

AGENDA
JEFFERSON COUNTY PLANNING COMMISSION
November 08, 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. Election of President.
2. Approval of the minutes for the October 11, 2011 meeting.
3. Citizen Communications.
4. Request for postponement.
5. Public Hearing for Zoning Map Amendment (Rezoning) for property designated as Tax District: Harpers Ferry, Map: 9, Parcel: 39.1. This property is currently zoned Residential Growth and Residential/Light Industrial/Commercial zoning is being requested. The property is located on the south side of Route 340 (William L. Wilson Freeway); the east side of Route 27 (Millville Road) and on the north side of Route 27/2 (Allstadt's Hill Road) and is a total of 12.97 acres. James and Barbara Gibson are the owners.
6. Public Hearing for Zoning Map Amendment (Rezoning) for property designated as Tax District: Shepherdstown, Map: 13, Parcels: 26.1, 26.2, 26.3 & 26.4. These properties are located on Kearneysville Pike approximately 0.5 miles west of its intersection with Morgan Grove Road and are a total of 13.69 acres. Twin Oaks Subdivision, LLC is the owner.
7. Final Plat Public Hearing for a resubdivision of Lot #16 and the Homeowners Association Parcel of the Cedar Meadows Airpark (PC File #11-07) The property is located on Hardesty Road near the VA/WV border, close to the intersection with Jamestown Road and is designated as Tax District: Middleway, Map: 29, Parcel: 1. Timothy J. Foltz is the owner/developer.
8. Final Plat Public Hearing for a major plat change for Spruce Hill (PC File #02-08) to amend the 50' landscape buffer to accommodate a garage on Parcel #88. This property is located on Huyett Road approximately 0.5 miles west of its intersection with US Route 340 at 411 Blue Spruce Drive in Charles Town, W.V., 25414 and is designated as Tax District: Kabletown, Map: 3C, Parcel: 88. William and Lori Davis are the owners.
9. Site Plan Public Hearing for Jefferson Asphalt Products (PC File #S11-12). This project consists of a 60 ft. by 70 ft. single story office building and a 60 ft. by 100 ft. maintenance shop. The property is located at 9390 Middleway Pike on WV Route 51 near Tuscawilla Hills and is designated as Tax District: Charles Town; Tax Map: 13 Tax Parcel: 7.
10. Request by Robert Henshaw (WilBob Farm Inc.) for a waiver from the Subdivision Regulations Section 20.201 to allow for a second access to the property. This property is located on Route 51 approximately 0.3 miles west of the intersection of Middleway Pike and North Childs Road and is designated as Tax District: Middleway, Map: 19, Parcel: 39.
11. Reports from Legal Counsel and legal advice to PC.

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NOVEMBER 8, 2011
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12. Director's Report.

13. County Commission Liaison Report.

14. Planning Commission Exchange.

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

15. President's Report.

16. Actionable Correspondence.

17. Non-Actionable Correspondence.

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.

Any party desiring a transcript of these proceedings will be responsible for providing a competent stenographer at their own expense. 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
OCTOBER 11, 2011

The Jefferson County Planning Commission met on Tuesday, October 11, 2011, with the following Commission members present: Daniel Hayes, President; Morgan Etters, Secretary; Gene Taylor, Kelly Baty, Ed Burns, Paul Taylor, Eric Smith and Walt Pellish. Staff members present included Jennifer Brockman, Director of Planning and Zoning; Seth Rivard, Planner; Jonathon Saunders, County Engineer; Stephanie Grove, Assistant Prosecuting Attorney; and Amy Puetz, Planning Clerk.

Mr. Arnold Dailey was absent with notification.

Mr. Hayes called the meeting to order at 7:00 PM.

1. Approval of the minutes for the September 13, 2011 meeting.

Mr. Pellish moved to approve the minutes of the September 13, 2011 Planning Commission meeting. Mr. Taylor seconded the motion which carried 5 for and 1 abstention (Ms. Etters).

2. Citizens Communication.

Ms. Kathy Knight, Homeowner's Association (HOA) President of Carriage Park I, discussed her concerns regarding the Home Business and Cottage Industry Amendments. She questioned which body, the Planning Commission or the HOA, would enforce the HOA covenants; that do not allow home businesses in their subdivisions. Ms. Knight commented that the HOA should be notified when a home business is being proposed within their subdivision. She distributed a form that she suggested to be completed and notarized with each Home Business/Cottage Industry applied for when the residence is located in a subdivision with an active HOA.

Mr. Hayes reminded Ms. Knight that the Planning Commission had already forwarded the amendments to the County Commission for approval. Ms. Brockman stated that the County Commission had left the public hearing on this topic open for public comment which would be discussed on November 3, 2011.

Ms. Knight continued to explain the proposed form and requested that the legal department make necessary edits to the document. Discussion regarding enforcement of covenants ensued. Ms. Brockman agreed to forward the proposed form to the County Commission for review.

3. Request for postponement. None.

4. Concept Plan Review and Public Workshop for Hite Road Park (PC File #S11-15). This property is located on the north side of Hite Road, approximately 2 miles south of the intersection of State Route 9 (Charles Town Road) and County Route 1 (Kearneysville-Virginia Line Road). This project consists of a 119 acre property owned by Jefferson County Parks and Receptions, dedicated for public use to include

walking trails, picnic and park areas, athletic fields, sports courts, a skate park, miniature golf course, and sports support facilities. The property is located in Tax District: Middleway; Tax Map: 9 Tax Parcel: 2.17.

Mr. G. Taylor recused himself due to being a member of the Jefferson County Parks and Recreation Committee (JCPRC) and he left the room.

Mr. Zac Lette, of Land Planning Development Association, representing JCPRC gave a detailed visual presentation of the project.

Mr. Baty entered the room at 7:17 PM.

Mr. Denny Dunlap, of Triad Engineering, reviewed the infrastructure on the property.

Mr. Rivard read from his staff report recommending approval with the condition that a required traffic study be submitted with the site plan and that the walking trail be extended across the roadside of the park to replace sidewalks.

Mr. Wesley Wendell, previous property owner, explained the history of the project.

Mr. Hayes opened the public hearing. Mr. David Tabb, Jefferson County resident, questioned if all Environmental Protection Agency (EPA) issues had been addressed and if the chemicals had been removed from the property to avoid a health risk.

Mr. James Wells, owner of an adjoining property, suggested that the park may need security and raised concern that foot traffic from a nearby subdivision may destroy the park.

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

Mr. Lette explained that a Phase I Environmental Site Assessment was completed to satisfy EPA issues and security would be addressed with a closed gate preventing vehicular access after-hours.

Mr. Burns moved to approve with the staff recommended motion (attached). Mr. Pellish seconded the motion which carried unanimously.

Mr. G. Taylor reentered the room at 7:45 PM.

- 5. Determination of Completeness of a Site Plan for Jefferson Asphalt Products (PC File #S11-12). This property is located at 9390 Middleway Pike on WV Route 51 near Tusawilla Hills. The property is located in Tax District: Charles Town; Tax Map: 13 Tax Parcel: 7.**

Mr. Smith entered the room at 7:46PM.

Mr. Rivard read from his staff report and recommended finding the site plan complete. Mr. Pellish moved to approve for completeness and to schedule the site plan public hearing for November 8, 2011. Mr. Smith seconded the motion which carried unanimously.

Mr. Dirk Stansbury, engineer for Jefferson Asphalt Products, requested that the Planning Commission allow him to pour concrete at the location prior to the site plan public hearing. There was discussion regarding legal aspects of allowing this activity for the project and if a decision could be made at this meeting since it was not placed on the agenda for voting. Mr. Hayes suggested that Mr. Stansbury work with staff to discuss options of commencing early construction properly.

6. **Request by Middleway Volunteer Fire Company (Marshall Edwards) for a waiver from the Subdivision Regulations Appendix B Section 9.6 A and C requiring sidewalks to be provided in non-residential development. This property is located at Leetown Rd. and Darke Hill Rd across from Hinton Rd and is designated as Tax District: Middleway, Map: 24, Parcel: 2.**

Mr. Rivard explained the history of the project and read from his staff report recommending approval of a waiver from sidewalk requirements. Mr. Saunders deferred to the Planner.

Mr. Michael Mood, applicant, commented that the staff report was complete and that he had nothing to add.

Mr. Hayes opened the public hearing. Mr. David Tabb, Jefferson County resident, spoke in support of granting the waiver.

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

Mr. Burns suggested that the staff amend the language of the Subdivision Regulations since several of the recent waivers have been regarding sidewalks.

Ms. Ethers moved to approve the waiver with the staff recommended motion with the amendment to the staff recommended motion that the 4 criteria for approving a waiver are included and the date at the bottom be corrected. (Corrected motion attached) Mr. Burns seconded the motion which carried unanimously.

7. **Discussion and vote on the Urban Tree Canopy Goals.**

Ms. Brockman reviewed the Urban Tree Canopy Goals and discussed the steps necessary to approve the document. She stated that Ranson and Charles Town had not yet provided comments. Mr. Smith moved to forward the Urban Tree Canopy Goals to the County Commission for approval with a provision that any comments or revisions received by Ranson and/or Charles Town be considered. Mr. Burns seconded the motion which carried unanimously.

8. Zoning Ordinance Amendments Updates.

Mr. Barney stated that amendments to zoning categories were being considered and that additional, more precise commercial zoning categories would be presented at a future Planning Commission meeting.

Mr. Barney stated that a round table discussion regarding Recreation Land Uses would be held on Friday, October 21, 2011. Ms. Brockman stated that the Planning Commissioners submit suggestion of potentially interested parties to staff.

9. Reports from Legal Counsel and Legal Advice to PC.

Ms. Grove stated that the agreed settlement order of Civil Action 11-C-125 Far Away Farms v. Jefferson County Planning Commission discussed at the July 26, 2011 Planning Commission meeting had been signed and should be included in the minutes of this meeting. (Full text of the order is attached)

Ms. Grove stated that, in accordance with Peters v. Wood County Commission, the Planning Commission would need to go into Executive Session to discuss pending litigation. Mr. Burns moved to begin Executive Session. Mr. Smith seconded the motion which carried unanimously. Executive Session began at 8:30 PM.

Mr. Burns moved to end Executive Session and reconvene in Regular Session. Mr. Pellish seconded the motion which carried unanimously. Executive Session ended at 8:47 PM.

10. Director's Report.

Ms. Brockman informed the Planning Commission that on Tuesday, October 18, 2011, the Eastern Panhandle Trail Blazers would host a meeting in conjunction with the Harpers Ferry National Park's Alternate Transportation Stakeholders meeting in the Mather Training Center to discuss planning a walking trail between Harpers Ferry and Charles Town.

Ms. Brockman discussed her role in speaking at the Chesapeake Bay Watershed Forum on September 30, 2011.

Ms. Brockman reported that the public hearing for amendments to article 4A, Section 2.2 and Section 10.3 of the Zoning and Land Development Ordinance, and Section 20.203 of the Subdivision and Land Development Regulations regarding Home Occupations and Cottage Industry had been continued to allow comment through October 20, 2011 and to be heard on November 3, 2011. She also stated that staff would be compiling comments and edits received regarding amendments Articles 20 and 26 of the Subdivision Regulations regarding Maximum Square Footage Requirements for a Minor Site Plan, Article 12 of the Zoning Ordinance regarding the Process of Amending the Zoning Map and/or Zoning Ordinance Text, and Article 24 of the Subdivision Regulations regarding the Timeframes and Noticing Requirements for Processing Procedures for the November 3, 2011 County Commission

meeting. She stated that the Planning Commission bylaws were adopted by the County Commission. There was a short discussion regarding allowing for better preparation of amendments in the future by holding a joint meeting between the Planning Commission and the County Commission before going forth with public hearings.

Ms. Brockman reported on a public hearing held by the County Commission on October 26, 2011 regarding the Hott Property rezoning.

Ms. Brockman reviewed upcoming agenda items for the November 8, 2011 meeting. She also discussed the first quarterly report that had been included in the packet.

11. County Commission Liaison Report.

Mr. Pellish requested that staff discuss with the legal department again if conditions placed on a zoning map amendment could be legally enforced. He also stated that he believes that HOAs need to be the enforcers of their own covenants.

12. Planning Commission Exchange.

- **Report from the Health Department Meeting Liaison.**

Mr. Burns reported that there was a lengthy discussion between the Health Department and the Ranson Parks and Recreation regarding digging a well on the park property behind Kohls to deter large water charges. The Health Department was awaiting legal advice to see if the regulations could be either varied or amended since regulations do not allow a well to be installed currently.

- **Report from the Public Service District Meeting Liaison.**

Mr. Hayes stated he was unable to attend. However, he reported that the main issue that the PSD is facing is the cancellation of plans for the Flowing Springs Wastewater Treatment Plant.

- **Report from the Parks and Recreation Meeting Liaison.**

Mr. G. Taylor stated that the Parks and Recreation meeting discussed the projects of Hite Road Park and Molten Park.

- **Report from the Jefferson County Development Authority Meeting Liaison.**

Mr. Pellish stated that there was nothing significant to report.

- **Report from the Water Advisory Committee Meeting Liaison.**

Mr. Baty reported that Ms. Widmeyer addressed the Water Advisory Committee and reminded them to focus on County Commission direction when developing their work plan.

Mr. G. Taylor distributed a proposed amendment to Section 4.9 of the Planning Commission Bylaws regarding tardiness. He read the proposed amendment, which was drafted by staff, in its entirety, making edits as he read. There was discussion regarding the amount of time that would constitute tardiness. Mr. Hayes directed staff to make the edits to the proposed amendments and to place on the December 13, 2011 agenda. He also requested to review the election of officers should any officer be forced to resign his position for any reason.

Mr. Burns commented that the motion approved by the Planning Commission to forward the Hott Property zoning map amendment to the County Commission was improperly written and had lead some citizens to believe that the Planning Commission had approved the rezoning instead of only recommending approval. Discussion ensued regarding ensuring that the staff recommended motion is correct before including in a final motion and if the staff recommended motion needs amending, ensuring the edits are correct before the president signs the document.

13. President's Report.

Mr. Hayes allowed this time for Mr. David Tabb to make public comment.

Mr. Tabb requested that when area studies occur that residents within that study area receive notification.

14. Actionable Correspondence. None.

15. Non-Actionable Correspondence. None.

Mr. Burns moved to adjourn the meeting at 9:26 PM. Mr. G. Taylor seconded the motion which carried unanimously. An audio recording and/or a video recording of the meeting may be found on our website. These minutes were prepared by Amy Puetz, Planning Clerk.

**A Motion Recommending Completeness Review regarding a
Major Site Plan for Jefferson Asphalt
October 11, 2011**

**Whereas, Jefferson Asphalt is proposing a 4,200 square foot office and 6,000 square foot shop;
and**

**Whereas, The property is located at corner of 9390 Middleway Pike (Highway 51), Charles
Town, WV 25414 and is identified as Parcel 7 as shown on Tax Map 13 of the Middleway Tax
District, cumulatively consisting of 34.27 acres; and**

**Whereas, The Planning Commission is required to schedule a public hearing regarding the
major site plan as outlined in Section 24.124 of the Subdivision and Land Development
Regulations; and**

**Whereas, The Planning and Zoning Department Staff finds the Jefferson Asphalt Site Plan
complete and in conformance with the Subdivision and Land Development Regulations.**

**Now therefore be it moved, that the Jefferson County Planning Commission finds the above
complete for the major site plan for property identified in the Jefferson County Tax Map as
Parcel 7 as shown on Tax Map 13 of the Middleway Tax District.**

**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.**

**Direction given this 11 day of October 2011
By vote of the Jefferson County Planning Commission**


Planning Commission President

Daniel Hayes

**A Motion Recommending Waiver of sidewalks
for Middleway Volunteer Fire Company
October 11, 2011**

Whereas, Middleway Volunteer Fire Company is proposing a 9,000 sq. ft. fire station with an office, 6 bay garage, a multipurpose room; and

Whereas, The property is located east of Leetown Road and the Cedar Hollow intersection and is identified as Parcel 2 as shown on Tax Map 24 of the Middleway Tax District; and

Whereas, The property is located east of Leetown Road and the Cedar Hollow intersection and is identified as Parcel 2 as shown on Tax Map 24 of the Middleway Tax District is being subdivided for a new lot for the proposed use and only the new parcel create is affected by the waiver; and

Whereas, Middleway Volunteer Fire Company is requesting a waiver of sidewalks; and

Whereas, The Jefferson County Planning Commission finds that the potential future residential development near the proposed Middleway Volunteer Fire Company is limited and therefore sidewalks in this specific location are not appropriate; and

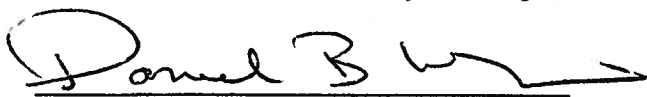
Whereas, the following findings shall have been made with regards to the request in accordance with the provisions of Appendix B, Section 9.6 of the 2008 Subdivision Regulations which requires sidewalks in nonresidential projects and a waiver of the requirement has been found to be in conformance with Section 24.300 of the 2008 Subdivision Regulations:

1. The design of the project will provide public benefit in the form of reduction in County maintenance cost, greater open space, parkland consistent with the County parks plan, or benefits of a similar nature.
2. The waiver, if granted, will not adversely affect the public health, safety or welfare or the rights of adjacent property owners or residents.
3. The waiver, if granted, will be in keeping with the intent and purpose of this Ordinance.
4. The waiver, if granted, will result in a project of better quality and/or character.

Now therefore be it moved, that the Jefferson County Planning Commission finds the above mentioned waiver from installing sidewalks for only the parcel that will be create out of property identified in the Jefferson County Tax Map as Parcel 2 as shown on Tax Map 24 of the Middleway Tax District.

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.

Direction given this 11 day of October 2011
By vote of the Jefferson County Planning Commission



Planning Commission President

Daniel Hayes

L. Gutsell

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

RECEIVED
AUG 03 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 Hason,
Respondents.

AGREED SETTLEMENT ORDER

On the 3rd day of August, 2011, came the parties, Far
Away Farm, LLC, by counsel, the Law Office of Richard G. Gay, LC, and the Jefferson County
Planning Commission, by counsel, Jefferson County Prosecutor's Office.

WHEREAS, the Planning Commission is currently in litigation in the Circuit
Court of Jefferson County, West Virginia in the above-referenced case.

WHEREAS, the Planning Commission has determined that it is in the best
interest of the Planning Commission and the citizens of Jefferson County to resolve the issues
currently before the court in Civil Action No. 11-C-125 by agreeing to settle the Circuit Court
case under the conditions stated below.

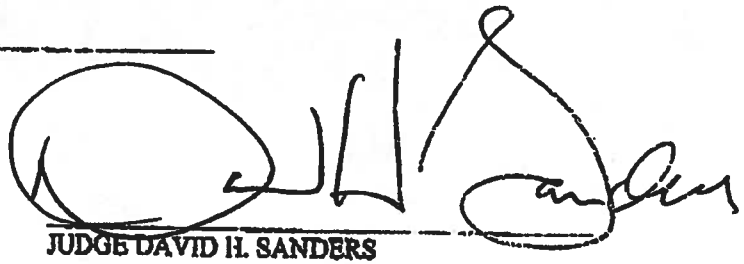
WHEREAS, the parties have agreed to resolve and settle the issues in this case under the following terms and conditions:

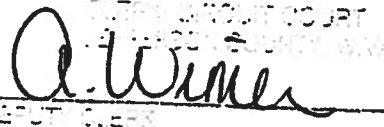
1. The Planning Commission will re-issue the conditional use permit to Far Away Farm, and all conditions to the existing conditional use permit will attach to the re-issued conditional use permit;
2. The developer will agree to proceed under the new subdivision regulations (as enacted on October 9, 2008, and as amended as of August 19, 2010, effective November 2010);
3. Further the Planning Commission agrees that the conditional use permit shall be valid for eighteen (18) months in addition to an eighteen (18) month extension permitted under the Jefferson County Zoning Ordinance, for a total of three (3) years;
4. Because Far Away Far, has submitted extensive documentation in relation to the community impact statement under the prior ordinance, and participated in an extensive public hearing, the Planning Commission agrees that the pre-existing community impact statement serves in lieu of the concept plan, public workshop/comments, and related pre-preliminary plat phase requirements that exist under the new subdivision ordinance;
5. All time lines with respect to the new subdivision regulations and the re-issuance of the conditional use permit will be reset and begin as of the date the Court signs the entry of the Agreed Settlement Order in this Civil Action No. 11-C-125; and

The parties agree this settlement resolves all issues that were raised in Civil Action No. 11-C-125. The case shall be dismissed with prejudice and removed from the docket of the Jefferson County Circuit Court. Further, each party shall bear its own costs and attorney fees incurred to date in this matter.

IT IS SO ORDERED.

DATE: 8/3/11


JUDGE DAVID H. SANDERS

CLERK OF COURT
JEFFERSON COUNTY, MISSOURI

CLERK

3cc
- C. Gutschall
- R. Gay
- S. Gron
8/4/11
AW

Agreed:

By: Jefferson County Planning Commission

Donald B. Hayes
President of the Planning Commission

[Signature]
Jefferson County Prosecutor's Office
Counsel for Jefferson County Planning Commission

By: Far Away Farm, LLC

[Signature] *Marketing member*

Mike Bohz
Richard G. Gay
Law Office of Richard G. Gay, LC
Counsel for Far Away Farm, LLC

MINUTES
JEFFERSON COUNTY PLANNING COMMISSION
JULY 26, 2011

The Jefferson County Planning Commission met on Tuesday, July 26, 2011, with the following Commission members present: Daniel Hayes, President; Morgan Etters, Secretary; Gene Taylor, Kelly Baty, Ed Burns, Eric Smith, and Walt Pellish. Staff members present included Jennifer Brockman, Director of Planning and Zoning; Seth Rivard, Planner; Jonathon Saunders, County Engineer; Stephanie Grove, Assistant Prosecuting Attorney; and Amy Puetz, Planning Clerk.

Mr. Arnold Dailey and Mr. Paul Taylor were absent with notification.

Mr. Hayes called the meeting to order at 7:00 PM.

1. **Approval of the minutes for the July 12, 2011 meeting.**
Mr. Pellish moved to approved the July 12, 2011 Planning Commission Meeting minutes.
Mr. Burns seconded the motion which carried 5 for and 1 abstention (Mr. Baty).
2. **Citizens Communication: None.**
3. **Request for postponement: None.**
4. **Old Business**
 - **Report back to the Planning Commission regarding the Hott property processing options.**
Ms. Brockman reported that staff had held a meeting with applicants for the Hott property rezoning request to discuss processing options of Rezoning versus a Conditional Use Permit (CUP). She notified the Planning Commission that the applicants had chosen to continue with the rezoning process and not process as a CUP.
5. **Declaration of Violation for Robert Schelin of the Jefferson County Improvement Location Permit Ordinance for no Improvement Location Permit for a shed on property designated as Parcel 40 on Tax Map 7 in the Shepherdstown District as found in Deed Book 826 at Page 676.**
Mason Carter, Ordinance Compliance Officer, requested a declaration of violation for Robert Schelin for a violation of a shed built on the property without a permit. Mr. Carter presented photographs as support for his request. Mr. Burns moved to declare a violation against Robert Schelin. Mr. Pellish seconded the motion which carried unanimously.

Mr. Hayes called to hear agenda item #7 before agenda item #6.
7. **Discussion and possible vote on 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.**
Mr. Barney reviewed the comments made at the June 28, 2011 Planning Commission Meeting when a public hearing regarding these amendments was held. Mr. Barney presented a chart of 8 issues with the amendments describing the current language in the ordinance, the

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public comment that was made, and staff's recommendation of changes that could be made to satisfy those requests:

- **Comment #1: In Section 4A.5.1.2, a WV Department of Highways (WVDOH) Highway Entrance Permit is required with plan submittal. Public comment addressed the concern that the WVDOH did not have different requirements for small home businesses and large commercial businesses. Mr. Barney reported that staff feels that the intent of this section was to address whether or not an existing or proposed access to a state road was permitted and that the entrance permit should be for the residential use, not the business use.**
 - Mr. Pellish moved to strike Section 4A.5.i.2 completely from the amendments. Mr. Burns seconded the motion which carried unanimously.

- **Comment #2: Section 4A.5.e allowed no more than twelve business-related vehicle visits per day and no more than sixty visits per week. Public comment requested that the weekly number of vehicle visits be maintained while the daily visits be more flexible. Mr. Barney suggested revising the section to increase the limit of the Cottage Industry to 15 visits per day and the Home Occupation Level 2 (Section 4A.4.e) to 5 visits per day provided that the weekly limit would not be exceeded.**
 - Mr. Smith moved that 4A.4.e and 4A.5.e be amended as suggested by staff. Mr. Pellish seconded the motion that carried 6 for and 1 opposed (Mr. Baty).

- **Comment #3: Section 4A.6 stated "It is the responsibility of an applicant for a proposed Cottage Industry or Home Occupation to research any private agreements relation to the subject property, contact the Homeowner's Association (HOA), or seek the advice of a surveyor, engineer or attorney. Public comment requested that the County require written approval from each HOA board prior to review of a Cottage Industry or Home Occupation application. Mr. Barney reported that the Jefferson County legal counsel had advised that HOA approval could not be used as a condition of County approval and that no change would be recommended.**
 - No change was made by the Planning Commission.

- **Comment #4: Public comment addressed public notification of a Home Occupation or Cottage Industry application. A request was made at the June 28, 2011 meeting that the property be posted with a placard for 30 days prior to approval to allow neighbors to appeal the request. Mr. Barney explained that a 30 day posting requirement would significantly delay a Zoning Certificate process and that staff was unsure how the appeal process would function as the appeal would have to be based on whether or not the land use meets the requirements of the Zoning Ordinance and not just personal issues or preferences. Mr. Barney did suggest that if the Planning Commission does provide an amendment to require posting for a Zoning Certificate, that the posting be limited to 14 days not 30 days.**
 - No change was made by the Planning Commission.

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JULY 26, 2011
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- **Comment #5:** Section 4A.5.j explained that a site plan is required if the combined gross floor area of a new building, an addition, and/or an existing accessory structure to be used as a Cottage Industry exceeds 1,500 square feet but is less than 3,000 square feet. Public comment requested that the square footage to trigger a site plan be increased to 3,000 or 5,000 square feet. Mr. Barney replied that any other non-residential development (other than a Cottage Industry) requires a site plan at 250 square feet and he recommended no change.
 - No change was made by the Planning Commission.

- **Comment #6:** Sections 4A.3.e, 4A.4.e and 4A.5.e detail the amount of traffic visits allowed for each level of Home Occupations and for Cottage Industry. Public comment asked that a clause be added to allow more traffic during an open house event such as an art studio tour. Mr. Barney stated that staff believes that the existing language is adequate as Section 4A.2, Exempt Activities, explains that participation in an event conducted yearly or twice-yearly with multiple locations do not constitute a Home Occupation or Cottage Industry and do not require a Zoning Certificate. Mr. Barney recommended no change although he did state that if the Planning Commission would opt to make this change, that Section 4A.2(3) have language added that states, "Such an event need not comply with the vehicular trip limits established by this article".
 - Mr. Burns moved to add the staff recommended comment to Section 4A.2(3). Mr. Pellish seconded the motion. Discussion ensued regarding if the added language would benefit the amendment or cause confusion. The motion failed 0 for, 5 opposed, 2 abstention (Mr. G. Taylor and Mr. Burns).

- **Comment #7:** Section 4A.1.g explained that no outdoor storage of any kind is permitted. Public comment requested that outdoor storage be allowed. Mr. Barney explained that since the intent of the requirement was to preserve the residential appearance of the property that staff would be comfortable amending the section to read, "No outdoor storage of any kind, *visible from a public or private right-of-way or vehicular access easement*, is permitted".
 - Mr. Smith moved to accept staff recommended language. Mr. Burns seconded the motion. Mr. Hayes offered a friendly amendment to add the words *property line* after the word *right-of-way*. Mr. Burns and Mr. Smith accepted the friendly amendment. The motion passed 6 for and 1 opposed (Mr. Baty).

- **Comment #8:** Section 4A.5.l discussed a setback of 25 feet for accessory structures used for a Cottage Industry. Public comment suggested that the setbacks should be consistent with the standard zoning district setbacks of the Zoning Ordinance. Mr. Barney reasoned that an accessory structure for a Cottage Industry may generate greater noise than an accessory structure used for residential purposes and therefore, a greater setback should apply. He recommended no change to the amendment.
 - No change was made by the Planning Commission.

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JEFFERSON COUNTY PLANNING COMMISSION
JULY 26, 2011
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Mr. Smith moved to accept the amendments with the above approved changes to send to the County Commission. Mr. Pellish seconded the motion which carried 6 for and 1 opposed (Mr. Baty).

6. **Discussion and possible vote on Proposed Text Amendment to Section 20.203 Minor Site Development, Section 20.204 Major Site Development, and Division 26.200 Definition of Terms, regarding the maximum square footage requirements for a Minor Site Plan in each Zoning District.**

Mr. Rivard explained the changes made to the amendments as a result of discussions by the subcommittee and public comment. He clarified that Section 20.203.2 was amended to state "Section 20.203, Sub-Sections (1) and (3) do not apply to this provision" and that the definitions for section B of both definitions of Minor Site Plan and Site Plan, Minor were amended to state "Sub-Sections A and C of this definition do not apply to this provision".

Ms. Etters moved to recommend to the County Commission the amendments dated July 25, 2011 as written. Mr. Smith seconded the motion which carried unanimously.

8. **Public Workshop regarding the Urban Tree Canopy Plans and Goals for Jefferson County.**

Ms. Brockman introduced Ms. Dawn Childs, Planning and Zoning Office Manager. She also introduced Doug Griffith, Intern tasked with drafting the Urban Tree Canopy Plans and Goals.

Ms. Brockman described the Urban Tree Canopy Plans and Goals project and the next steps in the process of approving the document. She reported that the Water Advisory Committee requested that the public workshop be left open for a week to allow for written public comment. Mr. Hayes agreed to leave the public workshop open to public comment until August 5, 2011 for discussion at the August 9, 2011 Planning Commission meeting.

Mr. Burns requested that staff write a letter of thanks to Doug Griffith so that he can include that with his resume.

9. **Discussion of Planning Commission Bylaws.**

Ms. Brockman suggested that this item be postponed since staff had not had the opportunity to discuss this issue with Mr. Stephan Groh, Assistant Prosecuting Attorney. Mr. Pellish distributed his comments regarding allowing a Planning Commissioner to vote via phone. Mr. Hayes rescheduled this discussion to the September 13, 2011 Planning Commission meeting.

Mr. Hayes called for a break at 9:02 PM. Mr. Hayes called the meeting to order at 9:07 PM.

10. **Reports from Legal Counsel and legal advice to PC.**

Mr. Smith moved to go into executive session to discuss legal matters. Mr. Burns seconded the motion which carried unanimously. The executive session began at 9:09 PM.

Audio
2:02 83

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Mr. Burns moved to come out of executive session. Mr. Smith seconded the motion which carried unanimously. Regular session resumed at 9:18 PM.

Audio 2:03:06

Mr. Burns moved to proceed with the order as presented by Counsel in executive session and to authorize Mr. Hayes as President to sign the order. Ms. Etters seconded the motion which carried unanimously.

*No SF = file
cc: order of PA*

11. Director's Report.

Ms. Brockman presented the 4th quarterly report and explained the history behind the reason for these reports.

Ms. Brockman discussed upcoming amendments to the Zoning Ordinance and the priority in which staff suggested they be handled. Mr. Hayes suggested moving forward with amendments for a recreational overlay district along the Shenandoah and Potomac Rivers with provisions for camping, river access points, and other tourist features. Mr. Hayes also supported initiating an amendment which would create new zoning categories.

Ms. Brockman reported that a list of upcoming Subdivision Regulation Amendments was being compiled. Mr. Hayes asked that the list be presented at the September 13, 2011 Planning Commission meeting.

12. County Commission Liaison Report. None.

13. Planning Commission Exchange. Mr. Baty reported on the recent Water Advisory Committee meeting.

14. President's Report. None.

15. Actionable Correspondence. None.

16. Non-Actionable Correspondence. None.

Mr. Burns moved to adjourn the meeting at 9:47 PM. Mr. Smith seconded the motion which carried unanimously. An audio recording and a video recording of the meeting may be found on our website. These minutes were prepared by Amy Puetz, Planning Clerk.

**A Motion Recommending Denial/Approval of a
Rezoning for James and Barbara Gibson Property
November 8, 2011**

Whereas, James and Barbara Gibson have requested rezoning of property known as the Gibson Property and Allstadts Corner; and

Whereas, The property is located at intersection of US 340 and Millville Road, Harpers Ferry, WV 25425 and is identified as Parcel 39.1 as shown on Tax Map 9, cumulatively consisting of 12.97 acres; and

Whereas, The applicant is requesting rezoning from Residential Growth to Residential-Light Industrial-Commercial; and

Whereas, The requested rezoning process complies with the requirements of Article 12 of the Jefferson County Zoning and Land Development Ordinance, effective July 7, 1988, as amended; and

Whereas, The Planning Commission finds that the requested rezoning is or is not in conformance with the adopted 2004 Comprehensive Plan as outlined in the staff report; and

Whereas, The Planning Commission further finds that there have been major changes of an economic, physical or social nature within the area involved which were not anticipated when the Comprehensive Plan was adopted; and

Whereas, The Staff report outlines elements of the Comprehensive Plan that are pertinent to the request. The staff report is attached.

Now therefore be it moved, that the Jefferson County Planning Commission recommends _____ the request for rezoning from Residential Growth to Residential-Light Industrial-Commercial for property identified in the Jefferson County Tax Map as Parcel 39.1 as shown on Tax Map 9.

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.


Recommended _____ this ___ day of November, 2011
By vote of the Jefferson County Planning Commission
By a vote of _ Yes _ No

Commission President

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Gibson Rezoning PC File # Z11-04

Item #5: Request by James and Barbara Gibson for a zoning map amendment for property designated as Tax District: Harpers Ferry, Map: 9; Parcel, 39.1. Requested zoning map amendment from Residential-Growth to Residential-Light Industrial-Commercial.

APPLICANT:	James G. & Barbara S. Gibson
OWNER:	Same as above
DEVELOPER:	Same as above
SURVEYOR/ENGINEER:	N/A
PROPERTY LOCATION:	The property is located on the south side of Route 340 (William L. Wilson Freeway); the east side of Route 27 (Millville Road) and on the north side of Route 27/2 (Allstadt's Hill Road).
LEGAL DESCRIPTION:	District: Harpers Ferry; Map: 9; Parcel: 39.1 
ZONING DISTRICT:	2010 Zoning Map Designation: Residential Growth
SURROUNDING PROPERTIES:	2010 Zoning Map North: RG East: R/L/I/C South: RG West: R/L/I/C
LOT AREA:	12.97 acres
PROPOSED ACTIVITY:	To rezone this Residential Growth property to a designation of Residential/Light Industrial/Commercial
Planning Commission Responsibility:	To advise the County Commission as to whether the requested Zoning Map Amendment is consistent with the 2004 Comprehensive Plan

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Staff Finding:	In this report Staff presents the various factors that affect this property as it relates to the Comprehensive Plan. There is no Staff suggestion to the Planning Commission. The there are elements of the 2004 Comprehensive Plan where the application is both in compliance and not in compliance with the Plan.
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Allstadt's Corner Subdivision PC File #07-10

APPROVALS:	
Community Impact Statement (CIS) <i>PC File #07-10</i>	Submitted: 04/19/07 County Engineer Approval: 04/30/07 Staff Review Mtg.: 05/04/07 County Planner Approval: 05/31/07 PC Approval: 06/26/07 Expires on: 05/04/09; PC Extended: 06/09/09
Preliminary Plat	Submitted: 10/18/07 Staff Review Mtg.: 11/02/07 County Engineer Approval: 08/20/08 County Planner Approval: 08/28/08
Site Plan	Will be processed in a different phase.
Final Plat	Submitted: 03/06/09 County Planner Approval: 04/24/09 County Engineer Approval: 05/21/09 PH & PC Action: 05/26/09 – rescheduled for 07/14/09 PH & PC Approval: 07/14/09 90-day to bond & Record Deadline: 10/12/09
Variance History	08/28/07- PC approved a variance to permit the residue parcel to retain two existing entrances off existing Allstadt's Hill Road. 04/14/09- PC approved a variance for an extension of time within which to advance through the final plat public hearing stage. The PC extended the 60-day provision until 06/09/09. 06/09/09- PC approved a variance for an extension of time within which to advance through the final plat public hearing stage. The PC extended the 60-day provision until 08/14/09. 08/25/09 – PC denied a variance for a one year extension of bonding and recording Allstadt's Corner Subdivision

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Background

The property known as Allstadt's and the Flea Market was previously approved for a 31 lots in 2009. At that time the development plan showed 2 lots proposed to contain apartment buildings; 28 lots proposed for villa/duplex style housing where the common wall of each unit was also the property line; and the residue parcel containing the history house on Allstadt's Hill Road (See Images 1 and 2). The applicant requested an extension for bonding and recordation of the Final Plat that was denied. That request was denied. Subsequently, the applicant did not bond and record the Final Plat and the development expired.

Introduction and Purpose

James and Barbara Gibson have requested rezoning the 12.97 acre property located at the corner of Millville Road and US 340 from Residential-Growth to Residential-Light Industrial-Commercial. Access to the property is from Millville Road and Allstadts Hill Road. The site is located to the west of the Town of Bolivar and across US 340. Surrounding the subject parcel, the property to the west and south are part of the National Park system, the property to the southeast is zoned Residential Growth with large lot residential approved, the property to the east is zoned Residential-Light Industrial- Commercial, and the property to the north, across US 340, is zoned Residential-Light Industrial-Commercial. Image 3 shows the National Park Service Property and Image 4 shows the current zoning for surrounding parcels.

The property is identified on the Jefferson County Tax Map as parcel 39.1, as shown on Tax Map 9, consisting of 12.97 acres. The property is currently zoned Residential Growth.

The applicant has requested rezoning of the entire property from Residential Growth to Residential-Light Industrial-Commercial. The following report has been prepared to assist the efforts of the Jefferson County Planning Commission and Jefferson County Commission to make findings regarding the consistency of the proposed rezoning with the Jefferson County Comprehensive Plan, in accordance with West Virginia State Code requirements.

Statutory Authority and Requirements

The West Virginia State Code, Section 12.1(a) provides that the boundaries of zoning districts may be amended by the County Commission with the advice of the Planning Commission. The County Zoning Ordinance also requires that the "procedure for amendment [by petition] shall be as dictated in Section 8A-1-1 et seq of the West Virginia State Code as amended." As it concerns amendments by petition, State statute provides that, "Before amending the zoning ordinance, the governing body with the advice of the planning commission must find that the

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amendment is consistent with the adopted comprehensive plan.” [See *WVC 8A-7-9(c)*] This subsection of the State Code also states that, “If the amendment is inconsistent, then the governing body with the advice of the planning commission, must find that there have been major changes of an economic, physical or social nature within the area involved, which were not anticipated when the comprehensive plan was adopted and those changes have substantially altered the basic characteristics of the area.”

Scope of this Assessment

This report focuses on whether or not the rezoning application is consistent with the Comprehensive Plan. As the Comprehensive Plan is a broad policy based document without a land use element, consistency with the plan is not a simple analysis; so many references are provided below. The Comprehensive Plan itself states *“Its recommendations are (by their nature and intent) general and, as such, sometimes conflicting. It will not be difficult to find two that individually justify and conflict with many land use proposals.”* In that sense, there are many plan references that are identified in this report that can or may appear to support or fail to support a finding of consistency between the proposed rezoning and the Comprehensive Plan. In the final analysis, each member of the Planning Commission and the County Commission will need to weigh the degree to which various plan provisions are of greater or less importance, in establishing their respective findings regarding the application.

If the Planning Commission determines that the request is not consistent with the Plan, it must find that there have been changes to the area that were not anticipated in the 2004 Plan only if the Commission desires to recommend approval to the County Commission. This staff report does note that there have been major changes of an economic, physical or social nature, within the area involved, that have occurred that were not anticipated when the comprehensive plan was adopted. Such changes could be argued to have substantially altered the basic characteristics of the area, and such changes would support preservation of existing uses and current zoning and do not appear to support the rezoning request. Those changes will be addressed in both the Historic Preservation section and in the recommendation. This discussion in this report is limited to the proposal to rezone the subject site.

The format for this assessment includes quotes from specific provisions of the Comprehensive Plan, which are identified by page number citation at the end of the sentence where it is quoted. Staff has used these notations and quotations in order to address sections of the Comprehensive Plan as it relates to the proposed rezoning. Identification of the specific page numbers where these provisions can be found in the Plan, this permits the Planning Commission and/or County Commission to easily locate the particular provision and personally

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evaluate the provision in the context of the larger Plan document. When available or appropriate, map references are provided with maps located in the Appendix to this report.

Finally, this report provides an analysis concerning the proposed rezoning based on review of the various plan sections and elements. The analysis should be considered the professional opinion of staff; no more and no less. Since the Planning and Zoning staff has no statutory authority to make decisions in this regard, we defer to the Planning Commission and subsequently the County Commission for any final recommendation or decision as to whether the request is consistent or inconsistent with the Comprehensive Plan.

Relevant Comprehensive Plan Elements and Commentary

Natural Resources:

As a broad outline the Comprehensive Plan notes that:

- *“Ironically, the natural beauty and rural setting of Jefferson County, the qualities that are so attractive to new residents, are the very qualities that are most threatened by a rapid pace of growth. With houses coming at a far faster pace than jobs, Jefferson County is facing a future as just another bedroom community in the larger metropolitan area. The intent of this plan is not to recreate or recapture the past but to shape future growth in a manner that preserves the most important features of Jefferson County: the rural landscape, the natural beauty of the rivers, the rolling terrain and the strong sense of community (pg. 8).”*

This vision for the document illustrates that the historic and scenic viewsheds of Jefferson County are threatened by the rate of growth occurring within the County. The intent is to shape growth in a manner that preserves these important features, while allowing for growth where appropriate. It may be important to note that jobs can be provided in a number of alternative County locations. Rural landscapes and beautiful rivers can only be preserved where they exist. Once these rural landscapes and vistas are developed, they are lost forever.

Development Implications:

The *“...plan encourages new development patterns that foster mixed-use neighborhoods, so that a sense of community begins at the subdivision level (pg. 8).”* The plan further *“...recommends that Jefferson County’s natural features, particularly stream valleys, be conserved as green space and that significant natural features be afforded protection as development proceeds (pg. 8).”* Staff concurs with the need for mixed development to provide

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for a variety of uses when possible. The Comprehensive Plan emphasizes that employment centers can be provided in a number of alternative County locations, where it is appropriate for more intense uses. While providing economic opportunities, the plan recognizes the importance to protect natural resources.

In this regard, the Plan emphasizes “...existing population centers as the focus of new, more intense development and the importance of working with municipalities to assure a pattern of development consistent with the Plan vision (pg. 8).” This is a policy statement within the document indicating that new, more intense development should be located within or adjacent to the Towns. Rezoning the parcel included in this request to Residential-Light Industrial-Commercial will result in an increase in intensity of development in that area, not contiguous to existing municipalities. There are a variety of permitted uses in the proposed zoning category which allows for more intense uses.

The Comprehensive Plan notes that “The Plan identifies strategies to assure that community facilities and transportation infrastructure are provided in sequence with new development (pg. 8).” In this instance, while adjacent to US 340, a major divided 4-lane route, the unsignalized intersection at which it is located has significant safety issues.

This policy is designed to insure provisions of adequate infrastructure concurrent with development that may require it. The policy statement is also designed to minimize sprawl from existing urban core areas to rural areas. The parcel that is the subject of the this request current provides a transition between properties zoned and used for commercial activity, residential zoned property and the picturesque vistas that attract people to Jefferson County.

Below is a partial “...list of general goals was adopted as guidelines for the preparation of the 1986 Comprehensive Plan. These goals were readopted, unchanged and incorporated into the 1994 Comprehensive Plan (pg. 19).” These goals have been adopted in the 2004 Comprehensive Plan as well.

- *Encourage growth and development in areas where sewer, water, schools and other public facilities are available or can be provided without unreasonable cost to the community.*
- *Promote growth and development that are both economically and environmentally sound.*
- *Encourage and support commercial, industrial, and agriculture activities to provide a diversified and sound local economy.*

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- *Promote the conservation of the natural, cultural, and historical resources and the preservation of its scenic beauty.*
- *Advocate the maintenance and improvements of transportation systems so that people and goods can move safely and efficiently throughout the County.*
- *Promote pedestrian friendly, livable communities.*

The Comprehensive Plan also addresses the negative impacts that commercial development in the County can have on traditional downtown central business districts. There is some evidence of underutilization of buildings located in the commercial core in Charles Town and Ranson presently. Rezoning of the subject property may lead to development which could be in direct competition with downtown commercial businesses.

It is possible to view the requested rezoning as an extension of the existing zoning in the area. Without standards in the current ordinances or regulations for building design standards, there is no assurance that the rezoning will result in structures that appropriately designed for the area and protection of existing natural and historic features on the property.

