015.<sup>1</sup> More to the point, those e-mail exchanges discuss something else missing from the record – the fact that there was an even earlier scheduling and advertisement for a hearing – set for December 9, 2015, and cancelled one day in advance, on December 8, 2014. See, Exhibit B, published notice of a December 9, 2014 hearing on this project.

The following arguments address these errors by Respondent in more detail.

On page 3 of Respondent's Return to the Writ of Certiorari, Respondent provides a list of the documents it claims to have relied upon in reaching its decision on the Oakland Overlook Application. That claim is plainly incorrect, since many of the documents on the list did not even exist at the time of the Preliminary Plat Hearing.

For example, item # 8 on Page 4 of the Respondent's filing lists correspondence regarding storm water permitting dated March 16, 2015 and correspondence regarding well permits dated March 24, 2015 as being relied upon by the Commission in reaching its decision. Also, Item # 23, letters from Alex Mooney's office dated February 24, 2015 and February 26, 2015, are claimed to have been a basis of the Planning Commission's decision. However, the hearing at which the application and waivers were approved was held on February 17, 2015, before these documents even existed. Clearly these documents were *not* part the Commission's decision and are thus being misrepresented by the Respondent.

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<sup>1</sup> See attached Exhibit A, which Petitioners believe comprises *all* of the e-mails.

Other documents cited by the Respondent in its list of materials relied upon by the Commission (See, Respondent's Return, p. 3), did exist at the time of the hearing but not until well after the notice of the hearing was published. For example, item #19, Justin Cowles' revised memo to the Commission, was not received by the Commission until February 11, 2015 (see Alma Gorse's time stamp on document) and was never provided to Petitioners or to Mr. Stern, who was working with them, until well after the February 17 hearing was over. In fact, Petitioners had no way prior to the hearing to know that such a memo even existed. Petitioners believe that much of the information in that memo, which appears to have been heavily relied up by the Commission in reaching its decision, is incorrect and misleading. However, Petitioners were provided no meaningful opportunity to respond to that information, despite a request for all documents in the official record.

Perhaps most importantly, much of the information included in Respondent's list of documents were unavailable to the Petitioners or Mr. Stern despite repeated requests for the formal record. In many cases, Petitioners and Mr. Stern were not even aware of the existence of such documents and had no possible way to see them. In other cases, although the materials may have theoretically been available via a detailed search of public records, the Petitioners had no practical way to conduct such a search or to even know what they should be looking for. Thus the Petitioners were effectively denied their right to view the relevant materials prior to the hearing.

For example, the following documents were not provided to the Petitioners or their representatives prior to the February 17, 2015 hearing:

- a. Item #1, MCPC agenda and meeting minutes for 9/26/06 meeting;
- b. Item #3, Oakland Overlook Covenants and Restrictions;
- c. Item #4, WVDEP Sewage Permits;
- d. Item #5, MCPC agenda and meeting minutes for 6/26/07 meeting;

- e. Item #6, Oakland Overlook final plat for original 12 lot residential subdivision;
- f. Item #8, State Permitting Correspondence (as noted above, some of which did not even exist at the time of the Hearing);
- g. Item #9, Supplement to the Declaration of Covenants, Conditions and Restrictions for Oakland Overlook;
- h. Item #10, Resubmitted version of Application and Waiver Requests;
- i. Item #11, Storm water calculations;
- j. Item #12, ARRO Consulting Engineer Reports dated 12/29/14, 1/23/15 and 2/04/15 (except for first page of 1/23/15 memo from Richard Parks to Alma Gorse which was provided to Paul Stern on January 26, 2015);
- k. Item #13, Revision to large plat received by Commission on 2/6/15;
- l. Item #15, Justin Cowles' initial Memorandum to Morgan County Planning Commission;
- m. Item #19, Justin Cowles' revised Memorandum to Morgan County Planning Commission;
- n. Item #22, Petition in support of Oakland Overlook PUD

Respondent acknowledges that certain information required by the Ordinance was not provided by the developer, but seeks to avoid the consequences of this by claiming that it was simply not necessary. For example, Respondent concedes that a transmittal letter wasn't provided but then states such a letter was not necessary because the application was hand delivered. However, Section 4.3 (f) of the Ordinance states that:

*[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.*

Ordinance, § 4.3(f). The means of delivery has no effect on the developer's duty. The transmittal letter is not in the file or the Record even today.

Had this simple, clear, mandatory requirement been met, we would not now be in dispute about whether the appropriate documentation was submitted by the developer and when such documentation was submitted. The failure of the Commission to ensure that this requirement was met has led to the current confusion as to what documentation was submitted, when it was submitted, and when it was available to Petitioners.

This failure of the Commission to obey the requirements of the Ordinance is also reflected in the filings before this Court. The "record" provided to the Court is presumably the record upon which this Court should reach its decision whether to grant the requested relief, including the Writ of Mandamus. But that is different and distinct from the record upon which the Planning Commission based *its* decision. Clearly Respondents have not provided that record since, as indicated above, many of the documents Respondent included did not even exist at the time of the February 17, 2015 hearing while others were never provided to Petitioners despite the fact that Petitioners were entitled to them. See, Ordinance, Section 10.3: "All information received shall become a part of the official record for the subdivision under consideration."

Even the record now provided to this Court is incomplete. For example, the e-mail correspondence between Mr. Stern and Ms. Gorse is only a part of the correspondence between these two individuals. That correspondence began not on January 28, 2015, as claimed by Respondent, but rather on December 8, 2014. See, Exhibit A, hereto. Also, the Commission did not issue its first notice of Hearing on the proposed Oakland Overlook Development on December 24, 2014, as claimed by Respondent, but rather on November 12, 2014. See, Exhibit B, hereto. That notice called for a Hearing date of December 9, 2014, which the Commission cancelled on December 8, 2014, *after* Mr. Stern notified the Commission that members of the community wished to speak against the Application. See, e-mails dated December 8, 2015, between Alma Gorse and Paul Stern, Exhibit A, attached hereto.



The correspondence between Ms. Gorse and Mr. Stern continued after the December 9<sup>th</sup> meeting was cancelled. It makes clear that Mr. Stern, along with another community member, Rebecca McLeod, wanted to come to the Commission's offices to view the underlying material supporting the Oakland Overlook Application. See, Exhibit A. That meeting took place on January 6, 2015 among Ms. Gorse, Commission President Jack Soronen, Paul Stern and Rebecca McLeod at which time the only documents made available to Mr. Stern and Ms. McLeod were the initial re-plat application and the proposed re-plat engineering diagram. No other documents were mentioned by the Commission at that meeting.

As of the date of the hearing on February 17, 2015, the only documents provided by the Commission to Mr. Stern, despite his repeated attempts to gain the full record, were the initial application (provided on January 6, 2015 as indicated above), page 1 of the ARRO Consulting Engineer Report dated 1/23/15 (provided on January 26, 2015) and the initial two waiver requests (provided on January 29, 2015). After the February 17, 2015 hearing concluded and the Board reached its decision, Mr. Stern continued to seek the appropriate documentation and was ultimately provided with: a) the minutes from the January 27, 2015 meeting (which was regarded as an "unofficial" hearing because proper notice had not been given); b) a copy of Mr. Cowles' revised memo to the Commission supporting the application and waivers; c) copies of the revised application and waiver forms containing new signature dates; and d) proposed modifications to the Oakland Overlook covenants. (These four documents were finally provided by the Commission to Mr. Stern on March 3, 2015, well after the Commission reached its decision.)

