IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

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ROBERT DONADIEU, RITA DONADIEU,
GEORGE N. SPARKS, PATIENCE T. SPARKS,
DONNA FALLIN and
MARTHA A. MACNAMARA,

Petitioners,

v.

CIVIL ACTION NOS. 15-P-15
JUDGE WILKES

MORGAN COUNTY PLANNING COMMISSION,

Respondent.

2015 SEP 28 PM 3:58

ORDER DENYING PETITION FOR WRIT OF MANDAMUS AND/OR CERTIORARI AND GRANTING MOTION TO DISMISS THE PETITION

This matter came before the Court on the 26 day of September, 2015 pursuant a petition for writ of mandamus and/or certiorari. The Petitioners, Robert Donadieu, Rita Donadieu, George Sparks, Patience Sparks, Donna Fallin, and Martha MacNamara, by counsel, Lawrence M. Schultz, Esq. and Respondent, Morgan County Planning Commission, by counsel, Richard G. Gay, Esq., both have briefed the Court in writing on the pertinent factual and legal issues. After a careful review of the written briefs, the record certified by the Secretary of the Morgan County Planning Commission, and the audio recording of the February 17, 2015 hearing, the Court finds that the Morgan County Planning Commission did not apply an erroneous principle of law, was not plainly wrong in its factual findings, or acted beyond its jurisdiction. Accordingly, this Court denies the Petitioners' Petition for Writ of Mandamus and/or Certiorari and grants the Respondent's Motion to Dismiss a Petition for Writ of Mandamus. The Court states the following history of the procedure and makes the following

findings of fact and conclusions of law.

History of the Procedure

This case involves an application for the re-platting request by the owner of a twelve (12) lot subdivision approved by the Planning Commission in 2007 ("Oakland Overlook"). All improvements to the Oakland Overlook were completed, including central sewer and no lots have been sold in Oakland Overlook.

The application requested that four (4) of the half (½) acre lots be re-platted for commercial development as a planned unit development consisting of one (1) commercial lot of 2.5 acres and that the residual lots in the approved subdivision remain the same half (½) acre size with approved wells and central sewage. To accomplish this, the owner needed certain permits under the amended Subdivision Ordinance.

The owner requested waivers of the time requirements for filing until the Final Plat hearing. Time waivers were requested for the Morgan County Health Department well permit; the West Virginia Department of Environmental Protection (WVDEP)/West Virginia Department of Health revised sewage permit; West Virginia Department of Highways (WVDOH) entrance permit; the West Virginia Department of Environmental Protection's National Pollutant Discharge Elimination System (NPDES) Permit; and Eastern Panhandle Conservation District (EPCD) Sediment & Erosion Control review until the Final Plat hearing.

The owner also requested waivers of the lots size of one (1) acre as required by the amended Subdivision Ordinance. The approved plat for Oakland Overlook was for half (½) acre lots as required by the Ordinance before the amendments in 2013.

On February 17, 2015, the Planning Commission held a public hearing on the waiver

requests and the consideration of a preliminary plat for the planned unit development.

After considering the documentation of record, the Planning Commission engineer's report, and the comments of the public regarding the planned unit development proposal, the Planning Commission approved the re-platting of the twelve (12) lot subdivision into one (1) commercial lot of 2.5 acres with a proposed separate entrance (WVDOH entrance permit needed at Final Plat), and eight (8) remaining half (½) acre lots with the already improved infrastructure, roads, central sewage and storm water management.

The Planning Commission decided to extend the time within which to file the permits required under the Subdivision Ordinance until the Final Plat hearing. The Planning Commission acted under the Ordinance that allows this under section 6.0 or 7.3. This waiver request only postpones compliance of the requirements of the Subdivision Ordinance to the Final Plat hearing and is not a waiver of the Ordinance requirements.

On March 19, 2015, the Petitioners filed their Petition for Writ of Mandamus and/or Certiorari challenging the Planning Commission's actions for scheduling a hearing on the application for a planned unit development without all the required material; the Commission's approval of waivers of the time requirements pursuant to Section 7.3 of the Ordinance for filing certain permits until Final Plat stage; and the decision of the Planning Commission to grant the waiver of the one (1) acre lot size requirements for the remaining eight (8) approved half (½) acre lots, including all installed improvements, was not supported by the evidence before the Planning Commission. The Petitioners claim there was no evidence in the record that "extraordinary hardship" existed in granting the waiver of the lot size requirement and that the Planning Commission did not make the necessary findings of "extraordinary hardship" required

by Section 6 of the Ordinance.

On June 2, 2015, the Planning Commission filed its Return to the Writ citing evidence in the Planning Commission record supporting its decision.

The Petitioners filed their Brief in Support of their Petition for Writ of Certiorari and in Opposition to Respondent's 12(b)(6) Motion on July 2, 2015. Two of the Petitioners' main arguments in their Brief were that the Planning Commission could not schedule and hold a hearing because the applicant did not submit a "transmittal letter" with the application, and that the Planning Commission did not issue any factual findings when it granted the waiver of the lot size requirement under Article 6 of the Ordinance.

The Respondents, Morgan County Planning Commission, filed its Brief in Support of its Decision on August 5, 2015, pursuant to the July 17, 2015, Stipulation for Extension.

Petitioners filed their Reply Brief in Support of their Petition for Writ of Mandamus and/or Certiorari on or about August 20, 2015.

Findings of Fact

1. The Petitioners challenge the actions of the Planning Commission for scheduling a hearing on the developer's application for a planned unit development claiming that an advertised hearing cannot occur unless all the items listed on Sections 4.3 and 4.4.a. - j.(sic) of the Ordinance are filed prior to the hearing.

2. Section 4.3 Application of the Ordinance states,

> The developer shall fill out and sign an Application for a Permit to Establish a Real Estate Subdivision in Morgan County, West Virginia. This application shall be on a printed form provided by the Planning Commission, and shall elicit from the developer such information regarding the proposed subdivision as may be reasonable.

