

JEFFERSON COUNTY, WEST VIRGINIA
Departments of Planning & Zoning
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MEMORANDUM

TO: JEFFERSON COUNTY PLANNING COMMISSION
FROM: JENNIFER BROCKMAN, DIRECTOR OF PLANNING
DATE: MAY 6, 2011
SUBJECT: MAY 10, 2011 PLANNING COMMISSION MEETING

Please find attached the following documents for consideration at the May 10, 2011 Planning Commission meeting.

Documents provided:

➤ **May 10, 2011 agenda.**

1. Guest Speaker: Dale Manual to address Parliamentary Procedure and Robert's Rules of Order.
2. Guest Speaker: Stephan Groh to discuss motions and Finding of Fact; Ex-Parte contact; and provide an ethics overview.
3. Approval of minutes for the April 12, 2011 meeting.
Approval of minutes for the April 26, 2011 special meeting.

Documents provided:

- **April 12, 2011 Planning Commission meeting minutes**
- **April 26, 2011 Planning Commission special meeting minutes**

4. Citizen Communications.
5. Request for postponement.
6. Discussion and possible scheduling of Public Hearing for Proposed Text Amendment for Sections of Article 24 of the Jefferson County Subdivision Regulations regarding timeframes and noticing requirements for processing procedures.
7. Discussion and possible scheduling of a Public Hearing for Proposed Text Amendment regarding the maximum square footage requirements for a Minor Site Plan in each Zoning District.

Documents Provided:

- **Memo regarding Proposed Subdivision Amendment for the Determination of a Minor or Major Site Plan**

8. Discussion of draft amendments to Articles 4A and Section 2.2 of the Zoning and Land Development Ordinance and Section 20.206 of the Subdivision and Land Development Regulations, regarding Home Occupations and Cottage Industries.

Documents provided:

- **Memo regarding Home Occupation and Cottage Industries amendments.**
- **Draft Amendments to Article 4A, Section 2.2 of the Zoning Ordinance and Section 20.206 of the Subdivision Regulations.**

9. Discussion and Commission input into the draft Urban Tree Canopy Plan and Goals.

Documents provided:

- **Memo regarding the UTC Plan and Goals.**
- **Draft Jefferson County UTC Plan and Goals.**

10. Director's Report.

Documents provided:

- **Director's agenda**
- **Activity Reports**

11. County Commission Liaison Report.

12. Planning Commission Exchange.

- Report from the Health Department Meeting Liaison.
- Report from the Public Service District Meeting Liaison.
- Report from the Jefferson County Development Authority Meeting Liaison.
- Report from the Water Advisory Committee Meeting Liaison.

13. President's Report.

- Scheduling of a meeting to discuss Planning Commission bylaws.

Documents provided:

- **Planning Commission bylaws.**

14. Reports from Legal Counsel and legal advice to PC.

- Discussion of pending legal issues.

Documents provided:

- **Far Away Farms Summons**

15. Actionable Correspondence.

16. Non-Actionable Correspondence.

Documents provided:

- **Letters from Martin Burk and Barbara Scott**
- **PPC Memos**

If you have any questions or any items are missing; please contact the office at (304) 728-3228 from 9:00 a.m. to 5:00 p.m. Thank you.

AGENDA
JEFFERSON COUNTY PLANNING COMMISSION
May 10, 2011

Planning Commission meetings are located in the Old Charles Town Library meeting room at 200 East Washington Street, at the side entrance on Samuel Street at 7:00 PM

1. Guest Speaker: Dale Manual to address Parliamentary Procedure and Robert's Rules of Order.
2. Guest Speaker: Stephen Groh to discuss motions and Findings of Fact; Ex Parte contact; and provide an ethics overview
3. Approval of the minutes for the April 12, 2011 meeting.
Approval of the minutes for the April 26, 2011 meeting.
4. Citizen Communications.
5. Request for postponement.
6. Discussion and possible scheduling of Public Hearing for Proposed Text Amendment for Sections of Article 24 of the Jefferson County Subdivision Regulations regarding timeframes and noticing requirements for processing procedures.
7. Discussion and possible scheduling of a Public Hearing for Proposed Text Amendment for maximum square footage requirements for a Minor Site Plan in each Zoning District.
8. Discussion of draft amendments to Articles 4A and Section 2.2 of the Zoning and Land Development Ordinance and Section 20.203 of the Subdivision and Land Development Regulations, regarding Home Occupations and Cottage Industries
9. Discussion and Commission input into the draft Urban Tree Canopy Plan and Goals.
10. Director's Report.
11. County Commission Liaison Report.
12. Planning Commission Exchange.
 - Report from the Health Department Meeting Liaison.
 - Report from the Public Service District Meeting Liaison.
 - Report from the Jefferson County Development Authority Meeting Liaison.
 - Report from the Water Advisory Committee Meeting Liaison.
13. President's Report.
 - Scheduling of a meeting to discuss Planning Commission bylaws.
14. Reports from Legal Counsel and legal advice to PC.
 - Discussion of pending legal issues.
15. Actionable Correspondence.
16. Non-Actionable Correspondence.

AGENDA
JEFFERSON COUNTY PLANNING COMMISSION
MAY 10, 2011
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The Planning Commission welcomes written comments at any time. Our office is open Monday through Friday, 9:00 a.m. to 5:00 p.m., and is located at 116 East Washington Street, P.O. Box 338, Charles Town, WV 25414. Our phone number is (304) 728-3228; our fax number is (304) 728-8126; our email address is planningdepartment@jeffersoncountywv.org and our website is www.jeffersoncountywv.org.

Minutes and video recordings of past meetings, Subdivision Regulations, Zoning Ordinance, and the Comprehensive Plan can be found on the website. The office has a file on each project as well as aerial photos of the county. Minutes and audio recordings of older meetings not on the website are available for review in the office.

MINUTES
JEFFERSON COUNTY PLANNING COMMISSION
APRIL 12, 2011

The Jefferson County Planning Commission met on Tuesday, April 12, 2011, with the following Commission members present: Daniel Hayes, President; Arnold Dailey, Vice-President; Morgan Eppers, Secretary; Gene Taylor, Kelly Baty, Paul Taylor, Ed Burns and Walt Pellish. Staff members present included Seth Rivard, Planner; Steve Barney, Zoning Administrator; Jonathon Saunders, County Engineer; Stephen Groh, Assistant Prosecuting Attorney; and Amy Puetz, Planning Clerk.

Mr. Eric Smith was absent without notification.

Mr. Hayes called the meeting to order at 7:03 PM.

Mr. Hayes welcomed the new Planning Commissioners, Mr. Burns and Mr. P. Taylor, and requested that all Planning Commissioners and staff introduce themselves.

1. Election of President, and if necessary, Other Officers.

Mr. Baty nominated Mr. Hayes. Mr. Pellish seconded the nomination. There were no other nominations. Mr. Hayes assumed the position of President by unanimous vote.

Mr. Baty nominated Ms. Eppers who respectfully declined. Mr. Hayes nominated Mr. Dailey. Mr. Baty seconded the nomination. Mr. Dailey assumed the position of Vice-President by unanimous vote.

Ms. Eppers retained the position of Secretary.

2. Approval of minutes for the March 8, 2011 meeting.

Mr. Baty moved to approve the minutes of the March 8, 2011 Planning Commission meeting as written. Mr. Dailey seconded the motion which carried 7 for and 1 abstention (Mr. Burns).

Approval of minutes for the March 22, 2011 special meeting.

Mr. G. Taylor moved to approve the minutes for the March 22, 2011 Special Planning Commission meeting as written. Mr. Baty seconded the motion which carried 7 for and 1 abstention (Mr. Burns).

3. Citizens Communication: None.

4. Request for postponement: None.

5. Request by Bettye K. Mason for a waiver from Subdivision Regulations Section 20.201 A.2, Section 21.103 D and Appendix B, Section 2.2 H to allow access for a proposed lot with an existing residence on an existing 20 foot access easement. This property is located on the north side of Summit Point Road at the intersection with Hardesty Road and is designated as Tax District: Kabletown, Map: 16, Parcel: 3.

Mr. Rivard reviewed the requested waiver and the location of the property. He stated that staff recommended that the Planning Commission request clarity regarding the waiver

MINUTES
JEFFERSON COUNTY PLANNING COMMISSION
APRIL 12, 2011
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request from Section 21.103 D as the applicant would meet those requirements without needing a waiver, and clarity regarding the waiver request from Appendix B, Section 2.2 which required the road right-of-way to be a minimum of 50' in width. Mr. Rivard explained that for the property to meet that condition, the applicant would need to provide a dedication of 20' along Summit Point Road. Mr. Saunders read from his staff report and recommended denial of the waiver from Section 20.201.A.2 since the request does not meet the four criteria necessary noting that granting the waiver affects public safety by constricting traffic to a 20' easement. He explained that if the Planning Commission were to grant the waiver, the Engineering Department would recommend that the width of the access road be no less than 40' wide as that was the minimum width in the 1978 Jefferson County Subdivision Regulation. Mr. Saunders stated that the waiver requests from Section 21.103.D and Appendix B, Section 2.2 H exempts minor subdivisions and therefore, no recommendation, other than to gain clarification, was given.

Mr. Groh reminded that Planning Commission to consider that, although all lots impacted by the waiver requests were currently owned by family members who support the requests, the lots may be sold to non-family members in the future.

Ms. Bettye Mason, applicant, asked if this subdivision had been placed in her will would the process be the same. She explained that she did not want the access road to be widened since it had functioned well for the last 40 years. Mr. Hayes asked how following the requirements as written in the Subdivision Regulations would be a hardship for her. She answered that it would not be a hardship; however, she felt that she should not have to lose useable land that was being used for a play area for her grandchildren. Mr. Hayes stated that the widening of the access easement would only be required on paper and that no actual widening of the access would need to take place at that time.

Mr. Ed Johnson, Surveyor for the subdivision, stated that if the property were left to the estate in the event of Ms. Mason's passing, the subdivision could occur by way of a petition suit without permission from the Planning and Zoning Department. Discussion regarding whether the regulations would need to be met ensued. Mr. Burns asked Legal Counsel for clarification. Mr. Groh stated that he did not want to give advice that Ms. Mason could use in court although he reported that undergoing the Planning and Zoning process would be simpler than the process of a petition suit. Mr. Johnson explained that widening the access easement may cause setback issues with future home additions. He also clarified that, since the applicant did not want the internal subdivision road to access the residue, the waiver requests from Section 21.103.D and Appendix B, Section 2.2.H were to allow a second entrance to the subdivision and yet to waive the requirement of a 20' roadway improvement dedication along Summit Point Road.

Mr. Andy Noland, grandson of the applicant, reasoned that the waiver is of benefit to the public since the family, not the County, would maintain the driveway. He also stated that the waiver would not adversely affect the public given that the access drive had been in the same status for the past 30 years and had never been a problem. He reiterated that adding 30' to the access easement would take away from lot size and may impose setback issues on any future home additions.

MINUTES
JEFFERSON COUNTY PLANNING COMMISSION
APRIL 12, 2011
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Mr. Hayes asked the applicant if she would be willing to provide a 40' access easement instead of a 50' access easement. Ms. Roxanne Noland, granddaughter of the applicant, stated that she felt that was still too extreme. Mr. Hayes asked if the applicant would be willing to provide a 30' access easement (an additional 10' to the existing access easement). Ms. Noland stated she would be agreeable to granting an additional 10' to create a 30' access easement.

Mr. Hayes opened the public hearing. There was no public comment. Mr. Burns moved to close the public hearing. Mr. G. Taylor seconded the motion which carried unanimously.

Mr. Burns questioned whether the applicant could dedicate 10' of easement along Summit Point Road if the land owner across the road would also dedicate 10' of easement. Mr. Rivard explained that the second entrance to a subdivision was required to be on a 50' right-of-way and since the applicant could not control land on the opposite side of the road, she would need to dedicate 20' in order to bring the second entrance into compliance with the regulations.

Mr. Baty moved to deny the waiver request for Section 20.201.A.2 because it does not meet the four criteria:

- 1) The waiver does not reduce County maintenance costs.
- 2) It will adversely affect public health and safety if the properties are ever sold or if for any reason traffic is increased and therefore sight visibility is decreased.
- 3) It does not in keeping with the intent and purpose of the ordinance.

Motioned failed for a lack of a second.

Mr. Burns moved to grant the waiver request for Section 20.201.A.2 because it does meet all four criteria primarily that it is in keeping with the intent and purpose of the ordinance which is to provide for the usability of property for land owner and that it provides for a project of better quality in keeping the family together and a rural character. Mr. Pellish seconded the motion. Mr. Hayes offered a friendly amendment to require the applicant to provide a 30' right-of-way by adding a 10' easement to the existing 20' access drive. Mr. Pellish and Mr. Burns accepted the friendly amendment. The motion carried 7 for and 1 opposed (Mr. Baty).

Mr. Saunders again stated that Section 21.103.D did not apply to this project and therefore, no waiver was needed. He explained that two entrances to a subdivision in a rural district are permitted as long as the entrance is along a 50' road right-of-way. There was discussion for purposes of clarifying how this section of the Subdivision Regulations affects the project. It was determined that no waiver was needed as the applicant already had the right to have two entrances.

Mr. Burns moved to deny the request for a waiver from Appendix B, Section 2.2.H. Mr. Pellish seconded the motion. Mr. Hayes stated that he felt a compromise of 10' dedication would be sufficient since it could be assumed that if the State were to widen the roadway, an equal amount of land would be taken from either side of the road. There was discussion on the reason that the dedication was a requirement for the project. Mr. Saunders clarified that, in the 1978 Subdivision Ordinance, two entrances to a subdivision were not permitted

without a variance. He explained that allowing the second entrance with a land dedication was a way of compromise for the updated Subdivision Regulations. Mr. Hayes called to question. The motion carried 4 for, 3 opposed (Mr. Hayes, Mr. G. Taylor, Ms. Etters), and 1 abstention (Mr. P. Taylor).

6. Public Hearing for Draft Policy Neutral Zoning Ordinance Amendments.

Mr. Barney explained that, if the Planning Commission were to approve the draft amendments, the next step would be to present the amendments to County Commission. He presented an email from Mr. Paul Petony, attorney, suggesting an amendment to the definition of a preschool adding, "If the West Virginia Department of Education establishes requirements for a preschool, the land use shall meet these requirements".

Mr. Hayes opened the public hearing. Ms. Gaye Snyder, Shepherdstown resident, commented on the preschool definition amendment. She stated that she was in support of the amendment and expressed gratitude that preschools will be recognized.

Mr. G. Taylor moved to close the public hearing. Mr. Burns seconded the motion which carried unanimously.

Mr. Barney reviewed the purpose of the amendments and gave an overview of the proposed changes.

Mr. Burns commented on the importance of allowing the public enough time to have the proper amount of input on any amendment. He questioned the amount of time the draft amendments had been available to the public. Mr. Barney answered that a draft document had been posted to the County website for one week. Mr. Burns suggested that any changes should be separated into categories and a note added to detail the reason the change was made. He explained that doing so would allow for easier comprehension for the public review and expressed that these clarifications should be made before the document is presented to the County Commission. There was a short discussion regarding ways to make the changes clear. Mr. Pellish suggested providing two versions of the Zoning Ordinance: one as the amended document to allow for a smaller version, and one with the tracked changes and comments. Mr. Barney agreed to take the suggestions of the Planning Commission and provide a more expanded summary of the amendments.

Ms. Etters moved to forward the draft Zoning Ordinance amendments to the County Commission as the document is written with the amendment suggested by Mr. Peter Petony via email regarding preschools. Mr. G. Taylor seconded the motion which carried unanimously.

Mr. Hayes stated that he would discuss item # 8 and item # 9 before item # 7.

8. Reports from Legal Counsel and legal advice to PC.

Mr. Groh presented an appeal of Henry v. Jefferson County Planning and Zoning Commission (Case Number: 3:06-cv-00033-JPB). He reported that he would attend a meeting on Thursday to discuss the James Gibson, et al v. The Jefferson County Planning

Commission (Case Number: 09-C-364) and requested to have his report placed at the end of the May 10th agenda in case an Executive Session would be necessary.

Mr. Groh asked, when the County Commission questioned him on discussions of the Planning Commission, if the Planning Commissioners felt comfortable with him addressing those questions. Mr. Pellish stated that the relationship between the County Commission and the Planning Commission had overcome any conflicts that had occurred in the past and that the Planning Commission acts as an advisory board to the County Commission and therefore should have an open, candid communications between them. Mr. Burns expressed that Mr. Hayes, as President, should carry the role of relaying discussions to the County Commission. Mr. Groh explained that this question could be decided on a case-by-case basis and that he would like clarification regarding if he could speak to the Zoning Ordinance Amendments specifically. Mr. Barney stated that, since he had been working on the document for the last several months, he or staff would like the opportunity to answer any questions about the rationale on the changes made to the Zoning Ordinance. Mr. Hayes clarified that Mr. Groh was asking to be allowed to answer questions that he is directly asked.

Mr. Burns moved that Mr. Groh be allowed to discuss the legal issues of the Zoning Ordinance Policy Neutral Amendments with the County Commission. Mr. G. Taylor seconded the motion which carried 7 for and 1 abstention (Mr. Baty).

9. Director's Report.

Mr. Rivard explained the proposed special meeting for mandatory Planning Commission training. Mr. Hayes called a special meeting on April 26, 2011 at 7pm for a 2 hour training workshop.

Mr. Rivard reported on the US 340 Corridor Study Kick-Off Meeting that was held March 26, 2011.

He reviewed upcoming Planning Commission and County Commission agenda items.

7. Discussion regarding Planning Commission Bylaws.

Mr. Hayes stated that he would like to review and potentially revise the Planning Commission Bylaws and would like for that discussion to take place at a meeting in the near future.

10. County Commission Liaison Report.

Mr. Pellish stated that he expected for there to be more interaction in the future between the Planning Commission and the Development Authority. He clarified that he would like for business development in the county to become easier.

11. Planning Commission Exchange.

Mr. Rivard explained the need to enlist the help of Planning Commissioners to act as liaisons to the below listed agencies. Mr. Hayes asked for volunteers.

- **Report from the Health Department Meeting Liaison.** Mr. Burns volunteered to attend Health Department Meetings.

- **Report from the Public Service District Meeting Liaison.** Mr. Hayes will retain the position of liaison to the Public Service District.
- **Report from the Jefferson County Development Authority Meeting Liaison.** Mr. Burns volunteered to attend the Development Authority Meeting.
- **Report from the Water Advisory Committee Meeting Liaison.** There were no volunteers.

12. President's Report.

Mr. Hayes reported that his purpose on the board is to make sure that regulations are followed. He also stated that he would like to see the meetings move a little faster so that focus is not lost by deviated conversation and that Robert's Rules of Order are followed during the meetings.

13. Actionable Correspondence. None.

14. Non-Actionable Correspondence. None.

Mr. G. Taylor moved to adjourn the meeting at 10:03 PM. Ms. Eters seconded the motion which carried unanimously. A detailed transcript of the meeting may be found on our website. These minutes were prepared by Amy Puetz, Planning Clerk.

MINUTES
JEFFERSON COUNTY PLANNING COMMISSION
APRIL 26, 2011

The Jefferson County Planning Commission met on Tuesday, April 26, 2011, with the following Commission members present: Daniel Hayes, President; Arnold Dailey, Vice-President; Gene Taylor, Kelly Baty, Paul Taylor, Ed Burns and Walt Pellish. Staff members present included Jennifer Brockman, Planning and Zoning Director; Seth Rivard, Planner; Steve Barney, Zoning Administrator; Roger Goodwin, Chief County Engineer; Jonathon Saunders, County Engineer; and Amy Puetz, Planning Clerk.

Mr. Eric Smith and Ms. Morgan Eppers were absent without notification.

Mr. Hayes called the meeting to order at 7:02 PM.

Ms. Brockman gave an introduction of the agenda for the training workshop explaining that each section on the agenda would last about 15 minutes and that time would be provided at the end of each session for questions. She reported that Mr. Dale Manuel, County Commissioner and Mr. Stephen Groh, Prosecuting Attorney were both unable to attend. However, she explained that she would request for them to speak on their respective topics at the beginning of the May 10, 2011 regular Planning Commission Meeting.

Mr. Ralph Lorenzetti, County Prosecutor, introduced himself and his explained his role in the County and to the Planning Commission.

Mr. Roger Goodwin, Chief County Engineer, gave a presentation regarding the Engineering Department's staff and general duties. He provided information on current projects such as the Chesapeake Bay initiative.

Ms. Brockman presented an overview of the Comprehensive Plan and explained that an update of the Comprehensive Plan would need to occur by 2014. She detailed a plan for that update.

Mr. Seth Rivard, County Planner, reviewed Planning Department general duties as it relates to site plan and subdivision review. He described the components of a site plan versus a subdivision and explained the process requirements for each.

Mr. Steve Barney, Zoning Administrator, presented a synopsis of the purpose of the Zoning Ordinance and detailed sections of that document.

Ms. Brockman suggested at this point that any other discussion be delayed to the May 10, 2011 meeting since the meeting was already over 2 hours and that sessions were lasting longer than 15 minutes. Mr. Hayes requested that he be able to speak on the Planning Commission bylaws before adjourning.

Mr. Daniel Hayes, Planning Commission President, reviewed parts of the Planning Commission bylaws and reported that he would like to schedule a discussion to review and possibly revise those bylaws by adding necessary policies and amending existing policies.

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JEFFERSON COUNTY PLANNING COMMISSION
APRIL 26, 2011
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Ms. Brockman stated she would give a review of the Work Plan and Quarterly Reports at the next meeting.

Mr. Burns moved to adjourn at 9:21 PM. Mr. P. Taylor seconded the motion which carried unanimously. A detailed transcript of the meeting may be found on our website. These minutes were prepared by Amy Puetz, Planning Clerk.

JEFFERSON COUNTY, WEST VIRGINIA
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MEMORANDUM

TO: Jefferson County Planning Commission
FROM: Seth Rivard, County Planner
DATE: May 4, 2011
SUBJECT: Proposed Subdivision Amendment - Combining the Submission and Completeness Review Processes

As the Department processes major site plans and major subdivisions, it has become apparent that there is the ability to reduce redundancies and provide for a more efficient review. There are multiple phases in processing a major site plan or major subdivision. The first phase is the submission of an application and the second phase is a completeness review of the application. Those two processes are similar. In the submission phase the application is reviewed for sufficiency. This review shall take no more than 10 days. If it is found insufficient, it is returned to the applicant to make corrections. Once the application is submitted again, the review can take up to 10 days for a second time. Then, once the application is found sufficient, it is then processed for the completeness review of the contents. The completeness review is the second phase of the process. The bulk of activity occurring during the completeness review is the contacting of outside agencies for their input on the proposed project. This process can take up to 45 days. Between the submission and completeness review of the application, there is a 55 day process if everything is submitted without errors.

As noted above, there are some redundancies that occur in the submission and completeness review processes that could be combined into one process. This would bring processes that are very similar in nature together for a cleaner and more efficient review. The new process would be listed as "Submission and Completeness Review." Staff believes that the 10 days of Submission Review could be within the 45 days of the Completeness Review. Doing this would allow staff to place a tentative Planning Commission meeting date on the calendar. Therefore, allowing Staff and the applicant to work toward meeting that scheduled day. This process would allow the applicant to have errors on a submission and still return it within the 45 day period. This would prevent the stopping of the time clock and potentially affecting the meeting date which the applicant is trying to hold. If the application is deficient of the requirements more than a few times, it is likely that the tentatively scheduled meeting will not be met and the application will be placed on the next Planning Commission meeting.

While the proposed amendment appears to only be saving 10 days, it is actually more than 10 days when the back and forth between Staff and applicant is taken into account. The 10 days could actually be 20-30 days depending upon applicant's turnaround time of the application. This new process would allow for multiple turnaround times to run concurrent with the 45 day process. As a note, all information for the tentatively scheduled Planning Commission meeting shall be submitted at least 14 days prior to the Planning Commission meeting date.

In general, many of the changes are rearranging requirements within the affected sections. In fact, there are very minimal changes proposed. An additional change within this section of the document is the public notification dates. Within this section, there was a conflict with state law regarding public notification dates and inconsistencies within the Subdivision Regulations as it relates to noticing requirements. In order to conform with state law and unify the document for both the public and staffs convenience, the public notification dates have been amended. The state law requires a 21 day notice, while the Subdivision Regulations only required a 14 day notice. Therefore, the 14 day notice has been changed to meet the 21 day notice required by state law.

Major Subdivision Approval Process

| <u>Step Taken</u> | <u>Action Taken</u> | <u>Acting Authority</u> |
|---|----------------------------------|--|
| Pre-Proposal Conference (Optional) | | |
| <u>Step 1</u> <u>Section 24.103A</u> | Submission | |
| <u>Step 2</u> <u>Sections 24.103B, C & D</u> | Conference | <u>Staff Conference within 15 days from submission</u> |
| <u>Step 3</u> <u>Section 24.103E</u> | Memorandum | <u>Staff Memo within 10 days</u> |
| Concept Plan | | |
| <u>Step 1</u> <u>Section 24.106</u> | Submission & Completeness Review | <u>Staff</u> |
| <u>Step 2</u> <u>Section 24.107</u> | Public Workshop | <u>Planning Commission</u> |
| <u>Step 3</u> <u>Section 24.108</u> | Concept Plan Direction | <u>Planning Commission</u> |

(For major subdivision criteria see the definition, Subdivision, Major and Sec. 20.202, Major Subdivisions.)

Major Subdivision Approval Process

| <u>Step Taken</u> | <u>Action taken</u> | <u>Acting Authority</u> |
|-------------------|---------------------|-------------------------|
|-------------------|---------------------|-------------------------|

Preliminary Plat Application

| | | |
|--|--|-----------------------------------|
| <p><u>Step 1</u> <u>Section 24.109</u></p> | <div style="border: 1px solid black; padding: 10px; background-color: #d9c8a8;"> <p style="color: red; font-weight: bold;">Submission & Completeness Review</p> </div> | <p><u>Staff</u></p> |
| <p><u>Step 2</u> <u>Section 24.110</u></p> | <div style="border: 1px solid black; padding: 5px; background-color: #d9c8a8;"> <p style="font-weight: bold;">Public Hearing</p> </div> | <p><u>Planning Commission</u></p> |
| <p><u>Step 3</u> <u>Section 24.111</u></p> | <div style="border: 1px solid black; padding: 5px; background-color: #d9c8a8;"> <p style="font-weight: bold;">Preliminary Plat Approval</p> </div> | <p><u>Planning Commission</u></p> |

Final Plat Application

| | | |
|--|--|-----------------------------------|
| <p><u>Step 1</u> <u>Section 24.112</u></p> | <div style="border: 1px solid black; padding: 10px; background-color: #d9c8a8;"> <p style="color: red; font-weight: bold;">Submission & Completeness Review</p> </div> | <p><u>Staff</u></p> |
| <p><u>Step 2</u> <u>Section 24.113</u></p> | <div style="border: 1px solid black; padding: 5px; background-color: #d9c8a8;"> <p style="font-weight: bold;">Public Hearing</p> </div> | <p><u>Planning Commission</u></p> |
| <p><u>Step 3</u> <u>Section 24.114</u></p> | <div style="border: 1px solid black; padding: 5px; background-color: #d9c8a8;"> <p style="font-weight: bold;">Final Plat Approval</p> </div> | <p><u>Planning Commission</u></p> |
| <p><u>Step 4</u> <u>Section 24.115</u></p> | <div style="border: 1px solid black; padding: 5px; background-color: #d9c8a8;"> <p style="font-weight: bold;">Recordation</p> </div> | <p><u>Staff</u></p> |

Sec. 24.106 Major Subdivision Concept Plan – Submission and Completeness Review

The submission of a concept plan is a required step for major subdivisions. The Department shall have 45 days to complete the sufficiency and completeness review. At the time of submission, Concept Plan shall be placed on the first regularly scheduled Planning Commission meeting after the 45 day review period for the public workshop. Within the 45 days, the department shall have ten (10) days to review the submission and determine whether it is sufficient in that it includes all of the items listed below. If the submission is insufficient, it shall be returned to the applicant. In order to keep on the proposed schedule, the applicant shall resubmit a sufficient application within 10 days after being notified of insufficiency. For the review to be complete within 45 days and remain on the scheduled Planning Commission meeting, all reviewing material, including outside agency reviews, shall be returned to the Department of Planning and Zoning at least 14 days prior to the scheduled Planning Commission workshop.

- A. **Submission.** The applicant is responsible for submitting an application and all supporting documents to the planning department. It shall be accompanied by the fee for concept plan review.
- B. **Submission Contents.** The submission shall contain the following elements in the number of copies indicated by staff.
 - 1. **General location.** A map or aerial photograph showing an area of 500 feet around the property. Zoning boundaries shall be located on this document.
 - 2. **Concept Plan.** A Concept Plan shall be submitted in accordance with the content and formatting guidelines provided in Appendix A, *Plan & Plat Standards*. Show or note if all features are addressed.
 - 3. **Zoning Information.** This shall include:
 - a. Determination of the zoning district in which the proposed subdivision or development project is situated.
 - b. Density calculations.
 - c. Site resource map.
 - 4. **Proposal Description.** This shall be a written description of the proposal with general identification of the number of dwelling units or floor area proposed, commentary, zoning, and development option selected if the development is residential.
 - 5. **Traffic Impact Data.** This shall include:
 - a. Average Daily Trip figures for the adjoining or accessible State road.
 - b. Trip generation figures based on the following table:

| <u>USE</u> | <u>PEAK HOUR</u> | <u>AVERAGE DAILY</u> |
|----------------------|------------------|----------------------|
| <u>Single family</u> | <u>0.8</u> | <u>8.0 per d.u.</u> |
| <u>Detached</u> | <u>0.7</u> | <u>6.0 per d.u.</u> |
| <u>Townhouse</u> | <u>0.6</u> | <u>7.0 per d.u.</u> |
| <u>Mobile Home</u> | <u>0.6</u> | <u>5.0 per d.u.</u> |

- c. Nearest key intersection that will serve the proposed project. A “key intersection” is defined as any intersection with a primary or secondary highway as classified by the current Comprehensive Plan.
 - d. “Highway Problem Areas” according to the current Comprehensive Plan that falls within a one-mile radius of the project.
 - e. In the event trip generation in the peak hour exceeds 100 or the limitation designated in the most current DOH Traffic Engineering Directive, a traffic study will be required which includes generators, etc. This type of study should be performed by a traffic engineering consultant. The effect of phasing the subdivision shall be cumulative.
6. **Agency Reviews.** The reviewing agencies shall conduct reviews of the proposed concept plan. Agency comments shall be received by the Department ~~fourteen (14)~~ days prior to the scheduled public workshop. The applicant shall distribute the concept plan to all reviewing agencies. Reviewing agencies are found in Sections 23.203 and 23.204. Applicant shall provide copy of letter sent to outside agencies to the Departments of Planning and Zoning upon submission of Concept Plan. If any review agency fails to respond, they shall be deemed by these Regulations to have approved the plan.
7. **Adjoining Property.** The applicant must provide an accurate list of all properties and owners’ addresses adjoining the subject property.
8. ~~6.~~ **Other Data.** Any other data or information the applicant believes will assist in the review.
9. ~~7.~~ **Other Reviews.** Any other staff or agency reviews of the plans.

~~C. **Submission Review.** The Department shall have ten (10) days to review the submission and determine whether it is sufficient in that it includes all of the items listed above. If the application is sufficient, the applicant will be contacted to forward application materials to all reviewing agencies. If the submission is insufficient, it shall be returned to the developer along with the fee.~~

~~D. **Effect.** A sufficient concept plan shall mean that the submission has formally been received. A public workshop shall be scheduled at the first meeting after the 45-day completeness review period.~~

Sec. 24.107 Major Subdivision Concept Plan – Completeness Review

~~Once the concept plan has been found sufficient, the applicant shall distribute the concept plan material to all reviewing agencies within seven days. Staff shall have 45 days to conclude a completeness review. After staff concludes the completeness review, the concept plan shall be placed on the next regularly scheduled Planning Commission agenda to hold a public workshop.~~

~~A. **Department and Agency Reviews.** The Department and appropriate reviewing agencies shall conduct reviews of the proposed concept plan. Agency comments shall be received by the Department ~~fourteen (14)~~ days prior to the scheduled public workshop.~~

C. ~~B.~~ **Review Content.** The Department and agency reviews shall address the areas indicated in ~~C~~D through ~~F~~G below and any other areas of concern to the agencies.

D. ~~C.~~ **Department.** The Department review shall include the following:

- a. ~~1.~~ Whether the density, use, and plan meet the requirements of the Zoning Ordinance and any other zoning issues that can be identified at the concept plan submission. (Landscaping, for instance, is not generally available at this stage). Staff shall identify conditions that would enable the plan to meet the standards. It shall also identify any other zoning issues the developer shall address in a preliminary plat~~n~~ submittal.

- b. ~~2.~~ Staff opinion as to whether the plan meets the site development planning or subdivision criteria of these Regulations. The Department shall review the concept plan for modifications that would improve the plan.
- E. ~~D.~~ **WVDOH.** When appropriate, the WVDOH shall submit a letter to the Department of Planning indicating issues and data requirements or notice that there are no issues or data requirements. If WVDOH determines that a traffic study needs to include more area than required by these Regulations or the Zoning Ordinance, it shall specify the expanded area. Any issues regarding sight distances, access location, road configuration, or off-site improvements shall be noted with recommendations or required changes. The purpose is to ensure that, at preliminary plat~~n~~ review, all transportation information is available so the agency does not have to seek additional data for a qualitative review.
- F. ~~E.~~ **Traffic Impact.** The review shall indicate whether the traffic impact study follows the generally accepted methodology for a traffic impact study, outlines the traffic impact, and recommends alternatives for mitigating the impact.
- G. ~~F.~~ **Public Services.** The review shall indicate whether there are existing water and sewer systems in place that can handle the development. If not, the review shall indicate the type or extent of a system that shall be proposed by the developer to best meet the County's needs in that area of the County.
- H. ~~G.~~ **Recommended Conditions.** All reviews shall contain recommended conditions for moving forward to a preliminary plat~~n~~ or reasons why the plat~~n~~ should be denied.
- I. ~~H.~~ **Approval.** Unless there are reviews indicating that the development cannot conform to the Zoning Ordinance, be serviced by public services, or provide its own utilities, or other factors that make the development impossible, Planning staff shall accept or deny the concept plan as complete.
- J. ~~I.~~ **Effect.** Upon accepting the application as complete, Planning staff shall place it on the next possible Planning Commission agenda as a public workshop. Staff shall advertise the public workshop in the local newspaper one time at least ~~fourteen (14)~~twenty-one (21) days in advance of the meeting and send notice by mail to the adjoining property owners at least fourteen (14) days prior to the meeting. ~~‡~~The applicant shall post notice on the property at least fourteen (14) days in advance of the meeting.

Sec. 24.1087 Major Subdivision Concept Plan - Public Workshop

At the scheduled Planning Commission meeting, the Planning Commission shall hold a public workshop to take public comments, concerns, and inputs on the proposed concept plan. This workshop is intended to provide the developer and the Planning Commission with said public input.

- A. **Plan Presentation.** The developer shall make a short presentation of the plan.
- B. **Agency Comments.** The staff shall briefly outline agency comments. The planning department shall specifically address whether the project can meet the standards of the Zoning Ordinance.
- C. **Public Comment.** The public will be invited to comment. The Planning Commission shall direct participants to briefly cite concerns or ask questions of the Planning Commission. The intent of this procedure, like the Department comments, is to inform the developer and Planning Commission with regard to issues that should be addressed in the preliminary plat and report such transportation or engineering matters.

Sec. 24.1098 Major Subdivision Concept Plan - Direction

After the close of the public workshop or at any public meeting within 14 days thereafter, the Planning Commission ~~shall, during their regular meeting or at a specific public meeting within 14 days, provide~~shall provide direction on the concept plan. If the Planning Commission decides to postpone action for 14 days,

the workshop shall be closed for public comment; however the applicant or designated representative will be permitted to interact with the Planning Commission at that meeting to answer questions raised during the public comment at the workshop.

- A. **Direction.** The Planning Commission shall direct the preparation of a preliminary plan subject to conditions to be addressed in the preliminary plat application. The purpose of this review is to guide the developer so that when the preliminary plat application is formally reviewed by the staff, there should not be a whole range of issues being raised for the first time. The developer shall cite conditions and demonstrate that they have been met or otherwise addressed.
- B. **Conditions.** In the direction, it is anticipated that there will be numerous conditions from the Department, agencies, and public comment. There may well be public comment that seeks to lower density of the project below that permitted by the Zoning Ordinance, or to deny the project because of concerns outside the scope of the zoning or subdivision regulations. The applicant may make proffers to address these concerns, but the Planning Commission may not use them as conditions unless they are proffered by the applicant.
- C. **Effect.** The direction is to the developer to proceed to prepare a preliminary plat (Section 24.110). The direction received in the Concept Plan Public Workshop shall be applicable for a period of two years, with the provision that any amendments to these Regulations or the Zoning Ordinance in the second year shall control. If any zoning changes have been presented in a public hearing prior to the decision on the concept plan direction, then meeting the amended zoning requirements, if adopted, shall be a condition of the direction.

Sec. 24.1109 Major Subdivision Preliminary Plat – Application Submission and Completeness Review

The submission of a preliminary plat application is a required step for major subdivisions. The Department shall have 45 days to complete the sufficiency and completeness review unless the applicant chooses to waive the 45 day period. Within the 45 days, the department shall have ten (10) days to review the submission and determine whether it is sufficient in that it includes all of the items listed below. If the submission is insufficient, it shall be returned to the applicant. The 45 day period shall restart when the applicant resubmits. After staff concludes completeness review, staff shall place the preliminary plat on the next regularly scheduled Planning Commission agenda for a vote to accept or deny the application as complete. In order for the preliminary plat to remain on the scheduled Planning Commission meeting, all reviewing material, including outside agency reviews, shall be returned to the Department of Planning and Zoning at least 14 days prior to the scheduled Planning Commission.

- A. **Submission.** The applicant is responsible for submitting an application and all supporting documents to the Department and reviewing agencies. It shall be accompanied by the fee for preliminary plat review.
- B. **Submission Contents.** The submission shall contain the following elements in the number of copies indicated.
 1. **Preliminary Plat.** A preliminary plat application shall be submitted in accordance with the content and formatting guidelines provided in Appendix A, *Plan & Plat Standards*.
 2. **Density Calculation and Site Resource Map.** This map shall have the preliminary plat on it and shall identify the total area of each resource present, the amount protected and a summary table showing that the resource protection standards are met.
 3. **General Location.** A map or aerial photograph showing an area of 500 feet around the property. Zoning boundaries shall be located on this document.

4. **Preliminary Engineering Plans.** A preliminary engineering plan shall be submitted in accordance with the content and formatting guidelines provided by the County Engineer.
5. **Preliminary Landscape Plans.** A preliminary landscape plan shall be submitted in accordance with the content and formatting guidelines provided by the Department of Planning.
6. **Transportation Impact Study.** Analysis, commentary, drawings, or other material specifically addressing conditions in the concept direction. This shall include comments or material from WVDOH regarding the impact study and any responses from the developer's engineers.
7. **Well and Septic Systems.** Where applicable, preliminary plats shall include well and septic provisions and all appropriate Jefferson County Health Department approvals.
8. **Feasibility of Water and Sewer Systems.** Where applicable, preliminary plats shall include connections to existing water and sewer systems or provisions for these systems and for oversizing to serve additional properties. This shall include comments or material from the Jefferson County Public Service District regarding the impact study and any responses from the developer's engineers.
9. **Special Engineering.** Special engineering studies are required if the site is in or partially in areas designated as high vulnerability areas. If other natural resources have specific resource protection standards contained in the Zoning Ordinance, a preliminary engineering assessment shall be provided regarding how those standards can be met.
10. **Historic Resource Preservation.** A Phase I archaeological study is required. A historic resources impact study shall also be included.
11. **Proposal Description.** This shall be a written description of the proposal with general identification of the number of dwelling units or floor area proposed, commentary, zoning, and development option selected if the development is residential.
12. **Identified Concerns.** A report demonstrating how specific conditions identified in the concept plan evaluation and direction received from the Concept Plan public workshop have been addressed on the preliminary plat or will be addressed on the final plat documents.
13. **Names.** Name of applicant and of consulting firms, addresses, phone, e-mail, and person(s) to whom correspondence shall be addressed.
14. **Other Data.** Any other data the applicant believes will assist in the review. If there are proffers being offered, they shall be included here.
15. **Other Agency Reviews.** Agency reviews as to the technical, engineering, zoning, landscaping, impact fee, and other agency reports, comments, and recommendations.