As can be seen in the correspondence between the Commission and Mr. Stern (Exhibit A), it is clear that in seeking the relevant documentation, Mr. Stern was acting not just on his own behalf but also on behalf of many others also opposing the application and waivers, including the Petitioners. Respondent's attempt to characterize that communication as irrelevant to the Petitioners' claim in this case is disingenuous at best. See also, Exhibit D, Affidavit of Stern.

The Planning Commission has a legal duty to obtain a complete application from the developer and make that application and supporting data available to the public. This duty is fundamental to Petitioners' right to a fair hearing and therefore not subject to waiver. While certain waivers are plainly permissible under the Ordinance, the right of the public to view in advance the information upon which the Commission intends to base its decision cannot be abridged consistently with the requirement of Article 6 that "such waiver shall not affect the implementation of the intent of this Ordinance." (See, first paragraph of Article 6). Nor can such a waiver withstand the additional requirement of Article 6 that waivers "shall not have the effect of nullifying the intent and purpose of the goals and policies of the Morgan County Comprehensive Plan or these regulations." It is apparent from a full reading of the Subdivision Ordinance and its enabling legislation (Chapter 8A of the West Virginia Code) that one purpose of the legislation is to protect the public's rights by ensuring notice and a fair hearing. The public must have sufficient information upon which to meaningfully participate in the application hearing, or its right to notice is meaningless. These rights, which are also protected by the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, cannot be "waived" by the Commission.

Even if such rights could be "waived" by the Commission under Article 6, there is no evidence in the record of any request under Article 6 to waive the requirements of § 4.3, § 4.4 or § 13.2.6 of the Ordinance or of the public's right to view the complete record prior to the hearing. Nor were there any findings of fact by the Commission on this matter, as required when a waiver is granted under § 6.

Further, some of the waivers that were granted by the Commission were granted not under Article 6 of the Ordinance but instead under Article 7. This was apparently done by the Commission in an attempt to avoid the "extraordinary hardship" requirement of Section 6 which provides that:

Where the Planning Commission finds that extraordinary hardship may result from strict compliance with these regulations, it may modify the regulations so that substantial justice may be done and the public interest secured, provided that such waiver shall not have the effect of nullifying the intent and purpose of the goals and policies of the Morgan County

Comprehensive Plan or of these regulations. The 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 or size, or is affected by such topographical conditions, or is subject to such title limitations of record that it is impossible or impractical for the subdivider to comply with all of the regulations of this 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.

Such waivers, however, were not permissible under Article 7 of the Ordinance. As stated in

Respondent's Return, Section 7.3 states that:

*Any of the **above time periods** binding upon the Commission or the developer may be waived by mutual consent for good cause shown.*

(Ordinance, Section 7.3, emphasis added.)

The word "above" in this section clearly refers to the time **periods** referenced only in Article 7. These are stated periods of time (90 days, 2 years, etc.) within which the developer or the Commission must accomplish their work. For example, after "all required material" has been submitted, the Commission must hold a hearing within 90 days. See, § 7.1. What § 7.3 says is that if both developer and Commission agree, then "for good cause shown" the 90 day limit may be waived. By the way, Respondent's record contains no evidence whatever for "good cause shown."

Section 7.3 is not applicable to the final sentence of § 4.5: "The subdivision Preliminary Plat Public Hearing & Evaluation *shall not be* scheduled and advertised until all material is submitted." Ordinance, § 4.5, Certified Record, Item 7. This is not a "time limits" or "time period" problem. Rather this is a "timing" problem: Whenever the developer has submitted all materials, then the hearing may be scheduled.

The differences between a proper Article 7 waiver and what was done here are easy to see. The "time limits" of §§ 7.1 and 7.2 are matters between the Commission and the developer which do not affect the public's right to know. In certain circumstances, such flexibility may protect the *developer's* due process rights. By contrast, the material submissions required by § 4.5, which are mandatory, protect the

right of the public to know at the earliest stage of the proceedings what the developer proposes to do. This is crucial to the protection of the public's interests as outlined in § 2.1 of the Ordinance and West Virginia Code, § 8A-1-1.

Respondent argues that the waivers were proper under § 6, but even if that were so, that is not what the Commission did. Section 6 requires findings of fact. There are none in this record.

Were §§ 7 and 6 of this Ordinance interpreted as broadly as Respondent suggests, then the Commission, for a given project, could simply waive *all* requirements, including the right of the public to speak, including the developer's duty to submit all plans, and including the duty to publish notice in the newspaper. This would be especially easy where the Courts fail or refuse to require that findings of fact be made while the public's input is being muzzled. Indeed, in this case, the Planning Commission is attempting not only to "waive" the submissions which trigger its right to schedule a hearing, but also to "waive" its duty to make the required finding to justify any waiver. The proper step would have been to simply follow the Ordinance.

The recent memorandum decision in Casto v Kanawha County Commission, 2015 WL 1839320, decided April 17, 2015, which Respondent cites as similar to the instant case, is instructive in this regard.

In Casto, a member of the public appeared pro se at a hearing and pointed out what the Circuit Court called "clerical errors"<sup>2</sup> in the developer's submissions. The Planning Commission in Casto recessed the hearing and corrected these clerical errors. It did not attempt to "waive" them and go on to approval. It re-scheduled the hearing to make the developer correct the clerical errors. While it is not entirely clear what the clerical errors were, there is no way to call what is missing from the instant proceeding a "clerical error."

On appeal, the West Virginia Supreme Court of Appeals found that Casto was not denied due process. It found, after noting that the hearing was delayed and the errors were corrected, that he was

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<sup>2</sup> See, Judge Stuckey's Circuit Court opinion in Casto, attached as Exhibit C.

given the process which was his due. Respondent should have done what the Planning Commission in Casto did: start over after enforcing the clear requirements of the Ordinance.

Article 7 is entitled "Time Limits" and as a whole lays out the consequences of failure of the Planning Commission and/or the Developer to act within specified time periods. Ordinance, § 7.1-2, Certified Record, Item 7.

These and only these time limits are subject to extension under Section 7.3 of Article 7. However, the so called "time limits" granted as waivers by the Commission do not fit any of these categories. Instead, these extensions were for specific permits which the Ordinance requires be submitted by the developer, prior to any hearing being *scheduled*, much less convened. Article 6, however, includes a stringent "extraordinary hardship" requirement which was not supported by the evidence or found by the Commission in its decision. The Commission attempted to circumvent this Section 6 standard and improperly handle the permit waivers under Section 7.3. This action of considering the permit waivers under Article 7 was apparently a last minute decision by the Commission announced by the Chairman immediately after the Commission voted on the waiver.

The Commission's own engineer believed the way to seek these waivers was under Article 6:

*Waiver 1 –Requesting deferral of agency permits and approvals until final plat consideration.*

*It has been the Planning Commission's practice to have the applicant secure all required government approvals and permits prior to preliminary plat consideration...*

*Given these ordinance requirements, **and the waiver criteria in section 6.0**, in my opinion, granting a waiver to defer permits and approvals until 30 days prior to a final plat hearing is justified.*

(Emphasis added. See, Record, Item 12.)

Since these were mandatory requirements, impacting Petitioners' rights to notice and a hearing, they should not have been "waived" at all under any section of the Ordinance. The Commission "waived"

Petitioners' rights pursuant to Article 7. Even its engineer knows that is wrong. Simply stated, Respondent could not legally convene a hearing that had not been advertised, and § 4.5 says the Commission could not legally advertise this hearing given the dearth of records. Respondent advertised it anyway, then attempted to cure the problem by granting "waivers" at an illegal meeting. These are Respondent's own rules. Respondent must not be permitted to just ignore them this way.

