IN THE SUPREME COURT OF APEALS OF WEST VIRGINIA

DOCKET NO. 15-1058

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

Petitioners,

v.

Appeal from a final order of the Circuit Court of Morgan County (Civil Action No.: 15-P-15)

MORGAN COUNTY PLANNING COMMISSION and SB DG BERKELEY SPRINGS, LP,

Respondents.

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

1. **THE CIRCUIT COURT ERRED WHEN IT HELD THAT THE MANDATORY LANGUAGE OF MORGAN COUNTY'S SUBDIVISION ORDINANCE § 4.5 REQUIRING THAT PERMITS AND OTHER DOCUMENTATION BE FILED *BEFORE* SCHEDULING AND ADVERTISING A HEARING COULD BE WAIVED AT THE VERY HEARING WHICH § 4.5 OF THE ORDINANCE SAYS COULD NOT BE SCHEDULED.**

2. **THE CIRCUIT COURT ERRED WHEN IT HELD THAT PETITIONERS' DUE PROCESS RIGHTS WERE NOT VIOLATED EVEN THOUGH THE PLANNING COMMISSION DID NOT HAVE ALL THE DOCUMENTS IN ITS FILE REQUIRED BY THE ORDINANCE, THESE DOCUMENTS WERE UNAVAILABLE TO PETITIONERS, AND APPROVAL OF THE DEVELOPMENT TOOK PLACE WITHOUT PETITIONERS SEEING THE COMPLETED FILE.**

3. **THE COURT ERRED WHEN IT PERMITTED INTERVENTION AFTER JUDGMENT WHERE THE INTERVENOR'S INTEREST IS ADEQUATELY REPRESENTED BY EXISTING PARTIES.**

STATEMENT OF THE CASE

This is an Appeal from a denial of Certiorari and/or Mandamus Relief in a case where the Respondent Morgan County Planning Commission (MCPC) did not follow its own procedures. Petitioners are "aggrieved persons" as that term is defined in West Virginia Code, § 8A-1-2(b), and members of the public. They bring this Appeal because the Circuit Court erred both legally and factually when it dismissed their suit for Certiorari and/or Mandamus arising out of the MCPC's approval of a re-plat of an existing residential subdivision to a commercial use - - the development and construction of a Dollar General Store at the intersection of Oakland Road and Route 522 in southern Morgan County. The owner of the existing residential subdivision is Cacapon Associates, LP, and the Developer is Cross Development, LLC. Order Denying Petition for Writ of Mandamus and/or Certiorari and Granting Motion to Dismiss the Petition (A.R. 501-535).

Respondent MCPC violated the due process rights of Petitioners when it scheduled, advertised and convened a hearing on February 17, 2015, on a commercial development and approved the development before the required documents were filed, in violation of its own Subdivision Ordinance (Ordinance). MCPC approved the re-plat February 17, 2015, at a Preliminary Plat Public Hearing and Evaluation under Ordinance § 4.5. (A.R. 219). MCPC also granted a hardship waiver regarding lot size under § 6 of its Ordinance with no findings of fact, despite a requirement in the Ordinance that waivers be granted only upon findings of fact. Since § 4.8 of the Ordinance says the approval or disapproval of the development is at the Preliminary Plat stage, Petitioners' right to a meaningful hearing was foreclosed before the required documents were ever filed.

SUMMARY OF ARGUMENT

The standard of review of this matter by the Circuit Court is as follows:

> 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 of *Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E.2d 899 (1975).

The standard of review to be applied by this Court is the same. See, Syl. Pt. 2, *Bd. of Zoning Appeals v. Tkacz*, 234 W.Va. 201, 764 S.E.2d 532 (2014).

This case concerns questions of due process for "aggrieved persons" and members of the general public in a county where a commercial development is proposed under a Subdivision Ordinance.

Both the West Virginia Code and the Morgan County Subdivision Ordinance contain provisions which recognize the public interest in the orderly planning of development. See,

Code, § 8A-1-1(a)(1-9), and Morgan County Subdivision Ordinance, § 2.1(a-g), "Purpose." (A.R. 214)

The West Virginia Code, § 8A-9-1, speaks to the rights of "aggrieved persons," such as nearby landowners like your Petitioners, to appeal from the decisions of a County Planning Commission.

The Morgan County Ordinance sets forth, *inter alia*, a "purpose" of protecting the "public health, safety and general welfare of the citizens of Morgan County." The Ordinance is written to reflect these purposes.