~~C. **Application Submission Review.** The Department shall have ten (10) days to review the submission (1-14 above) and determine whether it is sufficient for Planning Commission review. If it is sufficient, the material shall be sent to all reviewing agencies by the applicant within seven (7) days. If the submission is insufficient, the applicant shall be notified regarding materials required to render it sufficient, and the application shall not be considered a complete submission for review until such time as the additional materials are provided.~~

~~D. **Effect.** A sufficient submission means that the application has formally been received and the time schedules for preliminary review begin.~~

Sec. 24.111 Major Subdivision Preliminary Plat – Completeness Review

~~Once the preliminary plat has been found sufficient, the applicant shall distribute the preliminary plat material to all reviewing agencies within seven days. Staff shall have 45 days to conclude a completeness review unless the applicant chooses to waive the 45-day period. Upon completion, staff shall place the preliminary plat on the next regularly scheduled Planning Commission agenda for a vote to accept or deny the application as complete.~~

- ~~A. Department and Agency Reviews. The Department and appropriate reviewing agencies shall conduct reviews of the preliminary plat. Agency comments shall be received by the Department fourteen (14) days prior to the scheduled public hearing.~~
- C. ~~B.~~ **Review Content.** The Department and agency reviews shall address the areas indicated in paragraphs ~~C~~D to ~~E~~F below and any other areas of concern to the agencies.
- D. ~~C.~~ **Department of Planning.** The Department review shall include the following:
1. Whether the density, use, and plan meet the requirements of the Zoning Ordinance and any other zoning issues that can be identified at the preliminary plan submission. Staff shall identify conditions that must be adjusted if they would enable the plan to conform with Zoning and Subdivision Ordinance standards.
 2. Staff shall provide a written opinion as to whether the preliminary subdivision plat meets the site planning criteria specified in Articles 21 and 22 of these Regulations. In reviewing the submitted application, the Department shall determine whether modifications in layout would improve the plan.
- E. ~~D.~~ **WVDOH.** When appropriate, the WVDOH review shall determine whether the on-site conditions of the preliminary plat are acceptable to the Department, including sight distances, access location, turning or by-pass lanes, road configuration, road alignment and road drainage. A review of the traffic study shall be conducted and any problems or concerns with the study methodology or findings identified. WVDOH shall identify any off-site improvements that shall be required of the developer. A list of concerns to be addressed on the final plat shall be provided.
- F. ~~E.~~ **Public Services.** The review shall indicate whether the preliminary engineering indicates that water and sewer can adequately be provided for the project and if a new system is provided, whether the proposal is sufficient to handle other development in the area. The Public Service District shall make recommendations for oversizing and methods to recapture costs.
- G. ~~F.~~ **Recommended Conditions.** All reviews shall contain recommended final engineering standards that shall be met to deal with specific issues or conditions that need to be addressed in final engineering, plat, landscape plan, or other documents.
- H. ~~G.~~ **Approval.** If the preliminary plat is incomplete, or the development cannot conform to the Zoning Ordinance, be serviced by public services or on-site utilities, or is otherwise impossible, the Planning Commission shall deny the same; otherwise, the Planning Commission shall find it complete and accept it.
- I. ~~H.~~ **Effect.** ~~After staff concludes the completeness review, staff shall place the preliminary plat on the next regularly scheduled Planning Commission agenda for a vote to accept or deny the application as complete. At the meeting where the application~~ **If the application is found complete,** the Planning Commission shall schedule a public hearing within 45 days in accordance with Section 24.1120 , *Major Subdivision Preliminary Plat - Public Hearing*. ~~If Upon determining~~ the application is incomplete, the applicant shall be notified in writing stating the reasons for denial.

Sec. 24.1120 Major Subdivision Preliminary Plat - Public Hearing

Within 45 days of accepting an application as complete, the Planning Commission shall conduct a public hearing to receive public comments, concerns, and inputs on the proposed preliminary subdivision plat. The public notice of the public hearing shall be advertised in a local newspaper of general circulation in the area at least twenty-one (21) days prior to the public hearing. The applicant shall post notice on the site at least fourteen (14) days prior to the public hearing. The scope of this public hearing shall be limited to whether the application meets the requirements of these Regulations and the Zoning Ordinance.

Sec. 24.1131 Major Subdivision Preliminary Plat - Approval

After the close of the public hearing or at any meeting within 14 days thereafter, the Planning Commission shall (1) approve the application, (2) approve the application with conditions, (3) deny the application, or (4) hold the application for up for 45 days for additional information. If the application is to be held for the additional time, a date certain for re-opening the public hearing must be set by the Planning Commission simultaneously with the vote to hold. Additional legal advertisement is not required.

A. **Approval.** The Planning Commission shall review the recommendations and opinions of the reviewing agencies, the staff's decision regarding compliance with the Zoning Ordinance, and the testimony of the public and render its decision. ~~If any review agency fails to respond, they shall be deemed by these Regulations to have approved the plan.~~ In making the decision, the following rules apply:

1. **Zoning.** The preliminary plat application must be denied on zoning grounds if the staff's decision is that the proposed project does not comply with the Zoning Ordinance. If staff indicates it can meet zoning with a specific condition, these conditions shall be required by the Planning Commission. The Planning Commission cannot deny an application on the basis of zoning if the staff's decision is that the application complies with the Zoning Ordinance.
2. **Impact Fees.** The County has adopted impact fee requirements that apply to parks and recreation, schools, law enforcement, fire protection, and emergency services. All fees are collected from individual landowners or builders in conjunction with the building permit process. For this reason, the preliminary plat application cannot be denied on the grounds of adverse impact on these services.
3. **Roads.** The Planning Commission shall have the jurisdiction over any developer or subdivider to require the installation of such improvements as are deemed proper within or adjacent to the subdivision to assure safe access to and from the public highway, and maintain an adequate flow of traffic on the public highway. Improvements required may include the installation of traffic signs and signals, constructing left or right turn lanes, acceleration and deceleration lanes, or reconstructing public roads to eliminate vertical or horizontal curves. Such improvements shall be acceptable to and approved by the West Virginia Division of Highways, provided a denial of such approval shall supersede Planning Commission authority under this provision. The roads impacted by a development are State roads under the jurisdiction of WVDOH. The Planning Commission shall not substitute its judgment of the safety or performance of roads for that of WVDOH unless there is compelling professional evidence that WVDOH has erred in its determination of impact.
4. **Sewer and Water Systems.** All sewer and water systems, whether privately owned or publicly owned shall be permitted only on the recommendation of the Jefferson County Public Service District (JCPSD), and/or the City of Charles Town or private utilities, depending on the service area within which they are proposed. The Planning Commission shall not make a decision contrary to the agency provider recommendation unless there is compelling professional evidence that its recommendation is in error.

5. **On-Site Water Supplies and Sanitary Waste Disposal.** The Jefferson County Health Department shall make a determination regarding the feasibility of on-site wells and septic tanks (or other means of on-site disposal), where applicable.
 6. **Engineering and Landscaping.** The plan being reviewed consists of substantial sediment and erosion control, stormwater management and sewer or water system engineering, landscaping, and site development plan. There will be adjustments in additional work that needs to be done for final engineering, landscaping, and site development plan. The preliminary plat application cannot be denied based on engineering considerations that have not been addressed at this stage of the proceedings. The Planning Commission and Engineering Department may attach conditions to ensure that specific issues are addressed.
 7. **Open Space.** Open space to be provided to satisfy the requirements of the Zoning Ordinance shall be identified on the preliminary plat. Covenants and deed restrictions applicable to such open space to assure its retention shall be submitted and approved.
- B. **Conditions.** It is anticipated that there will be conditions for slight site adjustments and many conditions from the planning department and agencies on engineering and landscaping that must be met in the preparation of the final plat, final engineering, and final landscaping. In addition, there will be conditions on surety, payment of impact fees, and any proffers made by the developer and accepted by the Planning Commission or agency benefiting from the proffer. In no event shall a condition require the developer to reduce the density below the requirements of the Zoning Ordinance or what is shown on the proposal unless the reduction is proffered by the applicant.
- C. **Effect.** The approval of the preliminary plat, with or without conditions, allows the applicant to proceed to prepare a final plat, final engineering, and final landscape plan. The approval shall be good for a period of five years, with the provision that any zoning changes that have been advertised for public hearing prior to the date of approval may be made a condition of approval if adopted prior to submission of final plat including all engineering and landscaping.

Sec. 24.1142 Major Subdivision Final Plat – Application – Submission and Completeness Review

The submission of a final plat application is a required step for all subdivisions. **The Department shall have 45 days to complete the sufficiency and completeness review. At the time of submission, the final plat shall be placed on the first regularly scheduled Planning Commission meeting after the 45 day review period for the completeness public hearing. Within the 45 days, the department shall have ten (10) days to review the submission and determine whether it is sufficient in that it includes all of the items listed below. If the submission is insufficient, it shall be returned to the applicant. In order to keep on the proposed schedule, the applicant shall resubmit a sufficient application within 10 days after being notified of insufficiency. For the review to be complete within 45 days and remain on the scheduled Planning Commission meeting, all reviewing material, including outside agency reviews, shall be returned to the Department of Planning and Zoning at least 14 days prior to the scheduled Planning Commission meeting.**

- A. **Submission.** The applicant is responsible for submitting an application and all supporting documents to the Department of Planning. It shall be accompanied by the fee for final plat review.
- B. **Submission Contents.** The submission shall contain the following elements in the number of copies indicated.
 1. **Final Plat.** The final plat shall be submitted in accordance with the content and formatting guidelines provided in Appendix A, *Plan & Plat Standards*.

2. **Density Calculation and Site Resource Map.** This map shall have the final plat superimposed, and shall identify the total area of each resource present, the amount protected, and a summary table showing that the resource protection standards are met.
3. **General Location Map.** A map or aerial photograph showing an area of 500 feet around the property. Zoning boundaries shall be located on this document.
4. **Final Engineering Plans.** The final engineering plan(s) shall be submitted in accordance with the content and formatting guidelines provided by the Department of Engineering. If preliminary engineering plans satisfy the requirements of the Department of Engineering and no modifications to the preliminary engineering plans are required, then preliminary plans previously approved shall be considered final plans.
5. **Final Landscape Plans.** The final landscape plan shall be submitted in accordance with the content and formatting guidelines provided by the Department of Planning.
6. **Transportation Impact Study and WVDOH Approvals.** A transportation impact study shall be re-submitted only if there was a condition for revisions in the preliminary plat approval. WVDOH approvals shall be secured prior to final approval.
7. **Water and Sewer Services.** This shall include a declaration of Public Service District's approval of plats, or approval by the appropriate service provider, and an agreement to operate the facility. This shall also include documents necessary for the transfer of ownership of the facility to the Public Service District or appropriate operating agency.
8. **On-Site Sewer and Water.** If on-site waste disposal and water supply are provided, approval of the soils, design of the system, and its location on the site shall be indicated.
9. **Special Engineering.** If the site is in or partially in areas designated as high vulnerability areas, preliminary geotechnical engineering assessment may be required. All natural resources which have specific resource protection standards in the Zoning Ordinance or these Regulations shall be complied with and require final engineering approval. All natural resources which have specific resource protection standards in the Zoning Ordinance or these Regulations, shall be complied with, and require final engineering approval.
10. **Open Space.** Open space to be provided to satisfy the requirements of the Zoning Ordinance shall be identified on the final plat. Covenants and deed restrictions applicable to such open space to assure its retention shall be submitted and approved for recordation.
11. **Surety.** Cost estimates for all improvements and proof of surety. See Section 24.503, *Amount of Surety*
12. **Other Agencies.** Required agency sign offs that the final plat is approved by that agency. These agencies shall include the Jefferson County Health Department, West Virginia Division of Highways, West Virginia Department of Environmental Protection, the West Virginia Health Department, the Public Service District, appropriate utility service providers, Jefferson County 911 Addressing Department, ~~Jefferson County Landmarks District Commission and other review agencies certifying that the application is consistent with approved preliminary plat and meets all requirements of the applicable codes, ordinances, or standards or and~~ others when determined appropriate by County staff.
13. **Names.** Name of applicant and of consulting firms, addresses, phone numbers, e-mail addresses, and person(s) to whom correspondence shall be addressed.

C. **Endorsements on Final Plats.** The following certificates shall be placed on all final plats:

1. **Surveyor.** Certificate of accuracy and mapping by professional licensed surveyor signed and sealed.
2. **Owners.** Certificate of ownership and dedication signed and notarized, including all individuals, partnerships, and corporations, and lenders with financial security interests.

~~**D. Submission Review.** The planning department shall have ten (10) days to review the submission and determine whether it is sufficient. If it is sufficient, the applicant shall send the material to all reviewing agencies within seven (7) days. If the submission is insufficient, the applicant shall be notified regarding materials required to render it sufficient, and the application shall not be considered a complete submission for review until such time as the additional materials are provided.~~

D. Additional Information. The Department shall:

1. Review and approve all matters under its jurisdiction.
2. Issue a zoning compliance letter.
3. Certify that all proffers have been satisfied.

E. Approval. If the final plat is found by the Planning Commission to be incomplete, or the development cannot conform to the Zoning Ordinance, be serviced by public services or on-site utilities, the Planning Commission shall deny the same; otherwise, the Planning Commission shall find it complete and accept it.

~~**F. E. Effect.** A sufficient submission means that the application has formally been received and the time schedules for final review begin. At the meeting where the application is found complete, the Planning Commission shall schedule a public hearing within 45 days and in accordance with Section 24.116. Upon determining the application is incomplete, the applicant shall be notified in writing stating the reasons for denial. Upon completion, After staff concludes the completeness review, staff shall place the final plat on the next regularly scheduled Planning Commission agenda for a vote to accept or deny the application as complete. At the meeting where the application is found~~ **If the application is found complete,** the Planning Commission shall schedule a public hearing within 45 days in accordance with Section 24.1163, *Major Subdivision Final Plat - Public Hearing*. ~~If Upon determining~~ the application is incomplete, the applicant shall be notified in writing stating the reasons for denial.

Sec. 24.115 Major Subdivision Final Plat – Completeness Review

~~Once the final plat has been found sufficient, the applicant shall distribute the final plat material to all reviewing agencies within seven days. Staff shall have 45 days to conclude a completeness review. Upon completion, staff shall place the final plat on the next regularly scheduled Planning Commission agenda for a vote to accept or deny the application as complete. The Department shall:~~

- ~~1. Review and approve all matters under its jurisdiction.~~
- ~~2. Issue a zoning compliance letter.~~
- ~~3. Receive an approval letter from WVDOH, Jefferson County Public Service District, Jefferson County Historic Landmarks Commission, and other review agencies certifying that the application is consistent with approved preliminary plat and meets all requirements of the applicable codes, ordinances, or standards.~~
- ~~4. Certify that all proffers have been satisfied.~~

~~**A. Approval.** If the final plat is incomplete, or the development cannot conform to the Zoning Ordinance, be serviced by public services or on-site utilities, the Planning Commission shall deny the same; otherwise, the Planning Commission shall find it complete and accept it.~~

~~B. **Effect.** At the meeting where the application is found complete, the Planning Commission shall schedule a public hearing within 45 days and in accordance with Section 24.116. Upon determining the application is incomplete, the applicant shall be notified in writing stating the reasons for denial.~~

Sec. 24.1163 Major Subdivision Final Plat - Public Hearing

Within 45 days of accepting the application as complete, the Planning Commission shall conduct a public hearing to receive public comments, concerns, and inputs on the proposed final plat. The public notice of the public hearing shall be advertised in a local newspaper of general circulation in the area at least twenty-one (21) days prior to the public hearing. The applicant shall post notice on the site at least fourteen (14) days prior to the public hearing.

- A. **Subjects Covered.** The scope of this public hearing shall be limited to whether the final plat application meets the requirements of these Regulations and the Zoning Ordinance.
- B. **Hearing Procedure.** The hearing shall be conducted in accordance with the Bylaws of the Jefferson County Planning Commission.

Sec. 24.1174 Major Subdivision Final Plat - Approval

After the close of the public hearing or at any meeting within 14 days thereafter, the Planning commission shall (1) approve the application, (2) approve the application with conditions, (3) deny the application, or (4) hold the application for up to 45 days for additional information.

- A. **Approval.** If the final plat application is consistent with the preliminary plat application and meets all other requirements of these Regulations and the Zoning Ordinance and has received sign-off from the agencies specified in Section 24.115(3), the Planning Commission shall approve the subdivision application. ~~If any review agency failed to respond, they shall be deemed by these Regulations to have approved the plan.~~
- B. **Denial.** Denial can only be done on the following basis:
 - 1. The plat~~n~~ (plan, plat, final engineering, or final landscaping) is inconsistent with the approved preliminary plat~~n~~ or conditions of said approval.
 - 2. Failure to provide surety.
- C. **Plat Signing.** The Planning Commission President shall authorize the signing of the plat.
- D. **Effect and Vesting.** The approval of the final plat application and signing of the plat makes the document recordable.

Sec. 24.1185 Major Subdivision Final Plat - Recording

The applicant shall have 180 days after approval to file and record the final plat for lots to be recorded, together with any deed restrictions as may be required, in accordance with W.Va. Code §39-1-13. The approval shall become void if it is not recorded within the 180 day period. The following documents shall be submitted to the Department of Planning:

- A. One (1) mylar copy of the Final Plat suitable for recordation and acceptable to the Clerk of Jefferson County;
- B. Three (3) paper copies of the Final Plat;
- C. One (1) digital copy of the Final Plat compatible with the Jefferson County GIS, as specified by the Jefferson County GIS Office-requirements; and
- D. One (1) digital and one (1) paper copy of any deed restrictions/covenants in a form suitable to the Department.

Major Site Plan Approval Process

| <u>Step Taken</u> | <u>Action Taken</u> | <u>Acting Authority</u> |
|--|------------------------------------|--|
| Pre-Proposal Conference (Optional) | | |
| Step 1 <u>Section 24.102A</u> | Submission | |
| Step 2 <u>Sections 24.102B, C & D</u> | Conference | <u>Staff Conference within 15 days from submission</u> |
| Step 3 <u>Section 24.103E</u> | Memorandum | <u>Staff Memo within 5 days</u> |
| Concept Plan | | |
| Step 1 <u>Section 24.116</u> | Submission and Completeness Review | <u>Staff</u> |
| Step 2 <u>Section 24.117</u> | Public Workshop | <u>Planning Commission</u> |
| Step 3 <u>Section 24.118</u> | Concept Plan Direction | <u>Planning Commission</u> |

(For major site plan criteria see the definition, Site Plan, Major and Sec. 20.204, Major Site Development.)

Figure 24.101B
Major Site Plan Approval Procedure (Part 2)

| Step Taken Site Plan Application | Action taken | Acting Authority |
|-------------------------------------|----------------------------------|---------------------|
| Step 1 Section 24.119 | Submission & Completeness Review | Staff |
| Step 2 Section 24.120 | Public Hearing | Planning Commission |
| Step 3 Section 24.121 | Site Plan Approval | Planning Commission |

Sec. 24.1196 Major Site Plan Concept Plan – Submission and Completeness Review

The submission of a concept plan is a required step for major site plans. The Department shall have 45 days to complete the sufficiency and completeness review. At the time of submission, Concept Plan shall be placed on the first regularly scheduled Planning Commission meeting after the 45 day review period for the public workshop. Within the 45 days, the department shall have ten (10) days to review the submission and determine whether it is sufficient in that it includes all of the items listed below. If the submission is insufficient, it shall be returned to the applicant. In order to keep on the proposed schedule, the applicant shall resubmit within 10 days after being notified of insufficiency. For the review to be complete within 45 days and remain on the scheduled Planning Commission meeting, all reviewing material, including outside agency reviews, shall be returned to the Department of Planning and Zoning at least 14 days prior to the scheduled Planning Commission workshop.

- A. **Submission.** The applicant is responsible for submitting an application and all supporting documents to the planning department. It shall be accompanied by the fee for concept plan review.
- B. **Submission Contents.** The submission shall contain the following elements in the number of copies indicated by staff.
 1. **General location.** A map or aerial photograph showing an area of 500 feet around the property. Zoning boundaries shall be located on this document.
 2. **Concept Plan.** A Concept Plan shall be submitted in accordance with the content and formatting guidelines provided in Appendix A, *Plan & Plat Standards*. Show or note if all features are addressed.
 3. **Zoning Information.** This shall include:

- a. Determination of the zoning district in which the proposed site plan project is situated.
 - b. Density calculations.
 - c. Site resource map. [\(See definition\)](#)
 - d. Use designations for all adjoining and confronting parcels.
4. **Proposal Description.** This shall be a written description of the proposal with general identification of the number of dwelling units or floor area proposed, commentary, zoning, and development option selected if the development is multifamily residential.
5. **Traffic Impact Data.** This shall include:
- a. ADT figures for the adjoining or accessible State road.
 - b. Trip generation figures based on the following table:

| USE | PEAK HOUR | AVERAGE DAILY |
|-----------------------|-----------|------------------------|
| Townhouse | 0.6 | 7.0 per d.u. |
| Mobile Home | 0.6 | 5.0 per d.u. |
| Light Industrial | 1.2 | 5.5 per 1000 s.f. |
| Industrial Park | 0.99 | 7.0 per 1000 s.f. |
| Warehousing | 1.63 | 4.9 per 1000 s.f. |
| Mini-warehousing | 0.29 | 2.8 per 1000 s.f. |
| Office | 2.82 | 17.7 per 1000 s.f. |
| Small Shopping Center | 15.51 | 118.0 per 1000 s.f. |
| Convenience Market | 54.80 | 625/1000 leasable s.f. |

- c. Nearest key intersection that will serve the proposed project. A “key intersection” is defined as any intersection with a primary or secondary highway as classified by the current Comprehensive Plan.
- d. “Highway Problem Areas” according to the current Comprehensive Plan that falls within a one-mile radius of the project.
- e. If a use is not listed in the table above, the most current edition of the Institute of Transportation Engineers Trip Generation Manual or Handbook shall be referenced to determine appropriate trip generation figures.

6. In the event trip generation in the peak hour exceeds 100 or the limitation designated in the most current DOH Traffic Engineering Directive, a traffic study will be required which includes generators, etc. This type of study should be performed by a traffic engineering consultant. The effect of phasing the subdivision shall be cumulative.
 7. **Agency Reviews.** The reviewing agencies shall conduct reviews of the proposed concept plan. Agency comments shall be received by the Department **fourteen (14)** days prior to the scheduled public workshop. The applicant shall distribute the concept plan to all reviewing agencies. **Reviewing agencies are found in Sections 23.203 and 23.204. Applicant shall provide copy of letter sent to outside agencies to the Departments of Planning and Zoning upon submission of Concept Plan. If any review agency failed to respond, they shall be deemed by these Regulations to have approved the plan.**
 8. ~~7.~~ **Other Data.** Any other data or information the applicant believes will assist in the review.
 9. ~~8.~~ **Other Reviews.** Any other staff or agency reviews of the plans.
 10. **Adjoining Property.** The applicant must provide an accurate list of all properties and owners' addresses adjoining the subject property.
- C. Review Content.** The Department and agency reviews shall address the areas indicated in ~~E~~D through ~~F~~G below and any other areas of concern to the agencies.
- D. Department.** The Department review shall include the following:
1. Whether the density, use, and plan meet the requirements of the Zoning Ordinance and any other zoning issues that can be identified at the concept plan submission. (Landscaping, for instance, is not generally available at this stage). Staff shall identify conditions that would enable the plan to meet the standards. It shall also identify any other zoning issues the developer shall address in a site plan submittal.
 2. Staff opinion as to whether the plan meets the site plan criteria of these Regulations. The Department shall review the concept plan for modifications that would improve the plan.
- E. WVDOH.** WVDOH shall submit a letter to the Department of Planning indicating issues and data requirements or notice that there are no issues or data requirements. If WVDOH determines that a traffic study needs to include more area than required by these Regulations or the Zoning Ordinance, it shall specify the expanded area. Any issues regarding sight distances, access location, road configuration, or off-site improvements shall be noted with recommendations or required changes. The purpose is to ensure that, at preliminary plat review, all transportation information is available so the agency does not have to seek additional data for a qualitative review.
- F. Traffic Impact.** The review shall indicate whether the traffic impact study follows the generally accepted methodology for a traffic impact study, outlines the traffic impact, and recommends alternatives for mitigating the impact.
- G. Public Services.** The review shall indicate whether there are existing water and sewer systems in place that can handle the development. If not, the review shall indicate the type or extent of a system that shall be proposed by the developer to best meet the County's needs in that area of the County.
- H. Recommended Conditions.** All reviews shall contain recommended conditions for moving forward to a site plan or reasons why the plan should be denied.

- I. **Approval.** Unless there are reviews indicating that the development cannot conform to the Zoning Ordinance, be serviced by public services, or provide its own utilities, or other factors that make the development impossible, Planning Staff shall accept or deny the concept plan as complete.
- J. **Effect.** Upon accepting the application as complete, Planning staff shall place it on the next Planning Commission meeting agenda as a public workshop. Staff shall advertise the public workshop in a local newspaper of general circulation in the area one time at least twenty-one (21) days in advance of the ~~and the~~ meeting and send notice by mail to the adjoining property owners at least fourteen (14) days prior to the meeting. The applicant shall post notice on the property at least fourteen (14) days in advance of the meeting.

~~C. **Submission Review.** The Department shall have ten (10) days to review the submission and determine whether it is sufficient in that it includes all of the items listed above. If the application is sufficient, the applicant will be contacted to forward application materials to all reviewing agencies. If the submission is insufficient, it shall be returned to the developer along with the fee.~~

~~D. **Effect.** A sufficient concept plan submission shall mean that the application has formally been received.~~

Sec. 24.120 Major Site Plan Concept Plan – Completeness Review

~~Once the concept plan has been found sufficient, the applicant shall distribute the concept plan material to all reviewing agencies within seven days. Staff shall have 45 days to conclude a completeness review. Upon completion, staff shall place the concept plan on the next regularly scheduled Planning Commission meeting agenda to hold a public workshop.~~

~~A. **Department and Agency Reviews.** The Department and reviewing agencies shall conduct reviews of the proposed concept plan. Agency comments shall be received by the Department 14 days prior to the scheduled public workshop.~~

~~B. **Review Content.** The Department and agency reviews shall address the areas indicated in C through F below and any other areas of concern to the agencies.~~

~~C. **Department.** The Department review shall include the following:~~

- ~~1. Whether the density, use, and plan meet the requirements of the Zoning Ordinance and any other zoning issues that can be identified at the concept plan submission. (Landscaping, for instance, is not generally available at this stage). Staff shall identify conditions that would enable the plan to meet the standards. It shall also identify any other zoning issues the developer shall address in a site plan submittal.~~
- ~~2. Staff opinion as to whether the plan meets the site plan criteria of these Regulations. The Department shall review the concept plan for modifications that would improve the plan.~~

~~D. **WVDOH.** WVDOH shall submit a letter to the Department of Planning indicating issues and data requirements or notice that there are no issues or data requirements. If WVDOH determines that a traffic study needs to include more area than required by these Regulations or the Zoning Ordinance, it shall specify the expanded area. Any issues regarding sight distances, access location, road configuration, or off site improvements shall be noted with recommendations or required changes. The purpose is to ensure that, at preliminary plat review, all transportation information is available so the agency does not have to seek additional data for a qualitative review.~~

- ~~E. **Traffic Impact.** The review shall indicate whether the traffic impact study follows the generally accepted methodology for a traffic impact study, outlines the traffic impact, and recommends alternatives for mitigating the impact.~~
- ~~F. **Public Services.** The review shall indicate whether there are existing water and sewer systems in place that can handle the development. If not, the review shall indicate the type or extent of a system that shall be proposed by the developer to best meet the County's needs in that area of the County.~~
- ~~G. **Recommended Conditions.** All reviews shall contain recommended conditions for moving forward to a site plan or reasons why the plan should be denied.~~
- ~~H. **Approval.** Unless there are reviews indicating that the development cannot conform to the Zoning Ordinance, be serviced by public services, or provide its own utilities, or other factors that make the development impossible, Planning staff shall accept or deny the concept plan as complete.~~
- ~~I. **Effect.** Upon accepting the application as complete, Planning staff shall place it on the next Planning Commission meeting agenda as a public workshop. Staff shall advertise the public workshop one time and the meeting applicant shall post notice on the property~~

Sec. 24.1217 Major Site Plan Concept Plan - Public Workshop

At the scheduled Planning Commission meeting, the Planning Commission shall hold a public workshop to take public comments, concerns, and inputs on the proposed concept plan. This workshop is intended to provide the developer and the Planning Commission with said public input.

- ~~A. **Plan Presentation.**~~ The developer shall make a short presentation of the plan.
- ~~B. **Agency Comments.**~~ The staff shall briefly outline agency comments. The planning department shall specifically address whether the project can meet the standards of the Zoning Ordinance.
- ~~C. **Public Comment.**~~ The public will be invited to comment. The Planning Commission shall direct participants to briefly cite concerns or ask questions of the Planning Commission. The intent of this procedure, like the Department comments, is to inform the developer and Planning Commission with regard to issues that should be addressed in the site plan and report such transportation or engineering matters.

Sec. 24.1218 Major Site Plan Concept Plan - Direction

After the close of the public workshop, the Planning Commission shall, during their regular meeting or at a specific public meeting within 14 days, provide direction on the concept plan. If the Planning Commission decides to postpone action for 14 days, the workshop shall be closed for public comment; however the applicant or designated representative will be permitted to interact with the Planning Commission at that meeting to answer questions raised during the public comment at the workshop.

- A. Direction.** The Planning Commission shall direct the preparation of a site plan subject to conditions to be addressed in the site plan application. The purpose of this review is to guide the developer so that when the site plan application is formally reviewed by the staff, there should not be a whole range of issues being raised for the first time. The developer shall cite conditions and demonstrate that they have been met or otherwise addressed.
- B. Conditions.** In the direction, it is anticipated that there will be numerous conditions from the Department, agencies, and public comment. There may well be public comment that seeks to lower density of the project below that permitted by the Zoning Ordinance, or to deny the project because of concerns outside the scope of the zoning or subdivision regulations. The applicant may make proffers to address these concerns, but the Planning Commission may not use them as conditions, unless they are proffered by the applicant.

- C. **Effect.** The direction is to the developer to proceed to prepare a site plan (Section 24.123, *Major Site Plan Application – Submission*) The direction received in the Concept Plan Public Workshop shall be applicable for a period of two years, with the provision that any amendments to these Regulations or the Zoning Ordinance in the second year shall control. If any zoning changes have been presented in a public hearing prior to the decision on the concept plan direction, then meeting the amended zoning requirements, if adopted, shall be a condition of the direction.

Sec. 24.12319 Major Site Plan Application – Submission and Completeness Review

The submission of a site plan application is a required step for all major site plans. The Department shall have 45 days to complete the sufficiency and completeness review. Within the 45 days, the department shall have ten (10) days to review the submission and determine whether it is sufficient in that it includes all of the items listed below. If the submission is insufficient, it shall be returned to the applicant. The applicant shall resubmit a sufficient application within 10 days after being notified of insufficiency. In order for the review to be complete within 45 days and remain on the scheduled Planning Commission meeting, all reviewing material, including outside agency reviews, shall be returned to the Department of Planning and Zoning at least 14 days prior to the scheduled Planning Commission. After staff concludes completeness, staff shall place the site plan on the next regularly scheduled Planning Commission agenda for a vote to accept or deny the application as complete.

- A. **Submission.** The applicant is responsible for submitting an application and all supporting documents to the Department of Planning. It shall be accompanied by the fee for site plan review.
- B. **Submission Contents.** The submission shall contain the following elements in the number of copies indicated.
1. **Site Plan.** The site plan shall be submitted in accordance with the content and formatting guidelines provided in Appendix A, *Plan & Plat Standards*.
 2. **Density Calculation and Site Resource Map.** This map shall have the site plan superimposed, and shall identify the total area of each resource present, the amount protected, and a summary table showing that the resource protection standards are met.
 3. **General Location Map.** A map or aerial photograph showing an area of 500 feet around the property. Zoning boundaries shall be located on this document.
 4. **Final Engineering Plans.** The final engineering plan(s) shall be submitted in accordance with the content and formatting guidelines provided by the Department of Engineering. If preliminary engineering plans satisfy the requirements of the Department of Engineering and no modifications to the preliminary engineering plans are required, then preliminary plans previously approved shall be considered final plans.
 5. **Final Landscape Plans.** The final landscape plan shall be submitted in accordance with the content and formatting guidelines provided by the Department of Planning.
 6. **Transportation Impact Study and WVDOH Approvals.** A transportation impact study shall be re-submitted only if there was a condition for revisions in the concept plan approval. WVDOH approvals shall be secured prior to final approval.
 7. **Water and Sewer Services.** This shall include a declaration of Public Service District's approval of plans, or approval by the appropriate service provider, and an agreement to operate the facility. This shall also include documents necessary for the transfer of ownership of the facility to the Public Service District or appropriate operating agency.
 8. **On-Site Sewer and Water.** If on-site waste disposal and water supply are provided, approval of the soils, design of the system, and its location on the site shall be indicated.

9. **Special Engineering.** Special engineering studies are required if the site is in or partially in areas designated as high vulnerability areas. All natural resources which have specific resource protection standards in the Zoning Ordinance or these Regulations, shall be complied with, and require final engineering approval.
10. **Open Space.** Open space to be provided to satisfy the requirements of the Zoning Ordinance shall be identified on the site plan. Covenants and deed restrictions applicable to such open space to assure its retention shall be submitted and approved for recordation.
11. **Surety.** Cost estimates for all improvements and proof of surety. See Section 24.503, *Amount of Surety*
12. **Other Agencies.** Required agency sign offs that the site plan is approved by that agency. These agencies shall include the Jefferson County Health Department, West Virginia Division of Highways, West Virginia Department of Environmental Protection, the West Virginia Health Department, the Public Service District, appropriate utility service providers, Jefferson County 911 Addressing Department, ~~Jefferson County Landmarks District Commission~~ and other review agencies certifying that the application is consistent with approved site plans and meets all requirements of the applicable codes, ordinances, or standards or ~~and~~ others when determined appropriate by County staff.
13. **Names.** Name of applicant and of consulting firms, addresses, phone numbers, e-mail addresses, and person(s) to whom correspondence shall be addressed.
14. **Additional Information.** The Department shall:
 1. Review and approve all matters under its jurisdiction.
 2. Issue a zoning compliance letter.
 3. Certify that all proffers have been satisfied.

C. Signature Blocks on Site Plans. The following certificates shall be placed on all site plans:

1. **Surveyor/Engineer.** Certificate of accuracy and mapping by professional licensed surveyor/engineer signed and sealed.
2. **Owners.** Certificate of ownership and dedication signed and notarized, including all individuals, partnerships, corporations, and lenders with financial security interests.
3. **County Staff .** A signature block for the County Engineer and the County Planner approvals in accordance with Appendix A, *Plan & Plat Standards*.

~~D. **Submission Review.** The planning department shall have ten (10) days to review the submission and determine whether it is sufficient. If it is sufficient, the applicant shall send the material to all reviewing agencies within seven (7) days. If the submission is insufficient, the applicant shall be notified regarding materials required to render it sufficient, and the application shall not be considered a complete submission for review until such time as the additional materials are provided.~~

~~E. **Effect.** A sufficient submission means that the application has formally been received and the time schedules for review begin.~~

D. **Approval.** If the site plan is incomplete, or the development cannot conform to the Zoning Ordinance, be serviced by public services or on-site utilities, the Planning Commission shall deny the same; otherwise, the Planning Commission shall find it complete and accept it.

E. **Effect.** Once the site plan is found complete, staff shall place the site plan on the next regularly scheduled Planning Commission agenda for a vote to accept or deny the application as complete. At the meeting where the application is found complete, the Planning Commission shall schedule a

public hearing within 45 days and in accordance with Section 24.125-123. Upon determining the application is incomplete, the applicant shall be notified in writing stating the reasons for denial.

Sec. 24.124 Major Site Plan Application – Completeness Review

~~Once the site plan has been found sufficient, the applicant shall distribute the site plan material to all reviewing agencies within seven days. Staff shall have 45 days to conclude a completeness review. Upon completion, staff shall place the site plan on the next regularly scheduled Planning Commission agenda for a vote to accept or deny the application as complete. The Department shall:~~

- ~~1. Review and approve all matters under its jurisdiction.~~
- ~~2. Issue a zoning compliance letter.~~
- ~~3. Receive a sign-off from WVD OH, Jefferson County Public Service District, Jefferson County Historic Landmarks Commission, and other review agencies certifying that the application is consistent with approved site plans and meets all requirements of the applicable codes, ordinances, or standards.~~
- ~~4. Certify that all proffers have been satisfied.~~

- ~~A. **Approval.** If the site plan is incomplete, or the development cannot conform to the Zoning Ordinance, be serviced by public services or on-site utilities, the Planning Commission shall deny the same; otherwise, the Planning Commission shall find it complete and accept it.~~
- ~~B. **Effect.** Upon completion, staff shall place the site plan on the next regularly scheduled Planning Commission agenda for a vote to accept or deny the application as complete. At the meeting where the application is found complete, the Planning Commission shall schedule a public hearing within 45 days and in accordance with Section 24.125. Upon determining the application is incomplete, the applicant shall be notified in writing stating the reasons for denial.~~

Sec. 24.12520 Major Site Plan Application - Public Hearing

Within 45 days of accepting the application as complete, the Planning Commission shall conduct a public hearing to receive public comments, concerns, and inputs on the proposed site plan. The public notice of the public hearing shall be advertised in a local newspaper of general circulation in the area at least twenty-one (21) days prior to the public hearing. The applicant shall post notice on the site at least fourteen (14) days prior to the public hearing.

- A. **Subjects Covered.** The scope of this public hearing shall be limited to whether the site plan application meets the requirements of these Regulations and the Zoning Ordinance.
- B. **Hearing Procedure.** The hearing shall be conducted in accordance with the Bylaws of the Jefferson County Planning Commission.

Sec. 24.12621 Major Site Plan Application - Approval

After the close of the public hearing or at any meeting within 14 days thereafter, the Planning commission shall (1) approve the application, (2) approve the application with conditions, (3) deny the application, or (4) hold the application for up to 45 days for additional information.

- A. **Approval.** If the site plan application is consistent with the concept plan application and meets all other requirements of these Regulations and the Zoning Ordinance and has received sign-off from the agencies specified in Section 24.123(B)(12), *Other Agencies*, the Planning Commission shall approve the site-plan application. ~~If any review agency failed to respond, they shall be deemed by these Regulations to have approved the plan.~~
- B. **Denial.** Denial can only be done on the following basis:

1. The plan (plan, final engineering, or final landscaping) is inconsistent with the approved concept plan or conditions of said approval.
 2. Failure to provide surety.
- C. **Site Plan Signing.** The Planning Commission President shall authorize the signing of the plan.
- D. **Effect and Vesting.** The approval and signing of the site plan allows the applicant to provide surety, if necessary, and begin construction.

Division 24.200 Amendments

Sec. 24.201 Amendment and Modification of Site Plans

- A. **General.** Site plans shall be amended or modified in the same manner as they were originally approved.
- B. **Substantial Compliance With Previous Approval.** The Zoning Administrator shall approve an application to modify a site plan where it is demonstrated that the proposed modification or elimination will result in substantial compliance with the approved site plan, as demonstrated by all of the following:
1. Development density and intensity have not materially changed, in that:
 - a. the number of buildings is not increased by more than 5 percent;
 - b. the number of stories is the same or fewer;
 - c. the height of the building(s) is the same or less;
 - d. the number of units is the same or fewer;
 - e. the lot coverage and floor area ratios are the same or less;
 - f. the number of bedrooms and corresponding parking spaces may be increased or decreased by as much as 5 percent, based on the entire plan, provided the plan complies with all other requirements of these Regulations and the Zoning Ordinance; and
 - g. density or intensity (floor area ratio) may be transferred from one building to another or from one stage of development to another, provided that the total floor area ratio is not changed.
 2. Design has not materially changed, in that:
 - a. the roadway patterns, including ingress-egress points, are in the same general location as shown on the original plans, and are no closer to the rear or interior side property lines than shown on the original plans;
 - b. the parking area is in the same general location and configuration;
 - c. the building setbacks are the same or greater distance from perimeter property lines, except that the building setbacks for detached single family development, attached single family development, townhouse and cluster development may also be decreased, provided that such decrease is limited such that the resulting setback distance will be the greater of either
 - i. the underlying zoning district regulations, or
 - ii. any condition or restrictive covenant regulating the setback for which a substantial compliance determination is sought;

- d. the landscaped open space is in the same general location, is of the same or greater amount, and is configured in a manner that does not diminish a previously intended buffering effect;
 - e. the proposed perimeter walls and/or fences are in the same general location and of a comparable type and design as previously approved;
 - f. elevations and renderings of buildings, if originally provided, have substantially similar architectural expressions as those shown on the approved plans;
 - g. recreational facilities, if shown on approved plans, either remain the same or are converted from one recreational use to another;
 - h. if recreational facilities were not shown in the approved plans, they may be added, provided there is no increase in lot coverage or decrease in required open space and such facilities are located internally within the proposed development;
 - i. if a variance for signage has been granted, the proposed sign(s) are no greater in size and are placed in the same general location on the site as originally approved. An entrance sign location may be moved the same proportional distance as a relocated entrance drive;
 - j. the proposed changes do not have the effect of creating any noncompliance or nonconformity with the strict application of the Zoning Ordinance that were not previously approved at public hearing, or of expanding the scope of existing variances such that they would differ to a greater degree from the strict application of the Zoning Ordinance;
3. Additional outparcels may be added where:
- a. there is no increase in the project's total floor area ratio or lot coverage;
 - b. there is no reduction in the total amount of landscaped open space; and
 - c. addition of the outparcel does not result in noncompliance with any other provision of these Regulations or the Zoning Ordinance on any other portion of the subject property.
4. Reductions in the number of parking spaces on the site are permitted if sufficient parking spaces are provided to satisfy the requirements of the Zoning Ordinance.