These goals have been unchanged for over 20 years; there is a common held vision that they are important to the County. As stated previously, encouraging and supporting residential, commercial and light industrial developments can be accomplished in a number of ways and in a number of alternative locations in the County. With the current economic decline, there are a large number of residential and commercial vacancies in existence now that can promote this kind of development. Adding to a saturated market decreases the value of all property zoned that designation as the demand is low and the supply is high.

Colliers International, an international real estate firm, has noted that commercial retail space is over built by some one billion square feet (Source 1). This glut of retail space is not expected to abate quickly. While the proposed rezoning has a mixed use element conceptually built into it, there may not be enough property to provide a work and housing mix. As a result, this will be an auto dependent rezoning that will further cause congestion at an existing dangerous intersection and is not in keeping with pedestrian friendly, livable communities. Such activity has been established across the County. As for the use alone, setting aside any discussion on the natural and historic resources and transportation impacts, it could be argued that expanding the non-conforming use by the mechanism of a rezoning would be in keeping with the existing commercial use on the property and surrounding properties.

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While there are existing and additional locations that can provide this type of activity, the natural resources, cultural and historic preservation (the Harpers Ferry Park and viewsheds) of the scenic beauty can only occur where these features or resources are present. One of the goals mentioned above is to *“Encourage and support commercial, industrial, and agriculture activities to provide a diversified and sound local economy.”* It is important to remember that tourism is a real and vital component of Jefferson County’s economy which brings in real revenues just as other businesses do in the County. Jefferson County is number one in tourist dollars captured by any county in the State of West Virginia, capturing in \$729,000,000 for the 2008 year (Source 2). The proposed rezoning is centered within the area that visitors to the State and County acquire their first impression of the scenic views. Visitors do not enter the state to see suburban sprawl, rather the open vistas that welcome vacationers to Jefferson County and the State of West Virginia. Protecting our resources is pro-economic development that provides *“...a diversified and sound local economy.”*

Transportation Impacts:

The Comprehensive Plan notes the effects of traffic below, noting:

- *“With the increase in population in the last three decades, Jefferson County's roads have had to bear the combined burden of increased traffic volume and heavier commercial vehicles. As a result, the deficiencies of the highway and road systems have become more critical. Inadequate funding and increases in transportation demand are conditions which probably will be facing the people of Jefferson County indefinitely (pg. 26).”*

As many people are aware, the fact that inadequate funding and increased transportation demands are conditions the County is likely to continue to face indefinitely is ominous. The staff acknowledges that there is an existing bottleneck along US 340, which is a major transportation route through the County. Rezoning this parcel of land to Residential-Light Industrial-Commercial use may aggravate this condition. While this development by itself may or may not generate a lot of traffic, allowing this type of development to sprawl along Route 340 could result in increased congestion. It is certainly possible that the intersection of Bakerton/Millville and US 340 would see an increase in traffic pressure from this rezoning.

Without a coordinated traffic analysis for this property and surrounding parcels, the dangers of this intersection needs to be considered in a thorough fashion. Without adequate review, the increased activity in this area will result in a negative decline in safe and convenient access at this intersection.

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The Comprehensive Plan states that:

- *“A comprehensive and systematic approach to transportation planning is needed to meet the future transportation of the County (pg. 26).”* The plan further delineates the following general goals:
 1. *Reduce the occurrence and severity of roadway traffic accidents by encouraging the West Virginia Department of Transportation, Division of Highways to reduce or eliminate conditions which cause them.*
 2. *Encourage the West Virginia Department of Transportation, Division of Highways to take measures to provide for and maintain efficient roadway traffic flow.*
 3. *Find creative solutions to both funding and legislative limitations, in order to solve transportation problems.*
 4. *Seek a coordinated transportation plan among all levels of government that provides for coordinated transportation planning and funding of highways, streets, commuter rail service, public transit, car/van pooling, park & ride facilities, bike paths, pedestrian access, and technological improvements to the transportation system in the County.*
 5. *Encourage alternate forms of transportation within the County, such as pedestrian trails and bike paths, provided they are feasible and prove beneficial.*
 6. *Encourage the State and Federal government to increase public transit service to the County, provided it is feasible and proves beneficial.*

- *“During the Comprehensive Plan process, citizens have expressed concerns with some of the roads in the County. The County has reached a critical turning point as undeveloped land is becoming committed to new subdivision and development. As more and more land is developed future transportation improvements may become more difficult and more costly. Therefore, it is prudent for the State and County to plan for the future needs now, while the land is available and the improvements can be more easily made, or at least the land can be reserved during the development process for future improvements (pg. 27).”*

The Comprehensive Plan reflects the growth in traffic volumes, along the Route 340 Corridor, from 1996 to 2002. It is clearly the most heavily trafficked route. The 2008 West Virginia Department of Transportation traffic counts show 38,000 average daily trips (ADT) at WV 26 and 29,400 near Bakerton Rd.

The Comprehensive Plan highlights the bottleneck along US 340 and affirms:

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- *“Due to employment trends in the region, US 340 is the busiest highway used to access Jefferson County. On Fridays, commuter traffic has been known to back up from the Potomac River Bridge as far as Brunswick, Maryland as county residents return from their jobs in Maryland and Washington. Holiday travel can also create weekend backups at this bottleneck. Ways to correct this problem have been discussed. Several options to increase the capacity of this section of highway are to: widen the bridge/highway to four lanes, double deck the bridge/highway, or build an alternate by-pass highway. Given the major river crossings, coordination is necessary between the States of West Virginia, Maryland and Virginia, the impact on the National Park, and the design difficulties and high cost, it is unlikely that one of these solutions will be implemented in the foreseeable future. Therefore, another option is for future transportation planning efforts to study the benefits and feasibility of options that may decrease commuter traffic along this section of highway. These options may include park & ride facilities that are coordinated with public transportation, and encouraging telecommuting, etc. (pgs. 32-33).”*

The above referenced notation in the plan summarizes the problem in that area of US 340 and that a solution is not likely in the short term. The new Route 9 is not expected to solve the traffic concerns on Route 340, as the traffic on Rt. 9 has a different commuting pattern and direction than that of Route 340. Again, while the proposed development alone may or may not have a significant negative effect on Route 340, the County needs to consider the potential accumulation of these effects. Without a detailed site plan for a specific use, the impact is hard to predict. The study underway is not anticipated to improve the bottle neck, but it could provide solutions that would allow for better flow along US 340 for inter-travel in the county. Presently, crossing some intersections of US 340 are not either designed suitably or easy to cross. Page 30 of the Plan (titled Highway Problem Areas) identifies the Route 340 corridor as having problem areas, but does not identify the intersection at Bakerton Road as a problem area, as of 2003. However, that intersection is notable in the county as a hazardous area to cross. There is an accompanying table on page 31 of the plan which lightly details this issue, but it fails to mention the single lane sections. These single lane sections are where the bottlenecks occur along portions of the Route 340 Corridor.

US 340 Corridor East Gateway Plan:

This segment of US 340 is undergoing a comprehensive and systematic study to address the current and future transportation needs of the corridor. This study should be allowed to

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mature in the process before land use decisions are pre-determined. There are real implications to land use decisions, such as this rezoning, that affects the transportation network. In this analysis and specific section, it is not only the rezoning and the possible uses that could be built that could cause a negative impact upon the traffic conditions, but the potential for transportation improvements to be built on the parcel to improve the Corridor. Such transportation improvements are difficult if buildings are being constructed or are built. The West Virginia Department of Highways noted this concern to staff in another area of the County. With a detailed traffic analysis, each development that occurs in the area could assist in improving the intersection without a disproportionate burden to anyone applicant or project.

The current East US 340 Corridor Study may recommend necessary corridor improvements and land use (zoning districts) changes along the corridor. The corridor study is discussed here and in the recommendation below. There is significant land mass along US 340 that could potentially be developed. There are a number of large parcels, totaling approximately 650 acres that are potentially developable. That acreage does not include the numerous lots that are 7 to 20 acres in size that could be assembled for development, adding presumably an additional 100 to 200 acres of conceivable development. For reference, a square mile is 640 acres of land.

While a single more intense non-residential development may not have a significant negative impact on US 340, setting a precedent for allowing this type of development without a comprehensive corridor management plan in this area, sets the stage for an accumulation of minor negative effects that could result in a major problem. The goal of this plan is not to predetermine what is going to occur along the corridor, so much as to plan how components of corridor mesh as a unit. It is not unreasonable to expect that the plan could accommodate up-zoning of some parcels along the corridor. It is important to remember the goal of the plan is more than just allow an increase in zoning, but transportation improvements and possible design standards for structures.

In the course of the process for the US 340 plan, there has been some confusion surrounding the plan and the outcomes. There are no predetermined findings. As the planning process has unfolded, there appears to be at this preliminary stage of the project, some general agreement on future activity along the corridor. In an area where agreement is often difficult, the planning process is beginning to show results. To destabilize this process just as agreement is growing and options for property owners to exercise their rights with less controversy would not benefit anyone. A project built on mutual agreement is more productive than one on disagreement.

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Historic Resources:

While noted above, the Comprehensive Plan expands upon the natural, environmental and historical resources along the US 340 Corridor and this analysis would be not be whole if this important component is not addressed.

- *“In terms of environmental resources, Jefferson County suffers from an embarrassment of riches. Located in the shadow of the Blue Ridge at the confluence of two major rivers, Jefferson County is also one of the most agriculturally productive counties in the State of West Virginia. If we are not careful, we could squander these resources. Effective planning is essential to preserving these resources for use and enjoyment of future generations (pg. 48).”* Additionally the plan notes *“Caves, scenic vistas, wildlife corridors and cliff areas are just several examples of additional forms of natural resources that contribute to the environmental and cultural mix that is Jefferson County. The topography, geology, hydrology, and biological diversity of the environment is one of the hallmarks that makes Jefferson County the beautiful environment that it is. Unfortunately, not every form of natural resource can be discussed in detail within the context of a Comprehensive Plan. The protection of scenic vistas has been the subject of public comment during this process. During the life of the 1994 Plan, which stated that scenic vistas should be protected through the purchase of easements, the Circuit Court voided the issuance of a Improvement Location Permit (ILP) for a telecommunications tower near Alstadt's Hill, based on non-conformance with the Comprehensive Plan, although no easements were in place. The County should identify the protection of scenic vistas as an issue to address, this is best done through the adoption of standards within the ordinances, so that all parties are aware of their rights and responsibilities in this regard (pg. 52).”*

Expanding upon the natural resources of the community to historic resources, the Comprehensive Plan presents the following topic at depth, but is of importance to this rezoning request in the total evaluation:

- *Jefferson County is an area rich in historical and archaeological interest. It has arguably been referred to as the most historic rural county in America. As part of our country's first western frontier, it was settled by Europeans before 1720 and was inhabited by Native Americans for several thousand years before.*

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- *Surveyed by a young George Washington and host to seven Washington family homes and three Revolutionary War generals' residences, Jefferson County's rich early history in the areas of transportation, farming, the military and industry are still evident in the structures and other resources that survive. As one of the major areas of military maneuver and the site of the John Brown Insurrection, the County's place at one of the crossroads of the Civil War forever links it to many of the important events that occurred during our Nation's greatest test of endurance.*
- *Given its size and population, Jefferson County has been fortunate in the amount of historic preservation projects that have been implemented around the County. The effort to preserve the fire engine house of the Harpers Ferry Armory (a.k.a. "John Brown's Fort) in the late 1890s is among some of the earlier concerted efforts at preserving a historic building in the United States. From Harpers Ferry National Historical Park to the historic districts of Shepherdstown and Middleway, Jefferson Countians can be proud of the number of historic resources that have been preserved here.*
- *Over the years, a "windshield survey" of historic and vernacular buildings was created. This inventory was an initial effort, and is outdated, incomplete and should not be used as a working document nor a model for a new inventory.*
- *History tourism is a significant element of Jefferson County's economy. Harpers Ferry, the Appalachian Trail, Shepherdstown, Antietam and the C&O Canal all serve to draw visitors to the County and surrounding area. The Jefferson County Landmarks Commission was reestablished in 1980 to be a central clearinghouse for preservation activities in the County, from reviewing nominations to the National Registers of Historic Places, to restoring and interpreting the Peter Burr Farm, to providing input regarding developments.*
- *While there have been many preservation "success" stories in Jefferson County, the issue has not been without controversy in recent years. Disagreements over such projects as the proposed demolition of the circa 1920 Jefferson County Jail have highlighted such issues as the responsibility of governments as stewards of historic structures, the use of appropriate government bodies in advisory roles, identification of preservation priorities, and long term preservation planning.*
- *Regardless of the successes of the past, as an increasing number of tracts are developed for residential, commercial or industrial uses, existing unprotected historic resources become endangered. Existing processes should be evaluated for their ability to address this growing issue (pgs. 55-56)."*

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Expanded discussion is found on page 66 of the plan which states that:

- *“History, culture and scenic beauty combine to make Jefferson County an attractive area for travel and tourism. The area's proximity to the major population centers of Baltimore and Washington enhances this potential. Local attractions include Harpers Ferry, Shepherdstown, the Contemporary American Theater Festival, Charles Town Races and Slots, Summit Point Raceway, the Mountain Heritage Arts and Crafts Festival, the Washington Heritage Trail, white water rafting, etc. Two existing organizations are primarily responsible for encouraging the expansion of the tourism industry and an increase in visitors - the Jefferson County Chamber of Commerce and the Jefferson County Convention and Visitors Bureau. The JCDA can be most useful in assisting with the location and expansion of destination oriented tourist facilities.”*

Historic and natural features are given a significant priority in the 2004 Comprehensive Plan. This section of the Plan underscores the importance of heritage tourism to the economy and notes the cultural and scenic features that drive locally based tourism's economic engine. The text substantially supports the need to protect the “scenic vistas” both in this plan and in the 1994 Comprehensive Plan. Most of the site is visible from various areas of the National Park. Considering the property's location in relation to the national historic buildings and park, the views may be considered just as important as the development potential.

Staff suggests that any development of the site, with or without rezoning, identify key locations where components of the viewshed may be considered more important and would require easements to protect the view. As stated earlier it is important to note that recreational tourism, heritage tourism, scenic tourism, and eco-tourism are part of Jefferson County's pro-business and pro-economic development avenues. Potentially impacting that significant, valuable and irreplaceable part of the county and the affected economic generators, without a plan in this rezoning is unsystematic.

This section of the Plan underscores the importance of heritage tourism to the economy and notes the cultural and scenic features that drive locally based tourism's economic engine. Staff notes that care should be taken when reviewing rezoning that might jeopardize the efforts to nurture the tourism economy or reduce interest in visitation to tourist offerings. The subject property is integral element of a historic battlefield as shown on Image 4. While it should be noted that there is limited commercial activity on the site, the commercial activity is very mobile in nature in that the site is not impacted by structures.

Implications of National Park Service Property:

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As mentioned above, if the Commission determines the proposed rezoning is not consistent with the 2004 Comprehensive Plan, it must find that *"...there have been major changes of an economic, physical or social nature within the area involved, which were not anticipated when the comprehensive plan was adopted and those changes have substantially altered the basic characteristics of the area."* in order to recommend approval of the request. There have been major changes to the US Route 340 Corridor area that were not anticipated when the Comprehensive Plan was written. Since 2004, there have substantial acquisitions by the National Park Service surrounding this property that were not anticipated in 2004. This is a significant consideration in that the subject parcel may have once been potentially part of a larger area that could have developed that is not protected from development. This unanticipated change does not support the rezoning request, rather it further indicates that the area may not be appropriate for rezoning.

As the Planning Commission determines the merits of this rezoning, the amount of land protected by the NPS in this area which was not anticipated in the Plan could be significant factor. Any discussion about new development that has occurred along the US 340 corridor toward Charles Town needs to acknowledge that the existing zoning was in place when those areas developed. As this zoning existed for those properties, the Comprehensive Plan recognized the potential development in those locations and made no recommendations for change in those areas. On the other hand, the Comprehensive Plan discussed the area surrounding the battlefield as an important County and State resource worthy of protection.

Changes along US 340 and Applicants Position:

The applicant has stated that the property should have always been zoned commercial based on the uses that have been on the property or that are currently on the property. There is some limited potential to that argument. At the time of the adoption of the zoning ordinance and zoning map in 1988, the property was being used as a flea market. As noted above that is a very limited form of commercial activity that is easily disassembled and relocated. It is speculative to assume why this property was zoned as it is versus the zoning provided in neighboring properties in 1988 but it could be argued that the intent was to encourage eventual redevelopment to residential uses.

As for neighboring properties, staff defines the neighboring properties as generally those parcels surrounding the intersection of US 340 and Route 27. The applicant defines neighboring as nearly the whole corridor, which is broad notion. The applicant makes an effort to state the parcels that have developed miles away were not anticipated either in the 1988 Zoning Ordinance Map or the 2004 Comprehensive Plan. That is not an accurate statement. There have been extremely few rezoning's in Jefferson County since the adoption of zoning and

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no non-residential CUPs in this corridor. Regardless of one's feelings on the zoning in this corridor, the 1988 Zoning Map established the zoning classifications along the corridor and therefore development of those parcels was anticipated. While the 2004 Plan contains significant discussion in the Comprehensive Plan regarding the 340 corridor, there was no discussion of up zoning any additional parcels or area in the corridor. Sections of the corridor were planned and retained in both the Zoning Ordinance and Comprehensive Plan to provide an appropriate balance as delineated in the Comprehensive Plan.

Further, while the applicant cites the additional development along the corridor, they neglect to review the significant preservation of land directly adjacent to the subject parcel. While it is possible to dismiss the current condition of the Custom and Border Patrols site as being quasi-commercial in nature, it's important to remember the site will be buffered by a significant sized berm and extensive plantings. If future development of any site along the corridor developed as a campus like setting, as the Custom and Border Protection is doing, than support for that type of development is encouraged.

Proposed Zoning District:

While the applicant has taken great strides and should be strongly commended in restoring the existing home, the remaining acreage is open for a broad array of uses. The applicant is not proposing any specific use at this time and rezoning to this mixed use category would allow development of a wide variety of uses.

The Residential-Light Industrial-Commercial zoning district, which the applicant is requesting, is:

- *“...commonly referred to as the “mixed use” zone, permits uses of a light industrial and commercial nature, as well as a spectrum of residential and institutional uses ranging from single-family dwelling units to multi-family apartments and group homes. Residential uses must conform to the standards set forth in the Residential Growth District, but industrial and commercial uses are required to conform to a set of specific performance criteria, which include numerical measurements of several factors for uses that may have nuisance effects on adjacent uses.*
- *There are two issues regarding this district that should be studied as part of planned amendments to the Zoning Ordinance. First, most ordinances that have “mixed use” zones require certain minimum percentages of land usage in residential, commercial and dedicated open space. Jefferson County’s Ordinance doesn’t. Land in this district can be developed entirely for commercial or residential use or any combination thereof.*
- *A second, less pressing issue is whether the property that is in this district, but part of a larger tract under common ownership should be required to submit a concept plan for*

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the development of the entire tract as part of the application for development of the initial phase of the project. By policy statement, the Planning Commission does ask for a concept plan, but it is nonbinding and advisory only. Requiring the approval of a concept plan (subject to revision if the circumstances needs change) would allow the Planning Commission to view how the development as a whole would affect the area and how the initial phase would coordinate with the proposed build out concept (pg. 71)."

The plan outlines further, that as a recommendation for future changes to the Zoning Ordinance, a concept plan be submitted when a plan or rezoning is requested for this district.

The plan does detail some of the potential benefits of the Residential-Light Industrial-Commercial District and a number of concerns with the district. While this district is defined as mixed used, it does not require any mixing of uses, it merely allows for the possibility. The district allows two vague uses as permitted by right, "Commercial Uses" or "Uses of light industrial." "Uses of light industrial" is essentially defined by uses that are not defined as heavy industrial and commercial uses. There is wide latitude for the ability to interpret what qualifies as light industrial use. These two terms allow for some interpretation of what they mean and what is permitted. As such, there are a variety of uses that could be proposed on the subject property, each of which could have very different impacts.

The Comprehensive Plan outlines a notion that a concept plan should be presented when a rezoning is requested. This would provide some level of expectation of what may occur in the future. The requirements for this type of submittal should be reasonable in order to provide a balance for the applicant's resources and the public understanding of the proposal. Since the Residential-Light Industrial-Commercial District allows such a wide variety of uses, it's not an unreasonable notion.

Finally, the Comprehensive Plan accurately and clearly describes the circumstances and elements of the area that this rezoning could affect, as noted below:

- *"The US 340 corridor from the Shenandoah River bridge to the Charles Town bypass serves many purposes. It is the major transportation spine in the eastern part of the County. It is from this road that one views the panorama of the rest of the County from Alstadt's Hill. It serves as a collector for several secondary State highways which serve significant numbers of houses and businesses, and it serves as the eastern gateway to West Virginia. Traffic is ever increasing on this road, as are development pressures.*
- *This segment of US 340 is the most identifiable and visible artery in the County. Without effective study and management, this corridor could deteriorate into a strip of housing*

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developments indistinguishable in character, and commercial development rivaling "strips" in nearby larger cities.

- *US 340 is the main transportation spine through the County. As such, the purpose of this study is not to turn US 340 into an undeveloped parkway. Rather, it is stated here that the purpose of this study is to identify ways to ensure that the residential and commercial development that occurs along this corridor is designed and constructed in such a way where the development does not cause visual blight and major traffic problems along the eastern entrance corridor to the State. Buffers, landscaping requirements, traffic and access design, sign regulation and aesthetic highway improvements are all examples of issues that could be discussed as part of this study (pg. 72)."*

Again, while this rezoning is for 12.97 acres of property, the expansion and potential for traffic and visual blight is possible without careful consideration of the Corridor as a whole. It is imperative that the activity on this Corridor be reviewed very closely due it being the "most identifiable and visible artery in the County."

Staff Recommendation

The applicant has provided documentation that they believe support the request for rezoning and has demonstrated what might appear to be consistency of the proposed rezoning with certain provisions contained in the Comprehensive Plan. It is possible to argue that the existing adjacent activity and existing use of the property may help justify a rezoning of the property. This view acknowledges only the uses on the property and adjacent parcels and ignores many of the other elements outlined in the Comprehensive Plan.

Staff recommends that the request for the zoning map amendment take into account the US 340 East Corridor study to mature and provide some recommendations. There are two prisms through which the rezoning could be viewed. First, is that the corridor plan may provide for the ability to rezone some parcels and provide some standards for rezoning that are appropriate for that area and allow for owners to exercise their rights. Second, is that it could be rezoned based on the adjacent zoning classifications adjacent to this parcel, not remote influences of activity 5 miles away. The applicant could petition the County Commission to waive a one-time rezoning fee on this property if they were willing to wait until the 340 study is complete.

Additional consideration of the proposed rezoning should include the following:

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- As noted above, State statute provides that “Before amending the zoning ordinance, the governing body with the advice of the planning commission must find that the amendment is consistent with the adopted comprehensive plan.” [See *WVC 8A-7-9(c)*] This subsection of the State Code goes on to state that, “If the amendment is inconsistent, then the governing body with the advice of the planning commission, must find that there have been major changes of an economic, physical or social nature within the area involved, which were not anticipated when the comprehensive plan was adopted and those changes have substantially altered the basic characteristics of the area.”

There have been major changes of an economic, physical or social nature within the area that were not anticipated when the current Comprehensive Plan was written in 2004. Since 2004 the area has experienced a significant shift toward acquisition of historic properties by the National Parks Service. While these properties have long been a place of historical significance, the land was not open to the public. With this change, the property is now bordered by lands that are in public holdings. On the flip side, subject property adjacent to lands that could be developed.

- Page 72 of the Comprehensive Plan identifies the Route 340 Corridor as an area that should be targeted for special study. It notes that the corridor serves as a collector for several secondary state highways which serve significant numbers of houses and businesses and it serves as the eastern gateway to West Virginia. Traffic is ever increasing on this route. This segment of US 340 is the most identifiable and visible artery in the County. Without effective study and management, this corridor could deteriorate into a strip of housing developments indistinguishable in character and commercial development rivaling “strips” in nearby larger cities. The Plan recommends study of the US 340 corridor, including land use, viewscales, economic development, traffic design and management in order to create an effective strategy for a long term plan of this important Corridor. The Plan notes that buffers, landscaping requirements, traffic and access design, sign regulation and aesthetic highway improvements are all examples of issues that could be discussed as part of the study. Staff believes there is merit with this plan and believes such a study should precede any rezoning with the corridor.
- Pages 32 and 33 of the Comprehensive Plan discuss the Harpers Ferry Water Gap. This discussion focuses specifically on the two-lane roadway condition through the Shenandoah-Potomac River Water Gap at Harpers Ferry. It documents the history of

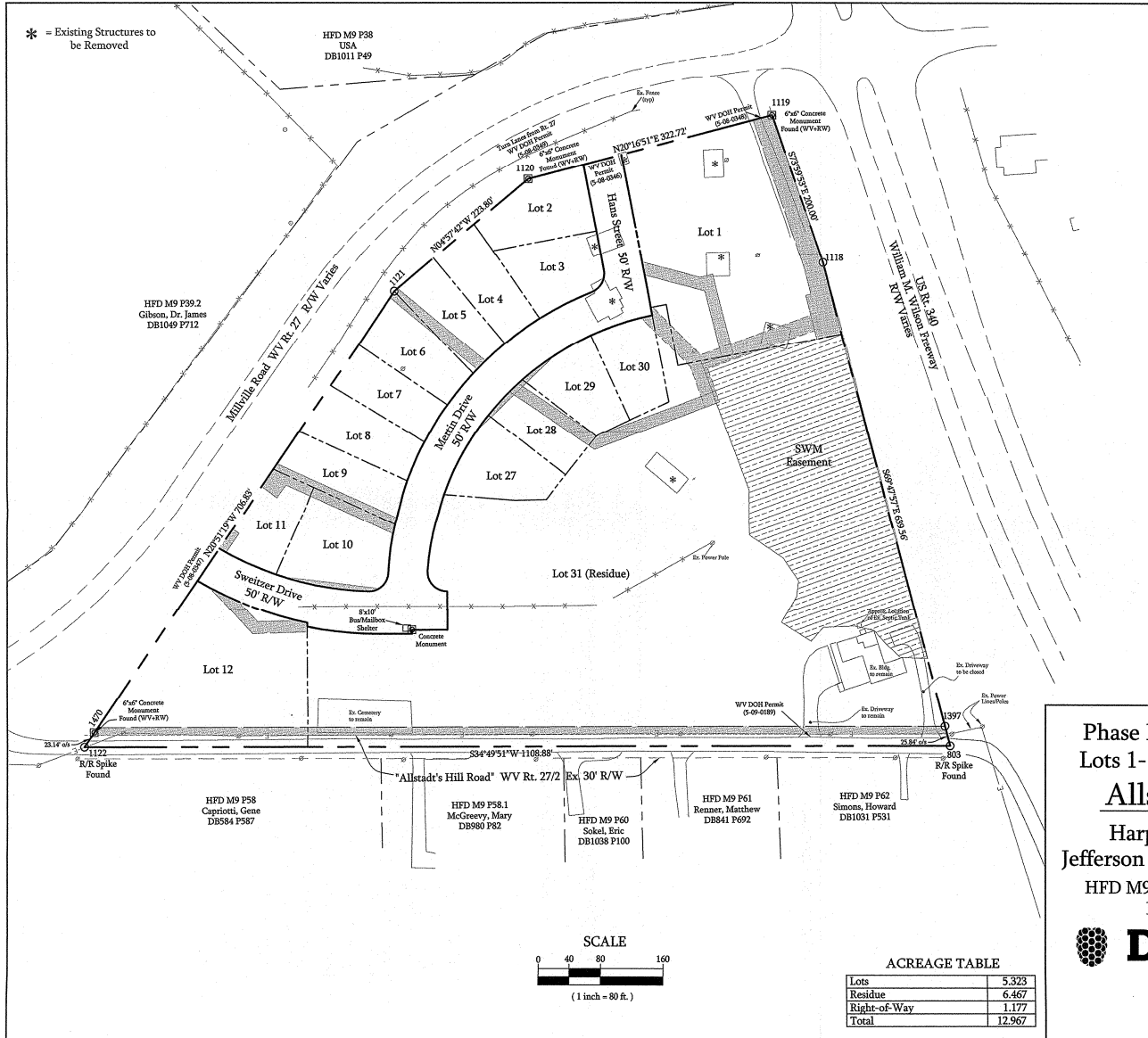
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back-ups and suggests that alternative ways to correct the problem have been discussed. It notes however, that a solution is not likely in the short term (if ever) due to design difficulties, high cost and impacts on the National Park. For this reason, consideration of additional pressures on limited highway capacity in this area should be measured in this rezoning. As noted in this report, the proposed change of zoning could result in higher traffic patterns than currently allowed in the existing zoning.

- Staff proposes that the applicant wait 12 months until June 30, 2012 to return to the County Commission at the second meeting in July to have this item heard by that body. This would allow for the US 340 East Gateway Corridor study to fully mature and provide at a minimum recommendations regarding land use (possible rezoning options) and traffic impacts. The study underway is addressing this corridor with meticulousness and will allow for land use decisions based on an overall plan, not an ad hoc basis. It is a real possibility that the corridor study may have an overlay zone, in this area that allows the applicant more flexibility in uses.
- Finally the applicant always has the option to apply for a CUP. In the CUP the applicant could outline the permitted uses they would like and it would provide a way to reduce some concerns related to uses permitted in the Residential-Light Industrial-Commercial District. With this process the applicant may be able to achieve their objectives.

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Image 1



Phase I
 Lots 1-
All
 Harj
 Jefferson
 HFD M9
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Image 2

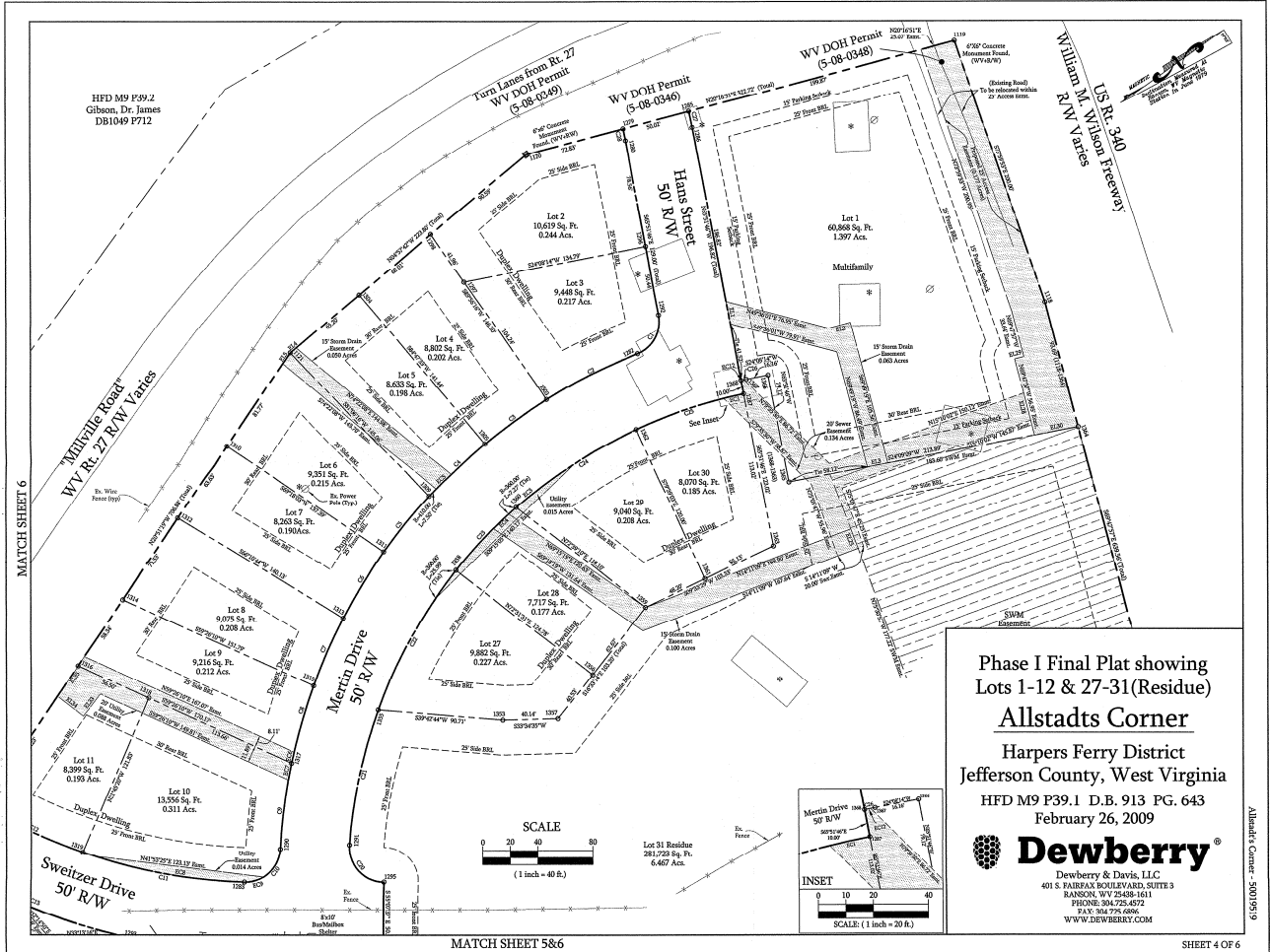
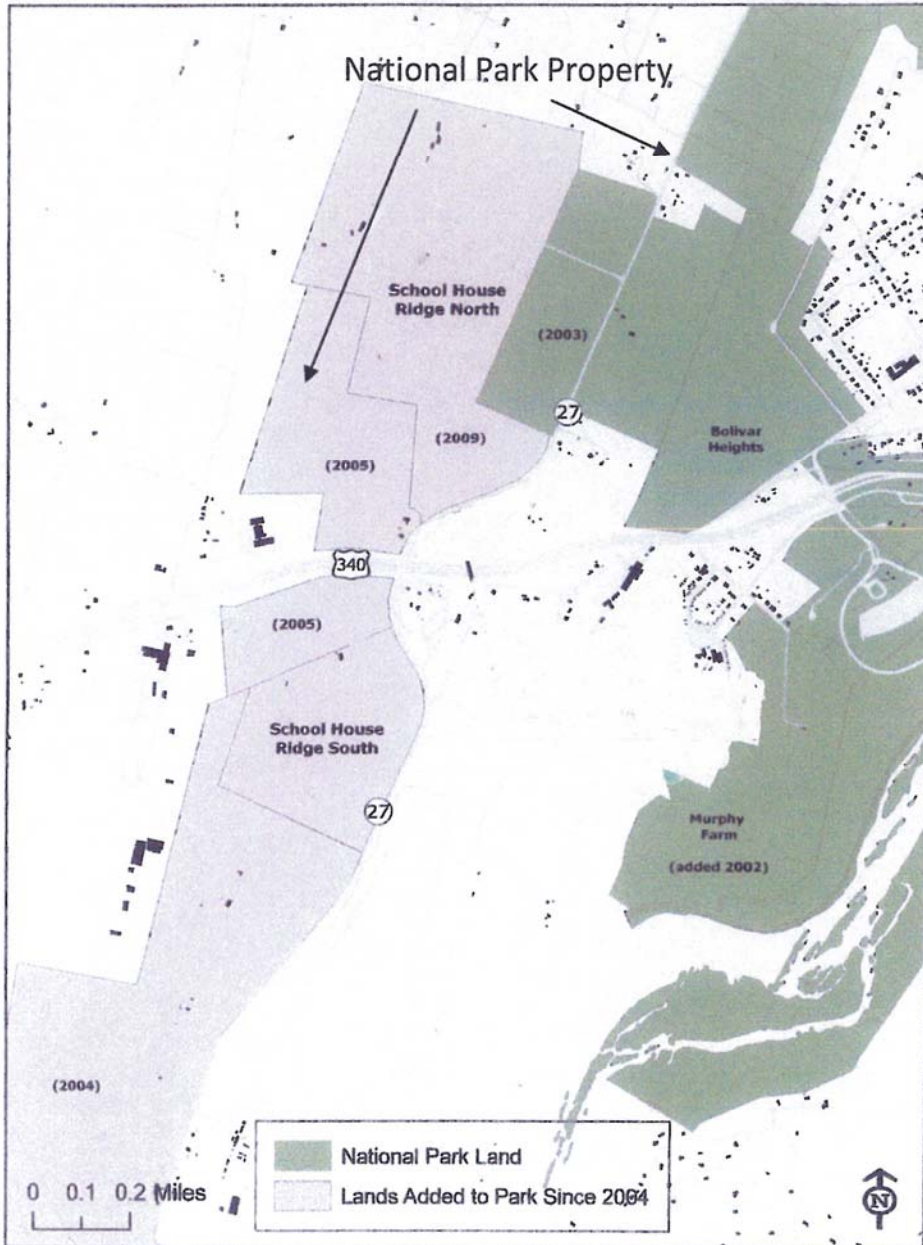


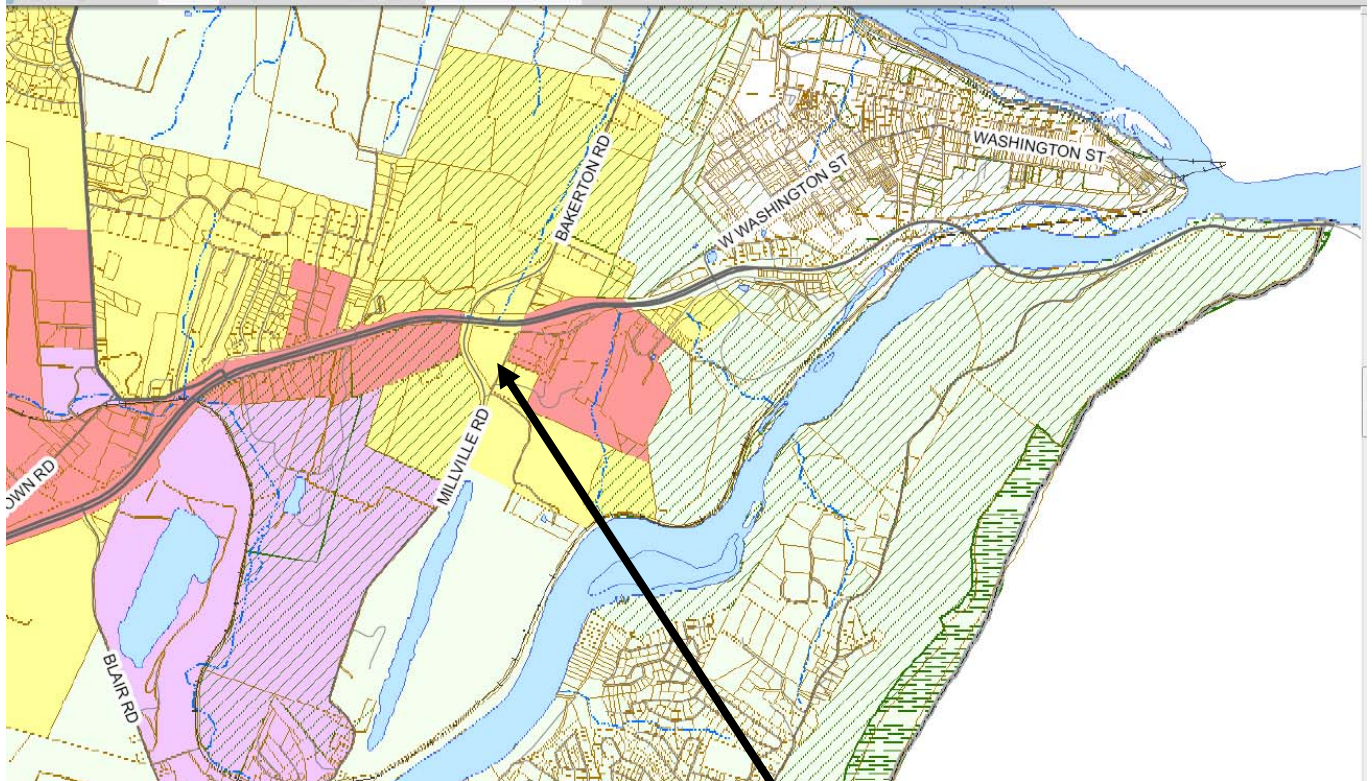
Image 3

Growth of Harpers Ferry NHP Since 2004








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Image 4



Legend

-  Urban Growth Boundary
-  Parcels
-  Tax District Boundary
-  Public/Quasi-Public Land
-  Appalachian Trail

Zoning District

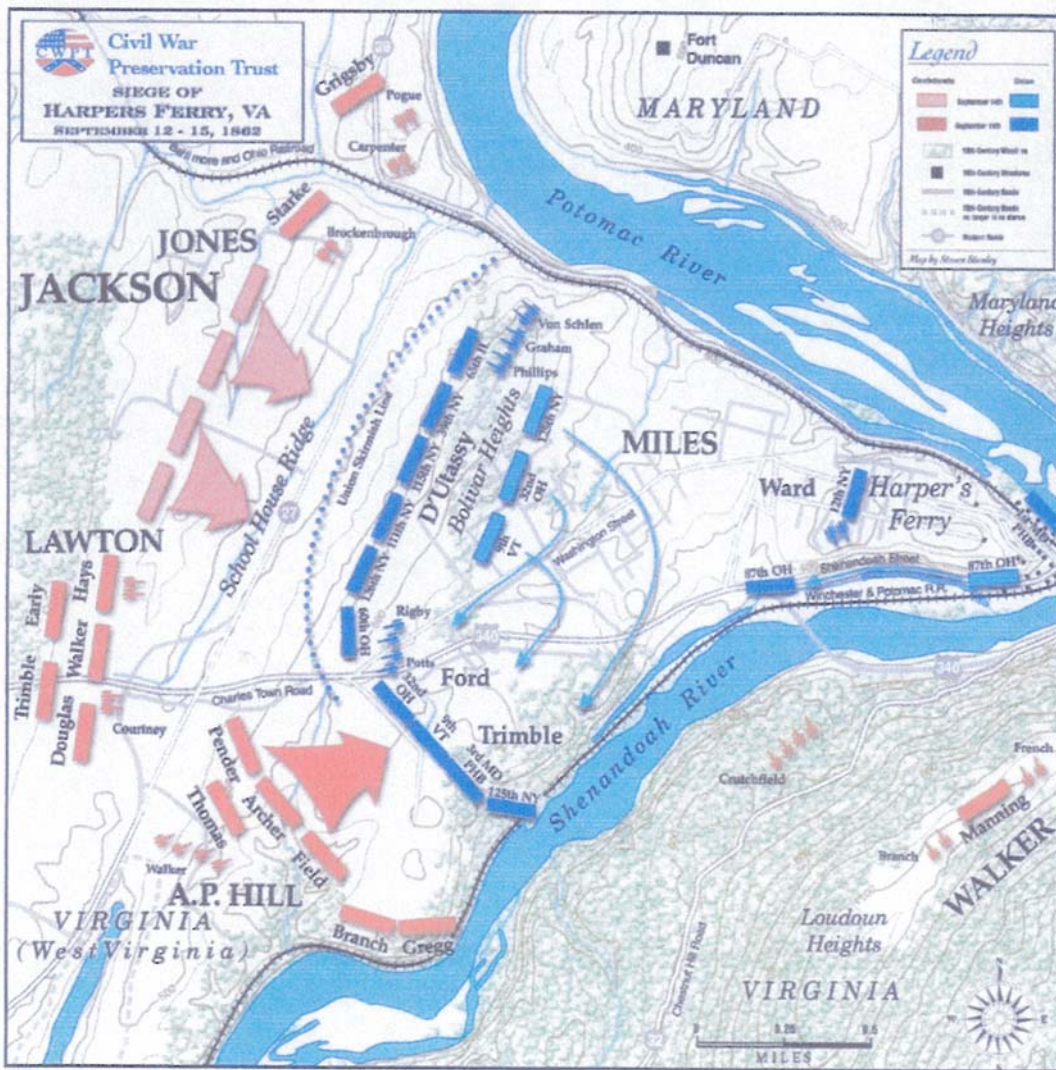
-  Incorporated Town
-  Industrial-Commercial
-  Residential-Growth
-  Residential-Light Industrial-Commercial
-  Rural
-  Village

Subject Property

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Image 5

School House Ridge and Bolivar Heights



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Source 1

“The Big Box Dilemma” Colliers International White Paper (Summer 2010)

Item # has changed to
#5

Engineer's Report
Planning Commission Meeting
November 08, 2011
#4 Zoning Map Amendment

The engineering department defers to the Zoning Administrator on the matter.

PETITION FOR MAP AMENDMENT
James and Barbara Gibson
August 30, 2011

*Rec'd
August 30, 2011
Jennifer S. Magham,
County Clerk.*

Owner/Applicant:

James G. and Barbara S. Gibson
201 Needwood Farm Lane
Harpers Ferry, WV 25425

RECEIVED

AUG 30 2011

**JEFFERSON COUNTY
PLANNING, ZONING AND ENGINEERING**

Substantiation for the Request:

1. The property is currently zoned Residential Growth and the Applicant is seeking a map amendment for the Residential/Light Industrial/Commercial District (commonly known as the Mixed-Use District). The Applicant believes that this change is consistent with the 2004 Jefferson County Comprehensive Plan, as explained in this application;
2. There has been a significant change in the neighborhood, since the Jefferson County Zoning Ordinance was adopted in 1988, as explained in this application; and,
3. The Applicant believes that the Residential Zoning Classification is an error due to the long term mixed use nature of the property, as explained in this application.