### **THE PUBLIC HAS A STAKE IN THESE PROCEEDINGS**

The Morgan County Subdivision Ordinance was adopted for the following purposes, according to the Ordinance itself:

#### **Section 2.1 Purpose**

This ordinance is adopted for the following purposes:

- a. To protect and provide for the public health, safety and general welfare of the citizens of Morgan County;
- b. To assist orderly and efficient land development;
- c. To coordinate existing streets, roads, and utilities with new streets, roads and utilities;
- d. To insure that roads are safe and adequate for the type of subdivision selected and that adequate provision has been made for road maintenance;
- e. To safeguard lives and property from loss by fire, flood and erosion;
- f. To protect water supplies and other natural resources;
- g. To protect prospective purchasers of land in subdivisions.

Clearly those stated purposes cover a number of matters important to nearby landowners *and* the public at large. Such purposes as "protecting and providing for the public health, safety and general welfare of the citizens" (2.1(a)); assisting "orderly and efficient land development" (2.1(b)); "safeguarding lives and property from loss by fire, flood and erosion" (2.1(e)); protecting "water supplies and other natural resources" (2.1(f)); and "protecting prospective purchasers of land in subdivisions" (2.1(g)); all implicate

members of the public who neither live near the subdivision, own the subdivision, seek to develop it, nor sit on the Planning Commission.

To this same end, § 4.6 of the Ordinance specifically allows for "members of the public" to be heard at the meeting regarding the application. Similarly, § 4.5 requires that a sign be placed on the property 21 days prior to the hearing "in a location visible to the public," and requires notice of the hearing to be published for two consecutive weeks in a local newspaper of general circulation. Of course, your Petitioners are *both* members of the general public *and* aggrieved parties.

The Ordinance implicitly and explicitly recognizes the general public's stake in these issues. Every resident of Morgan County has a stake in these issues, as best exemplified in § 2.1(a) of the Ordinance quoted above.

Moreover, the Morgan County Planning Commission itself, in this very situation, has recognized the public's stake in this matter, including its right to notice and a meaningful public hearing. The Commission concedes that an earlier scheduled hearing was cancelled, in part, because of "difficulties with the posted sign on the property..." (Respondent's Return, p. 6, footnote 4).

Why cancel the hearing? Planner Alma Gorse says the sign was "illegible and [contained] incorrect information" according to the record. (See Record, Item 24). The general public's right to notice of the hearing would have been violated had the hearing gone forward on January 27, 2015 so the Planning Commission rescheduled it for later.

In the instance of the sign posting, the Commission recognized that the failure to follow the Subdivision Ordinance would violate the general public's right to notice and a fair hearing, so it stopped and started over. The Commission recognized that it could not lawfully go forward without proper notice, so it required proper notice. Unfortunately, Respondent now refuses to adopt that same stance with regard to enforcing § 4.5.

Section 4.5 of the Subdivision Ordinance states: "the Subdivision Preliminary Plat Public Hearing & Evaluation shall not be scheduled and advertised until all material is submitted."

The term "all material" refers to the items listed in §§ 4.3 and 4.4 of the Ordinance. Thus, for example, § 4.4(b) requires that "A Preliminary Plat as described in Article 13..." be filed with the Application. This is the very document the developer wants to have approved. It is the heart of the reason for the hearing, yet even the *Plat* was not filed until after the hearing was advertised. County Planner Alma Gorse has nevertheless written "Approved by PC 2-17-15" in the margin of the document. See, Record, Item 13.

Significantly, even the Planning Commission does not attempt to argue that it waived the § 4.5 "all materials" requirement for *this* violation. The developer did not even *seek* a waiver of the time to file the plat.

The meeting should not have been scheduled, advertised or held without a plat in compliance with Section 13.2. Whether this defect is waivable or not, no waiver was sought or granted. This alone is sufficient reason to find Respondent violated its own Ordinance.

Under the clear terms of § 4.4(c), a letter was required from the owner authorizing the developer to act as the owner's agent with full authority. This material was never submitted.

Under § 4.4(f), the developer was to provide "profiles of the center lines of each road within the subdivision, and typical cross-sections." This material was not supplied until February 6, 2015,<sup>3</sup> *after* the second notice of the Preliminary Plat Hearing was published in the newspaper. Thus the Planning Commission violated its own mandatory rule, § 4.5, cited above. It also failed to alert Mr. Stern, who it knew was requesting all the documentation. The developer never sought, nor did Respondent ever grant, a waiver of this deficiency.

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<sup>3</sup> See Respondent's Return, p. 6.



Section 4.4(i) calls for the developer to provide a proposed plan for control of erosion and sediment. No such plan was in the record as of the date of the hearing, even though the person who filled out the form checked "completed" for this item.

Section 4.4(j) requires that state road entrance permits be submitted prior to the scheduling and advertising of the hearing. This material has never been submitted, even until today.

The clear purpose behind requiring all the material to be submitted before the hearing is scheduled or advertised is so that the public can review the material and gain an understanding of the proposal before the meeting. When the public has a right to speak, it is entitled to know what is planned so it can speak knowledgeably. "[I]t is a fundamental requirement of due process to be given the opportunity to be heard at a meaningful time and in a meaningful manner." Hutchison v. City of Huntington, supra, quoting Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed 2d 18 (1976).

Citizens of Morgan County in fact requested to review the record prior to the hearing. Paul Stern and Rebecca McLeod both appeared at the office of the Planning Commission on January 6, 2015. The attached affidavit of Stern reflects that he and Ms. McLeod were not shown the document revealed in the Record as Document No. 9, "Suppliment (sic) to Declaration of Covenants, Conditions and Restrictions for Oakland Overlook," even though they asked to see the file and the Commission had allegedly received it on November 20, 2014, over a month before. See, Affidavit, Exhibit D. It is now clear that Stern and McLeod could not have viewed the Plat which was ultimately approved, either, since that was not filed by the developer for over a month.

Thereafter, Stern exchanged e-mails with Alma Gorse in an effort to obtain other documents. Some further documents were provided, but crucial documents, which the Commission claims supported its decision, were never provided. Justin Cowles, on behalf of the owner, provided extensive written argument regarding claimed waivers, which was never provided to Petitioners, Stern or anyone else. See, Record, Item 19.

Respondent says that it can waive any section of its Ordinance any time it wishes to do so. This argument goes too far, and presents a bootstrap issue for Respondent. Until "all materials" are submitted, the Respondent could not lawfully schedule a meeting. Without a lawfully scheduled meeting, Respondent could take no official action on the proposed project, including granting "waivers" of the very provisions it violated in scheduling the meeting in the first place.

In other words, Respondent tried at the February 17, 2015 meeting to waive the provisions in its Ordinance it had already violated by scheduling the meeting.

### **CONCLUSION**

For all the foregoing reasons, and others which may become apparent as this briefing schedule proceeds, your Petitioners respectfully request that this Honorable Court order that the February 17, 2015 decision of the Planning Commission be declared void and without effect.

### **PETITIONERS' OPPOSITION TO MOTION TO DISMISS MANDAMUS**

This Court ought to grant a Writ of Mandamus to compel the Morgan County Planning Commission to follow its own rules, as set forth in the Morgan County Subdivision Ordinance.

The standard for granting a writ of mandamus is set forth in State ex. rel Brown vs. Corporation of Bolivar, 614 S.E.2d, 719, 217 W.Va 72 (2005):

A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

That Ordinance says at § 4.5: "The subdivision Preliminary Plat Public Hearing & Evaluation shall not be scheduled and advertised until all material is submitted."