The public has the right to a prescribed form of notice both posted on the property and published in the newspapers (§ 4.5), and the right to attend the Preliminary Plat Hearing and be heard about the proposed development at the public hearing (§ 4.6). These rights are in place to serve the public purposes in § 2.1.

The Ordinance says, at § 4.5, "The subdivision Preliminary Plat Public Hearing and Evaluation shall not be scheduled and advertised until all material is submitted." Ordinance § 4.5 (A.R. 219). This is a reference to a long list of required documents from § 4.3 of the Ordinance. (A.R. 218).

The MCPC set and reset this hearing on several occasions, cancelling it on one occasion because the sign requiring notice to the public was inadequate. When the Preliminary Plat Hearing was finally advertised in January, 2015, the following documents had *not* been submitted:

- A letter of transmittal setting forth the purpose of the application, the material being submitted for review, and the number of copies being submitted, § 4.3(f).
- A Preliminary Plat as described in Article 13 of the Ordinance, § 4.4(b).
- A letter from the owner giving the developer authority to act for him, § 4.4(c).
- Copies of existing and proposed deed restrictions or protective covenants, § 4.4(d).

- Septic System Permits and/or a copy of an application made for waiver from the West Virginia Department of Health, §4.4(g, h).
- A proposed plan for control of erosion and sediment during and after construction, §4.4(i).
- State road entrance permits, § 4.4(j).

Ordinance § 4.3 – 4.4 (A.R. 218-219)

The MCPC admits that it did not have a transmittal letter, but says this mandatory requirement is simply unnecessary.

At the Preliminary Plat Hearing on February 17, 2015, the MCPC granted waivers of several of these mandatory filings without which its own rules say the hearing "shall not be scheduled or advertised." It convened a hearing without the documents to waive the requirements that the documents be filed. Then it approved the development, despite the incomplete file, at the same hearing. Morgan County Planning Commission Meeting Minutes, February 17, 2015 (A.R. 360-369).

Petitioners appeared and were able to state their opposition, but had no access to the unfiled documents, and thus their hearing rights were rendered meaningless.

Also on February 17, 2015, the MCPC waived the one-acre lot size requirements on the basis of extraordinary hardship. Morgan County Planning Commission Meeting Minutes, February 17, 2015 (A.R. 360-369). It did this without the findings of fact mandated by § 6.0 of the Ordinance. (A.R. 222).

In place of the required findings, the MCPC simply cites the comments of individual Commissioners. No vote of the Commission was taken regarding any findings of fact, and no actual findings were produced either verbally or in writing anywhere in the record of this case. This is not a case where the findings are criticized by the Petitioners. This is a case where the mandatory findings of fact were never made.

Section 4.8 of the Ordinance states;

> **The approval or disapproval of the development is determined at the Preliminary Plat Public Hearing and Evaluation.** The purpose of the Final Plat Hearing is to determine if the development work has been done properly, that adequate provisions have been made to insure completion of remaining development work and that there is no reason to delay the sale of lots.

(Emphasis added). Ordinance § 4.8 (A.R. 221).

What this means is that the transmittal letter, permits and other documents which should have been in the file for the consideration of the public were not there when the decision to approve the development was made. This is a fatal error in terms of Petitioners' ability to meaningfully address the missing documents and what they might have implied about the development. This development was *approved,* before Petitioners ever saw documents which were required to be filed before the hearing was even *scheduled.* In its Order dismissing Petitioners' claims, the Court did not even address this foreclosure of Petitioners' rights by operation of § 4.8. Order Denying Petition for Writ of Mandamus and/or Certiorari and Granting Motion to Dismiss the Petition (A.R. 501-535).

There are now two (2) Respondents:

First, MCPC, whose failure to adhere to its own rules violated the procedural due process rights of the Appellants, and second, SB DG Berkeley Springs, LP, a lender tangentially related to the Developer of the project, which moved to Intervene after the judgment was issued herein. The Circuit Court permitted SB DG Berkeley Springs, LP, to intervene, over the objection of Petitioners, after the judgment and after the Notice of Appeal was filed. Order Granting SB DG Berkeley Springs, LP's Motion to Intervene (A.R. 682-687).

Petitioners/Appellants have amended the caption of this case to reflect the late-added party, but strenuously object to this late intervention, and ask this Court to strike SB DG Berkeley Springs, LP, as a party. Still pending in the Circuit Court is a separate Motion to permit Cross Development, LLC, and CD DG Berkeley Springs, LP, to intervene. Motion to Intervene (A.R. 688-709). This latter Motion has not been ruled upon and Petitioners have not added these latter two (2) parties to the caption of the case.