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.

3. Section 4.4 Accompanying Material of the Ordinance states,

Accompanying the application form shall be the following:

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 provision 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;
k. 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.

4. The Respondent's position is that the application complied with Sections 4.3 and 4.4 of the Morgan County Ordinance prior to the hearing.

5. The Petitioners also challenge the Planning Commission's approval of waivers of the time limitations pursuant to Section 7.3 of the Morgan County Subdivision Ordinance for filing certain permits with the Planning Commission as required for preliminary plat approval.

6. The developer requested waivers of the time to file certain permits because he was asking for a re-plat of an approved residential subdivision pursuant to the planned unit development ordinances of the County wherein four (4) of the existing residential lots would be merged into one (1) parcel of 2.5 acres for purposes of being available for commercial development, and if the re-plat was approved, the permits currently still in effect but they would have to be cancelled or modified.

7. To do this prior to preliminary approval of the Planning Commission for the project to move forward would have a tremendous impact on the existing property.

8. Section 7.3 of the Morgan County Subdivision Ordinance <u>Waiver of Time Limits</u> states,

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

Id. at 11.

9. The Planning Commission waived the time requirements for filing the Morgan County Health Department well permit; the WVDEP/WV Dept. of Health revised sewage permit; the WVDOH entrance permit; the WVDEP NPDES permit; and EPCD Sediment & Erosion Control review until application for the Final Plat hearing.

10. The Planning Commission file contains correspondence between the developer and the Cacapon South Utility Association, the public sewer utility, indicating that the Cacapon South Utility Association (CSUA) would prefer to have the planned unit development plat preapproved before they petition the Public Service Commission to change any treatment allocations required by the PSC. Cacapon South Utility Association indicated that they did not foresee a problem with converting four (4) of the lots into one (1) commercial lot since the usage of one (1) commercial lot was substantially less than that of the four (4) residential lots. *(Record No. 8)*

11. Likewise, the WVDOH indicated that the entrance permit, which was modified so they would not have to use the same entrance for access to the commercial site, would be forthcoming and the developer represented that it would be filed before the Final Plat hearing and before construction. The request for a separate entrance permit was done to reduce the traffic on the residential roads and to provide a separate entrance to the commercial site. *(Record No. 8)*

12. The NPDES permit was not required because the developer already had several stormwater management ponds as shown on the prior approved Plat and there was no additional runoff anticipated. Further, the existing subdivision had substantial stormwater management placement and the commercial site was not calculated to increase the runoff. *(Record No. 19)*

13. The Morgan County Health Department had issued well permits for all twelve (12) residential lots in the subdivision in 2006, and had indicated that it would not be a problem issuing a well permit for the commercial site, however, before a well permit would be issued, there would have to be the revised Health Department permit for the sewage treatment. *(Record No. 4)*

14. Additional requirements for sediment and erosion control review would also take

place following the approval of the re-plat of this property into one (1) commercial development lot of 2.5 acres, with the remaining eight (8) lots being still a single family subdivision of half (½) acre each. The total residential lots would be 5.6 acres.

15. All of the permits will be required with the final plat submittal as provided in the February 17, 2015 Planning Commission minutes. The Planning Commission minutes and the documentation indicate that the time limitation waivers did not waive the filing of the various permits required by the Ordinance but merely postponed the time for filing them prior to the final plat hearing.

16. The record reflects in the February 17, 2015 meeting minutes that the engineer for the Planning Commission and staff did an overview of the planned unit development plat. An engineering report dated January 23, 2015, was filed by Richard Parks, P.E. of ARRO Consulting stating,

> "We have reviewed the resubmitted PUD plan for Oakland Overlook and find that it meets the minimum technical requirements of the County Subdivision ordinance with the following conditions:
>
> 1. The owner needs to sign and date.
> 2. The original recorded date for the subdivision should be 7-5-07 not 1-16-15 as shown.
> 3. The waivers must be approved by the Planning Commission."

(Record No. 12)

17. Minutes from the meeting reflect as follows,

> "Planning Commission member Eric LaRue stated that the applicant is not asking to not do something, they are requesting an extension of time to get all the permits in place."
>
> President of the Planning Commission, Jack Soronen remarked:
>
> "There are required documents for application such as entrance permits from the WVDOH and the Planning Commission accepts what they propose, any design

generated we accept it; same with well & septic permits, we can't create a lot without access or approval of septic and well; NPDES and EPCD permits, theses are sediment & erosion control approvals and it could be that there is no permit needed at this time. We have an arrangement with the EPCD where they are made aware of proposals. None of these we can pass judgment on; they are administrative permits in nature; things we do have a say in are the things we deal with such as road designs, sediment & erosion control, there is a distinction between both."

(Record No. 21)

18. The Planning Commission then granted the waiver request for time extension in submitting the Morgan County Health Department permit until the final plat hearing being; the waiver request in submitting the revised WVDEP Sewage Permit; the waiver request in submitting the revised WVDOH access permit; the waivers requesting deferral of the receipt of the WVDEP NPDES permit and the EPCD review until Final Plat stage. *(Record No. 21)*

19. The applicant's next request was for a waiver to keep the lot sizes the same (half (½) acre) as when originally approved in 2007 prior to the amendment to the Ordinance in 2013. The waiver request was based on Article 6 of the Subdivision Ordinance entitled "Waivers." Section 6.0 states generally that,

> "The Planning Commission shall have the right to waive any provision of this Ordinance when evidence is presented showing that such a waiver shall not affect the implementation of the intent of this Ordinance. A request for a waiver must be in writing on a form provided by the Planning Commission."

20. At the public hearing of February 17, 2015, Justin Cowles, the landowner/developer's representative, offered justification to keep the lot sizes at half (½) acre as approved in 2007. Mr. Cowles stated,

> "Complying with the one acre lot size, it would remove 4 residential lots and would not be easily resolved by merging existing lots due to infrastructure that is already in place. The existing roadway would need to be reconfigured, shifting property lines; dig up sewer lines, electric conduit, phone lines and stormwater

management improvements. This would be a costly project that would double the cost of the lots. The increase would then make these lots unaffordable. The demand for vacant lots is low right now."