Sec. 24.202 Amendment, Modification, and the Vacating of Subdivision Plats

- A. **Amendment.** The Planning Commission (or staff, in the case of a minor subdivision plat) may approve an amendment to a subdivision plat in the same manner as the plat was originally approved, provided:
- 1. All of the property that is affected by the amendment is under the ownership of the applicant;
 - 2. The amendment will not affect the ownership or right of convenient access of persons owning other parts of the subdivision; and
 - 3. The amendment complies with all of the standards of these Regulations, including verification of compliance with the Zoning Ordinance.
- B. **Minor Modification.** The Zoning Administrator may authorize minor modifications to a plat if no lots have been sold as follows.
- 1. Design has not materially changed, in that:

- a. the roadway patterns, including ingress-egress points, are not moved more than five feet (centerline) from their indicated location on the original plat, and are no closer to the rear or interior side property lines than shown on the original plat;
- b. parking areas are in the same general location and configuration;
- c. the landscaped open space is in the same general location, is of the same or greater amount, and is configured in a manner that does not diminish a previously intended buffering effect;
- d. the proposed perimeter walls and/or fences are in the same general location and of a comparable type and design as previously approved;
- e. recreational facilities, if shown on the plat, either remain the same or are converted from one recreational use to another;
- f. if recreational facilities were not shown in the approved plat, they may be added, provided there is no increase in lot coverage or decrease in required open space and such facilities are located internally within the proposed development;
- g. the proposed changes do not have the effect of creating any noncompliance or nonconformity with the strict application of the Zoning Ordinance that were not previously approved at public hearing, or of expanding the scope of existing variances such that they would differ to a greater degree from the strict application of the Zoning Ordinance;

2. If lots have been sold, the minor modification process shall only be used for the relocation of septic reserve locations on individual lots.

C. **Vacating All or Part of Plat.** The Planning Commission may vacate a subdivision plat either in whole or in part if it is demonstrated that:

1. The persons making application for vacating a property own the fee simple title to the whole tract, or the entirety of that part of the tract covered by the plat which is sought to be vacated;
2. Vacating the property will not affect the ownership or right of convenient access of persons owning other parts of the subdivision; and
3. All easement holders whose easements are indicated only on the plat (and not by separate recorded instrument) provide written consent to the vacating of the property.

Sec. 24.203 Reformation of Approved Site Plans or Subdivision Plats to Correct Clerical or Scrivener's Errors

A. **Reformation by Application.** The Zoning Administrator shall approve an application to reform a clerical or scrivener's error in a subdivision plat or site plan approval, including an error in an application or notice, which error causes the approval to not accurately reflect the approving body's intent, and where it is demonstrated that all of the following requirements are met:

1. the reformation does not include a change of judgment, policy, or prior intent of the approving body;
2. prior to the conclusion of the public hearing at which the approval for which reformation is sought was taken (if a public hearing was required), the current applicant either did not know of the error, or knew of the error and made it known to the adopting board;
3. the reformation is essential to ensure that the approved subdivision plat or site plan reflects the intent of the approving body;

4. the record, including but not limited to the staff recommendation, minutes, and motion, evidences the clear intent of the approving body;
5. the substance of the decision of the approving body was evident at the time of the approval, and there was no intent to deceive the public or the approving body on the part of the current applicant at any time;
6. failure to approve the reformation would lead to an unjust result;
7. the error in the prior approval did not mislead anyone in a way that would cause them to be prejudiced by the reformation; and
8. any errors related to public notice did not affect the legal sufficiency of the required notice.

B. Reformation by Zoning Administrator. Notwithstanding the foregoing provisions, the Zoning Administrator, within 30 days of the approval of a subdivision plat or site plan, may reform a clerical or scrivener's error without public notice, if:

1. the error is not related to public notice, and
2. the error causes the approval as written to inaccurately reflect the clear decision of the approving body.

C. Relation Back. A reformed approval shall relate back to the original approval and the effective date of the corrected language shall be deemed to be the same as the effective date of the previous approval.

Division 24.300 Waivers

Waivers from the minimum standards in these Regulations may be granted by the Planning Commission only when the Planning Commission finds that granting a waiver will be consistent with all of the following criteria: (1) that the design of the project will provide public benefit in the form of reduction in County maintenance costs, greater open space, parkland consistent with the County parks plan, or benefits of a similar nature; (2) that the waiver, if granted, will not adversely affect the public health, safety or welfare, or the rights of adjacent property owners or residents; (3) that the waiver, if granted, will be in keeping with the intent and purpose of these Regulations; and (4) that the waiver if granted will result in a project of better quality and/or character. No process or procedural waivers shall be granted.

A. Applicant. An application for a waiver may be made by anyone with a financial interest in a property. The owner is responsible for providing all information and justification for the waiver request.

B. Application. An application for a waiver shall be filed with the Planning Commission. An application for the waiver shall be submitted, along with the required fee, on the appropriate form. In addition to that basic information, the following information shall be submitted to support the application:

1. Plat or plan of the property depicting parcel information, proposed layout, and, where applicable, all proposed modifications.
2. A description of the physical features of the property, total acreage, present use, the use of the property at the time of the adoption of these Regulations, and any known prior uses;
3. A description of the specific portions of these Regulations for which relief is being sought;
4. A narrative describing how the proposed waiver will improve the public benefits.; and
5. An accurate list of all properties and owners' addresses adjoining the subject property.

- C. **Public Notice.** The applicant shall post the property ~~within fourteen (14) days of~~ prior to the scheduled meeting. The adjoining property owners shall be noticed by staff via mailed letter seven (7) days prior to the scheduled meeting.
- D. **Action.** The Planning Commission shall make a decision within 30 days of the receipt of the request for waiver.
- E. **Conditions of Approval.** In granting a waiver, the Planning Commission may prescribe any conditions and safeguards that it finds are appropriate and in conformity with these Regulations.
- F. All waivers and/or conditions of approval associated with the waiver shall be documented on all subsequent plats or plans.

Division 24.400 Appeals

An appeal of a decision of the Planning Commission or staff regarding subdivision or site development decisions shall be taken directly to Circuit Court of Jefferson County, West Virginia, pursuant to W.Va. Code §8A-5-10 and §8A-9-1, et seq.

Division 24.500 Surety

All major subdivisions and all site developments shall be required to provide security that meets the approval of the Department, agencies responsible for accepting the improvements, and in accordance with the County Commission Bonding Policy. Surety is a financial guarantee that the improvements proposed in the subdivision or site development are made as planned if, for some reason, the developer fails to make the required improvements.

Sec. 24.501 Improvements Requiring Surety

- A. **Requirement.** Each of the following elements or systems requires surety:
 1. Clearing, Grading, and Site Preparation.
 2. Stormwater Facilities.
 3. Water and Sewer Utilities or facilities.
 4. Streets, Sidewalks, Parking, Curbs, Street Drainage, and Lighting.
 5. Landscaping and Recreation Facilities.
 6. Other Utilities.
- B. **Exception.** Utilities that install their own infrastructure (such as telephone, electric, gas, and cable companies) will not require surety.

Sec. 24.503 Amount of Surety

- A. **Cost Estimates.** The developer shall submit cost estimates from the project engineer for the cost of such installation.
- B. **Review and Approval.** The County planning department and engineers shall review the cost estimates and make upward adjustments if they find the cost estimates below those the County is currently experiencing.
- C. **Amount.** The surety shall be in the amount of 115 percent of the approved estimate. This covers inflation, the cost of inspecting, and rebidding if the developer defaults and the County has to take over construction or construction supervision.

Sec. 24.504 Funding of Improvements

- A. **On-Site Infrastructure.** All on-site infrastructure shall be provided by the developer.
- B. **Off-Site Infrastructure.** Generally, off-site infrastructure that is necessitated by the development shall be funded by applicable impact fees or proffers (if proffers are made). The County may also approve developer construction of off-site infrastructure.

Sec. 24.505 Improvement Location Permit

An improvement location permit and/or building permit is required prior to the erection, relocation, or alteration of a building or structure, prior to establishing a land use on a vacant lot or in a vacant building; prior to changing a land use existing on a lot or in a building to a different land use, and prior to any land altering activity in a flood prone area.

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MEMORANDUM

TO: Jefferson County Planning Commission
FROM: Seth Rivard, County Planner
DATE: May 4, 2011
SUBJECT: Proposed Subdivision Amendment for the Determination of a Minor or Major Site Plan

While using the recently amended Subdivision Regulations, it became apparent to Staff that there are components of the Regulations that could use further review and potential amendments. Staff believes that the determination of a minor versus major site plan is one section of the Regulations that warrants further review and an amendment.

Currently, any site plan greater than 5,000 square feet is processed as a major site plan, which requires multiple additional steps in the process and two public hearings as compared to the minor process.

Staff is proposing, an increase in the square footage that prompts the requirement for a major site plan process. In the process of reviewing projects and potential site plans, Staff has become aware of the restrictiveness of determining that all projects that are 5,000 square feet or more be classified as major site plan. One of the limits of this dividing point is that it is a one size fits all approach and does not recognize the differences in uses within the zoning districts. Activities and structures in the Rural district are inclined to be smaller in nature than those located in the Industrial-Commercial district. This proposed amendment is to increase the square footage for the determination of a major site plan, based on the zoning district in which the proposed project will be located.

There have been a number of cases in which applicants attempt to stay at or under 5,000 square feet, by either downsizing buildings to fit the requirements or by intending to return later for an addition to add the needed extra square feet. It is an issue; as an applicant is not allowed to do multiple minor site plans in order to avoid the major process. Staff's intent is to provide an increase in the square footage, yet balance the need for public input and awareness. While any number could be considered arbitrary, staff feels the proposal balances the aspects of arbitration versus the increase in size, thereby eliminating any possible detriment to the public.

Another related issue is that a significant amount of staff resources are being expended on projects that should be a minor, but the square footages requires it to be a major. For example, in any district that allows for commercial or industrial uses, most members of the public would realize that buildings constructed in those districts would generally well exceed 5,000 square feet. It is on those grounds that this proposed amendment is founded.

Shown below are the sections from the Subdivision and Land Development Regulations with the proposed text amendments to address the previously stated issues shown in blue.

Sec. 20.203 Minor Site Development

Minor Site Developments are those proposals that do not require the development of new infrastructure or the extension of existing off-tract infrastructure ~~and where there is no subdivision into separate lots.~~ If the development requires easements for drainage or other purposes, private roads, or parking, and access to public roads is involved that serve one or more land uses, it is a site development. Minor site development proposes one or more of the following:

- (1) Building(s), both new and additions to existing, where all structures located on the parcel total less than: ~~5,000 square feet gross floor area (GFA) on any site;~~
 - 6,000 square feet gross floor area (GFA) on any site in the Village District.
 - 10,000 square feet gross floor area (GFA) on any site in the Rural/Agriculture, Residential Growth and Residential/Light Industrial/ Commercial Districts.
 - 20,000 square feet gross floor area (GFA) on any site in the Industrial/Commercial District.
- (2) Building(s), both new and additions to existing, regardless of size, when located in a business and/or industrial park on a lot within an approved major non-residential subdivision with master planned roads and stormwater;
- (3) Addition(s) to existing development of less than ~~ten percent of existing GFA or additions less than 10,000 square feet GFA, whichever is less;~~ or
 - ten percent of existing GFA or additions less than 10,000 square feet GFA, whichever is less in the Village, Rural/Agriculture District and Residential Growth Districts.
 - ten percent of existing GFA or additions less than 20,000 square feet GFA, whichever is less in the Residential/Light Industrial/ Commercial and Industrial/Commercial Districts.
- (4) apartment or multi-family development of nine ~~eight~~ or less dwelling units.

Division 26.200 Definitions of Terms

Minor Site Plan. A plan that follows the minor site development process and that will not require the development of new infrastructure or the extension of existing off-tract infrastructure, that proposes one or more of the following:

- A. Building(s), both new and additions to existing, where all structures located on the parcel total less than: ~~5,000 square feet Gross Floor Area (GFA) on any site.~~
 - 6,000 square feet gross floor area (GFA) on any site in the Village District.
 - 10,000 square feet gross floor area (GFA) on any site in the Rural/Agriculture, Residential Growth and Residential/Light Industrial/ Commercial Districts.
 - 20,000 square feet gross floor area (GFA) on any site in the Industrial/Commercial District.
- B. Building(s), both new and additions to existing, regardless of size, when located in a business and/or industrial park on a lot within an approved major subdivision with master planned roads and stormwater;
- C. Addition(s) to existing development of less than: ~~ten percent of existing GFA or additions less than 10,000 square feet GFA, whichever is less.~~
 - ten percent of existing GFA or additions less than 10,000 square feet GFA, whichever is less in the Village, Rural/Agriculture District and Residential Growth Districts.
 - ten percent of existing GFA or additions less than 20,000 square feet GFA, whichever is less in the Residential/Light Industrial/ Commercial and Industrial/Commercial Districts.
- D. Apartment or multi-family development of nine ~~eight~~ or less dwelling units.

Minor Site Plans do not include the design, erection or addition to detached single family dwelling units when only one dwelling unit is located on an established lot.

Site Plan, Minor. A plan that follows the minor site development process and that will not require the development of new infrastructure or the extension of existing off-tract infrastructure, that proposes one or more of the following:

A. Building(s), both new and additions to existing, where all structures located on the parcel total less than: ~~5,000 square feet Gross Floor Area (GFA) on any site.~~

- 6,000 square feet gross floor area (GFA) on any site in the Village District.
- 10,000 square feet gross floor area (GFA) on any site in the Rural/Agriculture, Residential Growth and Residential/Light Industrial/ Commercial Districts.
- 20,000 square feet gross floor area (GFA) on any site in the Industrial/Commercial District.

B. Building(s), both new and additions to existing, regardless of size, when located in a business and/or industrial park on a lot within an approved major subdivision with master planned roads and stormwater;

C. Addition(s) to existing development of less than: ~~ten percent of existing GFA or additions less than 10,000 square feet GFA, whichever is less.~~

- ten percent of existing GFA or additions less than 10,000 square feet GFA, whichever is less in the Village, Rural/Agriculture District and Residential Growth District.
- ten percent of existing GFA or additions less than 20,000 square feet GFA, whichever is less in the Residential/Light Industrial/ Commercial and Industrial/Commercial Districts.

D. Apartment or multi-family development of nine ~~eight~~ or less dwelling units.

Minor Site Plans do not include the design, erection or addition to detached single family dwelling units when only one dwelling unit is located on an established lot.

Major Site Plan. A plan that follows the major site development process and proposes one or more of the following:

A. A new public or private street or dedication to public use of an existing street;

B. Building(s), both new and additions to existing, where all structures located on the parcel are equal to or total more than: ~~5,000 square feet or more of GFA on any site;~~

- 6,000 square feet gross floor area (GFA) on any site in the Village District.
- 10,000 square feet gross floor area (GFA) on any site in the Rural/Agriculture, Residential Growth and Residential/Light Industrial/ Commercial Districts.
- 20,000 square feet gross floor area (GFA) on any site in the Industrial/Commercial District.
- except building(s), both new and additions to existing, regardless of size, when located in a business and/or industrial park on a lot within an approved major subdivision with master planned roads and stormwater;

C. Addition(s) to existing development of: ~~ten percent or more of existing GFA or with additions of 10,000 square feet or more of GFA;~~

- ten percent or more of existing GFA or additions more than 10,000 square feet of GFA, in the Village, Rural/Agriculture District and Residential Growth District.
- ten percent or more of existing GFA or additions more than 20,000 square feet of GFA, in the Residential/Light Industrial/ Commercial and Industrial/Commercial Districts.

D. Apartment or multi-family development of ten or more dwelling units; or

E. A heavy industrial use.

Site Plan, Major. A plan that follows the major site development process and proposes one or more of the following:

A. A new public or private street or dedication to public use of an existing street;

B. Building(s), both new and additions to existing, where all structures located on the parcel are equal to or total more than: ~~5,000 square feet or more of GFA on any site;~~

- 6,000 square feet gross floor area (GFA) on any site in the Village District.
- 10,000 square feet gross floor area (GFA) on any site in the Rural/Agriculture, Residential Growth and Residential/Light Industrial/ Commercial Districts.
- 20,000 square feet gross floor area (GFA) on any site in the Industrial/Commercial District.
- except building(s), both new and additions to existing, regardless of size, when located in a business and/or industrial park on a lot within an approved major subdivision with master planned roads and stormwater;

C. Addition(s) to existing development of: ~~ten percent or more of existing GFA or with additions of 10,000 square feet or more of GFA;~~

- ten percent or more of existing GFA or additions more than 10,000 square feet of GFA, in the Village, Rural/Agriculture District and Residential Growth District.
- ten percent or more of existing GFA or additions more than 20,000 square feet of GFA, in the Residential/Light Industrial/ Commercial and Industrial/Commercial Districts.

D. Apartment or multi-family development of ten or more dwelling units; or

E. A heavy industrial use.

Sec. 20.204 Major Site Development

Major site developments are those proposals that require the development of new infrastructure or the extension of off-tract infrastructure or where the proposal does not meet the definition of a minor site development ~~and where there is no subdivision into separate lots.~~ This covers the development of one or more parcels of land where there is no subdivision into separate lots. If the development requires easements for drainage or other purposes, private roads, or parking, and access to public roads is involved that serve one or more land uses, it is a site development. Excluded are developments for the purpose of extraction or harvesting of resources and for roads on agricultural land for the purpose of conducting the agricultural operation. Re-subdivision or adjustments of lot lines are also excluded. Major site development shall adhere to full site plan requirements in all proposals.

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MEMO

TO: Planning Commission Members
FROM: Steve Barney, Zoning Administrator
DATE: May 6, 2011
RE: Draft Amendments – Article 4A (Home Occupation / Cottage Industry)

Overview

In response to recent community input, the Planning and Zoning Departments are proposing changes to the Home Occupation and Cottage Industry standards of the Zoning and Land Development Ordinance. The purpose of the changes is to provide additional flexibility for business owners seeking to establish a home business, as well as to provide standards for some aspects of these land uses, currently lacking in the existing Ordinance. The intent of the proposed amendments is to facilitate the establishment of home-based businesses while also protecting the rights of adjacent residents.

On March 1, Staff conducted a public workshop to hear comments on the current Home Occupation and Cottage Industry requirements. Attendees' comments included the following:

- Site plan requirements for Cottage Industries (such as stormwater management, ADA standards and highway entrance permits) are perceived as burdensome to small businesses
- Current standards are overly restrictive, including square footage limits and vehicular trips-per-day caps.
- Home Occupations and Cottage Industries should be permitted in more districts than is currently the case and should not be restricted in residential subdivisions.
- Seasonal Use approval by the Board of Zoning Appeals should not be required for annual festivals involving multiple locations.

Planning and Zoning staff has met with the Engineering Department regarding the proposed amendments, and has subsequently identified additional minor changes needed. These additional changes will be addressed prior to a Planning Commission vote to recommend the amendments for County Commission adoption.

Proposed Changes

Significant changes proposed include:

- Addition of a “General Standards” section
A new section 4A.1 provides general standards that are currently repeated for each section. The purpose of this new section is to enhance the clarity of the Ordinance.
- Addition of an “Exempt Activities” section
Certain types of home-based business activities that have no impact on surrounding residential areas are proposed to be exempt from Zoning Certificate requirements.
- Changes to site plan requirements
Currently, a site plan is required for a Cottage Industry if an accessory building exceeding 250 square feet is proposed, or if additional parking is required per the Zoning and Land Development Ordinance. The proposed Ordinance would only require a site plan if a new accessory structure, addition, or converted accessory structure exceeds 1,500 square feet. The Ordinance would also establish a maximum area of 3,000 square feet for new or converted accessory structures associated with a Cottage Industry.
- Addition of sketch plan requirement for Cottage Industry
To replace the site plan requirement currently in place, the proposed amendments would establish a requirement for a sketch plan delineating basic features and dimensions of the site. The sketch plan would require preparation by a registered engineer or surveyor.
- Accessory structure setbacks
Currently, the existing Ordinance states that all accessory structures associated with a Cottage Industry must have a 25’ setback on all sides. The proposed amendment would clarify that this requirement applies only to new structures.
- Shared rights-of-way
The proposed Ordinance would require a modified Compatibility Assessment Meeting process for Cottage Industries that would be served by a shared private right-of-way or access easement. This process would allow other property owners, who share use of the easement, to be informed about the traffic impact of the proposed Cottage Industry.
- No requirements for annual events
The proposed Ordinance would clarify that participation in annual events with multiple locations, such as a studio tour, does not require a Zoning Certificate.
- Companion amendment to the Subdivision and Land Development Regulations
A minor amendment to Section 20.203 of the Subdivision and Land Development Regulations is proposed, to clarify the site plan requirement for a Cottage Industry.

Please refer to the full text of the draft amendments for details of all the proposed changes.

Next Steps

During or after the May 10th Planning Commission meeting, the Planning Commission may choose to schedule a public hearing for the proposed amendments. Following the hearing, the

Planning Commission may direct staff to make certain changes to the Ordinance and vote to recommend the draft amendments to the County Commission for review and adoption. The Planning Commission may also direct staff to make specific amendments in response to public comments received.

For more information, please contact me at zoning@jeffersoncountywv.org.

ARTICLE 4A. HOME OCCUPATIONS AND COTTAGE INDUSTRIES
[AMENDED BY ACT OF THE COUNTY COMMISSION ON MAY 18, 1996]

Blue = new text

Green = text moved from elsewhere

Red = deleted text

Purple = text moved to elsewhere

Section 4A.1 Home Occupation and Cottage Industry, General Standards

- a. A Zoning Certificate is required for a Cottage Industry or Home Occupation pursuant to Section 3.2 of this Ordinance.
- b. ~~It~~A Home Occupation or Cottage Industry shall be ~~is~~ clearly incidental and subordinate to the use of the dwelling unit as a residence.
- c. There shall be no change in the outside appearance of the building or premises, or other visible evidence of the conduct of ~~such home occupation~~the Home Occupation or Cottage Industry, other than as provided in this Article.
- d. No equipment or process shall be used in ~~such a home occupation~~Home Occupation or Cottage Industry which creates offensive manifestations by sight, sound or smell detectable to the normal senses, or electrical interference or vibrations perceptible, ~~outside the dwelling unit~~at any lot line.
- e. The following land uses cannot be established as a Home Occupations or Cottage Industry:
 - (1) ~~do not include; b~~Boarding or rooming homes
 - (2) ~~or b~~Bed and breakfast establishments
 - (3) ~~or a~~Adult uses.
 - (4) ~~No~~Any business which ~~includes~~involves the storage of loaded weapons such as firearms, or the discharge of such weapons (other than the residents' hunting, protection and leisure weapons) ~~shall be permitted.~~ [AMENDED BY ACT OF THE COUNTY COMMISSION, EFFECTIVE OCTOBER 14, 1999]
 - (5) Automotive uses, including automotive, vehicular, or motorcycle repair or engine repair, body and fender repair, automotive painting, and similar uses.
- f. Any need for parking generated by the ~~conducted use of such home business~~Home Occupation or Cottage Industry shall be met off street and other than in a required front yard.
- g. No outdoor storage of any kind is permitted.

Section 4A.2 Exempt Activities

The following land uses do not constitute a Home Occupation or Cottage Industry, and do not require a Zoning Certificate:

- (1) Telecommuting
- (2) A computer-based occupation involving one full-time resident and no other on-site employees, provided that the occupation generates no additional vehicular trips, no customer visits, no additional shipping or mailing that exceeds a normal residential volume, and would not be otherwise prohibited by this Article. This category includes internet-based sales activities that do not require the presence of inventory at the property, such as drop-shipping.
- (3) The participation of an individual location in an annual event with multiple locations, such as a home and garden tour or an art studio tour

Section 4A.13 Home Occupation, Level 1

An occupation conducted in a dwelling unit for gain provided that:

- a. No person other than members of the family residing on the premises shall be engaged in such occupation. Said members must be full time residents of the premises.
- b. The use shall be conducted wholly within the dwelling unit and shall not exceed one third (1/3) ~~25%~~ of the floor area of the dwelling unit.
- c. ~~There shall be no change in the outside appearance of the building or premises, or other visible evidence of the conduct of such home occupation.~~
- d. There shall be no sales, other than items handcrafted on the premises, in connection with such home occupation.
- e. Traffic generated by such home occupation must not exceed two (2) business related vehicle visits per day nor more than ten (10) visits per week at the premises. ~~Any need for parking generated by the conduct of such home occupation shall be met off street and other than in a required front yard.~~
- f. ~~It is clearly incidental and subordinate to the use of the dwelling unit as a residence.~~
- g. ~~No equipment or process shall be used in such a home occupation which creates offensive manifestations by sight, sound or smell detectable to the normal senses, or electrical interference or vibrations perceptible, outside the dwelling unit.~~
- h. ~~No business which includes the storage of weapons such as firearms (other than the residents hunting, protection and leisure weapons) shall be permitted. Home~~

Comment [SB1]: Moved to "General Standards" section.

Comment [SB2]: Moved to "General Standards" section.

Comment [SB3]: Moved to "General Standards" section.

Comment [SB4]: Moved to "General Standards" section.

~~occupations do not include; boarding or rooming homes or bed and breakfast establishments or adult uses. [AMENDED BY ACT OF THE COUNTY COMMISSION, EFFECTIVE OCTOBER 14, 1999]~~

Comment [SB5]: Moved to "General Standards" section.

Section 4A.24 Home Occupation, Level 2

An occupation conducted in a dwelling unit for gain, provided that:

- a. The occupation must be conducted by a full-time resident of the property. Up to two (2) nonresident employees also may be permitted to work on the premises.
- b. The use shall be conducted wholly within the dwelling unit and shall not exceed one third (1/3) of floor area of the dwelling unit.
- c. ~~The use shall be no change in the outside appearance of the building or premises, or other visible evidence of the conduct of such home occupation other than one sign, not exceeding one two (12) square foot feet in area, non-illuminated, is permitted.~~
- d. There shall be no sales, other than items crafted on the premises, in connection with such home occupation.
- e. No more than three (3) business-related vehicle visits per day nor more than fifteen (15) visits per week at the premises, including delivery vehicles, but excluding employee commuting, shall be permitted. ~~Any need for parking generated by the conducted use of such home business shall be met off street and other than in a required front yard.~~
- f. ~~It is clearly incidental and subordinate to the use of the dwelling unit as a residence.~~
- g. ~~No equipment or process shall be used in such a home business which creates offensive manifestations by sight, sound or smell detectable to the normal senses, or electrical interference or vibrations perceptible, outside the dwelling unit.~~
- h. ~~No business which includes the storage of weapons such as firearms (other than the residents hunting, protection and leisure weapons) shall be permitted. Home businesses do not include; boarding or rooming homes or bed and breakfast establishments or adult uses. [AMENDED BY ACT OF THE COUNTY COMMISSION, EFFECTIVE OCTOBER 14, 1999]~~
- i.h. For a Home Occupation located in an existing residential subdivision established after since July 17, 1979, the minimum lot size is 20,000 square feet.

Comment [SB6]: Moved to "General Standards" section.

Comment [SB7]: Moved to "General Standards" section.

Comment [SB8]: Moved to "General Standards" section.

Comment [SB9]: Moved to "General Standards" section.

Comment [SB10]: Moved to "General Standards" section.

Section 4A.35 Cottage Industry

An occupation conducted at a residential premises for gain, provided that:

(a) The occupation must be owned and operated by a full-time resident of the property. Up to four (4) nonresident employees may be permitted to work on the premises.

(b) The use shall ~~may~~ be conducted at least in part within the dwelling unit. Said use area within the dwelling unit shall not exceed ~~one-third (1/3)~~ one half (1/2) of the floor area of the dwelling unit. ~~In addition all cottage industry.~~ Two subordinate structures shall be permitted in accordance with the requirements of this Article. ~~not exceeding two stories and shall not have a footprint greater than 1000 square feet.~~

(c) There shall be no change in the outside appearance of the residential structure. One sign, not exceeding four (4) square feet in area, non-illuminated may be permitted.

~~(e)~~(d) Sales on the premises shall be permitted with the limitation that no less than seventy-five (75) percent of the items for sale shall be products produced on the premises and that items not produced on premises shall be items similar or related to the items produced on the premises.

~~(d)~~(e) No more than twelve (12) business-related vehicle visits per day nor more than sixty (60) visits per week at the premises, including delivery vehicles, but excluding employee commuting, shall be permitted. ~~Any need for parking generated by the conduct of such cottage industry shall be met off street and other than within the required front yard setback.~~

~~(e)~~(f) ~~No evidence in the appearance of the property or other visible manifestation of the conduct of cottage industry activity shall be visible from the public way, other than a non-illuminated sign.~~

~~(f)~~(g) ~~No equipment or process shall be used in such a cottage industry establishment which creates offensive manifestations by sight, sound or smell detectable to the normal senses at any property line, or which creates electrical interference or vibrations perceptible, at any lot line.~~

~~(g)~~(h) ~~No business which includes the storage of weapons such as firearms (other than the residents hunting, protection and leisure weapons) shall be permitted. Home businesses do not include; boarding or rooming homes or bed and breakfast establishments or adult uses.~~
~~[AMENDED BY ACT OF THE COUNTY COMMISSION, EFFECTIVE OCTOBER 14, 1999]~~

Comment [SB11]: Moved to "General Standards" section.

Comment [SB12]: Moved to "General Standards" section.

Comment [SB13]: Moved to "General Standards" section.

Comment [SB14]: Moved to "General Standards" section.

(i) Submittal of a sketch plan is required for all Cottage Industry applications. The plan need not be prepared by a licensed engineer or surveyor. The plan submittal shall include the following elements:

- (1) Accurate locations and dimensions of all existing and proposed:
 - a. Structures, paved areas, parking areas and drive aisles (including setbacks from property lines)
 - b. Septic areas
 - c. Access points to roads, driveways, and easements
 - d. Property boundaries
- (2) Highway entrance permit for the residential use
- (3) Most recent deed for the property

(j) Additionally, ~~Site~~ plans pursuant to ~~Article 4 of the Improvement Location Permit Ordinance~~ the Subdivision and Land Development Regulations are required ~~for~~ if the combined gross floor area of a new building, an addition, and/or an existing accessory structure as described in (1) – (4) below, to be used as a Cottage Industry, exceeds 1,500 square feet but is less than 3,000 square feet:

- (1) ~~new~~ accessory structures, or
- (2) An addition to an existing residence or accessory structure, when the addition is intended for use as part of a Cottage Industry;
- (3) Existing accessory structures that are to be converted to be ~~used~~ used as a part of the Cottage Industry, if constructed during the five years prior to application for a Zoning Certificate for a Cottage Industry; ~~unless otherwise permitted by the Planning Commission.~~
- (+)(4) An existing structure or addition built without a required, valid building permit or Improvement Location Permit after December 20, 1975.

(k) The maximum combined gross floor area of a new building, an addition, and/or an existing accessory structure as described in subsection (j)(1) – (4), to be used as a Cottage Industry, is 3,000 square feet. For any additional building area exceeding 3,000 square feet, the development and property shall meet all requirements of the Subdivision and Land Development Regulations and the Zoning and Land Development Ordinance.

(l) Setbacks shall be as provided below for an accessory structure used for a Cottage Industry:

- (1) For an accessory structure lawfully constructed during the five years prior to application for a Zoning Certificate for a Cottage Industry, setbacks are 25 feet from all lot lines.
- (+)(2) For an accessory structure ~~all round the structure~~ lawfully constructed more than five years prior to application for a Zoning Certificate for a Cottage Industry, the applicable zoning district setbacks for an accessory structure apply.

(m) ~~Permitted anywhere except~~ For a Cottage Industry located in the Residential Growth District ~~and or an~~ existing residential subdivision, the minimum lot size is 2 acres. s.

(n) If a proposed Cottage Industry would utilize a private, shared right-of-way, driveway or easement for vehicular access, a Compatibility Assessment Meeting is required. The meeting shall be conducted as described in Section 7.6A and 7.6C of this Ordinance, with the following exceptions:

- (1) The purpose of the meeting is for the applicant to inform adjacent owners of the proposed Cottage Industry and to describe any associated traffic impacts.
- (2) Owners of all properties with vehicular access to the right-of-way or easement shall be notified of the date, time, and place of the meeting by registered mail. Letters shall be mailed 14 days prior to the scheduled date of the meeting. Staff shall approve the letter as adequate prior to mailing, and the applicant must provide proof of mailing.
- (3) During the Compatibility Assessment Meeting, attendees should limit their comments to the adequacy of the private, shared right-of-way, driveway or easement, to accommodate traffic generated by the proposed Cottage Industry.
- (4) No Board of Zoning Appeals approval of the application is required.

4A.46 Private Covenants Running with the Land

Jefferson County shall not enforce or become involved in the enforcement of deed restrictions, covenants, easements, or any other private agreement, and, in the review of development proposals, the County will apply only its regulations to evaluate the proposal.. All such restrictions shall be enforced by the parties to the restriction. It is the responsibility of an applicant for a proposed Cottage Industry or Home Occupation to ~~Although not regulated by the County, it is recommended that prior to the operation of a Home Occupation and/or Cottage Industry applicants~~ research ~~restrictive covenants~~ any private agreements relating to ~~for their~~ the subject property, contact the Homeowners' Association, ~~and~~ or seek the advice of a surveyor, engineer or attorney.

[PREVIOUSLY INVALIDATED APRIL 8, 2005 AMENDMENTS REINSTATED BY COURT ORDER ON DECEMBER 3, 2009]

Section 2.2 [Definitions]

Boarding or Rooming House

A building other than a Hotel, Motel, Bed and Breakfast, Residential Care Home, Group Residential Home, Group Residential Facility, or Country Inn where lodging is provided for compensation for more than 6 unrelated persons. Meals may or may not be served but are not provided to outside guests. There is one common kitchen facility.

Sec. 20.203 Minor Site Development

B. **Limited Site Plan Required.** A site plan limited to basic information needed to address (a) erosion and sediment control, (b) parking requirements for the expanded use, (c) stormwater management for the additional impervious area only, (d) handicapped access to the existing and proposed structures and (e) compliance with the Zoning Ordinance, may be used on sites where the structure is:

1. An addition to an existing structure, or, ancillary to an existing use; and
2. The footprint does not exceed 1600 square feet or 35% of the existing structure, whichever is smaller.
3. ~~If the principle use is residential and~~ For a home occupation or cottage industry ~~is proposed~~, the limited site plan standards ~~shall be adhered to~~ are applicable if a site plan is required pursuant to the Zoning Ordinance.

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MEMO

TO: Planning Commission Members
FROM: Jennifer M. Brockman, AICP, Director, Planning and Zoning Department
DATE: May 10, 2011
RE: Urban Tree Canopy Goals and Plan – Update and Request for PC Input

As most of you know the Urban Tree Canopy Grant that Jefferson County, Charles Town and Ranson jointly received in the Fall 2010 from the WV Division of Forestry to address the Urban Tree Canopy issues within the County had two primary components:

- the organization and execution of a tree planting event on public lands; and
- the development of an Urban Tree Canopy Plan, which is essentially a set of policies and goals related to urban tree canopy coverage, for all 5 municipalities and the County.

A number of tree planting events have been held and I can update you on those if desired at the meeting. We are in our final month of this grant and are obligated to have a good draft of an Urban Tree Canopy Plan and Goals by the end of the month. Our goal is to have this completed by the next Council of Governments meeting on May 25, 2011. All of the jurisdictions are recruiting input from the most appropriate public body to incorporate into a draft document that will be presented to the elected members of the 5 municipalities and the County Commission at the May 25th meeting. For the County, as there is no Tree Committee, the Planning Commission will act as this advisory body.

Attached is the working draft generated by staff detailing the work completed to date and some broad concepts of potential goals that may be relevant to Jefferson County. The plan is building upon the University of Vermont land coverage work completed last year. Each jurisdiction, either through a tree committee or the local elected body, will be reviewing and recommending goals and concepts specific to their jurisdiction. The primary role for the County Planning Commission is to provide staff with input regarding goals, dreams, and visions for Jefferson County related to the overall tree canopy in the unincorporated areas of the County (see pages 7 and 8 of the attached).

Note that Doug Griffith, our intern for this project, is also working on finalizing the University of Vermont Report which will go into Chapter 3; updating Chapter 5 data related to the plantings that have already occurred; and investigating resources and references for Chapter 6. Frank Rodgers, Cacapon Institute, is completing the Benefits of Tree information for Chapter 2. We will jointly work to incorporate relevant Goals and Vision statements received from each jurisdiction over the next few weeks into the appropriate areas of Chapter 4.

The Municipal Representatives groups will be meeting again in mid-May to review the work in progress and provide final edits. County staff will be making a presentation of this draft to the Council of Governments Roundtable meeting (which includes representatives of all 5 municipalities and the County Commission) to request that they will develop a methodology for receiving public input on this draft to move it toward a final adoptable document. The adoption or endorsement of the Urban Tree Canopy Plan and Goals, when it is finalized, will qualify the County and Municipalities for future tree planting grant funds that can be utilized to implement the goals and vision.

JEFFERSON COUNTY URBAN TREE CANOPY GOALS AND PLAN

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Chapter 6: Resources/References ???

Appendices:

A. Technical Planting Recommendations

WORKING DRAFT

Chapter 1: Background/Purpose

Background

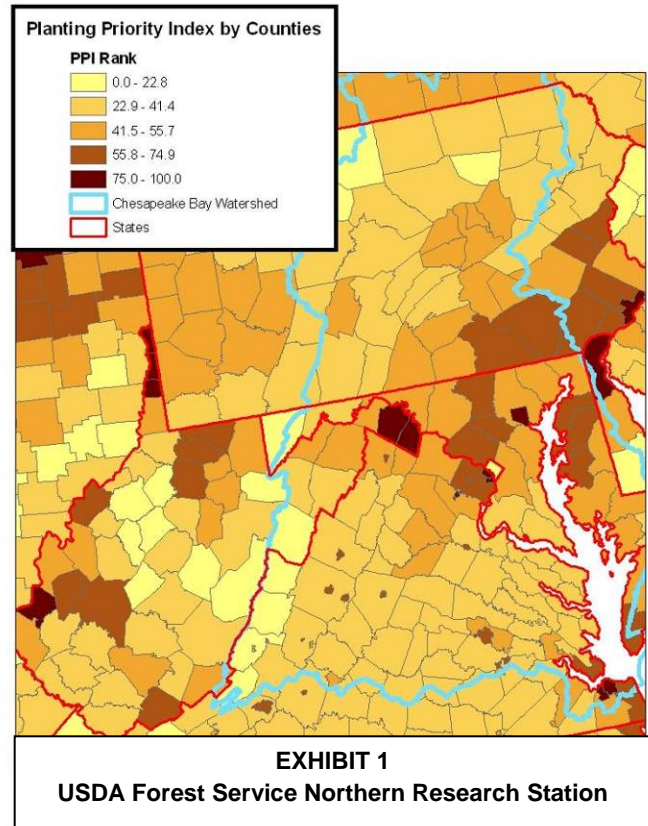
In 2009, Jefferson County, West Virginia (WV), with the assistance of the WV Potomac Tributary Strategy Implementation Team (WV Trib Team), began an Urban Tree Canopy (UTC) assessment project. The County, in its effort to foster wider acceptance of voluntary best management practices (BMPs) for urban tree conservation and plantings, first needed a UTC assessment to determine the extent and location of canopy. Preserving and extending the tree canopy will reduce excessive storm water runoff. Jefferson County's efforts, in conjunction with its five municipalities, will help WV meet the state's commitment to the Chesapeake Bay Program (CBP) goal to have "at least 5 local jurisdictions ... in each state ... complete an assessment of urban forests, adopt a local goal to increase urban tree canopy and encourage measures to attain the established goal."

Coincidentally, at the same time Jefferson County was conducting a tree canopy assessment, the USDA Forest Service published its first National Planting Priority Index. Jefferson and Berkeley Counties (WV) rank above 75% national and are among the highest priority counties in the Chesapeake Bay watershed (Exhibit 1).

Purpose

Tree canopy is the layer of leaves, branches, and stems of trees that cover the ground when viewed from above. "Urban", as defined by the U.S. Census Bureau, is any census block with a population of 500 person per square mile, or the entirety of any incorporated municipality with a single census block meeting that criteria. Urban Tree Canopy (UTC), therefore, is the study of the tree canopy in and around populated areas. Expanding the UTC provides many benefits to communities, including improving water quality, reducing stormwater runoff, saving energy, lowering city temperatures, reducing air pollution, enhancing property values, providing wildlife habitat, facilitating social and educational opportunities, and providing aesthetic benefits.

County and Municipal leaders and public officials in Jefferson County are keenly aware of, and engaged in, efforts to reduce stormwater runoff for the sake of protecting local watersheds and the larger Chesapeake Bay watershed. Trees intercept rain water and have the potential to reduce stormwater runoff by up to >75% under their canopy. Establishing a UTC Plan and Goals with adoption by each of the municipalities and the County Commission is a crucial component of Jefferson County's effort to reduce runoff and improve its green infrastructure.



Chapter 2: Benefits of Trees

Trees provide urban and developing rural areas with a wide variety of tangible and intangible benefits. Well developed and preserved tree canopy helps communities preserve, protect, and enhance the natural and built environment and assists in reducing excess stormwater runoff, mitigating the impact of impervious surfaces, and protecting local and regional waters such as the Chesapeake Bay. Trees are an asset that appreciates in value over time because they are living and growing. They do, however, require regular maintenance and protection to ensure that the value continues as they reach maturity. Some municipalities have formed Tree Committees and/or hired an arborist to assist with this critical maintenance component.