After Petitioners filed the Notice of Appeal, the Circuit Court denied Petitioners' Motion for Stay Pending Appeal, to which Petitioners also object. Petitioners will request relief by Motion pursuant to the West Virginia Rules of Appellate Procedure.

Certiorari is the appropriate remedy. Petitioners' right to a meaningful public hearing was lost as the MCPC cast it own Ordinance aside in the rush to approve the development, and the appropriate remedy under the Code is Certiorari. Petitioners respectfully request that this Court reverse the judgment of the Circuit Court, strike the grant of Preliminary Plat approval, and remand this matter to the MCPC so that it may conduct a Preliminary Plat Approval Hearing in accord with the Ordinance.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request oral argument in this case because the extent of the procedural due process rights of aggrieved persons such as Petitioners has not been authoritatively decided. While it is not a matter of first impression, See, e.g. *Casto v. Kanawha County Commission*, No. 14-0683, (W.Va Supreme Court, April 17, 2015) (Memorandum Decision), it appears that this Court has never issued a case in which it addressed the procedural due process rights of nearby-landowner, "aggrieved persons" and specifically, how these rights compare with the rights of Developers. Specifically, while the Court issued a *per curiam* decision in *Maplewood*

Homeowner's Association v. Putnam County Planning Commission, 218 W.Va. 719, 629 S.E.2d 778, 782 (2006), which dealt with a Circuit Court's rejection of findings of fact found by a Planning Commission, this Court does not appear to have addressed a case in which the Commission's own rules prohibited scheduling any hearing and the Commission granted hardship waivers with no findings of fact at all. Counsel urges the Court to permit oral argument, and to hear the case under Rule 20.

ARGUMENT

1. **THE CIRCUIT COURT ERRED WHEN IT HELD THAT THE MANDATORY LANGUAGE OF MORGAN COUNTY'S SUBDIVISION ORDINANCE § 4.5 REQUIRING THAT PERMITS AND OTHER DOCUMENTATION BE FILED *BEFORE* SCHEDULING AND ADVERTISING A HEARING COULD BE WAIVED AT THE VERY HEARING WHICH § 4.5 OF THE ORDINANCE SAYS COULD NOT BE SCHEDULED.**

The Circuit Court held [1] that:

> 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.

Order Denying Petition for Writ of Mandamus and/or Certiorari and Granting Motion to Dismiss the Petition (A.R. 501–535).

This conclusion by the Court is plainly wrong, as the Court's own Order shows. It is undisputed in this litigation that the Developer in this matter applied for, and was granted, waivers of the following permits:

- Morgan County Health Department Well Permit
- WVDEP/WV Department of Health Revised Sewage Permit
- WVDOH Entrance Permit

[1] With what appears to be only minor changes, the Court endorsed MCPC's thirty-five (35) page Proposed Order. (A.R. 766 - 772-27)

- WVDEP NPDES Permit
- EPCD Sediment & Erosion Control Review

Morgan County Planning Commission Meeting Minutes, February 17, 2015 (A.R. 360).

Either these documents were in the file before the hearing was advertised and scheduled, or they were not. That the Developer sought and obtained a waiver of the filing requirement shows they were not in the file on February 17, 2015. Resort to the Certified Record submitted by MCPC shows they were not there by May 15, 2015, either. (A.R. 119-398).

This is neither ambiguous nor susceptible of interpretation, and goes to the heart of the Petitioners' claims here. The Developer applied for waivers because the documents *were not in the file*. It borders on the fantastic to say 1) the documents were in the file, and 2) the Developer needed a waiver to relieve it of the duty to put them in the file.

The Developer applied for and received waivers for permits crucial to the public's (and Petitioners') claims. The Court's finding that all materials were submitted is plainly wrong. Petitioners' Reply to Morgan County Planning Commission's Brief in Support of its Decision, p. 2 (A.R. 443-473).

County ordinances are entitled to the same rules of interpretation as statutes. *Town of Burnsville v. Kwik-Pik, Inc.*, 185 W.Va 696, 408 S.E.2d 646 (W.Va 1991). One of the foremost canons of statutory construction is that "[t]he plain meaning of the legislation should be conclusive, except in rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters." *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649, 660 (W.Va 1996). Further, an administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W.Va. 723, 228 S.E.2d 220. The Ordinance establishes a set of procedures which

give rise to a process which is due any aggrieved person. Petitioners are aggrieved persons. They are demanding the process which is their due under the Ordinance.

