



AGENDA
Jefferson County Planning Commission
Tuesday, March 10, 2015, 7:00 PM

Planning Commission meetings are held in the Old Charles Town Library Meeting Room located at 200 East Washington Street, at the side entrance on Samuel Street in the City of Charles Town.

All Citizens that desire to speak must sign-in prior to the Agenda Item being addressed.

1. Approval of the minutes from the following Planning Commission Meetings:
 - February 10, 2015
 - February 24, 2015
2. Citizen Communications: If you wish to comment, please sign-in to speak for issues that are not on the agenda or items that are not open for public comment. Items not open for public comment will be so noted.
3. Request for postponement.
4. **Public Hearing:** Request by applicant Roderick Planes, LLC / Aspen Greens Phase IIA (File #PCV15-01) to be represented by Gates Associated, Inc. for a variance from Article 6, Section 6.3 of the 1979 Jefferson County Subdivision Ordinance which requires a Final Plat public hearing within 24 months of the Final Plat public hearing for the previous phase. The applicant is requesting a time extension from April 10, 2015 to June 10, 2016, to advance through the Final Plat public hearing for this development. The property is located northeast of the intersection of Old Country Club Road and Flowing Springs Road. The property is designated as Tax District: Charles Town (02); Tax Map: 4; Parcel: 19; Size: 110 acres total (203 lots); Zoned: Rural (R).
5. **Public Hearing:** Request by applicant Shepherdstown Community Club (File #PCV15-02) related to the Morgan's Grove Park property for a variance from Article 8, Section 8.2.c.1.d., of the 1979 Jefferson County Subdivision Ordinance (storm water management regulations). The applicant is requesting to install four – 50 gallon rain barrels in lieu of constructing an infiltration trench required as a part of the site plan for the kitchen and bathroom building. The property is located southwest of the intersection of Kearneysville Road (WV 480) and Morgan Grove Road. The property is designated as Tax District: Shepherdstown (09); Tax Map: 13; Parcel: 28 (25.9 ac.).

There is no public comment for the remaining items.

6. Discussion of the implementation of the Envision Jefferson 2035 Comprehensive Plan recommendations.
7. Reports from Legal Counsel and legal advice to the Planning Commission.
 - a) Active Litigation:
 - Far Away Farms
8. Director's Report.

9. Planning Commission Exchange and Liaison Reports:

- County Commission
- Health Department
- Public Service District
- Parks and Recreation
- Jefferson County Development Authority
- Water Advisory Committee
- Planning Commission Exchange

10. President's Report.

11. Actionable Correspondence.

12. Non-Actionable Correspondence.

13. Signing of approved Motions from previous Planning Commission meetings.

All files are made available for public review Monday through Friday, 9:00 AM to 5:00 PM (excluding Holidays). The Planning Commission welcomes written comments at any time. Submitting a document no later than the Thursday before a scheduled meeting will provide the Commission an advanced opportunity to review your comments prior to the meeting. Please note that documentation and exhibits submitted at a Planning Commission meeting are retained as part of the official record.

Feel free to submit your comments to any of the addresses below:

Physical Address: 116 E. Washington St., Charles Town, West Virginia 25414

Mailing Address: P.O. Box 338, Charles Town, West Virginia 25414

Email Address: planningdepartment@jeffersoncountywv.org

Fax Number: 304-728-8126

Any party desiring a transcript of these proceedings will be responsible for providing a competent stenographer at their own expense. Minutes, video and/or audio recordings of past meetings, the Jefferson County Subdivision Regulations, Zoning Ordinance and Comprehensive Plan, as well as any working proposed amendments are located on the Departments page within the County's website at www.jeffersoncountywv.org. Minutes and audio recordings of older meetings that are not on the County's website are available for review in the office.

This information is
Tab # 1 of your binder

Draft Minutes

Jefferson County Planning Commission February 10, 2015

The Jefferson County Planning Commission met on February 10, 2015 with the following Commission members present: Steve Stolipher, President; Wade Louthan, Vice President; Gene Taylor, Secretary; Dale Manuel, Gary Phalen, Mike Chapman, Donnie Fisher, Peter Fricke, and Dick Childs. Staff members present included Jennifer Brockman, Director of Planning and Zoning; and Rhonda Greenholtz; Planning Clerk.

Mr. Stolipher called the meeting to order at 7:00 p.m.