There are numerous benefits to a community that values its trees and works toward implementation of improving and increasing its tree canopy. These benefits fall into the following categories:

Environmental

- Improved Air Quality
- Reduction in Rate of Stormwater Run-off
- Improved Water Quality in adjacent and downstream stream and rivers
- Reduced soil erosion and sedimentation
- Reduction in the heat island effect created by parking and hardscape surfaces in urban and suburban areas
-
-
-

Community Character and Sense of Place

- Create enjoyable pedestrian and driving environment
- Create a sense of peace and relaxation
- Reduce negative noise pollution and impacts from winds
-
-
-

Economic Vitality and Marketability

- Preferred places of employment
- Benefit to retail market
- Positive impact on tourism and attracting and retaining visitors to a community
-
-
-

Chapter 3: Tree Canopy Analysis Methodology and Data

A Jefferson County UTC assessment was completed by the University of Vermont's (UVM) Spatial Analysis Laboratory in January 2010, under contract to Jefferson County. This County-wide study, the largest of its kind in the U.S., utilizes the U.S. Forest Service's premier UTC assessment protocol. By combining existing Light Detection and Ranging (LiDAR, USGS, 2005) and high resolution color infrared imaging data (NAIP, 2007), the UVM high resolution UTC assessment (<1 meter resolution, U. Vermont 2009) is more than 95% accurate, approximately 20% more accurate than assessments that use only color infrared. The results are currently under review and being edited by the Jefferson County Department of Planning and Zoning. Results of the UTC assessment have been presented to the Jefferson County "Round Table", an informal assembly of elected officials and leaders; and to the various planning and public officials and interested public.

The UTC assessment delineates the percentage of tree canopy (TC), amount of impervious, and amount of area open to possible tree canopy. The analysis of Jefferson County, based on high resolution aerial imagery sufficient to enumerate single trees, revealed a tree canopy of about 134,000 acres (termed Existing TC) that corresponds to 38% of all land within the county. The UVM assessment also found that 59% (79,000 acres) of the county that was without trees could theoretically be improved with tree canopy (termed Possible TC). Possible TC includes non-canopy vegetation (e.g., grass/shrubs), bare earth, and certain paved surfaces (e.g., driveways, sidewalks) that, under the right circumstances, could be modified to increase tree cover. Because much of Jefferson County is devoted to agriculture, the county's Existing TC generally occurs in scattered patches. The largest, most contiguous patches occur east of the Shenandoah River in the Blue Ridge Mountain area. Note that agricultural land-cover types were not specifically mapped as part of this project but are included in the Grass/Shrubs land-cover category.

While the UTC assessment maps in high resolution where there is, and is not, tree canopy, it does not specifically identify or recommend where additional trees can be planted. The specific site recommendations and planting specifications are being prioritized in this Plan and Goals are being established for the County and each of the municipalities. The following is a brief summary of the TC data derived for the County and each of the municipalities from the analysis: (??add tables after each section??)

Jefferson County, WV Tree Canopy Facts:

Jefferson County Total Land Area = 133,661 acres

Total Tree Canopy Area = 50,603 acres

38% of the total land area of Jefferson County is identified as Tree Canopy.

59% of the total land area of Jefferson County is available for additional Tree Canopy.

3% of the total land area of Jefferson County is unsuitable for tree planting.

To increase Tree Canopy by 1% (to 39%), an additional 1,525 acres would be required to be planted in trees.

To increase Tree Canopy by 2% (to 40%), an additional 2,861 acres would be required to be planted in trees.

To increase to 40% Tree Canopy over a 10 yr span, 286 acres per year would have to be forested (assuming zero loss during that time span).

To increase to 40% Tree Canopy over a 20 yr span, 143 acres per year would have to be forested.

Bolivar, WV Tree Canopy Facts:

Bolivar Total Land Area = 276 acres

Total Tree Canopy Area in Bolivar = 136 acres

49% of the total land area of Bolivar is identified as Tree Canopy.

33% of the total land area of Bolivar is available for additional Tree Canopy.

18% of the total land area of Bolivar is unsuitable for tree planting.

To increase Tree Canopy by 1% (to 50%), an additional 2 acres would be required to be planted in trees.

Charles Town, WV Tree Canopy Facts:

Charles Town Total Land Area = 3,669 acres

Total Tree Canopy Area in Charles Town = 759 acres

21% of the total land area of Charles Town is identified as Tree Canopy.

70% of the total land area of Charles Town is available for additional Tree Canopy.

9% of the total land area of Charles Town is unsuitable for tree planting.

To increase Tree Canopy by 1% (to 22%), an additional 48 acres would be required to be planted in trees.

Harpers Ferry, WV Tree Canopy Facts:

Harpers Ferry Total Land Area = 335 acres

Total Tree Canopy Area in Harpers Ferry = 230 acres

69% of the total land area of Harpers Ferry is identified as Tree Canopy.

19% of the total land area of Harpers Ferry is available for additional Tree Canopy.

12% of the total land area of Harpers Ferry is unsuitable for tree planting.

To increase Tree Canopy by 1% (to 70%), an additional 4.5 acres would be required to be planted in trees.

Ranson, WV Tree Canopy Facts:

Ranson Total Land Area = 5,168 acres

Total Tree Canopy Area in Ranson = 759 acres

15% of the total land area of Ranson is identified as Tree Canopy.

78% of the total land area of Ranson is available for additional Tree Canopy.

7% of the total land area of Ranson is unsuitable for tree planting.

To increase Tree Canopy by 1% (to 16%), an additional 53 acres would be required to be planted in trees.

Shepherdstown, WV Tree Canopy Facts:

Shepherdstown Total Land Area = 227 acres

Total Tree Canopy Area in Shepherdstown = 106 acres

47% of the total land area of Shepherdstown is identified as Tree Canopy.

30% of the total land area of Shepherdstown is available for additional Tree Canopy.

23% of the total land area of Shepherdstown is unsuitable for tree planting.

To increase Tree Canopy by 1% (to 48%), an additional 3 acres would be required to be planted in trees.

WORKING DRAFT

Chapter 4: Recommendations/Goals

This Tree Canopy Plan sets forth recommendations for tree canopy goals for the County as a whole and specific Goals for each municipality that address their specific needs. The overall Goals and specific jurisdictional Goals should be utilized in setting priorities related to tree canopy improvement and taken into consideration in a variety of local land use decisions.

The Goals set and recommendations made in this plan are intended to be considered and implemented over a twenty year planning period. They should be reviewed at least every 10 years and/or in conjunction with locally adopted Comprehensive Plans which may rely on these Goals and expand the recommendations.

County Wide Goals (including all Municipalities)

- Increase Overall County Tree Canopy by ___ percent to ___ percent by 2030.
- Develop a strategy to add Tree Canopy Coverage along key transportation US and State Routes that serve as Gateways to the County and provide an entryway to visitors and residents alike.
- Increase Tree Canopy coverage along key riparian buffers within watersheds that contain primary streams that directly enter the Shenandoah and Potomac Rivers.
- Increase Tree Canopy coverage within active agricultural operations along streams and creeks that drain farmland to reduce sedimentation and nutrient loading in receiving streams and rivers.
- Develop an education and outreach program in cooperation with all jurisdictions and the County Extension Service (?) to promote the planting of native tree species on private property through landowner incentive programs; pursue grants to fund such a program. Develop policies requiring landowners to water all new trees in the first three years of planting with a commitment by the property owner, through educational materials (handout pamphlets and news releases).
- Review the land coverage data to identify key areas lacking Tree canopy to help prioritize areas to be planted including, but not limited to, additional school site; infilling vacant lots; slowing the flow of stormwater into public areas: such as parking lots, streets, public parks, HOA open space areas; pathways/trails, public buildings, and gateways; etc.
-

County Goals Specific to Unincorporated Areas

- Increase Tree Canopy Coverage within the unincorporated areas of the County by ___ percent to ___ percent by 2030.
- Review and consider amending Subdivision Regulations and Site Plan development standards to improve policies regarding tree planting and tree and forest protection, including more detailed landscaping plan requirements which detail plant species; encourage native species; require design which integrates landscaping design with stormwater management plans; etc.

- Increase the percentage of trees that a developer must conserve before construction or replace trees in existing wooded areas after construction with a minimum goal of ___ to ___% canopy cover, while specifying species native to the area.
- Develop local land use policies which employ best management techniques to preserve trees and minimize damage from construction activities such as trenching, soil compaction, and soil clearing and grading
- Develop implementable land use policies which encourage the retention of existing tree canopy coverage on steep slopes and in riparian buffer areas; pursue ordinance amendments that implement such policies.
-

Tree Canopy Goals for Bolivar

- Focus on retention and improvement of existing tree stands – develop tree maintenance policy and incentives for appropriate tree trimming and maintenance practices
- Review and consider amending Subdivision Regulations and Site Plan development standards to improve policies regarding tree planting and tree and forest protection

Tree Canopy Goals for Charles Town

- Maintain the Town's "Tree City USA" status ??
- Improve tree planting/shade tree ordinances and policies including provisions for street tree maintenance, improvement and replacement?
- Develop local policies providing that all new street plantings will have root barriers or root deflectors to prohibit sidewalk lifting and will incorporate the correct soil type to encourage tree longevity?
- Develop ?? a maintenance program for tree care including pruning street trees and ensuring that all new tree plantings are selected to provide species diversity and maximum benefits for shade and stormwater mitigation. Include times for watering, weeding and periodic tree health assessment using current arboricultural standards in the maintenance schedule. ??
- Develop a municipal policy that states that every street tree removed by a property owner shall be replace with an appropriate native tree in the same tree well or in another designated area ???
- Review and consider amending Subdivision Regulations and Site Plan development standards to improve policies regarding tree planting and tree and forest protection

Tree Canopy Goals for Harpers Ferry

- Focus on retention and improvement of existing tree stands – develop tree maintenance policy and incentives for appropriate tree trimming and maintenance practices

- Maintain zero net loss of canopy by protecting and properly maintaining existing tracts of urban forests?
- Review and consider amending Subdivision Regulations and Site Plan development standards to improve policies regarding tree planting and tree and forest protection
-

Tree Canopy Goals for Ranson

- Develop local land use policies and regulations that encourage the use of well designed and located tree plantings that promote economic development and vitality.
- Develop a plan and program to continue to increase tree canopy on appropriate areas of municipal parks and public lands utilizing citizen volunteers and outreach programs.
- Review and consider amending Subdivision Regulations and Site Plan development standards to improve policies regarding tree planting and tree and forest protection
- Continue to maintain and plant trees in a nursery area in Ranson in order to provide a future source of inexpensive native trees for planting along the streets and in other areas around the Municipality.
- Establish economic value/compensatory value of the existing street trees through a professional inventory and utilize this data to draft planting requirements in new retail, employment and industrial areas within the Municipality.
-

Tree Canopy Goals for Shepherdstown

- Maintain the Town's "Tree City USA" status ??
- (see ideas under Charles Town)
- Review and consider amending Subdivision Regulations and Site Plan development standards to improve policies regarding tree planting and tree and forest protection
-

Chapter 5: Planting Priorities and Project Implementation

This Plan and its Goals are a part of a larger effort to improve water quality within the Chesapeake Bay Watershed while providing other benefits that increased Tree Canopy provide to a community. This plan was prepared through an Urban Tree Canopy (UTC) Grant awarded to the Jefferson County Commission, in partnership with the Cities of Ranson and Charles Town, by the WV Division of Forestry in 2010.

This grant allowed the County to build on the 2009 TC assessment effort to work towards two primary tasks:

- a. Utilizing the data from the study conducted by the University of Vermont containing land coverage analysis to develop an urban tree canopy assessment and create a long term management plan, setting Urban Tree Canopy Goals for the County and the five municipalities within the County; Bolivar, Charles Town, Harpers Ferry, Ranson and Shepherdstown (this document).
- b. Plan and execute multiple Spring 2011 tree planting events in priority areas using grant and matching funds to purchase trees, site preparation and planting and other related planting supplies including: mulch, stakes and ties, watering bags, hoses and tanks.

The development of the Plan and Goals is intended to lay the groundwork for future grants and projects to work towards improving and increasing the UTC within Jefferson County and its municipalities in years to come. In addition to the Plan and Goals, this grant allowed the following plantings to occur in the Spring of 2011 as a means of kicking off this County-wide planning effort.

2010 Forestry UTC Grant Activities

County and municipal planners, working with the WV Trib Team, developed specific planting plans for the spring of 2011. In addition to planning planting to maximize the environmental benefits of trees, all plantings will also be developed for the purpose of outreach and public education on the value of trees. In an effort to foster wider acceptance of voluntary best management practices (BMPs) for urban tree conservation and plantings, public plantings under the grant included an educational component to encourage private citizens to “reforest” their own properties and/or plant shade trees.

The following priority areas were identified to implement the current grant, which was limited to public lands only. These sites will be chosen, based on the UTC assessment, for their lack of adequate tree canopy in relation to their potential for planting and for maximum stormwater runoff mitigation. Tree planting sites considered included public school grounds, transportation corridors, and public parks. Specific planting plans were developed for each of the eight plantings that occurred. These planting plans included the planting of approximately 100 “large” trees (i.e. hardwood shade trees such as Maple, Oak, Sycamore, etc.) and approximately 50 “small” trees where “large” trees are inappropriate (i.e. Red Bud, Hawthorn, Cherry, etc.). Because the goal is to increase Tree Canopy, the priority was to plant “large” trees that have the greater environmental benefit.

Priority Planting Areas

The grounds at a number of **Jefferson County Public Schools** were identified with an insufficient tree canopy. Schools offer a unique opportunity for public education through involvement of the

students and parents. The ecological benefits of cleaner air and cooler ambient temperatures will benefit the youth attending selected schools. Plantings occurred in March and April 2011 utilizing these grant funds at the following schools:

- Jefferson High School
- CW Shipley Elementary School
- Page Jackson Elementary School
- Driswood Elementary School
- North Jefferson Elementary School
- Shepherd University

Road right-of-ways often offer potential for tree plantings if located in such a way as to not interfere with public safety or highway operations. Road ROW plantings are highly visible and demonstrate the benefit of cost saving from reduced mowing, the aesthetic value of trees, and their ability to reduce stormwater runoff. Examples of areas that might be appropriate for road right-of-way plantings include the new Route 9 corridor, which has a limited landscaping plan along the bike trail, Route 51, and the urbanized portion of US 340 east of Charles Town and Ranson. For the purpose of utilizing the 2010 grant funds, no road right-of-ways were chosen for a tree planting; however, plantings in these areas continue to be a priority for the County and municipalities.

Public parks that have aging and/or insufficient tree canopy can be ideal locations to engage public volunteers in planting projects as they are visible and the communities are often invested in the park areas.. Park plantings, in addition to providing the environmental benefits of shade and cooler ambient temperature, offer an opportunity to demonstrate proper planting techniques to the general public and disseminate information on the benefits of trees to encourage citizens to plant trees on private property. While parks typically have more tree canopy and open green space than other “urban” areas might, focusing on maximizing the extent of the tree canopy in parks helps to increase the net tree canopy for a municipality. Two parks were chosen for a “double planting event” as a part of this grant funding cycle. These parks are the Charles C. Marcus Field in Ranson and the Willingham Knolls Park in Charles Town. These plantings were widely advertised to ensure maximum public involvement and outreach.

Approximately 450 trees of 26 different native species were planted in the Spring 2011 under this grant. Utilizing a forestry standard of 109 trees per acre, this is the equivalent of an increase in the Tree Canopy of 4 acres.

Next Steps

Grants to allow future tree plantings on private and public properties

Public Outreach and Education

Appendix A: Technical Planting Recommendations

The following technical requirements were in place for the multiple tree planting events held in the Spring 2011:

All planting stock met ANSI Z60.1-1986 standards.

The number of trees and species varied; but, preference was be for “large” hardwood trees.

All trees were 1.5” to 1.75” caliper (>3’ conifers) at the time of planting.

Trees were planted in accordance with best practices as outline in the Planting Specification in Appendix 2 of the Chesapeake Bay Community Grants 2010 RFP.

Specific sites chosen were based on suitability of the soil for planting (lack of compaction, appropriate moisture content, pH, etc.)

Deer protection

Mulching

Watering and Follow up Care

Proper Tree Planting and Maintenance Techniques

(excerpted from Community Tree Management Plan and Canopy Goals Borough of Columbia, Pennsylvania)

Planting a tree in the right place where it will survive best as it grows to mature height and providing sufficient space for the underground root system to grow will enhance the longevity and benefits of trees. After planting maintenance is critical in protecting and preserving the community’s investment in its trees. Proper selection and placement will improve longevity and reduce maintenance costs by supporting healthy trees.

The following practices and techniques are recommended for all individuals and communities planting trees within Jefferson County to allow the trees planted to benefit the overall County Tree Canopy for years to come:

1. Site conditions – Be aware of height, canopy spread, shape, and growth rate in relation to overhead utility wires, underground water and wastewater treatment lines and obstruction of visibility to vehicular traffic and damage from that traffic (both parked and traveling).
2. Select trees species for the right site conditions - direct or low sunlight locations, dry or moist soil conditions and sensitivity to salt and pollution to achieve optimum growth and health. Also, consider the amount of fruit litter a mature tree may produce.
3. Tree pits should provide a minimum square footage of 24 s.f. of open area (typically 4 feet x 6 feet or 5 feet x 5 feet) and should include root deflectors. (For planting in tree pits please to see ‘Proper Planting Techniques’ section.)
4. Engineered soil should be used to avoid soil compaction. A new material known as “CU Structural Soil TM” is recommended to incorporate into planting spaces especially along streets and areas that have high potential for soil compaction.
5. Proper Planting Techniques

The success or failure of trees to grow and produce the desired effects in the County begins with proper planting. Trees planted along streets, shopping centers, around schools and homes, etc. are forced to grow in often artificial or unnatural environment where soil conditions, water tables,

drainage, etc. have been altered. Therefore, it is necessary to make sure that the plants are properly installed and receive the best of care until they become established.

Planting pits. The hole should be dug a minimum of two to three times than the width of the root ball or spread of bare roots but only as deep as the root ball. All planting pits should be dug with vertical sides that have been “roughed up” a bit (not smooth) to allow roots to penetrate the soil layer as they grow.

Identify the trunk flare. The flare or collar is just above where the roots spread at the base of the tree. This point should be partially visible after the tree has been planted. If it is not, some soil may need to be removed from the top of the root ball. Find the flare to determine the proper planting depth in the pit.

Placing the tree. Before placing the plant in the pit, check to see that hole has been dug to the proper depth. The majority of the roots on the newly planted tree will develop in the top 12 inches of soil. If the tree is planted too deeply, new roots will have difficulty developing because of lack of oxygen. It is better to plant a little high, 2 to 3 inches above the base of the trunk flare, than to plant it at or below the original growing level. To avoid damage when setting the tree in the hole, always lift it by the root ball and never by the trunk.

Balled and burlapped plants. If the tree is wrapped in wire, the most prudent action is to remove or push the top two tiers of wire down in the bottom of the hole after the ball has been placed. Treated burlap (feels like plastic) and nylon rope should be completely removed. Other kinds of burlap and twine, even if biodegradable, should be cut away from the upper 1/3 of the ball as well as the trunk. Never let remaining pieces protrude above the soil or they can act as wick, drying the soil. Trees in containers should be gently removed before planting. Circling roots, if present, should be cut or removed before planting to avoid tree problems later in life.

Mulching. A 2- 4 inch layer of composted mulch is ideal. More than 4 inches may cause a problem with oxygen and moisture levels. When placing mulch, be sure the mulch does not touch the actual trunk of the tree. Doing so may cause decay of the living bark at the base of the tree. A mulch-free area, 1 to 2 inches wide at the base of the tree, is sufficient to avoid moist bark conditions and prevent decay.

Follow-up care. Keep the soil moist but not soaked; overwatering causes leaves to turn yellow or fall off. Water trees at least once a week, barring rain, and more frequently during hot weather. When the soil is dry below the surface of the mulch, it is time to water. Continue until mid-fall, tapering off for lower temperatures that require less-frequent watering. The STC may want to purchase Treegator® bags, a drip irrigation system in the form of a bag.

Bare-root or smaller containerized stock maybe considered for private land and larger scale plantings. These types of stock are more economical in price than purchasing balled and burlapped, however, it is important to keep tabs on soil moisture until the root systems are established.

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Director's Report
May 10, 2011
Planning Commission Meeting

- 1) Activity Report (attached)
- 2) Recent CC action:
 - a) Follow up on Public Hearing input into Proposed Urban Growth Boundaries for Harper's Ferry and Bolivar (4/14/11) – *both proposed UGBs were denied*
 - b) Public Hearing on Subdivision Regulation Amendments regarding Minor Site Plan Process in Major Non-Residential Subdivisions (4/14/11) – *approved 4/28/11*
 - c) Follow Up on Planning Commission Recommended Land Development Fee Schedule – *Public Hearing Scheduled for 5/19/11 1 pm*
 - d) Authorization to utilize Planning Department Professional Services funds as a part of the local match to the HEPMPO scope of work for the US 340 East Transportation Project (4/28/11) -- *Approved*
- 3) Upcoming CC agenda items:
 - a) Authorization to utilize Planning Department Professional Services funds as a part of the local match for a proposed grant being applied for by the Freshwater Institute for the purpose of developing a High-Resolution Land Use/Land Cover Data Set for Jefferson County (5/12/11)
 - b) Approval of Job Offer for 2011 Summer Planning Intern (5/12/11)
 - c) Discussion/Workshop of the Proposed Policy Neutral Amendments to the Zoning and Land Development Ordinance (July 7, 1988, as amended) and Scheduling of a Public Hearing for the Proposed Amendments (5/12/11)
 - d) Land Development Fee Schedule Public Hearing (5/19/11, 1 pm)
- 4) Upcoming PC meetings:
 - a) May 24, 2011 – no meeting currently planned
 - b) June 14, 2011 – preliminary agenda items:
 - Highland Farms Cluster Subdivision Concept Plan Workshop
 - Shenandoah Professional Services Zoning Map Amendment Public Hearing
 - Public Hearings on Text Amendments
 - c) July 12, 2011
 - Three Concept Plan Workshops tentatively scheduled

Christine Chalmers

To: PLANNING COMMISSION
Subject: RE: WEEKLY CALENDAR

MONDAY, APRIL 11, 2011

10:00 am STEVE, SETH – MEETING WITH PAUL RACO / RE: FALCON RIDGE RESIDUE
JENNIE – OUT / RE: NATIONAL CONFERENCE IN BOSTON

TUESDAY, APRIL 12, 2011

7:00 pm STEVE, SETH & AMY – PLANNING COMMISSION MEETING
INTERN DOUGLAS GRIFFITH – WORK / 9:00 am – 4:00

JENNIE – OUT / RE: NATIONAL CONFERENCE IN BOSTON

WEDNESDAY, APRIL 13, 2011

JENNIE – OUT / RE: NATIONAL CONFERENCE IN BOSTON

THURSDAY, APRIL 14, 2011

9:00 am - JENNIE & SETH – ALL DAY / COUNTY COMMISSION MEETING
2:00 pm – 2:30 pm STEVE, SETH & JONATHAN – MEETING / RE: MIDDLEWAY FIRE DEPARTMENT
ASHBURY UNITED METHODIST CHURCH

INTERN DOUGLAS GRIFFITH – WORK / 1:00 pm – 4:00 pm

FRIDAY, APRIL 15, 2011 -

9:30 am JENNIE, SETH & JULIE – REVIEW/DISCUSS RTE. 340 MEETING NOTES
2:00 pm JENNIE – MEETING #1 WITH ALANA HARTMAN /
RE: PHASE II WFP – CHESAPEAKE BAY ISSUES

Christine Chalmers

To: PLANNING COMMISSION
Subject: RE: WEEKLY CALENDAR

MONDAY, APRIL 18, 2011

JENNIE – OUT / RE: NCTC

TUESDAY, APRIL 19, 2011

INTERN DOUGLAS GRIFFITH – WORK / 9:00 am – 4:00

JENNIE – OUT / RE: NCTC

WEDNESDAY, APRIL 20, 2011

10:00 am STEVE, SETH & JONATHAN – SITE PLAN PPC / ST. JAMES LUTHERAN CHURCH
11:00 am STEVE, SETH & JONATHAN – SITE PLAN PPC / DUANE DUNN – MIDDLEWAY STORE
2:00 pm STEVE, SETH & JONATHAN – SITE PLAN PPC / BRENDA STAUBS – TANNING SALON
4:45 pm STEVE – SITE VISIT

JENNIE – OUT / RE: NCTC

THURSDAY, APRIL 21, 2011

NO COUNTY COMMISSION MEETING
10:00 am - 11:30 am STAFF MEETING
11:30 am – 1:00 pm JENNIE, SETH & JULIE – RTE. 340 MEETING / COMMITTEE MEMBERS
3:00 pm JENNIE, STEVE, JENNILEE – BZA MEETING

INTERN DOUGLAS GRIFFITH – WORK / 1:00 pm – 4:00 pm

FRIDAY, APRIL 22, 2011 -

Christine Chalmers

To: PLANNING COMMISSION
Subject: RE: WEEKLY CALENDAR

MONDAY, APRIL 25, 2011

10:30 am STEVE, SETH & JONATHAN – CONCEPT PLAN REVIEW /
RE: ASHBURY UNITED METHODIST CHURCH

TUESDAY, APRIL 26, 2011

10:00 am JENNIE & JULIE – INTERVIEW WITH SEAN RILEY
(PROSPECTIVE SUMMER INTERN)
11:00 am – 11:30 am JENNIE, SETH & JULIE – RTE. 340 COMMITTEE MEETING
1:15 pm – 2:45 pm JENNIE, STEVE & JENNILEE – WEEKLY ZONING MEETING
3:00 pm – 4:00 pm JENNIE, SETH & AMY – WEEKLY PLANNING MEETING
7:00 pm PLANNING COMMISSION MEETING / TRAINING SESSION

INTERN DOUGLAS GRIFFITH – WORK / 9:00 am – 4:00

WEDNESDAY, APRIL 27, 2011

9:30 am SETH & STEVE – MEETING / RE: ROCK FERRY STATION
10:00 am - 11:00 am STAFF MEETING
3:00 pm – 4:00 pm JENNIE & STEVE – TENTATIVE MEETING WITH BARBARA SCOTT
RE: SUMMIT POINT RACEWAY
5:00 pm JENNIE – “COG” ROUNDTABLE MEETING

THURSDAY, APRIL 28, 2011

9:00 am - COUNTY COMMISSION MEETING
10:00 am JENNIE & SETH – APPOINTMENT @ CC MEETING
2:00 pm – 3:30 pm JENNIE & JULIE – URBAN TREE CANOPY GOALS & PLANNING MEETING

INTERN DOUGLAS GRIFFITH – WORK / 1:00 pm – 4:00 pm

FRIDAY, APRIL 29, 2011

1:00 pm JENNIE / WEBINAR: CHESAPEAKE BAY SMALL WATERSHED GRANTS PROGRAM

Christine Chalmers

To: PLANNING COMMISSION
Subject: RE: WEEKLY CALENDAR

MONDAY, MAY 2, 2011

9:30 pm – 10:30 am JENNIE & SETH - WEEKLY PLANNING MEETING
10:30 pm – NOON JENNIE & STEVE – WEEKLY ZONING MEETING
1:30 am STEVE – MEETING WITH JUDY MOORE
3:30 pm SETH – MEETING WITH PAUL RACO / RE: STALEY M/S

TUESDAY, MAY 3, 2011

10:00 am – STAFF MEETING
1:00 pm – 3:00 pm JENNIE, STEVE & SETH - MEETING
3:30 pm JENNIE – PSD PRE-TESTIMONY BRIEFING w/ JAMES KELSH, ESQ.
6:00 pm – 9:00 pm JENNIE – PSD TESTIMONY

INTERN DOUGLAS GRIFFITH – WORK / 9:00 am – 4:00

WEDNESDAY, MAY 4, 2011

8:00 am – 9:30 am JENNIE – MONTHLY DEPARTMENT HEAD MEETING
9:30 am JENNIE & JULIE – INTERVIEW WITH AARON MOLINDA
(PROSPECTIVE SUMMER INTERN)
10:00 am - 11:00 am STEVE, SETH & JONATHAN – SITE PLAN PPC / RE: DEEPINDER SINGH
11:00 am – NOON STEVE, SETH & JONATHAN – SITE PLAN PPC / RE: JOHN STAUBS
2:00 pm JENNIE, STEVE & JENNILEE – MEETING WITH ROGER / RE: COTTAGE INDUSTRY

THURSDAY, MAY 5, 2011

9:00 am - COUNTY COMMISSION MEETING / JULIE TO ATTEND: 10:45 am -1:45 pm
9:30 am – 11:30 am JULIE – MEETING WITH DOUG GRIFFITH / RE: UTC GRANT
ALL DAY JENNIE, STEVE & SETH – SPRING CONFERENCE IN CUMBERLAND, MARYLAND

INTERN DOUGLAS GRIFFITH – WORK / 1:00 pm – 4:00 pm

FRIDAY, MAY 6, 2011

PLANNING COMMISSION PACKET DAY

ALL DAY JENNIE, STEVE & SETH – SPRING CONFERENCE IN CUMBERLAND, MARYLAND

SATURDAY, MAY 7, 2011

ONE DAY – TWO TREE PLANTINGS! OPEN TO ALL VOLUNTEERS

9:00 am – NOON Charles C. Marcus Field / 132 Athletic Way, Ranson, WV (behind Potomac Towne Center)
1:00 pm – 4:00 pm Willingham Knolls Park (Old Cave Road near intersection of Rt. 340)

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JEFFERSON COUNTY
PLANNING, ZONING AND ENGINEERING

BYLAWS OF THE JEFFERSON COUNTY PLANNING COMMISSION

Article I - General

Section 1.1 – References

As used throughout these Bylaws, “Planning Commission” shall refer to the Jefferson County Planning Commission, and “County Commission” shall refer to the County Commission of Jefferson County, both of Jefferson County, West Virginia. The term “item” as used herein shall refer to any matter before the Planning Commission for consideration or discussion, and shall be construed broadly.

Section 1.2 – Authority

These bylaws and its provisions are authorized by W.Va. Code § 8A-2-11, which empowers the Planning Commission, among other things, to “(2) Prescribe rules and regulations pertaining to administration, investigations and hearings[,]” provided that the same are adopted by the County Commission.

Section 1.3 – Severability

The invalidation of any provision or section of these Bylaws shall not invalidate any other provision or section of these Bylaws.

Section 1.4 – Amendments

These Bylaws may be amended at any regular meeting of the Planning Commission by a majority vote of the Planning Commission, and shall take effect upon adoption by the County Commission or at a date certain thereafter.

Article II - Organization

Section 2.1 – Membership

The Planning Commission, by ordinance previously adopted by the County Commission, shall be comprised of nine (9) members appointed by the County Commission pursuant to W.Va. Code § 8A-2-4.

Section 2.2 – Term of office

Upon appointment to the Planning Commission, a member shall serve a term of three years pursuant to W.Va. Code § 8A-2-4(g).

Section 2.3 – Powers and Duties

In addition to the powers and duties provided in these Bylaws, the Planning Commission shall have such other powers and duties as provided by law, including but not limited to W.Va. Code § 8A-2-11.

Section 2.4 – Committees

The Planning Commission may establish one or more committees to which, pursuant to W.Va. Code § 8A-2-11(15), it may delegate limited powers. Committees shall consist of no less than three (3) members nor more than five (5) members of the Planning Commission. Appointments to committees shall be made by a majority vote of the Planning Commission.

Article III - Officers

Section 3.1– Elections

At its first regular meeting each January, the Planning Commission shall elect a President, Vice President, and Secretary.

Section 3.2 – President

The President shall preside at all public hearings and meetings held by the Planning Commission. The President may call special meetings of the Planning Commission as necessary, and is empowered to certify by signature or otherwise any official and valid action of the Planning Commission. The President shall also perform such duties and functions as may from time to time be required by the Planning Commission.

Section 3.3 – Vice President

During any absence of the President, the Vice President shall assume the duties and functions of President. The Vice President shall also perform such duties and functions as may from time to time be required by the Planning Commission.

Section 3.4 – Secretary

The Secretary shall perform such duties and functions as may from time to time be required by the Planning Commission.

Section 3.5 – Absence of President and Vice President

In the absence of both the President and Vice President, any present member may call to order a regular or special meeting of the Planning Commission, which shall thereupon immediately empower one or more of its present members to fulfill the duties and functions of President and/or Vice President during said absence.

Section 3.6 – Replacing Officers

In the event of the death, resignation, or removal of an officer of the Planning Commission, the Planning Commission shall thereupon elect one of its members to complete the unexpired term. A three-fifths majority of the total membership of the Planning Commission may, at any regular meeting, remove the President and/or the Vice President from office, provided that a new election to fill the remaining term(s) of office is immediately held.

Article IV - Meetings

Section 4.1 – Regular Meetings

The Planning Commission shall hold regular meetings on the second and fourth Tuesdays of each month at 7:00 p.m. in the ground floor meeting room of the Old Charles Town Library, at 200 East Washington Street, Charles Town, West Virginia. Prior notice shall be provided in the event that any regular meeting is held at a different location. A regular meeting may be postponed or cancelled for appropriate reasons, and in such case prior notice of said postponement or cancellation shall be provided if possible.

Section 4.2 – Special Meetings

A special meeting may be called by the President or by two or more members of the Planning Commission to be held on a different day and/or a different time than regular meetings. Pursuant to W.Va. Code § 8A-2-7, notice for all special meetings shall be in writing, include the date, time and place of the special meeting, and be sent to all members at least two days before the special meeting. A special meeting may be postponed or cancelled for appropriate reasons, and in such case prior notice of said postponement or cancellation shall be provided if possible.

Section 4.3 – Recording of Meetings

All meetings of the Planning Commission shall be recorded, and such recordings shall be maintained and made available, upon request and in accordance with the procedures of the Planning Commission and/or its staff, to the public.

Section 4.4 – Agendas

An agenda shall be made available prior to the start of all regular and special meetings. Items shall be listed on the agenda in such a manner as to sufficiently identify the substance of the item and allow for a vote on the item by the Planning Commission if necessary. The Planning Commission may deviate from an agenda's order if necessary.

Section 4.5 – Quorum

In order to conduct a regular or special meeting, a quorum of the members must be present. A majority of the members of the Planning Commission shall constitute a quorum. No action of the Planning Commission shall be official or valid unless authorized by a majority of members present at a regular or special meeting.

Section 4.6 – Procedures for Conducting Meetings

In the absence of state law or of other procedures of the Planning Commission, Roberts Rules of Order, current edition, shall be the parliamentary authority of Planning Commission meetings.

Section 4.7 – Open Governmental Proceedings

All meetings and actions of the Planning Commission shall comply with the requirements of West Virginia's open meetings laws, codified at W.Va. Code § 6-9A-1, et seq.

Article V – Consideration of Items

Section 5.1 – Voting

A member must be physically present at a meeting to vote on any item considered at said meeting. Voting via telephone or proxy is not permitted. Abstention shall not be permitted by a member who is otherwise entitled to vote on an item.

Section 5.2 – Recusal

A member may recuse himself/herself in relation to an item for the reasons set forth herein, in which case such member shall not participate in discussion, consideration or vote on said item. Valid reasons for recusal include (1) having a personal interest in an item, (2) having a contractual, employment, or other relationship with a party involved with an item, (3) being unable to impartially consider an item, or (4) having been absent from part or all of the discussion or consideration of an item. A member recusing himself or herself shall thereupon state the reason for such recusal and leave the meeting, remaining absent for the duration of consideration and/or discussion of the item.

Section 5.3 – Ex Parte Communications

For purposes of these Bylaws, ex parte communications consist of communications regarding the substance of an item that is or will be before the Planning Commission for consideration and/or discussion, when such communications are between one or more members of the Planning Commission and one or more individuals involved with the item. No member of the Planning Commission shall voluntarily and knowingly engage in ex parte communications without the authority of the Planning Commission. In the event that a member of the Planning Commission has engaged in or receives any ex parte communication, said member shall bring the same to the attention of the Planning Commission. Communications with third parties regarding procedural aspects of items do not constitute ex parte communications in the context of these Bylaws.

Section 5.4 – Ex-Officio Member Voting

A member who is also a member of the County Commission is a full voting member of the Planning Commission. However, any such ex-officio member may elect not to vote as a member of the Planning Commission on items which will subsequently require action or consideration by the County Commission.

An ex-officio member may remain at the meeting and participate in discussion on an item on which they elected not to vote under this Section.

SUMMONS

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

FAR AWAY FARM, LLC,

Petitioner,

v.

CIVIL ACTION NO. 11-C- 125

JEFFERSON COUNTY PLANNING COMMISSION,

A public body;

JOHN MAXEY, President,

THOMAS TRUMBLE, Vice-President,

MORGAN ETTERS, Member,

GENE TAYLOR, Member,

KELLY BATY, Member,

ARNOLD DAILEY, Member,

ERIC SMITH, Member, and

FRANCES MORGAN, Commission liason,

Respondents.

To the above-named Respondent:

Jefferson County Planning Commission

116 E. Washington Street

Charles Town, WV 25414

In the name of the State of West Virginia:

You are hereby summoned and required to serve upon Petitioner's attorney, Richard G. Gay, Esq. whose address is: Law Office of Richard G. Gay, 31 Congress Street, Berkeley Springs, W.Va. 25411, an answer, including any related counter claim or defense you may have, to the complaint filed against you in the above-styled civil action, a true copy of which is herewith delivered to you. You are required to serve your answer within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, thereafter, upon proper hearing and trial, judgment may be taken against you for the relief demanded in the complaint; and you will be thereafter barred from asserting in another action any claim, cross complaint or defense you may have which must be asserted in the above-styled civil action.

Dated: April 20, 2011

Spura E. Opatowski
CLERK OF COURT

By: Bucky Chalk, Deputy

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JEFFERSON COUNTY PLANNING,
ZONING & ENGINEERING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

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APR 19 2011

JEFFERSON COUNTY
CIRCUIT CLERK

FAR AWAY FARM, LLC,

Petitioner,

v.

CIVIL ACTION NO. 11-C-125

JEFFERSON COUNTY PLANNING COMMISSION,

A public body;

JOHN MAXEY, President,

THOMAS TRUMBLE, Vice-President,

MORGAN ETTERS, Member,

GENE TAYLOR, Member,

KELLY BATY, Member,

ARNOLD DAILEY, Member,

ERIC SMITH, Member, and

FRANCES MORGAN, Commission liason,

Respondents.

**VERIFIED PETITION FOR WRIT OF CERTIORARI OR MANDAMUS,
OR, IN THE ALTERNATIVE, COMPLAINT FOR DECLARATORY JUDGMENT
AND INCORPORATED MEMORANDUM OF LAW**

COMES NOW Far Away Farm, LLC, (herein "Far Away Farm") by counsel Richard G. Gay, Esquire and Nathan P. Cochran, Esquire, and hereby files this Verified Petition for a Writ of Certiorari, pursuant to West Virginia Code §8A-9-1 or in the alternative, Complaint for Declaratory Judgment or Mandamus pursuant to W. Va. Code §8-24-1, et seq., (1969), W. Va. Code §8A-1-1, et seq., W. Va. Code §53-3-1, et seq., W. Va. Code § 55-13-1, et seq.; W. Va. Code § 53-1-2, and related statutes, challenging the decision of the Jefferson County Planning Commission¹ denying a request of Far Away Farm, LLC for a tolling of the expiration date of

¹ The Jefferson County Planning Commission is referred to as the "Planning Commission" herein.

the previously issued Community Impact Statement until March 2, 2015, and for an award of attorney's fees and costs expended in this action. The Order was entered by the Planning Commission on March 22, 2011, and is attached hereto as *Exhibit A*. Far Away Farm, LLC respectfully avers as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to W. Va. Code §8-24-1, et seq. (1969), and related statutes, W. Va. Code §8A-1-1, et seq., the Jefferson County West Virginia Zoning Ordinance, W. Va. Code §53-3-1, et seq. and W. Va. Code § 55-13-1, et seq.

2. Less than 30 days has elapsed since the decision below that is the basis for appeal was signed, thus W. Va. Code §8A-9-1 and related statutes, Ordinance, and Rule provisions provide for the filing of this petition with this Court.

3. Venue is proper since the matters alleged arose in Jefferson County, West Virginia.

II. PARTIES

4. Petitioners re-state all the foregoing paragraphs as if fully set forth herein.

5. Far Away Farm, LLC, is a West Virginia Company with property located in Jefferson County, West Virginia, and is aggrieved by the March 22, 2011 decision of the Planning Commission as set forth herein.

6. The Jefferson County Planning Commission is a political entity operating under the authority of the Jefferson County Commission.

7. The members of the Planning Commission who were responsible for the decision herein in their official capacity are:

- (a) JOHN MAXEY
- (b) THOMAS TRUMBLE
- (c) DANIEL HAYES
- (d) MORGAN ETTERS
- (e) GENE TAYLOR
- (f) W. KELLY BATY
- (g) ARNOLD DAILEY, JR.
- (h) ERIC SMITH, and
- (i) FRANCES MORGAN

III. STANDARD OF REVIEW

- 8. Petitioner restates all the foregoing paragraphs as if fully set forth herein.
- 9. The appropriate standard of review for appeal of decision of the Planning

Commission to 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."

Corliss v. Jefferson County Bd. of Zoning Appeals, 214 W.Va. 535, 591 S.E.2d 93, 102 (2003), citing *Syl. Pt. 3, Harding v. Board of Zoning Appeals of the City of Morgantown*, 159 W. Va. 73; 219 S.E.2d 324 (citing Syllabus point 5, *Wolfe v. Forbes*, W. Va., 217 S.E.2d 899 (1975)).