West Virginia Code § 8A-1-1, et seq., is the enabling statute which authorized the MCPC and the Subdivision Ordinance at issue in this case.

The Legislature made legislative findings in support of Chapter 8A, as follows:

> §8A-1-1. Legislative findings.
>
> (a) The Legislature finds, as the object of this chapter, the following:
>
> (1) That planning land development and land use is vitally important to a community;
>
> (2) A planning commission is helpful to a community to plan for land development, land use and the future;
>
> (3) A plan and a vision for the future is important when deciding uses for and development of land;
>
> (4) That sprawl is not advantageous to a community;
>
> (5) A comprehensive plan is a guide to a community's goals and objectives and a way to meet those goals and objectives;
>
> (6) That the needs of agriculture, residential areas, industry and business be recognized in future growth;
>
> (7) That the growth of the community is commensurate with and promotive of the efficient and economical use of public funds;
>
> (8) Promoting growth that is economically sound, environmentally friendly and supportive of community livability to enhance quality of life is a good objective for a governing body; and
>
> (9) Governing bodies of municipalities and counties need flexibility when authorizing land development and use.

Similarly, the Subdivision Ordinance declares its "purpose" in **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, not just the Developer's interest and the Planning Commission's interests are implicated in the enabling legislation and the Ordinance. The public's interest is obviously implicated. Your Petitioners' property interest in the enjoyment and value of their real estate is implicated as well.

The Morgan County public (and your Petitioners in particular) have an interest in the "public health, safety and general welfare," "orderly and efficient land development," coordination of "existing streets, roads and utilities with new streets, roads and utilities," and so on through Section 2.1 of the Ordinance.

The same sort of analysis applies to the enabling statute. Your Petitioners, as members of the public, members of the community, *and* "aggrieved persons," under the applicable code provisions, have a right to insist that MCPC follow its own Ordinance. The public's rights in this matter are not found only in the legislative findings of § 8A-1-1 and Section 2.1. As shown below, the public also is entitled to notice and a right to be heard at the Preliminary Plat stage of the proceeding. Ordinance, § 4.6 (A.R. 219-210).

West Virginia Code, § 8A-5-7(a), part of the enabling statute, sets forth the minimum requirements for a subdivision plat approval.

It says, in pertinent part, "a land development plat and plans *must* include *everything* required by the governing body's subdivision and land development ordinance." (Emphasis added). Code, § 8A-5-7(a). Similarly, the Subdivision Ordinance at issue here says, "The Subdivision Preliminary Plat Public Hearing and Evaluation shall not be scheduled and advertised until all material is submitted." The "material" referenced is listed in §§ 4.3, 4.4 and 13 of the Ordinance. Both the West Virginia Code (§ 8A-5-8) and the Ordinance (§ 4.5) require that public notice be afforded, and that a public hearing be held for Preliminary Plat Approval. Both the Code and the Ordinance require "everything" ("all materials") mandated by the Ordinance be submitted. Moreover, the Ordinance permits members of the public to speak at the hearing on the Preliminary Plat. Ordinance, § 4.6 (A.R. 210-220).

MCPC suggests that Petitioners, members of the public and aggrieved persons, must sit by as the Planning Commission waives a large percentage of the pre-hearing filings. This suggests a statutory scheme set up to invite the public to the discussion, then permit the Planning Commission to waive all the requirements, so the developer does not have to obtain, and the public cannot see, the documents which describe the development at this crucial stage. It beggars the imagination that the Legislature or the Morgan County Commission ever intended such a result. There is, in the end, only one reason to post the land, advertise this to the public and permit the public to speak – to allow the public (especially "aggrieved persons") to ask informed questions about issues reflected in the documents *required* to be in the file, before the development is approved.

The purposes of the Ordinance go to the very same issues as the missing permits. The public could not review and ask questions about the permits because the permits were not in the file. By the time the permits were obtained and filed the development was approved.

The Court also held in its Order dismissing Petitioners' claims that the Plat which MCPC approved *after* the deadline for advertisement and scheduling had only "technical" issues which made it non-compliant. Order Denying Petition for Writ of Mandamus and/or Certiorari and Granting Motion to Dismiss the Petition (A.R. 518).

One of the requirements of § 4.4 of the Ordinance is that Developer shall supply "A Preliminary Plat as described in Article 13 of this Ordinance." § 4.4(b) (A.R. 218). This was not addressed by the Court.