This sentence is mandatory and perfectly clear. It is shown, without question, that Respondent not only scheduled and advertised a hearing three (3) separate times, but actually held the hearing, without the required material having been submitted until after the hearing was advertised. This was simply a violation of the rules under which the Respondent must operate.

As members of the public, and as "aggrieved persons," Petitioners have a clear legal right to examine the public records of the Commission, including all the documents required to be in the file before the hearing was scheduled and advertised. Their right to make such an examination *before* the hearing is what the language of § 4.5 compels.

Members of the public are permitted to "speak" at the hearing. Section 4.6. This opportunity to be heard is meaningless if the public is denied the benefit of examining the required submissions. No hearing should ever have been scheduled.

By scheduling the hearing in violation of the Ordinance, then "waiving" the public's access to the documents by approving the Preliminary Plat and allowing the development to move forward, Respondent did an end run around Petitioners' rights.

So that it is clear, the very Preliminary Plat which was approved by Respondent on February 17, 2015 did not hit the Respondent's file until February 6, 2015 some eight or nine days after advertisement. Respondent hasn't even suggested there is a "waiver" of record which covers this violation of the Rules.

Article 13 of the Ordinance sets the requirements for Preliminary Plats. There appear to be numerous deficiencies in the way this Plat was drafted. Several of the required items are missing from the Plat. See, Record, Item 13, and Record, Item 7, Article 13.

Respondent had a clear legal duty under § 4.4(b) and § 4.5 to require that the Plat itself, which was the subject of the hearing, be filed before scheduling or advertising the hearing. Respondent scheduled the hearing three (3) separate times and never had the Plat for which approval was sought until after the hearing was scheduled.

Even assuming, *arguendo*, that the "waivers" of all the state and county permits were permitted under the rules, Respondent must now admit that 1) it was never asked to waive the requirement that the Plat it approved be submitted before advertising, and 2) it never granted such a waiver.

The duty to require the actual Plat which the developer wishes to have approved *in the file* before scheduling and advertising the hearing is a non-discretionary duty. The developer neither requested nor did the Respondent grant any alleged "waiver" from that duty.

The final part of the analysis is the absence of another adequate remedy. In this regard, see Syllabus Point 4 of Walter v. Ritchie, 156 W. Va.98, 191 S.E 2d 275 (1972).

Mandamus will lie to compel performance of a nondiscretionary duty of an administrative officer though another remedy exists, where it appears that the official, under misapprehension of the law, refuses to recognize the nature and scope of his duty and proceeds on the belief that he has discretion to do or not do the thing demanded of him.

Moreover, Petitioners as members of the public have substantial rights under this Ordinance whether they are "aggrieved persons" such as adjacent landowners, or not. Nothing in § 8A-9-1 forecloses other means of seeking redress against Respondent.

Beginning with the Commission's aborted attempt to approve the Oakland Overlook Application at a premature meeting scheduled for December 9<sup>th</sup>, the Commission has struggled mightily to play "catch-up" with the Ordinance. Respondent has done so by attempting to waive non-waivable rights of the Petitioners and public and just plain ignoring its legal duties.

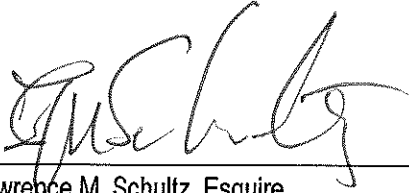
This behavior by the Commission ultimately failed to bring them into compliance with the Morgan County Subdivision Ordinance. That Ordinance is not, as the Commission would apparently have us believe, a mere suggestion of how best to proceed, but a prescription for the steps that must be taken to properly approve an application for development. Section 8A of the West Virginia Code, the underlying enabling legislation authorizing creation of the Planning Commission, states that “[a] land development plan and plat must include **everything** required by the governing body's subdivision and land development ordinance” (emphasis added). Even as of today, that has not happened, e.g. the Plat provided by the Developer is still not in compliance with the requirements of Section 13 of the Ordinance, and several requirements of Sections 4.4. and 4.5 have still not been met by the developer.

The Subdivision Ordinance should be interpreted by this Court under the same standards afforded West Virginia Statutes. Town of Burnsville v. Kwik-Pik, Inc., 185 W. VA 696, 408 S.E 2d 646 (W.Va 1991) (recognizing that the rules for construing statutes also apply to the interpretation of municipal ordinances.)

Because the Commission has not complied with the Subdivision Ordinance, Mandamus is proper in this case. Using the Brown test, Petitioners had a clear legal right to have the Commission obtain all the appropriate information from the developer and make that information available to Petitioners in a timely fashion, the Planning Commission had a duty to obtain that information and make it available to Petitioners, and the only adequate remedy is for this Court to order the Commission to restart the process and comply with the Ordinance. Further, the responsibility of the Commission to follow the notice procedures outlined in the Ordinance, to obtain from the developer all the material required by the Ordinance, and to make that information available to the Petitioners was a non-discretionary duty. In this case the Commission has failed to properly understand that duty and instead proceeded on the basis that it had discretion to take actions and make decisions not authorized under West Virginia Law or the applicable Ordinance.

Petitioners ask that this Honorable Court deny the Motion to Dismiss and require Respondent to answer with ten (10) days.

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



---

Lawrence M. Schultz, Esquire  
BURKE, SCHULTZ, HARMAN & JENKINSON  
WV State Bar No. 4293  
P. O. Box 1938  
Martinsburg, WV 25402  
(304) 263-0900  
(304) 263-0469 (fax)

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.

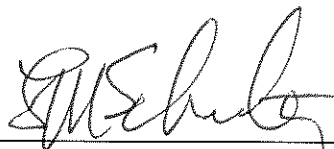
CIVIL ACTION NO.: 15-P-15  
JUDGE WILKES

MORGAN COUNTY PLANNING  
COMMISSION,

Respondent.

CERTIFICATE OF SERVICE

Type of Service: First Class United States Mail, postage prepaid and e-mail  
Date of Service: July 2, 2015  
Person (s) Served: Richard G. Gay, Esquire  
LAW OFFICE OF RICHARD GAY, LC  
31 Congress Street  
Berkeley Springs, WV 25411  
Item(s) Served: PETITIONERS' BRIEF IN SUPPORT OF THEIR PETITION FOR CERTIORARI  
AND IN OPPOSITION TO RESPONDENT'S 12(b)(6) MOTION

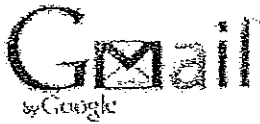


---

Lawrence M. Schultz  
BURKE, SCHULTZ, HARMAN & JENKINSON  
WV State Bar No. 4293  
85 Aikens Center  
P. O. Box 1938  
Martinsburg, WV 25402

# **Exhibit A**





Paul Stern &lt;pastern1@gmail.com&gt;

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**Tuesday Planning Commission Meeting**

12 messages

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Paul Stern <pastern1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>

Mon, Dec 8, 2014 at 10:50 AM

If we would like to speak at the meeting, do we need to sign up in advance?

Thanks,  
Paul Stern

---

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastern1@gmail.com>

Mon, Dec 8, 2014 at 11:04 AM

no need for signing up...our planning commission president will open the floor for public comments once review with staff and pc members is complete...  
thanks, alma

[Quoted text hidden]

Alma E. Gorse  
Morgan County Planning Commission  
77 Fairfax Street, Room 105  
Berkeley Springs, WV 25411  
(304).258.8540 ext. 1303

---

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastem1@gmail.com>

Mon, Dec 8, 2014 at 2:39 PM

Paul, The Planning Commission President and Vice President have decided to cancel tomorrow night's Planning Commission meeting. The applicant's submittal still needs some work so this will probably get pushed to the January 27th meeting. Keep an eye out for the public notice. Thank you and Happy Holidays.