(Record No. 21)

21. Article 6 further provides,

> 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 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.
>
> A complete description of all waivers approved by the Planning Commission must be listed on the Final Plat.

(Record No. 7)

22. The record included a Memorandum from Justin Cowles representing owner Cacapon Associates to the Morgan County Planning Commission for the February 17, 2015 meeting which stated,

> The preliminary PUD Re-plat proposal before you is to merge four (4) of the small parcels into one (1) larger parcel for future development as retail. It is NOT a Commercial Improvement Application. The merits and technical specification of any future retail development should be addressed if and when such application is submitted and schedule for public meeting. Whether the future retail development is an upscale boutique retailing arts and crafts to tourist and wealthy transplants or a discount retailer serving the working families of southern Morgan County, the specifics and technical requirements of a retail development are NOT the subject of this PUD Re-plat proposal which merely aims to merge four (4)

small parcels into one (1) larger parcel.

(Record No. 19)

23. Mr. Cowles' Memorandum further stated,

> Changing the remaining lands so that each measures a minimum of one-acre would be a huge hardship. The initial development of the land was extensive and expensive. The conditions for NPDES permit for sediment and erosions control, in conjunction with storm water management requirements, were particularly elaborate. Erosion and runoff control was implemented to accommodate construction of the primary roadway as well as the future residential development of each of the 12 parcels. Calculations for storm water management included the impervious area associated not only with the roadway, but also for twelve (12) single-family homes. As a result, there currently exists at the site two (2) separate SWM facilities: 1) a surface SWM pond that includes a sediment catch for the entrapment of potential erosion from homebuilding, and 2) an elaborate, underground storm water management chamber system. While the property is only 8-acres, the installation of two storm water and erosion mitigation facilities was extensive given it was designed to accommodate all runoff from 12 single-family homes plus all community infrastructure.
>
> Additionally, great cost was incurred to install sewer lines, force mains, and service laterals to accommodate the total number of lots. The sewer lift station hydraulic volume and pumping capacity also accounted for the total number of homes. Requiring changes to reconfigure all remaining lands would not only result in the existing infrastructure to be twice that which is necessary, it would create a huge financial hardship to the owner by immediately doubling the per parcel development costs for the changes already made to the land.
>
> Moreover, such changes to the remaining lands could result in a tremendous engineering and construction undertaking. No longer would permits (such as the sewer permit) be minor modifications; they would likely require complete re-engineering and re-issuance as new. Every parcel boundary would change thereby resulting in a change of sewer collection layout and service lateral locations. Underground phone lines, electric conduits, and transformer pads would all have to be modified and moved. Current utility easements on the land would have to be abandoned and new easements recorded. Shifting boundaries also means shifting house locations impacting planned driveway culvert and catch basin locations. No longer would earthwork be minimal. Modifying sewer lines, electric/phone lines, transformer pads, and storm water collection points would require significant excavation thereby creating the potential for sediment runoff into watersheds as existing infrastructure is dug up and replaced to accommodate new boundaries and locations. In addition to the hardship of lost value for the

cost of infrastructure already installed and ready to serve the existing remainder, the list of additional changes to the land to modify easements, move infrastructure, amend surveys, merge parcels, secure permits, and re-plat the entire remainder would be extensive.

(Record No. 15)

24. The Planning Commission's findings on the request for waiver of the lot size requirement are set forth in the February 17, 2015 meeting minutes:

"J. Hoyt: Keep existing covenants; supplement is to modify covenants.

G. Didawick: Thinks that applicant does have a hardship, there has been a change to topographical features of subdivision.

S. Parker: Our engineer outlined the fact the reason why we went to one acre lots and that really does not apply here.

> 'Richard Parks, Planning Commission engineer, stated that one of the reasons for the one acre lot size was to allow for a 10,000 square foot reserve area. The developer does not need that for they have public sewer available and certainly thinks they are developable as half acre lots.'

J. Soronen: Reserve areas and necessary setbacks for well and septic locations are needed for blank sheet (unimproved land), not a situation like this.

S. Parker: The land has changed significantly."

(Record No. 21)

25. Planning Commission member Eric LaRue further stated,

"Our decision needs to be based on whether it meets the requirements, not wanting something or not; Need to do what's fair and go by what's in front of us; Infrastructure is in place and that is an expense; To me it meets hardship."

(Record No. 21)

26. After consideration of the documentation of record, the Planning Commission engineer's report, and the comments of the public regarding the planned unit development proposal, the Planning Commission approved the re-platting of the twelve (12) lot subdivision into one commercial lot of 2.5 acres with a proposed separate entrance (WVDOH entrance

permit needed at Final Plat), and eight (8) remaining half (½) acre lots with the already improved infrastructure, roads, central sewage, and storm water management.

27. The Planning Commission decided to extend the time within which to file the permits required under the Subdivision Ordinance until the Final Plat hearing. The Planning Commission acted under the Ordinance that allows this under section 6.0 or 7.3. This waiver request only postpones compliance of the requirements of the Subdivision Ordinance to the Final Plat hearing and is not a waiver of the Ordinance requirements.

Conclusions of Law

A. Standard of Review

The standard of review on certiorari is set forth in *Sams v. City of White Sulphur Springs*, 226 W. Va. 723, 704 S.E.2d 723 (2010) which stated:

> In the context of land use planning and zoning, circuit court jurisdiction in certiorari to review the decisions and orders of various local entities is described in W. Va. Code § 8A-9-1 (2004), et seq. Relevant to the circumstances herein is W. Va. Code § 8A-9-6 (2004), which states:

Id. at 725.