The Plat, which was filed after the advertisement and scheduling of the hearing, is not in compliance, even now, with § 13.2(b)(7), which requires a statement that it complies with all current restrictive covenants. The fact is that the restrictive covenants in effect on February 17, 2015, for the Oakland Overlook property prohibited commercial uses, such as this one.

The Plat the MCPC approved on February 17, 2015, was filed late and did *not* reflect the truth. It says, at Note 3: "This Plat complies with all restrictive covenants for the existing Subdivision. (A.R. 720). The claim is false. The Plat does not comply with § 13. It is important to the public to know the truth about the covenants.

Members of the public spoke at the meeting in opposition to the project, but of necessity, they spoke in generalities because they had no opportunity to fully understand the planned development. This opportunity was denied them because of the waived filing requirements.

1(a). Section 7.3 of the Ordinance does not permit the waivers of the required prehearing filings because § 7.3 only applies to time limits within which the Developer and Planning Commission must do their work, as set forth in Article 7.

The Circuit Court cited § 7.3 of the Ordinance as support for the waiver of the mandatory pre-hearing filings under § 4.5. Order Denying Petition for Writ of Mandamus and/or Certiorari and Granting Motion to Dismiss the Petition (A.R. 515). But the language of § 7.3 does not apply to such waivers.

Section 7.3 says:

> 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.

Ordinance (A.R. 224)

The application of this rule is dependent upon the meaning afforded the term "above" in the Ordinance. Section 7.0 says, "The consequences of failure to act within specified time periods shall be as follows:" Ordinance (A.R. 222).

The next two sections deal with specific things the Developer or Commission must do, and place a limit on the time to get them done.

Interestingly, § 7.1 says, in pertinent part:

> If the Planning Commission fails to hold a public hearing or take other action resulting in approval or disapproval of a Phased Preliminary Plat or Preliminary Plat, whichever the case may be, within ninety (90) days following the date of *submission of said plat and all required supporting material* and payment of required fees, then the Phased Preliminary Plat or Preliminary Plat shall be considered to be approved.

(Emphasis added). Ordinance (A.R. 222-223)

Note that the trigger for the consequence for failing to obey the time period is ninety (90) days "after ...all required material" is submitted.

Clearly, § 7.3 applies to waiver of the "above time periods" in §§ 7 – 7.2, not to the pre-hearing filing requirements of § 4.5.

Your Petitioners have a recognized and valuable property interest here. Even if § 7.3 meant that MCPC could approve this development without permitting Petitioners to review the permits and the Plat, it does violence to their right to a meaningful hearing. It is a denial of due process.

1(b). The § 6 waiver granted by MCPC is not supported by any findings of fact.

MCPC argued below, and the Circuit Court held, that § 6 of the Ordinance was followed by MCPC when it granted lot-size waivers. The Court quoted a part of § 6 in its Order:

> "Section 6.0 General of the Ordinance regarding Waivers states:
>
> The Planning Commission shall have the right to waive any provisions 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."

Order Denying Petition for Writ of Mandamus and/or Certiorari and Granting Motion to Dismiss the Petition (A.R. 515).

But the Circuit Court failed to quote the rest of § 6:

> The application for a waiver, if possible, shall be submitted with the application for the proposed subdivision and notice shall be included in the advertisement for the Preliminary Plat Public Hearing & Evaluation. If the waiver is requested between hearings, notice of the request shall be included in the advertisement for the Final Plat Public Hearing.
>
> When 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.

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

(Emphasis added). Ordinance (A.R. 222).

This section contains mandatory language that was ignored by the MCPC just as MCPC ignored the mandate regarding pre-hearing filings in § 4.5, discussed above.

The plain words of the Ordinance require that the Commission make certain findings of fact. No findings of fact appear in the minutes of the February 17, 2015 meeting. Morgan County Planning Commission Meeting Minutes, February 17, 2015 (A.R. 360-369).

This is not some mere clerical oversight, either: there is absolutely nothing about the shape or size or topography of the property, nor any title limitations, which make it impossible or impractical for the subdivider to comply with the regulations. Clearly, the reasons for which the waiver was sought do not fit the requirements of the Ordinance. The Circuit Court's Order reads as though one might review the minutes and discover some vote taken by the MCPC on particular findings of fact, or a list of findings. There are none. Morgan County Planning Commission Meeting Minutes, February 17, 2015 (A.R. 360-369). MCPC's application of § 6 to this case was clearly erroneous. Counsel for the Petitioners repeatedly asked for oral argument on this matter, to no avail.