Tax District, Map and Parcel Number:

Harpers Ferry Tax District, Map 9, Parcel 39.1

Deed Book Reference:

Deed Book 913 at Page 643

Plat:

Attached

Tract Size:

12.97 Acres

Discussion on:

Comprehensive Plan compatibility of the proposed change: See Below.

Any Change of transportation characteristics and neighborhood from when the original ordinance was adopted: See Below.

Typically, an amendment to a zoning map can include three types of justifications based on the jurisdiction. These justifications include: Comprehensive Plan compatibility or consistency; change of neighborhood; and/or error in the zoning map. The Jefferson County Zoning Ordinance requires a discussion on the Comprehensive Plan, transportation characteristics and change of neighborhood. This application will also discuss why the applicant feels that this property should always have been included in the Residential/Light Industrial/Commercial District.

1. Comprehensive Plan Compatibility

The 2004 Comprehensive Plan includes a total of 32 recommendations. Of these 32 recommendations, the Applicant believes that 27 of them are neutral with respect to this application. These neutral recommendations include: 3.01; 3.02; 3.04; 3.05; 3.06; 3.07; 3.08; 3.09; 3.10; 3.11; 3.12; 3.14; 3.15; 3.16; 3.17; 3.19; 3.20; 3.21; 3.22; 3.23; 3.24; 3.26; 3.27; 4.02; 4.03; 4.04; and, 4.05.

The Applicant believes that the remaining five (5) recommendations support the map amendment. These recommendations include the following:

Recommendation 3.03 on page 25 states: "When considering amendments to the Ordinances and Zoning Map to incorporate decisions based on the recommendations of this Plan, the County should address the ordinances in their entirety including: a. The preparation of a comprehensive 'existing land use map'".

Comment: If this 'existing land use map' were to be completed, it would demonstrate that this property is currently residential and commercial. In fact, the Ordinary (currently a residence) on site was used as a tavern, meeting hall and an inn in the early 19th Century. In addition, this property was used as a drive-in theater from 1952 to around 1983 and was then converted to the flea market in 1983 (prior to the adoption of the Zoning Ordinance). As everyone is aware, the flea market is still an ongoing commercial enterprise. Accordingly, when considering this amendment to the Zoning Map, Recommendation 3.03 appears to support the request based on the 'existing land uses'.

Recommendation 3.13 on Page 56 states: "The County should examine existing land use regulations and Planning Commission resources and explore regulation amendments and policies that encourage preservation of historic resources. Some amendments and policies may want to investigate may include: a. Rewarding the retention and restoration of historic buildings during the subdivision process with limited increased density to offset the expense of preservation; b. Re-evaluating zoning restrictions on the adaptive reuse of historic county-wide in order to encourage their continued occupancy and maintenance".

Comment: The Applicant has already restored the existing buildings on site, including the Ordinary, at their own expense. The Applicant has also placed them on the National Register of Historic Places. Accordingly, it appears that they have already met the intent of subsection 'a' of Recommendation 3.13; and, in order to meet subsection 'b', the property would need the 'Mixed-Use' Zoning Classification.

Recommendation 3.18 on Page 64 states: "The County should continue to pursue new industrial and commercial development in order to diversify its economy, increase the tax base and thereby mitigate the problems of increasing residential growth, and provide quality employment opportunities in the workforce."

Comment: This map amendment would be consistent with this recommendation by the virtue that it would allow the Applicant to pursue these types of projects.

Recommendation 3.25 on Page 73 states: "The County should study the US 340 corridor, including the land use, viewscape, economic development and traffic design and management in order to create an effective strategy for the long term management of this important mixed-use corridor".

Comment: This is a subjective recommendation that is viewed differently by each person. The Applicant is on record in the recent past indicating that this study is futile, since the corridor has already been developed. It is interesting to note that in the implementation section of the Comprehensive Plan (page 106), it only states that to implement this recommendation the County should 'Initiate a cooperative planning effort with the WV DOT to improve the US 340 corridor'. Unfortunately, the County has little to say in what the DOT does in this corridor. This is evident in that the 340 Study doesn't include the area between Harpers Ferry and the Virginia line, because of the discussions taking place between West Virginia, Virginia and Maryland. This also recently became evident since the State and the Border Patrol and Customs appear to be placing a new traffic signal without local County planning input. Finally, this recommendation is written in the suggestive form (should) versus the mandatory form (shall).

Notwithstanding this, the Applicant feels that this recommendation supports the rezoning application for the following reasons: the land use on this property is already mixed-use; the viewscape looking towards this property already includes the flea market and a rezoning would allow marketing to other commercial/office ventures; it would permit economic development; and, traffic design for new commercial development would necessitate improvements, even though the property already generates commercial traffic. A major purpose of this request is to allow mixed uses on the property that meets current design standards, in order to enhance the views from the top of Allstadts Hill.

Recommendation 4.10 on Page 78 states: "It is the vision of this Comprehensive Plan that development will be concentrated within the designated growth areas".

Comment: With regard to this rezoning application, this is probably the strongest and most definitive recommendation of them all. There is only one map in the Comprehensive Plan that makes land use recommendations. This map is on page 75 of the Plan. Although it shows the limits of four other study areas, it does not mention the '340 Study' area at all. It does, however show the 'Growth Area' as contemplated in recommendation 4.10. The property that the Applicant is requesting a map amendment is located squarely in this Growth Area. What better place to allow a mixed-use community, then one that is already mixed-use and is in the designated growth area where development should be concentrated pursuant to recommendation 4.10?

In addition to these Comprehensive Plan Recommendations, portions of the narrative also support this application. This discussion isn't intended to spark a debate on which narrative portions take precedent over others, since again this is in the eyes of reader. It merely identifies some sections of the Plan that are supportive of this request. Two of the Plan's policies include the following statements:

'This Plan encourages new development patterns that foster mixed-use neighborhoods so that a sense of community begins at the subdivision level'; and,

'This Plan encourages economic development so that residents can live and work in the County'.

Two of the Statement of Goals in the Plan state that the Plan should:

'Encourage growth and development in areas where sewer, water, schools, and other public facilities are available or can be provided without unreasonable costs to the community'; and,

'Encourage and support commercial, industrial, and agricultural activities to provide a diversified and sound local economy'.

With regard to the public services mentioned in the first statement, this property is already zoned Residential, so any commercial component would lessen the demand on schools (school impact fees are in place anyway). Also, public water and sewer are currently available on this site.

Page 71 of the Plan lists a shocking fact. It states that "Land zoned for commercial and industrial use makes up approximately 5% of the County, which is almost evenly split between the I-C District and the mixed use district". If this is true, it would appear to be very difficult for the County to meet recommendation 3.18 listed above (pursue commercial and industrial development); if there is only 5% of the land in the County is zoned for commercial use.

In conclusion, with regard to how this application relates to the Comprehensive Plan, it would appear that the requested map amendment is very much consistent and compatible with the 2004 Jefferson County Comprehensive Plan.

2. Change of Neighborhood

There have been significant changes in the neighborhood that would support the requested change from Residential Growth to the Mixed-Use Zone. These include the following:

Availability of Central/Public Water and Wastewater Treatment Facilities:

Public utilities were not available in this neighborhood when the original zoning ordinance was adopted. These services are now available in the neighborhood as well as directly on this property. As stated earlier, a goal of the Comprehensive Plan is to encourage growth and development where sewer and water services are available.

Adjacent and Confronting Zoning, Commercial and Industrial Subdivision Approval and Intensity of Use has changed:

The zoning classification on the property directly across Route 340 was recently changed from Residential Growth to the Mixed-Use district. As such, the applicant's property is now bordered on the East (River Riders) and the North (Shenandoah Professional Building) by property zoned Residential/Light Industrial/Commercial. This same logic should apply to the applicant's property, especially since this property has had commercial uses on it longer than those adjacent and confronting properties.

Since the adoption of zoning, the intensity of use on the adjacent and confronting properties has also increased. River Riders has greatly expanded their operation to the benefit of the region and the Shenandoah Professional Building is a converted residential structure.

In additions to those changes and expansions, the adjacent Old Standard Quarry is now an approved recorded commercial/industrial subdivision. This is certainly a change in the neighborhood that should favorably justify this application.

Also in the immediate neighborhood, the former Cliffside Inn has undergone extensive renovations to become a Quality Inn. Its renaissance has made it a much more desirable destination.

Addition of the Park Service Parking Lot and Bus Transportation/Tourist Center:

The Park Service parking lot and transportation center was added since the adoption of the zoning ordinance. This parking and transportation has enhanced the transportation network in the area. It also converted open land into a paid parking lot.

Addition of Commercial and Residential Uses in the Neighborhood:

Besides the Shenandoah Professional Building, at least two new commercial enterprises have opened in the immediate neighborhood. These include Through the Garden Landscaping and Meadow's Nursery. These businesses were opened after the zoning ordinance was adopted and are adjacent to two residential developments that were developed after zoning was adopted. These additions further demonstrate that the neighborhood has changed into a mixed-use neighborhood.

Most recently, the Customs and Border Patrol began one of the largest nonresidential developments in the neighborhood. Regardless of who owns it, it is a massive complex that includes offices and training facilities, among other uses. It can't be ignored as a significant change in this particular neighborhood. Based on intensity of use, it is a significant quasi-commercial development in this area.

There have been multiple changes in the slightly expanded neighborhood that would support a change to the Residential/Light Industrial/Commercial District. These include the addition of Eckels-Spencer Funeral Home, the Sears Store along with the multi-unit commercial and warehousing complex in which it is located, the new Sheetz store, the Aldi Grocery Store, Rock and Tile (formerly The Lumber Yard), the Farm and Tractor Supply Store under construction, the zip-line operation along the Potomac River and the townhouse development at Windmill Crossing. All of these projects were developed after the zoning ordinance was adopted. Not only does this demonstrate that the neighborhood has changed to mixed-use, it also demonstrates that mixed-use must be consistent with the Comprehensive Plan, since all of these projects were approved in the past ten or so years.

Finally, with regard to changes in the area since the zoning ordinance was adopted, no discussion would be complete without mentioning the addition of slot machines and table games at the Charles Town Race Track. These enhancements to the Race Track have increased incoming visitors to this area of Jefferson County. Accordingly, the Route 340 Corridor needs to change in order to accommodate the additional commercial growth needed to serve these visitors.

3. *Change of Transportation Characteristics (from when the original ordinance was adopted):*

There have been many changes in the transportation characteristics in this area since the adoption of the zoning ordinance. These include: the reconstruction of the Route 340 Bridge over the Shenandoah River; a new traffic signal at the intersection of Route 230 and Route 340; a new traffic signal at the intersection of Route 24 (Country Club Road) and Route 340; the improvement of the Shipley School access to Route 340; and, the addition of the previously mentioned Harpers Ferry Parking Facility and Bus Transportation Center along Route 340 near Bolivar. There is also a proposed traffic signal and intersection realignment planned at the Customs and Border Patrol Complex. Furthermore, the Planning Staff has reported that West Virginia, Virginia and Maryland are in serious discussions with regard to improving the Route 340 Corridor in the area of the Shenandoah and Potomac Rivers.

All of these improvements have had a positive effect on the transportation characteristics and traffic flow in this area. The opening of the new four lane Route 9 towards Leesburg should also have a positive effect on the traffic flow along Route 340.

Furthermore, the proposed map amendment from Residential Growth to Residential/Light Industrial/Commercial should have very little impact on traffic, since the property is already zoned for high density residential and the site is already utilized commercially.

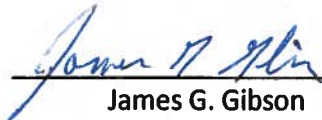
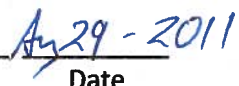
4. Error in the Zoning Map:

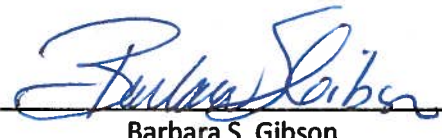

The applicant's property had a mix of commercial and residential uses on the property when the original Zoning Ordinance and the Residential/Light Industrial/Commercial District were adopted. As such, the property should always have been included in this mixed-use zone. The property contains the Allstadt residence and an Ordinary which was built in the late 18th Century. An Ordinary was a commercial tavern and meeting place. This reference is to show how early the property was utilized both residentially and commercially. More recently, the property was used as a drive-in movie theater from 1952 until 1983; and, as a large flea market from 1983 until the present. The property also contains the Wilt Fruit Stand and farmers' market, which has been open since 1968. The dwellings have remained on the property.

When the Zoning Ordinance was adopted in 1988 and continuing today, the applicant's property contained a large flea market, a fruit stand and several dwelling units. Furthermore, the property is adjacent to one of only a couple of 'Primary' access roads in Jefferson County as defined on a map in the 1987 Comprehensive Plan (the Plan that was in effect at the adoption of the original Zoning Ordinance) and on the same map in the 2004 Comprehensive Plan. Accordingly, the property should have been always been zoned Residential/Light Industrial/Commercial.

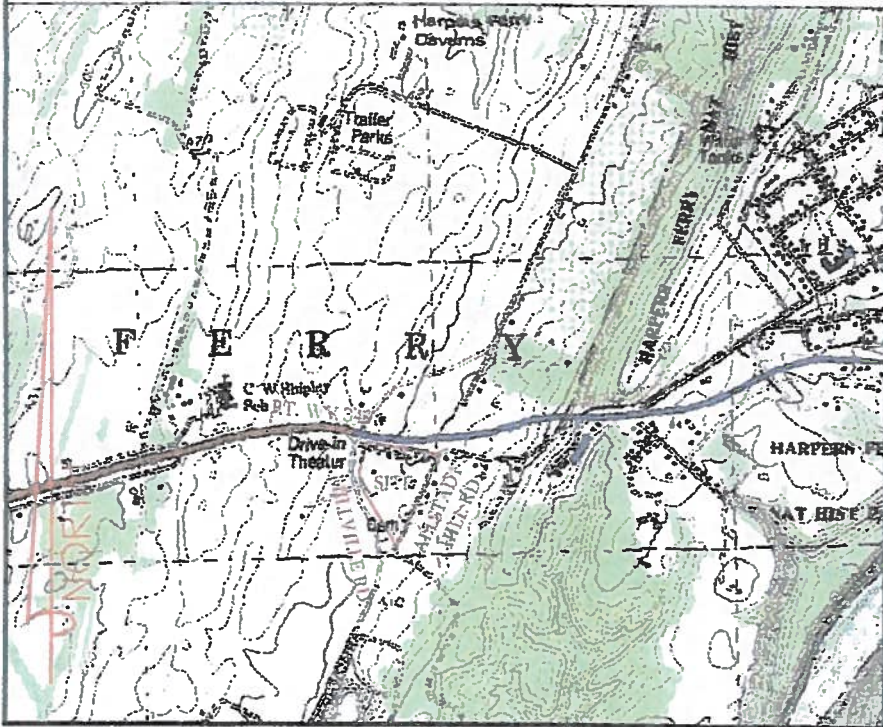
5. Conclusion:

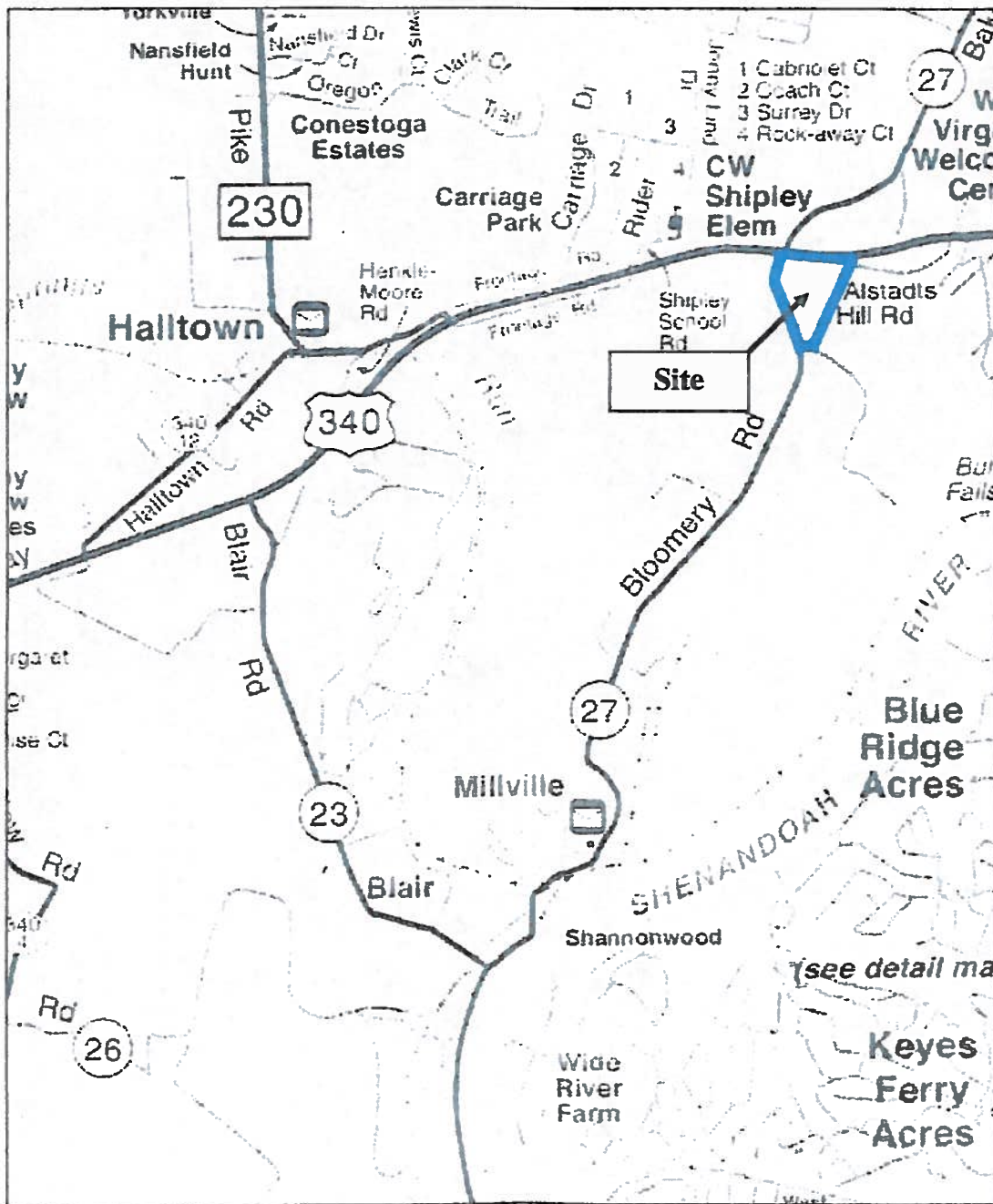
The Applicant is requesting that the County Commission of Jefferson County approve a map amendment to the Jefferson County Zoning Map. This map amendment will change the zoning classification on the applicant's property from the Residential Growth District to the Residential/Light Industrial/Commercial District. This request is supported by the 2004 Jefferson County Comprehensive Plan, along with the other reasons set forth in this petition, which include the Change of Neighborhood and the Error in the Zoning Map.


James G. Gibson

Date

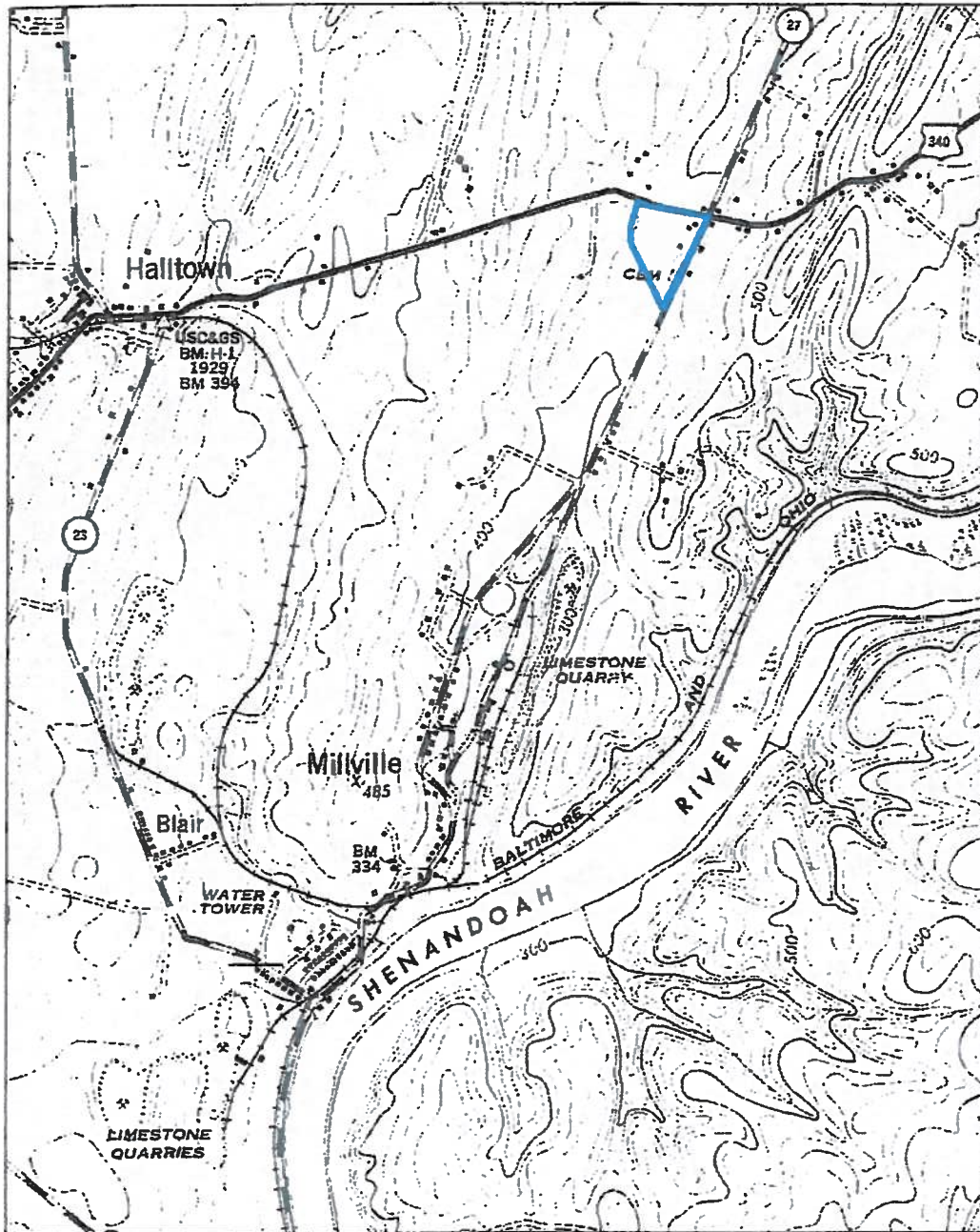

Barbara S. Gibson

Date

LOCATION INSET
SCALE: 1" = 2000'





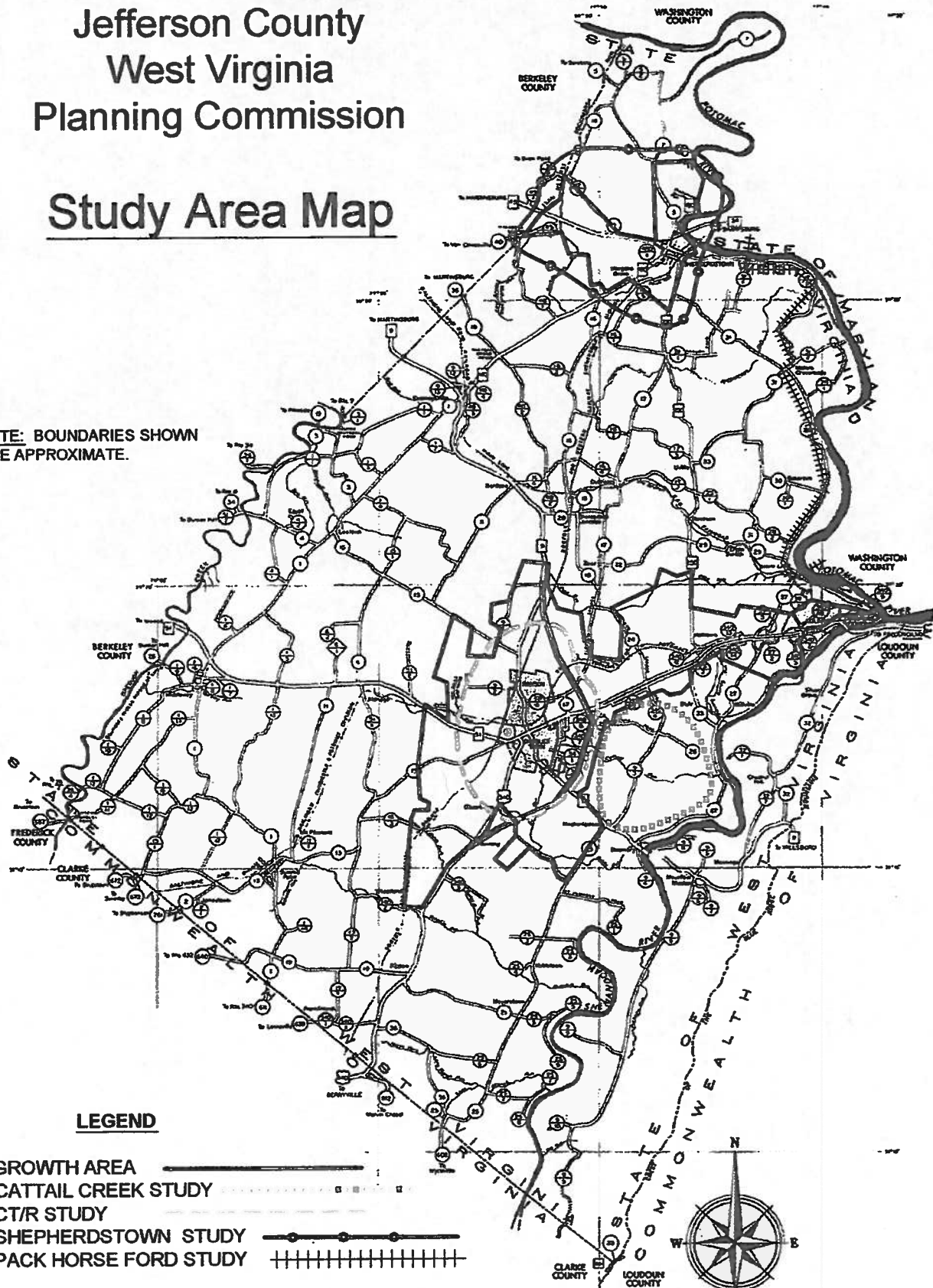
Location of Gibson/Flea Market Property



USGS Map of Property

Jefferson County West Virginia Planning Commission Study Area Map

NOTE: BOUNDARIES SHOWN
ARE APPROXIMATE.



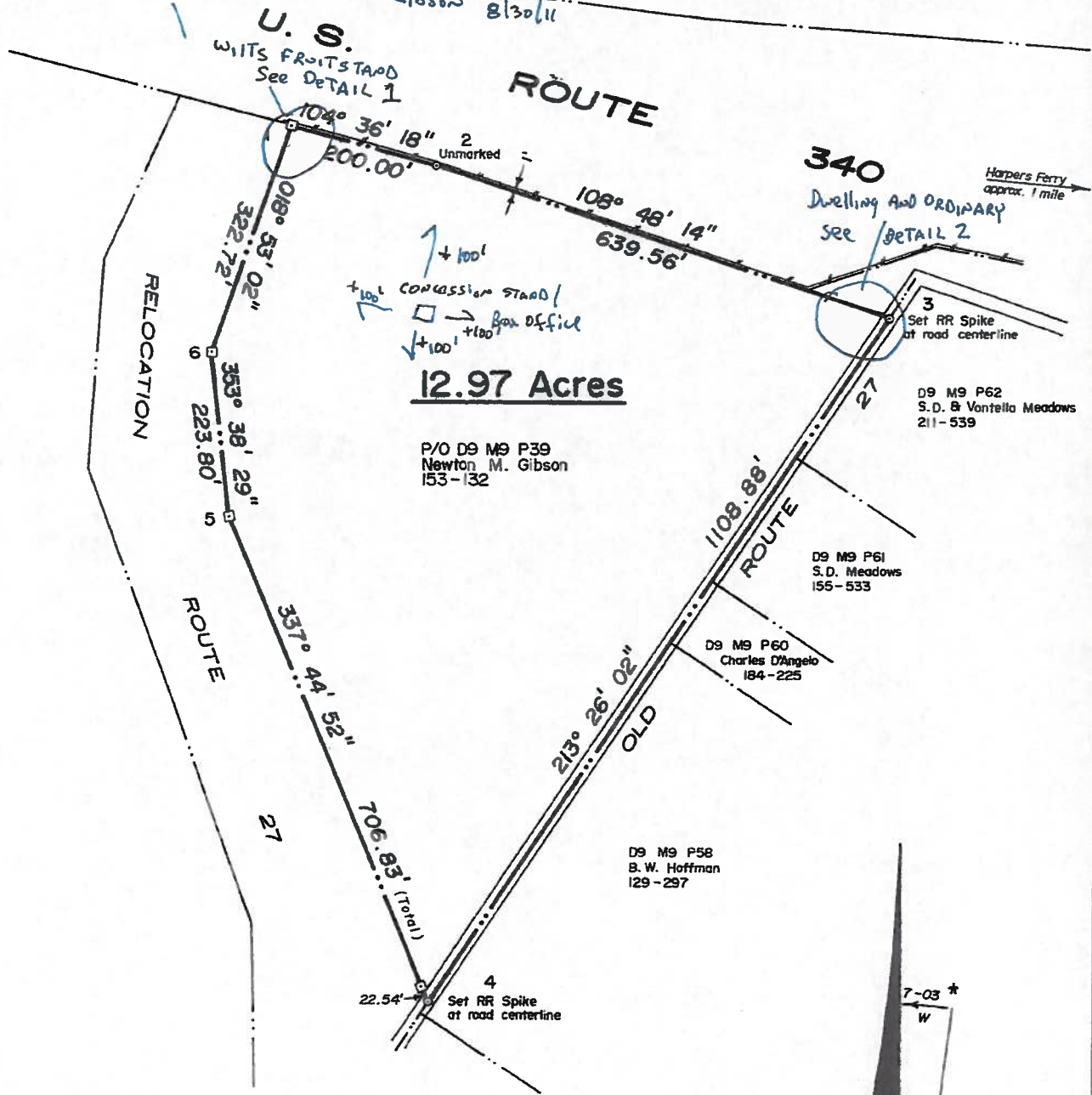
LEGEND

1. GROWTH AREA
2. CATTAIL CREEK STUDY
3. CT/R STUDY
4. SHEPHERDSTOWN STUDY
5. PACK HORSE FORD STUDY

August, 2003
NOT TO SCALE

Illustrations by James Gibson 8/30/11

□ = Dept. of Highways Concrete Monument



Plat of Survey showing a portion of the **Newton M. Gibson property**

Harpers Ferry District
Jefferson County, W. Va.

Scale : 1" = 200'
Surveyed : 06 June 1981

Charles K. Sager
Jefferson County Surveyor

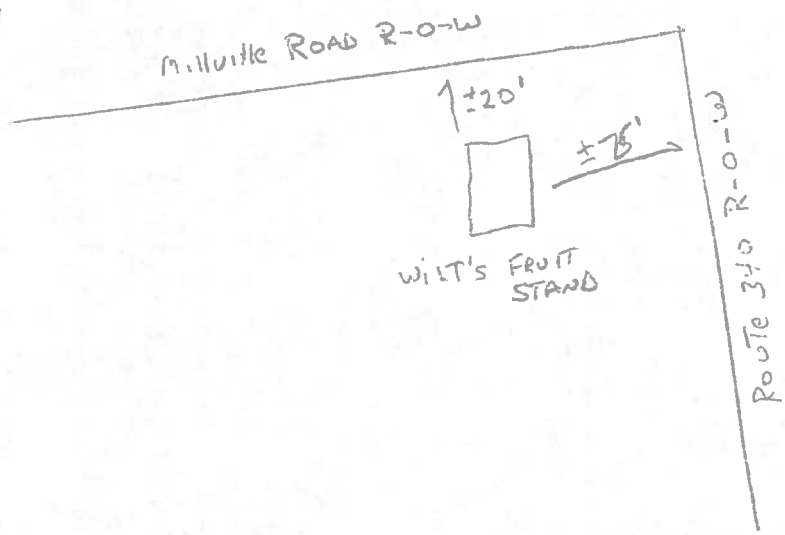


Declination measured at the Ranson, WV Magnetic Station June 1979.

MAGNETIC NORTH

APPALACHIAN SURVEYS, INC.

P.O. BOX 35
CHARLES TOWN, WV 25414



Detail 1



DETAIL 2

**A Motion Recommending Denial of a
Rezoning for Twin Oaks Subdivision, LLC Property
November 8, 2011**

Whereas, Twin Oaks Subdivision, LLC. has requested rezoning of property known as the Twin Oaks Subdivision LLC and Town Run Commons; and

Whereas, The property is located on Kearneysville Pike (Route 480), Shepherdstown, WV and is identified as Parcels: 26.1, 26.2, 26.3 & 26.4 as shown on Tax Map 13, cumulatively consisting of 13.69 acres; and

Whereas, The applicant is requesting rezoning from Rural to Industrial-Commercial; and

Whereas, The requested rezoning process complies with the requirements in accordance with the provisions of Article 12 of the Jefferson County Zoning and Land Development Ordinance, effective July 7, 1988, as amended; and

Whereas, The Planning Commission finds that the requested rezoning is not in conformance with the adopted 2004 Comprehensive Plan as outlined in the staff report; and

Whereas, The Planning Commission further finds that there have not been major changes of an economic, physical or social nature within the area involved which were not anticipated when the Comprehensive Plan was adopted; and

Whereas, Staff finds the request inconsistent with the Comprehensive Plan based on the conditions outlined in the staff report attached; and

Now therefore be it moved, that the Jefferson County Planning Commission recommends _____ the request for rezoning from Rural to Industrial-Commercial for property identified in the Jefferson County Tax Map as Parcels: 26.1, 26.2, 26.3 & 26.4 as shown on Tax Map 13.

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.


Recommended _____ this ___ day of November
By vote of the Jefferson County Planning Commission
By a vote of _ Yes _ No

Commission President

Staff Report
 Jefferson County Planning Commission Meeting
 November 8, 2011

Twin Oaks Subdivision, LLC Rezoning PC File # Z11-05

Item #6: Request by Peter Corum and J. Edward Slonaker of Twin Oaks Subdivision, LLC for a zoning map amendment for property designated as Tax District Shepherdstown, Map: 13, Parcels: 26.1, 26.2, 26.3 & 26.4.

APPLICANT:	Peter Corum and J. Edward Slonaker
OWNER:	Same as above
DEVELOPER:	Same as above
SURVEYOR/ENGINEER:	N/A
PROPERTY LOCATION:	This property is located on Route 480, Kearneysville Pike, adjacent to Morgan's Grove Park.
LEGAL DESCRIPTION:	District: Shepherdstown; Map: 13; Parcel(s): 26.1, 26.2, 26.3 and 26.4 
ZONING DISTRICT:	Current 2010 Zoning Map: Rural
SURROUNDING PROPERTIES:	Current 2010 Zoning Map North: Park South: Rural East: Rural West: Residential Growth
LOT AREA:	Site area: 13.69 acres
PROPOSED ACTIVITY:	To rezone this Rural property to a designation of Industrial/Commercial.

Staff Report
 Jefferson County Planning Commission Meeting
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Planning Commission Responsibility:	To advise the County Commission as to whether the requested Zoning Map Amendment is consistent with the 2004 Comprehensive Plan.
Staff Findings:	The proposed zoning district is not in conformance with the 2004 Comprehensive Plan.

APPROVALS:	
Conditional Use Permit <i>PC File #Z06-01</i>	Submitted: 02/22/06 Approved: 08/17/06
Community Impact Statement (CIS) <i>PC File #06-33</i>	Submitted: 10/29/06 Staff Review Mtg.: 11/3/06 County Engineer Approval: 03/22/07 County Planner Approval: 03/19/07 PC Approval: 04/24/07 Expires on: 11/03/08; Extended to: 02/17/2009; 12/09/09
Preliminary Plat	Submitted: 11/30/07 Staff Review Mtg.: 12/10/07 Approved: 08/06/08
Site Plan	N/A
Final Plat	Submitted: 8/8/08 Public Hearing and Approval: 10/14/08
Variance History	02/21/08 BZA approved a 12 month extension (until 02/17/09) for the expiration date of the Conditional Use Permit. 08/26/08 PC granted a 3 month variance for Final Plat approval from 11/03/08 to 02/17/09. 12/09/08 PC granted a 12 month variance from 12/09/08 to 12/09/09 to bond and record Town Run Commons Subdivision. 12/08/09 Variance requested for 1 year extension to bond and record Town Run Commons Subdivision. This request could not be heard due to a recusal leaving a lack of a quorum. 01/12/10 PC denied a request for a 1 year extension to bond and record Town Run Commons Subdivision.
OTHER APPROVALS:	

Staff Report
Jefferson County Planning Commission Meeting
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Background

The property is located directly south of Morgan's Grove Park on Kearneysville Pike (Rt. 480), Shepherdstown, WV. There are four parcels that are owned by the applicant and those parcels are part of this current request and previous site activity. All of four parcels are being requested for rezoning and total 13.69 acres.

In 2006 this applicant was granted a CUP for a work-live development call Town Run Commons (See Image 1). The applicant proceeded through the Final Plat process. The applicant had received time extensions on the both the Final Plat for bonding and recordation and extensions on the CUP. In January of 2010 the Planning Commission denied another Final Plat extension request. The Final Plat was not bonded and recorded and as such the project expired.

Introduction and Purpose

The subject properties are located along Route 480 directly adjacent Morgan's Grove Park. The property currently has a concrete pad, which was for a restaurant, and a paved area for parking. Those appurtenances are used to host a weekly market farmers/crafts. The remaining land is a community garden opened in 2011, open fields, a few stands of trees and a two unoccupied houses. The parcels are identified as Tax Map 13 and Parcels 26.1, 26.2, 26.3 and 26.4 of the Shepherdstown District. Parcel 26.1 is approximately 6.69 acres, Parcel 26.2 is approximately 2 acres, Parcel 26.3 is approximately 3 acres and Parcel 26.4 is approximately 2 acres. All of four parcels are being requested for rezoning and total 13.69 acres (Image 2).

The parcels are currently zoned Rural. The properties to the south and west are zoned Rural with large lot residential, to the north is Morgan's Grove Park which is zoned Rural, and to the west is property zoned Residential Growth (Image 3). The applicant has requested rezoning of the 13.69 acres from Rural to Industrial-Commercial. The following report has been prepared to assist the efforts of the Jefferson County Planning Commission and Jefferson County Commission to make findings regarding the consistency of the proposed rezoning with the Jefferson County Comprehensive Plan, in accordance with West Virginia State Code requirements.

Statutory Authority and Requirements

The West Virginia State Code, Section 12.1(a) provides that the boundaries of zoning districts may be amended by the County Commission with the advice of the Planning Commission. The County Zoning Ordinance also requires that the "procedure for amendment [by petition] shall be as dictated in Section 8A-1-1 et seq of the West Virginia State Code as amended." As concerns amendments by petition, State statute provides that, "Before amending the zoning

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ordinance, the governing body with the advice of the planning commission must find that the amendment is consistent with the adopted comprehensive plan.” [See *WVC 8A-7-9(c)*] This subsection of the State Code also states that, “If the amendment is inconsistent, then the governing body with the advice of the planning commission, must find that there have been major changes of an economic, physical or social nature within the area involved, which were not anticipated when the comprehensive plan was adopted and those changes have substantially altered the basic characteristics of the area.”

Scope of this Assessment

This report focuses on whether or not the rezoning application is consistent with the Comprehensive Plan. If the Planning Commission determines that the request is not consistent with the Plan, it must find that there have been changes to the area that were not anticipated in the 2004 Plan only if the Commission desires to recommend approval to the County Commission. Staff does not believe that there have been major changes of an economic, physical or social nature, within the area involved, that were not anticipated when the comprehensive plan was adopted, such that they would “substantially” alter the basic characteristics of the area.

The format for this assessment includes quotes from specific provisions of the Comprehensive Plan, which are identified by page number citation at the end of the sentence where it is quoted. Staff has used these notations and quotations in order to address sections of the Comprehensive Plan as it relates to the proposed rezoning. Identification of the specific page numbers where these provisions can be found in the Plan, permits the Planning Commission and/or County Commission to easily locate the particular provision and personally evaluate the provision in the context of the larger Plan document. When available or appropriate, map references are provided with maps located in the Appendix to this report.

It should also be noted that the Comprehensive Plan states, *“Its recommendations are (by their nature and intent) general and, as such, sometimes conflicting. It will not be difficult to find two that individually justify and conflict with many land use proposals.”* In that sense, there are many plan references that are identified in this report that can or may appear to support or fail to support a finding of consistency between the proposed rezoning and the Comprehensive Plan. In the final analysis, each member of the Planning Commission and the County Commission will need to weigh the degree to which various plan provisions are of greater or less importance, in establishing their respective findings regarding the application.

Finally, this report provides an account concerning the proposed rezoning based on review of the various plan sections and elements. The recommendations should be considered the

Staff Report
Jefferson County Planning Commission Meeting
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professional opinion of staff; no more and no less. Since the Planning and Zoning staff has no statutory authority to make decisions in this regard, we defer to the Planning Commission and subsequently the County Commission for any final recommendation or decision that may be forthcoming with respect to the subject application.

Applicants Stated Intention with the Property

The applicant has stated that the purpose of the rezoning is to support the agricultural industry in Jefferson County by providing a location for entrepreneurs, small local retail and professional services to encourage retention and development of the agricultural and crafts sector. As described by the applicant this site would act as incubator for these businesses. Approximately 15,000 square feet of commercial-retail building may be needed in the future. This space is proposed to be in one or more structures.

Current use and Staff Discussion with the Applicant Regarding use of the Property

In 2011, at the request of the property owner, the Planning and Zoning Department staff has issued determinations regarding proposed land uses for this property. On May 4, 2011 in response to an application submitted by the property owner, staff issued a Zoning Certificate (#ZC11-15) for this property for the following land use (the current use of the property):

“Market for the sale of farm products and incidental products, including arts and crafts, per Section 5.7(a)(11). Live music, events, and performances are permitted if accessory to the market. Events may not be a primary attraction or conducted on non-market days.”

On August 19, 2011, following a meeting with the property owner, staff issued a Pre-Proposal Conference memo to the owner, noting:

- Staff’s understanding is that the owner seeks to build a new structure for the purpose of bringing the existing Morgan’s Grove Market indoors. The market would sell produce, jams, honey, and other products. These types of sales would be consistent with the definition of “Farm Market”, which is a permitted use in the Rural District.
- Other options identified by the applicant (“ . . . expanding the health and fitness aspect of the facility / massage therapy, homeopathic retail, nurses station, office space . . .”) appear to be less related to a Farm Market and would need to be considered on a case-by-case basis. Staff would consider allowing some of these uses as accessory uses if truly incidental; however, a more detailed description from the applicant of the nature and extent of the uses would be necessary. A commercial kitchen may be permitted as

Staff Report
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an agricultural use if staff determines that it meets the intent of the Zoning and Land Development Ordinance.

- As such, staff has determined that the existing zoning (Rural) is sufficient for the current land use (outdoor farmers market), as well as for an enclosed farmers market which includes the sale of other products and services, and for a commercial kitchen meeting the intent of the Zoning and Land Development Ordinance.

Staffs Comments of this request

Staff supports the concept the applicant is proposing. However, Staff has thoughtful concern regarding the requested zoning district. The requested zoning district allows for intense industrial uses. It appears that the applicant is asking for a more intense zoning district than is required for the proposed uses. The application that was submitted did not indicate any uses that would necessitate the need for the level of manufacturing that is permitted in the requested zoning district.

While the proposed activity is for agricultural and artisan based activity and may seem to be an appropriate use in the Rural District, the intended intensity in adding value to those products is more than the Rural District permits. Additionally, the Rural District requires that most of the goods have to be grown on the parcel where such goods are sold. Such a requirement is not inappropriate in the Rural District where agribusinesses are promoting goods grown or created on site. Among other components, this is a limiting factor for the applicant with the current district.

The current use on the property is permitted in the Rural district since the activity is principally contained to the weekly market.

As with any rezoning request, an applicant may have the most honorable intentions, however the zoning and all the permitted use allowed continue with the land, not the owner. Any of the permitted uses in the zoning district may be exercised by future owners of the property. Down zoning a property is more difficult than if it had been right zoned from the start. As this request is considered, it is imperative that the decision is evaluated with the question, "Do we want the potential for industrial operations in this area 30, 50 or a 100 years from now?" Assessment of this request should take into consideration existing and future citizens and residents who will live in the community long after such decision are made.

