

IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

RECEIVED

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

OCT 19 2015

Petitioners,

v.

Civil Action No.: 15-P-15  
Judge Christopher C. Wilkes

MORGAN COUNTY PLANNING COMMISSION,

Respondent.

**SB DG BERKELEY SPRINGS, LP'S RESPONSE IN OPPOSITION  
TO PETITIONERS' MOTION FOR STAY PENDING APPEAL**

COMES NOW SB DG Berkeley Springs, LP, a Texas limited partnership (the "Developer"), by and through counsel, Kenneth J. Barton, Jr., Kelsey L. Swaim, and the law firm of Steptoe & Johnson PLLC, and hereby responds in opposition to Petitioners' *Motion for Stay Pending Appeal*.

**INTRODUCTION**

The Petitioners filed a *Motion for Stay Pending Appeal* with this Court on October 6, 2015, requesting that this Court grant a stay of all proceedings and work on the commercial lot pending the Petitioners' planned appeal of the September 28, 2015 decision to the Supreme Court of Appeals of West Virginia. The Petitioners argue that, unless a stay pending appeal is granted, the Respondent, the Morgan County Planning Commission (the "Planning Commission") will be able to approve the final plat and construction will commence, therefore rendering their appeal rights null and void. *Pet'rs Mot. for Stay Pending Appeal* ¶¶ 3-4. Additionally, the Petitioners argue that this Court, in its September 28, 2015 *Order*, did not

address the Petitioners' claim that, pursuant to Section 4.8 of the Morgan County Subdivision Ordinance, approval of the preliminary plat equates approval of the development. *Id.* at ¶ 7. Finally, the Petitioners argue that the Planning Commission will not be harmed if a stay pending appeal is granted. *Id.* at ¶ 8. The Developer hereby opposes said *Motion* on the grounds that the appeal is without merit and that the Developer will be significantly harmed if this matter is stayed.

## ARGUMENT

### A. Petitioners' *Motion For Stay Pending Appeal* Is Meritless.

The Petitioners base their claim for a stay pending appeal on two issues. First, the Petitioners argue that, absent a stay, the Planning Commission will be able to approve the final plat and construction will commence, therefore rendering their appeal rights null and void. *See Pet's Mot. for Stay Pending Appeal* ¶¶ 3-4. Second, the Petitioners argue that a stay pending appeal is warranted because this Court did not address the Petitioners' claim regarding Section 4.8 of the Morgan County Subdivision Ordinance in its *Order Denying Petition for Writ of Mandamus and/or Certiorari and Granting Motion to Dismiss the Petition* (the "Final Order"). *See id.* at ¶ 7.

Sections 4.3 and 4.4 of the Morgan County Subdivision Ordinance address the requirements of a developer's application for a planned unit development, and this Court's Final Order indicated that the application complied with Sections 4.3 and 4.4. *Order Den. Pet. Writ Mandamus and/or Cert. and Granting Mot. Dismiss Pet.* Sept. 28, 2015, at ¶ 4. Consistent with this Court's Final Order, the Supreme Court of Appeals of West Virginia has held that:

When an applicant meets all requirements, plat approval is a ministerial act and a planning commission has no discretion in approving the submitted application.

Syl. Pt. 8, *Kaufman v. Planning & Zoning Comm'n of City of Fairmont*, 171 W. Va. 174 (1982). Section 4.8 of the Morgan County Subdivision Ordinance is inapplicable to the Planning Commission's review of the application or the Preliminary Plat, but rather addresses the Final Plat Public Hearing. Furthermore, this Court's Final Order found that the Planning Commission acted properly in deciding to grant extensions for filing the required permits until the Final Plat hearing, which renders the Petitioners' argument regarding Section 4.8 moot.

Despite the Petitioners' contentions, this Court's Final Order repeatedly found that the Planning Commission's decisions were based on the evidence provided and were in compliance with the Morgan County Subdivision Ordinance and West Virginia law. *See Order Den. Pet. Writ Mandamus and/or Cert. and Granting Mot. Dismiss Pet.* Sept. 28, 2015. Specifically, regarding the Planning Commission's decision to grant time extensions for the filing of required permits until the Final Plat hearing, this Court stated in its Final Order that "[t]he 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." *Id.* at p. 20. As such, the Petitioners have failed to present an argument as to why this Court's Final Order is incorrect and should be overturned on appeal. Therefore, the Petitioners' *Motion for Stay Pending Appeal* should be denied.