In *Maplewood Homeowner's Association v. Putnam County Planning Commission*, 218 W.Va. 719, 629 S.E.2d 778, 782 (2006), and *Bd. of Zoning Appeals v. Tkacz*, 234 W.Va. 201, 764 S.E.2d 532 (2014), planning and/or zoning boards issued findings of fact which the Circuit

Court ruled upon, and in both cases found to be wrong. Because the factual findings of these bodies are given deference, and upheld if based upon substantial evidence, both Circuit Court decisions were reversed.

The Court held in its Order that § 6 in the instant case is comparable to the Putnam County Ordinance at issue in *Maplewood, supra.* Petitioners invite this Court to compare the two: The Putnam County Ordinance seems broader in some aspects and narrower in others. *Maplewood*, 629 S.E.2d 778, at 781; Ordinance, § 6 (A.R. 222).

What is starkly different about the two cases is that in *Maplewood, supra,* the Planning Commission actually made factual findings, while MCPC did not in the instant case. The lack of any findings of fact means that the MCPC is not entitled to deference.

Similarly, *Casto v. Kanawha County Commission*, No. 14-0683, (W.Va. Supreme Court, April 17, 2015) (Memorandum Decision) is helpful. There the administrative body's decision was honored because it followed its own rules rescheduling the matter when a clerical error arose.

MCPC deserves no such deference here. It violated its own Ordinance when it granted the lot size waivers without findings of fact.

Included in the MCPC file on February 17, 2015, was a memorandum from Justin Cowles of Cacapon Associates, LP, filed after the hearing was scheduled and advertised, setting forth the claimed basis for the § 6 waivers of lot size. Memorandum (A.R. 348-351). Despite an earlier request by members of the public to see the record, this document was never provided them, and it was not filed in the MCPC file until long after the meeting had been scheduled and advertised.

Beyond this issue, there is an even bigger problem with Cacapon Associates, LP's memorandum request: it does not meet the standard for a § 6 waiver, because it has to do with development choices already made and carried out in the past by Cacapon Associates, LP. Section 6 has to do with the shape or size of the land, its topography, and title limitations. Section 6 does not provide an avenue whereby one can seek a waiver to cure inconveniences and difficulties caused by the unforeseen fallout from the owner's previous development choices.

The Circuit Court identified the proper standard of review but failed to reach the right result here. The Court did not exceed its jurisdiction, but was plainly wrong in its factual findings and made legal errors as shown above.

2. THE CIRCUIT COURT ERRED WHEN IT HELD THAT PETITIONERS' DUE PROCESS RIGHTS WERE NOT VIOLATED EVEN THOUGH THE PLANNING COMMISSION DID NOT HAVE ALL THE DOCUMENTS IN ITS FILE REQUIRED BY THE ORDINANCE, THESE DOCUMENTS WERE UNAVAILABLE TO PETITIONERS, AND APPROVAL OF THE DEVELOPMENT TOOK PLACE WITHOUT PETITIONERS SEEING THE COMPLETED FILE.

The MCPC has said throughout this proceeding that the waivers of the requirement that all of the required material be in place before the preliminary plat hearing do not matter since the requirements would be met at the Final Plat Hearing. First, as noted above, in order to lawfully convene a hearing to grant the waivers, the Ordinance says all the material must be submitted. Ordinance, § 4.5 (A.R. 219).

Second, and equally important given Respondent's arguments here, *nothing in the Ordinance gives the public the right to speak* at a Final Plat Hearing. Unlike at the Preliminary Plat stage, there is no right to speak. Moreover, the development is approved at the Preliminary Plat hearing.

Section 4.8, Final Plat Public Hearing, says:

> *The approval or disapproval of the development is determined at the Preliminary Plat Public Hearing and Evaluation.* The purpose of the Final Plat Hearing is to determine if the development work has been done properly, that adequate provisions have been made to insure completion of remaining development work and that there is no reason to delay the sale of lots.
>
> If the material submitted is technically satisfactory and all conditions have been met, and if all construction work has been satisfactorily performed in the opinion of the Planning Commission, final approval shall be granted and a permit issued at this hearing.
>
> A public notice of Final Plat Public Hearing shall be published once, in a local newspaper of general circulation in Morgan County,. by the Planning Commission staff, 21 days prior to the Final Plat Public Hearing.

(Emphasis added). Ordinance, § 4.8 (A.R. 221)

Unlike in § 4.6, there is no mention of posting the property, or permitting the public to speak at the Final Plat stage. Even if the public were invited to speak, the development is already approved.