Finally, when noting elements of the Comprehensive Plan, the applicant provides broad assumptions regarding how the rezoning will provide for greater protection of agricultural resources off-site and in the county, but the request does not ensure the protection of the

Staff Report
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November 8, 2011

agricultural resources. A number of the applicant's citations of the Comprehensive Plan and subsequent elaborations of those citations pertain less to the subject parcels, but are based on off-site expectations.

This staff report is focused on the parcels involved in the rezoning request, not activity that may or may not occur off-site from the requested rezoning.

Relevant Comprehensive Plan Elements and Commentary

One of the weaknesses of the 2004 Comprehensive Plan is that there is not a future land use map. Additionally, not all areas of the County are adequately addressed. There are some areas of the County that are discussed in a fair amount of detail in the Comprehensive Plan. However there are other areas of the County, where the Plan is relatively silent regarding future planning impacts and opportunities in those areas.

When the Comprehensive Plan is silent, the directive found in state law that "...the governing body with the advice of the planning commission must find that the amendment is consistent with the adopted comprehensive plan...." is difficult to observe. It is possible to speculate that if the plan does not address areas or locations of the County, that the Plan might have anticipated those areas would not fundamentally change from their 2004 condition.

As noted above, Staff does not believe that there were major changes in the area that were not anticipated when the comprehensive plan was adopted. While there have been changes that have occurred in that area, the zoning has been in place in that area and the changes were anticipated. The 1988 Zoning Map established the zoning classifications in that area and any build out of those parcels was anticipated. This report focuses only on conformance to the Comprehensive Plan.

The 2004 Comprehensive Plan does reference a "Shepherdstown Area" of study. However the discussion is limited. The elements noted in the "Shepherdstown Area" are:

- WV 45 by-pass has assisted in relieving congestion in Shepherdstown
- A significant amount of the area to the north, south and west of Shepherdstown is zoned Residential Growth and Residential-Light Industrial-Commercial. The rationale for this statement is to highlight the zoning rights that are established and the significant growth that is permitted in those two districts.
- Due to the unique nature of Shepherdstown, future development needs to be closely managed and monitored.

The topics above are discussed in general terms and do not provide many specifics for improving or addressing the concern.

Staff Report
Jefferson County Planning Commission Meeting
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However, the notion that area surrounding Shepherdstown should be developed in an appropriate fashion is pertinent to this rezoning request. The intensity of the Industrial-Commercial District is not in keeping with the surrounding property and surrounding area. The transportation network is not adequate to allow the proposed zoning classification and the growth and development patterns existing are not conducive to potential heavy industrial operations.

Economic growth and development are outlined on page 63 of the Comprehensive Plan and outlines the following points as it relates to this rezoning:

- *Historically, small business development in the region has taken place in close proximity to housing and population growth. Earlier development and transportation trends created an economic mix that was geared to serve the needs of the local community. Hence, the older, more established small business firms are located in Charles Town and the other municipalities.*
- *In recent years, population growth and transportation improvements have generated new markets for small businesses. Multi-purpose shopping centers have been built on the outskirts of Charles Town and Shepherdstown, thereby creating competition for downtown businesses. In some instances, shopping centers have attracted downtown merchants to suburban locations. In addition, relatively easy access to Maryland and Virginia fosters shopping in Hagerstown, Frederick, Martinsburg, Leesburg and Winchester, retarding small business development in the County.*
- *While recent small business development on the fringe areas has helped increase the variety of goods and services available to area residents, it also heightened the competitive disadvantage of the traditional central business district, most notably Charles Town and Ranson. Although the municipalities are not within the planning jurisdiction of the County, it should be noted that having its major urban center handicapped by an abandoned, neglected or under-used commercial core is not in the County's best interest.*
- *The Bardane Park provided with much needed fully served sites, readily available to new manufactures.*
- *Encourage and support commercial, industrial, and agricultural activities to provide a diversified and sound economy (pg. 19)*

In general, based on the nature of the applicants proposed use there may be limited impact of business competition with the existing core communities in the county. However, if this development does not occur as planned, the proposed district does allow commercial activity that would impact the existing business centers. It appears that there is an attempt to make

Staff Report
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November 8, 2011

the proposed rezoning fit the site. Of importance is that the applicant is requesting a zoning classification that currently exists in the County in the industrial park. The industrial park has been established for the types of activity that the applicant has requested. Commercial and industrial developments can occur in a number of ways and in a number of alternative locations in the County. There are a large number of commercial and industrial vacancies that can accommodate this kind of development. Adding to a saturated market decreases the value of all property zoned that designation as the demand is low and the supply is high.

Further, while it is important to *“Encourage and support commercial, industrial, and agricultural activities to provide a diversified and sound economy”* in the County, that does not mean every site is conducive to such use or should be rezoned to the maximum allowable use. There may be situations where a request cannot fit the site and there are time when a creative solution can allow for the applicants need on a particular site.

The applicant has applied to rezone to the Industrial-Commercial District. The Comprehensive Plan on page 70 outlines the purpose of that district and is noted here:

- *The district permits uses of a heavy or light industrial nature, including commercial uses, which include “manufacturing, processing, and commercial uses which may require extensive transportation and central or public water and sewer services”. Consumer oriented commercial use are permitted but not encourage. A set of specifically identified uses and activities, presumably identified because of their potential toxic or other nuisances characteristics, are listed as permissible only if approved under the Development Review System.*

In the Industrial-Commercial District, there are “Principle Permitted Uses” and uses that are permitted uses under the Development Review System. While the most offensive and intensive uses of a heavy industrial nature are restricted by the Development Review System, the district still permits under “Principle Permitted Uses” uses of heavy industrial nature by right. The applicant has tried to minimize the differences between the Industrial-Commercial District and Residential-Light Industrial-Commercial district. Due to the noteworthy differences in the two districts, it is hard to minimize the differences. To highlight, there are two “Principle Permitted Uses” in the Industrial-Commercial district that are distinctly different from the uses permitted in the Residential-Light Industrial-Commercial. Those permitted uses are “heavy industrial uses” and “adult uses.” While it may be easy to dismiss the more intensive and offensive uses that are heavy industrial in nature, since there is the Development Review System, it is important to know that as long as an applicant can meet the requirements set forth in the Development Review System process they are entitled to that use.

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The applicant has highlighted the primary use of the property as "...to provide low impact, high quality commercial, distribution, professional services and retail in the area." Staff believes all of these intended uses are more appropriate in the Residential-Light Industrial-Commercial district. Additionally, both the Comprehensive Plan and Zoning Ordinance state that retail services and consumer oriented commercial uses should be limited in the Industrial-Commercial district. Since retail sales of goods made from the region are an important goal of the applicants intended uses, the district requested by the applicant discourages such uses.

The applicant argues that the size of the site would limit uses of heavy industrial. With over 13 acres for use, it appears that statement is unfounded. The lot sizes in Burr/Bardane Industrial Park are generally 2.5-6 acres in size and allows for variety industrial uses. There is the ability for heavy industrial uses on this site.

In the information provided, the applicant asserts that the proposed use on the site is mixed use, excluding residential activity, yet the requested zoning district is not mixed use in its design.

The applicant contends that this site should have been zoned Industrial-Commercial since 1988. Their basis for this statement is that there was a restaurant on the site in 1988 when zoning was adopted. The structure burned in 1993. Considering the use that was on the property in 1988, it seems excessive that Industrial-Commercial would have been appropriate for this site. The restaurant use was considered a non-conforming use in the Rural district. Since that time there has been no commercial activity commenced on the property to establish a commercial use. While the applicant did receive a Conditional Use Permit for a work/live development, no commercial activity took place on the property. Additionally, while there is a farmers market on site, that did not reestablish the commercial use nor did it constitute a new commercial use. Much like a farmer with their own seasonal stand, that does not constitute a commercial use, such stands are an accessory use to the farm operations.

Staff Recommendation

The applicant has provided documentation that they believe supports the request for rezoning and has attempted to demonstrate an apparent consistency of the proposed rezoning with certain provisions contained in the Comprehensive Plan. The applicant's analysis is based more on the use the applicant is proposing, rather than the requested zoning district. The merits of the proposed use may be honorable, however state law requires the requested zoning district be evaluated not the use. As such Staff does not recommend approval of the requested rezoning from Rural to Industrial-Commercial.

Staff Report
Jefferson County Planning Commission Meeting
November 8, 2011

As noted on page 12 of the Plan, “its recommendations are (by their nature and intent) general and, as such, sometimes conflicting. It will not be difficult to find two that individually justify and conflict with many land use proposals.”

Additional consideration of the proposed rezoning should include the following:

As noted above, State statute provides that “Before amending the zoning ordinance, the governing body with the advice of the planning commission must find that the amendment is consistent with the adopted comprehensive plan.” [See *WVC 8A-7-9(c)*] This subsection of the State Code goes on to state that, “If the amendment is inconsistent, then the governing body with the advice of the planning commission, must find that there have been major changes of an economic, physical or social nature within the area involved, which were not anticipated when the comprehensive plan was adopted and those changes have substantially altered the basic characteristics of the area.”

There have not been major changes of an economic, physical or social nature within the area that were not anticipated when the current Comprehensive Plan was written in 2004.

As noted above, Staff supports the applicants proposed use and the concept, but cannot support the proposed zoning district. The proposed district is significantly out of context for the surrounding uses and the area of the property. Additionally, the district permits more intense uses than the applicant is proposing for the site. Staff believes that if a zoning district were to be chosen, that the Residential-Light Industrial-Commercial district may more appropriate for the request, as it is in keeping with the proposed use of the property. However, staff has not evaluated if that would be consistent with the Comprehensive Plan.

Staff also believes that the Conditional Use Permit (CUP) is specifically designed for this type of situation when the use is outside the norm in the available zoning districts. In the past the Staff and the applicant have discussed the merits of this project and their options for a CUP or a rezoning. The applicant could tailor the uses, the number of structures and the size of the structure for the particular application of this site. A Conditional Use Permit could be crafted for the particular use proposed and allow the flexibility that fits the needs of the applicant.

Image 1

Staff Report
 Jefferson County Planning Commission Meeting
 November 8, 2011

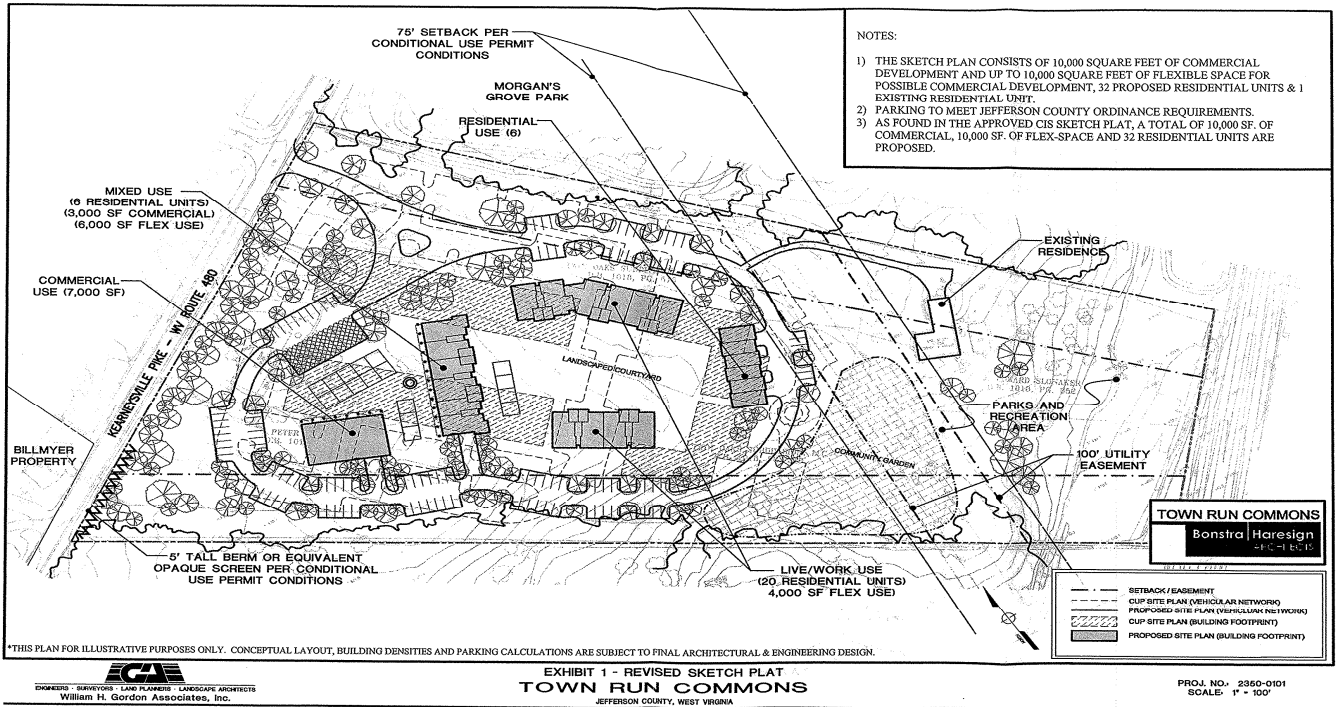


Image 2

Staff Report
 Jefferson County Planning Commission Meeting
 November 8, 2011

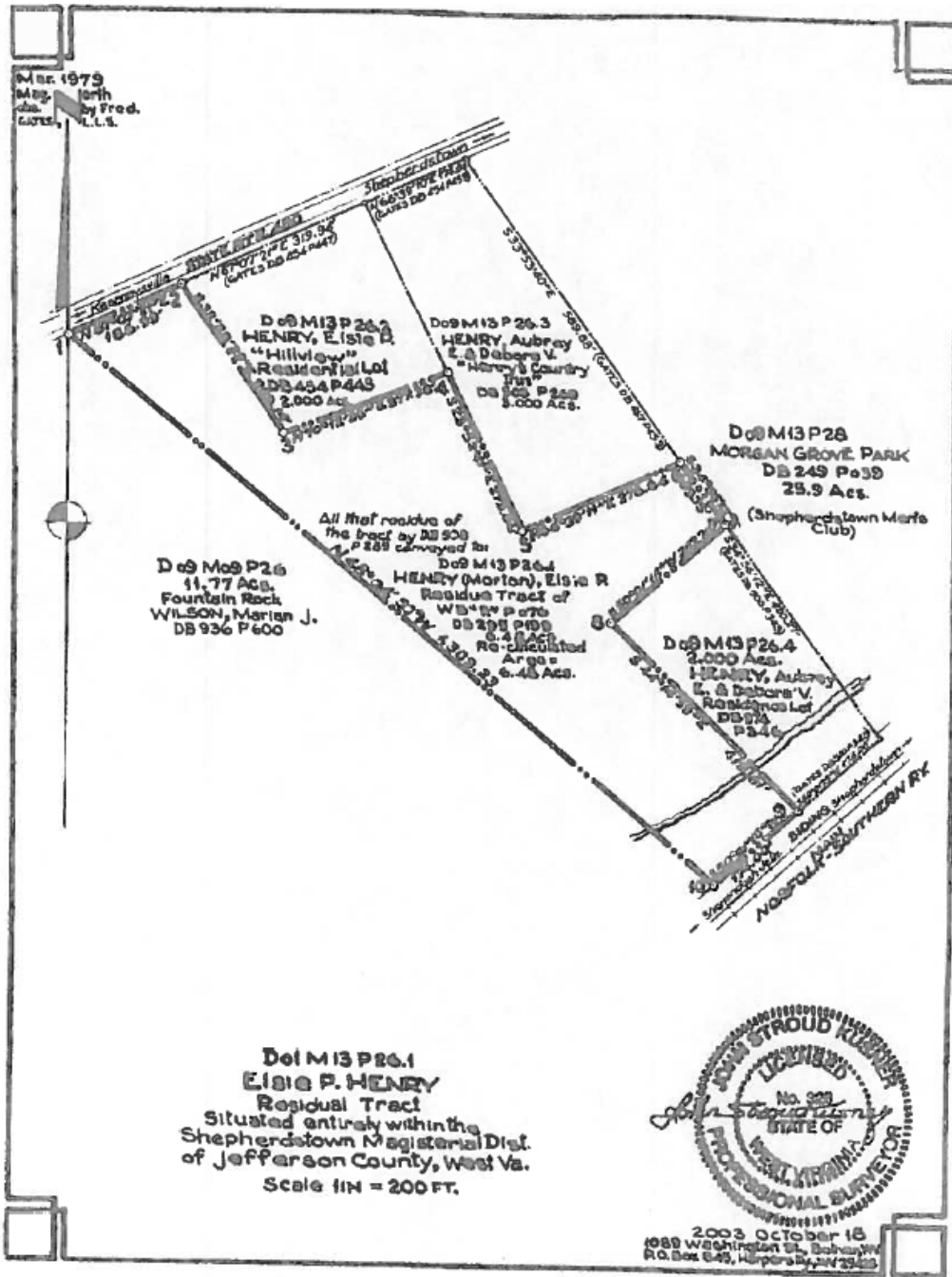
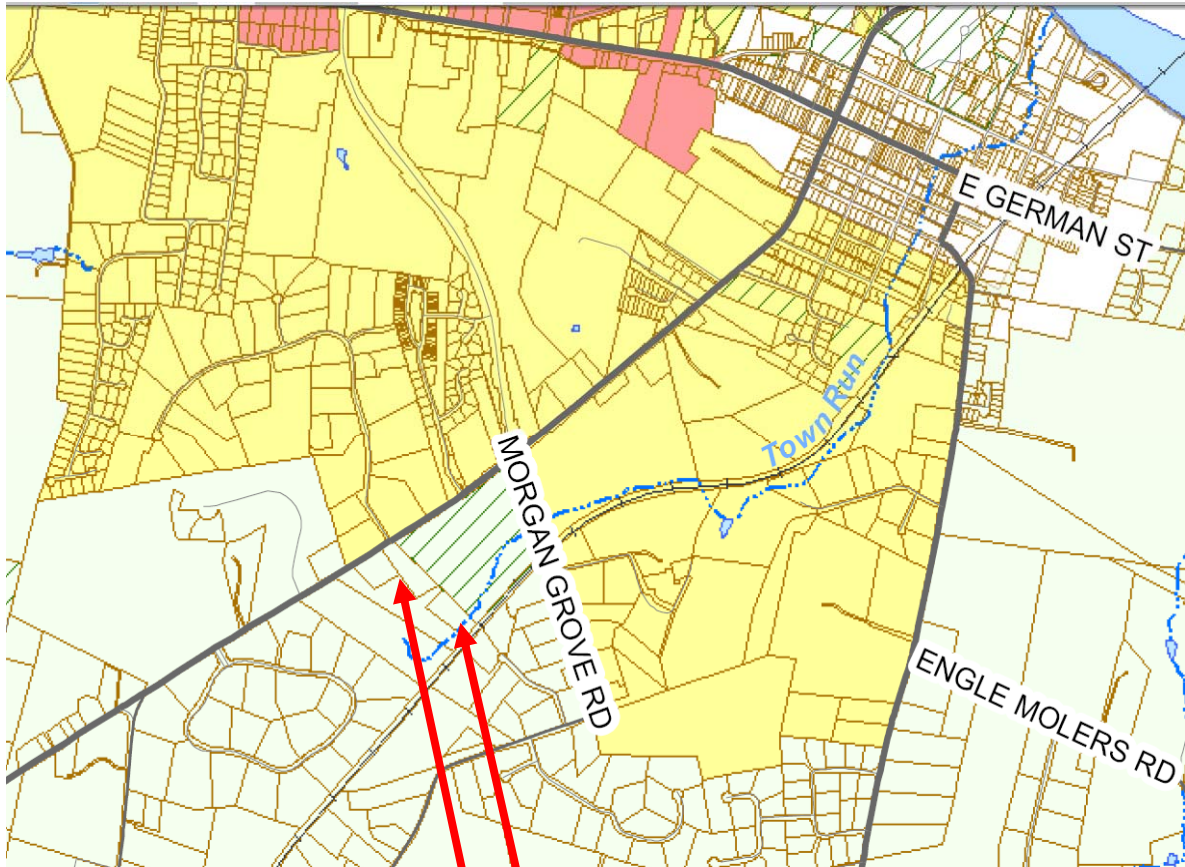


Image 3

Staff Report
Jefferson County Planning Commission Meeting
November 8, 2011



Legend

-  Urban Growth Boundary
-  Parcels
-  Tax District Boundary
-  Public/Quasi-Public Land
-  Appalachian Trail

Zoning District

-  Incorporated Town
-  Industrial-Commercial
-  Residential-Growth
-  Residential-Light Industrial-Commercial
-  Rural
-  Village

Subject Parcels

Item # has changed to
#6

Engineer's Report
Planning Commission Meeting
November 08, 2011
#5 Zoning Map Amendment

The engineering department defers to the Zoning Administrator on the matter.

Jefferson County Commission
PO Box 250
124 East Washington Street
Charles Town, WV 25414

September 21, 2011

Subject: Zoning Ordinance Amendment by Petition

Commissioners,

The undersigned owner(s) of land identified as Shepherdstown District; Tax Map 13 parcels 26.1, parcel 26.2, parcel 26.3 and parcel 26.4 requests a zoning map amendment. This request is being made through the procedures identified in WV Code 8A-1-1, 8A-7-9 and JC Zoning Ordinance Article 12 Section 21.1 and 12.3.

The purpose of the amendment is a change in designation of the subject property from the current designation as "Rural District" to "Commercial-Industrial District".

Narrative of substantiation for this request:

The property included in this request has been in continuous commercial use since 1968. The subject property is an island surrounded by suburban residential development. Placing a commercial-industrial zoning designation will accomplish several Comprehensive Plan goals. One of those would be to turn suburban sprawl into a mixed use community. Residential development would be prohibited while local jobs, commercial opportunities and neighborhood retail needs could be enhanced.

A case could be made that the requested zoning classification should have been updated to commercial-industrial when the property was first zoned. At a minimum, it could have been rezoned during subsequent zoning map amendments initiated by the County Commission.

Uses have included a restaurant, approved plans for high density mixed use development and commercial activities including Farm markets, community events and a community garden. All of these activities have received both local government and community support.

Economic development and commercial investment depend on predictability. In order for this property to continue attempts to fill local community needs it is imperative that the regulations regarding permitted use of the property be firm and understood. Site development planning and community participation are not possible if every potential

future use must be approved one piece at a time. It is much more efficient and beneficial for property development and public participation to have firm plans that can be evaluated, regulated and approved.

Current plans for the property are based on previous experience and current social-economic trends. Those plans include 15,000 square feet of commercial-retail space. The space would be in one or more individual structures. Negotiations for various operators of that space are in progress. The major theme of development will continue to be in support of the agricultural industry of Jefferson County. Providing facilities for entrepreneurs, small local retail and professional services is a priority.

This next step in developing the property and a community partnership cannot move forward without the predictability of the requested Zoning Amendment.

Thank you for your consideration.



Peter S. Corum *
Property Owner



J. Edward Slonaker *
Property Owner

*(Member of Twin Oaks Subdivision, LLC)

Attachments:

1. Tax District, Map and Parcel Number, Deed Book reference, Plat & Tract Size.
2. Comprehensive Plan compatibility of the proposed change.
3. Any change of transportation characteristics and neighborhood from when the original/current ordinance was adopted.

Copy submitted to Jefferson County Clerk (per WVC 8A-7-9 (a))

Name and address of owner(s):

Parcel 26.1 and 26.3
Twin Oaks Subdivision, LLC
PO Box 536
Shepherdstown WV 25443
Tel: (304) 283-2467

Parcel 26.2
Peter S. Corum*
PO Box 536
Shepherdstown WV 25443
Tel: (304) 283-2467

Parcel 26.4
J. Edward Slonaker*
PO Box 536
Shepherdstown WV 25443
Tel: (304) 283-2467

*(Member of Twin Oaks Subdivision, LLC)

Developer of all Parcels
Twin Oaks Subdivision, LLC
PO Box 536
Shepherdstown, WV 25443
Tel: (304) 283-2467

Name and address of contact person:

Peter Corum
PO Box 536
Shepherdstown, WV 25443

Tel: 304 283-2467

Tract size, shape, location and zoning:

The proposed area for zoning amendment is located in Shepherdstown District; Tax Map 13 parcel 26.1, parcel 26.2, parcel 26.3 & parcel 26.4.

The original tract acres:

Parcel 26.1	6.69 acres	DB 995	PG 321
Parcel 26.2	2.0 acres	DB 454	PG 445
Parcel 26.3	3.0 acres	DB 992	PG 60
Parcel 26.4	2.0 acres	DB 974	PG 346

The parcels have a total acreage of 13.69 acres.

Current zoning:

"Rural District"

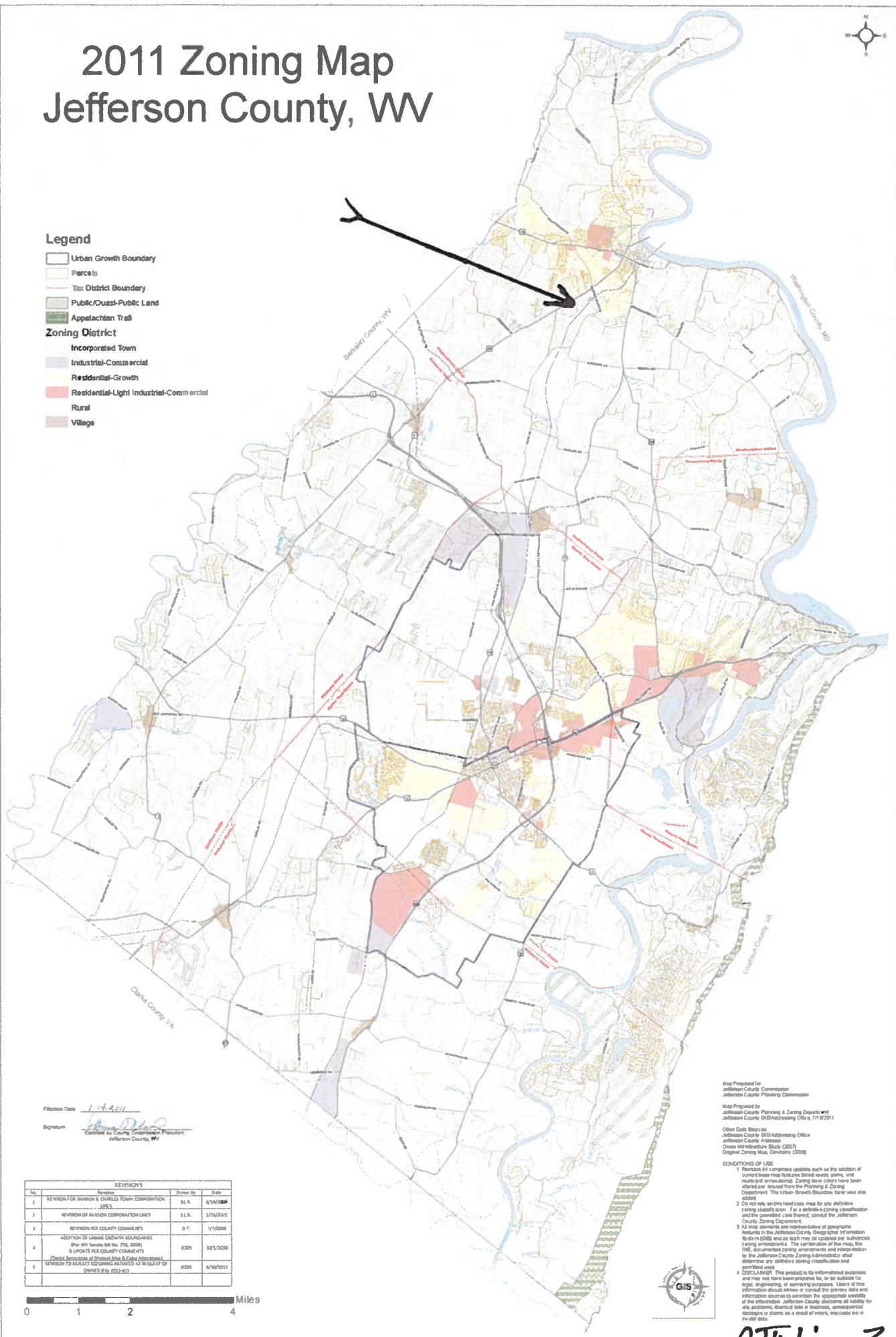
Plat, locator maps and tax map attached as pages 2, 3, 4 and 5.

2011 Zoning Map Jefferson County, WV



Legend

- Urban Growth Boundary
- Pierces
- Tax District Boundary
- Public/Quasi-Public Land
- Appalachian Trail
- Zoning District**
- Incorporated Town
- Industrial-Commercial
- Residential-Growth
- Residential-Light Industrial-Commercial
- Rural
- Village



Effective Date: 1-1-2011
 Signature: [Signature]
 Certified by County Commission President
 Jefferson County, WV

No.	Amendment	Enacted by	Effective Date
1	REVISION TO GR. BARRON & CHARLES TOWN CORPORATION (LIES)	S.L.R.	6/19/2008
2	REVISION OF MASON CORPORATION (LIES)	S.L.R.	3/29/2005
3	REVISION HCS COUNTY COMMISSIONERS	D.T.	1/17/2008
4	ADDITION OF URBAN GROWTH BOUNDARIES (Per WV Senate Bill No. 275, 2005) & SUPPLEMENTAL COUNTY COMMISSIONERS (Final Approvals of Original Maps & Code Amendments)	KOR	10/1/2005
5	REVISION TO SELECT ZONING DISTRICTS AS A RESULT OF ZONING MAP #2005-01	KOR	4/26/2011



Map Prepared for:
 Jefferson County Commission
 Jefferson County Planning Commission

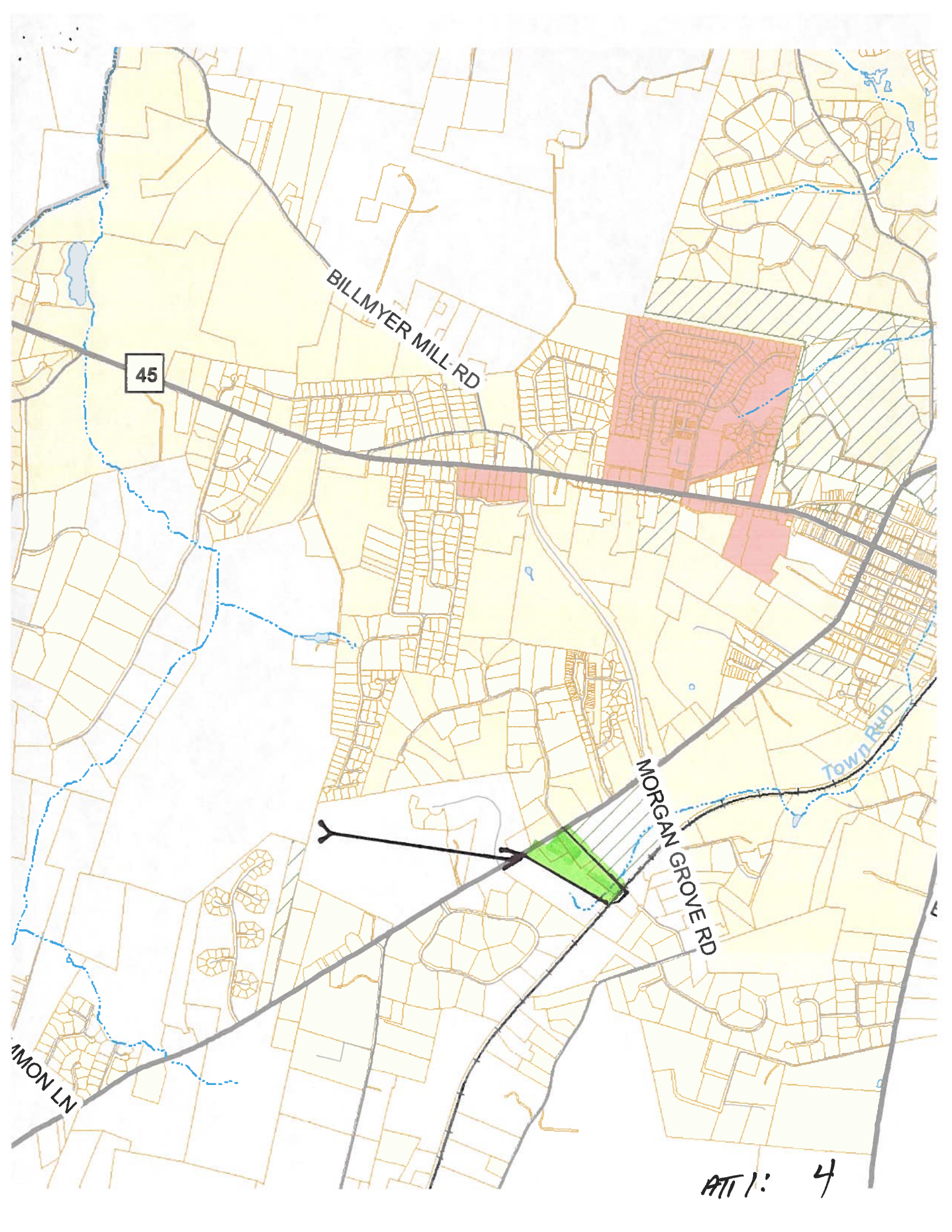
Map Prepared by:
 Jefferson County Planning & Zoning Division and
 Jefferson County GIS/Addressing Office, 7/1/2011

Other Data Sources:
 Jefferson County GIS/Addressing Office
 Jefferson County Address
 Open Wetlands Study (2007)
 Original Zoning Map, Ordinance (2005)

- CONDITIONS OF USE**
1. Revision #4 is a comprehensive update such as the addition of correct base map features (roads, utilities, and municipal boundaries). Zoning line colors have been altered per request from the Planning & Zoning Department. The Urban Growth Boundary for use was obtained.
 2. Do not rely on this hard copy map for any definitive zoning classification. If a definitive zoning classification and the associated tax district, consult the Jefferson County Zoning Department.
 3. All map elements are representative of geographic features in the Jefferson County Geographic Information System (GIS) and as such may be subject to future zoning amendments. The jurisdiction of this map, the GIS, documented zoning amendments and interpretation by the Jefferson County Zoning Administrator shall determine any definitive zoning classification and associated taxes.
 4. DISCLAIMER: This product is for informational purposes and may not have been prepared for, or be suitable for, legal, engineering, or planning purposes. Users of this information should review or consult the current data and information sources to ascertain the appropriate usability of the information. Jefferson County declines all liability for any problems, financial loss or business, commercial, residential or claims as a result of errors, omissions or use of this data.



ATT-1: 3



BILLMYER MILL RD

45

MORGAN GROVE RD

Town Run

MON LN

ATT 1: 4

Comprehensive Plan Discussion

Jefferson County – A Vision (page 8)

Plan Vision

This Plan recognizes that for our county to remain a vital, attractive community, new growth must include a balance of jobs and housing and be respectful of the very qualities that are attracting new residents every year: the rural landscape, the natural beauty and the pleasing character of our towns and villages.

(Focus on economic development and infilling residential development with local jobs and retail opportunities creates that living version of the vision being described.)

Plan Policies

This Plan encourages new development patterns that foster mixed-use neighborhoods so that a sense of community begins at the subdivision levels.

(The proposed rezoning is intended to enhance current attempts to provide low impact, high quality commercial, distribution, professional services and retail in the area. This can only be accomplished by the proper zoning designation.)

This Plan recommends that Jefferson County's natural features, particularly stream valleys, be conserved as green space and that significant natural features be afforded protection as development proceeds.

(Subject property includes a portion of Town Run. Designating this property as Commercial-Industrial will ensure the strictest stream, storm water management and environmental regulatory compliance will be enforced. Development standards and level of review will be beyond that of any other zoning district designation.)

This Plan encourages economic development so that residents can live and work in the County.

(Specific permitted uses and the predictability of business development approval is essential for professional, retail and commercial services recruitment. These types of economic development opportunity will benefit local surrounding residential communities. Jobs, services and local retail will enhance quality of life issues supported by this Comprehensive Plan.)

This Plan encourages the opportunity to farm and recognizes the changing shift in agriculture to include large family owned farms and smaller agricultural operations.

(Economic sustainability is a key component of maintaining viable farming operations. Open space combined with quality farm land production. Providing commercial space for value adding and aggregation of agricultural products for redistribution is essential to sustainable farming operations. This location continues to work toward providing those necessary components.)

This Plan recognizes existing population centers as the focus of new, more intense development and the importance of working with municipalities to assure a pattern of development consistent with the Plan vision.

(The subject property is an island surrounded by suburban residential development. Placing a "by right" commercial-industrial zoning designation will accomplish several Comprehensive Plan goals. One of those would be to turn suburban sprawl into a mixed use community. Residential development would be prohibited while local jobs, commercial opportunities and neighborhood retail needs could be enhanced.)

This Plan identifies strategies to assure that community facilities and transportation infrastructure are provided in sequence with new development.

(Proper zoning designation will fill a void in this area of the county. The surrounding area is virtually surrounded by classic suburban residential housing. It is devoid of job and retail service centers. There is no place to buy food, small household needs or enjoy informal social activities. Commercial long term primary employment is extremely limited.)

Chapter 2: The Role of the Comprehensive Plan (page 12)

The most readily apparent example of this implementation is the adoption of the Zoning Ordinances in 1988. The Zoning Ordinance was adopted during the period when the county's 1986 Comprehensive Plan was in effect. When the 1994 Comprehensive Plan was adopted, all

subsequent amendments to the Zoning Ordinance should have conformed with the policies on the new Plan. The 1994 Comprehensive Plan should not have been, (nor should this Plan be), retroactively applied to regulations adopted prior to its effective date.

(A case could be made that the requested zoning classification should have been updated to commercial-industrial when the property was first zoned. At a minimum, it should have been rezoned during subsequent zoning map amendments initiated by the County Commission.)

Rule of Construction and Interpretation: This Comprehensive Plan is not intended to replace or supersede definite, specific ordinances that were in effect at the time of its adoption; instead, its purpose is to lay the foundation for the future enactment of land use ordinances. Proposals for future revisions, amendments or enactments of the land use and development ordinances should be reviewed for conformity with this Comprehensive Plan.

(The subject property has been in continuous commercial since 1968. There have been several development proposals since zoning was first enacted. The last two uses were approved by conditional use permit or interpretation of current rural zoning restriction. In order for this property to continue as a community asset, the proper zoning designation should be changed to commercial-industrial.)

Statement of Goals (page 19)

A list of general goals was adopted as guidelines for the preparation of the 1986 Comprehensive Plan. These goals were readopted unchanged and incorporated into the 1994 Comprehensive Plan. "Webster's Dictionary" defines a goal as "the end toward which effort is directed." Given the changing nature of the County, adjustment of these goals is necessary to meet anticipated challenges. Therefore, adopts the following goals as the guidelines for the 2003 Comprehensive Plan, with no particular purpose as to their order:

Encourage growth and development in areas where sewer, water, schools, and other public facilities are available or can be provided without unreasonable cost to the community.

(Development in the requested zoning designation is required to pay ALL costs incurred to provide services. There is no new residential component. Commercial-Retail-Industrial defined projects must be completed without cost to current infrastructure providers. Taxes and fees for service are charged at the highest approved rate. This is usually viewed as a benefit to predominantly residential neighborhoods.)

Promote growth and development that are both economically and environmentally sound.

(Current local, state and federal regulation ensures that both goals are met.)

Promote the maintenance of an agricultural base in the County at a level sufficient to encourage the continued viability of farming in all its various forms.

(Maintaining an agricultural base requires providing product outlets. Wholesale and retail operations run in the local area provide the best prospect for local support of local goods.)

Encourage and support commercial, industrial, and agricultural activities to provide a diversified and sound local economy.

(That is EXACTLY what this zoning amendment is about.)

Promote the conservation of the natural, cultural, and historical resources and the preservation of scenic beauty.

(Infill commercial development of suburban residential areas is one of the ways to accomplish this goal.)

Advocate the maintenance and improvement of transportation systems so that people and goods can move safely and efficiently throughout the County.

(Property owners requesting this change have been pro active in dealing with transportation and safety improvements. The most visible example the successful lowering of the speed limit not only for this property but for the benefit of existing residential and social activities in the area of the property to be rezoned. Applications and approvals for other potential highway improvements are in the process of being reviewed.)

Promote a diversity of housing within the County.

(The requested zoning designation does not allow a variety of housing types.)

Support and protect private property rights while supporting and protecting overall public health, safety and general welfare.

(Applying the proper zoning designation and enforcing ALL the associated regulation will accomplish this goal)

Promote a Planning and Zoning process that is understandable and straightforward, with ample opportunity for meaningful public input.

(This re-zoning application and the subsequent public participation requirements accomplish this goal.)

Promote pedestrian friendly, livable communities.

(Approval of this re-zoning will work toward this goal. Jobs, commercial and retail opportunities will become available to the surrounding residential neighborhoods.)

Chapter 3: Management of the Natural and Built Environment.

Recommendation 3.12 (page 54)

A Diversified Agriculture Industry

Economic viability is key to the survival of farming. However, economic viability is contextual. The 1997 USDA Census of Agriculture reported that 47% of Jefferson County farmers have full-time jobs elsewhere and 57.7% of county farms produced less than \$10,000 in sales annually. Seventy-five percent posted sales of less than \$25,000. This is not unique to Jefferson County. Off-farm employment is becoming a way of life throughout the farming community.

(Approval of the requested zoning designation of commercial-industrial will help support this recommendation. The statistics presented clearly demonstrate that wholesale and retail outlets are required to make small scale farming sustainable. Aggregation and wholesale redistribution fill the gap between having to supplement farming operations with other income and economic viability of small farm preservation.)

Existing County Economic Development Efforts: (page 64)

According to the United States Department of Commerce, economic development is fundamentally about enhancing the factors of productive capacity – land, labor, capital and technology – of a national, state or local economy. By using its resources and powers to reduce the risks and cost which could prohibit investment, the public sector has often been responsible for setting the stage for employment generating investment by the private sector. This is as true in this State and County as it is in other parts of the country.

Recommendation 3.18:

The County should continue to pursue new industrial and commercial development in order to diversity its economy, increase the tax base and thereby mitigate the problems of increasing residential growth, and provide quality employment opportunities to its workforce.

This recommendation mirrors the existing mission statement of the Jefferson County Development Authority. It also encompasses a myriad of factors that affect the County's ability to succeed in new business attraction, addressed here individually:

(Re-zoning of the particular property is essential toward meeting this recommendation. The property's historic use has been commercial and approved, but unbuilt, residential use. By granting the zoning designation of commercial-industrial, the predictability that economic and commercial development requires can be met. Business will be allowed and new residential development will not. Balance is what this recommendation seeks.)

Recommendation 3.21: (page 68)

Once recommendation 3.20 is accomplished the County should review different zoning methods to see if LESA is still the zoning of choice for the County.

Transferable Development Rights

Transfer Development Rights (TDR's) programs can be effectively used to allow landowners in the far reaches of the county to benefit from the development potential of their property without actually developing the land, while focusing the development the lots that would have been on that property in areas that are more appropriate for development. To avoid having to amend this Plan in the future to justify instituting a TDR program, this plan endorses investigating the

creation of a TDR program in the Rural District. Further study will be required regarding how such a plan should be implemented and where the density receiving area should be.

(Support of the farm community, preserving valuable agricultural land and maintaining individual property value is a challenge. Applications such as this one should be viewed as working drafts for the Transferable Development Right program. Assessing best use practices in the rural zoning district, combined with fair compensation for land restrictions is one of the best solutions to a land management dilemma. The proper use of the applicant property is the historic commercial use that is being requested. That is the best option under current zoning regulation. The addition of a functioning TDR program might provide the additional flexibility both landowners and regulators desire. The applicant is more than willing to work with county staff toward forwarding the TDR discussion.)

Jefferson County 2020

Industrial Commercial District (page 70)

This district permits uses of a heavy or light industrial nature, including commercial uses, which include "manufacturing, processing, and commercial uses which may require extensive transportation and central or public water and sewer services". Consumer oriented commercial uses are permitted but not encouraged. A set of specifically identified uses and activities, presumably identified because of their potential toxic or other nuisance characteristics, are listed as permissible only if approved under the Development Review System. No standards are included in the text that apply to whether these conditional use permits should be issued; an issue easily corrected.

(This district is the most appropriate for the property. It allows commercial, retail and industrial uses. Those are all subject to specific standards and requirements. The property itself is actually self limiting based on size and infrastructure available. There does not seem to be a foreseeable circumstance that would allow "industrial" classified development. On the other hand, this district restricts residential development in existing statutory form. The development and site plan requirements for this district are the most thorough in protecting the environment and neighbors. When permitted uses of this district are placed side by side with the residential growth-light industrial-commercial district, it becomes clear that commercial-industrial is the right district for this property.)

Residential Growth – Light Industrial – Commercial District (page 71)

This zone, commonly referred to as the "mixed use" zone, permits uses of a light industrial and commercial nature, as well as a spectrum of residential and institutional uses ranging from single-family dwelling units to multi-family apartments and group homes. Residential uses must conform to the standards set forth in the Residential Growth District, but industrial and commercial uses are required to conform to a set of specific performance criteria, which include numerical measurements of several factors for uses that may have nuisance effects on adjacent uses.