1. Approval of the minutes from the following Planning Commission Meetings:

- January 13, 2015
- January 27, 2015

Mr. Stephen Stolipher asked if there were any objections to the approval of the meeting minutes. No objections were raised. Minutes were approved.

2. Citizens Communications: None

3. Request for postponements: None

4. Public Hearing: Zoning Map Amendment Petition by property owner Standard Land Company, LLC (File # Z14-13) for a 404.69 +/- acre property located on the east side of Millville Road (Route 27), south of the intersection with Route 340, to change the current Rural (R) and Residential Growth (RG) zoning designation to Residential-Light Commercial-Industrial (R-LI-C).

Mr. Stephen Stolipher recused himself from this portion of the meeting, citing conflict of interest.

Mr. Wade Louthan presided over the meeting.

Ms. Jennie Brockman provided a brief overview of the location and history of the property pointing out neighboring zoning classifications. She also stated that some of these properties are owned and in permanent use by the Federal Government.

Ms. Jennifer Brockman stated the role of the Planning Commission is to advise the County Commission if this request is consistent with the 2004 Comprehensive Plan. She also stated that a Public Hearing would be held by the County Commission to take final action.

Mr. Mark Dyck, Gordon Associates, presented the request on behalf of Standard Land Company, LLC. Mr. Mark Dyck stated the Comprehensive Plan does not specifically address re-zoning applications; however the zoning ordinance requires the proposal to address the compatibility with the 2004 Comprehensive Plan. Mr. Dyck presented a Comprehensive Goal Plan and Rezoning Assessment handout to the Planning Commission outlining how the application is in conformance with the 11 objectives of the 2004 Comprehensive Plan. (A copy of this handout is included in these minutes.)

Ms. Jennie Brockman presented the Staff Report which included recommendations for both the 2004 Comprehensive Plan and the Envision Jefferson 2035 Comprehensive Plan. Ms. Jennie Brockman stated that the 2004 Comprehensive Plan does not support development of this area outside of the area identified for growth in the Plan. She further stated that while the Envision Jefferson 2035 Comprehensive Plan calls for redevelopment in this area encouraging recreation and tourism type venues and protecting slopes and natural resources, it does not support the use of the Residential-

Light Industrial-Commercial zoning category. The Envision Jefferson 2035 Comprehensive Plan recommends utilizing the new zoning categories adopted by the County Commission in June 2014. Staff recommended use of the new Zoning Categories.

Mr. Wade Louthan opened the floor to public comment.

Mr. Paul Rosa spoke on behalf of the Harpers Ferry Conservancy. Mr. Paul Rosa cited Land Use Covenants recorded in the Jefferson County Land Records Liber 986 Folio 676 and in Liber 995 Folio 465 restricting the use of the property to Non-Residential Use. No revocation of this has been recorded. Mr. Rosa also cited a Plat recorded among the Land Records in Plat Book 25, Pages 235-235D that allow the construction of 40 Lots. No revocation of this recorded Plat has been recorded. The Conservancy's primary concerns are that scenery and historic resources be preserved. The Conservancy would have no objections to structures that are below grade and not seen from the Battlefield.

Ms. Jennie Brockman addressed the statement by Mr. Paul Rosa regarding a recorded Plat showing the 40 approved lots. It is legal counsel's opinion that the said Plat has been voided due to lack of action. This Plat was not approved by the Planning Commission. At present there is no document recorded among the Land Records voiding this plat.

The following public comments were heard:

Christy Huddle – Ms. Huddle would like to see the narrower zoning categories of the Envision Jefferson 2035 Comprehensive Plan used.

William Cornwell – Mr. Cornwell is a property owner at the southern end of property and is opposed to any development.

Lyn Widmyer – Ms. Widmyer supports the Planning and Zoning staff's report and recommendations. Ms. Lyn Widmyer stated she would like to see a plan showing proposed areas designated for preservation and development. Traffic and public utilities were of concern. Ms. Widmyer entered into the record a letter from Todd E. Hooker, West Virginia Development Office noting the expiration of the Brownfield designation of this property.

Nicola Bastia – Ms. Nicole Bastia stated that she will provide written comments.

Kelly Baty – Mr. Kelly Baty voiced concerns related to floodplain, sinkhole/karst topography, and inadequate infrastructure issues.

Matt Knott – Owner, River Riders. Mr. Matt Knott is in support of this rezoning request as it will make it more financially viable for the property to be cleaned up. Commercial use would be the best fit for the property.