- 10. 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).

IV. PROCEDURAL HISTORY AND STATEMENT OF FACTS

- 11. Petitioner restates all the foregoing paragraphs as if fully set forth herein.
- 12. On June 23, 2004, Far Away filed an application for a Conditional Use Permit (herein "CUP") to develop 122.8 acres in the Rural District for 152 residential lots.

13. On September 22, 2004, the Planning and Zoning Director issued a LESA score of 46.2.

14. On October 29, 2004, Dunleavy and Moore appealed the LESA score to the Board of Zoning Appeals (herein "BZA").

15. On November 30, 2004, Far Away Farm filed a Motion to Intervene in the appeal to the BZA.

16. On August 9, 2005, the BZA denied Far Away Farm's CUP based primarily upon issues of "neighborhood compatibility" and "density". Prior to the April 8, 2005 amendments to the Zoning Ordinance, CUPs were issued based solely on LESA scores. Subsequent to the amendments, CUPs were issued based on LESA score, neighborhood compatibility and density.

17. On September 15, 2005, the BZA issued its Findings of Fact and Conclusions of Law denying Far Away Farm's CUP.

18. On October 12, 2005, Far Away Farm appealed the BZA's decision by filing a Petition for Writ to the Circuit Court.

19. On September 18, 2006, the Circuit Court affirmed the decision of the BZA.

20. On January 12, 2007, Far Away Farm filed a Petition for Appeal of the Circuit Court's decision to the West Virginia Supreme Court of Appeals.

21. On April 17, 2008, the West Virginia Supreme Court of Appeals reversed the Circuit Court's decision ordering that the CUP be issued.

22. On September 9, 2008, Dunleavy and the BZA filed a Petition for Writ of Certiorari with the United States Supreme Court of Appeals.

23. On October 6, 2008, the Planning Commission issued the CUP "under duress," having been ordered to do so by the West Virginia Supreme Court of Appeals. (*See opinion Far*

Away Farm, LLC v. Jefferson County Board of Zoning Appeals, 222 W. Va. 252, 664 S.E.2d 137 (2008))

24. On November 10, 2008, the United States Supreme Court denied Dunleavy's and the BZA's Petition for Writ of Certiorari.

25. On June 23, 2009, the Jefferson County Planning Commission filed a lawsuit in the United States District Court for the Northern District of West Virginia against Far Away Farm. (*Jefferson County Planning Commission v. Far Away Farm, LLC*, Civil Action No. 3:09-CV-45.) (See Complaint attached as *Exhibit B*)

26. The Complaint alleged that the West Virginia Supreme Court's decision in *Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals* violated its rights to due process of law as guaranteed to it by the Fourteenth Amendment to the United States Constitution and by U.S.C. §1983 in denying the Planning Commission's Motion to Intervene. However, the Planning Commission named Far Away Farm as the adverse party, instead of the West Virginia Supreme Court of Appeals.

27. On October 29, 2009, the United States District Court for the Northern District of West Virginia dismissed the case in its Amended Order Granting Far Away Farm's Motion to Dismiss. The Court stated:

"...this Court finds that plaintiff's claims must be dismissed as an impermissible collateral attack of the judgment in *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W. Va. 252, 664 S.E.2d 137 (W. Va. 2008), as this Court is bound pursuant to the Full Faith and Credit Clause of the United States Constitution to accord the judgment of the West Virginia Supreme the same *res judicata* effect it would receive in West Virginia state courts. As this Court finds that it lacks jurisdiction to entertain the above-styled case, it need not consider the other arguments of the parties."

See Amended Order Granting Defendant's Motion to Dismiss attached as *Exhibit C*.

28. On November 4, 2009, the Jefferson County Planning Commission filed a Motion for Reconsideration of the Amended Order Granting Far Away Farm's Motion to Dismiss.

29. At a meeting of the Jefferson County Board of Zoning Appeals on January 21, 2010, Far Away Farm, by counsel, requested an eighteen-month extension of the Conditional Use Permit issued on October 6, 2008, that would expire on April 6, 2010 due to the lack of resolution by the Court System. The request for an extension was approved without condition and it was determined that the matter would be readdressed at a future date upon the submittal of a variance request.

30. On May 10, 2010, the United States District Court for the Northern District of West Virginia denied the Jefferson County Commission's Motion for Reconsideration. The time for appeal of this decision to the United States Court of Appeals for the Fourth Circuit expired on or about June 9, 2010 and no appeal was filed.

31. Pursuant to a letter of July 26, 2010 from the Jefferson County Department of Planning, Far Away Farm's CUP would expire on October 6, 2011 and the expiration for Final Plat approval was December 19, 2010. (See July 26, 2010 letter attached as *Exhibit D*)

32. On November 5, 2010, counsel for Far Away Farm sent a letter to the members of the Jefferson County Planning Commission, the Board of Zoning Appeals, and their counsel requesting an extension of various deadlines for 1876 days from June 9, 2010, (the expiration date for an appeal of the decision of the United States District Court for the Northern District of West Virginia), due to the denial of the CUP and the subsequent challenge of that denial, and then by the Federal lawsuit filed by the Jefferson County Planning Commission. The letter requested in part:

Basis for the Extension of Time: I would like to raise these points for the Commission's consideration regarding the extension of time issue.

First, Far Away Farm's proceedings before the Planning Commission have been delayed, not by Far away Farm, but by the denial of the CUP and the subsequent challenge of that denial, and then by the Federal lawsuit that was filed by the Jefferson County Planning Commission.

It is improper to penalize Far Away Farm for upholding the project's legal rights. The West Virginia Supreme Court has ordered an extension of time to be granted to an applicant under the Subdivision Ordinance when the applicant's project was delayed due to legal proceedings. For example, the Supreme Court in *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d 873 (2005) stated "the trial court is hereby directed to enter an order approving the reissuance of the subject permits and adjust, where necessary, any time deadlines established in the Ordinance that may have passed during the pendency of this appeal so that the parties are not penalized for pursuing their statutory rights of appeal."

The time extension in this case should be granted for the same reason the Supreme Court stated in *Jefferson Utilities*. In Far Away Farm's case, the delay was as follows:

2005 – 107 days (Beginning on the date of the original denial of the CUP)
2006 – 365 days
2007 – 365 days
2008 – 366 days
2009 – 365 days
2010 – 308 days through November 5, 2010
Total delay is 1876 days through November 5, 2010

Total extension from the date upon which the project ceased to be under a legal disability is thereby calculated as June 9, 2010 plus 1876 days, resulting in a project deadline of July 29, 2015.

Also, the Far Away Farm project qualifies for an extension of time under West Virginia Code §8A-5-12(f).

(See November 5, 2010 letter from Far Away Farm, by counsel, to the Planning Commission attached as *Exhibit E*.)

33. On November 9, 2010, Far Away Farm requested to be put onto the Planning Commission's agenda for the meeting of December 14, 2010 for the purposes of a Community Impact Statement (herein "CIS") extension and related matters.

34. On November 12, 2010, it was requested by the Planning Commission that Far Away Farm submit a Variance application prior to November 23, 2010 to insure being placed on the agenda for the December 14, 2010 meeting.

35. On November 17, 2010, Far Away Farm submitted a request for an extension of time and a Variance Request to the Planning Commission.

36. On December 14, 2010, the Planning Commission denied the request for a variance of the expiration date of the Community Impact Statement and related deadlines.

37. On December 14, 2010, a hearing was held before the Jefferson County Planning Commission on Far Away Farm's request for an extension of time for its CIS and related deadlines. At that hearing, the Commission denied the request for a variance of the expiration date of the Community Impact Statement and related deadlines. (*See Hrg. Transcript attached as Exhibit F.*)

38. The members of the Planning Commission present at the meeting were John Maxey, President; Thomas Trumble, Vice-President; Morgan Eppers, Member; Gene Taylor, Member; Kelly Baty, Member; Arnold Dailey, Member; Eric Smith, Member; and Frances Morgan, County Commission liason and member of the Planning Commission.

39. After receiving the Staff Report and recommendation to extend Far Away Farm's time limits to July 1, 2012, the Planning Commission heard from counsel for Far Away Farm.

40. Far Away Farm requested that the Planning Commission members who were involved in the Federal lawsuit or any related proceedings against Far Away Farm recuse themselves. It is noted on the record that on July 9, 2009, Mr. Maxey voted in favor of the Planning Commission going to Federal Court against Far Away Farm and was supported by Commissioners, Taylor, Trumble, Baty, and Eppers. It is further noted that County Commissioner

Morgan who sits on the Planning Commission moved the County Commission on June 3, 2010 to approve the thousands of dollars needed to fund an appeal to the Fourth Circuit Court of Appeals from the Federal Court's dismissal of the Planning Commission's lawsuit against Far Away Farm. (Hrg. Tr., December 14, 2010, 10:9-23)

41. In the alternative, Far Away Farm, through counsel, asked that the matter be stayed so that Far Away Farm could seek a review of the matter through a writ of prohibition in the Circuit Court or other appropriate tribunal. (Hrg. Tr., December 14, 2010, 12:14-16)

42. Counsel for Far Away Farm further stated, "This is a definite and direct conflict in my opinion and failure to recuse yourself would be in error." In answer to Mr. Smith's question about who should be recused, counsel stated: "...suppose it would go back to whether or not you have been involved or anyone else has been involved in any other discussions in executive session or discussions with – amongst the Commission regarding the Far Away Farm issue and anything related to the lawsuit." (Hrg. Tr., December 14, 2010, 13:17-18, 20-24.)

43. Upon request to recuse or stay, but prior to hearing argument other argument from Far Away Farm's counsel, the Planning Commission went into executive session with its counsel, Stephen Groh, Esquire, Assistant Prosecuting Attorney for Jefferson County. (Hrg. Tr., December 14, 2010, 18:1-7)

44. Following the executive session and discussions with counsel for Far Away Farm, the members voted unanimously not to recuse themselves. This included Planning Commission members Maxey, Trumble, Eppers, Baty, and County Commission member, Frances Morgan, who constituted a majority or 5 out of the 9 members, refused to recuse themselves. (Hrg. Tr., December 14, 2010, 18:18-20:4) The Planning Commission also unanimously refused to stay the case to allow the issue of recusal to be reviewed. (Hrg. Tr., December 14, 2010, 23:10-14)

45. Far Away Farm, through counsel, also requested an extension of time pursuant to

W. Va. Code §8A-5-12(f) which states as follows:

“Any subdivision or land development plan or plat, whether recorded or not yet recorded, valid under West Virginia law and outstanding as of January 1, 2010, shall remain valid until July 1, 2012, or such later date provided for by the terms of the planning commission or county commission’s local ordinance or for a longer period as agreed to by the planning commission or county commission. *Provided*, That the land development plan or plat has received at least preliminary approval by the planning commission or county commission by March 1, 2010.”

46. Far Away Farm further requested an extension of time based upon the Court’s ruling in *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W. Va. 436, 624 S.E.2d 873 (2005) wherein the Court stated:

“The trial court is hereby directed to enter an order approving the reissuance of the subject permits and adjust, where necessary, any time deadlines established in the Ordinance that may have passed during the pendency of this appeal so that the parties are not penalized for pursuing their statutory rights of appeal.”

47. In addition to failing to recuse themselves, the Commission by unanimous vote, including the five tainted members, voted to deny the request for an extension of time pursuant to W. Va. Code §8A-5-12(f).

48. The Planning Commission then proceeded to hear a request for a variance which Far Away Farm filed at the request of the Planning Commission staff although counsel made the argument subject to the position that the request for the variance was not needed since the extension of time was mandated pursuant to statutory and case law. Counsel further made the variance argument subject to the position that the request for recusal and stay should be granted pursuant to applicable conflict of interest laws and due process requirements of an unbiased adjudicator.

49. Following the presentation of arguments on the request for a variance, the request for variance was also denied by the Planning Commission.

50. On January 11, 2011, the Planning Commission moved to table acceptance of the December 14, 2010 minutes to the next meeting to give the Attorney and Staff an opportunity to revise the minutes, if necessary, to more closely correspond to the events that evening and to the legal document (Findings of Fact and Conclusions of Law) that the attorney was preparing.

51. At the January 25, 2011 Planning Commission meeting, the Commission again tabled the approval of the minutes of the December 14, 2010 meeting regarding Far Away Farm's variance request.

52. On March 22, 2011, the Planning Commission finally approved the minutes of the December 14, 2010 meeting, however, President John Maxey was not in attendance to sign the Order and, upon information and belief, did not do so until March 31, 2011.

53. Pursuant to an Order dated March 22, 2011 which Far Away Farm did not receive until March 31, 2011, the decision was finally entered as a matter of record.

54. Far Away Farm had requested an Order from the Planning Commission following its hearing on numerous occasions. Upon information and belief, Far Away Farm believes that the Order was signed after March 22, 2011 since it was not received by Far Away Farm until March 31, 2011. The Order is included in its entirety and is attached as *Exhibit A*.²

² **Before the Planning Commission of Jefferson County, West Virginia**

In the Matter of: The Request by Far Away Farm, LLC for tolling of Deadlines and/or a Variance to Extend the expiration Date of the Community Impact Statement until March 2, 2015

On the 14th Day of December, 2010, the applicant, Far Away Farm, LLC, appeared and requested a tolling of the expiration date of the previously issued Community Impact Statement until March 2, 2015. In the alternative, the applicant requested a variance of the expiration date until the same date.

V. **ERRORS COMMITTED BY THE PLANNING COMMISSION TO BE CONSIDERED UPON A WRIT OF CERTIORARI**

55. Petitioner restates all the foregoing paragraphs as if fully set forth herein.

56. The Respondent Planning Commission has erred and applied an erroneous principle of law, was plainly wrong in its factual findings, or had acted beyond its jurisdiction as set

Prior to consideration of the formal requests, applicant's counsel Nathan Cochran, Esquire, asked certain members of the Planning Commission to recuse themselves because of their involvement in a lawsuit filed by the Planning Commission against the applicant. He specifically requested Mr. Maxey, Mr. Taylor, Mr. Trumble, Mr. Baty, Ms. Ethers, and Ms. Morgan to recuse themselves. After an executive session to receive legal advice, each member individually declined to recuse themselves upon the record.

The Staff report was presented. The professional planning staff recommended denying the request for tolling until March 2, 2015 but recommended an extension July 1, 2012 as consistent with other recent extensions.

The Planning Commission then heard from the applicant on the merits of its requests for tolling and/or a variance to extend the expiration date of its Community Impact Statement. The heart of applicant's request is that litigation caused delays to the project which justifies tolling of the deadlines on a day-for-day basis. During questioning, the applicant stated that it had made no progress on the project beyond the initial Community Impact Statement (CIS) and stated that the on-going litigation prevented further progress even during the periods of time in which litigation was not pending. Without waiving the claim for tolling, the applicant went on to set forth the basis for a variance addressing each of the four variance criteria as follows:

"1) The request is not contrary to public interest and that there would be public expense and time if the project had to start again from the beginning and that the development of the property had not been proven to violate any historic issues.

A literal enforcement of this Ordinance would result in an unnecessary hardship financially for the developer and require additional expense to the County.

The request is not the result of a self-imposed hardship due to the time in legal proceedings which the applicant did not initiate.

The spirit of the Ordinance will be observed and substantial justice done because Far Away Farms had followed all the requirements presented to them in order to be allowed to proceed with the development."

The portion of the record of the Planning Commission meeting pertaining to this application and the official minutes thereof are incorporated herein by reference as if set forth in full herein. After questioning the applicant and after discussion and deliberation, the Planning Commission by unanimous vote, DENIED the tolling request because the applicant failed to convince the Planning Commission that tolling of deadlines was justified. Furthermore, the Planning Commission DENIED the applicant's request for a variance because the applicant failed to meet its burden to demonstrate that the request for variance satisfied all four variance requirements. Specifically, the applicant did not prove that granting the variance was in the public interest since granting the variance would allow the development to proceed under 30-year-old subdivision regulations that do not conform with the current subdivision regulations.

forth herein.

A. Far Away Farm is entitled as a matter of law to an extension of time pursuant to W. Va. Code §8A-5-12(f)

57. Petitioner restates all the foregoing paragraphs as if fully set forth herein.

58. W. Va. Code §8A-5-12(f) states as follows:

“Any subdivision or land development plan or plat, whether recorded or not yet recorded, valid under West Virginia law and outstanding as of January 1, 2010, shall remain valid until July 1, 2012, or such later date provided for by the terms of the planning commission or county commission’s local ordinance or for a longer period as agreed to by the planning commission or county commission. *Provided*, That the land development plan or plat has received at least preliminary approval by the planning commission or county commission by March 1, 2010.”

59. The definition of plan or plat set forth in W. Va. Code §8A-1-2(v) and (x) which defined “plan” as a written description for the development of land, and “plat” as a map of the land development.

60. The approvals so far by Far Away Farm and the materials that Far Away Farm has filed with the Planning Commission meet the definition of plat or plan stated in the W. Va. Code.

61. W. Va. Code §8A-4-2(c) states:

All requirements, for the vesting of property rights contained in an ordinance enacted pursuant to this section that require the performance of any action within a certain time period for any subdivision or land development plan or plat valid under West Virginia law and outstanding as of January 1, 2010, shall be extended until July 1, 2012, or longer as agreed to by the municipality, county commission or planning commission. The provisions of this subsection also apply to any requirement that a use authorized pursuant to a special exception, special use permit, conditional use permit or other agreement or zoning action be terminated or ended by a certain date or within a certain number of years.

62. Far Away Farm has therefore met the requirements under W. Va. Code §§8A-5-12(f) and 8A-4-2(c) to receive an extension of time for deadlines until at least July 1, 2012 and

the Planning Commission is without jurisdiction to deny the extension.

B. Failure to follow the applicable state law is error since the Planning Commission has no authority to ignore applicable directives of the state legislature.

63. Petitioner restates all the foregoing paragraphs as if fully set forth herein.

64. Far Away Farm also is entitled to an extension of time because of the protracted litigation history in this case. This includes the Federal suit by the Planning Commission as the primary moving independent party attempting to reverse a decision of the West Virginia Supreme Court of Appeals which ordered the Board of Zoning Appeals to issue a CUP. (See 222 W. Va. 252, 664 S.E.2d 137 (2008), *Far Away Farm v. Jefferson County Bd. Zoning Appeals*)

65. The principle upon which this request for extension of time is made is set forth in *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W. Va. 436, 624 S.E.2d 873, (2005) wherein the Court stated:

“The trial court is hereby directed to enter an order approving the reissuance of the subject permits and adjust, where necessary, any time deadlines established in the Ordinance that may have passed during the pendency of this appeal so that the parties are not penalized for pursuing their statutory rights of appeal.”

Id. at 887.

66. The Planning Commission is without authority or jurisdiction to ignore the applicable State Supreme Court’s decision in denying the extension.

C. The Planning Commission’s refusal to recuse themselves and act in an unbiased and fair and unprejudicial manner violates Far Away Farm’s right to due process of law.

67. Petitioner restates all the foregoing paragraphs as if fully set forth herein.

68. The Planning Commission in this instance did not constitute a fair and impartial tribunal. The Planning Commission previously filed a Federal lawsuit against Far Away Farm which was instituted with the approval of the Planning Commission members, Maxey, Trumble,

Baty, Eppers and County Commissioner, Morgan, who moved the County Commission to approve funding for an appeal from the United States District Court for the Northern District's decision dismissing the Planning Commission's case against Far Away Farm to the Fourth Circuit. Far Away Farm argued recusal before the Planning Commission:

"...Mr. Maxey, that in the July 9th, '09 meeting you voted in favor of going to federal court for the Planning Commission. I note that Mr. Taylor and Commissioners, Trumble, Baty and Eppers voted to at least in May 25th of 2010 to ask the County Commission to approve funds regarding the appeal of the federal court decision to the Fourth Circuit and I note that Ms. Morgan moved the County Commission to approve the thousand dollars to fund the Fourth Circuit appeal on June the 3rd, 2010"

(Hrg. Tr., December 14, 2010, 10:14-23).

69. In *State ex rel. Hoover v. Smith*, 198 W.Va. 507, 511, 482 S.E.2d 124, 128 (1997)

the Court held:

"Due process is succinctly stated in Article III, § 10 of the West Virginia Constitution: 'No person shall be deprived of life, liberty, or property, without due process of law, and judgment of his peers.' This Court has recognized that 'due process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments."

Id. See also, Syl. pt. 2, *State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960); Syl. pt. 1, *McJunkin Corp. v. Human Rights Com'n*, 179 W.Va. 417, 420, 369 S.E.2d 720, 723 (1988); Syl. pt. 5, *State ex rel. Bowen v. Flowers*, 155 W.Va. 389, 184 S.E.2d 611 (1971).

70. *Rissler v. Jefferson County Bd. of Zoning Appeals*, 225 W. Va. 346, 693 S.E.2d 321 (2010), is a case involving whether or not two members of the Board of Zoning Appeals, Wiegand and Rockwell, had conflicts of interest requiring their recusal from the Board of Zoning Appeals because of prior conflicts of interest or the appearance of impropriety.

71. In *Rissler*, the Plaintiff also alleged violation of due process of law because they did not receive a hearing before an impartial tribunal in violation of due process of law. In

discussing the due process allegations and standard, the Court stated that the due process standard was as follows:

In the context of the issues raised in the case *sub judice*, due process requires a hearing before an impartial and neutral tribunal, over which a disinterested adjudicator presides. See *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”). See also *Concerned Citizens of S. Ohio, Inc. v. Pine Creek Conservancy Dist.*, 429 U.S. 651, 652, 97 S.Ct. 828, 829, 51 L.Ed.2d 116 (1977) (per curiam) (observing that due process requires “hearing before ... impartial judicial officer”). The United States Supreme Court has explained that due process requires a “neutral and detached judge in the first instance,” *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S.Ct. 80, 84, 34 L.Ed.2d 267 (1972), and the command is no different when a legislature delegates adjudicative functions to a private party, see *Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982), [superseded by statute on other grounds as stated in *Diagnostic Cardioline Monitoring of New York, Inc. v. Shalala*, No. 99-CV-5686 (JS), 2000 WL 1132273 (E.D.N.Y. June 26, 2000)]. “That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule.” *Tumey v. Ohio*, 273 U.S. 510, 522, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927). Before one may be deprived of a protected interest, whether in a criminal or civil setting, see *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, and n. 2, 100 S.Ct. 1610, 1613, and n. 2, 64 L.Ed.2d 182 (1980), one is entitled as a matter of due process of law to an adjudicator who is not in a situation “ ‘which would offer a possible temptation to the average man as a judge... which might lead him not to hold the balance nice, clear and true....’ ” *Ward, supra*, 409 U.S. at 60, 93 S.Ct. at 81[, 34 L.Ed.2d 267] (quoting *Tumey, supra*, 273 U.S., at 532, 47 S.Ct., at 444[, 71 L.Ed. 749]). Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator. 409 U.S., at 61, 93 S.Ct. at 83.

“[J]ustice,” indeed, “must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” *Marshall v. Jerrico, Inc., supra*, 446 U.S., at 243, 100 S.Ct., at 1613[, 64 L.Ed.2d 182] (citations and internal quotation marks omitted). This, too, is no less true where a private party is given statutory authority to adjudicate a dispute, and we will assume that the possibility of bias ... would suffice to bar [such parties] from serving as adjudicators[.]

Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for S. California, 508 U.S. 602, 617-18, 113 S.Ct. 2264, 2277, 124 L.Ed.2d 539 (1993). Thus, this requirement of impartiality applies not only to judicial officers but also to private persons who serve as adjudicators. See *Tumey v. Ohio*, 273 U.S. at 522, 47 S.Ct. at 441, 71 L.Ed. 749 (“That officers acting in a judicial

or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule.”). See also *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973) (“Most of the law concerning disqualification because of interest applies with equal force to ... administrative adjudicators.” (internal quotations and citation omitted)).

Id. at 328.

72. In *Rissler*, the Court also set forth the standard for determining the disqualification of an adjudicator, even though he does not have an actual interest in a matter over which he / she presides.

73. In *Rissler*, the Court set forth this standard for the adjudicator as follows:

As noted by the foregoing language of *Concrete Pipe, supra*, the appearance of justice may require the disqualification of an adjudicator, even when the adjudicator does not have an actual interest in a matter over which he/she presides. Thus, although there exists a “presumption of honesty and integrity in those serving as adjudicators,” *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975), where an adjudicator possesses the possibility of a disqualifying bias such that the proceedings, themselves, would appear to be constitutionally infirm, the adjudicator will be deemed to be disqualified to ensure that the aggrieved party receives the process to which he/she is due, *i.e.*, a hearing before an impartial tribunal. To this end, the Supreme Court has explained that

[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end ... no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.... Such a ... rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way “justice must satisfy the appearance of justice.” *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, [99 L.Ed. 11 (1954)].

In re Murchison, 349 U.S. at 136, 75 S.Ct. at 625, 99 L.Ed. 942. When determining whether disqualification is required in a particular case, “[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be

neutral, or whether there is an unconstitutional 'potential for bias.' ” *Caperton v. A.T. Massey Coal Co., Inc.*, --- U.S. ----, ----, 129 S.Ct. 2252, 2262, 173 L.Ed.2d 1208 (2009).

Id. at 328.

74. As the standard for an impartial adjudicator as set forth in *Rissler, supra*, states, the adjudicator will be deemed to be disqualified where there is the possibility of a disqualifying bias “such that the proceedings, themselves, would appear to be constitutionally infirm, and the adjudicator will be deemed to be disqualified to ensure that the aggrieved party receives the process to which he/she is due, *i.e.*, a hearing before an impartial tribunal.”

75. As *Rissler* explains, this is a basic requirement of due process.

76. Fairness requires an absence of actual bias or even the appearance of actual bias.

77. In this matter, 5 out of the 9 Planning Commission members who were directly involved in filing a lawsuit against Far Away Farm to the return the CUP its conditional use permit in Federal Court, not only have evidenced the appearance of impropriety, they have evidenced their bias to the extent and willingness to expend county funds to overturn a West Virginia Supreme Court decision that they disliked and even stated when they issued the CUP as ordered by the West Virginia Supreme Court of Appeals that they were doing it “under duress.”

78. Commissioner Morgan demonstrated her apparent lack of concern for the correct application of the law by stating:

“I am certain that there are appeal rights from any decision that emanates from this body this evening as usual so if it’s error it is subject to correction by a higher authority and I move to deny the request for an extension of the Community Impact Statement.”

(Hrg. Tr., December 14, 2010, 36:23-37:4)

79. For these five (5) Commissioners to have the temerity to claim that they have no

bias or interest in this proceeding, when they have taken the foregoing actions, (all fully documented by Court lawsuits), not only creates the appearance of impropriety, but demonstrates actual bias expressed in its most blatant form.

80. To state that the Commissioners who were directly involved in the lawsuit against Far Away Farm have no bias against the developer under the facts of this case is not only intellectually dishonest, it borders on deceit.

81. It was fundamentally impossible for Far Away Farm to have a fair hearing before the Planning Commission of Jefferson County because of the Commission's actual bias, intent to stop Far Away Farm under all circumstances, and to create any impediment for Far Away Farm to proceed to its development.

82. This bias is further evidenced by the fact that the staff recommended that the Commission follow the state law under W. Va. Code §8A-5-12(f) which grants an extension as a matter of law to a plan until July 1, 2012.

83. It is hard to imagine a project in Jefferson County which has had more concerted opposition by the public body who is supposed to be an impartial arbiter. The bias on the part of this Planning Commission and their duplicity in not recognizing either the statutory law, or the case law, and their lack of total concern about providing a fair tribunal for a hearing under due process of law is simply wrong. The Court should therefore grant a writ of certiorari to address the issues herein.

D. The Planning Commission lacks authority to grant a variance

84. Petitioner restates all the foregoing paragraphs as if fully set forth herein.

85. Pursuant to W. Va. Code §§8A-8-9(4) and 8A-4-2(13), the Board of Zoning Appeals can grant a variance, but that power is not granted to the Planning Commission.

Consequently, the Planning Commission's requirement that Far Away Farm submit a variance to the Planning Commission, and the Planning Commission's subsequent denial of the variance, is error.

86. W. Va. Code §8A-4-2(13) states that a subdivision and land development ordinance shall include "the process for granting waivers from the minimum standards of the subdivision and land development ordinance." The Planning Commission should have granted a waiver, but is without authority to grant a variance.

87. W. Va. Code §8A-8-9(4) states that the board of zoning appeals, not the planning commission, has the power and duty to "authorize, upon appeal in specific cases, a variance to the zoning ordinance."

88. In *American Tower Corporation v. Common Council of the City of Beckley*, 210 W.Va. 345, 346, 557 S.E.2d 752, 753 (2002), Syl. Pts. 3 and 4, the Court held as follows:

"When a provision of a municipal ordinance is inconsistent or in conflict with a statute enacted by the Legislature the statute prevails and the municipal ordinance is of no force and effect."

"When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."

89. An ordinance that is contrary to the statute must yield to the power of statute. To the extent the Subdivision and Land Development Ordinance provides that the Planning Commission can grant a variance is contrary to aforesaid statutes and is therefore void.

E. In the alternative, if a variance is required, Far Away Farm meets the elements for a variance contained in the Ordinance

1. The request is not contrary to the public interest.

90. Petitioner restates all the foregoing paragraphs as if fully set forth herein.

91. The request is not contrary to the public interest as a matter of law because the

West Virginia Supreme Court of Appeals has previously granted the exact type of tolling that Far Away Farm requests in this case. *See Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d 873 (2005). Consequently, the Supreme Court has considered this exact issue and ordered the same relief that Far Away Farm requests, thereby establishing the public policy of West Virginia as favoring tolling of the timeframes under circumstances far less egregious toward the developer than those in this case. By definition, then, the tolling requested cannot be contrary to the public interest.

92. The request is not contrary to the public interest as a matter of law because the West Virginia Supreme Court of Appeals has previously determined that the Zoning Ordinance that was in effect at the time that Far Away Farm filed its application for a Conditional Use Permit (pre-April 2005) was the ordinance that applied to Far Away Farm. Using that decision as a guide, it appears that the former subdivision ordinance (that was in effect at the time that Far Away Farm filed its original documentation with the County) should also apply. Therefore, it is error for the Planning Commission to decide that it is contrary to the public interest to apply the former subdivision ordinance to Far Away Farm.

93. The request is not contrary to the public interest because of the public policy expressed in West Virginia law.

94. W. Va. Code §8A-4-2(c) states:

All requirements, for the vesting of property rights contained in an ordinance enacted pursuant to this section that require the performance of any action within a certain time period for any subdivision or land development plan or plat valid under West Virginia law and outstanding as of January 1, 2010, shall be extended until July 1, 2012, or longer as agreed to by the municipality, county commission or planning commission. The provisions of this subsection also apply to any requirement that a use authorized pursuant to a special exception, special use permit, conditional use permit or other agreement or zoning action be terminated or ended by a certain date or within a certain number of years.

95. West Virginia Code 8A-5-12(f) states:

“Any subdivision or land development plan or plat, whether recorded or not yet recorded, valid under West Virginia law and outstanding as of January 1, 2010; shall remain valid until July 1, 2012, or such later date provided for by the terms of the planning commission or county commission’s local ordinance or for a longer period as agreed to by the planning commission or county commission. *Provided*, That the land development plan or plat has received at least preliminary approval by the planning commission or county commission by March 1, 2010.”

96. Far Away Farm is therefore entitled as a matter of law to have the former zoning and development ordinances applied to its case, since Far Away Farm’s original applications for the Conditional Use Permit were made under the former Zoning Ordinance, and the West Virginia Supreme Court of Appeals, as a matter of law, held that the Ordinance in existence prior to the April 8, 2005 amendments applied to Far Away Farm. Under the Far Away Farm analysis, the Planning Commission is without jurisdiction to apply the Subdivision Ordinance that came into effect after Far Away Farm’s application was filed. As a result, the time frame extension and the resultant application of the prior subdivision ordinance is in the public interest as a matter of law, since it comports with the Far Away Farm decision, and with the expressed public policy as stated in the West Virginia Code.

97. The request is also not contrary to the public interest because Far Away Farm, as a development, has undergone extensive expenditures to undertake the preliminary engineering of the project. The County likewise has undergone extensive expenditures to review the project, including public hearings, engineering reviews, and myriad of other expenditures. All of the expenditures listed above would be wasted if the development had to disregard all previous efforts and start a new procedure under the new Subdivision Ordinance. Not only would the developer suffer these extra expenses, but the County would also suffer additional expenses for the engineering staff to reexamine the materials that would have to be submitted for approval –

many of which have already been examined and approved. The substantial unnecessary expenditures would be contrary to the public interest.

98. Further, the request is also not contrary to the public interest because the development of the property has not been proven to violate any historic preservation issues, since the Circuit Court of Jefferson County, West Virginia ruled that:

It [BZA] concluded that a “designated historic area” was one that was designated in the Comprehensive Plan as a “historic site,” which is based on being listed on the West Virginia or National Historical Register according to Section 2.2. Therefore, the Court FINDS that it was not unduly restrictive or against the intent of the Ordinance for the BZA to conclude the site was not a designated historic area. Furthermore, the Court FINDS it was not erroneous for the BZA to uphold the Zoning Administrator’s assessment of one point for this category because Far Away Farm is not listed on the state or national registries, although it may have some historical significance because of the Battle of Shepherdstown. Thus, it is neither supportive of nor against this criterion.

99. The issue of the historic nature of the property was not appealed to the West Virginia Supreme court of Appeals and therefore a final judgment exists as to that issue, which is not subject to review.

2. The literal enforcement of this Ordinance would result in unnecessary hardship.

100. Petitioner restates all the foregoing paragraphs as if fully set forth herein.

101. For the same reasons, the literal enforcement of this Ordinance would result in numerous costs and hardship to the developer because of re-engineering and resubmission of documentation, as well as by having to now pursue legal actions in Court. The County would also suffer hardship because of the additional engineering and legal expenditures, as outlined above. All of which could be avoided by a simple extension or tolling of the time frames as requested, making the hardship, by definition, unnecessary.

3. The request is not the result of a self imposed hardship

102. Petitioner restates all the foregoing paragraphs as if fully set forth herein.

103. Perhaps most important, these are expenses not incurred as a result of any fault of the developer, but as a result of the necessity of defense against the numerous matters on appeal and the subsequent lawsuit by the Planning Commission against the developer. These hardships were not created by the developer, but by the county government and/or the persons opposed to the development. It is patently unfair and a denial of the developer's due process and equal protection rights to penalize the developer for matters that were not the developer's fault, but were instead brought on by others, such as the appeals by Mr. Dunleavy (former member of the Planning Commission) or directly by the Planning Commission (by the Commission filing a direct action against Far Away Farm in Federal Court).

4. The Spirit of the Ordinance will be observed and substantial justice done

104. Petitioner restates all the foregoing paragraphs as if fully set forth herein.

105. The Developer has done nothing throughout the tortured history of this case other than to attempt to comply with the Ordinance. The Planning Commission, instead of acting as an impartial governing body, has stepped outside its role as a commission and has instead acted as an advocate on behalf of various interests of the commissioners and against the interest of the developer in this case.

106. To say that the spirit of the Ordinance will be observed and substantial justice done by granting the developer, in this economy, a little more time to comply with the ordinance – time taken from the developer by the acts of the planning commission and others – is understatement.

107. The Court should therefore grant the petition and rule on the various declaratory and other relief requested herein.

VI. IN THE ALTERNATIVE, FAR AWAY FARM REQUESTS DECLARATORY JUDGMENT AS TO THE ISSUES PRESENTED HEREIN

108. Petitioner restates all the foregoing paragraphs as if fully set forth herein.

109. In the alternative, Petitioner moves this Court for declaratory judgment as to the rights and responsibility of the parties as set forth above, under the applicable provisions of West Virginia Law, including W. Va. Code §55-13-1, et seq., and requests this Court to declare that the decision of the Planning Commission in failing to recuse themselves from hearing the matter and following statutory and case law and to approve the request to extend the CIS as set forth herein is unlawful.

VII. IN THE FURTHER ALTERNATIVE, PETITIONER MOVES THIS COURT FOR DECLARATORY JUDGMENT AS TO THE FAILURE OF THE PLANNING COMMISSION TO FOLLOW STATE LAW

110. Petitioner restates all the foregoing paragraphs as if fully set forth herein.

111. In the further alternative, Petitioner moves this Court for declaratory judgment as to the rights and responsibility of the parties as set forth above, under the applicable provisions of West Virginia Law, including W. Va. Code §55-13-1, et seq., and requests this Court to declare that the decision of the Planning Commission in failing to follow State law as set forth herein is unlawful.

112. Further, the Planning Commission failed to provide due process by failing to follow applicable provisions of West Virginia law, thus violating Article III, § 10 of the West Virginia Constitution.

113. In *State ex rel. Hoover v. Smith*, 198 W.Va. 507, 511, 482 S.E.2d 124, 128 (1997)

the Court held:

“Due process is succinctly stated in Article III, § 10 of the West Virginia Constitution: ‘No person shall be deprived of life, liberty, or property, without due process of law, and judgment of his peers.’ This Court has recognized that ‘due process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments.’”

Id. See also, Syl. pt. 2, *State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960); Syl. pt. 1, *McJunkin Corp. v. Human Rights Com’n*, 179 W.Va. 417, 420, 369 S.E.2d 720, 723 (1988); Syl. pt. 5, *State ex rel. Bowen v. Flowers*, 155 W.Va. 389, 184 S.E.2d 611 (1971).

VIII. IN THE FURTHER ALTERNATIVE, PETITIONER MOVES THIS COURT FOR A WRIT OF MANDAMUS TO COMPEL THE PLANNING COMMISSION TO FOLLOW STATE LAW

114. Petitioner restates all the foregoing paragraphs as if fully set forth herein.

115. Petitioner Far Away Farm requests this Court to issue a Writ of Mandamus and order the BZA to (1) grant the extension of time requested to July 1, 2012 as mandated by W. Va. Code §8A-5-12(f), (2) issue an Order granting Far Away Farm’s request for an extension of time to July 15, 2015 as mandated by the precedent in *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d 873 (2005); and; (3) to provide a hearing before an impartial adjudicator.

116. This case meets the requirements set forth in *Brown* and *Kucera* to obtain a Writ of Mandamus / Prohibition, specifically (1) a clear legal right in petitioner Far Away Farm to the relief sought, *i.e.*, the extension of time requested under W. Va. Code §8A-5-12(f) and under *Jefferson Utilities, supra*, at page 887 and due process of law through a hearing by a fair and impartial Planning Commission; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; (3) to follow the extant statutory and case law and to

provide a fair and impartial Planning Commission; and (4) the absence of another adequate remedy.

117. "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).

118. This Court should therefore issue a Writ of Mandamus, directing the Planning Commission to follow the applicable statutes of the State of West Virginia.

IX. PRAYER FOR RELIEF

Based on the foregoing, the actions of the Planning Commission in failing to grant an extension of the CIS and other deadlines as set forth herein should be reversed, and that the actions of the Planning Commission as set forth herein should be declared unlawful and in violation of due process of law.

This Court should issue a Writ of Mandamus requiring the Planning Commission to issue the extension of time for Far Away Farm's CIS as provided by state law.

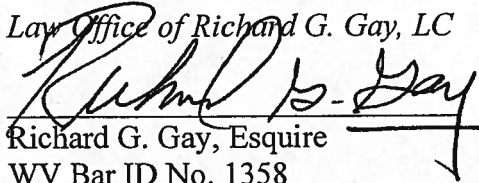
For the same reasons, this Court should award Far Away Farm, LLC its costs and attorney fees in this matter under W. Va. Code §8A-8-11(e), as set forth above.

Petitioner respectfully requests that the record of the proceedings below be certified and provided to this Court for its review.

Petitioner respectfully reserves the right to file supplemental documents and/or supporting memoranda when the Court establishes a briefing schedule in this matter.

Respectfully submitted,
Far Away Farm, LLC,
Petitioner,
By Counsel.

Law Office of Richard G. Gay, LC

A handwritten signature in black ink, appearing to read "Richard G. Gay", is written over a horizontal line. The signature is stylized and cursive.

Richard G. Gay, Esquire

WV Bar ID No. 1358

Nathan P. Cochran, Esquire

WV Bar ID No. 6142

Law Office of Richard G. Gay, L.C.

31 Congress Street

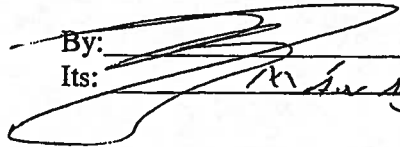
Berkeley Springs, WV 25411

(304) 258-1966

VERIFICATION

I, the undersigned, Michael N. Boltz hereby affirm under oath that the foregoing **VERIFIED PETITION FOR WRIT OF CERTIORARI OR MANDAMUS, OR, IN THE ALTERNATIVE, COMPLAINT FOR DECLARATORY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW** is true to the best of my knowledge and belief and to the extent that it is based on knowledge and belief, I believe it to be true.


FAR AWAY FARM, LLC

By: 
Its: Managing Member

STATE OF Maryland
COUNTY OF FREDERICK, to-wit:

I, DAVID R. WACHTEL, a Notary Public in and for the aforesaid jurisdiction, do hereby certify that MICHAEL N. BOLTZ, whose name is signed to the writing hereto annexed, have this day acknowledged the same before me in my said county.

Given under my hand and notarial seal this 19th day of April, 2011.