(This district has most of the same permitted commercial uses as the commercial-industrial district. The down side is that this district also allows future residential development as a permitted use. That designation is not appropriate for the applicant property. It has also been determined that voluntary restrictions on a zoning district's permitted uses are questionable at best.)

Measuring the Implementation of Recommendations Found in This Plan (page 97-98)

Rule of Construction and Interpretation: This Comprehensive Plan is not intended to replace or supersede definite, specific ordinances that were in effect at the time of its adoption; instead, its purpose is to lay the foundation for the future enactment of land use ordinances. Proposals for future revisions, amendments or enactments of the land use and development ordinances should be reviewed for conformity with this Comprehensive Plan."

Through the statement of this rule of construction and interpretation, this Plan gives specific guidance to all readers that this Plan is general and advisory in nature, containing goals that may or may not ultimately be implemented, depending up on time, funding, political will and other factors. When the background discussion of this text or the stated goals of this Plan conflict with the Ordinances, the Ordinances, as an adopted element (and the specific implementation of the 1994 Plan (and subsequent ordinance amendments being implementation of the recommendations found in this Plan) shall take precedence over the text and recommendations when reviewing land use development proposals.

(The applicant couldn't agree more.)

Change of transportation characteristics and neighborhood from when the original/current ordinance was adopted:

Transportation characteristics have change since 1988. Over the years several improvements have been made to address traffic flow and safety issues. WV DOH has built what is now referred to as the Shepherdstown bypass. It has helped with the issues at and around the 4 way stop in Shepherdstown. The speed limit was lowered through the area of this zoning change request. That was done at the request and effort of the current applicants in response to neighborhood concerns about speed and safety.

Traffic counts conducted by the WV DOH have remained fairly consistent for the past 5-10 years. 2002, 2005 and 2008 reports show a modest increase in the area. WV DOH has seen the property that is requesting zoning amendment. There have been approvals of design standards for mixed use and commercial development access to the existing road frontage. Those designs and recommendations will be reviewed based on any development plan that is submitted for commercial property use.

Neighborhood characteristics have gradually changed over the past decades Suburban residential development has change the rural setting from the original ordinance date of 1988. We have included three Google Earth photos of the area. They are dated 1988, 1997 and 2009. They show that the neighborhood surrounding the area to be amended has changed character. One of the more interesting points comparing photos is the increase in tree canopy as the area developed.

Three Google Earth photos. 1988, 1997 and 2009



2009



1997



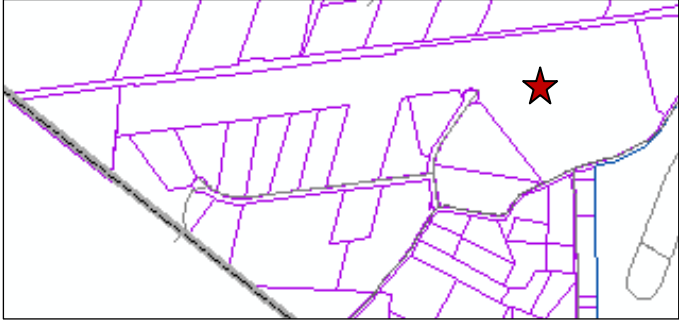

1988

STAFF REPORT

Jefferson County Planning Commission Meeting

November 8, 2011

Item #7 Final Plat Public Hearing for a resubdivision of Lot #16 of the Cedar Meadows Airpark subdivision (PC File #11-07).

APPLICANT:	B.K. Haynes
OWNER:	Cedar Meadows Air Park Holdings LLC
DEVELOPER:	Same as Owner
SURVEYOR/ENGINEER:	William H. Gordon and Associates
PROPERTY LOCATION:	The property is located on Hardesty Road near the VA/WV border, close to the intersection with Jamestown Road.
LEGAL DESCRIPTION:	District: Middleway, Map: 29, Parcel: 1 
ZONING DISTRICT:	Zoning Map Designation: Rural 
SURROUNDING PROPERTIES:	Zoning Map Designation: <i>North: R South: R</i> <i>East: R West: R</i>
LOT AREA:	69.7676 acres
PROPOSED ACTIVITY:	1 Single Family Residue Lot and 3 HOA parcels
DEVELOPMENT HISTORY:	Cedar Meadows Airpark (PC File #02-18) <ul style="list-style-type: none"> • Final Plat approved 06/24/03 • Minor Plat Change approved 07/18/07 – relocate private access and utility easement. • Minor Plat Change approved 06/06/08 – merge a portion of Lot 16 with a property in Clarke County

STAFF REPORT

Jefferson County Planning Commission Meeting

November 8, 2011

1. Summary of Request

Cedar Meadows Air Park Holdings LLC proposes to resubdivide Lot 16 of the Cedar Meadows Airpark subdivision to create the following lots:

- a) An HOA owned parcel containing the hangar and runway
- b) An HOA owned stormwater management parcel
- c) An HOA owned road right-of-way parcel
- d) Lot 16 – a residue lot limited to one single-family use (please note that Lot 16 currently exists; however, the proposed resubdivision would reduce the lot area and separate the HOA parcels from the residential use)

2. Background

The Cedar Meadows Airpark subdivision was approved in 2003 as a 16-lot residential subdivision including an airstrip and T-hangar. The Planning Department determined that the aviation-related amenities were permitted as accessory to the subdivision, provided that their use would be limited to residents of the subdivision and that its operation and maintenance would be provided for by uniformly applied HOA fees.

When the Cedar Meadows Airpark subdivision was created, Lot 16 was identified as:

“The COMMON AREA, a portion of Lot 16, is that land available to the association for the exclusive benefit, use, and enjoyment of its owners and members and their guests.”

The final plat shows a private access and utility easement on Lot 16, and this easement encompasses the landing strip and hangar. However, there is no deed associated with this easement, and no bearings and distances shown on the plat. As such, currently there is no legal instrument separating Lot 16 from the common area.

Per the applicant, the purpose of the proposed resubdivision is to better define the common area, and to allow this area to be transferred to the homeowners' association. The portion of Lot 16 remaining after resubdivision is intended for private ownership.

3. Subdivision Category and Review Process

Staff determined that an amendment to the final plat was necessary in order to resubdivide Lot 16. Because the bonding for the Cedar Meadows Airpark subdivision is closed, the resubdivision must follow the process outlined in Section 24.402A of the Subdivision and Land Development Regulations (“Amendment, Modification, and the Vacating of Subdivision Plats”). This section states:

“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.”

Planning Commission review and approval of the final plat amendment is required. This review process follows the steps outlined in Section 6.1 of the 1979 Subdivision Ordinance. As part of this process, the Department placed a notice in the Spirit of Jefferson 30 days prior to the scheduled date of the Planning Commission public hearing.

STAFF REPORT

Jefferson County Planning Commission Meeting

November 8, 2011

4. Staff Analysis of Request

Although the development rights for the subdivision are exhausted (including the right that exists on Lot 16), the Department has determined that Lot 16 may be resubdivided if the new lots created are limited exclusively to the HOA uses listed above, and if such resubdivision does not create any additional residential or commercial development rights.

Section 24.402A provides criteria for the approval of amendments, modifications, and vacations of subdivision plats. These criteria are listed below, in addition to staff's findings:

Criteria	Staff Finding
1. All of the property that is affected by the amendment is under the ownership of the applicant (Section 24.402A).	Timothy Foltz has submitted a letter disputing the proposed subdivision, and has indicated verbally to staff that he is the owner of the subject property. However, based on the most recently recorded deed for this property, Cedar Meadows Air Park Holdings LLC is shown as the owner of the property. The applicant has submitted deed history for the property, which is included in the Planning Commission packet for this meeting.
2. The amendment will not affect the ownership or right of convenient access of persons owning other parts of the subdivision (Section 24.402A).	The proposed amendment will enable transfer of properties (currently privately owned) to the homeowners' association. As such, this amendment has the potential to enhance the right of convenient access of other owners within the subdivision.
3. The amendment complies with all of the standards of these Regulations, including verification of compliance with the Zoning Ordinance (Section 24.402A).	The proposed amendment complies with the intent of the Zoning Ordinance and the Subdivision and Land Development Regulations. (It should be noted that the applicant has not yet submitted a plat that complies with all ordinance requirements.)

Regarding consistency with the Community Impact Statement, the CIS states that 17 single-family residential lots will be created.¹ Because the proposed resubdivision does not increase the number of residential development rights in the subdivision beyond the 16 residential rights approved as part of the final plat, it does not appear to contradict any elements of the CIS.

¹ The total lot yield was reduced to 16 residential lots following approval of the CIS, as a result of a reduction of the overall land acreage.

STAFF REPORT

Jefferson County Planning Commission Meeting

November 8, 2011

5. Staff Recommendation

Based on the findings described above, staff recommends approval of the subdivision with the following conditions:

- a) The applicant shall address all remaining, unresolved staff comments resulting from the Planning, Zoning, and Engineering Departments' first review of the plat.
- b) The applicant shall provide to the Planning, Zoning, and Engineering Departments and to the Cedar Meadows Airpark homeowners' association a schedule for the transfer to the association of the parcels containing the hangar and runway, the stormwater management facilities, and the road right-of-way.
- c) The applicant must be the owner of the property.

6. Planning Commission Action

Per the 1979 Subdivision Regulations, the Planning Commission "shall approve, approve with conditions, or disapprove a subdivision proposal and final plat within 60 days from the day the final plat and support material are submitted to the Planning Commission office."

It should be noted that "Failure to take action within the 60-day period shall result in final plat approval, unless a waiver of the 60 day period is granted to the Planning Commission by the subdivider."

The plat was submitted and fees paid on September 20, 2011. As such, the Planning Commission must act on the application by November 19, 2011, unless the applicant grants a waiver of the 60-day requirement.

Engineer's Report

Planning Commission Meeting

November 08, 2011

#6 Final Plat Public Hearing – Cedar Meadows Airpark

The submitted final plat is still under review. Engineering recommend denial of the final plat until items are addressed.

JEFFERSON COUNTY, WEST VIRGINIA

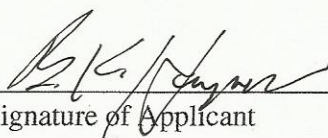
Department of Planning
116 East Washington Street, 2nd Floor
P.O. Box 338
Charles Town, West Virginia 25414

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

Email: planingdepartment@jeffersoncountywv.org

APPLICATION FOR SUBDIVISION REVIEW

Name of Subdivision	Cedar Meadows Airpark
Physical Location of Subdivision	North side of Hardesty Road
Tax Map Reference	Magisterial District Middleway
	Tax Map # 29 Parcel # 1 and 29a
Deed Book Reference	Deed Book # 1100 Page # 351
Name of Property Owner(s)	Cedar Meadows Air Park Holdings LLC
Address of Property Owner(s)	501 S Royce Avenue, Front Royal, VA 22630
Telephone of Property Owner(s)	540-635-3169
Name of Developer(s)	Same as Owner
Address of Developer(s)	
Telephone of Developer(s)	
Name of Registered Engineer/Surveyor(s)	William H. Gordon Associates, Inc.
Address of Registered Engineer/Surveyor(s)	301 N Mildred St, Suite 1, Charles Town, WV 25414
Telephone of Registered Engineer/Surveyor(s)	304-725-8456

 _____
Signature of Applicant 11/1/11
Date

Signature of Applicant Date

11/3/11

JEFFERSON CO PLANNING, ZONING & ENGINEERING.

I TIMOTHY FOLTZ OWNER OF CEDAR MEADOWS AIRPARK LOT # 16 ACCORDING TO DEED BOOK 1087-PAGE 320 & THE HAYNES-FOLTZ L.C. OPERATIONAL AGREEMENT STATE AS FOLLOWS:

I TIMOTHY FOLTZ DID NOT SUBMIT THIS APPLICATION FOR RESUBDIVISION OF LOT # 16 OF THE CEDAR MEADOWS AIRPARK.

THIS IS A FRAUDULENT APPLICATION AND REQUEST THAT THIS APPLICATION BE WITHDRAWN FROM THE DOCKET SCHEDULED FOR NOVEMBER THE 8TH, 2011 ON JEFFERSON COUNTY WV PLANNING, ZONING & ENGINEERING HEARING.

RECEIVED

NOV 03 2011

JEFFERSON COUNTY
PLANNING, ZONING AND ENGINEERING

Timothy Foltz

* Copy provided to Planning Commission with 11/04/11 packet - gth
mailed
ARF

Amy Puetz

From: Jennilee Hartman <jhartman@jeffersoncountywv.org>
Sent: Thursday, November 03, 2011 12:32 PM
To: Jennifer Brockman; Seth Rivard; Amy Puetz
Subject: FW: Cedar Meadows Ownership question
Attachments: haynes.pdf

From: Jason Gerhart [mailto:JGerhart@whga.com]
Sent: Thursday, November 03, 2011 11:34 AM
To: Steve Barney
Cc: jhartman@jeffersoncountywv.org
Subject: FW: Cedar Meadows Ownership question

From: jbciii@crawfordandkeller.com [mailto:jbciii@crawfordandkeller.com]
Sent: Thursday, November 03, 2011 10:53 AM
To: Jason Gerhart
Subject: RE: Cedar Meadows Ownership question

Foltz and Hayes were co-owners in Haynes Foltz L.C. who initially developed the project purchasing the property in 2003. As the market turned down, the notes signed and guaranteed by both of them and held by Marathon Bank went in default. The bank demanded that they honor their personal guarantees. Foltz refused leaving Haynes to bear the financial burden. Haynes bought the notes from the bank by paying the bank the balance owed. It is my understanding that Haynes asked Foltz to reimburse him and Foltz again refused.

After some months, Haynes made a demand on Haynes Foltz L.C. that the LLC pay the note in full and when the LLC did not pay the note, Brad Hayes attempted to foreclose on the property. I gave notice to Foltz personally of the foreclosure. As an aside, Foltz claimed to have never signed the notes in question and in response, I sent him copies of the notes which had his signature on them. Undeterred by this, Foltz responded by suing Haynes in the Circuit Court of Jefferson County. The judge dismissed the law suit because the original agreement between Hayes and Foltz was that any issues between them would be brought in Warren County, Va. To my knowledge Foltz has never pursued his issues in Warren County.

At this point I, foreclosed on the property and Brad Hayes bid it in for the value of the debt. He instructed me to place the title to the property in the name of B.K. Hayes Corporation. My deed is of record on September 8, 2010 to B.K. Hayes Corporation. On or about November 30, 2010 Haynes Foltz L.C. conveyed the property to Timothy Foltz with Timothy Foltz signing the deed as a member of the company. Other than the fact Timothy Foltz did not have authority to do this, Haynes Foltz L.C. did not own the property because of the previous foreclosure.

Recently, B.K. Hayes Corporation conveyed the property to Cedar Meadows. Brad is the principal in the LLC.

In summary, the deed to Timothy Foltz is a self-help measure on Mr. Foltz's part that was ineffective to transfer title to him. I attach a short summary of the courthouse records and a copy of the Cedar Meadows deed.

JBCIII

From: Jason Gerhart [mailto:JGerhart@whga.com]
Sent: Thursday, November 03, 2011 09:31
To: jbciii@crawfordandkeller.com
Cc: Dan@crawfordandkeller.com; Steve Barney
Subject: Cedar Meadows Ownership question
Importance: High

Jim,

Steve Barney with Jefferson County needs you to email him a brief summary of the ownership history between Timothy Foltz and Cedar Meadows since they have received a few questions on the project. Can you send him that summary of what has transpired as well as a copy of the current deed so that they are clear on the current ownership. I have copies Steve on this email so you can respond directly to him.

Thanks,

Jason Gerhart, P.E.
Senior Project Engineer

William H. Gordon Associates, Inc.

Civil Engineering | Landscape Architecture | Site Security Consulting | Land Planning | Surveying

301 North Mildred Street, Suite 1, Charles Town, WV 25414
office: 304-725-8456 | cell: 304-517-7069 | fax: 304-728-0117

GORDON



- 01/24/03 Haynes Foltz purchases
property from Charles T III
& Shirley Hardesty (969/509)
- 1151/191 Deed of Trust
Foreclosed (01/24/03)
- 09/08/10 JBC III, Trustee, to BK Haynes
Corporation (1083/737)
- 11/30/10 Boys Deed Haynes-Foltz to
Timothy Foltz
(1087/320)
- 10/27/11 BK Haynes to
Cedar Meadows (1100/351)

Deed of Conveyance

THIS DEED made this 29th day of September, 2011, by and between B. K. HAYNES CORPORATION, party of the first part and hereinafter referred to as Grantor and CEDAR MEADOWS AIR PARK HOLDINGS LLC, party of the second part and hereinafter referred to as Grantee.

WITNESSETH: That for and in valuable consideration, the receipt of which is hereby acknowledged, the said Grantor does hereby grant and convey unto said Grantee, with general warranty of title, in fee simple, in and to all of that certain lot or parcel of real estate with improvements and appurtenances thereunto belonging, lying, being in the Long Marsh Magisterial District of Clark County, Virginia and the Middleway District of Jefferson County, West Virginia containing 157.5344 acres, as the same is more particularly shown on a plat entitled "Boundary Survey of Lands of C. T. Hardesty, III, Long Marsh District, Clark County, Virginia" made and prepared by Dunn Land Surveys, Inc. dated July 26, 2002, revised October 8, 2002, LESS AND EXCEPTING all of Lots 1 - 15, the storm water management pond and those portions of the land which lie within the commonwealth of Virginia and a 6.2330 acre parcel sold to Dennison as the same is more particularly shown on a plat entitled "Cedar Meadows Air Park Final Plat of Subdivision of Land of Haynes-Foltz, L.C. dated May 7, 2003, revised May 23, 2003" prepared by Dunn Land

Deed of Conveyance

Surveys, Inc. and recorded in the Office of the Clerk of the County Commission of Jefferson County, West Virginia in Plat Book 20 at Page 25, the property being conveyed by this deed is all of Lot 16 residue less that portion of the property sold to Dennison as set forth in Deed Book 1069 at Page 586 containing approximately 69.77 acres, more or less.

AND BEING the same real estate conveyed unto the Grantor by James B. Crawford, III, substitute trustee by deed dated August 2, 2010 and recorded in the aforesaid Clerk's Office in Deed Book 1083 at Page 737.

THIS CONVEYANCE IS MADE SUBJECT, HOWEVER, to all those reservations, restrictions, easements and other matters of record including the rights of the homeowners of Lots 1 - 15 to use portions of this property for their full use and enjoyment.

DECLARATION OF CONSIDERATION OR VALUE
AND APPLICABILITY OF WITHHOLDING TAX

The undersigned Grantor does hereby certify that the document to which this declaration is attached does not involve a monetary transfer but the fair market value of the real estate herein transferred is \$193,000.00 and under the penalties of perjury, that the Grantor is an entity authorized to do business in the State of West Virginia

B. K. Haynes Corporation

By:  (SEAL)

Deed of Conveyance

B. K. Haynes, President

STATE OF WEST VIRGINIA

COUNTY OF JEFFERSON, to-wit:

The foregoing instrument was acknowledged before me this
30th day of September, 2011, by B. K. Haynes, President of B. K.
Haynes Corporation on behalf of the corporation.

Commission expiration date
and seal:

Sandra L Ours
NOTARY PUBLIC

April 4 2021



CEDAR HEADGWS AIR PARK HOLDINGS INC
501 S ROYCE AVENUE
FRONT ROYAL, VA 22630-

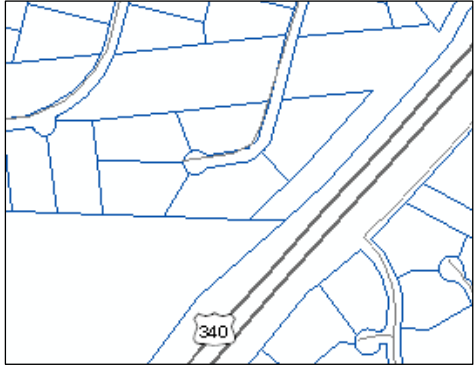

Jennifer S Hashan
JEFFERSON County 01:26:00 PM
Instrument No 2011030056
Date Recorded 10/27/2011
Document Type DEED
Pages Recorded 5
Book-Page 1100-351
Recording Fee \$11.00
Transfer Tax \$949.20
HB4331 Tax \$424.60
Additional \$25.00

STAFF REPORT

Jefferson County Planning Commission Meeting

November 8, 2011

Item #7 Final Plat Public Hearing for a plat amendment for the Spruce Hill subdivision (PC File #02-08) to amend a 50' landscape buffer to accommodate a garage on Parcel #88.

APPLICANT:	William and Lori Davis
OWNER:	Same
DEVELOPER:	Same
SURVEYOR/ENGINEER:	Stotler & Associates
PROPERTY LOCATION:	This subdivision is located on Huyett Road approximately 0.5 miles west of its intersection with US Route 340; the subject property is located at 411 Blue Spruce Drive in Charles Town, W.V., 25414.
LEGAL DESCRIPTION:	District: Kabletown, Map: 3C, Parcel: 88 
ZONING DISTRICT:	Zoning Map Designation: Residential-Light Industrial-Commercial 
SURROUNDING PROPERTIES:	Zoning Map Designation: North: R-LI-C South: R-LI-C East: R-LI-C West: R-LI-C
LOT AREA:	1.88 acres
APPROVED ACTIVITY:	Single Family Residence
DEVELOPMENT HISTORY:	Spruce Hill Subdivision, Section Two, Lots 38-98 & Residue (PC File #02-28) <ul style="list-style-type: none"> Final Plat approved 11/12/02

STAFF REPORT

Jefferson County Planning Commission Meeting

November 8, 2011

1. Summary of Request

The property owners have requested to amend a 50' landscaping buffer as shown on the approved final plat for the Spruce Hill Subdivision, Section Two in order to build a 24' x 36' garage on the subject property.

The proposed location of the garage, as shown on a sketch provided by the applicant, is between 33' and 39' from the rear property line.

2. Subdivision Category and Review Process

Because the bonding for the Spruce Hill subdivision is closed, the plat amendment shall follow the process outlined in Section 24.402A of the 2008 Subdivision and Land Development Regulations. This section states:

“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 . . .”

Planning Commission approval of the final plat amendment will be required. This review process follows the steps outlined in Section 6.1 of the 1979 Subdivision Ordinance. As part of this process, the Department placed a notice in the Spirit of Jefferson 30 days prior to the scheduled Planning Commission public hearing.

3. Staff Analysis of Request

Per the applicant, the reason for the request is that the homeowners' association restrictions for the subdivision require that a garage must be located behind the house. Because of the various factors of the site – such as the elongated shape of the property, the location of the house on the lot, and the location of the septic reserve area – very little buildable area remains available for the construction of a garage, outside of the landscape buffer area.

The landscape buffer is not a requirement of the Zoning and Land Development Ordinance or the Subdivision and Land Development Regulations. The buffer appears to have been applied voluntarily by the developer during the subdivision process.

The zoning setback for the property (rear yard) is 20', and the proposed 33' setback for the garage would comply with the zoning setback.

Section 24.402A provides criteria for the approval of amendments, modifications, and vacations of subdivision plats. These criteria are listed below, in addition to staff's findings:

Criteria	Staff Finding
1. All of the property that is affected by the amendment is under the ownership of the applicant (Section 24.402A).	Staff finds that the applicant is the owner of the subject property.
2. The amendment will not affect the ownership or right of convenient access of persons owning other parts of the subdivision (Section	Staff finds that the proposed plat change has no impact on the ownership or right of convenient access of persons owning other parts of the

STAFF REPORT

Jefferson County Planning Commission Meeting

November 8, 2011

24.402A).	subdivision.
3. The amendment complies with all of the standards of these Regulations, including verification of compliance with the Zoning Ordinance (Section 24.402A).	This buffer is not a requirement of the Zoning and Land Development Ordinance or of the Subdivision and Land Development Regulations. (It should be noted that the applicant has not yet submitted a plat that complies with all ordinance requirements.)

Regarding consistency with the approved Community Impact Statement (CIS), the CIS does not specify that the buffer be established; nor do the minutes of any board or commission meeting appear to require the buffer. As such, the proposed resubdivision does not appear to contradict any elements of the CIS.

A neighboring property owner, of 433 Blue Spruce Drive, has submitted a letter of support for the proposed garage.

4. Staff Recommendation

Staff recommends approval of the subdivision with the following condition:

A plat must be prepared by a registered engineer or surveyor showing the subject property. The plat must contain all notes that pertain to the original final plat of the Spruce Hill subdivision. The plat shall be reviewed by the Planning, Zoning, and Engineering Departments for compliance with all applicable standards of the Subdivision and Land Development Regulations, the Zoning Ordinance, and any other applicable ordinances, and shall be approved by these departments prior to recordation.

5. Planning Commission Action

Per the 1979 Subdivision Regulations, the Planning Commission “shall approve, approve with conditions, or disapprove a subdivision proposal and final plat within 60 days from the day the final plat and support material are submitted to the Planning Commission office.”

It should be noted that “Failure to take action within the 60-day period shall result in final plat approval, unless a waiver of the 60 day period is granted to the Planning Commission by the subdivider.”

The application was submitted and fees paid on September 30, 2011. As such, the Planning Commission must act on the application by November 29, 2011, unless the applicant grants a waiver of the 60-day requirement.

Engineer's Report

Planning Commission Meeting

November 08, 2011

#7 Final Plat Public Hearing – Spruce Hill

The engineering department defers to the Zoning Administrator on the matter.

JEFFERSON COUNTY, WEST VIRGINIA

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

#02-28

Email: planingdepartment@jeffersoncountywv.org

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

APPLICATION FOR SUBDIVISION REVIEW

Name of Subdivision SPRUCE HILL

Physical Location of Subdivision 411 Blue Spruce Drive, Charles Town, WV 25414

Tax Map Reference
Magisterial District Kabletown
Tax Map # 3C Parcel # 88

Deed Book Reference
Deed Book # 1067 Page # 168

Name of Property Owner(s) WILLIAM & LORI DAVIS

Address of Property Owner(s) 411 BLUE SPRUCE DR

Telephone of Property Owner(s) 304 724 7081

Name of Developer(s) Dan Ryan Builders

Address of Developer(s) 60 Thomas Johnson Drive Frederick, MD 21702

Telephone of Developer(s) 301-696-0200

Name of Registered Engineer/Surveyor(s) Associated Engineering Sciences, Inc.

Address of Registered Engineer/Surveyor(s) 34 West Franklin Street, Hagerstown, MD 21740

Telephone of Registered Engineer/Surveyor(s) 301 - 797-9160

Original
Subdivision
Surveyors

Will Dan
Signature of Applicant

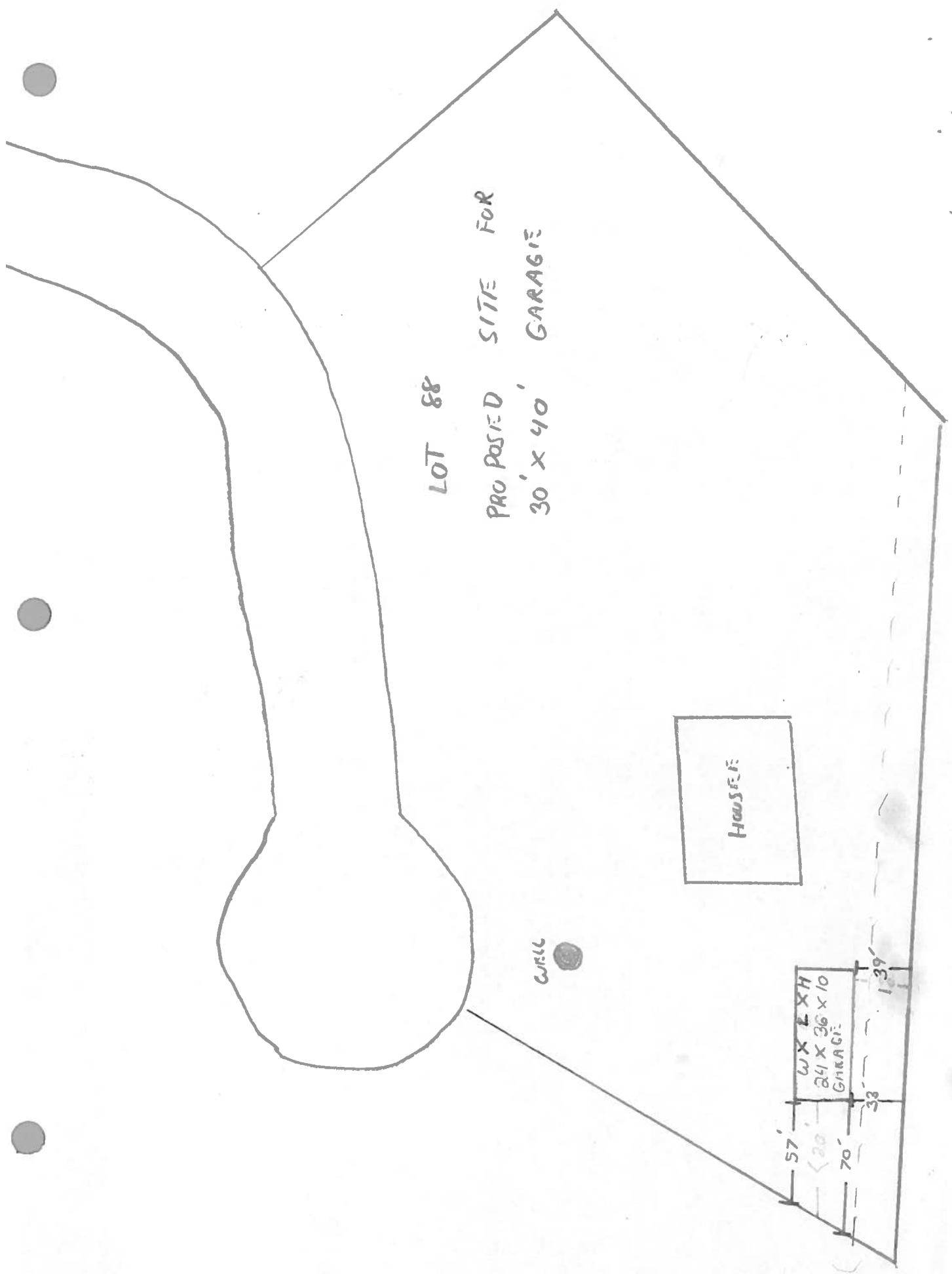
9/27/11
Date

Lori Davis
Signature of Applicant

Sept 27 2011
Date

* Our property surveyors
Wayne Stotler
Stotler & Associates
P.O. Box 519
Berkely Springs, WV
25411-0519
P: 304-258-6388

RECEIVED
SEP 30 2011
JEFFERSON COUNTY
PLANNING, ZONING AND ENGINEERING



LOT 88

PROPOSED SITE FOR
30' X 40' GARAGE

HOUSE

WELL

W X L X H
24 X 36 X 10
GARAGE

57'

20'

70'

38'

139'

LOREI E. WILLIAMS
DANIEL S
411 BLUE SPRUCE DRIVE
CHARLES TOWN, WV

To Whom It May Concern:

I, Ashley Hobbs, at 433 Blue Spruce Drive, authorize the building of a garage on the property beside ours, 411 Blue Spruce Drive.

RECEIVED
NOV 04 2011
JEFFERSON COUNTY
PLANNING, ZONING AND ENGINEERING

Sincerely,

Ashley Hobbs
304-725-0444

Corey Hobbs
Cell: 703-856-5390


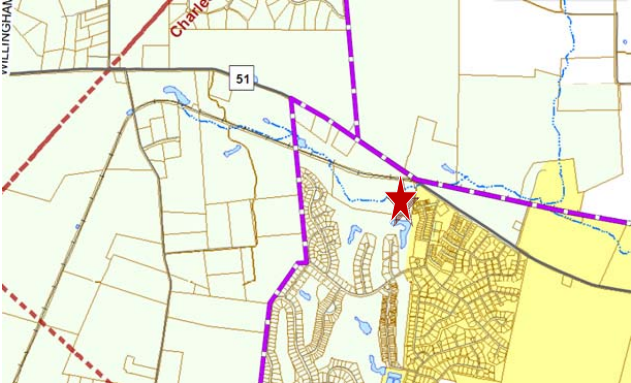
*Copy sent to PC in 11/04/11 mailed packet for 11/08/11 mtg. -JAT

STAFF REPORT

Jefferson County Planning Commission Meeting

November 8, 2011

Item #9 Request by Jefferson Asphalt for a Public Hearing of a Major Site Plan consisting of a proposed office building and maintenance shop (PC File #S11-12). (Subdivision Regulations 24.125 and 24.126)

APPLICANT:	Jefferson Asphalt Products
OWNER:	Same
DEVELOPER:	Same
SURVEYOR/ENGINEER:	D.A. Stansbury Engineering
PROPERTY LOCATION:	9390 Middleway Pike on WV Route 51 near Tuscowilla Hills.
LEGAL DESCRIPTION:	District: Charles Town; Map: 13; Parcel: 7 
ZONING DISTRICT:	Zoning Map Designation: Rural 
SURROUNDING PROPERTIES:	Zoning Map Designation: <i>North: R</i> <i>South: R</i> <i>East: RG</i> <i>West: R</i>
LOT AREA:	34.27 acres
EXISTING STRUCTURES:	Multiple existing buildings that collectively consist of 12,600 square feet

STAFF REPORT

Jefferson County Planning Commission Meeting

November 8, 2011

PROPOSED ACTIVITY:	New office facility consisting of 4,200 sq. ft. and a shop area of 6,000 sq. ft.
CONCEPT PLAN PUBLIC WORKSHOP:	August 9, 2011
COMPLETENESS REVIEW COMPLETED:	By Staff: September 20, 2011 By the Planning Commission: October 11, 2011

1. Summary of Site Plan

Jefferson Asphalt proposes to construct an office building consisting of 4,200 square feet and a shop building of 6,000. The applicant is proposing to build this office space in the near future, while the shop is expected to be built later as part of Phase 2. Additional parking is shown for the expanded uses and the required stormwater management is being designed for build out of Phases 1 and 2.

2. Staff Determination of Application Submission and Completeness

Staff has found the site plan complies with the Zoning Ordinance and Subdivision Regulations.

3. Staff Recommendation

The Planning and Zoning Department Staff finds the Jefferson Asphalt Major Site Plan complete based on the information required in Section 24.123 and 24.124. At the Concept Plan Public Workshop no direction was given to the applicant.

4. Planning Commission Role

On October 11, 2011 the Planning Commission accepted the site plan as "Complete," which allows for the proposed project to advance to the Public Hearing. The Public Hearing allows the Planning Commission to receive public comments, concerns and input on the proposed site plan. The scope of the hearing is limited to whether the site plan application meets the requirements of the Zoning Ordinance and Subdivision Regulations. Like the Concept Plan, the Planning Commission can take action on approval or denial during the meeting where the Public Hearing occurs or within 14 days of the Public Hearing.

In reviewing the site plan for approval or denial of the project, the Planning Commission has the following four options:

1. Approve the application
2. Approve the application with conditions
3. Deny the application
4. Hold the application for up to 45 days for additional information

Denial can only be on the following basis:

1. The plan (plan, final engineering, or final landscaping) is inconsistent with the approved concept plan or condition of said approval.
2. Failure to provide surety.

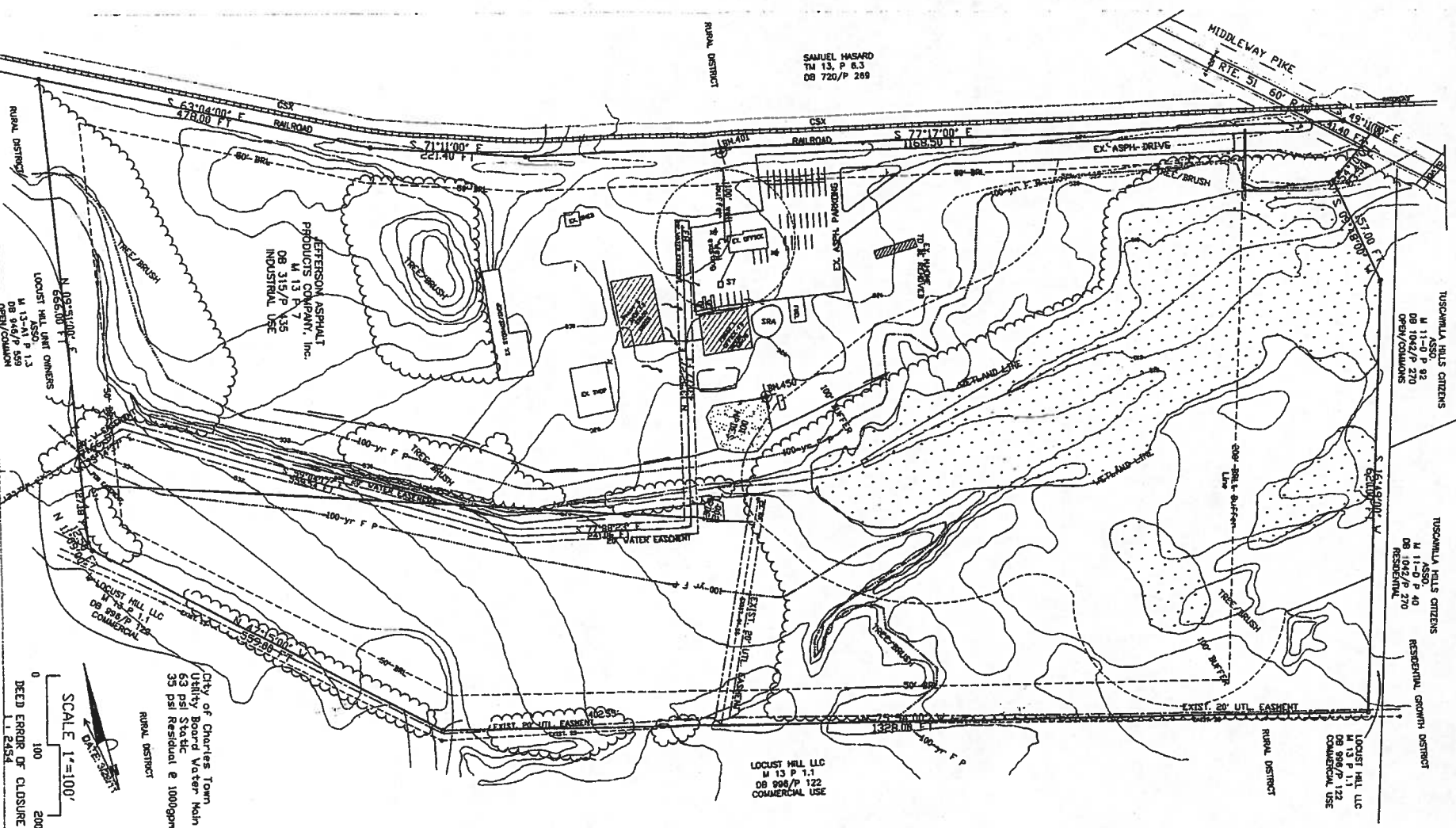
Engineer's Report

Planning Commission Meeting

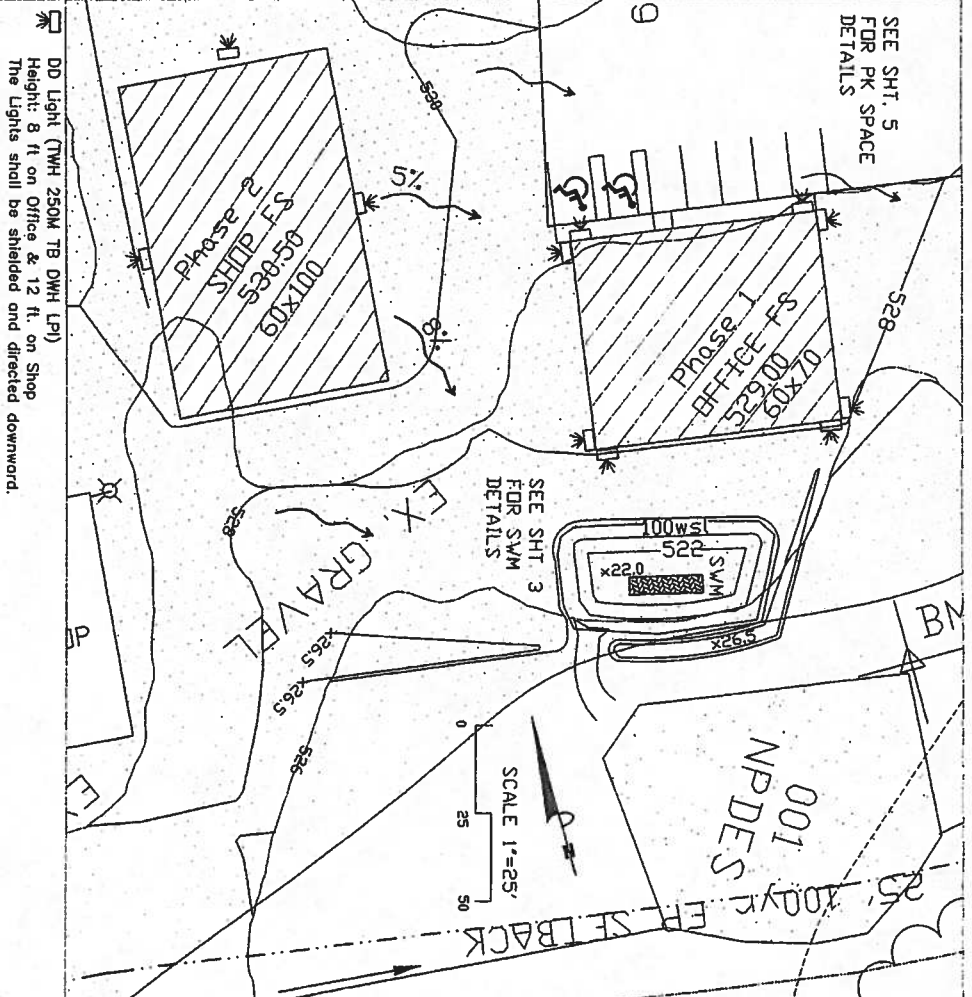
November 08, 2011

#8 Site Plan Public Hearing – Jefferson Asphalt Products

The site plan has been reviewed and approve. The engineering department recommends approval of site plan.



Wetland Areas
 Proposed Structure
 Existing OH
 UP (Utility Pole)
 UP w/ DD Light
 100-yr FP - Flood Plane Limit
 DEED ERROR OF CLOSURE
 SCALE 1"=100'



DD Light (TMM 2500 TB DMH LP)
 Height: 8 ft on Office & 12 ft. on Shop
 The Lights shall be shielded and directed downward.

JEFFERSON COUNTY NOTES:
 1. PERMITS AND SEWERING CONTRACTS SHALL BE IN PLACE PRIOR TO PERFORMING...
 2. EXISTING UTILITIES SHALL BE MAINTAINED TO THE PERMANENCES OF...
 3. CHANGES TO THE PLAN SHALL BE APPROVED BY THE COUNTY ENGINEER...
 4. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...
 5. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...
 6. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...
 7. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...
 8. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...
 9. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...
 10. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...
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 12. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...
 13. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...
 14. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...
 15. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...
 16. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...
 17. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...
 18. THE COUNTY ENGINEER SHALL BE NOTIFIED OF ANY CHANGES...

MAP INFORMATION
 CONTROL POINTS W/ NORTHINGS & BARS
 BM 401 (5994) E-2,420,581.782 Bx 528.72
 BM 430 (5994) E-2,420,529.008 Bx 523.84
 BM 293 (5994) E-2,420,582.519 Bx 528.251
 TOPOGRAPHY BY JIRA from Aerial Topo obtained from Al Hooper, Jr.
 All known surface features have been shown or otherwise identified.

Highways:
 Problem Area-Per JCPC Map 3 there are no problem areas within one mile of this site.
 Nearest Intersection With Primary or Secondary Road- access onto Rte. 51, a Secondary Road, is a key intersection.

Permits
 a) WV State Health Water/ Permit to Construct #18,801
 b) WV State Health Sewer/ Permit to Construct #15,282 (June, 2002) dated May 3, 2011.
 c) City of Charles Town Utility Bo. Intent to Serve 11 Feb. 2011
 d) Existing NPDES Permit #WV0511416
 e) W/Dividers: NO WAIVERS

Easements: Easements are as shown, there are no future easements proposed.

Zoning 8.9.A (1-8)
 The proposed site improvements do not alter the current conditions of Jefferson Asphalt Products as related to Article 5. The yard activities will remain much as they have in the past. A reduction in activity of the site occurred when the asphaltic concrete plant was moved to a distant location about a decade ago.

STATEMENT OF ACCEPTANCE
 THE OWNER IN SIGNING THIS PLAN, AGREES TO ACCEPT AND ABIDE BY ALL CONDITIONS, TERMS AND SPECIFICATIONS, PROVIDED HEREIN.

FOR JEFFERSON ASPHALT PRODUCTS:

DATE: _____
 DATE: _____

TABLE OF MILESTONE INSPECTION

The Developer shall request County inspections a minimum of 48 hours in advance by calling 304-728-3228. Inspections shall be requested according to the Table of Milestones below.