[Quoted text hidden]

Paul Stern <pastem1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>  
Cc: Russell <russellmokhiber@gmail.com>, jensuya1 <jennifer@robert-peak.com>, Jensuya <raqs@tarabraqs.com>, Gale Foulds <ggfoulds2@frontier.com>, Jo <jjlls1@yahoo.com>

Mon, Dec 8, 2014 at 3:34 PM

Thanks for letting us know Alma. Happy holidays to you too.

[Quoted text hidden]

Paul Stern <pastem1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>

Sun, Dec 28, 2014 at 7:42 PM

Alma: I was hoping to stop by the Courthouse this week and look over the available public info on Oakland Overlook and the Family Dollar waiver requests. I also have a few questions about the hearing process.

Is there a convenient time for you when I could stop by?

Thanks,

Paul

On Mon, Dec 8, 2014 at 11:04 AM, alma gorse <gorsealmae@gmail.com> wrote:  
[Quoted text hidden]

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastem1@gmail.com>

Mon, Dec 29, 2014 at 8:51 AM

Hi Paul..please allow me to get caught up here this morning at a minimum...always pretty hectic after the holidays...tomorrow would probably be a better day for me...  
thank you, alma

[Quoted text hidden]

Paul Stern <pastem1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>

Mon, Dec 29, 2014 at 11:58 AM

Tuesday is fine with me Alma. In fact if you would rather wait until Friday or even the first week of January that is also okay.

Thanks,  
Paul

[Quoted text hidden]

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastem1@gmail.com>

Mon, Dec 29, 2014 at 12:33 PM

i'll email you in the morning...thank you so much for your understanding....  
it's wonderful to have the time off but we sure pay for it when we get back!!

[Quoted text hidden]

---

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastern1@gmail.com>

Tue, Dec 30, 2014 at 8:33 AM

Good morning Paul...unfortunately, I am home today..feeling a bit under the weather...  
I will get in touch with you early next week to schedule a site down...have a happy new year...

[Quoted text hidden]

---

Paul Stern <pastern1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>

Tue, Dec 30, 2014 at 11:32 AM

Feel better soon Alma. Early next week is fine.

[Quoted text hidden]



Paul Stern &lt;pastern1@gmail.com&gt;

---

**Oakland Overlook**

4 messages

---

Paul Stern <pastern1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>

Mon, Jan 5, 2015 at 12:24 AM

Hi Alma. Hope you are feeling better.

Any chance I could stop by the office to look over the Dollar General paperwork in the afternoon either today or Tuesday?

---

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastern1@gmail.com>

Mon, Jan 5, 2015 at 8:39 AM

this afternoon or tomorrow afternoon should work fine...thanks for your patience...

On Mon, Jan 5, 2015 at 12:24 AM, Paul Stern <pastern1@gmail.com> wrote:

Hi Alma. Hope you are feeling better.

Any chance I could stop by the office to look over the Dollar General paperwork in the afternoon either today or Tuesday?

Alma E. Gorse  
Morgan County Planning Commission  
77 Fairfax Street, Room 105  
Berkeley Springs, WV 25411  
(304).258.8540 ext. 1303

---

Paul Stern <pastern1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>

Mon, Jan 5, 2015 at 1:21 PM

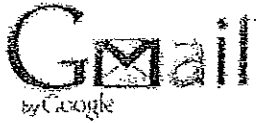
How about Tuesday at 2:00 pm? Does that work?  
[Quoted text hidden]

---

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastern1@gmail.com>

Mon, Jan 5, 2015 at 1:23 PM

perfect...I'll see you then...  
[Quoted text hidden]



Paul Stern <pastern1@gmail.com>

---

## Oakland Overlook

1 message

---

Paul Stern <pastern1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>

Tue, Jan 6, 2015 at 10:07 AM

Alma—just want to let you know that Rebecca MacLeod (I am thinking you know her but not sure) will also be coming this afternoon to help look through the docs.

Thanks,  
Paul



Paul Stern &lt;pastern1@gmail.com&gt;

---

**Dollar General Community Meeting.**

2 messages

Paul Stern &lt;pastern1@gmail.com&gt;

Fri, Jan 9, 2015 at 3:51 PM

To: alma gorse &lt;gorsealmae@gmail.com&gt;

Hi Alma. The meeting to discuss the proposed Dollar General is set for January 19th at 7pm at Union United Methodist Church. (Snow date is the 21st.)

Please pass this onto Jack.

Thanks again for your time the other day.

Paul

Paul Stern &lt;pastern1@gmail.com&gt;

Fri, Jan 9, 2015 at 4:03 PM

To: alma gorse &lt;gorsealmae@gmail.com&gt;

Should have said Union Chapel United Methodist Church.  
[Quoted text hidden]



Paul Stern &lt;pastern1@gmail.com&gt;

---

**Oakland Overlook Application**

1 message

Paul Stern &lt;pastern1@gmail.com&gt;

Sun, Jan 25, 2015 at 1:20 PM

To: alma gorse &lt;gorsealmae@gmail.com&gt;

Cc: Rebecca MacLeod &lt;rebecca.macleod@frontier.com&gt;, Russell Mokhiber &lt;russellmokhiber@gmail.com&gt;

Hi Alma.

I know you already provided us with the application for the Oakland Overlook re-platting and also showed us the engineering diagrams. Were there any other attachments or documentation that was provided as part of the application? If so, is that something that could also be provided to us before the Tuesday Planning Commission meeting?

Thanks,  
Paul



Paul Stern <pastern1@gmail.com>

Good morning

2 messages

Mon, Jan 26, 2015 at 9:32 AM

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastern1@gmail.com>  
Cc: jack soronen <jack@starwv.com>

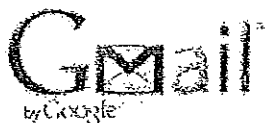
Hi Paul...I am forwarding you our engineer report upon completion of technical review..  
thanks, alma

Alma E. Gorse  
Morgan County Planning Commission  
77 Fairfax Street, Room 105  
Berkeley Springs, WV 25411  
(304).258.8540 ext. 1303

SMoCo Commi15012512420.pdf  
177K

*- 1 PAGE  
1/23/15  
\*RSD  
LETTER*





Paul Stern &lt;pastern1@gmail.com&gt;

---

**topic of waiver forms**

9 messages

---

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastern1@gmail.com>  
Cc: jack soronen <jack@starwv.com>

Wed, Jan 28, 2015 at 9:29 AM

Good morning Paul, last night you had made the comment, question regarding waiver forms...there are indeed waiver forms that get filled out along with the application , if applicable. I had thought that I had provided you with copies of all that when you had visited my office. Should you not have a copy of the waiver forms, please let me know and my apologies for the oversight.  
Thank you. alma

—  
Alma E. Gorse  
Morgan County Planning Commission  
77 Fairfax Street, Room 105  
Berkeley Springs, WV 25411  
(304).258.8540 ext. 1303

---

Paul Stern <pastern1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>  
Cc: jack soronen <jack@starwv.com>

Wed, Jan 28, 2015 at 3:08 PM

Hi Alma,

What I have from you is a five page application form that includes the Plan Review Checklist and the Environmental and Project Considerations Checklist, with Cross's responses attached. I don't have anything regarding a separate waiver application. It wasn't clear to me if they had even submitted that.