The appropriate standard of review for appeal of decisions of the Planning Commission to the Circuit Court is provided in *Green v. City of Clarksburg* which states:

> This Court has previously held that "[w]hile on appeal there is a presumption that a board of zoning appeals [planning commission] 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. Syllabus Point 5, *Wolfe v. Forbes*, 159 W. Va. 34, 217 S.E.2d 899 (1975)." Syl. Pt. 2, *Sams v. City of White Sulphur Springs*, 226 W. Va. 723, 704 S.E.2d 723 (2010) (per curiam).

> (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 party (sic), the decision or order.

Green v. City of Clarksburg, 2011 WL 8197531 (W. Va.).

As the Court explained in *Maplewood Estates HOA v. Putnam County Planning Commission*, 218 W. Va. 719, 629 S.E.2d 778 (2006):

> This Court has explained that "the plainly wrong standard of review is a deferential one, which presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." *Conley v. Workers' Compensation Division,* 199 W.Va. 196, 199, 483 S.E.2d 542, 545 (1997). *See also* Syllabus Point 3, *In re Queen,* 196 W.Va. 442, 473 S.E.2d 483 (1996); *Frymier–Halloran v. Paige,* 193 W.Va. 687, 695, 458 S.E.2d 780, 788 (1995). Substantial evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *In re Queen,* 196 W.Va. at 446, 473 S.E.2d at 487. A factual finding that is supported by substantial evidence is conclusive. *Id.* Consequently, "[n]either this Court nor the circuit court may supplant a factual finding of [the Commission] merely by identifying an alternative conclusion that could be supported by substantial evidence." *Id.*

Id. at 782.

B. The Planning Commission decision to grant extensions of the time within which to file the required permits until the Final Plat hearing is authorized by the Ordinance and is entitled to deference by this Court.

The Planning Commission granted time extensions within which to file the MCHD well permit; the WVDEP NPDES permit; the WVDOH entrance permit; and the EPCD sediment control and review until the Final Plat hearing. The Ordinance provides the Planning Commission the discretion to grant waiver requests as follows:

Section 7.3 Waiver of Time Limits states,

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

Section 6.0 General of the Ordinance regarding Waivers states

"The Planning Commission shall have the right to waive any provision of this Ordinance when evidence is presented showing that such a waiver shall not affect the implementation of the intent of this Ordinance. A request for a waiver must be in writing on a form provided by the Planning Commission."

There is a presumption applicable to the Court's review of this matter that the Planning Commission acted correctly unless three (3) things can be shown:

1. The Planning Commission applied an erroneous principle of law;
2. The Planning Commission was plainly wrong as to the factual basis for their decision; or
3. The Planning Commission acted beyond its jurisdiction.

Sams v. City of White Sulphur Springs, Syl. Pt. 2, 226 W. Va. 723, 704 S.E.2d 723, 724 (2010).

1. The Planning Commission did not apply an erroneous principle of law.

a. No hearing allowed by the Planning Commission

The Petitioners argue that the Planning Commission could not notice and schedule a

hearing on the application for a planned unit development until all the items listed in Sections 4.3 and 4.4 of the Ordinance are on file with the Commission.

The Commission had all the material required under Section 4.4 to advertise and schedule the public hearing except for the transmittal letter, which was not required. The transmittal letter merely would have reflected the substance of the material being provided for consideration as was pointed out in Respondent's Return to the Writ.

W. Va. Code §8A-5-6(a) states,

> An applicant for approval of a major subdivision or land development plan and plat shall submit written application, a copy of the proposed land development plan and plat, and the fees to the planning commission having jurisdiction over the land.

The transmittal letter is just that. According to the Mayfield Handbook of Technical & Scientific Writing, the term "transmittal letter" is defined as "A transmittal or cover letter accompanies a larger item, usually a document." The transmittal letter provides the recipient with a specific context in which to place the larger document and simultaneously gives the sender a permanent record of having sent the material." Leslie C. Perelman, James Paradis & Edward Barrett, *The Mayfield Handbook of Technical & Scientific Writing* (McGraw-Hill, 2001).

The Court is not persuaded by the Petitioners' argument concerning the absence of the transmittal letter. The transmittal letter contains no substantive information that is not already included in the application, i.e., the plat and other documentation submitted to the Planning Commission by the applicant, and therefore, is not required as a condition precedent for the Planning Commission to notice and schedule a hearing.

All items required by Section 4.4.a. – j.(sic) were addressed by the Planning Commission. The request for a waiver of the time to file the required permits is contemplated by the Ordinance

and that is how the Planning Commission has interpreted its own Ordinance.

The argument that the Planning Commission could not have a hearing because the requirements of Section 4.4 are mandatory, ignores the Ordinance as a whole, which provides for waivers of the time limits, Sections 7.3 and 6 and other requirements of the Ordinance as a whole.

The Petitioners also claim that the Planning Commission scheduled and advertised three separate hearings without having the preliminary plat in hand.

Pursuant to the record, the applicant filed the preliminary plat on December 12, 2014, and resubmitted the plat on January 20, 2015. The January 20, 2015 plat was reviewed by the engineer who indicated that the only changes needed for the plat was the owner's signature and the date that the original final plat for Oakland Overlook Subdivision was recorded, which was July 05, 2007, not January 16, 2015. The applicant made the changes and submitted the plat with changes on February 6, 2015.

The Petitioners' Brief, p. 18 states,

> "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."

As reflected in the Planning Commission Record No. 6, the plat was filed January 20, 2015, and subsequently reviewed by the engineer who determined that minor changes were necessary for approval by the Planning Commission.

Section 13.2 of the County Ordinance entitled Preliminary Plat, subparagraph (a) provides,

> The County Planner is authorized to approve minor plan changes. Minor plan changes are those which, in the opinion of the County Engineer, are technical in

> nature, do not change or significantly impact the project concept, and do not require judgment which is the prerogative of the Planning Commission. Major plan changes require a formal review by the County Engineer and subsequent approval by the Planning Commission.