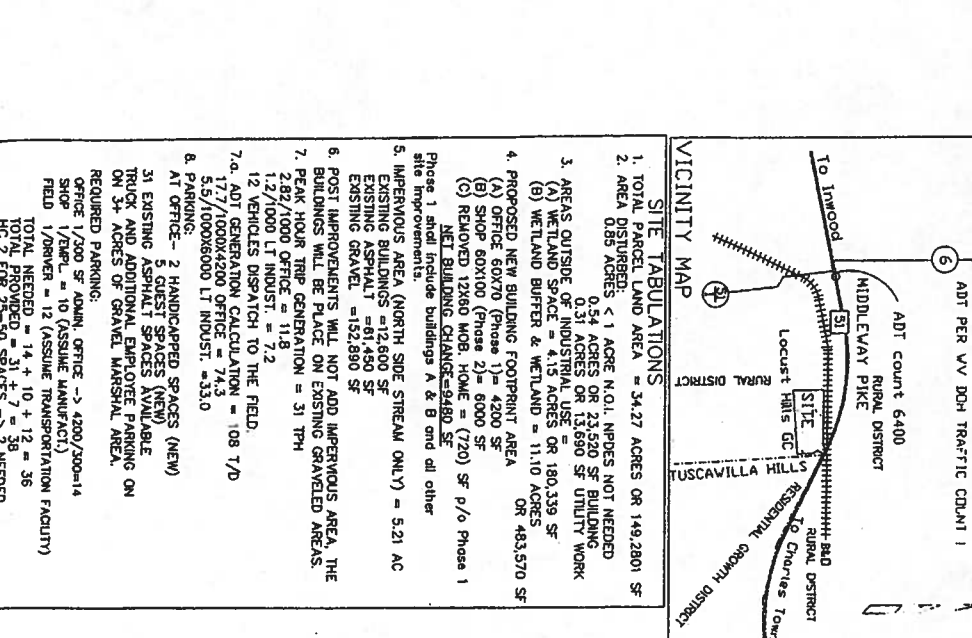
NO.	DESCRIPTION	DATE	INSPECTOR'S INITIALS
1.	INSTALLATION OF SEDIMENT CONTROL DEVICES**		
2.	COMPLETION OF SURGRADE FOR ROADS & PARKING**		
3.	COMPLETION OF ROADWAY AND/OR PARKING STONE BASE TO DEPTH**		
4.	UNDERGROUND UTILITY INSTALLATION INSPECTION AND APPROVED BY PSD/UTILITY OWNER.		
5.	FINAL INSPECTION a) SEED & MULCH-OTHER STABILIZATION b) DRAINAGE (ROADS/PARKING) c) DISTURBANCE & MANAGEMENT d) SIGNS AND TRAFFIC CONTROLS e) LANDSCAPING		

Approved for:
 By: _____
 County Engineer Date: 9/29/11

Site Plan
Jefferson Asphalt Products Facility Plan
 Middleway Pike (Rte 51 West)
 Charles Town Dist., Jefferson County, West Virginia
 MAP 13 PARCEL 7, DB 315 PG 435

REVISIONS

NO.	DESCRIPTION	DATE
1	PER JC-ENGN.	9/2/11



D.ASTANSBURY-ENGINEERING
 3 SUE COURT SUITE B
 Martinsburg, WV 25405
 304-596-2543


9390 Middleway Pike
 Charles Town, WV

STAFF REPORT

Jefferson County Planning Commission Meeting

November 8, 2011

Item #10 Request by Robert Henshaw (Wilbob Farms, Inc.) for a waiver from Subdivision Regulations Section 20.201 to allow for a second access to the property.

APPLICANT:	Wilbob Farm, Inc. in care of Robert Henshaw
OWNER :	Robert Henshaw
DEVELOPER:	Same
SURVEYOR/ENGINEER:	N/A
PROPERTY LOCATION:	5885 Middleway Pike, Kearneysville, WV
LEGAL DESCRIPTION:	District: Middleway; Map: 19; Parcel: 39 
ZONING DISTRICT:	Zoning Map Designation: Rural
SURROUNDING PROPERTIES:	Zoning Map Designation: <i>North:</i> R <i>South:</i> R <i>East:</i> R <i>West:</i> R
LOT AREA:	154.7 Acres
VARIANCES:	None
PROPOSED ACTIVITY:	To create a second access to the property in order to prevent the land locking of another parcel. A conservation easement will be created and a portion of the existing access will be dissolved.

Description of Request

The property in question is on Route 51 (Middleway Pike), west of North Childs Road and located on the north side of Route 51. In this request, the applicant currently has two lots on an existing access easement (see image below). As shown on the image, there is a 0.92 acre lot with house and the lot has no frontage onto Route 51. The second lot is the residue parcel, consisting of 181 acres, which has access to Route 51. Access to both lots is through the residue parcel. The applicant is proposing to create a 73 acre conservation easement. As an agreement between the applicant and the conservation easement organization, the use of the existing access easement will be limited to the area

STAFF REPORT

Jefferson County Planning Commission Meeting

November 8, 2011

under the conservation easement, including associated farm structures. As a result of this agreement, the single family home will have no access to a state road and will have to obtain a new point of access.

The Subdivision Regulations require all lots to be on one access easement per Section 20.201(A)2. The purpose of this requirement is to reduce the number of entrances onto a state road. The applicant is requesting a waiver of Section 20.201 to allow for the existing access to remain and that a new access easement be created, resulting in a total of two access easements.

In order to grant a waiver the following four criteria must be met per 8A of the State Code:

The design of the project will provide public benefit in the form of reduction in County maintenance cost, greater open space, parkland consistent with the County parks plan, or benefits of a similar nature.

Having two access points, in this situation, will not result in any maintenance cost for the County, since the road is state maintained. Neither, would this create an increase in cost for the state. In this instance there is no parkland or parks plan implications. Protecting the agricultural use and historic battlefield area is in keeping with the County's goals of protecting community resources.

The waiver, if granted, will not adversely affect the public health, safety or welfare or the rights of adjacent property owners or residents.

The waiver will not adversely affect the public health, safety or welfare or the rights of adjacent property owners. The access to this lot currently exists and there will be no additional adverse impact from how the site is currently used. No significant amount of traffic expected to flow through this new access point.

The waiver, if granted, will be in keeping with the intent and purpose of this Ordinance.

While the intent of the Subdivision Regulations is to limit the number of access points, there are mitigating circumstances in this request. The existing access easement will be strictly used for the conservation area only. As such, there will be no further subdivision of that section of the property which will be allowed to use that access easement. The use of the access easement will be minimal. The new access easement will be the easement that is used the most and will functionally operate as the only entrance for vehicular purposes.

The waiver, if granted, will result in a project of better quality and/or character.

Granting the waiver will result in a project of better character. Given that 73 acres of land will be protected from development, this will reduce the number of building lots on this property. If future lots were to be created out of the remaining acreage, those lots would be situated on the rear of the property and the area being conserved would act as a visual buffer from Route 51.

STAFF REPORT

Jefferson County Planning Commission Meeting

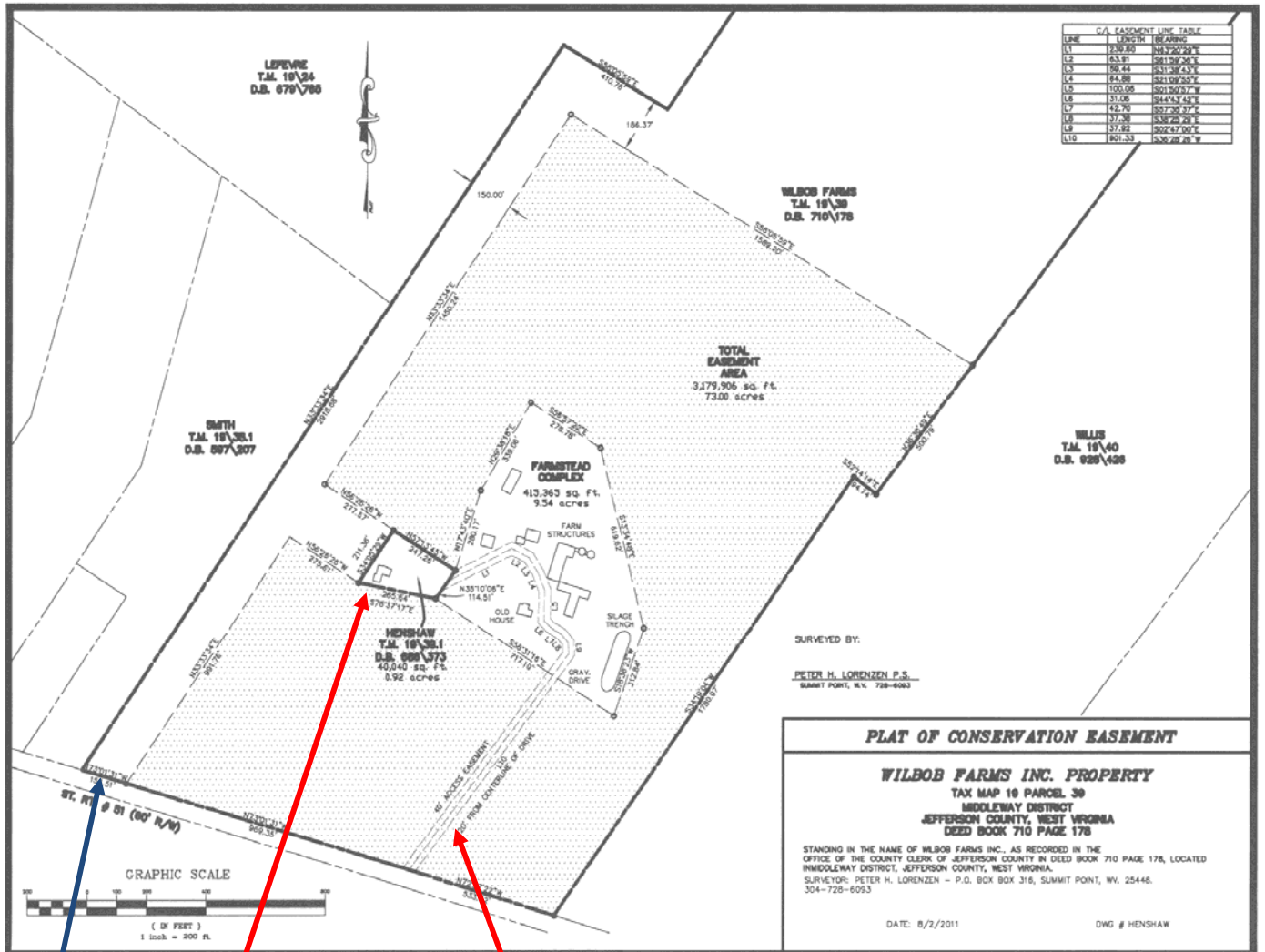
November 8, 2011

Staff Recommendation

Staff recommends approval of this waiver, to allow for two access points. As noted above, there are agricultural, historic and natural features that would be protected by granting this waiver. There is no adverse impact to public health, safety and welfare nor will it undermine the intent of the Subdivision Regulations.

STAFF REPORT

Jefferson County Planning Commission Meeting
November 8, 2011



Existing single family home on separate lot

Proposed location of new access easement

Existing access easement used for single family home on separate lot and residue parcel. Access easement will be limited to conservation area in gray.

Engineer's Report

Planning Commission Meeting

November 08, 2011

#9 Wilbob Farm Inc Waiver

The applicant is requesting a waiver from the 2008 Jefferson County Subdivision Ordinance Section 20.201.A.2 Minor Subdivision, Access which state to have individual access to a road right of way having a 50 foot width; a lot in the rural district must have 200 feet of road frontage. The applicant has two existing lots and wants to provide separate access for each.

The lots in question meet the requirement of being in the rural district, and having access to a road right of way with more than 50 feet width. However, the smaller of the two lots does not have the required 200 feet of frontage. Therefore, a waiver is needed.

To be able to approve this waiver, the applicant needs to prove all of the following:

1. The design of the project will provide public benefit in the form of reduction in county maintenance costs, greater open space, parkland consistent with county parks plan or benefits of a similar nature.
2. The waiver will not adversely affect the public health, safety or welfare or the rights of adjacent property owners or residents.

1. Because of the conservation easement, some would say this is met because it is a public benefit in the manor of greater open space.
3. Due to the larger lot has over 1600 feet of frontage to route 51, the intent of the ordinance is satisfied.

The proposed waiver does not meet the following:

2. Due to the fact that the applicant has a West Virginia Highway Entrance Permit for the new location but there is no permit for the existing access, it is unclear as to the intent the WVDOH has for the existing entrance: is it to be abandon or upgrade. Clarification on this matter is needed.
4. The applicant has stated that the existing entrance will be just for the conservation easement and the new entrance will be used for non conservation easement part of the larger lot and to the smaller lot. A concern would be: who would perform the maintenance on the conservation easement access? When something is not used daily, it seems to get neglected. I think it would better if the conservation easement was accessed from the new entrance and abandon the

existing. Therefore, when someone wants to access this easement, they are not in the middle of route 51.

Summary

The engineering department feels that the requested waiver is unclear as to the WVDOT intent for the existing access and does not improve this project due to the fact that the maintenance of the access to the conservation easement is on route 51. Therefore, we recommend denial of this waiver. However, if the planning commission is inclined to grant this waiver, have the applicant provide documentation as to how they will address the existing entrance with the WVDOT and maintenance of the existing entrance.

PW11-07

Jefferson County Planning Commission
116 East Washington Street
Charles Town, WV 25414

WAIVER REQUEST FORM

I/We request a waiver from the provisions of the Jefferson County Subdivision Regulations.

Property Owner (s): Willbob Farm Inc c/o Robert C. Henshaw
Address: 5885 Middleway Pike
Kearneyville, WV. 25430.
Phone Number: 304-270-6857.
Location of Property: Rt. #51, 6 miles west of Charles Town.
Lot Size: 74 acres
Deed Book Reference: Deed Book #: 710 Page #: 710-178
Tax Map Reference: District: 07 Map: 19 Parcel: 39
Zoning District: Middleway Rural
Section of Ordinance: 20.201

Briefly describe (in your own words) by specific reference to a sketch (in accordance with the following paragraph) the nature of your waiver request.

Conservation easement on 74 acres Willbob Farms Inc.
(Sketch to be included)

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JEFFERSON COUNTY
PLANNING, ZONING AND ENGINEERING

Sketch on a separate 8 1/2" x 11" sheet of paper the shape and location of the lot. Show the location of the intended construction or land use indicating building setbacks, size and height. Identify existing buildings, structures or land uses on the property. Sign and date the sketch. Please provide a vicinity map of the area.

Please note waivers to the Subdivision Regulations must comply with Division 24.300 of the Subdivision Regulations. To justify your waiver request, please address the following items:

1. 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.

Greater open space.

2. The waiver, if granted, will not adversely affect the public health, safety or welfare or the rights of adjacent property owners or residents.

Correct.

3. The waiver, if granted, will be in keeping with the intent and purpose of this Ordinance.

Correct.

4. The waiver, if granted, will result in a project of better quality and/or character.

Correct.

Robert C. [Signature]

Signature of Property Owner

Signature of Property Owner

For Official Use Only

Amount of Fees Paid: _____

Date of Meeting/Public Hearing: _____

Official/Administrative Body: _____

Property to be posted by: _____

Adjoiner letters to be mailed by: _____

Official Signature and Seal: _____

PCW1107

THIS DEED OF CORRECTION made and entered into this 9 day of April, 1992, by and between WILLOUGHBY E. HENSHAW and VIRGINIA L. HENSHAW, husband and wife, Grantors and parties of the first part and WILBOB FARMS, INC., a West Virginia corporation, Grantee, and party of the second part.

WHEREAS, by general warranty deed, made and delivered by the parties of the first part to the party of the second part, on September 22, 1980, the parties of the first part granted and conveyed, to the party of the second part, the burdens, benefits and fee simple title to the below described real estate; and

WHEREAS, the aforesaid deed, dated September 22, 1980, did not, on the date it was made, contain certain clerical information and did then contain certain minor clerical errors; and

WHEREAS, the party of the second part, having now corrected those clerical omissions and errors, desires to record a corrected deed, thereby invoking the protections of the recording statutes of the State with respect to its title in the below described real estate.

WITNESSETH: That for and in consideration of the sum of TEN DOLLARS (\$10.00) cash in hand, receipt of which is hereby acknowledged, and other good and valuable consideration, receipt of which is also hereby acknowledged, said parties of the first part do hereby grant, bargain, sell and convey unto the party of the second part, with covenants of general warranty and against all liens and encumbrances, together with all rights, privileges, improvements, rights-of-way and appurtenances thereunto belonging or in anywise appertaining, all those two certain contiguous tracts or parcels of land containing in the aggregate one hundred eighty (180) acres, more or less, situate, lying and being in Middleway Magisterial District, Jefferson County, West Virginia, on West Virginia Primary Route 51 leading from Charles Town to Middleway, about six miles west from Charles Town, bounded and described as follows:

TRACT NO. 1: Formerly known as the Bates Farm, beginning at a post on the north side of the Charles Town-Middleway turnpike, a corner to N. R.

Maped 4.20.92 Michael S. Cuyler, Esq. P.O. Box 1419 Middlesboro, W.V.

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OCT 18 2011
JEFFERSON COUNTY
PLANNING, ZONING AND ENGINEERING

Roberts and running with his lines, N. 26°40' E. 2452 feet; thence N. 25°00' E. 400 feet; thence N. 30°00' E. 840 feet to a stone, corner to Wm. Riely; thence with his lines N. 60°00' W. 358 feet to a white oak; N. 62°00' W. 1712 feet; N. 43°00' E. 1140 feet corner to Sensesy; thence with his lines S. 44°00' E. 1658 feet; N. 40°00'; N. 40°45' E. 2344 feet to a rock, corner to Mrs. H. B. Baylor's woods; thence S. 56°00' E. 611 feet crossing the county road to a rock, corner to T. Lee Shirley and continuing with his line in all 1331 feet; thence recrossing the county road and running with Mrs. H. B. Baylor's "Cedar Cottage" farm S. 32°20' W. 4250 feet; N. 56°00' W. 97 feet; S. 29°30' W. 1910 feet to the turnpike; thence with the north side of said turnpike N. 78°00' W. 1232 feet to the beginning, containing 231.05/100 acres, more or less.

LESS AND EXCEPTING a tract of 76.93 acres described in a deed from Willoughby E. Henshaw, et. al. to George T. Penwell, et. al., bearing date the 8th day of March, 1954 and of record in the aforesaid Clerk's office in Deed Book 198 at page 281, in metes and bounds described as follows:

A certain tract of real estate with the improvements thereon situate, lying and being in Middleway District, Jefferson County, West Virginia, on the south side of the public road leading from West Virginia State Route Number 51 to the Middleway-Leetown Road, and adjoining the lands of the grantors herein, and the lands of Swartz and the heirs of H. B. Baylor, more particularly described by a survey and plat thereof made by J. Jas. Skinner, S.J.C. dated February 27, 1954, and attached to and recorded with the said deed, to-wit:

BEGINNING at a post (fig. 1 on plat) an original corner with the land of Swartz; thence with the line of Swartz S. 43°50' W. 2260 feet to an iron pin (fig. 2) now made a corner with the other land of W. E. Henshaw; thence by a new line S. 46°10' E. 1637 feet to an iron pin (fig. 3) in the line of the H. B. Baylor heirs; thence with said land N. 33°00' E. 2536 feet crossing the said public road to a stake on the north side thereof (fig. 4); thence with the north side of said road crossing the same at the curve therein and thence with the fence line N. 57°00' W. 1183 feet to the point of beginning, containing 76.93 acres, more or less.

LESS AND EXCEPTING ALSO, a tract of 40,041 square feet, together with a 40 foot wide access easement to and from West Virginia Primary Route 51, described in a deed from Willoughby E. Henshaw, et. al. to Robert C. Henshaw, bearing date the 22nd day of September, 1980, and of record in the aforesaid Clerk's office in Deed Book 475, at page 526, to-wit:

A certain parcel of real estate, together with all rights, privileges, improvements, rights-of-way and appurtenances thereunto belonging or in anywise appertaining, situate in Middleway District, Jefferson County, West Virginia on the north side of West Virginia Primary Route 51, the Smithfield-Charles Town-Harpers Ferry Turnpike, and approximately 1 mile southeast of Middleway, and being more particularly bounded and described according to a survey and plat thereof made by Charles K. Sager, Licensed Land Surveyor, thereto attached and made a part of the said deed, as follows:

BEGINNING at a point in an existing fence line (fig. 1 on plat); thence in an azimuth angle accruing clockwise from magnetic north $219^{\circ}56'33''$ a distance of 211.36 feet to a set capped $5/8''$ rebar next to a wooden fence post (fig. 2 on plat); thence in an azimuth angle accruing clockwise from magnetic north $107^{\circ}13'45''$ a distance of 265.64 feet to a corner wooden fence post (fig. 3 on plat), a corner to Parcel "A"; thence with Parcel "A" for one line in an azimuth angle accruing clockwise from magnetic north $041^{\circ}01'08''$ a distance of 114.51 feet to a corner wooden fence post, (fig. 4 on plat); thence leaving Parcel "A" in an azimuth angle accruing clockwise from magnetic north $308^{\circ}37'19''$ a distance of 247.26 feet to a point of beginning, containing 40,041 square feet, more or less, as shown upon a plat of Charles K. Sager, Licensed Land Surveyor, dated the 10th day of July, 1980, of record in the said Clerk's office in Deed Book 475, at page 529, the tract hereinabove described being shown on said plat as Parcel "B".

LESS AND EXCEPTING ALSO, from this conveyance a tract or parcel of real estate containing 1.559 acres, the title thereto being EXCEPTED AND RESERVED unto the Grantors herein, said tract being described in metes and bounds as follows:

All of that certain parcel of real estate in Middleway District, Jefferson County, West Virginia on the north side of West Virginia Primary Route 51, the Smithfield-Charles Town-Harpers Ferry Turnpike, and approximately 1 mile southeast of Middleway, more particularly bound and described according to a survey and plat thereof made by Charles K. Sager, Licensed Land Surveyor, as follows:

BEGINNING at a corner wooden fence post (fig. 3 on plat), the souther most corner to Parcel "B"; thence with said Parcel in an azimuth angle accruing clockwise from magnetic north $041^{\circ}01'08''$ a distance of 114.51 feet to a corner wooden fence post (fig. 4 on plat); thence in an azimuth angle accruing clockwise from magnetic north $069^{\circ}11'31''$ a distance of 212.60 feet to a set capped $5/8''$ rebar on the north east side of a gravel road (fig. 5 on plat); thence in an azimuth angle accruing clockwise from magnetic north $123^{\circ}51'26''$ a distance of 79.67 feet to a T-Iron fence post (fig. 6 on plat); thence in an azimuth angle accruing clockwise from magnetic north $154^{\circ}12'19''$ a distance of 66.70 feet to a Potomac Edison utility pole, no

number, (fig. 7 on plat); thence in an azimuth angle accruing clockwise from magnetic north $164^{\circ}41'07''$ a distance of 70.79 feet to a Potomac Edison utility pole #M100432, (fig. 8 on plat); thence in an azimuth angle accruing clockwise from magnetic north $187^{\circ}41'59''$ a distance of 95.52 feet to a Potomac Edison utility pole #M100431, (fig. 9 on plat), on the northeast side of a gravel road; thence in an azimuth angle accruing clockwise from magnetic north $224^{\circ}09'22''$ at a distance of 8.9 feet crossing the center of said gravel road, in all, 69.76 feet to a set capped $5/8''$ rebar (fig. 10 on plat); thence in an azimuth angle accruing clockwise from magnetic north $296^{\circ}17'19''$ a distance of 109.80 feet to a set capped $5/8''$ rebar (fig. 11 on plat); thence in an azimuth angle accruing clockwise from magnetic north $018^{\circ}31'25''$ a distance of 35.24 feet to a corner wooden fence post (fig. 12 on plat); thence in an azimuth angle accruing clockwise from the magnetic north $287^{\circ}03'07''$ a distance 250.17 feet to the point of beginning, containing 1.559 acres, more or less, as shown upon a plat of Charles K. Sager, Licensed Land Surveyor dated the 10th day of July, 1980, of record in the said Clerk's office in Deed Book 475, at page 529. The tract hereinabove described being shown on said Plat as Parcel "A".

Together with a 40-foot wide access easement to and from West Virginia Primary Route 51, said easement centerline being the centerline of an existing gravel road, more particularly bound and described as follows:

Beginning at a point in the centerline of said gravel road (fig. 13 on plat), said point being $224^{\circ}09'22''$ a distance of 8.9 feet from a Potomac Edison utility pole #M100431, (fig. 9 on plat); thence with the centerline of said gravel road for 5 lines in an azimuth angle accruing clockwise from magnetic north $141^{\circ}06'30''$ a distance of 20.01 feet, (fig. 14 on plat); then in an azimuth angle accruing clockwise from magnetic north $128^{\circ}14'35''$ a distance of 42.70 feet, (fig. 15 on plat); thence in an azimuth angle accruing clockwise from magnetic north $147^{\circ}24'43''$: a distance of 37.38 feet, (fig. 16 on plat); thence in an azimuth angle accruing clockwise from magnetic north $183^{\circ}03'12''$ a distance of 37.92 feet, (fig. 17); thence in an azimuth angle accruing clockwise from magnetic north $222^{\circ}18'38''$ a distance of 913.55 feet, (fig. 18 on plat), to be extended to the northern right of way limit of West Virginia Primary Route 51.

HOWEVER, Parcel "A" is subject to a 40-foot wide access easement for Parcel "B", said easement running parallel with and 40 feet from the boundary lines of Parcel "A" from Fig. 4 thru Fig. 9 as shown on the said plat made by Charles K. Sager and of record in the said Clerk's office in Deed Book 475, at page 529.

AND BEING, a part of the same real property that was conveyed to the parties of the first part from F. Dean Nichols, Trustee, by

deed dated the 27th day of June , 1972, and of record in the said Clerk's Office in Deed Book 344, at page 436.

TRACT NO. 2: BEGINNING at a point (1) in center of said turnpike in line of the grantors; thence with said line No. 28°30' E. 1000 feet to a point (2); thence again with the line of the grantors N. 30°00' E. 1442 feet to a post (3), and finally with line of the grantors N. 24 30' E. 398 feet to a post (4), corner to M. Brathwaite; thence with same N. 62°10' W. 411 feet to a post (5) corner with S. W. Dunn; thence with Dunn and Roy Lambert S. 28°45' W. 2950 feet to a point in center of turnpike (6); thence S. 78°00' E. 421 feet to the point of beginning, containing twenty seven and eighty one hundredth (27.80) acres, more or less.

AND BEING, a part of the same real property that was conveyed to the parties of the first part from F. Dean Nichols, Trustee, by deed dated the 27th day of June, 1972, and of record in the said Clerk's Office in Deed Book 344, at page 436.

This conveyance is subject to all easements, restrictions, deeds of trust and other unreleased encumbrances previously of record.

DECLARATION OF CONSIDERATION OR VALUE

The undersigned hereby declares that the total consideration paid for the property conveyed by the document to which this declaration is appended is One Hundred Ten Thousand Dollars (\$110,000.00)

Willoughby E. Henshaw

Address: RT 1 Box 300
Kearneysville W. Va 25430

WITNESS the following signatures and seals.

Willoughby E. Henshaw
Willoughby E. Henshaw

Virginia L. Henshaw
Virginia L. Henshaw

STATE OF WEST VIRGINIA,
COUNTY OF Berkeley, TO-WIT:

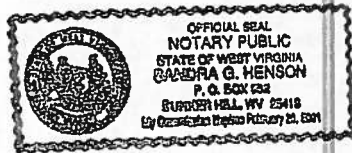
I, Sandra G. Henson, a Notary Public in and for the County and State aforesaid, do hereby certify that Willoughby E. Henshaw, whose name is signed to the writing hereto annexed, bearing date on the 9th day of April, 1992, has this day acknowledged the same before me in my said County.

Given under my hand this 9th day of April, 1992.

My commission expires:

02/20/2001
SEAL:

Sandra G. Henson
NOTARY PUBLIC



STATE OF WEST VIRGINIA,
COUNTY OF Berkeley, TO-WIT:

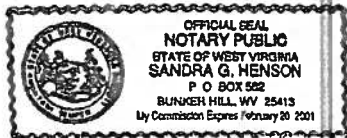
I, Sandra G. Henson, a Notary Public in and for the County and State aforesaid, do hereby certify that Virginia L. Henshaw, whose name is signed to the writing hereto annexed, bearing date on the 9th day of April, 1992, has this day acknowledged the same before me in my said County.

Given under my hand this 9th day of April, 1992.

My commission expires:

02/20/2001
SEAL:

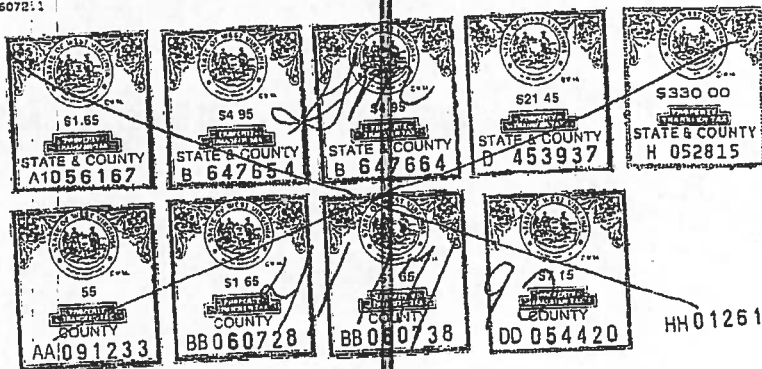
Sandra G. Henson
NOTARY PUBLIC



THIS INSTRUMENT WAS PREPARED BY:

Michael E. Caryl, Esquire
Bowles Rice McDavid Graff & Love
105 West Burke Street
Post Office Drawer 1419
Martinsburg, West Virginia 25401

36072:1



State of West Virginia, County of Jefferson, Sct.

IN THE CLERK'S OFFICE OF THE COUNTY COMMISSION:

On APR 17 1992, at 11:20 A.M., the foregoing document was received in my said office and duly admitted to record.

Test,

John E. Ott
Clerk of County Commission

PERMIT TO ENTER UPON, UNDER, OVER OR ACROSS THE STATE ROADS OF THE STATE OF WEST VIRGINIA, AS PROVIDED FOR IN SECTION 6, ARTICLE 16, CHAPTER 17; SECTION 9, ARTICLE 16, CHAPTER 17; SECTION 8, ARTICLE 4, CHAPTER 17, WEST VIRGINIA CODE, 1931, AS AMENDED.

THIS PERMIT, Made this 5th day of October 20 11, between the WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a statutory corporation hereinafter called DIVISION and Wilbob Farms Inc. (c/o Robert C. Henshaw)

Address: 5885 Middleway Pike, Kearneysville, WV 25430 Phone No: 304-270-6857
hereinafter called APPLICANT.

WITNESSETH

In consideration of the hereinafter set out covenants and in accordance with Section 6, Article 16, Chapter 17; or Section 9, Article 16, Chapter 17; or Section 8, Article 4, Chapter 17, of the Official Code of West Virginia, 1931, as amended, and the rules and regulations promulgated thereunder, APPLICANT does hereby apply to enter

Route Type & No. WV 51 (T) DOH Project No. _____ (if applicable);
at North side of WV 51 (T), 0.574 mile West of CR 1/5 Mile Post 1.736
in Jefferson County, for the purposes hereinafter set forth and in accordance with the

plans and specifications which are attached hereto and made a part hereof: To construct and maintain 1-20' residential approach stabilizing with a maximum size of 1 1/2" crusher run stone to a total depth of 6" compacted from the edge of the pavement to the right of way line per attached typical sheet. This work shall be constructed and maintained so that water and debris will not flow or be tracked onto the roadway. Should this parcel develop commercially, subdivide, or be located within a subdivision with internal access, this permit will be invalid. Applicant shall apply for a new permit to fit altered conditions.

APPLICANT further agrees to accept the conditions hereinafter set forth:

1. APPLICANT shall deposit with DIVISION the sum of \$ _____ in the form of an official, certified or cashier's check, or executed bond with surety satisfactory to DIVISION to cover any damage and inspection costs DIVISION may sustain by reason of the granting of this permit, including any expense incurred in restoring said highway to its original condition or the proper repair of any and all damages that may result within one (1) year from the date of the completion of said work.
2. APPLICANT agrees to reimburse DIVISION for inspection costs as follows:
 - A. For any inspection costs incurred under this permit.
 - B. At \$ _____ per linear foot for _____ feet of water line installed under this permit
 - C. At \$ _____ per linear foot for _____ feet of sewer line installed under this permit
3. APPLICANT shall notify DIVISION at least 48 hours in advance of the date the work will begin. Failure to comply will be cause for cancellation of this permit.
4. APPLICANT agrees to protect its employees, equipment and users of the highway at all times in accordance with the current Division of Highways manual "Traffic Control For Street and Highway Construction and Maintenance Operations".
5. APPLICANT agrees to comply with all applicable state and federal laws in the performance of work under this permit.
6. Supplementary conditions cited on the reverse side of this permit are understood and agreed to be a part hereof.
7. The work authorized under this permit shall be completed on or before (Date): October 31, 2012

APPROVED
OCT 17 2011

WV DOT
District 5

Applicant's signature on this permit affirms that all text herein is a verbatim reproduction of The West Virginia Division of Highways Encroachment Permit Form MM-109, revision date May 19, 2005. All attachments are inclusive to this permit.

RECOMMENDED: [Signature]
Title Design Engineer

BEFORE DIGGING OR OTHERWISE DISTURBING THE EARTH CALL 1-800-245-4848 TO NOTIFY MANY UNDERGROUND OWNERS • FREE SERVICE

[Signature: Robert C. Henshaw]
Signature and Title of Applicant

BOND REQUIREMENT:
BOND NO. _____ DATE _____
Attached On File
INSPECTION: Owner/Consultant
Full Time Part Time
Periodic Reimbursable No Cost

APPROVED: [Signature]
Title District Engineer/Manager
West Virginia Division of Highways

In the Circuit Court of Jefferson County, West Virginia

GARY L. CAPRIOTTI
EDWARD R. MOORE
EDWARD DUNLEAVY
SHEPHERDSTOWN BATTLEFIELD PRESERVATION ASSOCIATION, Inc.
Plaintiffs

COPY

11-C-325, 326, 327 & 328
Judge Sanders

JEFFERSON COUNTY PLANNING COMMISSION,
A public body,
Defendant

Defendant's AMENDED Motion to Dismiss

COMES NOW THE JEFFERSON COUNTY PLANNING COMMISSION, by the undersigned counsel, Stephen V. Groh, Assistant Prosecuting Attorney who respectfully appears specially to object to jurisdiction and in the alternative moves this Court to Dismiss above referenced Actions. In support, thereof, the Defendant avers as follows:

1. This AMENDED Motion to Dismiss follows and supercedes the earlier Motion to Dismiss filed on October 6th, 2011. Said prior motion to dismiss appears to have been a draft which was filed in place of the instant Amended Motion.
2. This matter involves a dispute in which aggrieved neighbors to the subject property have prosecuted a long, multi-stage strategy of litigation about proposed development of a nearby parcel of land in Jefferson County, West Virginia. Most recently, the Planning Commission settled a civil action with the owners of Faraway Farms by order entered August 3, 2011 and received by the parties some time on or

after August 8, 2011 (Paragraphs 1-23 of the complaint). The current plaintiffs attempted to intervene in said prior lawsuit between Faraway Farms and the defendant but the Court accepted and entered a settlement order in the prior action before ruling upon the plaintiffs motion to intervene.

3. The complaint in this matter appears to assert two separate causes of action, neither of which state a legally cognizable cause of action. In addition, the plaintiffs failed to obtain personal jurisdiction over the defendant by failure to obtain proper service.

Failure of Jurisdiction for Failure to Serve Proper Party

4. The Planning Commission asserts that the Plaintiffs failed to follow the requirements of WVRCP Rule 4(c)(6)(B) in that they failed to serve any member of the Planning Commission, failed to serve the county clerk and failed to serve the Prosecuting Attorney. Upon information and belief the plaintiffs merely had county commission employees who work and the Department of Planning and Zoning served. The plaintiffs did not serve any commissioner, nor the county clerk nor the prosecuting attorney. County Commission employees are not members of the Planning Commission and, in fact, appear in front of the planning commission as witnesses. Since service was not perfected, the defendant respectfully requests that this matter be Dismissed.

Complaint should be Dismissed for Failure to State a Claim

5. The complaint in paragraph 17 asserts that “the Commission’s decision cannot be compromised through negotiation.”
6. However, this, if attempts to state cause of action, fails to recognize that once sued the Planning Commission has, by statute, full legal and equitable authority and access to any remedy available to any party at law. See W.V. Code §8A-2-11(12)([Planning Commission] may invoke any legal equitable or special remedy . . .[under] any action taken hereunder.”) This certainly allows the Planning Commission to settle outstanding legal claims against it. To hold otherwise would force both the Planning Commission and citizens aggrieved by the actions of the Planning Commission into fully litigating claims that could well and justly be compromised. This would waste both public and private resources litigating matters which should justly be settled.
7. In the main cause of action asserted by the Plaintiffs, the Planning Commission allegedly held a secret meeting in violation of the Open Meetings Act and at said alleged secret illegal meeting settled the most recent Faraway Farms litigation of April 2011. The facts as alleged in the petition combined with the applicable law clearly indicate that the petition fails to state a legally cognizable cause of action.
8. From the facts as asserted in the complaint (which the defendant contests but which are accepted for the purposes of this motion) the Planning Commission held a meeting on July 26, 2011 in which settlement of the FAF lawsuit was discussed in Executive Session with counsel.¹ [complaint 20-22]

¹ The Faraway Farms litigation had been on the agenda several times in the past and a recent motion in opposition to intervention had been included in the July 12, 2011 packet. Earlier executive sessions had discussed the Faraway Farms litigation. The fact the such litigation was proceeding was known publically. In fact in paragraph 19

9. According to the complaint immediately after the closed session ended the Planning Commission to a public vote and specifically referred to an order prepared and circulated to the Planning Commission and was publically voted upon by the Planning Commission.
10. [paragraph 28] "After the executive session the planning commission entertained the motion of a Commissioner which stated as follows: 'I move that we proceed with the order as drawn up by counsel and presented to the Commission and authorize the president to sign it.'"
11. According to the Complaint, the Settlement Order was not signed by the Court until August 3rd, 2011 and received by plaintiff's counsel on August 8th, 2011.[Paragraph 19]
12. According to West Virginia Code §6-9A-4(11): "If a public agency has approved or considered a settlement in closed session and the terms of the settlement permit disclosure, the terms of the settlement shall be reported by the public agency and entered into the minutes with a reasonable time after the settlement is concluded." This section clearly allows a public body to discuss litigation in closed session but merely requires that the settlement terms be reported a reasonable time after the settlement is concluded.
13. First of all, the Planning Commission asserts that the minutes clearly make reference and identify an "order drawn up and presented by counsel" and said order is part of the public file of the Circuit Clerk, the public file of the subject property FAF and was received by the plaintiff [Paragraph 19] Therefore, said order was in no way hidden

of the complaint the plaintiffs admit receiving a copy of the order at issue from the circuit clerk certainly undermining their assertion that the settlement was "secretive."

or secret but rather was publically identified and incorporated by reference by the public body in compliance with the requirements of the Open Meetings Act.

14. Even assuming for the sake of argument that the clear public reference to the specific public settlement order in the minutes of July 26, 2011 is insufficient, the complaint fails to state a cause of action because the Open Meetings Act merely requires that the settlement “must be entered into the minutes within a **REASONABLE TIME AFTER THE SETTLEMENT IS CONCLUDED.**” W.V. Code 6-9A-11.
15. By the facts asserted in the complaint, the Court did not sign the settlement order until over a week after the proposed offer to settle the lawsuit was voted on by the Planning Commission.
16. The settlement was not concluded until the settlement offer was accepted by the FAF plaintiffs and accepted by the Court in August 2011. The Court signed the Order of Settlement on August 3, 2011 clearly **AFTER** the July meeting. Therefore, the settlement did not “conclude” until after the July 26, 2011 meeting. The defendant was not required to be entered into the minutes of a meeting before the settlement was concluded.
17. In short (while not waiving the claim that the hearing was public as set forth herein) the Planning Commission could not enter the settlement into the July 2011 minutes **BEFORE** the “settlement is concluded” by the Court’s signature in August 2011.²
18. Whatever the Open Meetings Act means by a “reasonable time after settlement is concluded” as a matter of law it cannot require an August settlement Order to be

² Steps were taken after receipt of the signed order to enter the order into minutes of meetings of the Planning Commission, but it is impossible for the order to have been entered into minutes **BEFORE** the Court signed the order such that “settlement is concluded.”

entered into minutes in July before the settlement order even existed and before the
"settlement was concluded."

19. Therefore, the complaint fails to state a cause of action and should be dismissed.

WHEREFORE, the Planning Commission respectfully suggests that service of process was insufficient and that the complaint fails to state a cause of action for which relief can be granted and respectfully requests that this petition be DISMISSED and grant such other relief as may be just and equitable. Furthermore, in the event that the Court denies this motion, defendant respectfully requests a reasonable time to file a bona fide answer.

Respectfully submitted,

Jefferson County Planning Commission,
By

Stephen V. Groh, Assistant Prosecuting Attorney

Certificate of Service.

I certify that on this _____ day of _____, 2011, I caused a copy of the foregoing to be mailed first class mail, postage pre-paid to counsel for the Plaintiffs, Linda Gutsell, Esq. 107 North College St. Martinsburg, WV 25401

Stephen V. Groh, Assistant Prosecuting Attorney

In the Circuit Court of Jefferson County, West Virginia

GARY L. CAPRIOTTI
EDWARD R. MOORE
EDWARD DUNLEAVY
SHEPHERDSTOWN BATTLEFIELD PRESERVATION ASSOCIATION, Inc.
Plaintiffs

11-C-325, 326, 327 & 328
Judge Sanders

JEFFERSON COUNTY PLANNING COMMISSION,
A public body,
Defendant

ANSWER

COMES NOW THE JEFFERSON COUNTY PLANNING COMMISSION by the undersigned counsel who, incorporating and restating all matters in previously filed Motion to Dismiss, does ANSWER the complaint in this matter as follows:

1. The Defendant has no personal knowledge of the facts alleged and therefore must DENY the assertions.
2. The Defendant has no personal knowledge of the facts alleged and therefore must DENY the assertions.
3. The Defendant has no personal knowledge of the facts alleged and therefore must DENY the assertions.
4. Based on examination of public records from the Secretary of State the defendant admits the assertions.
5. The defendant admits the assertions.
6. The paragraph merely states a legal proposition which requires no answer.
7. The defendant admits that it approved a community impact statement for a proposed development called Faraway Farms.
8. The defendant admits that December 2010 was the deadline for the final plat public hearing.
9. The defendant has no knowledge as to "progress" by the property owner and so must DENY in part and admits in part that in November, 2010 the property owner appeared to request an extension to time because of delay it alleged were caused by litigation by the instant plaintiffs and by the Planning Commission itself when it

brought suit against the property owners in federal court. Said suit was ultimately dismissed but the property owners claimed that the suit by the Planning Commission itself prevented them from completing the project and justified the Planning Commission granting additional time to finish the project.

10. The defendant admits that the Planning Commission as then constituted denied the property owners any extension of time.
11. The defendant admits that toward the end of March 2011 a vote was taken to approve written decision denying the extension of time. The exact date in the end of March at which the written findings were signed is denied.
12. The defendant admits that the Faraway Farms property owners filed a lawsuit against the defendant some time in April 2011.
13. The defendant admits that the Court accepted said Faraway Farms lawsuit for filing contemporaneously with its filing.
14. The defendant admits that the instant plaintiffs filed a motion to intervene in the Faraway Farms lawsuit of April, 2011.
15. The defendant admits that motions in opposition to the motion to intervene in the Faraway Farms lawsuit of April, 2011 were filed.
16. The defendant admits in part that a hearing was conducted but denies the characterization as to the defendant's motivation for said opposition.
17. The paragraph merely asserts and legal theory and as such does not an answer but to the extent it may assert facts the defendant denies the same and asserts that W.V. Code §8A gives the Planning Commission full authority to exercise any and all legal and equitable remedies, including the equitable ability to reach just and equitable settlement of pending litigation. The Planning Commission is a public body and has an obligation to fairly deal with any and all parties with which it interacts, including litigants. Plaintiff's erroneous legal theory would require the Planning Commission to ignore just and equitable claims of citizens and force citizens to prosecute needless and expensive litigation when justice requires that a matter be settled. To adopt the plaintiff's flawed legal theory would unjustly force aggrieved citizens to "fully litigate" all claims, even claims which the Planning Commission believes have merit, which would be an abuse of power.
18. The defendant admits that the parties to Faraway Farms lawsuit of April, 2011, proposed to the Court an agreed settlement order to said lawsuit, a settlement the parties believed was just and equitable. On, or about, August 3, 2011, this Court reviewed said proposed settlement and, finding it just, signed and entered the same. The defendant admits that the Court chose to enter the proposed settlement order before the Court chose to rule upon the plaintiffs' motion to intervene. All other facts that may have been asserted in said paragraph are denied.
19. The defendant admits that the plaintiffs received a copy of public settlement order of the April 2011 Faraway Farms lawsuit. The defendant admits that said

settlement order is public document from a public court file about a public settlement of a lawsuit. The defendant admits that no copy of the proposed order was submitted to the plaintiffs prior to acceptance by the Court because the plaintiffs were not a party to the action and were not entitled receive a copy nor to respond to the proposed settlement. The defendant has no knowledge of the exact time when the plaintiffs received a copy of said settlement order but argues that plaintiffs receiving a copy of said order in the timely fashion undercuts the plaintiffs' assertion that the settlement was somehow "secretive." The defendant denies any other allegations in the paragraph.