**B. Alternatively, If This Court Grants A Stay, Petitioners Should Be Required To Post A Bond.**

Contrary to the Petitioners' statement that a stay pending appeal will not harm the Planning Commission, the Developer will be materially harmed if this Court grants a stay. *See See Pet'rs Mot. for Stay Pending Appeal* ¶ 8. As such, the Developer opposes the Petitioners' *Motion for Stay Pending Appeal* unless the Petitioners are required to post a bond in accordance

with Rule 28 of the West Virginia Rules of Appellate Procedure. Specifically, Rule 28(c) of the West Virginia Rules of Appellate Procedure provides that:

In civil cases the relief available in the circuit court or the Supreme Court under this rule may be conditioned upon the filing of a bond or other appropriate security in the circuit court, in such amount and upon such conditions as the court granting the stay feels is proper for the protection of the adverse party. The provisions of the West Virginia Code § 58-5-14, are applicable. Such bond shall be filed within such time as provided by the circuit court or this Court. Failure to execute such bond may be grounds for the dismissal of the appeal.

W. VA. R. APP. P. 28(c). In accordance with Rule 28(c), if the Petitioners are granted the requested stay pending their appeal, the Petitioners should be required to post a bond in an amount sufficient to protect the Developer from the expenses and other damages incurred as a result of delaying construction.

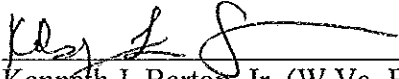
Contemporaneously herewith, the Developer filed a *Motion to Intervene* in order to protect its interest in the development of the commercial lot that is the subject of this civil action. Assuming, *arguendo*, this Court grants the Developer's *Motion to Intervene*, the Developer is an adverse party to the Petitioners, which would require the Petitioners to file a bond for the Developer's protection. Specifically, the Petitioners would need to protect the Developer from the substantial damages that the Developer will incur if the Petitioners' requested relief is granted and construction of the Dollar General store is delayed, either temporarily or permanently. Should this project be delayed for six (6) months, the Developer anticipates that it will incur a minimum of \$290,000.00 in damages, including, but not limited to, changes in obtaining and paying for permits, damages under the lease with Dollar General, expenses associated with attending additional Planning Commission hearings, and legal fees. Therefore, the Petitioners' *Motion for Stay Pending Appeal* should be denied.

## CONCLUSION

WHEREFORE, SB DG Berkeley Springs, LP respectfully requests that this Court deny  
Petitioners' *Motion for Stay Pending Appeal*.

Dated this 16th day of October, 2015.

**SB DG BERKELEY SPRINGS, LP,  
By Counsel,**

  
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2015, I served the foregoing *SB DG Berkeley Springs, LP's Response in Opposition to Petitioners' Motion for Stay Pending Appeal* upon the following counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Lawrence M. Schultz, Esq.  
Burke, Schultz, Harman & Jenkinson  
P.O. Box 1938  
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*Counsel for Petitioners*

Richard G. Gay, Esq.  
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Berkeley Springs, WV 25411  
*Counsel for Respondent*

  
Kenneth J. Barton, Jr. (W.Va. Bar No. 6044)  
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**ORDER DENYING PETITIONERS' MOTION FOR STAY PENDING APPEAL**

On this \_\_\_\_ day of \_\_\_\_\_, 2015, this matter came before the Court upon a *Motion for Stay Pending Appeal* by the Petitioners, Robert Donadieu, Rita Donadieu, George N. Sparks, Patience T. Sparks, Donna Fallin, and Martha A. Macnamara. The Court having reviewed the Petitioners' *Motion*, the Respondent's *Opposition to the Petitioners' Motion for Stay Pending Appeal*, SB DG Berkeley Springs, LP's *Response in Opposition to Petitioners' Motion for Stay Pending Appeal*, and any further reply, it is hereby **ORDERED** and **ADJUDGED** that the Petitioners' *Motion for Stay Pending Appeal* is **DENIED**.

The Clerk of the Court is directed to enter this Order and provide a copy of this Order to:

Lawrence M. Schultz, Esq.  
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The Honorable Christopher C. Wilkes  
Circuit Court of Morgan County, WV

Prepared By:

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