According to the Ordinance, the "approval or disapproval of the development is determined at the Preliminary Plat Public Hearing and Evaluation." From a plain reading of the Ordinance this development is already approved.[2]

Thus, the "hearing," which already took place, at which the record was woefully inadequate and most of the requirements were waived, was the end game.

This means that Petitioners are not at some early stage of a long process but at the end. When it ignored/waived the requirement that the transmittal letter, the permits and a Plat drawn to the specifications of § 13 (among other things) be submitted prior to advertising the hearing, the Respondent permanently and irrevocably denied your Petitioners the right to be heard

[2] This might explain why § 4.5 is so absolute about all of the materials being submitted. This is why the requirements are not waivable. This was Petitioners' only chance.

regarding all of those issues. The development of this property has already been approved. For the MCPC to give Petitioners a truly meaningful right to be heard now might actually be argued to be a denial of the *developer's* rights.

The clear and incontrovertible fact that this development has already been approved lends a new urgency to the many violations of due process outlined and reiterated above. None of the salutary public purposes and goals outlined above can be served if you waive the Ordinance's requirements, then approve the development before the public has a chance to know what the plan is and ask informed questions.

In *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996), a property owner sued a Planning Commission over a delay in receiving a requested permit. After a trial in which the property owner was awarded damages, this Court overturned the verdict on the grounds of immunity. This Court said, "In the context of a permitting system, due process requires, at a minimum, that a properly made application be addressed on the merits pursuant to the articulated standards in a reasonably timely manner." *Hutchison*, at 198 W.Va., at 155.

"After all, it is a fundamental requirement of due process to be given the opportunity to be heard at a meaningful time and in a meaningful manner." *Hutchinson*, at 198 W.Va., at 154, (quoting *Matthews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976)). Petitioners respectfully suggest that they have the right to a fair, meaningful and timely hearing also.

Petitioners do not object to lawful development in accord with the Subdivision Ordinance. Their objection is to development in which reasonable notice and an opportunity to be meaningfully heard are foreclosed, as happened here.

Section 7.3 is not a license to relieve the Developer of its duty to file the documentation that the public has a right to see before the Preliminary Plat Approval.

There is a broader, and in some ways, more troubling aspect to MCPC's practice in this case of waiving required permits and approving the development without the permits in hand.

When an administrative body has the unfettered discretion, without findings of fact, to waive the requirements of the Ordinance under which it operates, there is an invitation to arbitrary and capricious behavior. In order to accommodate a favored development, the MCPC might grant waivers beyond the reach of the Ordinance. If, over time, favored developments are granted such waivers while others are not, respect for the rule of law is tarnished. The purpose for which laws are created is so the government may treat like things alike, without favor to anyone.

Given that the subject here is procedural due process, MCPC's reliance below upon the substantive due process discussion in *Struna v. The Shepherdstown Planning Commission*, 2011 U.S. Dist. Lexis 24016, below is misplaced.

Struna does, however, discuss procedural due process: "In order to state a claim for violation of procedural due process, the plaintiff must show that the [Planning] Commission failed to provide the process provided by the Ordinance." Id., at HN 13, p, 22.

In the instant case, the MCPC cancelled and re-scheduled a hearing once because the sign posted on the property did not meet the requirements of the Ordinance. That would have been a violation of Petitioners' procedural due process rights, and the MCPC started over so as to make the developer follow the rules.

The recent memorandum decision in *Casto v Kanawha County Commission*, No. 14-0682, W.Va. Supreme Court April 17, 2015 (Memorandum Decision) which MCPC 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"[3] 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, what is missing from the file in the instant proceeding is not the result of a "clerical error," but an intent to permit the Developer to bypass the requirements.

On appeal, this 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 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. Petitioners ask this Court to make MCPC start over.

Because the MCPC denied the Petitioners' right to a meaningful hearing at a meaningful time, the Circuit Court erred in refusing to overturn the Preliminary Plat Approval.

When MCPC scheduled and advertised a hearing without first obtaining all required materials, it violated the Ordinance. There can be no more obvious example of a legal error by an administrative body than to violate the Ordinance under which it operates.

When the MCPC granted "waivers" under § 7.3 of pre-hearing filings at a meeting convened in violation of § 4.5, it made an error of law which should have caused this matter to be reversed and remanded by the Circuit Court for proceedings in accord with the Ordinance.

When the MCPC failed to render findings of fact in accord with the mandate of § 6 of the Ordinance, it violated not only the Ordinance, but your Petitioners' right to a fair process.