20. The defendant admits in part that, as fully reflected in the minutes of the July 26, 2011 Planning Commission meeting, the Planning Commission, after an executive session to discussion pending litigation, publically voted on a prepared written settlement proposal which settlement order and vote are noted in the minutes of said meeting. The defendant denies that said vote concluded the settlement of the pending lawsuit as the settlement was not concluded until accepted by the plaintiffs of said lawsuit and then ultimately accepted and signed by the Court.
21. The public documents referred to speak for themselves and require no answer but to the extent that the paragraph makes factual characterizations about the packet the characterizations are denied. Further the defendant asserts that "Update from Legal Counsel" was a recurring agenda item, that on at least two prior occasions the Planning Commission went into executive session to discussion pending litigation and that earlier packets included documents, motions and other pleadings specific to pending Faraway Farms litigation of April 2011. The defendant further asserts that no public discussion of on-going litigation is required and that the only requirement is that the terms of any final settlement be entered in to the minutes of the meeting after the settlement is concluded. West Virginia Code §6-9A-4(11) clearly permits a public agency to consider issues associated with litigation and possible settlement of litigation in closed session. The only require of public notice of such settlement discussions is terms of the settlement shall be reported and entered into its minutes within **a reasonable time after the settlement is concluded.**" To require a public body to publically discuss pending litigation issues, much less publically announce it that it was considering settlement and the reasons thereof, undercuts sound litigation and negotiation strategy, undermines attorney-client privilege and is not required by law. While the defendant continues to assert that the specific references in the July 26th 2011 minutes suffice, the settlement was clearly not "concluded" until after the Faraway farms plaintiff accepted the proposed offer of the defendants and until after the Court accepted and signed the Order on August 3rd 2011. Thus, the defendant fully complied with the applicable law.

22. The public documents referred to speak for themselves and require no answer but to the extent that the paragraph makes factual characterizations about the packet the characterizations are denied. Further the defendant asserts that "Update from Legal Counsel" was a recurring agenda item, that on at least two prior occasions the Planning Commission went into executive session to discussion pending litigation and that earlier packets included documents, motions and other pleadings specific to pending Faraway Farms litigation of April 2011. The defendant further asserts that no public discussion of on-going litigation is required and that the only requirement is that the terms of any final settlement be entered in to the minutes of the meeting after the settlement is concluded. West Virginia Code §6-9A-4(11) clearly permits a public agency to consider issues associated with litigation and possible settlement of litigation in closed session. The only require of public notice of such settlement discussions is terms of the settlement shall be reported and entered into its minutes within **a reasonable time after the settlement is concluded.**" To require a public body to publically discuss pending litigation issues, much less publically announce it that it was considering settlement and the reasons thereof, undercuts sound litigation and negotiation strategy, undermines attorney-client privilege and is not required by law. While the defendant continues to assert that the specific references in the July 26th 2011 minutes suffice, the settlement was clearly not "concluded" until after the Faraway farms plaintiff accepted the proposed offer of the defendants and until after the Court accepted and signed the Order on August 3rd 2011. Thus, the defendant fully complied with the applicable law.
23. The paragraph states a legal conclusion and requires no answer. To the extent that is may assert facts, the facts are denied.
24. The general purpose of the executive session was stated upon the record of the July 26th, 2011 meeting and speaks for itself. The motion made after the hearing speaks for itself. The actual discussions between the defendant and its counsel are subject to attorney-client privilege, the defendant asserts the privilege and must respectfully decline to provide any details of said communication.
25. The record quoted speaks for itself and requires no answer. To the extent that is may assert facts, the facts are denied.
26. The record quoted speaks for itself and requires no answer but the defendant denies that the general purpose of the executive session was in any way unclear from the context: discussion with legal counsel about pending litigation.
27. The paragraph states a legal conclusion and requires no answer. To the extent that is may assert facts, the facts are denied.
28. The record quoted speaks for itself and requires no answer. The defendant agrees that the Planning Commission after leaving executive session with its counsel

clearly identified the settlement proposal by reference a specific document and that a public vote was taken upon the settlement proposal.

29. The record speaks for itself and requires no answer. The defendant asserts that the reference to a specific existing document is sufficient. The defendant further asserts that the Open Meetings Act, W.V. Code §6-9A-4(11), clearly permits a public agency to consider issues associated with litigation and possible settlement of litigation in closed session. The law requires only that terms of the settlement shall be reported and entered into its minutes within **a reasonable time after the settlement is concluded.** W.V. Code §6-9A-4(11). As discussed elsewhere in this answer, the requirement of reporting a settlement only after it is concluded protects proper attorney-client relations and promotes the ability of the public body to conduct sound litigation strategy on behalf of the public interest.
30. The record quoted speaks for itself and requires no answer. The defendant admits that the motion upon the publically identified motion referenced in the minutes of the July 26th, 2011 meeting was unanimous.
31. The record speaks for itself and requires no answer. The defendant asserts that the reference to a specific existing document is sufficient. The defendant further asserts that the Open Meetings Act, W.V. Code §6-9A-4(11), clearly permits a public agency to consider issues associated with litigation and possible settlement of litigation in closed session. The law requires only that terms of the settlement shall be reported and entered into its minutes within **a reasonable time after the settlement is concluded.** W.V. Code §6-9A-4(11). As discussed elsewhere in this answer, the requirement of reporting a settlement only after it is concluded protects proper attorney-client relations and promotes the ability of the public body to conduct sound litigation strategy on behalf of the public interest.
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34. The document referred to speaks for itself but the defendant agrees that the proposed settlement agreement was forwarded to the Court for consideration after the July 26th, 2011 sometime in the early part of August 2011 and it was reviewed and approved by the Court on August 3rd, 2011.

35. To the extent that the paragraph asserts legal conclusions, said legal conclusions require no answer, to the extent that the paragraph asserts fact the facts are denied except to the extent that the Planning Commission asserts that the settlement agreement improves upon the situation of the proposed Faraway Farms by requiring the developer to conform to the more modern and effective revised 2008 subdivision ordinance to which the original proposal was not require to comply. The defendant argues that the plaintiffs' legal conclusion that the Open Meeting Act bars settlement of civil lawsuits involving a public body is incorrect as the Act clearly contemplates closed session discussions about settlement with legal counsel and the defendant again argues that the Open Meetings Act, W.V. Code §6-9A-4(11), clearly permits a public agency to consider issues associated with litigation and possible settlement of litigation in closed session. The law merely requires that the terms of the settlement shall be reported and entered into its minutes within a **reasonable time after the settlement is concluded.**"
36. To the extent that the paragraph asserts legal conclusions, said legal conclusions require no answer, to the extent that the paragraph asserts fact the facts are denied except to the extent that the Planning Commission asserts that the appropriate private discussions with legal counsel are not "secretive" merely privileged. The defendant asserts that the plaintiffs' legal conclusion that the Open Meeting Act bars settlement of civil lawsuits involving a public body is incorrect as the Act clearly contemplates closed session discussions about settlement with legal counsel and the defendant again asserts that the Open Meetings Act, W.V. Code §6-9A-4(11), clearly permits a public agency to consider issues associated with litigation and possible settlement of litigation in closed session. The law require of public notice of such settlement discussions is terms of the settlement shall be reported and entered into its minutes within a **reasonable time after the settlement is concluded.**" The defendant asserts that nothing is unlawful about a public body settling litigation against it. Finally, the defendant again asserts that it is clearly lawful for a public agency to receive legal advice about pending litigation in closed session.
37. To the extent that the paragraph asserts legal conclusions, said legal conclusions require no answer, to the extent that the paragraph asserts fact the facts are denied except to the extent that the Planning Commission asserts that the settlement agreement improves upon the situation of the proposed Faraway Farms by requiring the developer to conform to the more modern and effective revised 2008 subdivision ordinance to which the original proposal was not require to comply. The defendant argues that the plaintiffs' legal conclusion that the Open Meeting Act bars settlement of civil lawsuits involving a public body is incorrect as the Act clearly contemplates closed session discussions about settlement with legal counsel and the defendant again argues that the Open Meetings Act, W.V. Code §6-9A-4(11), clearly permits a public agency to consider issues associated with litigation and

possible settlement of litigation in closed session. The law merely requires that the terms of the settlement shall be reported and entered into its minutes within a **reasonable time after the settlement is concluded.**" Finally, the defendant again asserts that it is clearly lawful for a public agency to receive legal advice about pending litigation in closed session.

38. To the extent that the paragraph asserts legal conclusions, said legal conclusions require no answer, to the extent that the paragraph asserts fact the facts are denied except to the extent that the Planning Commission asserts that the settlement agreement improves upon the situation of the proposed Faraway Farms by requiring the developer to conform to the more modern and effective revised 2008 subdivision ordinance to which the original proposal was not required to comply. The defendant argues that the plaintiffs' legal conclusion that the Open Meeting Act bars settlement of civil lawsuits involving a public body is incorrect as the Act clearly contemplates closed session discussions about settlement with legal counsel and the defendant again argues that the Open Meetings Act, W.V. Code §6-9A-4(11), clearly permits a public agency to consider issues associated with litigation and possible settlement of litigation in closed session. The law merely requires that the terms of the settlement shall be reported and entered into its minutes within a **reasonable time after the settlement is concluded.**" The defendant asserts that nothing is unlawful about a public body settling litigation against it. Finally, the defendant again asserts that it is clearly lawful for a public agency to receive legal advice about pending litigation in closed session. Nothing in the Open Meetings Act requires public input upon a decision to reach a settlement in a pending lawsuit (since permits closed session discussions with legal counsel and only requires settlement be announced a reasonable time after the conclusion) and to infer such a requirement would totally destroy the public bodies ability to confer with counsel and to properly defend and/or prosecute litigation.¹The Planning Commission asserts that the settlement improved upon the proposed development by requiring it to proceed under the up-dated 2008 sub-division regulations.²

39. To the extent that the paragraph asserts legal conclusions, said legal conclusions require no answer, to the extent that the paragraph asserts fact the facts are denied

¹ Contemplate the absurdity: "I now ask public comment upon the litigation strategy publically outlined by our lawyer about the on-going multi-dollar litigation . . .the chair recognized the plaintiff's counsel [Who with his court reporter present ask about details of litigation strategy, insists that the settlement offer be increased and demands the body relinquish its most potent defensive arguments]. . ." That is why the Open Meetings Act permits closed sessions and only requires the terms be revealed after settlement to do otherwise would prevent a public body from being able to defend litigation and would prevent any meaningful attorney-client privilege.

² Ironically, this new requirement was one of the current plaintiff's requests when it attempted to intervene in the April 2011 Faraway Farms litigation: it wanted the project to be required to proceed under the 2008 regulations and now objects to a settlement that incorporates one of its own requirements.

except to the extent that the Planning Commission asserts that the appropriate private discussions with legal counsel are not “secretive” merely privileged. The defendant asserts that the plaintiffs’ legal conclusion that the Open Meeting Act bars settlement of civil lawsuits involving a public body is incorrect as the Act clearly contemplates closed session discussions about settlement with legal counsel and the defendant again asserts that the Open Meetings Act, W.V. Code §6-9A-4(11), clearly permits a public agency to consider issues associated with litigation and possible settlement of litigation in closed session. The law requires of public notice of such settlement discussions as follows: “terms of the settlement shall be reported and entered into its minutes within a **reasonable time after the settlement is concluded.**” W.V. Code §6-9A-4(11). The defendant asserts that nothing is unlawful about a public body settling litigation against it. Finally, the defendant again asserts that it is clearly lawful for a public agency to receive legal advice about pending litigation in closed session. Nothing in the Open Meetings Act requires public input upon a decision to reach a settlement in a pending lawsuit and to infer such a requirement would totally destroy the public body’s ability to confer with counsel and to properly defend and/or prosecute litigation. The Planning Commission asserts that the settlement improved upon the proposed development by requiring it to proceed under the up-dated 2008 sub-division regulations.

40. To the extent that the paragraph asserts a legal conclusion it requires no answer to the extent that it asserts facts the facts are denied. Specifically, as outlined elsewhere herein, the settlement fully complied with the requirements of the Open Meetings Act which clearly contemplates and permits closed discussions with legal counsel about pending litigation.
41. To the extent that the paragraph asserts a legal conclusion it requires no answer to the extent that it asserts facts the facts are denied. Specifically, as outlined elsewhere herein, the settlement as issue fully complied with the requirements of the Open Meetings Act which clearly contemplates and permits closed discussions with legal counsel about pending litigation.

Motions

- 1) For the Reasons set forth in the previously filed motion to dismiss which is incorporated herein by reference, the Defendant respectfully moves this Court to Dismiss the complaint has failing to state a claim for which relief can be granted because plaintiffs’ claims to the contrary, the Open Meetings Act permits closed sessions with legal counsel to discuss pending litigation and only requires “terms of the settlement shall be reported and entered into its minutes within a **reasonable time after the settlement is**

concluded.” W.V. Code §6-9A-4(11). Since the Settlement was not concluded until the Court approved and signed the Order on August 3, 2011, the plaintiffs complaint that the settlement was not fully revealed in July 26th, 2011 fails to state a claim and must be dismissed.

- 2) Pursuant to Rule 19 WVRCP, the defendant respectfully notes the absence of a party in interest, Faraway Farms, LLC. As the plaintiffs seek to set aside a settlement agreement between the defendant and a third party, Faraway Farms, LLC if the plaintiffs succeed it would stop any on-going development of the subject property injuring the third party. Further, the defendant respectfully suggests that the absence of Faraway Farms as a party to this action would “impair or impede the [Faraway Farms, LLC] ability to protect that interest” at trial or on appeal. Wherefore, the defendant respectfully requests that in the event that the Court denies the motion to dismiss and proceeds further in litigation of the instant matter, then the Court Order that Faraway Farms, LLC be made a party to this matter to fully protect its interests.
- 3) The Defendant objects to further proceedings in this matter because the Court lacks personal jurisdiction over the defendant (as set forth in previously filed motion to dismiss). Plaintiffs failed to follow the requirements of WVRCP Rule 4(c)(6)(B) in that they failed to serve any member of the Planning Commission, failed to serve the county clerk and failed to serve the Prosecuting Attorney. Upon information and belief the plaintiffs merely had county commission employees who work for the Department of Planning and Zoning served. The plaintiffs did not serve any commissioner, nor the county clerk nor the prosecuting attorney served. County Commission employees are not members of the planning commission and, in fact, appear in front of the planning commission as witnesses. Since service was not perfected, the defendant respectfully requests that this matter be Dismissed.

WHEREFORE THE DEFANDENT respectfully submits this Answer and associated motions and asks that the Court take such actions are required by the same and as the Court deems just and equitable.

Jefferson County Planning Commission, by

Stephen V. Groh, Assistant Prosecuting Attorney

Certificate of Service.

I certify that on this _____ day of _____, 2011, I caused a copy of the foregoing to be mailed first class mail, postage pre-paid to counsel for the Plaintiffs, Linda Gutsell, Esq. 107 North College St. Martinsburg, WV 25401

Stephen V. Groh, Assistant Prosecuting Attorney

COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA
EX REL. GARY L. CAPRIOTTI,
EDWARD R. MOORE,
EDWARD E. DUNLEAVY, and,
SHEPHERDSTOWN BATTLEFIELD
PRESERVATION ASSOCIATION, INC.,

Petitioners,

v.

DOCKET NO. _____
(Civil Action No. 11-C-125 in the
Circuit Court of Jefferson County)

THE HONORABLE
DAVID H. SANDERS,

Respondent.

PETITION FOR WRIT OF PROHIBITION

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PETITION FOR WRIT OF PROHIBITION

For their Petition for Writ of Prohibition, your Petitioners, Gary L. Capriotti, Edward R. Moore, Edward E. Dunleavy, and the Shepherdstown Battlefield Preservation Association, Inc. (hereinafter, "SBPA"), by and through their counsel, Linda M. Gutsell, state:

I. QUESTIONS PRESENTED FOR REVIEW

A. Did the circuit court exceed its jurisdiction when it entered an Agreed Settlement Order which was unlawful because it was the product of the Defendant Jefferson County Planning Commission's having:

1. "Reopened" a prior decision of the Planning Commission, which decision had been rendered upon evidence presented at a properly-noticed public hearing (App. 199-200);
2. "Reversed" said prior decision by a privately-negotiated settlement with the aggrieved applicant (App. 199-200);
3. Reissued a conditional use zoning permit without an application submitted by owner or hearing being held on same, and which zoning permit was not before the circuit court in the case below (App. 46; 84-85; 176); and,
4. Granted an extension of the time limits attached to the conditional use permit pursuant to the provisions of a zoning ordinance which do not apply to landowner's project, and over which the Planning Commission has no administrative or quasi-judicial jurisdiction (App. 25 at ¶ 29; 84-85; 129)?

B. Did the circuit court exceed its jurisdiction when it entered the Agreed Settlement Order prior to granting the Motion to Intervene filed by parties with demonstrated legal interests in the action? (App. 200; 309-310; 313-327)

II. REQUEST FOR ORAL ARGUMENT

Petitioners request that this case be set for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. Petitioners believe that this case is proper for consideration by Rule 20 oral argument because:

(1) This case presents issues of first impression for this Court as to a planning commission's power, if any, to reopen a prior decision that was rendered upon a public hearing, and to then modify, amend or reverse that prior decision in a privately-negotiated settlement with the applicant aggrieved by the original decision. Petitioners herein have learned that the planning commission decision at the core of the instant case is not the only one to have been altered or reversed by private negotiation, which suggests the adoption of a practice affecting the public at large that will continue unless and until addressed by this Court. Moreover, this case presents an issue of first impression as to the power of a circuit court, if any, to adopt such privately-negotiated reversal of a planning commission's decision as the resolution of the case challenging that original decision.

(2) This case may be said to present an issue of fundamental public importance. Although the instant case is limited to a particular administrative context, the larger issue is the exclusion of the public from a regulatory process which the State Legislature has decreed to be of such interest to citizens that it must be conducted under the light of public scrutiny. If administrative bodies, such as planning commissions, can render a decision upon the public hearing required by the statutes, only to later go behind a closed door to undo that decision, then the legislative directives to protect the public interest are wholly defeated.

Moreover, even if such negotiated compromises by this Planning Commission were accomplished through discussions conducted and decisions made in an open public

meeting, they would not be lawful. The Planning Commission has no legal authority to render its decisions on the basis of negotiation with an applicant, or to reopen decisions previously made, save for one scenario that is not presented in the instant case.

III. PROCEDURAL HISTORY AND STATEMENT OF FACTS

On October 6, 2008, the Jefferson County Planning Commission issued a conditional use permit (hereinafter, "CUP") to Far Away Farms, LLC ("FAF") (App. 23, at ¶ 23), in accordance with this Court's decision in *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W.Va. 252, 664 S.E.2d 137 (2008). The CUP will allow FAF to develop a 152 residential-lot subdivision on a 122.8-acre parcel within an area designated as the Rural District under Jefferson County's zoning ordinance. *Id.* (App. 22 at ¶ 12 and 23 at ¶ 21)) Subsequent to the issuance of the CUP, FAF began the next step toward development: the subdivision plan/plat approval process. Pursuant to the Jefferson County Subdivision Ordinance (1979, as amended) (hereinafter, "the 1979 Subdivision Ordinance") that was applied to FAF's submission, the first step in the subdivision review process was the informal Pre-Application Conference and Community Impact Evaluation with the Planning staff. 1979 Subdivision Ordinance, § 6.1(a)(1)-(4). (App. 267) The 24-month deadline for completion of the process, that is, for the final plat approval hearing, began to run on the date of the Pre-Application Conference with staff. 1979 Subdivision Ordinance, § 6.3. (App. 270) Under this regulatory scheme, FAF's deadline for its final plat approval hearing was December 19, 2010.¹ (App. 49) Failure to meet the deadline would result in the file being closed and the applicant being required to begin the process again as a new project. 1979 Subdivision Ordinance, § 6.3 (App. 270).

¹ Petitioner notes, however, that other sources in the record of the subdivision review proceedings indicate that the initial staff review of FAF's Community Impact Statement took place on December 15, 2008 (App. 212), by which the deadline for final plat approval would have been December 15, 2010.

The Planning Commission approved FAF's Community Impact Statement (hereinafter, "CIS") at its meeting of April 28, 2009. (App. 204-205) Approval was made subject to a number of conditions that FAF was to fulfill before initiating the formal subdivision approval process, which is begun by submission of an application, the required fees, and a preliminary plat. *Id.*; 1979 Subdivision Ordinance, § 6.1(a)(6-8). (App. 267) The conditions were informed by an independent review of the proposed subdivision by URS Corporation, Inc. (App. 210-251) By November of 2010, however, FAF had not completed any of the conditions placed upon its CIS, had not made formal application and submitted a preliminary plat, and had not advanced to a final plat hearing. (App. at 10-11; 17; 28) FAF submitted correspondence, dated November 5, 2010, requesting that the Planning Commission grant an extension of its deadline to March 2, 2015, based upon its assertion that litigation had prevented its pursuit of its development. (App. 51-54)

The Planning Staff determined that the only procedure provided in the 1979 Subdivision Ordinance under which the Planning Commission had authority to entertain FAF's request was the variance procedure provided at § 17.1. (App. 271) FAF was directed to submit a variance request, which it did, but upon its objection that it should not be required to do so. (App. 15; 20; 25²) The Planning Commission scheduled FAF's variance request for hearing at its regularly-scheduled meeting of December 14, 2010. (App. 14-15)

At the Planning Commission hearing, FAF first moved that six of the Commissioners, including five of the seven members then present, recuse themselves from participation in the hearing and decision on FAF's request, and if not, to stay the matter so that FAF could seek relief from another tribunal. (App. 14; 62-65; 70). FAF sought the recusal of

² The transcript of the December 14, 2010, meeting was prepared by a court reporter hired by FAF. It was submitted to the Circuit Court below as an exhibit to FAF's pleading. Reference to the transcript herein does not constitute a representation as to its accuracy.

every Commissioner who had served on the Planning Commission at any time during the pendency of a federal district court case initiated by the Commission to address concerns of constitutional issues arising from this Court's decision in *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W.Va. 252, 664 S.E.2d 137 (2008). (App. 14; 27-28 at ¶¶ 40-42; 64-65) It appears that FAF sought recusal of these members, whether or not the individual Commissioner had been a member or had participated in the decision to pursue the litigation. (App. 28 at ¶ 42; 65; 67-68) The federal court case had ended by the grant of a motion to dismiss. (App. App. 24 at ¶ 27)

After consultation with legal counsel, the Commissioners targeted by FAF declined to recuse themselves, and the Planning Commission denied FAF's motion to stay the hearing. (App. 14, 28 at ¶ 44; 69-70) The hearing proceeded on the merits of FAF's tolling and/or variance request, at the end of which, the Planning Commission denied the request. (App. 14-15; 83-87) In denying the extension sought, the Planning Commission found that FAF had made no progress toward fulfilling the conditions on which the CIS was approved (App. 10; 88), and concluded that FAF had failed to show that the extension would be in the public interest, because it would allow the development to proceed under obsolete 30-year-old subdivision regulations. (App. 10-11; 86)

FAF timely challenged the decision of the Planning Commission, filing its "Verified Petition for Writ of Certiorari or Mandamus, or, in the Alternative, Complaint for Declaratory Judgment and Incorporated Memorandum of Law" (hereinafter, "FAF's Petition") in the Circuit Court of Jefferson County. (App. 20-48) The gravamen of all counts of FAF's Petition was that the Planning Commission erred in refusing its request to extend, as a matter of right, its subdivision process deadline until March 2, 2015, and that the Circuit Court should rule

that the extension of FAF's CIS be granted. *Id.* Although FAF set out in its Petition the entire history of proceedings on its CUP under the Jefferson County Zoning and Development Review Ordinance (1988, as amended through 2002) (hereinafter, "the 2002 Zoning Ordinance") as evidence of its alleged entitlement to an extension of its CIS approved under the 1979 Subdivision Ordinance, there was no legal issue relating to the CUP that was put before the Circuit Court by FAF. *Id.* In fact, FAF noted that its CUP had already once been extended by the Board of Zoning Appeals (hereinafter, "the BZA"), and that it would be readdressed in the future upon submission of a variance request to the BZA. (App. 25, at ¶ 29)

The option for notice to adverse parties chosen by FAF did not require notice to adjacent landowners or publication of a legal advertisement. W.Va. Code § 8A-9-2 (App. 281) Your Petitioners learned of FAF's Petition by word-of-mouth on or about May 2, 2011, and promptly acted to protect their interests by filing with the Circuit Court their Motion to Intervene. (App. 91-115) As required by W.V.R.Civ.P. 24(c), Petitioners attached to their Motion to Intervene the Response of Intervenors that they proposed to file in response to FAF's Petition if the Motion was granted. (App. 116-148) In their proposed Response, Petitioners challenged FAF's Petition on the merits of all asserted points. *Id.* The Circuit Court entered a Rule 22 Scheduling Order on the Motion to Intervene, establishing a briefing schedule and timeline for resolution of the Motion. (App. 4) By that Order, the Motion to Intervene would have been ripe for decision before the end of June, 2011. *Id.*

Petitioners live and/or operate in the immediate vicinity of the parcel that FAF plans to develop. Gary L. Capriotti (hereinafter, "Capriotti") is owner and resident of a 4.17-acre improved parcel of real property situate on Trough Road, confronting/adjacent to the southern

boundary of the FAF parcel. (App. 4; 105³; 314) The Capriotti parcel is situated so as to be directly impacted by the planned FAF development, by which he has legally protectable interests in all aspects of the administration of the planning and zoning regulations as applied to the FAF development plan. Motion to Intervene, at ¶¶ 4-18. (App. 92-95)

Petitioner Edward R. Moore (hereinafter, "Moore") is owner and resident of a 73.42-acre improved parcel of real property adjoining the westerly boundary of the FAF tract to which the CIS in issue pertains; the shared boundary is approximately 1452 feet. (App. 95, 105; 313-314) The Moore parcel is situated so as to be directly impacted by the planned FAF development, particularly as regards the introduction of vast areas of impervious surfaces near his common boundary with FAF, and the resultant run-off of increasing quantities of unabsorbed surface water onto his lower-elevation parcel. He, too, has legally protectable interests in all aspects of the administration of the planning and zoning regulations as applied to the FAF development plan. Motion to Intervene, at ¶¶ 19-28. (App. 95-96)

Petitioner Edward E. Dunleavy (hereinafter, "Dunleavy") is owner and resident of a 8.32-acre improved parcel of real property, situate on Trough Bend Lane, which adjoins Trough Road directly across from the FAF parcel. (App. 97, 105; 314-316) The Dunleavy parcel is situated so as to be directly impacted by the planned FAF development, by which he, like his co-Petitioners, has legally protectable interests in all aspects of the administration of the planning and zoning regulations as applied to the FAF development plan. Motion to Intervene, at ¶¶ 29-39. (App. 97-98)

Petitioner SBPA is a West Virginia non-profit corporation that was incorporated in 2006, as a successor to the former the Shepherdstown Battlefield Preservation Association,

³ Marked parcel boundaries on the aerial photo are intended to provide location of the respective parcels relative to the FAF parcel, but are not drawn to metes and bounds exactitude.

LLC. (App. 99) SBPA operates exclusively as an educational and scientific organization with the goal of preserving and developing a Civil War battlefield park on the site of the 1862 Battle of Shepherdstown, and educating the public about the Battle of Shepherdstown. *Id.* SBPA has endeavored since 2004 to purchase and/or otherwise preserve, to the extent possible, the remaining 282 acres of land on which the Battle of Shepherdstown was fought. *Id.* To date, the efforts of SBPA have resulted in the preservation of 84 of those acres in conservation easements, including the conservation easement located on the Edward R. Moore property and other properties surrounding the core of the battlefield, said core being the tract now owned by FAF. *Id.*; App. 113-115; 316-324. SBPA's past and future investment in properties surrounding the FAF parcel will be directly impacted by the development planned by FAF, by which it also claims legally protectable interests in all aspects of the administration of the planning and zoning regulations as applied to the FAF development plan. Motion to Intervene, at ¶¶ 40-53. (App. 99-101)

FAF opposed the Motion to Intervene. (App. 149-174; *see, also*, App. 291; 333:21-334:17) After again reciting in protracted, irrelevant detail, the entire litany of the earlier zoning proceedings on its CUP, FAF asserted the primary source of its objection to Petitioners' Motion. That is, the argument that Petitioners lacked standing to intervene in the civil action below, because FAF's request for extension of deadlines was purely procedural. (App. 166-167). FAF also argued that by virtue of the participation of Petitioners – as well as other unrelated individuals – in the earlier CUP hearings conducted under the 2002 Zoning Ordinance, Petitioners were barred by *res judicata* from asserting their interests in the action below, even though the action below arose under the 1979 Subdivision Ordinance – not the Zoning Ordinance

– and was a wholly different type of permit approval process (i.e., a CIS, not a CUP). (App. 170-172; 311:1-312:14)

On June 17, 2011, Petitioners filed their Reply to Far Away Farm’s Opposition to Motion to Intervene, addressing each of FAF’s arguments. (App. 175-183) As to the only material question presented by their Motion – that is, whether or not they had protectable legal interests in the proceedings at hand – Petitioners relied upon this Court’s decisions in *Rissler v. Jefferson County Board of Zoning Appeals*, 225 W.Va. 346, 693 S.E.2d 321, 325-327 (2010), *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93 (2003), and others. (App. 176-178) Petitioners also argued that W.Va. Code § 8A-9-2 (App. 281) implicitly defined them as “interested parties.” (App. 176)

The Court convened a status conference hearing in the case on June 28, 2011 (App. 5-9; 285-354), which hearings are typically used to set briefing schedules when *certiorari* has issued in land use appeals. Noting that the Motion to Intervene had yet to be granted, the Court permitted counsel for Petitioners to participate, and, at FAF’s initiation, the Court entertained argument on the Motion to Intervene. (App. 5-8; 291:16-292:7; 295:18-296:18; 304:23-305:2) It was at the hearing that Petitioners learned that a major reason for the Planning Commission’s opposition to the Motion to Intervene was interference in what they, as well as FAF, referred to as a “discretionary duty” of the Planning Commission. (App. 6; 297:14-298:2; 305:15-24) It was only after the hearing that Petitioners learned that by “discretionary duty,” the Planning Commission and FAF were obliquely referring to their intent to negotiate a resolution to FAF’s appeal.

Having been granted an extended time to file its response to the Motion to Intervene, the Planning Commission served “Defendant’s Response to Motion to Intervene” on

July 12, 2011. (App. 189-194) The Planning Commission's arguments closely followed those of FAF as to standing, *Id.*, but also intimated the claimed right to negotiate planning decisions. (App. 190, at fn. 2) The Planning Commission asserted that to allow intervention by parties such as Petitioners would set a precedent of allowing persons to interfere in Planning Commission decisions and pursuit of its discretionary duty, *Id.*, and that neighboring landowners had to sustain actual injury before having a protectable legal interest in a land use case. (App. 191-193) The Planning Commission went so far as to suggest that if the build-out of FAF's subdivision actually did damage Petitioners, they could then file a nuisance action. (App. 193, at fn. 5)

Petitioners served their Reply to Defendant's Response to Motion to Intervene on July 14, 2011. (App. 195-202) Petitioners addressed each of the Planning Commission's arguments, including a recitation of this Court's 60+ years of decisions demonstrating that the legal interests of neighboring landowners has always been recognized in the land-use jurisprudence of this State by permitting such parties to intervene in zoning and planning cases. (App. 196-197) As to the apparent intention to resolve FAF's appeal by negotiation, Petitioners specifically countered that the negotiated compromise of a decision of the Planning Commission would be unlawful, and that the Commission had no legal authority to do it. (App. 199-200)

Upon the filing of Petitioners' Reply to Defendant's Response to Motion to Intervene, the Motion became ripe for decision. No ruling on the Motion to Intervene was ever made, however. Instead, on August 8, 2011, Petitioners received a copy from the Circuit Clerk of the Agreed Settlement Order that had been entered by the Circuit Court on August 3, 2011. (App. 1-3) Petitioners had been given no notice that the proposed Order had been submitted to the Court. In fact, Petitioners had no notice of any kind that a specific, proposed settlement had been presented to the Planning Commission, or that the Commission was scheduled to decide

upon a specific settlement proposal. All that Petitioners had was the intimation of the Planning Commission that it had the power to resolve appealed decisions by negotiation, which appears in its response to the Motion to Intervene. (App. 190, at n. 2)

Petitioners undertook to discover how and when the settlement with FAF was proposed, presented, considered and approved by the Planning Commission – an arduous process that required first securing and then reviewing the hundreds of pages of materials presented to the Planning Commission for each of its meetings in the preceding two months, as well as the published agendas and meeting minutes. This review revealed that no proposed settlement was ever included within any packet of materials provided for Commissioners to review for any agenda item of any meeting, that consideration of a settlement was never revealed on any meeting agenda, and that no decision approving the settlement was ever reported in the minutes of any of the meetings reviewed.

By process of elimination, and from circumstantial evidence – including the timing of the entry of the Agreed Settlement Order – Petitioners ultimately determined that the Planning Commission both considered and approved the proposed settlement with FAF in an executive session during its meeting of July 26, 2011. The issue, however, does not appear on the agenda of that meeting (App. 257-258) nor is the decision reported on the minutes of that meeting. (App. 259-263) In fact, FAF is not even mentioned. The only mention of the Planning Commission's action is the oblique entry in the minutes that, following an executive session with legal counsel:

Mr. Burns moved to proceed with the order as presented by Counsel in executive session and to authorize Mr. Hayes as President to sign the order. Ms. Ethers seconded the motion which carried unanimously.

Id. at 263. The minutes also revealed that among those Commissioners who participated in the decision to approve the settlement were the three remaining members of the six who, in December 2010, were asserted by FAF to be disqualified from participating in its request for an extension. *Id.* at 259.

In addition to reversing the decision denying FAF's request for an extension of its CIS, the Agreed Settlement Order included provisions addressing FAF's conditional use permit (App. 2), even though there had been no application relating to the CUP filed for consideration by the Planning Commission, and the CUP was not in issue before the Circuit Court below.

(App. 46) The Agreed Settlement Order provided:

1. The Planning Commission will re-issue the conditional use permit to Far Away Farm, and all conditions to the existing conditional use permit will attach to the re-issued conditional use permit;

* * * * *

3. Further, the Planning Commission agrees that the conditional use permit shall be valid for eighteen (18) months in addition to the eighteen (18) month extension permitted under the Jefferson County Zoning Ordinance, for a total of three (3) years;

* * * * *

5. All time lines with respect to the new subdivision regulations and the re-issuance of the conditional use permit will be reset and begin as of the date the Court signs the entry of the Agreed Settlement Order in this Civil Action No. 11-C-125;

Id.

FAF's CUP previously had been extended for a period of eighteen months – by the Jefferson County Board of Zoning Appeals (“the BZA”), the body to which FAF made its request – and further extension of the CUP was made subject to the filing of a variance request with that body. (App. 25 at ¶ 29; 254)

Based upon the information uncovered in their investigation of the Planning Commission's settlement agreement below, Petitioners took such action at law as was available to them as non-parties to case below: on September 16, 2011, they filed a Petition for violation of the Open Governmental Proceedings Act, W.Va. Code § 6-9A-1, *et seq.*, seeking the relief available under that Act.

The Petitioners now ask this Court to prohibit the enforcement of the Circuit Court's Order of August 3, 2011, and, in the event that this matter should be returned to the Circuit Court for further proceedings, to prohibit those proceedings from commencing unless and until Petitioners herein are made parties pursuant to their Motion to Intervene.

IV. STANDARD OF REVIEW

In Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), this Court articulated the standard of review applicable to the instant case:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

See, also, Syll.Pt. 1, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010).

V. ARGUMENT

The standards by which this Court will determine whether or not to issue a writ of prohibition, set out immediately above, favor the granting of the writ(s) sought by your Petitioners.

1. Petitioners are without other adequate means to secure relief

The Circuit Court entered the Agreed Settlement Order (App. 1-3) and dismissed the action from the docket below before ruling on the merits of Petitioners' Motion to Intervene. There is no order denying Petitioners' Motion to Intervene on the merits from which Petitioners might have appealed; at most, the Motion is deemed denied as moot. The case was dismissed with Petitioners still non-parties to the case below. Petitioners have found no case in which the right of appeal to this Court has been extended under these precise circumstances.

2. Damage and prejudice to Petitioners will not be corrected on appeal

The parties to the case below, FAF and the Planning Commission, consensually ended the case through presentation of the Agreed Settlement Order. Neither party will be appealing the adoption of the Order that they jointly presented to the Circuit Court. Accordingly, there will be no appeal in which the damage and prejudice to Petitioners might be corrected.

3. The lower court's order is clearly erroneous as a matter of law

a. The CIS and the CUP. Petitioners, not only because of their status as immediate neighbors of the FAF parcel, but owing to their status of citizens of Jefferson County, have been denied the rights guaranteed to them by the provisions of the zoning and planning enabling statutes found in Chapter 8A of the W.Va. Code. That is, that all decisions of the Planning Commission arising under the Subdivision Ordinance will be rendered upon the evidence adduced in public hearings, which Petitioners and others have the right to observe

and/or participate in as they deem necessary to protect their own interests. *See, e.g.,* W.Va. Code § 8A-5-8 (App. 280); *see also, Kaufman v. Planning and Zoning Comm'n of the City of Fairmont*, 171 W.Va. 174, 298 S.E.2d 148 (1982). Moreover, the Planning Commission is subject to the Open Governmental Proceedings Act, W.Va. Code § 6-9A-1, *et seq.* (App. 275-279). The Planning Commission's emerging practice of privately negotiating the modification or reversal of its prior orders will continue to damage and prejudice the legally-cognizable interests of Petitioners, and others in the community, so long as it is allowed to continue.

As noted previously, Petitioners have initiated an action alleging violation of the Open Governmental Proceedings Act, which action may correct the procedural wrong below, that is, the secretive manner in which the Planning Commission decided to reverse its prior decision denying FAF's request for an extension of its CIS. That action does not, however, reach or prevent in the future all of the substantive legal wrongs encompassed within the Agreed Settlement Order, which also are at issue in the instant Petition.

Even if the Planning Commission had conducted its deliberation and voted on the proposed settlement with FAF in an open, public meeting, it still would have been acting outside the scope of its legal powers and authority. First, there is no provision in either the enabling statutes or the 1979 Subdivision Ordinance that allows the Planning Commission to reopen a prior decision such as the one at issue here. State law provides only one instance where a Planning Commission can reconsider a prior decision: where it has denied final plat approval of a major subdivision or land use plan, and the applicant has made a request for reconsideration within ten days of the decision. W.Va. Code § 8A-5-8(i). (App. 280) *Inclusio unius est exclusio alterius*. Second, there is no provision in either the enabling statutes or the 1979 Subdivision

Ordinance that allows the Planning Commission to render a decision on any application or request submitted under the provisions of the Ordinance through negotiation with the applicant.

The unlawful reopening of the prior decision and the reversal of that decision by negotiation was clear upon the face of the Agreed Settlement Order presented to the Court below. Moreover, the illegality of such potential action was specifically argued to the Court by Petitioners before the settlement was approved by the parties and the Order presented for entry. (App. 199-200) Even if these defects were the only ones in the Agreed Settlement Order, the Circuit Court's entry of the Order would be clearly erroneous as a matter of law. But, there is more.

As noted previously, the Agreed Settlement Order also set out negotiated decisions regarding FAF's CUP – an existing, in-force permit that had not been before the Planning Commission, and was not before the Circuit Court in the case below. (App. 25 at ¶ 29; 46; 50; 254) Because the CUP was not put in issue in the case below, there was no occasion to suspect that the Planning Commission and FAF would negotiate issuance of a new CUP with built-in time extensions, let alone an opportunity to assert arguments in opposition to such conduct. The substantive legal wrongs, however, are significant.

To understand the full scope of the wrongs committed in relation to FAF's CUP, it is necessary to first revisit this Court's decision in *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W.Va. 252, 664 S.E.2d 137 (2008) At oral argument in that case, FAF raised the argument (1) that its CUP was subject, both substantively and procedurally, to the version of the Ordinance in effect when it applied for the CUP (i.e., 2002 Zoning Ordinance), not the Ordinance as amended in 2005 (hereinafter, "the 2005 Zoning Ordinance"); and, (2) that the Planning Commission, not the BZA, had jurisdiction over the CUP under the 2002 Zoning

Ordinance. 664 S.E.2d at 141-143. This Court agreed, holding that the 2002 Zoning Ordinance applied to FAF's CUP, and that the Planning Commission had jurisdiction over the CUP. 664 S.E.2d S.E.2d at 143-144. The Court's ruling, *Id.*, is the law of the case of FAF's CUP, and all of the parties are bound by it. *See, e.g., State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W.Va. 802, 591 S.E.2d 728, 734 (2003), *quoting*, Syl. Pt. 1, *Mullins v. Green*, 145 W.Va. 469, 115 S.E.2d 320 (1960) ("... when a question has been definitely determined by this Court its decision is conclusive on parties, privies and courts, including this Court, upon a second appeal and it is regarded as the law of the case.").

The CUP that the Planning Commission issued to FAF on October 6, 2008, was due to expire on April 6, 2010 (App. 50; 254), and because FAF had yet to begin construction, it desired an extension of the CUP. However, when FAF applied for that extension, it did not apply under the 2002 Zoning Ordinance and submit to the jurisdiction of the Planning Commission as per its argument and this Court's ruling in *Far Away Farm, LLC*, 222 W.Va. 252, 664 S.E.2d 137. It applied to the BZA, and sought its extension pursuant to the 2005 Zoning Ordinance. (App. 254)⁴

Why, after so forcefully – and successfully – arguing to this Court that the 2002 Zoning Ordinance applied to its CUP and that it was under the jurisdiction of the Planning Commission, would FAF seek an extension of its CUP from the BZA? It would seem to be because the 2005 Zoning Ordinance includes a provision that allows for an 18-month extension of a zoning certificate *or* of a CUP, while the 2002 Zoning Ordinance only authorized extensions

⁴ The BZA's quotation and cite to the Ordinance reveals that the application for extension of the CUP proceeded under the 2005, instead of the 2002, Zoning Ordinance. The BZA cited Sec. 3.2(g), which is the extension provision of the 2005 Zoning Ordinance (App. 273), while the extension provision of the 2002 Ordinance appears in Sec. 3.2(e) and does not include CUPs. (App. 271)

to be granted for zoning certificates.⁵ *Compare*, § 3.2(e) of the 2002 Zoning Ordinance (App. 271) to § 3.2(g) of the 2005 Zoning Ordinance (App. 273). So, in order to take advantage of the more favorable provisions of the 2005 Zoning Ordinance, FAF ignored this Court's ruling, and submitted itself to the jurisdiction of the BZA and the provisions of the 2005 Ordinance, from which it secured an extension of its CUP. (App. 254)

FAF may argue that, even though there was no authority for it in the 2002 Zoning Ordinance, the Planning Commission routinely granted extensions on CUPs. But, this would beg the question: on what authority would the Planning Commission have done so? And, if that were true, then why did FAF seek its CUP extension from the BZA if extensions were routinely granted by the Planning Commission under the 2002 Zoning Ordinance? Clearly, it simply does not add up.

Consequently, when FAF filed its appeal of the CIS extension denial below, it was the holder of an extant CUP on an 18-month extension that had been granted by the BZA pursuant to the 2005 Zoning Ordinance. This evidently was not perceived as an impediment, however, when the Planning Commission and FAF undertook to negotiate the resolution of the appeal below. The Planning Commission and FAF not only negotiated reversal of the CIS extension denial at issue in the Circuit Court, but also negotiated a "reissuance" of the CUP with the usual initial term of eighteen (18) months, *and then* awarded it an additional, front-loaded eighteen (18) month extension "under the Jefferson County Zoning Ordinance." (App. 2) Problematically, as explained above, the 2002 Zoning Ordinance that applies to FAF's CUP does not include a provision for granting an eighteen (18) month extension to a CUP as does the 2005 Zoning Ordinance. And, as was fully established in this Court's decision in *Far Away Farm*,

⁵ It also allowed the request for extension to escape the notice of the interested neighbors, who, pursuant to this Court's ruling, watched the agendas published by the Planning Commission for any subsequent zoning requests relating to FAF.

LLC, 222 W.Va. 252, 664 S.E.2d 137, under the 2002 Zoning Ordinance, the Planning Commission had jurisdiction over CUPs, but under the 2005 Zoning Ordinance, it is the BZA that has jurisdiction over CUPs. So, by what authority did the Planning Commission negotiate an extension to the “reissued” CUP, when such extension is available only under the 2005 Zoning Ordinance over which the Planning Commission has no jurisdiction? The simple answer is that it had no authority whatsoever.