Basically I would like to see everything that was submitted by either Cross or Cacapon Associates, LP in support of either the main or waiver applications. That would include all the items listed in Sections 4.3 and 4.4 of the Subdivision Ordinance, if provided.

If you could e-mail the documents that would be great but if it's too much material, let me know when it's convenient for you and I will come to your office.

Thanks,

Paul

[Quoted text hidden]

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastern1@gmail.com>  
Cc: jack soronen <jack@starwv.com>

Thu, Jan 29, 2015 at 9:24 AM

my apologies Paul, It sounds like all that's missing is the two waiver forms...i have attached both of those...  
you've reviewed the plans and I have sent the engineer report, that should be everything.  
thanks, alma

[Quoted text hidden]



SMoCo Comm115012910210.pdf  
695K

*- WAIVER  
REQUESTS*

---

Paul Stern <pastern1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>  
Cc: jack soronen <jack@starwv.com>

Thu, Jan 29, 2015 at 11:05 AM

Thanks Alma. I appreciate you sending these.

Paul

[Quoted text hidden]

---



Paul Stern &lt;pastern1@gmail.com&gt;

2/10

3 messages

Jack Soronen <jack@starwv.com>  
To: Paul Stern <pastern1@gmail.com>  
Cc: alma gorse <gorsealmae@gmail.com>, Scott Swaim <:sswaim@mafc.com>

Tue, Feb 10, 2015 at 3:12 AM

Good morning Paul.

One thing I wanted to get back to in our conversation yesterday, but somehow it slipped, has to do with your comment about the agenda steps of considering the permit waivers before the PUD request. (I understood that you wanted the PUD to be considered before the waivers.)

Procedurally, the Planning Commsn. can't consider the PUD first. The waivers have to be cleared in order to - I guess the term would be something like "justify" or "complete" the PUD since the items being requested to be waived are otherwise required. And, as I've mentioned a couple of times, the denial of any one of the waiver requests would mean we can not consider the PUD. This is our normal procedure.

I hope this helps.

Jack

Paul Stern <pastern1@gmail.com>  
To: Jack Soronen <jack@starwv.com>

Tue, Feb 10, 2015 at 5:05 PM

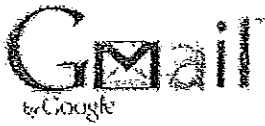
Understood Jack.

Thanks for the note.

We are putting together a letter outlining our objections to the Dollar General application and will get it to Alma in the next day or two.

Regards,

Paul  
[Quoted text hidden]



Paul Stern <pastern1@gmail.com>

# Letter and Attachment for Commissioners

1 message

Paul Stern <pastern1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>


Thu, Feb 12, 2015 at 4:05 PM

Hi Alma,

I dropped off the Dollar General letter (with copies for the Commission members) this afternoon. I am also attaching an electronic copy to this e-mail in case any of the Commissioners prefer that.

Thanks for your help getting this distributed.

Paul

 Oakland Overlook Letter and Attachment.pdf  
350K

*- P. STERN  
LETTER & MEMO  
2/12*



Paul Stern &lt;pastern1@gmail.com&gt;

---

**Tuesday Oakland Overlook Hearing**

2 messages

---

Paul Stern <pastern1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>

Mon, Feb 16, 2015 at 7:28 PM

Hi Alma.

One of the waivers requested by Cross Development is for something called Fire Marshall Review (CILP Apps). What is this? Will it be one of the Waivers that the Board votes on during the Tuesday hearing on Oakland Overlook?

Thanks,  
Paul

---

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastern1@gmail.com>, jack soronen <jack@starwv.com>

Tue, Feb 17, 2015 at 9:13 AM

This is only applicable to Commercial Building Permit Applications. We are dealing with a Subdivision Preliminary Plat application.  
thanks, alma

[Quoted text hidden]

—  
Alma E. Gorse  
Morgan County Planning Commission  
77 Fairfax Street, Room 105  
Berkeley Springs, WV 25411  
(304).258.8540 ext. 1303



Paul Stern &lt;pastern1@gmail.com&gt;

## Meeting Minutes

5 messages

Paul Stern <pastern1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>

Sun, Mar 1, 2015 at 10:23 PM

Alma: Are the minutes from the January 27th Planning Commission meeting available? (I think these were approved at the February 17th meeting) I would also like the minutes from the February 17th meeting, assuming they have since been approved by the Commission.

Is there anything else that "formalizes" the Commission's approval of the Oakland Overlook subdivision?

Thanks,  
Paul

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastern1@gmail.com>  
Cc: Jack Soronen <jack@starwv.com>

Mon, Mar 2, 2015 at 12:36 PM

Hi Paul..the January meeting minutes are on our website now...Planning Commission homepage, and the February minutes will be available once the Planning Commission approves them.. Our next meeting is scheduled for March 24, 2015....thanks and have a good day...  
alma

[Quoted text hidden]

Alma E. Gorse  
Morgan County Planning Commission  
77 Fairfax Street, Room 105  
Berkeley Springs, WV 25411  
(304).258.8540 ext. 1303

Paul Stern <pastern1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>  
Cc: Jack Soronen <jack@starwv.com>

Mon, Mar 2, 2015 at 1:02 PM

Thanks Alma.

I see the Agenda's for the January and February meetings at the bottom of the Planning Commission page but not the minutes. When I click o the link that says 2015 meetings nothing happens. Am I looking in the right place?

[Quoted text hidden]

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastern1@gmail.com>

Mon, Mar 2, 2015 at 1:54 PM

I have had the same trouble...when you have that screen up, click "refresh" to reboot the page on your screen...then it should magically appear !! (at the bottom of the page)  
if you continue to have trouble, I'd be happy to scan and email to you...thanks, alma

[Quoted text hidden]

3/7/2015

Gmail - Meeting Minutes

Mon, Mar 2, 2015 at 5:59 PM

Paul Stern <pastern1@gmail.com>  
To: alma gorse <gorsealmae@gmail.com>

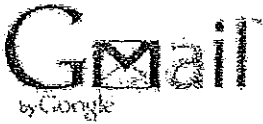
Still no luck Alma—I don't see a refresh button. If you could send them to me I would appreciate it.

Also, I know you sent me the two forms covering the waiver requests, but I want to make sure that I now have everything that constitutes the "official record" for the Oakland Overlook request that was approved by the Planning Commission at the February 17th meeting.. Is there anything beyond what you have already provided (Application,, waiver requests, Jan. 23, 2015 letter from ARRO) that is included in that record?

Thanks,  
Paul

[Quoted text hidden]





Paul Stern <pastern1@gmail.com>

### OO Request

4 messages

alma gorse <gorsealmae@gmail.com>  
To: Paul Stern <pastern1@gmail.com>  
Cc: Jack Soronen <jack@starwv.com>

Tue, Mar 3, 2015 at 10:23 AM

Good morning Paul, I have attached paperwork relating to the OO hearing dated 2.17.15. Also attached the minutes from the January 27, 2015 Planning meeting. The plat and stormwater management calculations are available to review at my office since they are quite cumbersome and the plat is tough to reduce...thanks and have a good day..alma

Alma E. Gorse  
Morgan County Planning Commission  
77 Fairfax Street, Room 105  
Berkeley Springs, WV 25411  
(304).258.8540 ext. 1303

#### 4 attachments

- MCPC mtg min 1.27.15 (2).pdf 1470K
- Cacapon Assoc Memo Rcd. 2.11.15.pdf 1908K
- OO Application for 2.17.15 Hearing.pdf 2056K
- OO Covenant Supplement for Comm. Lot.pdf 417K

*- NIG MIP - (NO ATTACH.)*

*- JUSTIP REVISED MEMO*

*- REVISED APP FORMS*

*- REVISED WATER*

*- PROPOSED MISC. TO OAKLAND OVERLOOK CO-EXPTS*

Paul Stern <pastern1@gmail.com>

Wed, Mar 4, 2015 at 12:54 AM

To: alma gorse <gorsealmae@gmail.com>

Cc: Jack Soronen <jack@starwv.com>

Thanks Alma.