Notary Public

My Commission expires: 04/16/15 (SEAL)

Before the Planning Commission of Jefferson County, West Virginia

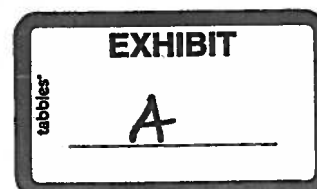
In the Matter of: The Request by Far Away Farm, LLC for tolling of Deadlines and/or a Variance to Extend the expiration Date of the Community Impact Statement until March 2, 2015

On the 14th Day of December, 2010, the applicant, Far Away Farm, LLC, appeared and requested a tolling of the expiration date of the previously issued Community Impact Statement until March 2, 2015. In the alternative, the applicant requested a variance of the expiration date until the same date.

Prior to consideration the formal requests, applicant's counsel Nathan Cochran, Esquire, asked certain members of the Planning Commission recuse themselves because of their involvement in a lawsuit filed by the Planning Commission against the applicant. He specifically requested Mr. Maxey, Mr. Taylor, Mr. Trumble, Mr. Baty, Ms. Ethers, and Ms. Morgan recuse themselves. After an executive session to receive legal advice, each member individually declined to recuse themselves upon the record.

The Staff report was presented. The professional planning staff recommended denying the request for tolling until March 2, 2015 but recommended an extension July 1, 2012 as consistent with other recent extensions.

The Planning Commission then heard from the applicant on the merits of its requests for tolling and/or a variance to extend the expiration date of its Community Impact Statement. The heart of applicants request is that litigation caused delays to the project which justifies tolling of the deadlines on a day-for-day basis. During questioning, the applicant stated that it had made no progress on the project beyond the initial Community Impact Statement (CIS) and stated that the on-going litigation prevented further progress even during the periods of time in which




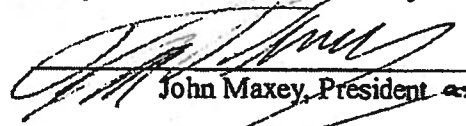

litigation was not pending. Without waiving the claim for tolling, the applicant went on to set forth the basis for a variance addressing each of the four variance criteria as follows:

- 1) The request is not contrary to public interest and that there would be public expense and time if the project had to start again from the beginning and that the development of the property had not been proven to violate any historic issues.
- 2) A literal enforcement of this Ordinance would result in an unnecessary hardship financially for the developer and require additional expense to the County.
- 3) The request is not the result of a self-imposed hardship due to the time in legal Proceedings which the applicant did not initiate.
- 4) The spirit of the Ordinance will be observed and substantial justice done because Far Away Farms had followed all the requirements presented to them in order to be allowed to proceed with the development."

The portion of the record of the Planning Commission meeting pertaining to this application and the official minutes thereof are incorporated herein by reference as if set forth in full herein.

After questioning the applicant and after discussion and deliberation, the Planning Commission by unanimous vote, DENIED the tolling request because the applicant failed to convince the Planning Commission tolling of deadlines was justified. Furthermore, the Planning Commission DENIED the applicants request for a variance because the applicant failed to meet its burden to demonstrate that the request for variance satisfied all four variance requirements. Specifically, the applicant did not prove that granting the variance was in the public interest since granting the variance would allow the development to proceed under 30-year-old subdivision regulations that do not conform with the current subdivision regulations.

22nd March 
Entered this 3rd day of February, 2011 the Jefferson County Planning Commission by


John Maxey, President as of December 14, 2010 

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MARTINSBURG DIVISION

JEFFERSON COUNTY PLANNING
COMMISSION,

Plaintiff,

VS.

CIVIL ACTION NO. _____

FAR AWAY FARMS, LLC,

Defendant.

COMPLAINT

For its causes of action, plaintiff avers as follows:

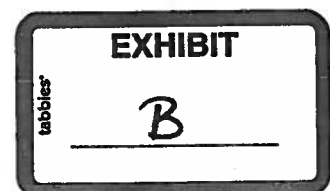
JURISDICTION

~~1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C.~~

§§ 1331 and 1343 involving claims arising under the Constitution of the United States and the violation of plaintiff's federal civil rights; venue lies in this Court pursuant to 28 U.S.C. §§ 1391(b) and (c).

PARTIES

2. The plaintiff Jefferson County Planning Commission is a governmental entity created pursuant to West Virginia Code §§ 8A-2-1, *et seq.*, and by ordinances enacted by the Jefferson County Planning Commission to address land use planning issues in Jefferson County; its powers



and duties are set forth in West Virginia Code § 8A-2-11.

3. Defendant Far Away Farms, LLC (hereafter "FAF" or "defendant") is a West Virginia Corporation with its principal place of business in Charles Town, Jefferson County, West Virginia.

FACTS

3. In June, 2004, defendant applied to the Jefferson County Department of Planning, Zoning, and Engineering (hereafter "DPZE") for a conditional use permit (hereafter "permit") to construct a residential development on a rural tract of land.

4. Under the Jefferson County Zoning and Land Development Ordinance (hereafter "the Ordinance"), FAF could not construct the development without obtaining the permit, which had to be secured through the Ordinance's Development Review System (hereafter "DRS").

5. As required by the Ordinance, the Director of the DPZE conducted a Land Evaluation and Site Assessment (hereafter "LESA"), which assigns a numerical rating to the proposal based on criteria stated in the ordinance.

~~6. The DPZE gave FAF a passing score on the LESA, thus allowing the permit application to proceed to the next stage of DRS, the compatibility assessment.~~

7. Landowners adjacent to or near the site of the proposed development appealed the LESA score to the Jefferson County Board of Zoning Appeals (hereafter "BZA"), which lowered the score, but it remained sufficient to proceed to compatibility assessment.

8. FAF then requested a compatibility assessment hearing before the BZA, which held the hearing on July 26, 2005.

9. On August 9, 2005, the BZA denied the requested permit, concluding that the

~~proposed development would not be compatible with the surrounding community and that the roads that would service the development would be inadequate to meet the demands of the increased traffic that the development would cause.~~

10. FAF then appealed the BZA's decision to the Jefferson County Circuit Court, naming the BZA and its members as defendants; thereafter, the landowners-opponents intervened.

11. By an order entered September 18, 2006, the circuit court affirmed the BZA's decision.

12. FAF appealed the circuit court's decision to the West Virginia Supreme Court of Appeals (hereafter "Supreme Court"), naming the BZA and its members as respondents.

13. The Supreme Court granted review of the petition and, on March 11, 2008, heard oral argument on the appeal.

14. At the oral argument, FAF argued, for the first time, that BZA did not have jurisdiction over the application for the permit and that jurisdiction lay, instead, with the plaintiff.

15. On April 17, 2008, the Supreme Court issued its decision in the appeal ruling that the ~~BZA did not have jurisdiction, that jurisdiction lay with the plaintiff, and that, on the merits,~~ "the evidence in the record shows that FAF satisfied all of the requirements necessary to obtain the permit." *Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals*, ___ W.Va. ___, ___, 664 S.E.2d 137, 145 (2008).

16. The Supreme Court concluded, "Consequently, we must reverse the decision of the circuit court which affirmed the BZA's decision and direct the Jefferson County Planning and Zoning Commission to issue the permit to FAF." *Id.*

17. The plaintiff was never a party to FAF's litigation against the BZA, never

participated in the litigation, never had an opportunity to make an independent judgment on the legality and propriety of FAF's permit application, and never had an opportunity to persuade any court that the permit should or should not be granted.

18. In July, 2008, the Office of the Jefferson County Prosecutor advised plaintiff's members that they had to grant the FAF permit and that they could be held in contempt of court if they did not.

19. Feeling legal duress, the plaintiff on August 12, 2008, passed a motion granting FAF's permit, while expressly stating that it was not waiving its rights to challenge the Supreme Court decision in the *FAF* appeal and reserving the right to rescind the FAF permit upon obtaining a court order permitting the same.

20. On April 13, 2009, plaintiff moved to intervene in the West Virginia Supreme Court litigation between FAF and the BZA and further moved for relief from judgment.

21. On April 30, 2009, by a 3-2 vote and without comment, the West Virginia Supreme Court denied plaintiff's motion to intervene.

GROUND FOR RELIEF

20. The West Virginia Supreme Court's decision *Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals* violated plaintiff's rights to due process of law as guaranteed to it by the Fourteenth Amendment to the United States Constitution and by 42 U.S.C. § 1983 for the following reasons:

- A. The Supreme Court lacked personal jurisdiction over the plaintiff;
- B. The Supreme Court lacked subject matter jurisdiction over the case;
- C. Plaintiff never had an opportunity to participate in the proceedings that led to the

~~Supreme Court decision and never had an opportunity to address independently the merits of~~
FAF's permit application;

D. Plaintiff was not a party to the case.

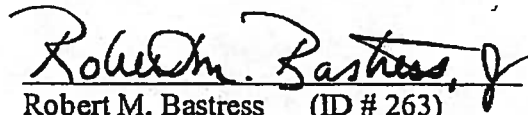
RELIEF REQUESTED

Wherefore, plaintiff requests that it be granted the following relief:

A. A declaratory judgment holding (1) that the decision of the West Virginia Supreme Court in *Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals*, ___ W.Va. ___, 664 S.E.2d 137 (2008), violated plaintiff's rights to due process of law as guaranteed to it by the Fourteenth Amendment to the United States Constitution and by 42 U.S.C. § 1983 because the Court in that case lacked personal jurisdiction over the plaintiff, lacked subject matter over the case, and failed to provide the plaintiff with *any* opportunity to state a defense, (2) that the decision in that case is therefore null and void as to the plaintiff, and (3) that the plaintiff may rescind its order granting FAF's permit and may consider it on its merits;

B. An order granting plaintiff its costs and its reasonable attorney's fees;

~~C. Any other relief to which the Court deems the plaintiff to be entitled.~~



Robert M. Bastress (ID # 263)
P.O. Box 1295
Morgantown, W.Va. 26507-1295
(304) 293-5308

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

JEFFERSON COUNTY PLANNING COMMISSION,

Plaintiff,

v.

CIVIL ACTION NO. 3:09-CV-45
(BAILEY)

FAR AWAY FARMS, LLC,

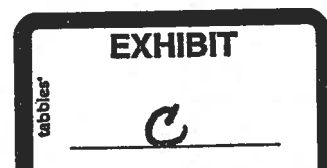
Defendant.

AMENDED ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

On this day, the above-styled matter came before the Court upon consideration of Defendant Far Away Farms, LLC's ("FAF") Motion to Dismiss the Complaint [Doc. 3], plaintiff's Response in Opposition to the Motion to Dismiss [Doc. 6], and defendant's Reply [Doc. 7]. The Court has reviewed the record and the arguments of the parties and finds that defendant FAF's Motion to Dismiss [Doc. 3] should be a **GRANTED**.

BACKGROUND

On June 26, 2009, plaintiff, the Jefferson County Planning Commission, brought suit in the Northern District of West Virginia pursuant to 28 U.S.C. §§ 1331 and 1343. [Doc. 1]. Plaintiff alleges violation of its rights under the Fourteenth Amendment to the United States Constitution, and under 42 U.S.C. § 1983. The crux of plaintiff's argument is that the "West Virginia Supreme Court's decision *Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals*, violated plaintiff's rights to due process of law as guaranteed



it by the Fourteenth Amendment to the United States Constitution and by 42 U.S.C. § 1983..." ([Doc. 1] ¶ 20).

The decision in *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W.Va. 252, 260, 664 S.E.2d 137, 145 (W.Va. 2008), dealt with a challenge by Far Away Farm, LLC ("FAF") to a denial of a Conditional Use Permit ("CUP") in Jefferson County West Virginia. In the case, the West Virginia Court of Appeals ordered the Jefferson County Planning and Zoning Commission ("the Commission") to issue a CUP to FAF, as FAF had met the substantive standards to obtain a permit as set out in the Jefferson County Zoning Ordinance. (Id.)

The Jefferson County Board of Zoning Appeals had previously applied the wrong version of the zoning ordinance to FAF, held hearings under the wrong version of the Ordinance, and then denied FAF a CUP. On appeal, the West Virginia Supreme Court of Appeals ordered the County to apply the correct version of the ordinance and then ordered the correct governmental agency, the Planning Commission, to issue the permit.

The West Virginia Supreme Court of Appeals' issued its decision in *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W.Va. 252, 664 S.E.2d 137 (W.Va. 2008), on April 17, 2008. (See [Doc. 3-1] at 1). A member of the Commission who was a party to the suit, filed a petition for rehearing. (See [Doc. 3-1] at 27, 36-37) (On May 16, 2008, Edward E. Dunleavy and Edward R. Moore filed a petition for rehearing arguing that the court lacked personal jurisdiction over the Commission). Additionally, the Jefferson County Zoning Board of Appeals filed a petition for rehearing. ([Doc. 3-1] at 46) (On May

19, 2008, the Jefferson County Board of Zoning Appeals also filed a petition for rehearing arguing the court lacked personal jurisdiction over the Commission). The motions for rehearing were denied. Those motions, and the judgment of the court, were then appealed to the United States Supreme Court which denied certiorari. See *Dunleavy v. Far Away Farm*, 129 S.Ct. 573 (Nov. 10, 2008) (denying certiorari). Finally, plaintiff filed a Motion to Intervene in April of 2009, making the same arguments they have presented to this Court in the above-styled case. (See [Doc. 3-1] 22-25). Plaintiff did not appeal the denial of the Motion to Intervene. ([Doc. 6] at 3).

Now, in the Complaint before this Court, the Jefferson County, West Virginia Planning Commission argues that the West Virginia Supreme Court of Appeals violated the Commission's rights under 42 U.S.C. § 1983 when it ordered the Commission to grant FAF the CUP. (See generally [Doc. 1]).

On August 24, 2009, defendant Far Away Farms filed a Motion to Dismiss [Doc. 3]. In the motion, defendant argued this Court is without jurisdiction to review the decision of the West Virginia Supreme Court of Appeals decision in *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W.Va. 252, 664 S.E.2d 137 (W.Va. 2008). ([Doc. 3] at 6). Specifically, defendant argued plaintiff's only remedy lies in the United States Supreme Court pursuant to 28 U.S.C.A. § 1257 which provides for certiorari of final judgments or decrees from the highest court of a State. (Id. at 6-7). Defendant also argued that plaintiff is barred by collateral estoppel from bringing the instant action as the action was previously decided against the BZA and plaintiff is either the same party or in

privity with the BZA; and as this Court is required to give full faith and credit to the decision of the West Virginia Supreme Court of Appeals it must accordingly dismiss the action. (Id. at 8-12). Additionally, defendant argued that plaintiff does not have standing to bring the above-styled suit because plaintiff has no statutory authorization to do so. (Id. at 7-8). Finally, defendant argued that plaintiff has failed to state a claim under 42 U.S.C. § 1983 because: (1) the Complaint does not allege defendant acted under color of state law; (2) the Complaint does not allege that defendant's actions worked a denial of plaintiff's rights under the Constitution of the United States; and (3) the Complaint on its face fails to allege more than harmless error. In the alternative, defendant asked that this Court find that plaintiff had failed to join an indispensable party (either the West Virginia Court of Appeals or the United States Supreme Court). (Id. at 23-24).

On September 24, 2009, plaintiff filed a Response to the Motion to Dismiss [Doc. 6]. In the Response, plaintiff argued this Court does have subject matter in the above-styled case as the state court decision in *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W.Va. 252, 664 S.E.2d 137 (W.Va. 2008), violated plaintiff's right to due process because the West Virginia Supreme Court of Appeals imposed a remedy which ordered plaintiff to issue defendant a permit—without having personal jurisdiction over plaintiff. ([Doc. 6] at 2). Plaintiff notes that the above-styled case is one which seeks to “redress a deprivation” and that although the state court was the party which deprived plaintiff its due process rights, defendant Far Away Farms (“FAF”) is the party from which to get “redress” in the form of an order declaring the decision of the West Virginia Supreme

Court of Appeals null and void. (Id. at 3). Plaintiff also addressed defendant's contentions that plaintiff has no standing to bring the instant suit, arguing that the Commission needs to express authorization and that it has such express authorization in West Virginia Code § 8A-2-11(12). (Id. at 3). In response to defendant's arguments that plaintiff's action is barred by the full faith and credit doctrine and *res judicata*, plaintiff summarily stated that the denial of plaintiff's Motion to Intervene was not a ruling on the merits of plaintiff's due process claim, but a denial of access to the court to present such an argument. ([Doc. 6] at 4). Next, plaintiff addressed the merits of the above-styled case arguing that plaintiff has presented a valid claim for denial of due process rights which is not barred, noting that plaintiff is not challenging the authority of the State of West Virginia to shape the relationship between state and local government, but is only seeking to remedy a state judgment which went beyond the jurisdiction of the state court. (Id. at 7-8). Plaintiff also argued that the harmless error doctrine does not apply to the denial of notice and an opportunity to be heard, and as plaintiff alleges it was never given such an opportunity their case should not be dismissed. ([Doc. 6] at 8-9). Finally, plaintiff argued that the West Virginia Court of Appeals, and the United States Supreme Court are not indispensable parties. (Id. at 9).

On October 6, 2009, defendant filed a Reply in Support of the Motion to Dismiss [Doc. 7]. In the Reply, defendant argued that this Court has discretion pursuant to the Declaratory Judgment Act and that the above-styled case can serve "no useful purpose" the Court should decline to exercise jurisdiction. ([Doc. 7] at 3-4). Defendant also argues

that plaintiff should not be allowed to collaterally attack the judgment of the West Virginia Supreme Court of Appeals as plaintiff failed to avail itself of the opportunity to challenge the decision of the state court at the time the decision was rendered. (Id. at 6-8). Next, defendants argued the decision of the West Virginia Supreme Court of Appeals is “not void” as the court had jurisdiction to order the remedy plaintiff seeks to void. (Id. at 9-12). Finally, defendant argues this Court should not permit plaintiff to pursue a cause of action against defendant under 42 U.S.C. § 1983 because defendant is not a state actor. (Id. at 12).

The Court has reviewed the record, the arguments of the parties, and the relevant law and finds for the reasons more fully set out below that the above-styled case should be **DISMISSED** for lack of jurisdiction.

I. Standard of Review

Defendant asks the Court to dismiss plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6), and 12(b)(1), arguing that this Court lacks jurisdiction to review plaintiff's claim, and that plaintiff has failed to state a claim under 42 U.S.C. § 1983. (See generally [Doc. 3]).

When a defendant files a 12(b)(1) motion to dismiss the plaintiff's complaint for lack of subject matter jurisdiction, the plaintiff “has the burden of proving that subject matter jurisdiction exists.” *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). In considering a motion to dismiss pursuant to Rule 12(b)(1), a court should “regard the pleadings as mere evidence on the issue, and may consider evidence outside the

pleadings without converting the proceeding to one for summary judgment.” *Id.* (internal citation omitted). The moving party’s motion to dismiss should be granted when “the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Id.* (internal citation omitted).

In assessing a Rule 12(b)(6) motion for failure to state a claim, the court must accept the factual allegations contained in the complaint as true. *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 143 (4th Cir. 1990). “[A] motion to dismiss for failure to state a claim for relief should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.” *Johnson v. Mueller*, 415 F.2d 354, 354 (4th Cir. 1969).

“A complaint need only give ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” *In re Mills*, 287 Fed.Appx. 273, 280 (4th Cir. 2008) (quoting Fed.R.Civ.P. 8(a)(2)). “Specific facts are not necessary; the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests.”

Id. (internal quotations and citations omitted).

Here, defendant argues that the Complaint should be dismissed as this Court lacks jurisdiction. This Court agrees that it lacks jurisdiction to entertain plaintiff’s collateral attack of the State Court judgment.

II. Analysis

Here, plaintiff has mounted a collateral attack against the judgment of the West Virginia Supreme Court of Appeals in *Far Away Farm, LLC v. Jefferson County Bd. of*

Zoning Appeals, 222 W.Va. 252, 664 S.E.2d 137 (W.Va. 2008). Under West Virginia law, a collateral attack of a judgment is allowed where the court issuing the judgment lacked jurisdiction. *State of West Virginia v. Mazzone*, 213 W.Va. 661, 664, 584 S.E.2d 517, 521 (2003); see also *Jordhal v. Democratic Party of West Virginia*, 122 F.3d 192, 203 (4th Cir. 1997) (stating “A defendant who has lost in state court and sues in federal court does not assert injury at the hands of his adversary; he asserts injury at the hands of the court, and the second suit therefore is an effort to obtain collateral review”); *Resolute Ins. Co. v. State of North Carolina*, 397 F.2d 586 (4th Cir.), cert. denied, 393 U.S. 978 (1968) (“a federal court may entertain a collateral attack on a state court judgment which is alleged to have been procured through fraud, deception, accident or mistake.”) Plaintiff’s collateral attack would be permitted under West Virginia law, if the West Virginia Supreme Court lacked jurisdiction to impose the judgment issued in the State Court case. *Mazzone*, 213 W.Va. at 664, 584 S.E.2d at 521.

While plaintiff is allowed to collaterally attack a judgment issued without jurisdiction, this Court must look at that challenge through the lens of the Full Faith and Credit Clause. See *Durfee v. Duke*, 375 U.S. 106, 116 (1963). A state court decision is “entitled to full faith and credit—even as to questions of jurisdiction—when the second court’s inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the judgment.” *Durfee*, 375 U.S. at 111. Thus, this Court is bound pursuant to the Full Faith and Credit Clause to give *res judicata* effect to any judgment of the West Virginia Supreme Court that it had jurisdiction to impose the remedy plaintiff

seeks to void. See *Id.*

Based on the forgoing, this Court is left with the task of determining if plaintiff's collateral attack is precluded by the Full Faith and Credit Clause, or whether it is a permitted collateral attack on the judgment of the West Virginia Supreme Court as the court lacked jurisdiction to issue the judgment in the State Court case.

A. Full Faith and Credit

"The constitutional command of full faith and credit, as implemented by Congress, requires that 'judicial proceedings... shall have the same full faith and credit in every court within the United States... as they have by law or usage in the courts of such State... from which they are taken.' Full faith and credit thus generally requires every State to give a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it. 'By the Constitutional provision for full faith and credit, the legal doctrines of *res judicata*, speaking generally, become a part of national jurisprudence, and therefore [are] federal questions cognizable here.'" *Durfee*, 375 U.S. at 108 (internal quotations omitted). Accordingly, pursuant to the Full Faith and Credit Clause, this Court must give the West Virginia Supreme Court's judgment in the State Court case the *res judicata* effect that the judgment would have in the courts of West Virginia.

1. *Res Judicata* effect of State Court Case

In West Virginia, *res judicata* operates to bar duplicative litigation. See *Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (1983). "An adjudication by a court having jurisdiction of the subject matter and the parties is final and conclusive, not only as to the

matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from becoming *res judicata*." *Id.* 171 W.Va. at 586, Point 1, Syllabus, S.E.2d at 217

In order to determine whether *res judicata* would bar plaintiff's action in West Virginia state courts, this Court must, therefore, determine: (1) who the parties to the State Court case were; and (2) what matters were put at issue in the State Court case, or what issues might have been put at issue by the parties. *Id.* The merits of the West Virginia Supreme Court of Appeals ruling need not be considered. *Id.*

a. The Commission was a Party for Purposes of Res Judicata

Plaintiff's primary complaint is that it was not party to the previous suit as it was not named in the complaint and was not served with service of process. (See [Doc. 6] at 2). Plaintiff was, however, fully aware of the state suit, as counsel for the BZA also represented plaintiff. ([Doc. 7] n.5) (noting that per public records, Ed Dunleavy, who was the intervening party in the West Virginia Supreme Court case, as well as the person who appealed the West Virginia Supreme Court's decision in the State Court Case to the United States Supreme Court, was a member of the Commission when the West Virginia Supreme Court heard the appeal). Additionally, plaintiff filed a Motion to Intervene in the State Court

Case. ([Doc. 3-1] at 22-26). In the Motion to Intervene, plaintiff argued the West Virginia Supreme Court lacked jurisdiction to order plaintiff to grant FAF a Conditional Use Permit because the Commission was never properly before the court. (Id. at 23-25). Alternatively, plaintiff asked for relief from the judgment under Federal Rule of Civil Procedure 60. (Id. at 22). The West Virginia Supreme Court denied the motion to intervene, and denied plaintiff relief under Rule 60. ([Doc. 6] at 2).

This Court finds that when plaintiff filed the Motion to Intervene contesting the jurisdiction of the West Virginia Supreme Court, it submitted to the jurisdiction of the West Virginia Supreme Court, and thereby became a party bound by the court's judgment on that issue. Since the purpose of plaintiff's Motion to Intervene was to allow it to enter into the action as a party—and the motion was denied—it would appear that of necessity, plaintiff was not a party to the action. This is not the law. When plaintiff, in filing its Motion to Intervene, entered an appearance before the court to contest jurisdiction, it submitted itself to be bound by the West Virginia Supreme Court's decision as to jurisdiction. See *United States ex. rel. Robinson Rancheria Citizens Council v. Bordneo, Inc.*, 971 F.2d 244, 251 (9th Cir. 1992) (noting that where an individual appeared specially to contest the jurisdiction of the California Superior Court, the court considered the issue, the individual lost, and the ruling was not appealed; the issue had been finally decided and was entitled to full faith and credit); see also *Underwriters Nat'l Ins. Co. v. North Carolina Life and Accident and Health Ins. Guaranty Ass'n*, 455 U.S. 691, 700-701 (1982) (noting "[a]s an intervening party to the rehabilitation proceeding, the North Carolina Association was obliged to

advance its argument that the Rehabilitation Court did not have authority to settle pre-rehabilitation claims to the deposit when it was given the opportunity to do so. A party cannot escape the requirements of full faith and credit and *res judicata* by asserting its own failure to raise matters clearly within the scope of a prior proceeding"). Had plaintiff not been bound by the West Virginia Supreme Court's ruling as to jurisdiction, there would be no reason for it to have filed the motion in the first instance. See *Underwriters Nat'l Ins. Co.*, 455 U.S. at 700-701, n.14 (stating "[t]he need for finality within our federal system, applies with equal force to questions of jurisdiction. As this Court stated in *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938): 'After a party has his day in court, with opportunity to present his evidence and view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first'").

Further, this Court would note the timing of plaintiff's Motion to Intervene. Specifically, plaintiff—although aware of the proceeding as one of the members of the Commission—was a party to the prior suit—did not move to intervene prior to the West Virginia Supreme Court's judgment in the State Court Case. ([Doc. 3-1] at 1) (decision filed April 17, 2008). Nor did plaintiff move to intervene within the 30 days after the judgment was issued so as to request a rehearing of the issue. Nor did plaintiff move to intervene prior to the decision being appealed to the United States Supreme Court. See *Dunleavy v. Far Away Farm*, 129 S.Ct. 573 (Nov. 10, 2008) (denying certiorari). In fact, plaintiff waited until after the United States Supreme Court denied certiorari before asking the West

Virginia Supreme Court to allow plaintiff to intervene. ([Doc. 3-1] at 22-26) (Motion to Intervene filed April 13, 2009). That appears to this Court, to be an intentionally ill timed motion to intervene in an effort to manipulate the legal system so as to “escape the requirements of full faith and credit and *res judicata*.” See *Underwriters Nat’l Ins. Co.*, 455 U.S. at 700-701.

Based on the forgoing, this Court finds that when plaintiff filed a Motion to Intervene on the basis of a lack of jurisdiction, plaintiff entered an appearance and agreed to be bound by the West Virginia Supreme Court’s decision as to jurisdiction. Plaintiff is, therefore, a party bound by *res judicata*.

b. The Issue of Jurisdiction Was Raised Before the West Virginia Supreme Court

Next, the Court must determine what issues were before the West Virginia Supreme Court in the State Court Case, or what issues might have been brought before the court in the challenged case. See *Conley v. Spillers*, 171 W.Va. at 586, 301 S.E.2d at 217. This Court finds that the West Virginia Supreme Court fully considered whether it had personal jurisdiction over the Commission; and as such, the issue is *res judicata*.

The West Virginia Supreme Court actually considered the jurisdictional issue several times, and each time rejected the arguments that it lacked jurisdiction. First, in its decision issued on April 17, 2008, the court stated: “[t]he BZA simply had no authority to apply the amended Ordinance to FAF’s application for a permit. ... Likewise, a board of zoning appeals does not have that power to determine the effective date of an amendment to a

zoning ordinance. That power belongs to the law-making body which in this instance is the Jefferson County Commission.” *Far Away Farm, LLC*, 222 W.Va. at 258-59. This statement alone shows that the court fully understood and acknowledged the procedural posture of the case that plaintiff alleges prevented the West Virginia Supreme Court from having jurisdiction over the Commission.

Plaintiff argues that because the BZA was the only party before the West Virginia Supreme Court, and as the court found that the BZA did not have the authority to deny FAF’s permit in the first place, then the case should have been remanded to the Commission for further proceedings without further instruction, and that the West Virginia Supreme Court’s instruction to the Commission to issue the permit denied plaintiff Due Process because the court had no personal jurisdiction over the Commission. ([Doc. 6] at 7) (noting “the plaintiff challenges the constitutionality of an extra-jurisdictional state court ruling issued against plaintiff without an opportunity to defend itself or to defend whatever authority that the State Legislature and local ordinances have given to it.”) That issue, however, was before the West Virginia Supreme Court at the time it made its decision.

Further, even were this Court to find that prior to issuance of its decision the West Virginia Supreme Court only considered the issue of subject matter jurisdiction, and not personal jurisdiction, the issue of personal jurisdiction was specifically addressed to the court on three later occasions and denied. Specifically, after the West Virginia Supreme Court issued its decision, the parties asked the court to rehear the case on the basis of a lack of subject matter jurisdiction over the Commission. (See [Doc. 3-1] at 27, 36-37) (On

May 16, 2008, Edward E. Dunleavy and Edward R. Moore filed a petition for rehearing arguing that the court lacked personal jurisdiction over the Commission); ([Doc. 3-1] at 46) (On May 19, 2008, the Jefferson County Board of Zoning Appeals also filed a petition for rehearing arguing the court lacked personal jurisdiction over the Commission). The motions for rehearing were denied. Those motions, and the judgment of the court, were then appealed to the United States Supreme Court, which denied certiorari. Finally, plaintiff filed a Motion to Intervene in April of 2009, making the same arguments it has presented to this Court in the above-styled case. (See [Doc. 3-1] 22-25). Thus, it is apparent that while plaintiff only filed a Motion to Intervene after the judgment was final, the court was fully aware of plaintiff's arguments when it denied the Motion to Intervene.

Based on the reasoning stated above, this Court finds that the issue of a lack of personal jurisdiction over the Commission was fully and fairly litigated before the West Virginia Supreme Court, and that the court found in a final judgment that it had sufficient jurisdiction to order the Commission to issue FAF a permit. As such, this Court finds that ~~plaintiff would be bound in the West Virginia courts by the judgment issued in the State~~ Court Case. This Court is, therefore, bound by the Full Faith and Credit Clause of the Constitution of the United States to accord that judgment the same preclusive effect as it would be granted in the courts of West Virginia.

B. Collateral Attack

As noted above, a collateral attack of a state court judgment is allowed where the judgment being attacked was issued by a court without jurisdiction. Here, plaintiff has

mounted a collateral attack of the judgment in *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W.Va. 252 664 S.E.2d 137 (W.Va. 2008). Plaintiff argues the West Virginia Supreme Court lacked jurisdiction to issue the challenged judgment because plaintiff was not before the court, and therefore, not subject to personal jurisdiction. ([Doc. 6] at 2). While this Court has determined that the issue of lack of personal jurisdiction was presented to the West Virginia Supreme Court, and that plaintiff was a party to that judgment (see II(A), *supra*), before this Court can accord the judgment full faith and credit this Court should make limited inquiry into the West Virginia Supreme Court's jurisdiction. See *Underwriters Nat'l Ins. Co.*, 455 U.S. at 704.

"To be sure, the structure of our Nation as a union of States, each possessing equal sovereign powers, dictates some basic limitations on the full-faith-and-credit principles.... Chief among these limitations is the caveat, consistently recognized by this Court, that a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits-had jurisdiction, that is, to render the judgment. Consequently, before a court is bound by the judgement rendered in another State, it may enquire into the jurisdictional basis of the foreign court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given." *Underwriters Nat'l Ins. Co.*, 455 U.S. at 704 (internal quotations and citations omitted). The enquiry into the jurisdiction of the court issuing the judgment is, however, limited. "[A] judgement is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions

have been fully and fairly litigated and finally decided in the court which rendered the judgment." *Durfee*, 375 U.S. at 111. Further, "the fact that the rendering court may have made an error of law with respect to a particular question does not deprive its decision of the right to full faith and credit, so long as that court fully and fairly considered its jurisdiction to adjudicate the issue." *Underwriters Nat'l Ins. Co.*, 455 U.S. at 710 n.16 (citing *American Express Co v. Mullins*, 212 U.S. 311 (1909)).

Here, the judgment in the State Court Case must be given preclusive effect as the West Virginia Supreme Court fully and fairly considered its jurisdiction to adjudicate the issue. (See II(A)(2), *supra*). As more fully discussed above, the question of the West Virginia Supreme Court's jurisdiction to issue a judgment which required the Commission to issue FAF a permit was raised on at least four occasions, three of which occurred prior to the United States Supreme Court's consideration of the appeal. Thus, as more fully set forth in section II(A)(2), this Court finds that the West Virginia Supreme Court fully and fairly considered its jurisdiction to adjudicate the issue and made a final determination that it had proper jurisdiction.

When the West Virginia Supreme Court's decision as to jurisdiction is accorded the preclusive effect, plaintiff's action must fail. This is because a collateral attack of a state court judgment cannot be mounted in federal court where the state court had jurisdiction. After finding that the West Virginia Supreme Court fully and fairly considered its jurisdiction this Court's enquiry ends. Any argument that the court acted in error is to be disregarded by this Court. See *Underwriters Nat'l Ins. Co.*, 455 U.S. at 710 n.16 (noting

"the fact that the rendering court may have made an error of law with respect to a particular question does not deprive its decision of the right to full faith and credit...").


CONCLUSION

Based on the forgoing, this Court finds that plaintiff's claims must be dismissed as an impermissible collateral attack of the judgment in *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W.Va. 252, 664 S.E.2d 137 (W.Va. 2008), as this Court is bound pursuant to the Full Faith and Credit Clause of the United States Constitution to accord the judgment of the West Virginia Supreme Court the same *res judicata* effect it would receive in West Virginia state courts. As this Court finds that it lacks jurisdiction to entertain the above-styled case, it need not consider the other arguments of the parties. Further, this Court **ORDERS** that defendant's Motion to Dismiss [Doc. 3] be **GRANTED**, and that the above-styled case be **DISMISSED** and stricken from the active docket of this Court.

It is so **ORDERED**.

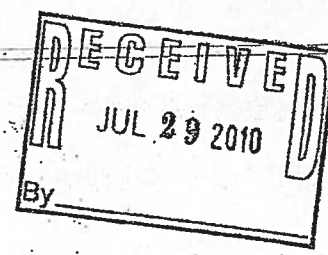
The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: October 29, 2009


JOHN PRESTON BAILEY
CHIEF UNITED STATES DISTRICT JUDGE

2168-020

JEFFERSON COUNTY, WEST VIRGINIA
Department of Planning



116 East Washington Street, 2nd Floor
P.O. Box 338
Charles Town, West Virginia 25414

Phone: (304) 728-3228
Fax: (304) 728-8126

Email: planningdepartment@jeffersoncountywv.org

July 26, 2010

Far Away Farm, LLC
305 Copper Oaks Dr.
Woodsboro, MD 21798

Dear Far Away Farm, LLC:

As you may know, on March 11, 2010, a change to WV Code Chapter 8A, Article 4 occurred through the passage of Senate Bill No. 595. The changes to Chapter 8A read as follows:

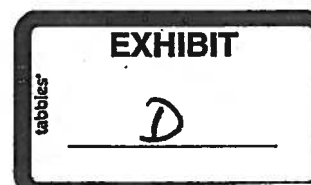
"§8A-4-2. Contents of subdivision and land development ordinance

c) All requirements, for the vesting of property rights contained in an ordinance enacted pursuant to this section that require the performance of any action within a certain time period for any subdivision or land development plan or plat valid under West Virginia law and outstanding as of January 1, 2010, shall be extended until July 1, 2012, or longer as agreed to by the municipality, county commission or planning commission. The provisions of this subsection also apply to any requirement that a use authorized pursuant to a special exception, special use permit, conditional use permit or other agreement or zoning action be terminated or ended by a certain date or within a certain number of years."

"§8A-5-12. Vested property right.

(f) Any subdivision or land development plan or plat, whether recorded or not yet recorded, valid under West Virginia law and outstanding as of January 1, 2010, shall remain valid until July 1, 2012, or such later date provided for by the terms of the planning commission or county commission's local ordinance or for a longer period as agreed to by the planning commission or county commission. Any other plan or permit associated with the subdivision or land development plan or plat shall also be extended for the same time period. *Provided, That* the land development plan or plat has received at least preliminary approval by the planning commission or county commission by March 1, 2010."

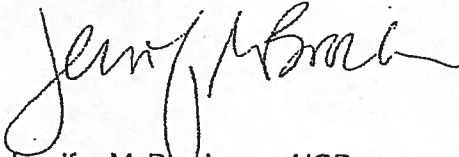
After a careful review of the Jefferson County ordinances and files, the Jefferson County Planning Commission, at its July 13, 2010 meeting, determined that this provision does not apply to your project known as Far Away Farm (PC file#08-28) because a Preliminary Plat had not been approved by March 1, 2010. Your current expiration date for approval of a Final Plat is December 19, 2010. This requires that your Final Plat Public Hearing be held by this date.



Your current expiration date for the Conditional Use Permit is October 6, 2011 by which date commencement of construction must have occurred.

If you have any questions, please feel free to contact the Departments of Planning and Zoning at (304) 728-3228 or e-mail us at planningdepartment@jeffersoncountywv.org.

Sincerely,



Jennifer M. Brockman, AICP
Director, Planning and Zoning

Cc: William H. Gordon Associates, Inc.



LAW OFFICE
 of
 RICHARD G. GAY, L.C.

31 CONGRESS STREET
 BERKELEY SPRINGS
 WEST VIRGINIA 25411
 Phone: 304.258.1966 • Fax: 304.258.1967
 richardgay@rglawoffices.com

RICHARD G. GAY
 ADMITTED IN WEST VIRGINIA, PENNSYLVANIA, OHIO,
 AND THE DISTRICT OF COLUMBIA

NATHAN P. COCHRAN
 ADMITTED IN WEST VIRGINIA AND PENNSYLVANIA

R. GREG GARRETSON
 ADMITTED IN WEST VIRGINIA, MARYLAND AND
 PENNSYLVANIA

November 5, 2010

Jefferson County Planning Commission
 P.O. Box 338,
 116 E. Washington Street
 Charles Town, WV 25414

Steve Groh, Esquire
 Asst. Prosecutor/ Jefferson County
 P.O. Box 729
 Charles Town, WV 25414

Jefferson County Board of Zoning Appeals
 P.O. Box 250
 124 E. Washington Street
 Charles Town, WV 25414

RE: FAR AWAY FARM

Dear Members of the Board, Commission and Mr. Groh:

I am writing regarding a request for extension of time for the Far Away Farm Project. As you know, the West Virginia Supreme Court has determined that Far Away Farm qualified for a conditional use permit. However, § 3-2(E) of the Jefferson County Zoning Ordinance that applies to Far Away Farm requires that action on a conditional use permit be commenced within 18 months of the issuance of the permit or the permit expires.

However, the project has been delayed by legal proceedings, of which you may be aware. Because of those delays, and for the reasons stated below, Far Away Farm requests that the Planning Commission extend the time for this stage of the project until July 29, 2015.

History of the Proceedings: Far Away Farm filed an Application for Conditional Use Permit pursuant to Article 6 of the Development Review System of the Jefferson County Zoning and Land Development Ordinance on the 24th day of June, 2004. As a result of the Application, a LESA score evaluation was undertaken by Paul J. Raco, Director of Planning and Zoning. Raco concluded that the applicable LESA score for the Far Away Farm was 46.2 points. The LESA score was challenged by appeal to the BZA on October 29, 2004 by Edward E. Dunleavy and Edward R. Moore.

EXHIBIT

E

A hearing was held on the LESA appeal before the BZA on January 20, 2005. On the 7th day of February, 2005, the BZA entered its decision with Findings of Fact and Conclusions of Law, upholding in part and reversing in part the decision of the Director of Planning and Zoning. The BZA thereupon awarded Far Away Farm a LESA score of 50.2 points, thus advancing the Application for the Conditional Use Permit to the Compatibility Assessment Meeting provided in Section 7.6 of the Ordinance. On April 13, 2005, pursuant to Section 7.6 of the Ordinance, a Neighborhood Compatibility Assessment Meeting for Far Away Farm subdivision was held. The matter was scheduled for a public hearing before the BZA on July 26, 2005, pursuant to 7.6(e) of the Ordinance.¹

Ultimately, on August 9, 2005, the BZA called a special meeting for the purpose of considering the action they would take on the conditional use application for Far Away Farm. As a result of the August 9, 2005, BZA special meeting, the BZA issued an Order on September 15, 2005, denying Far Away Farm its Conditional Use Permit.