The only requirements or plat changes were re-dating the plat to have the correct date for recording the final plat of the original Oakland Overlook Subdivision, which was recorded on July 5, 2007, and for the owner to sign the plat.

The Court finds these changes are truly technical in nature and do not change or significantly impact the project concept or the substantive requirements of the County's Ordinance.

b. Time Extensions

The Court finds that the granting of the extensions of time within which to file the permits required by the Ordinance until the Final Plat hearing are authorized by the Ordinance and within the discretion of the Planning Commission.

The Petitioner's claim that the extension of time waivers should not have been granted, however, those time waivers are within the power of the Planning Commission provided for by the Ordinance. The Planning Commission here is entitled to a presumption of correctness which is supported by substantial evidence in this record. Syllabus Point 2 of *Board of Zoning Appeals of the Town of Shepherdstown v. Tkacz*, 234 W. Va. 201, 764 S.E.2d 532 (2014) states,

> "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).

Id. at 533.

2. The Planning Commission was not plainly wrong as to the factual basis for their decision granting extensions of time for the various permits.

The minutes of the Planning Commission of February 17, 2015 set forth the Planning Commission's reasoning for granting the time extension. The minutes reflect that President Jack Soronen stated that the Planning Commission was acting under Article 7 of the Ordinance concerning time extensions. Following the comments, the Planning Commission granted the waivers to extend the time for the revised WVDEP sewage permit; the WVDOH entrance permit; the WVDEP NPDES permit; and to defer the receipt of the EPCD review until the final plat hearing.

An extension of time was also granted for submitting the Morgan County Health Department well permit. The minutes indicate that the waiver of Health Department well permit was approved but was contingent upon its receipt before the final plat would be approved.

The Court finds that the Planning Commission was not plainly wrong in these factual findings and they are supported by substantial evidence in the record below.

As the Court stated in *Board of Zoning Appeals of the Town of Shepherdstown v. Tkacz,* 234 W. Va. 201, 764 S.E.2d 532 (2014),

> This Court has explained that "the plainly wrong standard of review is a deferential one, which presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." *Conley v. Workers' Comp. Div.*, 199 W. Va. 196, 483 S.E.2d 542, 545 (1997).

Id. at 538.

3. The Planning Commission did not act beyond its jurisdiction.

The Court finds that the granting of the waivers to extend the time within which to file the various permits required by the Ordinance until the Final Plat hearing was clearly within the

jurisdiction and discretion of the Planning Commission.

The Planning Commission's decision does not violate any of the terms of its Ordinance or the authorizing statute W. Va. Code §8A-1-1 to §8A-11-2, et seq.

C. The waiver of the one (1) acre lot requirement of the Ordinance to allow the existing half (½) acre lots approved with public sewage is supported by substantial evidence.

Article 6 of the Subdivision Ordinance provides,

> 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 this waiver shall not be detrimental to the public welfare or injurious to other property in the vicinity of the subject property.
>
> A complete description of all waivers approved by the Planning Commission must be listed on the Final Plat.

Id. at p. 9.

1. Substantial evidence supports the Planning Commission's finding of extraordinary hardship as required by Section 6 of the Ordinance.

In 2006, the lot size requirements for single family housing, Section 11.2(1)(b) of the Ordinance was amended as follows,

"Minimum lot size shall be one (1) acre for lots served by well and central or

> public sewer systems, or lots served by central or public water and septic systems."

Id. at 18.

The developer was requesting a modification of the existing subdivision to a planned unit development which would consist of one commercial lot containing 2.5 acres, with the remaining eight (8), one-half (½) acre lots continuing as single family housing.[1]

Justin Cowles, representative of the owner of the property, stated at the February 17, 2015 meeting that "a portion of Cacapon South that fronts Route 522 is currently platted as commercial. The concept of mixing commercial with residential is not a unique concept." *(Record No. 21)*

The Planning Commission had before it an approved twelve (12) lot subdivision with all infrastructure installed, i.e., central sewer, permits for private wells, roads, the stormwater management ponds, and the other requirements of the Ordinance in existence when the plat for the twelve (12) lot subdivision was approved in 2007.

The February 17, 2015 Planning Commission meeting minutes set forth the Planning Commission's basis for supporting the lot size waiver thus keeping the existing the eight (8) lots at half (½) acre with central sewage and private wells,

> "... complying with the one acre lot size; it would remove 4 residential lots and would not be easily resolved by merging existing lots due to infrastructure that is already in place. The existing roadway would need to be reconfigured, shifting property lines; dig up sewer lines, electric conduit, phone lines and stormwater management improvements. This would be a costly project that would double the cost of the lots. The increase would then make these lots unaffordable. The demand for vacant lots is low right now."

Id. at pp. 6-7.

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[1] Morgan County has no zoning ordinance.

The Planning Commission engineer, Richard Parks, explained that "one of the reasons for the one acre lots size was to allow for a 10,000 square foot reserve area. The developer does not need that for they have public sewer available and certainly thinks they are developable as half acre lots." *(Record No. 21)* With central sewer, there is no need for the ten-thousand (10,000) square foot set aside.

The Planning Commission believed there was change to the topographical features of the subdivision and that the requirement for the one (1) acre lot size was for the ten-thousand (10,000) square foot set aside for lots where there would be private septic as opposed to central sewage. President Soronen explained that the Ordinance speaks about topographical changes for hardship. It was discussed at the February 17, 2015 meeting,

> "Ellen Lachewitz: Re-Platting of subdivision and that there is a hardship doing the re-platting; No numbers were discussed; why no cost mentioned.
>
> J. Soronen: It's an association concept; Ordinance speaks about topographical changes for hardship."

(Record No. 2)

It was further explained that "the condition of the land and what it would take to meet the requirements, conditions of land is what the Planning Commission took into account." *(Record No. 2)*

2. Section 6 of the Morgan County Ordinance at issue here is similar to the Ordinance involved in the *Maplewood Estates* case.