[Quoted text hidden]

21

<https://mail.google.com/mail/ca/u/0/?ui=2&ik=55ce1c3ce9&view=pt&q=gorsealmae%40gmail.com&qs=true&search=query&th=14be03be81c5e946&siml=14b...> 2/2

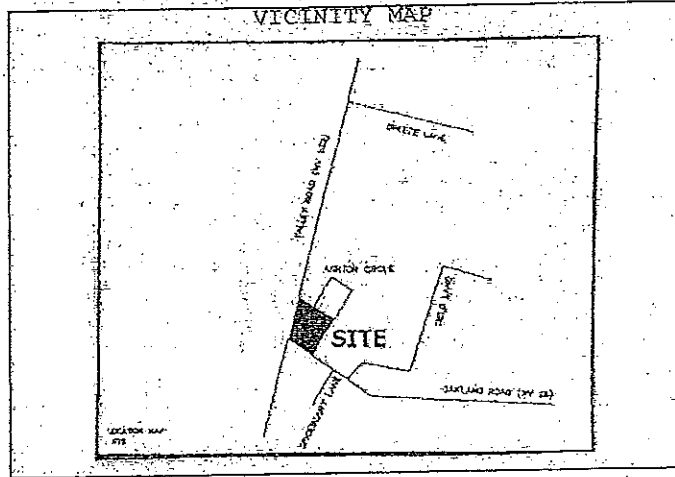
# **Exhibit B**

MORGAN COUNTY PLANNING COMMISSION  
PUBLIC NOTICE

The Morgan County Planning Commission will hold a Preliminary Plat Public Hearing for the following proposed Planned Unit Development.

1.) Oakland Overlook/Dollar General Planned Unit Development, owned and developed by Cacapon Associates/Cross Development, LLC, is located in Timber Ridge District, at the intersection of Route 522 south (Valley Road) and Oakland Road. The proposed subdivision is a re platting of an existing single family development, Oakland Overlook. The current proposal is a Planned Unit Development to allow for commercial development, the Dollar General Store. The re plat proposal consists of 9 lots totaling 8.07 acres. The commercial development lot size is 2.5 acres. The 8 remaining single family subdivision lots total 5.56 acres and the current lot sizes are to remain the same.

Waiver Request: Waiver requesting approval of PUD without final State and County permits. Waiver of minimum lot size for remaining residential lots are grandfathered in.



The purpose of the Public Hearing is for the Planning Commission to examine all materials submitted and decide to approve or disapprove the application based upon requirements contained in the Morgan County Subdivision Regulations as adopted September 8, 1983, and amended.

The public is invited to participate in the hearing to be held Tuesday, December 9, 2014 beginning at 7:00 p.m. in the Morgan County Commission Room, Morgan County Courthouse Complex, Berkeley Springs, WV.

11-12-21m

1<sup>st</sup> NOTICE - DEC - 9

# **Exhibit C**

FILED

2014 APR 30 PM 3:07

CATHY S. GARDNER, CLERK  
KANAWHA COUNTY CIRCUIT COURT

CLINT CASTO,  
Petitioner,

v.

Civil Action No. 14-AA-14  
Judge James C. Stucky

KANAWHA COUNTY COMMISSION,  
Respondent.

2014 MAY -5 AM 8:00  
PLANNING OFFICE

**FINAL ORDER**

On the 7<sup>th</sup> day of February, 2014, came the Petitioner, Clint Casto, *pro se*, and filed with the Circuit Clerk of Kanawha County, a petition for a writ of certiorari in the above-styled civil action moving the Court to reconsider the Respondent Kanawha County Commission's (*hereinafter* "Respondent") approval of Beacon Cell Tower's (*hereinafter* "Beacon") application.

**STANDARD OF REVIEW**

In land use planning appeals, the Court's jurisdiction to review certiorari or the planning commission's order is described in West Virginia Code § 8A-9-1, *et seq.* W. Va. Code § 8A-9-6, in pertinent part, provides the following:

- (a) The Court or judge may consider and determine the sufficiency of the allegations of illegality contained in the petition without further pleadings and may make a determination and render a judgment with reference to the legality of the decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals on the facts set out in the petition and return to the writ of certiorari.
- (b) If it appears to the court or judge that testimony is necessary for the proper disposition of the matter, the court or judge may take evidence to supplement the evidence and facts disclosed by the petition and return to the writ of certiorari, but no such review shall be by trial de novo.

(c) In passing upon the legality of the decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals, the court or judge may reverse, affirm or modify, in whole or in part, the decision or order.

“While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction.” Syl. pt. 5, *Wolfe v. Forbes*, 159 W. Va. 34, 217 S.E.2d 899 (1975); Syl. pt. 1, *Corliss v. Jefferson County Board of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003).

### FACTS AND PROCEDURAL HISTORY

Any cell tower constructed in an unincorporated area of Kanawha County must comply with the Kanawha County Wireless Telecommunications Facilities Ordinance (*hereinafter* “Ordinance”). Potential builders must obtain approval from the Kanawha County Planning Commission (*hereinafter* “Planning Commission”) and comply with the Ordinance.

The Ordinance requires applicants proposing to build a new tower facility to provide, among other things, the following: documentation of the applicant’s title or interest in the property on which the facility will be located, a copy of the Federal Communications Commission (*hereinafter* “FCC”) license for the facility, proof that the facility will have co-location capabilities, a professionally prepared site plan, a scenic assessment of the proposed tower location, a propagation map displaying how the facility fits into the applicant’s telecommunication network, and evidence demonstrating that no existing facility can accommodate the applicant’s need.

At the Planning Commission’s meeting on September 11, 2013, Beacon’s application was publicly reviewed. Due to clerical errors, the Planning Commission continued the hearing to allow Beacon to amend the application.

The Planning Commission meeting was held on October 9, 2013, and members of the public were present and spoke in favor and in opposition to the application. Upon determining that the application met all the requirements of the Ordinance, the Planning Commission unanimously voted to approve Beacon's application.

Petitioner appealed the Planning Commission's decision to the Respondent. A public hearing was held on December 19, 2014, and again, several members of the public spoke in favor and in opposition to Beacon's application. Subsequently, the Respondent affirmed the Planning Commission's decision.

Petitioner requested a reconsideration of the decision, and the Respondent reviewed the application, again, at a meeting on January 9, 2014. The Respondent held that Beacon's application meets the rigorous requirements for the Ordinance. As a result, the Respondent affirmed the Planning Commission's approval of Beacon's application.

### DISCUSSION

Petitioner contends that his due process rights to a hearing were violated. The record provides that Petitioner received notice and ample opportunity to voice any concerns and comments.<sup>1</sup> In this matter, three public hearings have been held to allow members of the public an opportunity to speak about their views and opinion. Importantly, Petitioner expressed his opposition to the approval of Beacon's application at several different meetings.

Petitioner further contends that Beacon would impose significant safety concerns to the public. The Ordinance's purpose is to provide a set of requirements for the construction of wireless telecommunications facilities in order to, among other things, "...fairly and reasonably protect the public health, safety and welfare..." See *Wireless Telecommunications Facilities*

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<sup>1</sup> The record provides that advanced notice for public hearings were sent to surrounding property owners via certified mail and through posting of public notices.