Far Away Farm challenged this decision in the Jefferson County Circuit Court.² Ultimately, the matter was appealed to the West Virginia Supreme Court of Appeals. On April 17, 2008, the West Virginia Supreme Court held that "the evidence in the record shows that FAF satisfied all of the requirements necessary to obtain the permit" *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W.Va. 252, 260, 664 S.E.2d 137, 145 (W.Va., 2008). Further, the Court held that the Ordinance that existed prior to the April 8, 2005 amendments was applicable to Far Away Farm.³

After failed Petitions for Rehearing filed by Dunleavy and the BZA, the matter was thereupon appealed by Dunleavy to the United States Supreme Court, which refused the appeal on or about November 10, 2008.⁴

Subsequent to the decision of the United States Supreme Court, the Jefferson County Planning Commission filed a Motion to Intervene with the West Virginia Supreme Court that attempted to seek what was in effect another appeal to the West Virginia Supreme Court, and, when that was rejected, filed a lawsuit against Far Away Farm in the United States District Court for the Northern District of West Virginia, which was dismissed on October 29, 2009. Upon dismissal, the Planning Commission filed a motion for reconsideration which was decided and rejected by the United States District Court on May 10, 2010. The time for appeal of that decision to the United States Court of Appeals for the Fourth Circuit expired on or about June 9,

¹ Prior to the July 26, 2005 hearing, Far Away Farm had submitted documents in support of its position totaling approximately 320 pages. These documents included a traffic study, a preliminary ground water assessment supply study, architectural assessment study, an environmental report, an archeological report, and a preliminary geological site assessment.

² Edward E. Dunleavy filed an appeal of issues including the LESA score decision to the Circuit Court, and that appeal was consolidated with the appeal of the CUP decision by Far Away Farm in the Circuit Court's September 18, 2006 Order.

³ "Because Far Away Farm requested a permit on June 23, 2004, and completed the necessary documentation prior to April 8, 2005, we find that the former Ordinance was applicable" *Id.*

⁴ *Dunleavy v. Far Away Farm, LLC*, 129 S. Ct. 573, 172 L.Ed.2d 431 (2008) (Cert. denied)

2010, and no appeal was filed.

It was only after the Federal case was finally dismissed, and the time for appeal to the United States Court of Appeal for the Fourth Circuit was extinguished, that Far Away Farm could again plan to resume development of the project.

Consequently, the time for development under the Ordinance should be extended because the project was under legal review and should only begin to run from no earlier than June 9, 2010.

Basis for the Extension of Time: I would like to raise these points for the Commission's consideration regarding the extension of time issue.

First, Far Away Farm's proceedings before the Planning Commission have been delayed, not by Far away Farm, but by the denial of the CUP and the subsequent challenge of that denial, and then by the Federal lawsuit that was filed by the Jefferson County Planning Commission.

It is improper to penalize Far Away Farm for upholding the project's legal rights. The West Virginia Supreme Court has ordered an extension of time to be granted to an applicant under the Subdivision Ordinance when the applicant's project was delayed due to legal proceedings. For example, the Supreme Court in *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d 873 (2005) stated "the trial court is hereby directed to enter an order approving the reissuance of the subject permits and adjust, where necessary, any time deadlines established in the Ordinance that may have passed during the pendency of this appeal so that the parties are not penalized for pursuing their statutory rights of appeal."

The time extension in this case should be granted for the same reason the Supreme Court stated in *Jefferson Utilities*. In Far Away Farm's case, the delay was as follows:

2005 – 107 days (Beginning on the date of the original denial of the CUP)
2006 – 365 days
2007 – 365 days
2008 – 366 days
2009 – 365 days
2010 – 308 days through November 5, 2010
Total delay is 1876 days through November 5, 2010

Total extension from the date upon which the project ceased to be under a legal disability is thereby calculated as June 9, 2010 plus 1876 days, resulting in a project deadline of July 29, 2015.

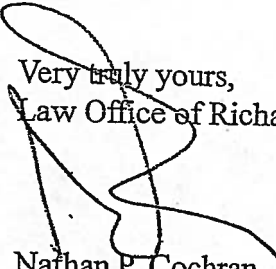
Also, the Far Away Farm project qualifies for an extension of time under West Virginia Code §8A-5-12(f).

November 5, 2010

Thank you for your attention to this matter. I trust the Planning Commission will consider this information and will grant Far Away Farm the extensions requested.

Please contact me with any questions or comments. Also, please advise me of the date and time of any hearing on this matter.

Very truly yours,
Law Office of Richard G. Gay, LC


Nathan P. Cochran, Esquire

NPC/tls

cc: Bruce Boltz
Mike Boltz

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JEFFERSON COUNTY PLANNING COMMISSION MEETING
 FAR AWAY FARM
 December 14, 2010

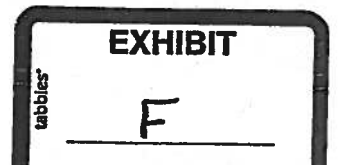
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I N D E X

Reporter's Certificate

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1 PLANNING COMMISSIONER: The next item on our
2 agenda this evening is item number five, a request by
3 Far Away Farm, LLC for a variance from Section 6.3 of
4 the Subdivision Ordinance to extend the expiration of
5 the Community Impact Statement until March 2nd, 2015.
6 Do we have a Staff report?

7 MR. RIVARD: Yes, we do. Again, I provided with
8 you a (inaudible) map showing (inaudible) there are
9 actually two parties involved here. It is on Trough
10 Road.

11 PLANNING COMMISSIONER: (inaudible).

12 MR. RIVARD: It's located along Trough Road and

13 there's two parcels involved and you can see that the
14 subject parcels are just slightly southeast of
15 Shepherdstown a little distance.

16 PLANNING COMMISSIONER: Can I interrupt for a
17 second? I want to point out this is our (inaudible)
18 map that we're going to talk about the policy later
19 with legal counsel. It is so good. The maps are so
20 usable to us. This gives you so much better
21 information.

22 PLANNING COMMISSIONER: You can go in and --

23 PLANNING COMMISSIONER: Yeah, you can zoom in like
24 this and you see can see where it is (inaudible).

‡

4

1 MR. RIVARD: The old one --

2 PLANNING COMMISSIONER: It didn't have the parcel
3 (inaudible).

4 MR. RIVARD: (inaudible).

5 PLANNING COMMISSIONER: This is from GIS.

6 PLANNING COMMISSIONER: This is our GIS firm.

7 This is really great to have this. Sorry.

8 MR. RIVARD: That's all right. Just to give you
9 an indication of what the development would look like
10 (inaudible) but having given you the graphics there as
11 was indicated by the President, the applicant had
12 requested an extension until May 2nd, 2015 and I'm
13 going to quote out of their application. They said, an
14 extension of time backlash tolling backlash variance
15 to extend the time frame under all aspects of the
16 former Jefferson County Subdivision Ordinance including
17 without limitations section 6.3 and any other
18 references to allow time allotted under the ordinance
19 or law end quote.

20 I have stated that Staff will only review this
21 under Section 6.3 of 1979 ordinance. Any other time
22 references the Staff would not support (inaudible) only
23 review this under 6.3.

24 PLANNING COMMISSIONER: Which is the time that

1 they have to (inaudible).

2 PLANNING COMMISSIONER: This is the old
3 subdivision.

4 MR. RIVARD: The 1979 Subdivision Regulations. I
5 will just point out that this request before you
6 tonight is just for an extension of time to get to the
7 final plat public hearing and is not on the merits of a
8 project itself. In my Staff report indicates why they
9 believe they're entitled May 2nd, 2015.

10 PLANNING COMMISSIONER: March.

11 MR. RIVARD: March 2nd, excuse me. I'm going to
12 go through the four requirements (inaudible) Staff
13 report. It says the first one I'm going to take a
14 little bit of time on because it's important. It says
15 their request is not contrary to public interest.
16 Staff believes that a variance to March 2nd, 2015 is
17 actually contrary to the public interest. A
18 development of this magnitude should proceed in a
19 timely and orderly fashion. Deadlines are to ensure
20 that significant factors and areas have not changed by
21 the time the project starts. Delayed starts of this
22 (inaudible) could result in a project (inaudible) site
23 work begins to change due to the regulations. And then
24 the reasons that these long delays could be negative to

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1 the public and the public interest is that additional
2 development could occur in the area in which need for
3 larger water and sewer pipes or larger pump stations
4 could possibly be required and if additional
5 (inaudible) they could work with those developments as
6 well.

7 Essentially, it's too much of a (inaudible) time
8 to quite know who would reasonably come in around
9 them. Again, a development that is not current with
10 complying with these regulatory changes would have a
11 negative impact on the community.

12 The second requirement a literal enforcement of
13 this ordinance will result in an unnecessary hardship.
14 The project is probably unlikely to change
15 fundamentally from the amended 2008 subdivision
16 Regulations that were required to come in under those
17 versus the 1979 regulations they've been (inaudible)
18 under. Their request is not (inaudible) hardship.
19 That's true, there's been some legal actions involved.

20 Finally, the spirit of the ordinance will be
21 observed and substantial justice be done. This is
22 essentially a time extension only. They have --
23 there's no real changes to anything substantive of the
24 product at this point and I've outlined a couple

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1 reasons why that would be involved. The public is
2 continually being updated and aware of the things that
3 are going on hence, this meeting for extension.

4 The recommendation does not recommend granting a
5 variance to March 2nd, 2015. I've indicated in my
6 report that staff could (inaudible) support an
7 extension to July 1st, 2012 and I stated in there that

8 that would create less of a (inaudible) time and be
9 able to give folks understanding of what is going on in
10 the area and the vicinity within a reasonable time
11 frame.

12 Then the applicant referenced Jefferson Utilities,
13 Inc. versus the Board of Zoning Appeals in which
14 (inaudible) was granted (inaudible) tolling of time.
15 They believe they sort of fall under that. Staff does
16 not agree with that because in this case when the
17 decision was handed down in the Far Away Farms there
18 was no Court order requiring tolling of time so Staff
19 does not believe they're entitled to that time frame.

20 As always, I would just like to note that on any
21 of these CISS if for some reason no extension was
22 granted they do have an outstanding CUP which could
23 come under the amended 2008 Subdivision Regulations and
24 start from a concept plan (inaudible) basically you

‡
1 have (inaudible). There's a number of lots permitted
2 under the CUP including all conditions (inaudible).
3 That is Staff's report.

4 PLANNING COMMISSIONER: Do you have a report from
5 (inaudible)?

6 (inaudible)

7 PLANNING COMMISSIONER: I just wanted to hear you
8 say that. We have questions for Mr. Rivard on this
9 issue (inaudible).

10 PLANNING COMMISSIONER: Is it could support or do
11 support? Could is a (inaudible) word. Do we support
12 or don't we?

13 MR. RIVARD: If -- we do not support it with the

14 May 2nd, 2015.

15 PLANNING COMMISSIONER: But the 2012 --

16 MR. RIVARD: We could support.

17 PLANNING COMMISSIONER: Could or we do?

18 MR. RIVARD: We would support.

19 STAFF MEMBER: The request isn't until 2012.

20 They're not asking for that.

21 PLANNING COMMISSIONER: Could is -- should we say

22 at least.

23 MR. RIVARD: It's predicate upon the applicant

24 requesting something.

♀

9

1 PLANNING COMMISSIONER: If the applicant requested

2 that then the Staff would in fact --

3 STAFF MEMBER: We would, in fact.

4 PLANNING COMMISSIONER: (inaudible).

5 STAFF MEMBER: That's specific (inaudible).

6 PLANNING COMMISSIONER: Any further questions for

7 the Staff (inaudible)?

8 We'll move on and hear from the applicant

9 following (inaudible).

10 State your name for the record.

11 PLANNING COMMISSIONER: Mr. President, I'm sorry.

12 Good evening, Mr. Cochran. I want to know if we're

13 going to have legal on this?

14 PLANNING COMMISSIONER: I believe we certainly

15 should.

16 PLANNING COMMISSIONER: Mr. Groh is here.

17 PLANNING COMMISSIONER: Mr. Groh is here. We may

18 call for a short executive session at some point during

19 the proceeding.

20 PLANNING COMMISSIONER: Thank you.

21 MR. COCHRAN: Very well. Mr. President, members
22 of the Commission, my name is Nathan Cochran, Law
23 office of Richard Gay here to speak on behalf of the
24 Far Away Farm development.

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10

1 First, I would note for the record that we are
2 here to request -- I would note that the agenda item
3 does not encompass all the issues specifically. We are
4 here to request the extension of time for any -- for
5 any plat -- fulfillment of any plat requirements as
6 well as the CIS and we made that clear in our
7 application. I think maybe the agenda item is not just
8 as specific or all as encompassing as it might be.

9 Second, before the Commission begins any type of
10 deliberation on this, I am requesting that the Planning
11 Commission members that were involved in the lawsuit or
12 any of the related proceedings against Far Away Farm
13 recuse themselves.

14 I note, Mr. Maxey, that in the July 9th, '09
15 meeting you voted in favor of going to federal court
16 for the Planning Commission. I note that Mr. Taylor
17 and Commissioners Trumble, Baty and Etters voted to at
18 least in May 25th of 2010 to ask the County Commission
19 to approve funds regarding the appeal of the federal
20 court decision to the Fourth Circuit and I note that
21 Ms. Morgan moved the County Commission to approve the
22 thousand dollars to fund the Fourth Circuit appeal on
23 June the 3rd, 2010.

24 I would draw the Commission's attention to a

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11

1 couple of cases. Just to save time I will draw your

2 attention to one in particular involving Jane Rissler
3 versus the Jefferson County Board of Zoning Appeals and
4 Thornhill, LLC who was an intervener in that case. In
5 that case involving the BZA I note that the West
6 Virginia Supreme Court was very concerned that
7 Mr. Weigand and Mr. Rockwell and Mr. Cassell, but
8 specifically for your consideration Mr. Weigand and
9 Mr. Rockwell who were both members of the Jefferson
10 County Board of Zoning Appeals had an extremely minimal
11 involvement with the applicant in that case, Thornhill,
12 and the Supreme Court said that there was an appearance
13 of impropriety. The Supreme Court said that the prior
14 relationship with regard to Mr. Weigand offers a
15 possible temptation to the average man as a judge which
16 might lead him not to hold the balance nice, clear and
17 true. The Supreme Court was concerned that there may
18 not have been a fair trial and a fair tribunal as
19 required by due process.

20 With regard to Mr. Rockwell, there was a concern
21 that even the probability of unfairness should be
22 avoided to ensure that the hearing before the impartial
23 tribunal guaranteed by due process has been afforded.

24 Again, we simply do not believe that because of

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12

1 the prior matters in which the Commission deliberately
2 and -- purposefully maybe is a better word, instituted
3 a lawsuit against our client, we do not believe that
4 the Commission can be a fair and impartial tribunal,
5 and therefore, we request that you recuse yourselves
6 from this matter and that we seek additional
7 commissioners to be appointed or brought on that could
8 hear this matter fairly.

9 Failing that and noting that you're thinking of
10 going into executive session and wanting to avoid
11 having to go into two executive sessions, I would just
12 inform the Commission just for that reason only that if
13 the Commissioners would choose not to recuse themselves
14 then I would ask that you stay this matter so I might
15 seek review of the matter through a writ of prohibition
16 in the circuit court or other appropriate tribunal.

17 Therefore, that way you could, if you choose to go
18 into a executive session, you can discuss both of those
19 issues there without having to reconvene and if you
20 would choose not to recuse yourselves then have to
21 reconvene again in executive session. Very well, so
22 not hiding the ball there.

23 PLANNING COMMISSIONER: (inaudible).

24 PLANNING COMMISSIONER: But you're not --

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13

1 PLANNING COMMISSIONER: I've got a question. Are
2 you asking for recusal (inaudible) itself because as a
3 body (inaudible) because I was not a part of any such
4 Commission, so therefore, I would not recuse myself
5 because I would consider myself to be impartial in this
6 matter. Would you be looking for Commissioners who
7 were on the Commission after that time therefore maybe
8 we could have a quorum, is that your request?

9 MR. COCHRAN: Here is my request. First, any of
10 the Commissioners that I mentioned were certainly
11 directly involved in pursuing an active lawsuit or an
12 active consideration of an appeal to the Fourth
13 Circuit.

14 PLANNING COMMISSIONER: Are you saying --

15 MR. COCHRAN: Excuse me, sir. I'm trying to
16 answer your question. I'm not trying to avoid it.
17 That is a definite and direct conflict in my opinion
18 and failure to recuse yourself would be an error.
19 However, with regard to your question, Mr. Smith, I
20 suppose it would go back to whether or not you have
21 been involved or anyone else has been involved in any
22 other discussions in executive session or discussions
23 with -- amongst the Commission regarding the Far Away
24 Farm issue and anything related to the lawsuit. I

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14

1 believe that if a Commissioner has been involved in
2 that then I think it gives an appearance of impropriety
3 at the least so that's my answer. I don't know --

4 PLANNING COMMISSIONER: Well, follow-up question
5 then. Are you saying that these actions that were
6 committed by these Commissioners were done outside the
7 mandate of their commission or were these done within
8 the regulations and mandates of the commission that
9 they've been sworn?

10 MR. COCHRAN: Well, that would certainly be a
11 matter that the -- another tribunal could address.

12 PLANNING COMMISSIONER: Because if they were
13 acting as Commissioners then there would be no need to
14 recuse themselves because the Commission was acting
15 within its right, correct?

16 MR. COCHRAN: In my --

17 PLANNING COMMISSIONER: He's making an argument.

18 PLANNING COMMISSIONER: And he's entitled to do
19 that.

20 PLANNING COMMISSIONER: He's advocating his
21 position.

22 PLANNING COMMISSIONER: I just want to make sure I
23 know what the position is.

24 MR. COCHRAN: In my -- I do not see that the

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15

1 Planning Commission has the ability to assert civil
2 rights as they tried to do in the federal court and I
3 think the federal judge agreed with that, so therefore,
4 in my opinion that was out -- that was something that
5 the Commission should not have done by -- that's not
6 really what we're here to hash out tonight. We're only
7 here to hash out whether or not --

8 PLANNING COMMISSIONER: Mr. Cochran?

9 MR. COCHRAN: Yes.

10 PLANNING COMMISSIONER: If we were to do as you
11 suggest we would still have a quorum. We would not be
12 able to act on your request.

13 MR. COCHRAN: I understand that; however, I do not
14 believe that Far Away Farm should be penalized because
15 of the Commission's failure to have a quorum on the
16 request. To do so would be to penalize Far Away Farm
17 for advocating and defending its rights in court.

18 PLANNING COMMISSIONER: You do understand that
19 we're not considering here whether or not Far Away
20 Farms can develop this parcel. We're considering
21 whether or not to grant the extension of the Community
22 Impact Statement which doesn't have to do with the
23 underlying zoning.

24 MR. COCHRAN: And related plats, yes. We're

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1 considering the time frames that Far Away Farm has to
2 meet under the ordinance to develop its property.

3 They're sort of tied together in that way. Yes, sir?

4 PLANNING COMMISSIONER: As I understand it, you're
5 saying that even though a Commissioner who did not
6 participate in the original decisions regarding the
7 lawsuit should they go into executive session they in
8 turn would become tainted and (inaudible).

9 MR. COCHRAN: I believe there is the likelihood
10 that if -- and I'm certainly not privy to what you
11 discuss in the executive session.

12 PLANNING COMMISSIONER: I want to know what you're
13 asking.

14 MR. COCHRAN: But my belief would be that if the
15 Commissioners were present in executive sessions where
16 the matter was discussed and debated about the merits
17 of the lawsuit, the merits of prosecuting a lawsuit or
18 an appeal, I certainly believe that they could be
19 tainted. I think it -- at least for those
20 Commissioners it has an appearance of impropriety that
21 the Supreme Court warned against in the Rissler case.

22 PLANNING COMMISSIONER TRUMBLE: So what you're
23 suggesting then is that should we go into an executive
24 session then we would no longer have a Planning

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1 Commission to hear your complaint, is that what you're
2 saying?

3 PLANNING COMMISSIONER: No. I think you've taken
4 too much from his point, Mr. Trumble. Mr. Cochran was
5 referring to past executive session.

6 PLANNING COMMISSIONER TRUMBLE: (inaudible)
7 question that I thought I heard which said if you go
8 into executive session in which these issues are
9 discussed you then become tainted. That was clearly

10 the implication that I drew from your response.

11 MR. COCHRAN: I think, you know, the Commission,
12 of course, can do as they will. I can't order the
13 Commission to do anything; however, to go into
14 executive session to discuss whether or not to -- for
15 the Commissioners to recuse themselves is one thing.
16 Having been in executive session where you're actually
17 prosecuting a lawsuit against my client is another in
18 my opinion.

19 PLANNING COMMISSIONER: Mr. President, I find this
20 whole line of argument is kind of beside the point that
21 I think we need to discuss with our counsel in the
22 executive session.

23 PLANNING COMMISSIONER: Sounds fair.

24 MR. COCHRAN: Very well.

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18

1 PLANNING COMMISSIONER: we'll (inaudible) motion
2 upon to enter executive session. All in favor? we
3 will enter executive session and we'll let you know
4 when we're (inaudible).

5 MR. COCHRAN: Thank you, Mr. President.

6 PLANNING COMMISSIONER: Thank you.

7 (Executive session was had.)

8 PLANNING COMMISSIONER: Mr. President, I would
9 move we come out of the executive session.

10 PLANNING COMMISSIONER: Thank you. Do we have a
11 second?

12 PLANNING COMMISSIONER TAYLOR: Second.

13 PLANNING COMMISSIONER: Thank you, Mr. Taylor.
14 All in favor of exiting our executive session and
15 (inaudible).

16 With that we had a request that certain members of
17 the Planning Commission be recused from this decision.
18 I'll start off by saying I feel quite confident that I
19 can hear this case in a true and impartial manner that
20 I have no financial stake whatsoever in these
21 proceedings or this decision and that as I understand
22 it we're here to listen to a request to extend a
23 Community Impact Statement which was approved, in fact,
24 on my motion some two-and-a-half years ago so I made

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19

1 the motion to approve the Community Impact Statement
2 that the applicant is here this evening to ask for an
3 extension on so I do feel that I can hear that and I
4 will be not be recusing myself.

5 PLANNING COMMISSIONER: I don't intend to recuse
6 myself.

7 PLANNING COMMISSIONER: I do not either.

8 PLANNING COMMISSIONER: I do not intend to recuse
9 myself. I would say that familiarity with the case is
10 not grounds for recusal. I would further say that
11 actions that this body took in response to legal
12 situations that had been referred to by the applicant's
13 counsel here this evening were taken in my view to
14 protect the rights of the local governing body.

15 PLANNING COMMISSIONER: Thank you. With that, we
16 will be heard from the Staff and we would like to hear
17 from the applicant.

18 PLANNING COMMISSIONER: Should Mr. Taylor be heard
19 from, too?

20 MR. COCHRAN: I was going to request that.
21 Mr. Taylor, I'm sorry, I don't believe you made a
22 statement on the record.

23 PLANNING COMMISSIONER TAYLOR: I'm sorry?

24 MR. COCHRAN: I don't believe, sir, you made a

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20

1 statement on the record as to whether or not you would
2 recuse yourself from this.

3 PLANNING COMMISSIONER TAYLOR: I'm going to stay
4 here.

5 MR. COCHRAN: Very well. Just for purposes of the
6 record, sir, no member has agreed to recuse themselves;
7 is that correct, Mr. Maxey?

8 PLANNING COMMISSIONER MAXEY: That's correct.

9 MR. COCHRAN: Very well, thank you. Then I would
10 follow with my second motion and ask --

11 PLANNING COMMISSIONER: I'm sorry, motions are
12 inappropriate coming from the applicant.

13 PLANNING COMMISSIONER: That would be true at this
14 point, Mr. Cochran. We would like to hear from the
15 applicant though. We've heard from the Staff and
16 procedurally what we would like to do is hear from the
17 applicant following which we'll have some questions by
18 the members of the Planning Commission and then we'll
19 open a public hearing and allow members of the public
20 to speak.

21 MR. COCHRAN: I appreciate that; however, I'm
22 requesting that the Commission stay these proceedings
23 so I can seek a review of the matter from the circuit
24 court or appropriate court regarding the --

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21

1 PLANNING COMMISSIONER MORGAN: Mr. President.

2 MR. COCHRAN: -- recusal --

3 PLANNING COMMISSIONER: Yes.

4 PLANNING COMMISSIONER MORGAN: Thank you.
5 Mr. Cochran, I believe the Commission understands your
6 position and I would move to reject the request for a
7 stay or a delay in these proceedings.

8 PLANNING COMMISSIONER: Thank you, Ms. Morgan. We
9 do have a motion. Do we have a second?

10 PLANNING COMMISSIONER: Second.

11 PLANNING COMMISSIONER: We have a second. All in
12 favor of --

13 PLANNING COMMISSIONER: Procedural question. Do
14 we need to reject it or do we have to act on his
15 request?

16 PLANNING COMMISSIONER: I guess --

17 PLANNING COMMISSIONER: We're keeping the record
18 clean. The gentleman put a request into the record --

19 PLANNING COMMISSIONER: So the motion would be
20 that we not stay our proceedings this evening and we
21 have -- that motion is on the floor. We have a motion
22 and a second. Do we have further discussion on that?

23 PLANNING COMMISSIONER: Yes, I've got a question.
24 If this stay is granted isn't there an expiration date

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22

1 of December 19th?

2 MR. COCHRAN: And again, as I said before, I do
3 not believe that the time standards and the ordinance
4 should count against Far Away Farm if there is no
5 ability to have a fair and impartial tribunal and,
6 therefore, it would be our position that the tribunal
7 is not fair and impartial based on the prior activities
8 that have occurred and, therefore, that's why we're
9 requesting the stay.

10 PLANNING COMMISSIONER: So you would have -- I'm
Page 17

11 just -- circuit court you would have to be there in the
12 next five days in order to beat the December 19th
13 expiration date, correct? You're saying you're not
14 recognizing the expiration date based on what you feel
15 is impartial --

16 MR. COCHRAN: I believe the expiration dates
17 should be tolled while we seek our legal rights before
18 the Court in the same manner that the Far Away -- that
19 we've requested that you tolled these statutory dates
20 or these ordinance dates.

21 PLANNING COMMISSIONER: That's why you're here
22 seeking to ask us for an extension of time but then
23 you're asking us to not grant that extension of time at
24 the same time.

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23

1 MR. COCHRAN: We filed timely the application;
2 however, I do not believe that this Commission can
3 fairly hear the application, therefore, that's why
4 we're seeking to ask the Commission to stay this matter
5 while we seek writ of prohibition.

6 PLANNING COMMISSIONER: Thank you. Further
7 comment or discussion upon the motion?

8 PLANNING COMMISSIONER: (inaudible).

9 PLANNING COMMISSIONER: Thank you, Mr. Trumble.
10 All in favor of the motion to continue with the
11 proceeding and not grant a stay raise your hand.
12 Unanimous vote.

13 Would you like to go ahead and present us the
14 applicant, Mr. Cochran?

15 MR. COCHRAN: Certainly. Would just ask you,
16 Mr. Maxey, to note our objection to the two prior

17 rulings regarding the -- a motion to recuse and a
18 motion for stay.

19 PLANNING COMMISSIONER MAXEY: I believe that would
20 be reflected in the minutes.

21 MR. COCHRAN: Very well. Sir, we believe that the
22 dates which are required to be met under the ordinance
23 which are, as I understand it, a time period for the
24 Community Impact Statement to expire which we received

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24

1 a letter from the Planning Department stating that --
2 Ms. Brockman said in a letter dated July 26th, 2010
3 that the current expiration date for the Conditional
4 Use Permit is October 6th, 2011; however, she noted
5 that the current expiration date for approval of a
6 final plat is December 19th, 2010.

7 We are asking the Commission to extend the dates
8 in which we would have to submit the plat approvals
9 that are required under the Subdivision Ordinance and
10 the dates for the Community Impact Statement based on
11 the request that we filed in our variance request.

12 The Jefferson Utilities case discussed that the
13 Court there said that the trial Court was directed to
14 enter an order approving the re-issuance of the permits
15 and (inaudible) were necessary any time deadlines
16 established in the Ordinance that may have passed
17 during the pendency of the appeal so the parties are
18 not penalized for pursuing their statutory rights of
19 appeal.

20 We believe that this Commission should apply the
21 same standard in this particular case as the Supreme
22 Court applied in Jefferson Utilities simply because Far
23 Away Farm pursued its rights under the law. When Far

24 Away Farm pursued its rights under the law there was --

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1 and I detailed all of this in the document that we
2 submitted to the Planning Commission. You're familiar
3 with the details.

4 PLANNING COMMISSIONER: We are.

5 MR. COCHRAN: Unless you want me to, Mr. Maxey, I
6 won't go through all the details of that. You're
7 familiar with the history, are you not?

8 PLANNING COMMISSIONER MAXEY: Yes. I was hoping
9 that you would be able to address the -- there are
10 certain conditions under which we're allowed to grant
11 an extension of a CIS and without those conditions
12 taken we're not legally allowed to grant an extension.
13 We're not required to grant an extension in any case as
14 we understand it by our Ordinance at the discretion of
15 the Commission provided that those conditions are met
16 so I need to have you address those conditions because
17 without those conditions being met we would not legally
18 be allowed to grant the extension that you're
19 requesting.

20 MR. COCHRAN: Certainly. As I expressed in my --
21 as I expressed in my request for a variance that we had
22 filed with the Planning Commission we do not believe
23 that a variance request was necessary. We believe that
24 we should have this extension as a matter of right to

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1 do otherwise would do as the Court cautioned in
2 Jefferson Utilities it would penalize Far Away Farm for
3 pursuing their legal rights and defending their legal
4 rights based on the actions of this Commission.

5 with -- so we were instructed by the Planning
6 Commission Staff to file a variance request, and as I
7 indicated in the variance request that we filed, you
8 know, if you want to choose to view it as a variance
9 request, that's certainly up to you; however, we
10 believe that -- and we filed a variance request because
11 that was what the Commission instructed us to do;
12 however, we do not really believe this is a variance
13 request. We believe that this is a matter of right
14 because of the intervening legal challenges that I have
15 addressed in the document and, again, I won't go
16 through that again; however, there were at least 1,727
17 days in which this project was sidetracked because of
18 the various court proceedings, the lawsuit against Far
19 Away Farms and the time frame for an appeal to be taken
20 to the Fourth Circuit that ultimately was not
21 pursued --

22 PLANNING COMMISSIONER: Mr. Cochran, excuse me.
23 Would it be possible for you to address the conditions
24 under which we would be allowed to grant you this

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1 extension. Without addressing those conditions unless
2 all four of those conditions (inaudible) it's our
3 understanding that we could not legally grant an
4 extension so we really need you to address those four
5 conditions if that's possible.

6 MR. COCHRAN: Very well. I'm only placing on the
7 record our position that I believe that the Commission
8 should grant this as a matter of right.

9 I will turn to the variance request conditions now
10 at your direction.

11 PLANNING COMMISSIONER: You're not doing this on
Page 21

12 your own volition. You're submitting a variance
13 request because we've asked to you do it?

14 MR. COCHRAN: That's correct. I do not believe
15 that the Commission should view this as a variance
16 request. I believe that the Commission should just
17 view this as a matter of right and as a matter of
18 fundamental fairness. This project was delayed for
19 almost 2,000 days because of legal issues and it's just
20 not fair then to turn around and penalize the developer
21 for those things because they were not of the
22 developer's making.

23 PLANNING COMMISSIONER: But Mr. President --

24 MR. COCHRAN: I don't believe you should do that.

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1 PLANNING COMMISSIONER: Yes (inaudible).

2 PLANNING COMMISSIONER: We are sitting here today
3 on December 14th, 2010. Mr. Cochran, what is the last
4 day of legal proceedings or the expiration of the last
5 day for an appeal, et cetera? Back me up until that
6 date. What's that date?

7 MR. COCHRAN: I believe that the --

8 PLANNING COMMISSIONER: The last day you can point
9 to that something could have happened in a judicial
10 proceedings regarding this case.

11 MR. COCHRAN: I believe that the deadline for an
12 appeal to the Fourth Circuit Court of Appeals was June
13 9th, 2010.

14 PLANNING COMMISSIONER: June 2010. That's what I
15 understood from looking at this written submission.
16 June 2010 and it's December 2010 and the Commission is
17 being told that this is an emergency because we have

18 from the 14th to the 19th.

19 PLANNING COMMISSIONER: Now, I recall also that
20 this particular applicant was here in April of 2009 and
21 I attended all those meetings. I haven't missed a
22 Planning Commission meeting yet. During those meetings
23 the applicant represented by Mr. Dick (inaudible) was
24 pretty emphatic in explaining they were ready to

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1 proceed with this project. In fact, the Planning
2 Commission hired an outside consultant to review the
3 CIS at considerable expense to the County. The
4 Planning Commission heard a considerable amount of
5 testimony from Mr. Dick and from the applicant
6 including statements by the applicant or by Mr. Dick on
7 their behalf that they were ready to proceed and well
8 within the timelines that we have in our Ordinance at
9 that point so what happened between April of 2009 to
10 this to make this all change? It sounds like some of
11 these court cases go back years and years.

12 MR. COCHRAN: They do go back years and years.
13 Again, I believe under the precedence in Jefferson
14 utilities that time should be added to the time in
15 which these folks should have to comply. I will tell
16 you one practical thing that occurred is the owner of
17 Far Away Farm got cancer and very nearly died and was
18 sidetracked for a considerable amount of time, was
19 unable to proceed for that basis as well. However,
20 the -- you know, the other issue that occurred is the
21 federal lawsuit that created a -- made it, you know,
22 impossible to appear before this Commission with any
23 hope of a fair hearing.

24 PLANNING COMMISSIONER: Not being a lawyer I don't
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1 quite understand how we (inaudible) you're asking --
2 you're asking for us not to accept a request for a
3 variance but to force a request for a variance upon
4 you. I'm not sure I understand how that works. You've
5 said you don't want to submit the paperwork for a
6 variance, that you don't want to do this because you
7 believe the issues have to do with fairness and tolling
8 and the things you've just identified so you're putting
9 me, I think, in the awkward position of requiring that
10 I and guys of my staff prepare a variance for you and
11 then vote upon it. I'm just not sure -- is that the
12 way we want to do this?

13 PLANNING COMMISSIONER: Originally they submitted
14 a letter the beginning of November right before your
15 last meeting requesting an extension of time but not in
16 the form of a variance.

17 PLANNING COMMISSIONER: Right.

18 PLANNING COMMISSIONER: In regard to your November
19 (inaudible) meeting stating that we weren't sure what
20 to do with the letter that we could put it on this
21 meeting's agenda under actual correspondence but we
22 weren't sure what action you would take because there
23 wouldn't be a notice of a hearing and signs posted for
24 correspondence. At your request we notified them that

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1 they needed to make a variance so that they followed
2 all the correct procedures so they did. They applied
3 for the variance --

4 PLANNING COMMISSIONER: That's not what he just
5 told me.

6 PLANNING COMMISSIONER: They don't believe that's
7 what they need. They believe they can just do the
8 request. But in order to be heard tonight they
9 understood us to say that they needed to be a variance
10 so they did the paperwork to be a variance but they
11 still believe that that's not what they need to do.
12 They believe they should have the right to an
13 extension --

14 PLANNING COMMISSIONER: Without a variance.

15 PLANNING COMMISSIONER: Without a variance.

16 MR. COCHRAN: We were --

17 PLANNING COMMISSIONER: We don't really have a way
18 to procedurally do that as I'm aware of.

19 MR. COCHRAN: We were just attempting to cooperate
20 with the Planning Commission as best we could, but
21 nonetheless, I don't really believe that the Planning
22 Commission should deal with this as a variance in and
23 of itself. I think the Planning Commission should just
24 as a matter of right attach the time to the end of the

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1 legal proceedings to give us a chance to proceed with
2 the development.

3 PLANNING COMMISSIONER: Do you support the
4 variance as it was submitted to us? Are the words that
5 I am to evaluate on those variance words that you
6 support?

7 MR. COCHRAN: I really don't care what vehicle
8 that the Planning Commission chooses to give us the
9 time frame but I think that -- the extension but the
10 issue is just extending the deadlines so we're not
11 penalized for our legal proceedings and, you know, as I
12 said, Mr. Maxey, one possible problem was the

13 gentleman, Mr. Boltz, whose family is long time from
14 this area got a -- he got cancer and was a problem.

15 Another thing is I believe that what you're
16 referring to as the being ready to proceed, once the
17 matter went to the West Virginia Supreme Court was
18 appealed to the United States Supreme Court and the
19 United States Supreme Court rejected that appeal then I
20 believe that the developer began to process the
21 documents and things for the subdivision; however,
22 subsequent to that the Planning Commission filed a
23 lawsuit on October 29th, 2009 and at that point the --
24 it became, I believe, impossible to proceed so --

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1 PLANNING COMMISSIONER: That's listed in this
2 written paperwork as the dismissal date.

3 MR. COCHRAN: I'm sorry?

4 PLANNING COMMISSIONER: Not the filing date.

5 MR. COCHRAN: I think on October 29th, 2009 the
6 Planning Commission filed a lawsuit and --

7 PLANNING COMMISSIONER: Well then the paperwork is
8 wrong.

9 MR. COCHRAN: I'm sorry.

10 PLANNING COMMISSIONER: That was when you filed a
11 motion to reconsider.

12 MR. COCHRAN: That's right. I'm sorry. The
13 lawsuit was filed at some point before that but
14 essentially when the lawsuit -- when the federal
15 lawsuit was filed it was apparent that it was difficult
16 to proceed here or impossible, so you know, that's
17 where we are. We just think it is a matter of fairness
18 that you shouldn't penalize us for exercising our

19 rights to proceed and defend our CUP as the Court said
20 in Jefferson Utilities.

21 PLANNING COMMISSIONER: Thank you, Mr. Cochran.

22 MR. COCHRAN: Would you like me to address the
23 four points in the variance request?

24 PLANNING COMMISSIONER: I thought that's what you

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1 were doing. I would be happy to hear that.

2 MR. COCHRAN: Very well. Again, I don't think the
3 request is contrary to the public interest. The
4 development of the property has not been proven to
5 violate any historic issues. That matter was decided
6 by the circuit court and not for the repeal. The
7 issues regarding the -- I think it would be against the
8 public interest to go back and reprocess all of these
9 documents because it creates a lot of expense and time
10 on the part of the Staff, public expense, things like
11 that. It's a big process as you know and I just don't
12 think it is against the public interest to proceed from
13 where we are because we have -- we have already
14 expended a lot of money and the county has expended a
15 lot of money to get here. Why do it again?

16 The literal enforcement of the ordinance would
17 result in a lot of costs and hardship to the developer
18 because of potential re-engineering, submission of
19 documentation. It would also result in additional
20 funds being expended by the County. And I believe that
21 that would be a hardship that was not created by the
22 developer. And I won't go into all of that again. You
23 have the documentation there showing the progression of
24 this matter, but as you know there was an appeal by

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1 Mr. Dunleavy to the circuit court early on. There was
2 ultimately an appeal by Far Away Farms to the circuit
3 court. The matters were consolidated. It went to the
4 West Virginia Supreme Court. The West Virginia Supreme
5 Court ruled in Far Away Farm's favor. There was some
6 other things that happened but ultimately an appeal to
7 the United States Supreme Court that was rejected, an
8 appeal by the folks opposing Far Away Farms that the
9 Supreme Court rejected, United States Supreme Court
10 rejected. Then we came back and at that point
11 ultimately the Planning Commission filed a lawsuit in
12 federal court against Far Away Farm which was rejected
13 by the federal court, the district court. There was a
14 motion for reconsideration. That was also rejected by
15 the federal district court and no appeal was filed so
16 it's been a long and tortured history not caused by Far
17 Away Farm and so it's not self-imposed.

18 Then the spirit of the ordinance would be observed
19 and substantial justice done. I have to tell you, you
20 all have put out rules to say if you jump through these
21 hoops you can do this development. We jumped through
22 the hoops and then the development wasn't allowed and
23 it's just -- it would be substantially just if when we
24 jumped through the hoops you let us do the development

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1 and I think it would be substantially just to not
2 penalize the developer for exercising their legal
3 rights and so I think that observes the spirit of the
4 ordinance.

5 PLANNING COMMISSIONER: Thank you.

6 MR. COCHRAN: Are there any questions from

7 anyone?

8 PLANNING COMMISSIONER: Questions for Mr. Cochran
9 by members of the Planning Commission?

10 Thank you, Mr. Cochran.

11 MR. COCHRAN: Thank you.

12 PLANNING COMMISSIONER: We will now open a public
13 hearing. Do we have members of the audience that would
14 like to address the topic?

15 Hearing none we'll close the public hearing and
16 we'll open this for discussion by members of the
17 Planning Commission. Do we have anyone who would be
18 willing to make a comment or forward a motion?

19 Commissioner Morgan.

20 PLANNING COMMISSIONER MORGAN: Mr. Cochran has
21 made some good arguments but I remain unconvinced. I
22 believe that we are -- what we have here is a request
23 which is clearly within our discretion. I am certain
24 that there are appeal rights from any decision that

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1 emanates from this body this evening as usual so if
2 it's error it is subject to correction by a higher
3 authority and I move to deny the request for an
4 extension of the Community Impact Statement.