Moreover, and perhaps more importantly, there is no provision in either the 2002 or the 2005 version of the Zoning Ordinance that allows a CUP to be “reissued.” An applicant whose CUP had expired without the commencement of the development would have to begin anew with a new application. Any such new application would be subject to the zoning ordinance then in force, and would require the usual public notices and hearings in which interested members of the public, such as Petitioners, could participate as speakers or observers. Accordingly, the purported “reissuance” of FAF’s CUP, in addition to its other obvious defects, also violates the Open Governmental Proceedings Act, W.Va. Code § 6-9A-1 *et seq.* (App. 275-279) The purported “reissuance” of FAF’s CUP, being unlawfully awarded, should be recognized as a legal nullity, and be declared void.

b. The right of the Petitioners to intervene below. The Legislature has determined that the “interested parties” in an appeal of an administrative land use decision include all adjacent landowners, as well as others. W.Va. Code § 8A-9-2(f). In *Rissler v. Jefferson County Board of Zoning Appeals*, 225 W.Va. 346, 693 S.E.2d 321, 325-327 (2010),⁶ this Court affirmed the continuing vitality of the holding of *Corliss v. Jefferson County Bd. of*

⁶ In *Rissler*, the neighboring land owners initiated the appeal of the zoning decision that was adverse to their interests. The challenge to their standing was the premise of an argument in opposition to the neighbors’ contention that they were entitled to due process in the hearing before the zoning board.

Zoning Appeals, 214 W.Va. 535, 591 S.E.2d 93 (2003), a case in which the parties appealing the zoning decision were residents in the immediate vicinity of, but not necessarily adjacent to, the subject parcel. The *Corliss* Court explained that a person has standing in a land-use decision

...where the individual demonstrates that, as a result of the challenged ruling, he/she will uniquely suffer injury separate and apart from that which the general citizenry might experience as a result of the same ruling.

Id. at Syl. Pt. 6. The *Corliss* rule of standing was incorporated into the definition of “aggrieved” when the Legislature enacted the new enabling act in 2004. W.Va. Code § 8A-1-2(b)(2) (App. 282) Additionally, in *Corliss*, three landowners were permitted to proceed as parties petitioner in the case under the doctrine of “dependent standing,” in which multiple parties may challenge a zoning decision so long as at least one of them has standing. *Id.* at n. 32.

The *Rissler* Court further explained the circumstances that constituted “injury separate and apart from” the general citizenry so as to confer standing on the challenger-neighbors:

... Thornhill proposes to build approximately 600 houses on roughly 500 acres of land. *It goes without saying that such an increase in population density significantly affects the property interests of the petitioners* insofar as they now own property in a low-density, rural district, but, should Thornhill's CUP application be approved, they will essentially own property in a high-density district due to the influx of 600 additional families in Thornhill's new subdivision. Because the property they own is adjacent to this rather substantial proposed new subdivision, the petitioners certainly “will uniquely suffer injury separate and apart from that which the general citizenry might experience as a result of the same ruling.” Syl. pt. 6, in part, *Corliss*, 214 W.Va. 535, 591 S.E.2d 93. Therefore, we find that the petitioners have standing....

Emphasis added. 693 S.E.2d at 327.

Although the neighbors in *Corliss* and *Rissler* appealed decisions that that they deemed injurious to their interests, nothing in W.V.R.Civ.P. 24 suggests that immediate

neighbors could not intervene in the appeal of an aggrieved applicant, so as to advocate for the preservation of a decision favorable to their interests. To read W.V.R.Civ.P. 24(a) so narrowly would be to wrongly interpret it only to allow parties to intervene on the side of plaintiffs/petitioners. Petitioners herein have found no reported case in which this Court has found immediate neighbors to lack protectable interests in a zoning or planning matter, whether those neighbors appealed as aggrieved parties or intervened in order to resist the reversal of a favorable decision. For over sixty (60) years, this Court has consistently recognized the interests of neighbors to intervene to preserve a favorable zoning or planning decision against the challenge of an applicant landowner:

In *Carter v. City of Bluefield*, 132 W.Va. 881, 54 S.E.2d 747 (1949), petitioners were denied a zoning permit, then sought mandamus to require the city to issue the permit that would allow them to build a commercial building in an area zoned residential; forty-two landowners in the general area were allowed to intervene in opposition to petitioners. Like the petitioners in *Carter, Id.*, the petitioners in *State ex rel. Baer v. City of Beckley*, 133 W.Va. 459, 57 S.E.2d 263 (1949), after being denied by the city planning commission, brought a writ of mandamus to compel the city to issue a special use permit⁷ so as to enable them to construct a business building in an area zoned residential; the other persons residing in the immediate vicinity of the subject property were allowed to intervene in opposition to the petitioners. In *Vector v. BZA of City of Martinsburg*, 155 W.Va. 362, 184 S.E.2d 301 (1971), petitioner sought mandamus to require the city's BZA to issue a special exception to allow the erection of an eight-story apartment building; "owners of property in the zoned area involved" had not been made parties in the circuit court, but were allowed to intervene in the Supreme Court appeal, *Id.* at 363, 184 S.E.2d at 302. In *Kaufman v. Planning and Zoning Comm'n of the City of Fairmont*,

⁷ "Special use permit" is but another name for a conditional use permit.

171 W.Va. 174, 298 S.E.2d 148 (1982), petitioner sought a writ of *certiorari* after twice being denied preliminary plat approval; area residents who opposed the proposed project were allowed to intervene. In *Stop and Shop, Inc. v. BZA of Westover*, 184 W.Va. 168, 399 S.E.2d 879 (1990), the landowner filed a petition for writ of certiorari after being denied the permit necessary to build a parking lot on the parcel adjoining its existing store; several residents in the area were allowed to intervene in opposition to the appeal. In *Jefferson Orchards, Inc. v. Jefferson County BZA*, 225 W.Va. 416, 693 S.E.2d 781 (2010), the petitioner appealed the denial of a conditional use permit for the requested lot density; a number of area residents were allowed to intervene in support of the denial. In each of the instructive cases cited, the nearby landowners were allowed to intervene so as to preserve a denial by the administrative zoning or planning body.

The universal recognition that nearby landowners and residents have protectable interests in zoning and planning matters is a reflection of the nature of land use laws. Zoning and planning laws and regulations are not remedial in nature, they are preventative. *See, e.g. Stop and Shop, Inc. v. BZA of Westover*, 184 W.Va. 168, 170, 399 S.E.2d 879, 881 (1990) (“The encroachment of a commercial use into a residential neighborhood is one of the occurrences that zoning laws are enacted to prevent.”); *Singer v. Davenport*, 164 W.Va. 665, 264 S.E.2d 637 (1980) (“... subdivision regulations govern the planning of new streets, standards for plotting new neighborhoods, and the protection of the community from financial loss due to poor development.”). *See, also*, W.Va. Code § 8A-1-2(b)(2). (App. 282) The goal of zoning and planning is to prevent bad outcomes in the first place, not to afford recourse after the fact.

It is not, therefore, that Petitioners wished to intervene below on the side of Respondents that would, as suggested by the Planning Commission and FAF, prohibit them from

intervening in the case. W.V.R.Civ.P. 24(a) only requires that, upon showing interest, the potential intervenor also show that (s)he is

... is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Id. The outcome of the case below certainly demonstrates that the Circuit Court's failure to allow Petitioners to intervene impaired their ability to protect their own interests, and that the interests of Petitioners were not adequately represented by the existing parties.

Nor should it ever be assumed that a BZA or planning commission will adequately protect the interests of neighbors in a zoning or planning appeal. As this Court has observed, and Petitioners argued below (App. 200; 327:7-18), the interests of the Planning Commission are general, broad and systemic, while the interests of neighbors are personal and specific. *See, State ex rel. Ball v. Cummings*, 208 W.Va. 393, 540 S.E.2d 917, 928-929 (1999).

Ultimately, this Court's recognition of the interests of neighbors in planning and zoning decisions, and their right to intervene to protect those interests, is so firmly entrenched in this State's jurisprudence that parties such as Petitioners should never have to confront the hostility to proposed intervention that they encountered below. The Circuit Court's entry of the Agreed Settlement Order, without first affording Petitioners the opportunity to protect their interests through intervention, was clearly erroneous as a matter of law.

4. There is no evidence of oft-repeated error or persistent disregard of law

Petitioners have no evidence from which they could argue to this Court that the errors of the Circuit Court are oft-repeated, or suggest a persistent disregard for procedural or substantive law. As noted previously, however, Petitioners have been advised that FAF's CIS is

not the only permit that has been modified or reversed by negotiated agreement, which does suggest an emerging pattern of improper decision-making by the Planning Commission.

5. The order below raises legal issues of first impression

As noted earlier in this Petition, issues of first impression are presented as to a planning commission's power, if any, to reopen a prior decision that was rendered upon a public hearing, and to then modify, amend or reverse that prior decision in a privately-negotiated settlement with the applicant aggrieved by the original decision. *Supra*, at p. 2. This Petition also presents a question of first impression as to a circuit court's ability to adopt in resolution of the appeal of a zoning or planning decision, a settlement negotiated between the body and applicant which modifies, amends or reverses the decision from which appeal is taken.

VI. CONCLUSION AND REQUEST FOR RELIEF

Petitioners bring this Petition for Writ of Prohibition to prevent the execution of an Order entered in furtherance of a clear legal wrong. A planning commission has no power to reopen its duly-rendered decisions, and to privately negotiate a different result with an aggrieved applicant. The filing by the aggrieved applicant of a petition for review by *certiorari* or a complaint for declaratory judgment in circuit court cannot and does not enlarge the powers of a planning commission. The Jefferson County Planning Commission had no more power to negotiate the outcome of FAF's request for extension of its CIS on July 26, 2011, than it did on December 13, 2010. This clear legal error was plain upon the face of the Agreed Settlement Order submitted to the Circuit Court below, and the entered Order should not be given effect.

FAF's CUP was not in issue in the case below. Nonetheless, by entering the Agreed Settlement Order, the Circuit Court also accepted the negotiated deal between the Planning Commission and FAF to "reissue" and extend FAF's CUP. This bargain allows FAF's

CUP to avoid the established procedures to which it must submit for original issuance or subsequent change. The Planning Commission has no power to “reissue” a CUP. Nor does the Planning Commission have power to endow such “reissued” CUP with extensions available only under the provisions of the 2005 Zoning Ordinance – an ordinance under which the Planning Commission has no jurisdiction over CUPs. The Agreed Settlement Order entered by the Circuit Court below gives legitimacy to these legal wrongs, and should not be given effect.

Nothing in this Petition addresses, or opens the door to address, the merits of FAF’s request for an extension of its CIS timelines. Whether or not the Planning Commission erred in denying that request was the issue before the Circuit Court, and that is where it should be decided, as prescribed by law. Within that process, Petitioners herein, if properly permitted to intervene, can assert their contentions against the merits of FAF’s CIS extension request.

Petitioners have amply demonstrated their real and legitimate interests in the matter below. They should have been permitted to intervene to protect those interests in a timely manner, prior to the entry of any final order in the case. Clearly, it is now beyond doubt that the Planning Commission will not protect the interests of Petitioners, or the other similarly-situated persons in the immediate vicinity of the FAF parcel. Only through the grant of intervention will the interests of the Petitioners receive their due consideration in the matter.

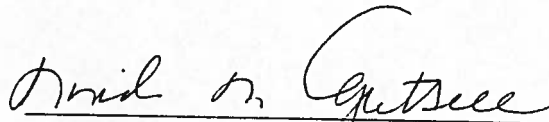
WHEREFORE, your Petitioners respectfully ask this Honorable Court to:

1. Issue a writ prohibiting enforcement of the Agreed Settlement Order entered on August 3, 2011 by the Circuit Court of Jefferson County in the action below;
2. Issue a writ prohibiting the Circuit Court of Jefferson County from resuming proceedings in the matter below unless and until the Motion to Intervene filed by your Petitioners is granted; and,

3. Award to Petitioners any and all such other relief to which they may be entitled under the laws of the State of West Virginia and the rules of this Court.

Respectfully submitted this 26th day of October, 2011.

GARY L. CAPRIOTTI, et al.,
Petitioners,
By counsel.



Linda M. Gutsell (WVSB No. 5774)
Attorney at Law
107 North College Street
Martinsburg, WV 25401
(304) 262-0223
gutsell_law@frontier.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA
EX REL. GARY L. CAPRIOTTI,
EDWARD R. MOORE,
EDWARD E. DUNLEAVY, and,
SHEPHERDSTOWN BATTLEFIELD
PRESERVATION ASSOCIATION, INC.,**

Petitioners,

v.

**DOCKET NO. _____
(Civil Action No. 11-C-125 in the
Circuit Court of Jefferson County)**

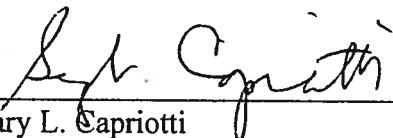
**THE HONORABLE
DAVID H. SANDERS,**

Respondent.

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF JEFFERSON, to wit:

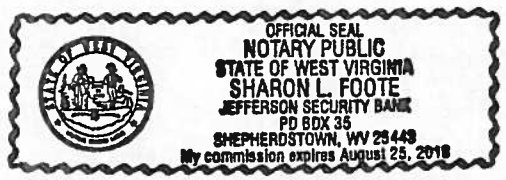
I, Gary L. Capriotti, a Petitioner in the above-captioned action, being duly sworn, hereby state that I have examined the foregoing Petition for Writ of Prohibition and that, to the best of my knowledge, the allegations contained therein are true, except so far as they are stated to be on information or belief, and so far as they are therein stated to be on information or belief, I believe them to be true.



Gary L. Capriotti

Taken, subscribed and sworn to before me this 1st day of October, 2011.

My commission expires: August 25, 2018.



Sharon L. Foote
Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA
EX REL. GARY L. CAPRIOTTI,
EDWARD R. MOORE,
EDWARD E. DUNLEAVY, and,
SHEPHERDSTOWN BATTLEFIELD
PRESERVATION ASSOCIATION, INC.,

Petitioners,

v.

DOCKET NO. _____
(Civil Action No. 11-C-125 in the
Circuit Court of Jefferson County)

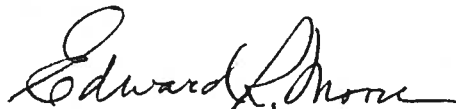
THE HONORABLE
DAVID H. SANDERS,

Respondent.

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF JEFFERSON, to wit:

I, Edward R. Moore, a Petitioner in the above-captioned action, being duly sworn, hereby state that I have examined the foregoing Petition for Writ of Prohibition and that, to the best of my knowledge, the allegations contained therein are true, except so far as they are stated to be on information or belief, and so far as they are therein stated to be on information or belief, I believe them to be true.

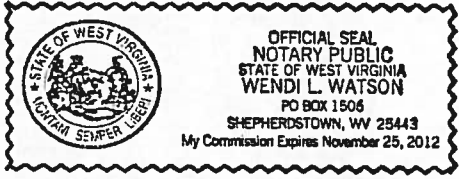


Edward R. Moore

Taken, subscribed and sworn to before me this 1ST day of

October, 2011.

My commission expires: November 25, 2011.



Wendi L. Watson
Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA
EX REL. GARY L. CAPRIOTTI,
EDWARD R. MOORE,
EDWARD E. DUNLEAVY, and,
SHEPHERDSTOWN BATTLEFIELD
PRESERVATION ASSOCIATION, INC.,**

Petitioners,

v.

**DOCKET NO. _____
(Civil Action No. 11-C-125 in the
Circuit Court of Jefferson County)**

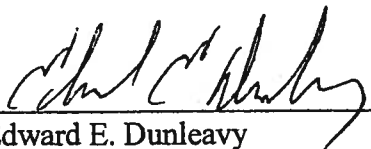
**THE HONORABLE
DAVID H. SANDERS,**

Respondent.

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF JEFFERSON, to wit:

I, Edward E. Dunleavy, a Petitioner in the above-captioned civil action, being duly sworn, hereby state that I have examined the foregoing Petition for Writ of Prohibition and that, to the best of my knowledge, the allegations contained therein are true, except so far as they are stated to be on information or belief, and so far as they are therein stated to be on information or belief, I believe them to be true.



Edward E. Dunleavy

Taken, subscribed and sworn to before me this 3 day of

October, 2011.

My commission expires: April 9, 2017.



Dara D. Shank
Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA
EX REL. GARY L. CAPRIOTTI,
EDWARD R. MOORE,
EDWARD E. DUNLEAVY, and,
SHEPHERDSTOWN BATTLEFIELD
PRESERVATION ASSOCIATION, INC.,

Petitioners,

v.

DOCKET NO. _____
(Civil Action No. 11-C-125 in the
Circuit Court of Jefferson County)

THE HONORABLE
DAVID H. SANDERS,

Respondent.

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF JEFFERSON, to wit:

I, Edward E. Dunleavy, President of

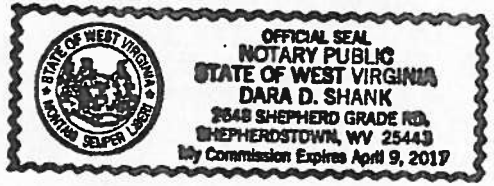
Shepherdstown Battlefield Preservation Association, Inc., a Petitioner in the above-captioned action, being duly sworn, hereby state that I have examined the foregoing Petition for Writ of Prohibition and that, to the best of my knowledge, the allegations contained therein are true, except so far as they are stated to be on information or belief, and so far as they are therein stated to be on information or belief, I believe them to be true.

By: 

Its:

Taken, subscribed and sworn to before me this 3 day of
October, 2011.

My commission expires: April 9, 2017.



Dara D. Shank
Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA
EX REL. GARY L. CAPRIOTTI,
EDWARD R. MOORE,
EDWARD E. DUNLEAVY, and,
SHEPHERDSTOWN BATTLEFIELD
PRESERVATION ASSOCIATION, INC.,**

Petitioners,

v.

**DOCKET NO. _____
(Civil Action No. 11-C-125 in the
Circuit Court of Jefferson County)**

**THE HONORABLE
DAVID H. SANDERS,**

Respondent.

CERTIFICATE OF SERVICE

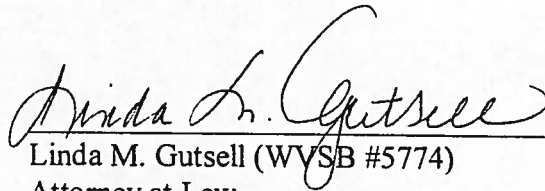
I, Linda M. Gutsell, counsel for the Petitioners, Gary L. Capriotti, *et al.*, do hereby certify that I have served the foregoing PETITION FOR WRIT OF PROHIBITION and the APPENDIX filed therewith upon Respondent judicial officer, by mailing a true and accurate copy thereof by U.S. Mail, first-class postage prepaid, to Respondent at the address shown below, this 26th day of October, 2011:

The Hon. David H. Sanders
Circuit Court of Jefferson County
100 East Washington Street
Charles Town, WV 25414

Additionally, I hereby certify that I have served the foregoing PETITION FOR WRIT OF PROHIBITION and the APPENDIX filed therewith upon the parties to the civil action below, by mailing a true and accurate copy thereof by U.S. Mail, first-class postage prepaid, to the counsel of record for the parties at the addresses shown below, this 26th day of October, 2011:

Stephen V. Groh, Esq.
Office of the Prosecuting Attorney
P.O. Box 729
Charles Town, WV 25414

Richard G. Gay, Esq.
Nathan P. Cochran, Esq.
Law Offices of Richard G. Gay, L.C.
31 Congress Street
Berkeley Springs, WV 25411

A handwritten signature in cursive script, reading "Linda M. Gutsell", is written over a horizontal line.

Linda M. Gutsell (WVSB #5774)
Attorney at Law
107 N. College St.
Martinsburg, WV 25401

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
zoning@jeffersoncountywv.org

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

Director's Report
November 8, 2011
Planning Commission Meeting

- 1) Activity Report (attached)
- 2) US 340 Corridor - East Gateway Plan
 - a) Reminder – MetroQuest Phase II website active until November 14, 2011 – please participate!
 - b) October 18, 2011 staff attended a meeting hosted by the Eastern Panhandle Trailblazers and the National Park Service to receive public input into potential hike/bike connections that may relate to the US 340 Corridor
 - c) Next Public Workshop – Tuesday, December 6, 2011, 7 -9 pm, KOA Campground Meeting Room, to discuss a preferred land use alternative and related recommendations

3) Recent Public Workshops

On October 21, 2011, staff held a Roundtable Discussion on Recreational Land Use opportunities in the County. It was well attended and staff has received many written comments since that time. Staff will give an update and recommended next steps to the Planning Commission at the regular December meeting.

4) Recent CC agenda items:

- a) The following items were on the November 3, 2011 County Commission agenda for "action":
 - i. Discussion of October 6, 2011 Comments Received, and Possible Action on a Proposed Amendment to Article 4A, Section 2.2 and Section 10.3 of the Zoning and Land Development Ordinance, and Section 20.203 of the Subdivision and Land Development Regulations Regarding Home Occupations and Cottage Industries **(approved with edits, 11/3/11)**
 - ii. Discussion of October 6, 2011 Comments Received and Possible Action on a Proposed Amendment to Articles 20 and 26 of the Jefferson County Subdivision and Land Development Regulations regarding the Maximum Square Footage Requirements for a Minor Site Plan in each Zoning District **(continued to 11/10/11 due to time constraints)**
 - iii. Discussion of October 6, 2011 Comments Received and Possible Action on a Proposed Amendment to Article 12 of the Jefferson County Zoning and Land Development Ordinance (March 2011) regarding the Process of Amending the

Zoning Map and/or Zoning Text District **(continued to future meeting due to time constraints)**

- iv. Discussion of October 6, 2011 Comments Received and Possible Action on a Proposed Amendment to Sections of Article 24 of the Jefferson County Subdivision and Land Development Regulations regarding Timeframes and Noticing Requirements for Processing Procedures District **(approved with edits, 11/3/11)**
- v. Presentation and Possible Action on Jefferson County Urban Tree Canopy Plan **(approve, 11/3/11)**

5) Upcoming PC meetings:

- a) No second meeting in November at this time
- b) December 13, 2011
 - Discussion of input received related to potential zoning text changes affecting to recreation uses in the County and discussion of next steps
 - Update on alternative commercial zoning categories and discussion of next steps
- c) No second meeting scheduled for December at this time

Christine Chalmers

To: Planning Commission
Subject: RE: WEEKLY CALENDAR / 10.10.11 - 10.14.11

MONDAY, OCTOBER 10, 2011

COLUMBUS DAY HOLIDAY – OFFICES CLOSED

TUESDAY, OCTOBER 11, 2011

10:00 am	STEVE & JENNILEE – SITE VISITS / RE: UPCOMING BZA MEETING
11:30 am - 1:00 pm	JENNIE – STAFF MEETING
2:00 pm – 3:00 pm	JENNIE, SETH & AMY – WEEKLY PLANNING MEETING
3:00 pm – 4:30 pm	JENNIE & STEVE – WEEKLY ZONING MEETING
7:00 pm	JENNIE, STEVE, SETH & AMY – PLANNING COMMISSION MEETING

WEDNESDAY, OCTOBER 12, 2011

9:00 am – 10:00 am	JENNIE, STEVE & SETH – MEETING WITH DON JACOBS
10:00 am	JENNIE – “TAC”
1:30 pm – 3:30 pm	JENNIE – HEPMPO INTERSTATE COUNCIL
1:30 pm – 3:30 pm	JENNIE – CONFERENCE CALL / RE: PHASE II LOCAL STAKEHOLDERS

THURSDAY, OCTOBER 13, 2011

9:00 am	COUNTY COMMISSION MEETING
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FRIDAY, OCTOBER 14, 2011

BOARD OF ZONING APPEALS PACKET DAY

3:00 pm – 4:00 pm	JENNIE & SETH – MEETING / RE: BLACK DOG
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COFFEE

Christine Chalmers

To: Planning Commission
Subject: RE: WEEKLY CALENDAR / 10.17.11 - 10.21.11

MONDAY, OCTOBER 17, 2011

1:30 pm JENNIE, STEVE, BECKY & MASON – ATF CONFERENCE CALL
RE: 340 DEFENSE & SHOOTING RANGE
2:00 pm – 3:00 pm STAFF MEETING

TUESDAY, OCTOBER 18, 2011

10:00 am - 11:00 am STEVE – MEETING WITH PAUL RACO/ RE: BOWLING ALLEY
2:00 pm – 3:00 pm SETH – MEETING WITH TRACY KABLE / RE: HIGHLAND FARM
2:00 pm – 3:30 pm JENNIE & STEVE – WEEKLY ZONING MEETING
3:00 pm – 4:30 pm JENNILEE, AMY & DAWN – DEED TRAINING
3:30 pm – 4:30 pm JENNIE & SETH – WEEKLY PLANNING MEETING
7:00 pm JENNIE – BIKEWAY PUBLIC MEETING (TRAILBLAZERS)
RE: EMPHASIS ON US 340

WEDNESDAY, OCTOBER 19, 2011

1:30 pm – 2:30 pm STEVE/JENNIE OR SETH/AMY & JONATHAN – PPC MEETING w/ DANNY LUTZ
RE: FAGAN'S MILL
2:30 pm – 3:30 pm JENNIE, STEVE, SETH & JONATHAN – PPC MEETING / RE: BLACK DOG COFFEE
4:00 pm JENNIE – JC CONVENTION & VISITOR'S LISTENING MEETING
5:00 pm JENNIE – "COG" ROUNDTABLE MEETING

THURSDAY, OCTOBER 20, 2011

9:00 am COUNTY COMMISSION MEETING
10:00 am - NOON JENNIE, STEVE & SETH – MEETING WITH PAUL RACO & BC PARTNERS
(BRECKENRIDGE)
RE: 340 CORRIDOR STUDY MEETING
12:30 pm – 3:00 pm JENNIE – EASTERN PANHANDLE BUSINESS ROUNDTABLE /
RE: AMERICAN JOBS – LOCATION: BERKELEY COUNTY
3:00 pm JENNIE, STEVE & JENNILEE – BOARD OF ZONING APPEALS MEETING

FRIDAY, OCTOBER 21, 2011

11:30 am – 12:30 pm JENNIE, STEVE & SETH – MEETING WITH MARK O'DELL /
RE: 340 DEFENSE SHOOTING RANGE
1:30 pm – 3:00 pm JENNIE, STEVE, SETH & MASON – RECREATIONAL USES ROUNDTABLE MEETING
LOCATION: LIBRARY CONFERENCE ROOM

Christine Chalmers

To: Planning Commission
Subject: RE: WEEKLY CALENDAR / 10.24.11 - 10.28.11

MONDAY, OCTOBER 24, 2011

10:00 am – 11:00 am STEVE – MEETING WITH PAUL RACO / RE: MADDEX FARM
2:00 pm JENNIE, STEVE, SETH – MEETING WITH MARK O'DELL & WHGA
RE: 340 DEFENSE & SHOOTING RANGE
3:00 pm – 5:00 pm JENNIE, STEVE & SETH – MEETING: COUNTY COMMISSION COMMENTS /
RE: AMENDMENTS

TUESDAY, OCTOBER 25, 2011

10:00 am – 11:00 am STAFF MEETING
1:30 pm - STEVE – MEETING WITH WANDA (FROM BAKERTON)/ RE: PROPOSED LAUNDRY
3:00 pm – 4:30 pm JENNIE, STEVE & JENNILEE – WEEKLY ZONING MEETING

WEDNESDAY, OCTOBER 26, 2011

9:30 am – 10:00 am SETH – MEETING WITH PETE LORENZEN & STEVE McMURRY
10:00 am- 11:00 am SETH, AMY AND JONATHAN – PPC MEETING WITH ED JOHNSON /
RE: JOHN KILROY
2:00 pm – 3:00 pm JENNIE, SETH & AMY – WEEKLY PLANNING MEETING

THURSDAY, OCTOBER 27, 2011

9:00 am - COUNTY COMMISSION MEETING

FRIDAY, OCTOBER 28, 2011

11:30 am JENNIE & SETH – PLANNERS LUNCH IN SHEPHERDSTOWN
3:00 pm – 3:30 pm JENNIE & SETH – REVIEW OF CEDAR MEADOWS AIRPARK

Christine Chalmers

To: Planning Commission
Subject: RE: WEEKLY CALENDAR / 10.31.11 - 11.04.11

MONDAY, OCTOBER 31, 2011

11:00 am – NOON STAFF MEETING

TUESDAY, NOVEMBER 01, 2011

WEDNESDAY, NOVEMBER 02, 2011

8:00 am – 11:30 am DAWN (FOR JENNIE) - MONTHLY DEPARTMENT HEAD MEETING
9:00 am – 4:30 pm STEVE & SETH – SEMINAR IN MARTINSBURG/
RE: LAND USE & ZONING LAW LITIGATION

THURSDAY, NOVEMBER 03, 2011

9:00 am - COUNTY COMMISSION MEETING
10:00 am STEVE & MASON – MEETING WITH GINA BILLER

FRIDAY, NOVEMBER 04, 2011

PLANNING COMMISSION PACKET DAY

12:30 pm – 3:00 pm JENNIE – BOARD OF HEALTH MEETING
LOCATION: HEALTH DEPARTMENT OFFICE

Jefferson County Public Service District

Jefferson County Public Service District Regular Board Meeting September 6, 2011

The monthly meeting of the Jefferson County Public Service District was held at 7:00PM on Tuesday, September 6, 2011 in the meeting room at the Districts office in Kearneysville. Those in attendance included: Chairman, Joe Hankins; Secretary, Jim Cummins (arrived late); Treasurer, Peter Appignani; General Manager, Susanne Lawton; Administrative Assistant, Ashley Stottlemeyer; Operations Manager, Joe Freeze; Pentree Engineers, John Tuggle and Zane Summerfield; District Legal Counsel, Jim Kelsh; and liaison for the County Commission, Commissioner Lyn Widmyer.

Chairman Hankins called the meeting to order at 7:02PM. Since Mr. Cummins was running late to the meeting, the Board decided to handle the budget discussions first until he arrived.

NEW BUSINESS

Discussion of any Expenses over Budget

Ms. Lawton informed the Board that the Fleet Services account is over budget this month.

Action: No action taken by the Board.

Disbursements

Action: Motion made by Mr. Appignani and seconded by Mr. Hankins to approve disbursements for Cavaland water expenses in the amount of \$4,927.00, Glen Haven water expenses in the amount of \$3,607.99. Approved 2-0.

Action: Motion made by Mr. Appignani and seconded by Mr. Hankins to approve disbursements for the Public Service District expenses in the amount of \$147,813.98. Approved 2-0.

Approve Transfer of \$2,707.23 from Sewer Security Deposit Account to Sewer Operating for Security

Deposit Refunds

Action: Motion made by Mr. Appignani and seconded by Mr. Hankins to approve the transfer of \$2,707.23 from Sewer Security Deposit Account into Sewer Operating Account for Security Deposit Refunds. Approved 2-0.

Approve Transfer of \$1,250.00 from Future Needs Account to Sewer Operating for Web Pay Invoice

Action: Motion made by Mr. Appignani and seconded by Mr. Hankins to approve the transfer of \$1,250.00 from Future Needs Account into Sewer Operating Account for Web Pay Invoice. Approved 2-0.

Public Comments

Tom Baldau, Harpers Ferry resident, commented on the decision by the Public Service Commission (PSC) to deny the District's Flowing Springs Wastewater Treatment Plant certificate application. He agreed with the decision and believed the Board owed the community and rate payers an apology for wasting the money and effort on a wastewater treatment plant that is not necessary. He requested to repeat his comments when Mr. Cummins arrives.

Consider Purchase of Sewer Camera

Mr. Freeze discussed the need for purchasing a sewer camera for District staff. There have been numerous occasions when staff has needed to use one, but no other utilities in the area currently have one that is working. He would like to purchase a color camera with accessories and at least 150 feet of cable not to exceed \$5000. The Board agreed that a sewer camera was needed for District staff.

Action: Motion made by Mr. Appignani and seconded by Mr. Hankins to purchase the sewer camera discussed or a similar model with options not to exceed \$5,000.00. Approved 2-0.

OLD BUSINESS

Update on Flowing Springs Wastewater Treatment Plant Project

Mr. Keish updated the Board on the denied decision on the Flowing Springs wastewater treatment plant certificate case at the Public Service Commission (PSC). He informed the Board that the West Virginia Department of Environmental Protection would appreciate a letter from the District if the Flowing Springs wastewater treatment plant is not going to be pursued so the funds committed to this project can be released for other projects. The Board has the legal right to appeal the PSC ruling on the case by September 11th if they wish to do so. The Board took public comments on this issue.

Mr. Cummins then arrived to the meeting at 7:23PM.

Todd Baldau repeated his comments he made earlier in the meeting.

Commissioner Patsy Noland, Jefferson County Commission, was disappointed in the PSC decision, but was not surprised. She felt the Flowing Springs wastewater treatment plant is needed, but with the make-up of the Supreme Court at this time an appeal would not be successful.

Jacquelyn Milliron, intervener in the Flowing Springs PSC certificate case, stated she was not against wastewater treatment plants or the location of the proposed Flowing Springs wastewater treatment plant, but was against plants that are solely paid for by her, a customer of the District. Ms. Milliron commended the District's staff, particularly Ashley Stottlemeyer, for the help in providing her with requested documents.

Commissioner Lyn Widmyer, Liaison to the Jefferson County Commission, requested the District figure out what happens next regarding sewer capacity in the County due to recent permit requests by developers.

Heidi Parker, intervener in the Flowing Springs PSC certificate case, agreed with the results of the PSC decision and stated the ones needing the plant should be the ones who pay for it, not the rate payers. Ms. Parker was not against the project itself or the location of the plant, but the means of paying for the costs. She believed that wasted time was spent on something that should not have gotten this far and even more time should not be spent by the District filing an appeal.

With there being no further public comments, Mr. Hankins expressed his thoughts. He stated there has been no project he has personally worked harder on and he takes full accountability of pushing the project forward. Mr. Hankins explained that projects have a window of opportunity and timing was not in favor of this project with the current status of the economy and funding options. He did not offer an apology for the project as requested because he felt the project needed to move forward and it is his personal opinion that it will be needed in the future. One of the challenges of the Board is thinking ten or twenty years in advance. The Board was trying to think in advance, involve the public, play by the rules, and illustrate complete transparency throughout the entire process of this project. Mr. Hankins stated there is no value in moving forward with an appeal, but the District will construct a new plan and move forward because wastewater in the County is in poor shape and investments will have to be made in the future.

Action: Motion made by Mr. Appignani to not pursue actions to file an appeal with West Virginia Supreme Court and send a letter to DEP informing them that the Flowing Springs plant is not going to be pursued so the funds committed to this project can be released for other projects.

Further discussions were made at this time. Mr. Cummins stated he supports Mr. Hankins' comments and feels there is no need to apologize for pursuing this project. He explained that the repercussions for the County will be negative in that small wastewater treatment plants will be proposed if capacity is not available. Mr. Appignani agreed with Mr. Cummins comment regarding the small plants.

Action: After discussions, the motion was approved unanimously.

Mr. Kelsh made the comment and commended the Board as being one of the most knowledgeable and hardworking Board's in the State of West Virginia when it comes to water and wastewater issues, with Mr. Hankins being highly respected throughout the state.

Review Minutes of August 1 Regular Board Meeting

The minutes of the August 1, 2011 regular Board meeting were approved as presented.

Action: Motion made by Mr. Appignani and seconded by Mr. Cummins to accept the August 1, 2011 minutes as presented. Approved 2-0. Mr. Hankins abstained due to his late arrival at that meeting.

NEW BUSINESS

Introduction of a Possible Project by Citizens of the Blue Ridge Act and the Westridge Hills Homeowners Association for a Public/Private Partnership between Jefferson Utilities, Inc and the District

John Maxey, a member of the Citizens of the Blue Ridge Act requested this item to be put on the agenda in hopes of the District possibly pursuing a project under the Public Private Partnership agreement the District currently has with Jefferson Utilities. Mr. Maxey informed the Board that the Westridge Hills test wells project that was taken on by the County was completed last month and resulted in two high production commercial design wells drilled out to 8-inch diameter, one with a rate of 150 gallons per minute that was tested by a long-term two week drawdown test and the other producing over 50 gallons per minute before the pump was installed. He stated the Dunn Engineering Report estimated that 50 gallons per minute were needed to solve the problems in the mountain communities, which the two Westridge Hills have proven to exceed. Mr. Maxey has suggested the District submit an application to the West Virginia Infrastructure and Jobs Development Council for a project to own and operate the wells to supply water to the mountain customers. These wells are on the property of the Westridge Hills Homeowner Association, which he stated, has offered to donate both the land and wells to the District. According to Mr. Maxey, the costs of this proposed project would be an estimated \$1.5 million.

Mr. Kelsh stated that the District currently has a design loan debt from a previous 1998 Blue Ridge project for \$145,000 that will need to be paid when the District undertakes another water project. He also stated that the current Memorandum of Understanding the District has with Jefferson Utilities would need to be revised to reflect this new proposed project if the District decides to pursue. The Board commended the County for donating the funds to complete the test wells project in Westridge Hills, but would like to wait for the final report from the County to be published before making any decisions. The District would also like to discuss this proposal with Jefferson Utilities before responding to Mr. Maxey's request. The Board deferred this item to Executive Session for further discussions.

Action: No action taken by the Board.

Discuss Status of Capacity Assurance Agreement (CAA) for Jefferson County Development Authority

Mr. Kelsh updated the Board. With the Public Service Commission denying the Flowing Springs certificate case, they also denied the funding package which included the Capacity Assurance Agreement the District currently has with the Jefferson County Development Authority. The Development Authority recently paid the District \$1 million to reserve capacity by entering into a Capacity Assurance Agreement with the District. Mr. Kelsh informed the Board of three different options the Board could possibly take including refunding the \$1 million dollars to the Development Authority, hold onto the money and negotiate a new agreement and resubmit to the Public Service Commission, or refund the \$1 million dollars and negotiate a new agreement and resubmit to the Public Service Commission.

Tom Bayuzik was in the audience and informed the Board that the Development Authority will be making a recommendation at their Board Meeting on September 13th and will notify the District of their decision.

Action: No action taken by the Board.

Consider Options and Process Path for Creating/Revising PSD Strategic Plan

With the denial of the Flowing Springs wastewater treatment plant certificate case, the District is considering drafting an RFP for a strategic plan long term planning of infrastructure in the County. Mr. Appignani suggested looking into consolidation options in the plan with Charles Town or Ranson. Mr. Cummins stated

that developing a strategic plan to incorporate growth the District does not have control on will be difficult and the help of other entities will be needed, but he believes the plan is necessary. Mr. Appignani responded to Mr. Cummins comments stating the District would have professionals draft the plan and revisit every couple years for updates. Commissioner Widmyer stated that a strategic plan would be a great asset to the County and its citizens.

Action: Motion made by Mr. Appignani to professionally undertake the creation of a strategic plan. A brief discussion took place before any further actions.

Bob Woodrome, resident of Gap View, suggested completing the Flowing Springs project in stages since the project was too large for its time.

Mr. Hankins commented that the Charles Town strategic plan is a useful document which the District should draft something similar and have consensus with Charles Town and Ranson. He agreed with Mr. Appignani to look into consolidation and suggested getting independent assistance with drafting the plan.

Ms. Milliron, intervener in the Flowing Springs PSC certificate case, stated that what's been missing in the Flowing Springs project is what's in the best interest of the customers. She suggested the District keep in mind the customers interests and what's both environmentally and economically feasible when drafting the plan.

The Board would like staff to draft a Request for Proposals for next month's agenda.

Action: Mr. Appignani amended his original motion and Mr. Cummins seconded to have staff work with the Board to draft a scope for a Request for Proposals and refine with public input and bring back at the October meeting as a first step of creating a strategic plan. Unanimously approved.

Consider Refinance or Repayment Options for BAN for Flowing Springs Project Expenses

Mr. Kelsh informed the Board of the BAN expiration that is coming up on January 6th which was initially approved two years ago to pay for engineering design work by Pentree totaling \$750,000 for the Flowing Springs Wastewater Treatment Plant. He reviewed the three options the Board could choose to take including pursuing a design loan from West Virginia Department of Environmental Protection (DEP), a bond from West Virginia Infrastructure and Jobs Development Council (IJDC), or refinancing the BAN with DEP, MVB Bank, or another private lender. Ms. Lawton received rates from MVB for a 3, 5, and 10 year loan. She would also like to borrow the necessary \$300,000 to upgrade pump station 5-3 in Burr Industrial Park. Along with the \$750,000 debt of the BAN, Pentree also has \$1.3 million invested in the Flowing Springs project that needs to be paid by the District. Mr. Kelsh informed the Board that the District must get approval from the Public Service Commission for any type of loan or grant. The Board would like Chuck Young from Cox Hollida Price to complete a cash flow analysis before making any financial decisions. Ms. Lawton is going to get loan rates options from multiple banks for next month.

Action: No action taken by the Board.

Report on Phase II WIP Summit in Martinsburg 31 August 2011

Mr. Hankins, Ms. Lawton, and the Districts newly hired engineering technician, Matt Piepenburg, along with numerous elected officials, DEP, engineers, local government employees, the public and state legislatures attended the Chesapeake Bay Summit in Martinsburg held by Region 9. The Chesapeake Bay program, phase I and II WIP, nutrient trading, and stormwater rulemaking were discussed at the meeting.

Action: No action taken by the Board.

Consider Upgrades to Glen Haven and Cavaland Water Systems

Ms. Lawton recently completed funding requests from Bureau for Public Health and Region 9 for possible funding assistance for the Glen Haven and Cavaland water systems projects. In 2009, Gwin, Dobson, & Foreman (GDF) engineers completed an evaluation study on both systems and proposed recommendations for upgrading each. The Board would like Ms. Lawton to contact GDF about possibly moving forward on the upgrade projects and draft an addendum to the original agreement. This item will be on the agenda next month.

Action: No action taken by the Board.

Discuss Upgrades to Pump Station 5-3

The District is continuing to experience daily problems at this pump station. Pentree has prepared an estimate to rebuild the pump station, but finding the money to cover the costs is an issue. Ms. Lawton suggested possibly rolling the costs into the refinance of the BAN loan. She will ask for an option which will include these costs in with the BAN costs when researching with banks and the loan options. She is also going to have Chuck Young from Cox Hollida Price draft an analysis based on findings from the banks on the added costs to cover the \$300,000 in upgrade costs. District staff will prepare a Request for Proposals while awaiting the analysis.

Action: No action taken by the Board.

General Manager's Report

Ms. Lawton updated the Board on activities since last month's meeting.

Cavaland Landscaping - Ms. Lawton received a proposal from Ellen May regarding landscaping around the Cavaland well house costing around \$385. The Board agreed with the proposal and would like to proceed.

Action: No action taken by the Board.

Public Comment

None.

Correspondence

None.

Action: Motion made by Mr. Hankins and seconded by Mr. Appignani to convene in executive session for the purpose of discussing litigation and contract negotiations. Unanimously approved.

Mr. Appignani excused himself from the discussions on the Jefferson Utilities, Inc General Investigation case currently at the Public Service Commission.

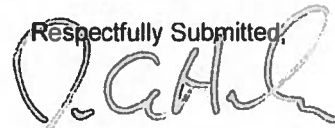
Action: Motion made by Mr. Hankins and seconded by Mr. Cummins to return to public session. Unanimously approved.

Action: Motion made by Mr. Hankins and seconded by Mr. Cummins to adjourn. Unanimously approved.

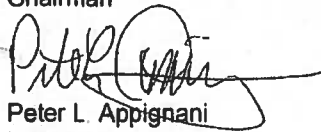
There being no further business at this time, the meeting was adjourned at 11:52PM

The next regular meeting is scheduled for October 3, 2011 at 7:00pm at 340 Edmond Road, Suite A at the Districts office in Kearneysville.

Respectfully Submitted,



Joseph A. Hankins
Chairman



Peter L. Appignani
Treasurer



William H. Gordon Associates, Inc.
301 North Mildred Street, Suite 1
Charles Town, WV 25414
304-725-8456 Phone
304-728-0117 Fax

October 18, 2011

JENNOR
BROCKMAN

Jefferson County Commission
P.O. Box 250
124 East Washington Street
Charles Town, WV 25414

This letter is to formally request on behalf of Catherine Hott (Applicant) that the petition for the Hott Property (identified in the Harpers Ferry District, Tax Map 15 as Parcel 56) Zoning Map Amendment not be scheduled for the upcoming County Commission meetings until requested by the Applicant.

On October 11, 2011 the applicant received a Notice of Violation from the Jefferson County Department of Engineering concerning the Engineering Departments perception of the current use of the property. The letter stated that the violations will go before the Planning Commission on November 8, 2011 if not resolved.

It is requested by the Applicant that the Hott Property Rezoning request not be placed on future agendas until such time as requested by the Applicant. This will allow the Applicant the necessary time to address the requests brought forward by the Jefferson County Department of Engineering prior to appearing before the Jefferson County Commission. Thank for your time and consideration for this request.

Sincerely,

Chad Wallen
William H. Gordon Associates

RECEIVED
OCT 19 2011
JEFFERSON COUNTY
PLANNING, ZONING AND ENGINEERING

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OCT 18 2011

JEFFERSON COUNTY COMMISSION