Ordinance §3. Here, any “perceived health risks” do not provide a basis to deny Beacon’s application.<sup>2</sup> In addition, the record provides that the Respondent thoroughly reviewed Beacon’s application to ensure that Beacon met Ordinance guidelines.

The Court has thoroughly reviewed the Petition, the entire record, and the applicable legal authority. Accordingly, the Court finds that the Kanawha County Commission was not plainly wrong in its factual findings, nor did it apply an erroneous principle of the law in affirming the approval of Beacon’s application for a new wireless communications facility.


**RULING**


Whereupon, after giving due and mature consideration to said written petition for appeal, and after reviewing the official court file, the Court does hereby **DENY** Petitioner’s petition for writ of certiorari. The Clerk of the Court shall send copies of this Order to the following:

Clint Casto  
913 Amherst Drive  
Charleston, West Virginia 25304

Andrew T. Gunnoe, Esquire  
Kanawha County Commission  
Post Office Box 3627  
Charleston, West Virginia 25336

Enter this Order the 30<sup>th</sup> day of April, 2014.

  
James C. Stucky, Judge  
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT,  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS  
DAY OF April 2014  
  
CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

<sup>2</sup> Petitioner argues that the tower would present the following “perceived health risks”: risk of collapse; impact on the food chain; and risk of fire.

# Exhibit D

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-P-15  
JUDGE WILKES

MORGAN COUNTY PLANNING  
COMMISSION,

Respondent.

AFFIDAVIT

COMES NOW the Affiant, Paul Stern, after first being duly sworn, deposes and says as follows:

1. I reside in Morgan County West Virginia and am over the age of 21 years.
2. I have been part of a group of Morgan County residents opposed to construction of a new Dollar General store in the Oakland Overlook development, and have attended numerous meetings and worked in concert with others in opposition to the proposed construction, including most of the named Petitioners in the above-styled Action.
3. In response to a notice that appeared in the Morgan Messenger I and several others concerned about development in Morgan County, became aware of a proposed December 9, 2014, Planning Commission Hearing to consider an application for development of a Dollar General store in the Oakland Overlook Subdivision.
4. On or about December 8, 2014 I began a series of phone calls and e-mails with the Alma Gorse, County Planner, regarding the proposed re-plat of the Oakland Overlook subdivision.
5. A true and correct copy of those e-mails, along with a notice that appeared in the Morgan Messenger on November 12, 2014 is attached hereto.

6. On December 8, 2014 in response to an e-mail I sent to Ms. Gorse I was informed that I and others that wished to speak at the December 9<sup>th</sup> meeting would be allowed to do so.
7. Later that same day I was informed by Ms. Gorse that the December 9<sup>th</sup> meeting had been cancelled because the applicant's submittal "still needs some work."
8. Following that cancellation and rescheduling of the Hearing for January 27, 2015, I engaged in a series of e-mail exchanges with Mr. Gorse in order to schedule a time when I could come to her office to look over the "available public info" on the Oakland Overlook re-plat request.
9. That meeting took place in Ms. Gorse's office on January 6 2015. The meeting participants were Alma Gorse, Jack Soronen (President of the Commission), Rebecca MacLeod (another representative of the community with questions about the proposed Dollar General store) and me.
10. Prior to that meeting I again informed Ms. Gorse that the purpose of the meeting was so that Ms. MacLeod and I could "look through the docs" relating to the Dollar General Application.
11. At that meeting, Ms. Gorse reviewed an engineering diagram of the proposed re-plat application and in response to my request for any other documentation supporting the application, provided me with a copy of the Application. The Application provided to me was a five page document including the "Plan Review Checklist" and the "Environmental and Project Review Checklist" with the Applicants' responses attached.
12. On January 25, 2015, I again e-mailed Ms. Gorse asking "Were there any other attachments or documentation that was provided as part of the application? If so, is that something that could also be provided to us before the Tuesday Planning Commission meeting?"
13. In response, I received a one page document which appears to be the first page of a four page memorandum from ARRO consulting to the Commission regarding the re-plat application. (See January 23, 2015 memo from Richard Parks, PE to Morgan County Commission, Attachment #12 in record submitted to this Court by Respondent. )
14. Based in part on the information provided by Ms. Gorse, I and many others spoke at the January 27<sup>th</sup> Public Hearing in opposition to the proposed development.
15. On January 28, 2015, the day after the Hearing, I received an e-mail from Ms. Gorse stating that she had mistakenly failed to provide the Waiver Requests that were attached to the application, apologizing for the oversight, and asking if I wanted them.

16. I responded that I would like to see the Waiver Applications and also wrote that "[b]asically I would like to see everything that was submitted by either Cross or Cacapon Associates LP in support of either the main or waiver applications." I also offered to come to her office to view the documents if it was too much material to e-mail.
17. On January 29, 2015 I received a response stating that "all that's missing is the two waiver forms." These forms were attached to the e-mail.
18. No other documentation was provided by the Commission prior to the February 17, 2015 Hearing despite the fact that the Commission was in possession of other relevant materials, including a memo from Justin Cowles, on behalf of Cacapon Associates, that was heavily relied up by the Commission in reaching its decision to approve the application and waiver requests.
19. On March 2, 2015, well after the Commission reached its decision on the Oakland Overlook re-plat application, I again asked the Commission for all information relevant to its decision, stating that "...I know you sent me the two forms covering the waiver requests, but I want to make sure that I now have everything that constitutes the 'official record' for the Oakland Overlook request that was approved by the Planning Commission at the February 17<sup>th</sup> meeting. Is there anything beyond what you have already provided, (Application, waiver requests, January 23, 2015 letter from ARRO) that is included in that record?"
20. In response, on March 3, 2015, I received an email with four additional documents attached: 1) the Planning Commission minutes from their January 27, 2015 meeting, 2) a copy of the Justin Cowles memo supporting the application (including the original memo received by the Commission on January 21, 2015 and revisions later added by Mr. Cowles and received by the Commission on February 11, 2015.), 3) a copy of the revised Application and Waiver forms (reflecting updated dates and signatures) and a copy of proposed modifications to the Oakland Overlook covenants intended to allow for commercial development which is barred by the existing covenants (received by the Commission on November 20, 2014).
21. At all times in taking the above actions I was working together with other concerned residents, including most of the Petitioners, by meeting with them on a regular basis, discussing or copying them with my email correspondence, and discussing other issues related to our opposition to the proposed Dollar General construction. I believe that this was evident to the Commission and that they understood that I was acting not solely on my own behalf but on behalf of a large group of residents opposed to the proposed development of Oakland Overlook.

FURTHER AFFIANT SAYETH NOT.

**AFFIRMATION**

I, the undersigned, Paul Stern, under penalties of perjury, hereby affirm that the foregoing Affidavit is true to the best of my knowledge and belief, and to the extent that it is based upon knowledge and belief, I believe it to be true.

7-1-2015  
DATE

*Paul Stern*  
PAUL STERN

STATE OF West Virginia

COUNTY OF Berkeley: to wit:

I, Phyllis B. Vallejo, a Notary Public in and for the State and County aforesaid, do hereby certify that Paul Stern, whose name is signed to the foregoing Affidavit has personally appeared before me and acknowledged the same.

Given under my hand this 1st day of July, 2015.

*PB Vallejo*  
NOTARY PUBLIC

MY COMMISSION EXPIRES: 4-16-2019