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[3] See, Judge Stuckey's Circuit Court opinion in *Casto* (A.R. 461-464)

When the MCPC "waived' the pre-hearing filing requirements and granted the Preliminary Plat Approval on February 17, 2015, it cut off your Petitioners' right to notice and an opportunity to be heard. By the time the filings were complete, so the Petitioners could be informed, the development was already approved. Ordinance, § 4.8 (A.R. 221).

It was reversible error by the Circuit Court to fail to note these errors and reverse this matter on *Certiorari* so that your Petitioners might have the benefit of a fair and lawful process.

3. THE COURT ERRED WHEN IT PERMITTED INTERVENTION AFTER JUDGMENT WHERE THE INTERVENOR'S INTEREST IS ADEQUATELY REPRESENTED BY EXISTING PARTIES.

The Circuit Court granted Intervention to SG DB Berkeley Springs, LP after the judgment and after the notice of this appeal was filed.

This was error, and this Court should strike the Intervenor. This Court has set up a four (4) part test for intervention of right.

This Court has held that:

> West Virginia Rule of Civil Procedure 24(a)(2) allows intervention of right in an action if an applicant meet four conditions: (1) the application must be timely; (2) the applicant must claim an interest relating to the property or transaction which is the subject of the action; (3) disposition of the action may, as a practical matter, impair or impede the applicant's ability to protest that interest; and (4) the applicant must show that the interest will not be adequately represented by existing parties.

Syl. Pt. 2, *State ex rel. Ball v. Cummings*, 208 W.Va. 393 (1999).

Intervenor claims that its interests in this matter are different from those of any other party.

Intervenor provided no documents or other supporting evidence of its interest other than a contract to which it is not even a party. The Intervenor says:

> "Ultimately, Cross Development, LLC (the Developer in the instant case) will be assigning the Contract to a related entity, CD DG Berkeley Springs, LLC. Furthermore, this Intervenor, SB DG Berkeley Springs, LP, is the lender providing the financing for the purchase of the real estate and the construction of the Project."

SB DG Berkeley Springs, LP's Reply to Petitioners' Opposition to Motion to Intervene, p. 2 (A.R. 661).

Thus, *if* there is a development, and *if* Cross Development, LLC's other related entity purchases the property, *then* this Intervenor will be providing the financing for the real estate purchase. This contingent, remote, potential future interest in the project is different in scale, but the same in principle, as a potential future customer of the store claiming an interest in the savings s/he might obtain by buying laundry detergent or trash bags closer to home. In this sense, many people and entities have an interest in the project, yet we know they all cannot intervene post-judgment.

Petitioners' view is that from the universe of people with potential interests in the project, only those whose interests will not be adequately served by those already parties ought to be permitted to intervene.

MCPC is doing everything anyone could do to protect this dubious Preliminary Plat Approval. If MCPC succeeds in convincing this Court that Petitioners' due process right to a fair hearing is without importance, then this contingent, remote, potential future interest will be protected. If not, then at least for the moment, one of the contingencies will fail.

The crucial aspect of the analysis is this: why would the existence or size of the potential profits to be earned or lost by the Developer and its lender have any impact whatsoever on the fundamental due process rights of the Petitioners? If there is some reason why the interest brought to the table by this Intervenor suggests a different level of due process protection for the "aggrieved persons" Intervenor should say what that reason is. If it cannot say what the

difference is, the Intervenor should be stricken from this lawsuit because its interests are adequately represented by MCPC.

This case went on from its filing March 19, 2015, until after judgment without the Intervenor's participation. The issues on appeal affect the interests of Intervenor, but not in a way which impacts the legal issues.

Petitioners ask that this Honorable Court strike the Intervenor.

CONCLUSION

The Circuit Court's thirty-five (35) page opinion contains numerous clearly-wrong factual findings and numerous errors of law as detailed in the brief. Intervenor's late and baseless intervention is unwarranted because Intervenor's interests will be adequately protected by those already parties.

Your Petitioners ask that this Court reverse the Circuit Court's decision and remand the matter with instructions to strike the Preliminary Plat Approval so that, if the Developer wishes to proceed, MCPC may follow its Ordinance and afford Petitioners their right to a fair process.

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CERTIFICATE OF SERVICE

Type of Service: First Class United States Mail, postage prepaid

Date of Service: January 28, 2016

Person (s) Served: Richard G. Gay, Esquire
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Item(s) Served: PETITIONERS' BRIEF

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