The Morgan County Ordinance states,

> The Planning Commission shall have the right to waive any provision of this Ordinance when evidence is presented showing that such a waiver shall not affect the implementation of the intent of this Ordinance. A request for a waiver must

be in writing on a form provided by the Planning Commission.

...

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 this waiver shall not be detrimental to the public welfare or injurious to other property in the vicinity of the subject property.

A complete description of all waivers approved by the Planning Commission must be listed on the Final Plat.

(Record No. 7)

The Putnam County Subdivision Ordinance at issue in *Maplewood Estates Homeowners Association v. Putnam County Planning Commission*, 218 W. Va. 719, 629 S.E.2d 778 (2006) indicated as its purpose,

> Where the Planning Commission finds that extraordinary hardships or practical difficulties may result from strict compliance with these regulations and/or the purposes of these regulations may be served to a greater extent by an alternative proposal, it may approve variances to these subdivision regulations so that substantial justice may be done and the public interest secured, provided that such variance shall not have the effect of nullifying the intent and purpose of these regulations, and further provided the Planning Commission shall not approve variances unless it shall make written findings based upon the evidence presented to it that all of the following conditions are met.

Id. at 781.

The extraordinary hardship standard is contained in both ordinances, although the Putnam

County Ordinance contains additional conditions, not present in the Morgan County Ordinance.

The Court finds that the record of the Planning Commission here supports the decision that the substantial hardship standard has been met by the applicant. The Planning Commission found the topographical features of the property were such that it was impractical for the applicant to comply with all the conditions of the Ordinance requiring one (1) acre single family homes. *(Record No. 2)*

The amendment to the Morgan County Ordinance in 2006 required one (1) acre lots for single family homes to provide a set aside of ten-thousand (10,000) square feet in case of failure of the onsite septic system.

Here, there was central sewage and no requirement for the ten-thousand (10,000) square foot set aside. Plus, the half (½) acre lots had been previously approved with appropriate stormwater management and drainage system in place to handle all stormwater runoff.

The impracticability of refiguring the remaining eight (8) half (½) acre lots into one (1) acre lots was explained in the revised memorandum to the Morgan County Planning Commission by the applicant Justin Cowles and in his testimony at the February 17, 2015 meeting. *(Record No. 19)*

No evidence was presented by the Petitioners that the waiver of the one (1) acre lot requirement would be detrimental to the public welfare or injurious to the other property owners in the vicinity nor that the waiver affects the implementation of the Ordinance.

Here,

1) there was a proposed separate entrance into the subdivision for the 2.5 commercial site;

2) the existing stormwater management system was more than capable to accept the runoff from the development of the commercial lot;

3) the necessity of resetting boundaries, reconfiguring sewage lines, pump stations and roadways, and other infrastructure was totally impractical and unnecessary;

4) there was other mixed use communities within the vicinity of the site; and

5) the site had access to central sewage treatment by an existing public utility to which pumping stations and lines were already existing.

The re-platting of the entire tract into one (1) acre lots was both unnecessary and impractical and constituted an extraordinary hardship which was fully supported by the findings of the Planning Commission.

In *Maplewood Estates,* the applicant had applied to divide their lots into two (2) parcels, however, the existing subdivision ordinance required forty (40) foot access roads and the existing roadways into the parcel was only thirty (30) feet wide, but the Ordinance was amended subsequent to the construction of the Maplewood Estates subdivision.

In *Maplewood Estates*, the Court stated,

> "The Circuit Court found that the Commission was plainly wrong with regard to two of its findings: first, that the subject property is "unique" and secondly, that a hardship to the owners would result if the variance was not granted. After thoroughly reviewing the record, we believe that there was substantial evidence supporting the Commission's findings."

Maplewood Estates Homeowner's Association v. Putnam County Planning Commission, 218 W. Va. 719, 629 S.E.2d 778, 782 (2006).

The Supreme Court in *Maplewood Estates* found that there was substantial evidence supporting the Commission's findings, concerning the Commission's interpretation of the hardship standard:

> "[W]e find that the circuit court abused its discretion by concluding that the Bennetts had to show that the effect of complying with the subdivision regulations was a hardship in relation to the physical attributes of the land and that such evidence was vacant from the record. The Bennetts clearly satisfied the requirements for a subdivision variance pursuant to the Putnam County Subdivision Regulations as interpreted by the Commission. The circuit court

improperly substituted its own judgment for that of the Commission."

Id. at 783.

The Supreme Court reversed the Circuit Court's findings and reinstated the decision of the Putnam County Planning Commission granting the variance to allow the subdivision of the single lot into two separate lots.

Thus, the *Maplewood Estates* case is substantially similar to this matter and contains both the definition and the application of the substantial evidence rule as applied here.

D. Failure to provide information

The Petitioners claim that the Planning Commission staff did not provide them all documentation of the public records that was requested and therefore, their due process rights and the right to be fully informed when the hearing was held have been impaired.

First, all the documents in the Planning Commission file are of public record and open for inspection by any member of the public. Second, none of the Petitioners or their counsel ever contacted the County Planner requesting copies of documents. According to the Planning Commission staff's knowledge, no Petitioner or counsel for Petitioners physically reviewed the file before filing the Petition.

This claim seems to be based upon a correspondence from a member of the public, Paul Stern, who transmitted a series of emails between the County Planner and himself concerning the file and the status of the file. Those emails are part of the record which show that the Planning staff responded to the request as well as could be expected. Mr. Stern was advised that the plat and stormwater management calculations were available for his inspection and review since they are quite cumbersome. Further, no Freedom of Information Act (FOIA) request was made for

anything in the file.

The Planning Commission and its staff are not responsible to make sure that the public avails themselves of the public records.