5 PLANNING COMMISSIONER: Thank you. Do we have a
6 second?

7 PLANNING COMMISSIONER TRUMBLE: I second.

8 PLANNING COMMISSIONER: Thank you, Mr. Trumble.
9 We'll have discussion by the Planning Commission.

10 PLANNING COMMISSIONER: That motion denies it
11 entirely? You're not just --

12 PLANNING COMMISSIONER: Yes.

13 PLANNING COMMISSIONER: Right. Here it says until
Page 29

14 March 2nd, 2015.

15 PLANNING COMMISSIONER: There was a suggested
16 motion by Staff that was not put forth by the applicant
17 but rather by Staff so that suggestion -- that's not
18 what is on the table right now. I intend to support
19 the motion to reject because I feel that what we're
20 discussing here is not whether or not that the
21 development should be built. We're discussing whether
22 or not a variance should be granted to allow an
23 extension of the Community Impact Statement. That
24 doesn't impact the underlying zoning at all. All it

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1 does is either allow or disallow an extension of the
2 CIS. If we allow an extension of the CIS what we're
3 saying is we're allowing this project to proceed under
4 our old 30-year-old ordinance where if we deny the
5 variance request and they're unable to proceed under
6 the current ordinance what that means is only that they
7 have to come in with engineering under our new
8 ordinance where we heard Staff this evening talk about
9 the new storm water management ordinance that will be
10 ready in February.

11 We know that we're under very, very heavy pressure
12 from the federal government and EPA for (inaudible). I
13 think it would be very unwise not in the public
14 interest to allow a project to proceed that close to
15 the Potomac River under a 30-year-old storm water
16 management regulations and we have new regulations that
17 (inaudible).

18 We are not by this decision this evening saying
19 that the project can't proceed. We don't have the

20 authority over the underlying zoning anyway. The
21 Conditional Use Permit is valid. All we're doing is
22 voting on whether or not this project proceeds under
23 the 30-year-old Subdivision Ordinance or they should be
24 engineered under our new ordinances.

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1 Commissioner Morgan.

2 PLANNING COMMISSIONER MORGAN: Well, I would just
3 point out I think your comments made it a little
4 unclear at least to me that this would require that the
5 applicant start over with the Community Impact
6 Statement process, correct, which is now the concept
7 plan under the new Subdivision Regulations.

8 PLANNING COMMISSIONER: Right. It would be
9 following the new Subdivision Regulations, correct.

10 PLANNING COMMISSIONER: But that's only if it is
11 not in by December 19th, correct?

12 PLANNING COMMISSIONER: Right.

13 PLANNING COMMISSIONER: They would still have five
14 days. It's not much time but you could assume maybe
15 they are in the process of getting that done in case
16 this --

17 PLANNING COMMISSIONER: That's correct.

18 PLANNING COMMISSIONER: Let me clarify that. It
19 has to go to final plat public hearing by December
20 19th.

21 PLANNING COMMISSIONER: which means you would have
22 to have it tonight.

23 PLANNING COMMISSIONER: Yes, we would have had to
24 review the preliminary plat and we haven't done that so

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1 there's not enough time to meet the current deadline

2 under the old Subdivision Regulations.

3 PLANNING COMMISSIONER: Addressing Mr. Cochran's
4 point specifically when he argued that granting the
5 extension would not be contrary to public interest. He
6 argued that it was because the development had not been
7 proven to be damaging to (inaudible) but we're not
8 here to vote on the development. We're here to vote on
9 extending the CIS which is a different matter and we've
10 not -- in my view, granting the CIS is clearly not in
11 the public interest particularly because of the issue
12 of storm water management but in addition some of the
13 issues that were raised in the previous CIS hearing
14 where I did vote to grant the CIS and happily did so.
15 We included a series of very specific conditions on
16 that CIS regarding provision of public water and sewer,
17 testing the wells to make certain we weren't drawing
18 down area neighbors' wells. All of those things I
19 would hope would have been worked on so that the
20 applicant could come in to us this evening for a final
21 plat public hearing having worked with all of those
22 conditions and solve them all and we would be
23 proceeding on with the development (inaudible) but
24 that's not where we are and it is the applicant's

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1 decision that we aren't there so I believe that number
2 one, we grant this -- granting it would, in fact, be
3 contrary to the public interest, and number two, I
4 believe that the hoops have not been jumped through.
5 We do have an ordinance and it's not been complied
6 with.

7 Mr. Trumble.

8 PLANNING COMMISSIONER TRUMBLE: Parallel to that
9 the underlying argument (inaudible) and I would just
10 very briefly like to make sure that you don't walk away
11 with the idea that the only rights (inaudible). Those
12 lawsuits were not brought frivolously. They were
13 brought because there are balancing rights of the
14 property owner, the balancing rights of this
15 institution and the rights of the people as a whole,
16 and those rights were contested in court. I understand
17 that there is a tolling issue but I don't want there to
18 be left in the public's mind that somehow this was the
19 heavy hand of government only opposed property rights
20 of the owner. I would like to reiterate the fact that
21 those lawsuits were brought because they were
22 contesting rights and those contested rights had to be
23 contested in court and there was never any intention on
24 my part to deny the property rights of the owner but

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42'

1 only to make sure there was a balancing, a correct
2 balancing in the various and sundry courts to determine
3 what, in fact, was fair to all parties. Thank you.

4 PLANNING COMMISSIONER: Further comments by
5 members of the Planning Commission? In that case we'll
6 have a vote. All in favor of Ms. Morgan's motion to
7 deny the variance request raise your hand.

8 MR. COCHRAN: Mr. Maxey.

9 PLANNING COMMISSIONER: That vote is unanimous.

10 MR. COCHRAN: The Commission did not address my
11 other request for the plan extension. I'm just
12 pointing that out.

13 PLANNING COMMISSIONER: Perhaps not. I don't
14 believe we had such a request before us.

15 MR. COCHRAN: You do, sir.

16 PLANNING COMMISSIONER: Let me clarify. The way
17 you typically do things is the approval -- the actual
18 submission of the CIS under the old rules, there was a
19 staff review and then there was a staff meeting. When
20 that meeting occurred it started the time frame under
21 which all of (inaudible) activities have to occur. It
22 wasn't from your approval date of the CIS. It was from
23 the first staff meeting after the first review of the
24 CIS had been submitted so there's a magic date back

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1 December 19th, 2008. And then that date was -- started
2 the 24-month period under which all the preliminary
3 plats, submittals had to come in, had to be reviewed
4 and approved by staff (inaudible) I don't remember
5 exactly, and then final plat had to come in and be
6 approved by staff and get to the point of a public
7 hearing for the final plat by December 19th, 2010. So
8 the extension request as we worded it incorporates all
9 pieces of the platting process.

10 The reason we sort of split it from every other
11 extension in there is we weren't including the time in
12 which they had to -- if you approve the final plat
13 there's a time limit to get it recorded and to post
14 your bond and all of that. We weren't including that
15 in this motion. We were including it only to the
16 extent of what you had to do to submit your preliminary
17 plat, final plat, and get to a final plat public
18 hearing because that was the time (inaudible) ended
19 December 19th, 2010.

20 PLANNING COMMISSIONER: I believe what we've done

21 here this evening is we've voted to not to approve an
22 extension.

23 PLANNING COMMISSIONER: Extension of the CIS which
24 includes all platting processes, preliminary and final

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1 platting processes.

2 MR. COCHRAN: Very well.

3 PLANNING COMMISSIONER: That should be sufficient.

4 MR. COCHRAN: I just wanted the record to be clear
5 that we had requested an extension of all of those
6 deadlines and I assume by your vote that you're
7 rejecting an extension of all of those deadlines.

8 PLANNING COMMISSIONER: There's only a single
9 deadline in our ordinance. It's the CIS. There's no
10 other deadlines.

11 PLANNING COMMISSIONER: But I believe the
12 gentleman has made his point for the record.

13 PLANNING COMMISSIONER: Correct. Thank you.

14 MR. COCHRAN: Thank you. Note our objection.

15 (End of proceeding.)

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1 STATE OF WEST VIRGINIA,

2 COUNTY OF BERKELEY, TO WIT:

3

4 I, Tracy P. Herron-Rice, certified court reporter
5 do hereby certify that the said transcript was taken by
6 electronic means and reduced to typewriting under my
7 supervision to the best of my ability.

8 I further certify that the foregoing was prepared
9 in accordance with Code 51/7/4.

10 Given under my hand this 14th day of April 2011.

11

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Certified Court Reporter

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4/14/11

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To: Barbara Scott
Summit Point Motorsports Park
Summit Point, West Virginia 25446

18 April, 2011

From: Martin Burk
342 Turn One Drive
Summit Point, West Virginia 25446

CC: County Commission of Jefferson County
Jefferson County Planning Commission

Dear Barbara,

You recently requested that I advise you of instances when noise from your Summit Point facility's operations were a concern. Activities over the last few days have generated excessive sound pressures that disrupt my 'quality of life', and thus, raise such concerns.

Friday afternoon, 15 April 2011, a series of 'air burst' explosions were detonated that startled me and my pets. I could see the explosions from my kitchen window. These did not originate from the Department of State Campus. They appeared to originate from a field at the back of your Training Campus property. This activity is in contradiction to the Covenants your company indicated would be imposed and enforced on this property in your 28 August 2011 Community Impact Statement presented to the Planning Commission.

Saturday and Sunday, 16 and 17 April 2011, un-muffled vehicles utilized the 'skidpad' located just behind our home throughout both days. At times, they did so with the pad dry. As you know, the original presentations to the Planning Commission for the expansion that included the 'skidpad', was that the skidpad would only be used by fully muffled BSR School cars on a fully wet surface. The repetitious full throttle applications of un-muffled vehicles and the constantly skidding tires on a dry surface exceeds the scope of use that was presented to the community and the Planning Commission.

Sunday, 17 April 2011, started with un-muffled cars on track, I believe from the loudness and throttle on-off applications, on the Jefferson Circuit, at 07:15 am. Again, the original scope of use presented and approved for the Jefferson Circuit's use was for muffled BSR School cars only, not motorsports use. In addition, I would hope that any event starting at 07:15am of un-muffled vehicle's activities would require no further explanation from me as to why that was quite disruptive.

I look forward to your prompt attention to these matters, that these types of disruptive activities not occur again.

Thank you.


Martin.



April 20, 2011

County Commissioners
Jefferson County Commission
PO Box 250
Charles Town, WV 25414

Dear Commissioners,

The purpose of this letter is to clarify some of the statements made last Thursday, April 14, 2011, at the County Commission meeting regarding the Amendment to the Subdivision and Land Development Regulations.

The Summit Point Automotive Research Center, LLC or SPARC is the land holder for the Summit Point Training Campus and Summit Point Raceway. All of the training on the Summit Point Training Campus and on the Summit Point Raceway facility is a conforming use in a rural district. Only the motorsports activities on 240 acres of the 700+ acre facility are considered a non-conforming use. The proposed amendment will not apply to any of the raceway property, only the conforming use 270-acre "campus" property.

The Training Campus completed the two-year major subdivision process after a community impact study, traffic study, and multiple public hearings and was approved for the current and pending uses.

The United States Department of State Diplomatic Security Service conducts training at Summit Point Raceway and on the Summit Point Training Campus. This training is for government employees going to US embassies in high-threat areas and has been done at the Summit Point facility since 1984. In 2007 the State Department requested that an Interim Training Facility (ITF) be built on the Summit Point Training Campus. A classroom and office building, a gymnasium with mat room, a tactical maze building, and an indoor firing range were completed in 2008. Since then we have added another instructor/office building for them. Fifty-three permanent, highly paid employees have been added since the ITF became operational.

The State Department has added a mock urban village for training with a 40' repelling tower at one corner. This village, built of tan conex containers, is not a "five-story" building. Most of the complex is sixteen to twenty-four feet tall. No live ammunition is used at the ITF, except in the indoor firing range, which is totally sound proof.

Only two helicopters have landed at the ITF in two years. The small utility craft brought visiting government officials each time. There is no helicopter training on the property except for the two stationary non-functioning helicopters with no rotors or engines that are used to train students how to get on and off the aircraft.

The State Department has a self-imposed quiet time from 7PM until 7AM, and usually trains from 8AM until 5PM. The only exception is for summer night-drive training that uses muffled sedans and uses no firearms. Between April and October during day-light savings time, night-drive training occurred only eight times last year after 7 PM.

The State Department is considering expansion within the Training Campus which will include two classroom buildings and a covered parking area. This addition is to meet an urgent and specific training requirement for Foreign Service personnel being posted to Iraq. This facility will support training on equipment that is not available anywhere else. The approval of the proposed amendment to the Jefferson County Ordinances will lead to an immediate economic impact with the employment of eight additional full time instructors, one new maintenance engineer, and two technicians. The construction phase will employ West Virginia contractors.

The Summit Point training facility management and the State Department' officials are sensitive to the concerns of our neighbors and have always tried to work with the community on any issues that arise. Going forward that will remain our highest priority.

Sincerely,



Barbara Scott
President
Summit Point Raceway
Summit Point Training Campus

To: Barbara Scott
Summit Point Motorsports Park
Summit Point, West Virginia 25446

22 April, 2011

From: Martin Burk
342 Turn One Drive
Summit Point, West Virginia 25446

CC: County Commission of Jefferson County
Jefferson County Planning Commission

Dear Barbara,

When we spoke earlier this month about the observed increase in sound emissions from your Summit Point facility, you questioned what could have changed to contribute to that observation. One factor may be the continued reduction of forest and vegetation from the clear-cut and bull-doing activities on your property.

Yesterday, during the hours that a large pavement milling machine carved up pavement in Turn One of the original circuit, (and it's vibrations resonated up through the foundation of my home), it occurred to me. As a racer, I am very appreciative of this seemingly annual, very expensive commitment to establish and maintain a precision smooth pavement surface. But there is no evidence of a similar commitment to maintain an effective sound buffer.

In fact, when forest and vegetation are removed, a natural sound barrier is removed as well. The section of forest at Turn Three that was bull-doed flat over the winter is an example of what changes are occurring that contribute to increased sound emissions.

Certainly, maintaining or improving the existing sound buffers would help to contain and absorb the sound energy generated by activities at Summit Point Motorsports Park. The continued elimination of these barriers may lead to even larger sound pressures endured by your neighbors.

I hope this helps to answer your question.

Sincerely,



Martin.



April 25, 2011

Martin Burk
342 Turn One Drive
Summit Point, WV 25446

Dear Martin,

Thank you for your letter outlining your observations. I welcome your input and would be happy to meet with you so that we can come to a better understanding.

After discussions with State Department officials, track maintenance personnel, and representatives of the various motorsports groups using the property April 15-17, here are a few things I found out.

On Friday afternoon, 15 April 2011, the State Department was conducting exercises on their leased property adjacent to the Interim Training Facility. Their response to my inquiry was, "The SNOE (Security in Nontraditional Operating Environments) course instructors used airburst pyrotechnics to create realism in simulated attacks. Since this may have caused some disturbance the State Department is reviewing the use of pyrotechnics for all training exercises." Officials have indicated, "They will do everything in their power to cause a minimum inconvenience to neighbors with a minimum impact on training."

Also be assured that the small proposed State Department project will be two classroom buildings and should not increase the noise level on our property. One building will contain one large classroom for medical training and the other building will hold two classrooms to instruct Foreign Service personnel being posted to Iraq.

On Saturday and Sunday, 16 and 17 April 2011, regarding un-muffled vehicles on the skid pad close to your home; the expansion you cited was in regard to the Shenandoah Circuit built in 2002. The skid pad in question was built as part of the Summit Point Circuit complex twenty-five years ago and has been used occasionally by high performance driving groups since it was built. Also, since it rained continuously on Saturday the 16th, the skid pad was wet all day. On Sunday, according to the group leasing the track, "the water was turned on several times during the day to keep it wet."

Finally, your report that un-muffled cars were on track on the Jefferson Circuit at 7:15am was in actuality the Woodbridge Kart Club that started their first session at 7:40am on the Shenandoah Circuit. The group was unable to run on Saturday due to the torrential rains, so started just after their normal start time of 7:30. Summit Points self-imposed quiet time for no un-muffled cars on track is 7:00 pm to 7 am, but most groups start after 8 am and end well before 7 pm.

Our records show on Saturday and Sunday, there were no cars on track before 8:15 and 8:30 am, respectively, on the Summit Point Circuit. On the Jefferson Circuit there were no cars on track before 9 am both days. I'd also like to politely correct the assumption that the Jefferson Circuit is restricted to muffled school cars. The restriction on the Jefferson Circuit is limited to schools and occasionally a high performance school is conducted on that circuit.

As you know we are installing a sound monitoring system, per your suggestion, that will continuously record sound levels on the Summit Point Circuit. We have been working with the sanctioning bodies that use the various tracks to reduce sound. We will continue to stress an awareness to reduce sound to our many users, and the track management will be more diligent in monitoring start times and noise levels of both racing and school events.

Once again, I look forward to our meeting to discuss this further.

Sincerely,



Barbara Scott
President
Summit Point Raceway

Cc: Jefferson County Commission
Jefferson County Planning Commission



April 25, 2011

Martin Burk
342 Turn One Drive
Summit Point, WV 25446

Dear Martin,

Summit Point Raceway has always tried to be a good neighbor and as a neighbor we would like to work with you and Connie to resolve any issues you have. You bought your home over ten years ago next to the end of turn one knowing that there would be motorsports going on here most weekends from March through November, and training nearly every day. You welcomed the chance to be close to the sport you love. You also enjoyed the proximity to both Summit Point Raceway and the State Department's Interim Training Facility (ITF) during the time you worked for the raceway or the ITF.

Summit Point has not changed the policy of racing time or types of vehicles that use the facility. Whatever construction we have done we have added vegetative buffer above and beyond that required by the county. We have an ongoing sound buffer planting program and will be happy to explore the possibility of adding even more vegetative buffer where our properties abut.

I love trees, and the last thing I would permit on this property is "clear-cutting." Over the winter some trees were removed to make the inside of turn three safer. Turn three is just about in the middle of our 700-acre property and since there is plenty of forest on either side of that safety improvement, there is little chance the sound will change. We will monitor to see if there is any increased decibel level at our boundaries.

The milling and paving that took place on the Summit Point Circuit last Wednesday and Thursday was done by the paving company that "repaired" our corners last year. As a racer, I'm sure you know that the turns in question were starting to unravel and had a buckled surface. Hopefully, their re-pave will solve the problem for many years.

As far as the machinery used: The milling machine was only used on Wednesday, not Thursday, as it was needed on a job elsewhere on Thursday. The paving, mix transfer, and roller machinery, used Thursday, are all standard paving equipment used on county and state roads in every state. We had a consultant on the job, Robert Harrington, who

said in a phone call to me today. "I've been in the paving and paving consulting business for thirty years. This same equipment has been used in cities, near homes and businesses with no ill effect."

Martin, why don't you come over and have a chat instead of engaging in this letter writing campaign? I'm available any day next week.

Look forward to seeing you.

Sincerely,



Barbara Scott
President
Summit Point Raceway/BSR
Manager
SPARC, LLC

Cc: Jefferson County Commission
Jefferson County Planning Commission

Jefferson County, West Virginia
Department of Planning & Zoning
116 East Washington Street; 2nd Floor
P.O. Box 338
Charles Town, West Virginia 25414

Email: planningdepartment@jeffersoncountywv.org

Phone: (304) 728-3228
Fax: (304) 728-8126

March 25, 2011

PRE-PROPOSAL CONFERENCE MEMORANDUM

MEETING DATE: Wednesday, March 9, 2011 @ 11:00 a.m.

OWNER/CONTACT: Robert S. and Amy R. Leonard aleonard@bowlesrice.com
Mailing Address: 5187 Scrabble Road; Shepherdstown, West Virginia 25443
Phone Number: (304) 876-9309 / (304) 264-4235 (Amy/work)

Physical Address: Brookstone Ridge Subdivision

PROPOSED PROJECT: RESIDENTIAL MINOR SUBDIVISION

ZONING DISTRICT: TAX DISTRICT: Shepherdstown – 09 / MAP: 2 / PARCEL(S): 7
RURAL

INDIVIDUAL PARCELS: Lots 1-6 = 24 (+/-) Acres; Lot 7 Residue = 69.46 Acres
TOTAL PARCEL SIZE: 108 Acres

MEETING DESCRIPTION:

- Need to declare density as required in the RURAL District.
- The meeting attendees included Zoning Administrator, Steve Barney; County Planner, Seth Rivard; County Engineer, Jonathan Saunders; and Owners, Robert and Amy Leonard.
- Overview: The proposed project consists of either merging all lots back into the original 98 Acre parcel, and determining what minor subdivision options are available for said parcel; or, “tolling” the Bond for the subdivision improvements.
- Tentative site capacity calculations.
- Potential environmental constraints and mitigation measures as required by Zoning Ordinance, Art. 4.
- Anticipated Time-Frame and Deadlines.
- Additional relevant information to be considered: #06-37. Lots 1-6 approved May 21, 2008; three (3) Family Transfer Lots, identified as Lots 8, 9 & 10 were approved in December 2008. Remaining Residue Lot 7 = 69.46 Acres. No infrastructure or construction has commenced on project to date.
- FEES: Upon submission, all applicable Site Plan and Building Permit fees, as required by the Engineering Department.
- Application Fee: **Currently under review and may be subject to change.**
- Payment(s): **None Received**

COMMENTS

The Owners have the option of merging all lots, then seeking re-approval of the Parent-to-Child lots as a Minor Plat. Another option is to “toll” the Bond for the development. The Owners can post a \$10,000 Bond with the County and agree to a “sunset provision”. This provision provides that the lots shall be un-platted and merged if the Owner fails to request the Bond and Surety within four years. It also stipulates that the Owner’s \$10,000

Bond would be forfeited at that time. No building permit will be issued during the “tolling” period and the lots are restricted from being sold.

If the Owners seek to merge and re-subdivide the lots:

- Minor Plat process is restricted to five lots. There are no required construction standards concerning infrastructure for a Minor Plat.
- Parent-to-Child Lots are exempt from density. Otherwise, density is 1 lot per 15 acres or 1 lot per 10 acres (cluster).
- No Bonding required for a Minor Subdivision.
- If lots front on a Right-of-Way, there must be a dimension of 50’ with sufficient area dedicated for this purpose, if necessary. Lots located on a Right-of-Way must also have 200’ frontage.
- Five-year property sale restriction on Parent-to-Child lots.

Additional information to consider includes:

- The farmhouse could be located on a separate lot if said lot has sufficient buildable area outside the floodplain. The County’s Floodplain Administrator should be consulted regarding use of the existing structure.
- There is only one access to an existing road in a Major Subdivision.
- There is a 40,000 sq. ft. minimum lot size requirement for a Parent-to-Child lot in the Rural Zoning District.
- A lot boundary adjustment with the adjacent 10-acre parcel is another option to consider for achieving access to the existing road.

FINDING:

The Minor Subdivision proposal discussed during the meeting appears to satisfy the Subdivision and Land Development Regulation requirements.

EFFECT OF FINDING:

The Applicant may proceed with the engineering of the proposed Minor Subdivision. However, because the discussion of the proposed Minor Plat was general in nature, staff recommends that the Applicants schedule another PPC Meeting prior to the submittal of a Minor Plat. Upon receipt of the required material, the Department of Planning and Zoning will process said Minor Subdivision within the time line requisites stated in the Subdivision Regulations.

Sincerely,

Steve Barney
Zoning Administrator

Jefferson County, West Virginia
Department of Planning & Zoning
116 East Washington Street; 2nd Floor
P.O. Box 338
Charles Town, West Virginia 25414

Email:planningdepartment@jeffersoncountywv.org

Phone: (304) 728-3228
Fax: (304) 728-8126

April 12, 2011

PRE-PROPOSAL CONFERENCE MEMORANDUM

MEETING DATE: Wednesday, March 23, 2011 @ 2:00 p.m.

CONTACT: Roger E. Harris, LS, PS
MAILING ADDRESS: 56 Coach Court; Harpers Ferry, West Virginia 25425
PHONE NUMBER: (304) 725-8993 rogerharrisls@frontier.com

OWNER: Roy and Janet Fry
PHYSICAL ADDRESS: 649 Willingham Road

PROPOSED PROJECT: MINOR RESIDENTIAL SUBDIVISION

TAX DISTRICT: Middleway – 07 / MAP: 16 / PARCEL: 2.8
DEED BOOK: 806 PAGE: 748
ZONING DISTRICT: RURAL

INDIVIDUAL PARCELS:
TOTAL PARCEL SIZE: 12.50 Acres

MEETING DESCRIPTION:

- Need to declare density as required in the RURAL District.
- The meeting attendees included Zoning Administrator, Steve Barney; County Planner, Seth Rivard; County Engineer, Jonathan Saunders; and Consultant, Roger Harris.
- Overview: The proposed project consists of creating a five acre parcel in the rear third section of the property with remaining Residue.
- Tentative site capacity calculations.
- Potential environmental constraints and mitigation measures as required by Zoning Ordinance, Art. 4.
- Anticipated Time-Frame and Deadlines.
- Additional relevant information to be considered: Deed of Subdivision provided.
- Because the existing access easement already serves more than five lots, a 50' access off Willingham Road is required to serve rear lot. Said access shall be located 50' off property line.
- A Plat Note must be added to limit access to Willingham only, unless Paddock (Pifer) is upgraded to a County grade road.
- FEES: Upon submission, all applicable Site Plan and Building Permit fees, as required by the Engineering Department.
- Application Fee: **Currently under review and may be subject to change.**
- Payment(s): **None Received**

FINDING:

The Minor Subdivision Concept Plan appears to satisfy the Subdivision and Land Development Regulation requirements.

EFFECT OF FINDING:

The Applicant may proceed with the engineering of the proposed Minor Subdivision. Upon receipt of the required material, the Department of Planning and Zoning will process said Minor Subdivision within the time line requisites stated in the Subdivision Regulations.

Sincerely,

Seth A. Rivard
County Planner

SR / clc
cc: Engineering and Building Permit Department

Jefferson County, West Virginia
Department of Planning & Zoning
116 East Washington Street; 2nd Floor
P.O. Box 338
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April 12, 2011

PRE-PROPOSAL CONFERENCE MEMORANDUM

MEETING DATE: Wednesday, March 23, 2011 @ 1:00 p.m.

CONTACT: Peter Kubic (for Nelson Vanquez)
MAILING ADDRESS: 241 Edmond Road; Kearneysville, West Virginia 25430
PHONE NUMBER: (304) 728-4384 kubicconstr@aol.com

PROPERTY OWNER: Donnie Fargo
PHYSICAL ADDRESS: Lone Oak Subdivision – Lot 2

PROPOSED PROJECT: MINOR RESIDENTIAL SUBDIVISION
PARENT-TO-CHILD TRANSFER

TAX DISTRICT: Charles Town – 02 / MAP: 7 / PARCEL: 8.23
DEED BOOK: 827 PAGE: 530

ZONING DISTRICT: RURAL

INDIVIDUAL PARCELS:
TOTAL PARCEL SIZE: 2 Acres

MEETING DESCRIPTION:

- Need to declare density as required in the RURAL District.
- Approval of access may be mandated by the HOA but is not a County requirement.
- The meeting attendees included Zoning Administrator, Steve Barney; County Planner, Seth Rivard; County Engineer, Jonathan Saunders; and Consultant, Peter Kubic and Nelson Vanquez.
- Overview: The proposed project consists of creating a one-acre parcel for conveyance to Mr. Fargo's daughter in a Parent-to-Child transfer. Said transfer includes a five-year restriction on the sale of the new lot.
- Tentative site capacity calculations.
- Potential environmental constraints and mitigation measures as required by Zoning Ordinance, Art. 4.
- Anticipated Time-Frame and Deadlines.
- Additional relevant information to be considered: None Known.
- Minimum lot size is 40,000 sq. ft.
- A lot line adjustment cannot be undertaken for the purpose of accumulating sufficient lot area to subdivide a new lot. However, a lot line adjustment could take place after subdivision.
- Regarding access: The Lone Oak Subdivision prohibits the subject lot from accessing Leetown Road. As Lone Oak Road is considered a right-of-way, the proposed lot may access this road if the lot has 200' of frontage, per Sec. 20.201(A)(2). Additional right-of-way dedication may be required. Joint-access driveway is an option.

- A 50' access easement is required unless 200' frontage along the road right-of-way is 50'. Since only 40' currently exists, a 10' dedication along the entire frontage of the parcel is required to achieve said 50' access easement.
- It is recommended that the HOA be contacted prior to subdividing.
- FEES: Upon submission, all applicable Site Plan and Building Permit fees, as required by the Engineering Department.
- Application Fee: **Currently under review and may be subject to change.**
- Payment(s): **None Received**

FINDING:

The Minor Subdivision Concept Plan appears to satisfy the Subdivision and Land Development Regulation requirements.

EFFECT OF FINDING:

The Applicant may proceed with the engineering of the proposed Minor Subdivision. Upon receipt of the required material, the Department of Planning and Zoning will process said Minor Subdivision within the time line requisites stated in the Subdivision Regulations.

Sincerely,

Seth A. Rivard
County Planner

SR / clc
cc: Engineering and Building Permit Department

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April 13, 2011

PRE-PROPOSAL CONFERENCE MEMORANDUM

MEETING DATE: FEBRUARY 23, 2011 @ 10:00 a.m.

CONTACT NAME: Peter Lorenzen
Mailing Address: P.O. Box 316 – Summit Point, West Virginia 25446
Phone Number: (304) 728-6093

Property Owner: Julie Blikensstaff

Physical Address: Route 1, Box 1001 – Summit Point, West Virginia 25446

PROPOSED PROJECT: RESIDENTIAL MINOR SUBDIVISION

ZONING DISTRICT: TAX DISTRICT: MIDDLEWAY – 06 / MAP: 1 / PARCEL: 3
RURAL

INDIVIDUAL PARCELS: Lot #1: 1.54 Acres / Lot #2: 3.10 Acres / Remaining Residue: 166.75 Acres
TOTAL PARCEL SIZE: 171.39 Acres

MEETING DESCRIPTION:

- Need to declare density as required in the Rural District.
- The meeting attendees included Zoning Administrator, Steve Barney; County Planner, Seth Rivard; County Engineer, Jonathan Saunders; Consultant, Pete Lorenzen and Mr. Blikensstaff.
- Overview: The proposed project consists of creating a Three (3) Lot Minor Subdivision to include Two Lots and a Residue.
- Tentative site capacity calculations.
- Potential environmental constraints and mitigation measures as required by Zoning Ordinance, Art. 4.
- Anticipated Time-Frame and Deadlines.
- Additional relevant information to be considered: File #05-12; File #95-32 / Re: Transfer of development rights associated with Shirley Estates Subdivision.
- FEES: Upon submission, all applicable Site Plan and Building Permit fees, as required by the Engineering Department.
- Application Fee: **Currently under review and may be subject to change.**
- Payment(s): **None Received**

COMMENTS:

- Two development rights currently exist on the Residue parcel as documented in File #05-12. Following the proposed creation of two lots and a Residue parcel, no development rights will remain. A note to this effect must be placed on the Plat per Appendix A, Sec. 1.3A(31).
- The existing easement must be widened to 50' along the frontage of the lots.
- Health Department approval for well and septic is required.
- West Virginia Department of Highways entrance permit is required.
- Rural District setbacks apply: 40' front / 15' side / 50' rear. Applicant has the option to use 15' side yard setback for corner lot on side fronting an access easement serving five or fewer lots.
- Add note to Final Plat as required by Addressing Division.

FINDING:

The Minor Subdivision concept plan appears to satisfy the Subdivision and Land Development Regulation requirements.

EFFECT OF FINDING:

The Applicant may proceed with the engineering of the proposed Minor Subdivision. Upon receipt of the required material, the Department of Planning and Zoning will process said Minor Subdivision within the time line requisites stated in the Subdivision Regulations.

Sincerely,

Steve Barney
Zoning Administrator

SB / clc
cc: Engineering and Building Permit Department

**Jefferson County, West Virginia
Department of Planning & Zoning**

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Email: planningdepartment@jeffersoncountywv.org

April 8, 2011

PRE-PROPOSAL CONFERENCE MEMORANDUM

MEETING DATE: Wednesday, March 23, 2011 @ 3:00 p.m.

APPLICANT / CONTACT NAME: Scott Bearup papabear-64@hotmail.com
Address: 166 Lamonte Drive; Harpers Ferry, West Virginia 25425
Phone Number: (517) 525-2079

Property Owner: Shannondale, Inc.
Physical Address: 2128 Mission Road; Harpers Ferry, West Virginia 25425

PROPOSED PROJECT: NON-RESIDENTIAL MINOR SITE DEVELOPMENT

ZONING DISTRICT: DISTRICT: Kabletown – 06 / MAP: 6 / PARCEL: 4
Rural
TOTAL PARCEL SIZE: 15.487 Acres

MEETING DESCRIPTION:

- The meeting attendees included Zoning Administrator, Steve Barney; County Planner, Seth Rivard; County Engineer, Jonathan Saunders; County Compliance Officer, Mason Carter; County Building Inspector, Mike Monaghan; GIS Technician, Jessica Gormont; Applicants, Scott Bearup and Michelle Black.
- Overview: The proposed project consists of creating a primitive campground comprised of approximately one hundred fifty (150) 25'x60' sites. An existing administrative building will house an office.
- Potential environmental constraints and mitigation measures as required by Zoning Ordinance.
- Anticipated Time-Frame and Deadlines.
- Additional relevant information to consider includes: The property was surveyed in 1995 by Ed Johnson (PB#13/PG#42). Said parcel was part of a 4-5,000 acre area in the 1950's. There are two existing buildings situated on property, totaling approximately 1,100 sq. ft. The first structure is a pre-Revolutionary building that was expanded during the Civil War. The other is a former Iron Forge, also dated prior to the Revolutionary War, that was originally used in the construction of Harpers Ferry and its ammunition factory.
- FEES: Upon submission, all applicable Site Plan and Building Permit fees, as required by the Engineering Department.
- Payment(s): **None Received**

COMMENTS:

As with any significant real estate transaction, staff recommends that the Applicants **consider consulting with a real estate attorney prior to purchasing a property**. Staff's understanding of the Applicants' proposal is as follows: a campground with 147 primitive sites, including a central paddock for horses from the Charles Town racetrack. An office for the campground would be located in the existing building on the site (per the Applicant, the building has been used as an office since 1950) and the campground operator(s) would also reside in this building to reduce permanent campers. Campground tenants would be required to relocate to a different site every two weeks.

To establish a campground on the property identified by the Applicants, the following steps will be necessary:

- 1) Land use approval
- 2) Preliminary approval from other agencies
- 3) Site plan approval
- 4) Engineering Department inspection of improvements

1. Land use approval

As discussed at the meeting, a campground is not a principal permitted use in the Rural District. **Staff has determined that conversion of the existing land use on the property to a campground will not qualify as a change of nonconforming use, for the following reasons:**

- The office land use that the Applicant has identified as taking place on the property is currently limited to the building on the site. A change in nonconforming use is limited to an increase of 35% of the physical area where the use is taking place. This would allow only a very small portion of the property to be converted to a campground use, rather than the conversion of the entire site, as the Applicant has requested.
- The Zoning Ordinance provides staff limited authority to administratively approve only nonconforming use changes between land uses that are similar in nature. An office and a campground are not sufficiently similar to allow an administrative change in nonconforming use. Such a change would require Board of Zoning Appeals approval; however, as noted above, only a small portion of the site could be converted to a different nonconforming use.

To achieve permitted-use status for a campground land use, successful processing of Conditional Use Permit application (pursuant to Article 6 and Article 7 of the Zoning Ordinance) would be necessary. The Conditional Use Permit process requires at least three months and entails the following steps:

- Applicant submittal of a full Conditional Use Permit application including all items listed in Section 7.4
- Staff evaluation of the application per the Development Review System, including an evaluation of soils and amenities as described in Article 6 of the Zoning Ordinance
- Determination of LESA score (a score below 60 points advances the application to a Neighborhood Compatibility Meeting)
- Neighborhood Compatibility Meeting

- Board of Zoning Appeals public meeting and vote on the CUP application
- Staff issuance of the CUP

2. Preliminary Approval from Other Agencies

If the Applicant successfully attains a Conditional Use Permit, documentation of (at minimum) preliminary approval from the following other agencies will be required for site plan submittal. The Applicant may want to initiate obtaining these approvals during the Conditional Use Permit process:

- Jefferson County Health Department (water and septic)
- West Virginia Health Department (if needed)
- West Virginia Division of Highways (entrance permit)
- Department of Environmental Protection (alternative wastewater treatment)

In addition, the Applicant should seek a floodplain delineation from the Department of Engineering, and/or a base flood elevation determination from a surveyor or engineer.

3. Site Plan Approval

Approval of a site plan, prepared by a civil engineer, will be required prior to issuance of permits. A full site plan would be required. In addition to the standard site plan requirements of the Subdivision and Land Development Regulations, a campground must also comply with the minimum requirements of Section 7.3, Appendix B. Please note that among other requirements, Section 7.3D requires, at minimum, “water and sewerage facilities provided at convenient comfort stations as determined by the Planning Commission.”

Stormwater management will be required. However, the use of Low-Impact Development stormwater management techniques may be an option, depending on the slope of the site.

The plan may be processed as a minor site plan (reviewed administratively) if it meets the criteria of Sec. 20.203 of the Subdivision and Land Development Regulations.

Approvals from all relevant agencies listed above will be required prior to the Planning, Zoning and Engineering Departments’ approval of a site plan. In addition, all site improvements must be bonded.

4. Engineering Department inspection of improvements

The Engineering Department must inspect and approve all improvements (driveway, stormwater management, parking, etc) prior to release of bonding and approval for use of the site.

Other factors to be aware of include the following:

- A portion of the property lies in the floodplain. No new structures (buildings, campers, etc) or work (grading, removal of trees, etc.) within the Floodplain. Please refer to Jefferson County Floodplain Ordinance for permitted work options in a Floodplain.
- If the proposed use of the existing office building is considered a change of use per the adopted Building Code, all relevant standards must be met. Some flexibility is provided for historic properties. If both

residential and commercial uses are combined in the existing office building, it may be considered a live/work structure if the building and use meet the technical requirement of Section 419 of the adopted version of the International Building Code.

- As a proposed commercial land use located within 1000 feet of the Shenandoah River, section 22.504 (Protection of Resources) may apply.
- Offsite signage would require a variance from the Board of Zoning Appeals.

FINDING:

Per Section 4.10 of the Zoning Ordinance, the ILP Ordinance, and current Subdivision Regulations, the proposed plan concept will require approval of a Conditional Use Permit in addition to a Full Site Plan submission, and may comply with the processing conditions for Minor Site Development.

EFFECT OF FINDING:

The processing of a Conditional Use Permit and Site Plan are required. Building Permits must also be obtained, prior to the start of construction, and appropriate approvals from all Local, State and Federal Agencies, are necessary for the issuance of a Zoning Certificate. Contact the Jefferson County Addressing Department for additional processing information.

Sincerely,

Steve Barney
Zoning Administrator

Jefferson County, West Virginia

Department of Planning & Zoning

116 East Washington Street; 2nd Floor

P.O. Box 338

Charles Town, West Virginia 25414

Phone: (304) 728-3228

Fax: (304) 728-8126

Email: planningdepartment@jeffersoncountywv.org

April 15, 2011

PRE-PROPOSAL CONFERENCE MEMORANDUM

MEETING DATE: Wednesday, April 6, 2011 @ 3:00 p.m.

APPLICANT / OWNER NAME: Eric and Anna Sokel
ADDRESS: 164 Alstadt's Hill Road; Harpers Ferry, West Virginia 25425
PHONE NUMBER: (304) 535-2527 / EAS2RIVERS@aol.com

PHYSICAL ADDRESS: Same

PROPOSED PROJECT: NON-RESIDENTIAL MINOR SITE DEVELOPMENT

DISTRICT: Harpers Ferry – 04 / MAP: 9-2 / PARCEL: 60
DEED BOOK: 154 / PAGE: 228

ZONING DISTRICT: Residential-Light Industrial-Commercial
TOTAL PARCEL SIZE: 1.25 Acres

MEETING DESCRIPTION:

- The meeting attendees included Zoning Administrator, Steve Barney; County Planner, Seth Rivard; County Engineer, Jonathan Saunders; County Inspector, Mike Monaghan; and Owner, Eric Sokel.
- Overview: The proposed project consists of opening an annual Seasonal Use Food Stand, primarily during weekends from May-October (approximately six months), to correspond with the 340 Flea Market operation time-frame.
- Potential environmental constraints and mitigation measures as required by Zoning Ordinance.
- Anticipated Time-Frame and Deadlines.
- Additional relevant information to consider includes: Property was Platted by J. James Skinner on May 29, 1941. Chain of Ownership: (pre 1941) Hardy / 1941- Everhart / (?) James / 1951- D'Angelo / 2000 – Sokel.
- Will need to contact the Health Department.
- Parking: Four (4) paved spaces required - three for business, one for the residence. Of these, one space must be handicap van accessible.
- Structure, parking setbacks, and distance requirements must be met.
- Electrical inspection may be necessary.
- Proposed aluminum tent may require a fire resistant top.
- Site Plan, designed by Certified WV Civil Engineer, is required.
- Site Plan to include Stormwater.
- FEES: Upon submission, all applicable Site Plan and Building Permit fees, as required by the Engineering Department.
- Payment(s): **None Received**

FINDING:

Per Section 4.10 of the Zoning Ordinance, the ILP Ordinance, and current Subdivision Regulations, the proposed plan concept will require a Limited Site Plan submission, and may comply with the processing conditions for Minor Site Development.

EFFECT OF FINDING:

The processing of a Site Plan is required. Building Permits must also be obtained, prior to the start of construction, and appropriate approvals from all Local, State and Federal Agencies, are necessary for the issuance of a Zoning Certificate. Contact the Jefferson County Addressing Department for additional processing information.

Sincerely,

Seth A. Rivard
County Planner

SB/ SR/ clc
cc: Engineering and Building Permit Department