The Planning Commission hearing was noticed two (2) times: once for January 27, 2015, that was postponed due to insufficient posting at the site, snow, and other factors; and another hearing was set for February 17, 2015, that was held and attended by the Petitioners. The Notice[2] clearly informed the public and the Petitioners of what actions the Planning Commission were considering and the failure of the Petitioners or anyone else in the public to avail themselves of the right to look at the file or to file a FOIA request is not a basis for reversing the Planning Commission's actions nor does it support a claim that the failure to provide certain

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2 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 Planned Unit Development, owned by Cacapon Associates, developed by 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 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 Requests: Waiver requesting approval of PUD without final State and County permits; Wavier 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 on Tuesday, February 17, 2015 beginning at 7:00 p.m. in the Morgan County Commission Room, Morgan County Courthouse Complex, Berkeley Springs, WV.

(Record No. 17)

information to a person not a party to these proceedings in any way, violates due process of law and the Petitioners' right to be aware of what was happening in these proceedings.

The Court finds that a claim by a person not a party to these proceedings that information was not provided to him is not a basis for this Court to reverse the decision of the Planning Commission or remand it. That claim does not arise to a finding that the Planning Commission applied an erroneous principle of law, was plainly wrong in its factual findings, or acted beyond its jurisdiction.

E. Petitioners claim that they were not afforded due process according to the United States Constitution and the West Virginia Constitution.

This Petition for Writ of Certiorari in this case has a lot of similarities to a recent case decided by the West Virginia Supreme Court of Appeals, *Casto v. Kanawha County Commission*, 2015 WL 1839320 decided April 17, 2015. The *Casto* case involved an application to the Kanawha County Planning Commission for the erection of a cell tower and in which,

> Petitioner generally argues that (1) insufficient process was afforded to those opposing the new cell phone tower during the approval process; and (2) Beacon Towers' application was deficient. Respondent counters that (1) petitioner received due process because he had both notice and an opportunity to voice his opposition to the cell phone tower; and (2) respondent made the determination that Beacon Towers' application met the Ordinance's requirements for approval. We agree with respondent.

Here, there were two (2) notices for a public hearing concerning Oakland Overlook's application for a PUD. The first public notice was for a hearing on January 27, 2015, however, due to a deficiency in the sign size, snow, and other factors, the proceedings were postponed and a new hearing was noticed for February 17, 2015. As to Petitioners' claim that they did not receive due process, a review of the minutes and the audio recordings of the February 17, 2015

meeting reveal that both the Petitioners and other members of the community opposing the application before the Planning Commission had both an opportunity to be heard, and, in fact, voiced their opposition to the proposed approval of the planned unit development for the Oakland Overlook project. Petitioners Robert Donadieu, Rita Donadieu, George Sparks, Patience Sparks, and Donna Fallin appeared in person and expressed their opposition to the application. *(Record No. 21)*

The opponents specifically opposed a proposed use of the commercial site for the construction of a Dollar General Store. What they did not recognize is that until the Planning Commission issues an Industrial Location Permit the actual construction of the Dollar General Store cannot be commenced.

As the Supreme Court found in *Casto*,

> We find that the petitioner was afforded both notice and an opportunity to be heard. We also find that contrary to petitioner's assertions that Beacon Towers acted in bad faith, Beacon Towers representatives did not pass themselves off as also representing AT&T during the approval process. Therefore, we conclude that petitioner received the process due him as an area resident opposed to the approval of the cell phone tower.

Secondly, the Petitioners argue about the deficiencies in the Oakland Overlook application. The Court in *Casto* found that the application of Beacon Towers was not deficient because the Planning Commission's minutes found "the application of Beacon Towers meets the rigorous requirements for approval as set forth in the [Ordinance]."

The Supreme Court went on to hold that,

> Under the applicable standard of review, we may not overturn respondent's finding unless it is plainly wrong. We find that nothing in the record indicates that respondent was plainly wrong in finding that Beacon Towers' application satisfied the Ordinance's requirements.

Further, as the Court observed in *Casto*,

> "When an applicant meets all requirements,...approval is a ministerial act and a planning commission has no discretion in approving the submitted application." Syl. Pt. 7, *Kaufman v. Planning & Zoning Com'n of City of Fairmont,* 171 W.Va. 174, 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))."

The Planning Commission engineer's review of the application of Cacapon Associates found,

> "We have reviewed the resubmitted PUD plan for Oakland Overlook and find that it meets the minimum technical requirements of the County Subdivision ordinance with the following conditions:
>
> 1. The owner needs to sign and date.
> 2. The original recorded date for the subdivision should be 7-5-07 not 1-16-15 as shown.
> 3. The waivers must be approved by the Planning Commission."

(Record No. 21)

Accordingly, the Court finds that the Petitioners were afforded due process in this matter.

F. Mandamus

1. Legal Standard

The appropriate standard for a writ of mandamus is as follows:

> "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." *State ex rel. Brown v. Corporation of Bolivar*, 209 W. Va. 138, 544 S.E.2d 65 (2000), citing *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).

The Court finds that the Petitioners fail to allege a prima facie case for mandamus in their Petition for Writ of Mandamus and/or Certiorari.

In order to obtain a writ of mandamus, three (3) requirements must be alleged and met by

Petitioners. *State ex rel. Brown v. Corporation of Bolivar,* 217 W.Va. 72, 614 S.E.2d 719 (2005) sets forth the requirements for mandamus wherein the Court held,

> Our longstanding three-prong standard for issuing writs of mandamus was announced in syllabus point two of *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969):
>
> > 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 respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Id. at 75.

Also applicable is this Court's determination is syllabus point one of *Richie v. Hill,* 216 W.Va. 155, 603 S.E.2d 177 (2004):

> " ' "Mandamus lies to require the discharge by a public officer of a nondiscretionary duty." Point 3 Syllabus, *State ex rel. Greenbrier County Airport Authority v. Hanna,* 151 W.Va. 479[, 153 S.E.2d 284 (1967)].' Syllabus point 1, *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W.Va. 636, 171 S.E.2d 545 (1969)." Syllabus point 1, *State ex rel. Williams v. Department of Military Affairs*, 212 W.Va. 407, 573 S.E.2d 1 (2002).

Id. at 157.

The Court's examination of each of the three (3) elements required to obtain a writ of mandamus show that Petitioners are not entitled to a writ of mandamus.

2. Clear legal right in the Petitioners to the relief sought

Petitioners claim that the Planning Commission cannot hold a hearing on the requests for waivers of the time requirements for the filing of the permits and the one (1) acre minimum lot size requirement, or the planned unit development approval, until all the requirements of Sections 4.3 and 4.4 of the Ordinance are met.

Sections 7.3 and 6.0 entitled "Waivers" of the Ordinance provides the Planning Commission the authority to grant waivers of the Ordinance requirements. A reading of the Ordinance shows that the Planning Commission has the authority and discretion to grant waivers under those provisions.

In *Canterbury v. County Court of Wayne County*, Syl. Pt. 3, 151 W. Va. 1013, 158 S.E.2d 151 (1967), the Court stated,

> " 'Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse to do so, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made.' Syl. Pt. 1, *State ex rel. Buxton v. O'Brien and the County Court of Mason County*, 97 W.Va. 343, 125 S.E. 154."

The Petitioners' argue that all the requirements of Sections 4.4 and 4.5 of the Ordinance were not met by the applicant, and therefore the Planning Commission could not consider the waiver requests. This argument ignores the plain language of the waiver sections of the Ordinance.

The Petitioners claim that the Planning Commission could not hold the hearing or make a decision on the planned unit development approval without the proper information from the developer in the record as required by the Ordinance, e.g., a transmittal letter. However, the Planning Commission engineer found that the resubmitted planned unit development plan for Oakland Overlook met the minimum technical requirements of the Subdivision Ordinance with the following conditions:

> 4. The owner needs to sign and date.
> 5. The original recorded date for the subdivision should be 7-5-07 not 1-16-15 as shown.
> 6. The waivers must be approved by the Planning Commission."

Also, the notice for the February 17, 2015 public hearing as published in the February 4,

2015 edition of the Morgan Messenger clearly stated its purpose was to consider the waiver requests, lot size requirement and the approval of the planned unit development.

Petitioners do not have a clear legal right to prohibit the Planning Commission from holding a hearing, granting waivers or approving the planned unit development application as authorized by the Ordinance and therefore, the Court finds that the Petitioners fail to meet the first element for obtaining mandamus.

3. A legal duty on the part of the Planning Commission to do the thing that Petitioners seek to compel.

The West Virginia Supreme Court of Appeals stated in *City of Charles Town v. County Commission of Jefferson County*, Syl. Pt. 1, 221 W. Va. 317, 655 S.E.2d 63 (2007)

> " ' "*Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies.*" Syllabus Point 1, *State ex rel. Allstate Ins. Co. v. Union Public Service Dist.*, 151 W.Va. 207, 151 S.E.2d 102 (1966).' Syl. Pt. 4, *State ex rel Affiliated Constr. Trades Found. V. Vieweg*, 205 W. Va. 687, 520 S.E.2d 854 (1999)." Syllabus Point 2, *State ex rel. Public Service Comm'n of West Virginia v. Town of Fayetteville, Municipal Water Works*, 212 W. Va. 427, 573 S.E.2d 338 (2002). (Emphasis added).

Id. at 319.

The Petitioners also challenge the Planning Commission's discretion in granting the waivers requested under the terms of the Ordinance. There is no legal duty on the part of the Planning Commission to not schedule an application for subdivision approval and to not consider the application, including any requests for waivers, as alleged by the Petitioners.

The Supreme Court of Appeals of West Virginia held as early as 1890 in *Miller v. County Court of Tucker County*, Syl. Pt. 1, 34 W. Va. 285, 12 S.E. 702 (1890),

> "*Where an inferior tribunal is authorized to use its discretion, and proceeds to exercise such discretion, it cannot be controlled by mandamus in judicially*

determining questions properly presented for its consideration and within its jurisdiction." (Emphasis added).

4. The absence of another remedy.

W. Va. Code § 8A-9-1 provides,

> (a) Every decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals is subject to review by certiorari.
>
> (b) Within thirty days after a decision or order by the planning commission, board of subdivision and land development appeals, or board of zoning appeals, any aggrieved person may present to the circuit court of the county in which the affected premises are located, a duly verified petition for writ of certiorari setting forth:
>
> (1) That the decision or order by the planning commission, board of subdivision and land development appeals, or board of zoning appeals is illegal in whole or in part; and
>
> (2) Specify the grounds of the alleged illegality.

The Petitioners have filed a request for writ of certiorari. Chapter 8A of the W. Va. Code became effective in March of 2004. Therefore, Petitioners have an adequate remedy of law and mandamus is unwarranted.

The Court concludes that the Petitioners' Petition did not allege a prima facie case as required by W. Va. Code § 51-3-5. None of the elements required for mandamus are met by the Petitioners and pursuant to W. Va. Code § 8A-9-1, et seq., also, the Petitioners have an adequate remedy at law.

Accordingly, based on the foregoing facts, briefs, record below, and arguments in this case, the Court holds that:

a) The Petitioners are DENIED their Petition for the issuance of a Writ of Certiorari; and

b) Respondent's Motion to Dismiss Petitioners' request for a Writ of Mandamus is hereby GRANTED.

The Court notes the objection of all parties to all adverse rulings. The Clerk shall enter this Order as of this date, provide an attested copy of this Order to all parties, through counsel, and retire this case and place it among the causes ended.

Entered this 26 day of September, 2015

Counsel for Petitioners:

Richard G. Gay, Esq.
Law Office of Richard G. Gay, LC
31 Congress Street
Berkeley Springs, WV 25411

Counsel for Respondent:

Lawrence M. Schultz, Esq.
Burke, Schultz, Harman & Jenkinson
P. O. Box 1938
Martinsburg, WV 25402

CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
MORGAN COUNTY, WEST VIRGINIA

A TRUE COPY, ATTEST:
Clerk of the Circuit Court
of Morgan County, West Virginia