Mr. Wade Louthan closed the floor to Public comment.

Mr. Noah Mehrkam, Standard Land Company, LLC. Mr. Noah Merkhkam took this opportunity to introduce himself and to state reasons how the R-LI-C (Residential-Light Industrial-Commercial) zoning designation would provide for more flexible uses of the property.

Mr. Mark Dyck of Gordon Associates, rebutted with the following:

- The Envision Jefferson 2035 Comprehensive Plan is used as a reference point and doesn't believe it can be used as a basis for approving or denying this application as it has not been approved at this time.

- The Zoning Ordinance amendments related to the new zoning categories state that the new zones can only be used in areas that are defined in the 2004 Comprehensive Plan. Mr. Mark Dyck went through the list of new zoning categories and explained why these weren't feasible options.
- Creating employment within the 340 corridor may alleviate traffic congestion at the "bottleneck area" at the bridges leading into and out of the area.
- An application will be submitted to void the Plat recorded in Plat Book 25 Pages 235-235A.
- A majority of concerns expressed at this meeting will be addressed with the submittal of the Concept Plan.
- The bulk of the development will occur on the north side of the property.
- The proposed development will meet all FEMA setback requirements, as well as the County Zoning and Subdivision Hillside Development and Riparian Buffer requirements.
- Infrastructure improvements will be at the cost of the developer, not the public.

Mr. Wade Louthan opened up the floor for discussion.

Mr. Peter Fricke inquired about the water rights of the Old Standard Quarry as they relate to a Certificate of Need issued by the Maryland Department of Natural Resources for the Catoctin Power Plant.

Mr. Paul Rosa spoke regarding the water rights agreement. The agreement was put in place by a power company based in California for a Catoctin Power Plant project located in Frederick County. The last record of renewal for the agreement has expired.

Mr. Dick Childs inquired about affordable housing on the property.

Mr. Mark Dyck responded that a mix of residential property would be the anticipated use of the property. No specific plans are in place at this time, but high end residential properties are not proposed.

Mr. Dale Manuel made a motion to leave the record open.

Mr. Mike Chapman addressed Mr. Dale Manuel's motion reiterating the Planning Commission's role in this request and that further public comments will be heard at a required County Commission public hearing.

Mr. Gary Phalen asked Ms. Jennie Brockman for clarification on the Planning Commission's role with respect to this request.

Ms. Jennie Brockman restated that the Planning Commission's role is to determine if this request is in conformance with the 2004 Comprehensive Plan. The local Zoning and Land Development Ordinance requires the County Commission to hold a Public Hearing on this request.

Mr. Dale Manuel made a motion to leave the record open for written public comments and moved to finalize action at the next scheduled Planning Commission meeting.

A vote was taken and failed 2-6. Mr. Peter Fricke and Mr. Dale Manuel in favor.

Mr. Peter Fricke made a motion that the request is not consistent with the 2004 Comprehensive Plan nor the draft Envision Jefferson 2035 Comprehensive Plan as it does not support zoning the R-LI-C (Residential-Light Industrial-Commercial) categories.

Mr. Donnie Fisher spoke to the track record of the applicant working with the community. Groups with concerns have praised the discussion and the dialogue with the applicant. Mr. Donnie Fisher believes the information given meets the requirements of the 2004 Comprehensive Plan.

Mr. Peter Fricke stated that the Planning Commission is not supposed to make a recommendation based on the applicant's quality of business, but whether or not the proposal is consistent with the 2004 Comprehensive Plan.

Mr. Gary Phalen stated that a project like this does have merit when an applicant such as this has demonstrated the ability to perform in this county.

Mr. Mike Chapman cited the Scope of Assessment in the Staff Report. The 2004 Plan itself states that its recommendations are general and that there may be internal conflicts within its recommendations and that all of them need to be considered in considering zoning map amendments. The fact that the Envision Jefferson 2035 Comprehensive Plan proposes different uses for this area of the county indicates that there have been major changes since the 2004 Plan that are addressed in the 2035 Plan. He believes that this change between the Plans further supports the proposed rezoning at this time.

Mr. Dale Manual stated the development of this property is an opportunity to clean up this brownfield area and the requested rezoning would enable some control of the property.

A vote was taken and failed by a vote of 1-7. Mr. Peter Fricke in favor.

Mr. Dick Childs made a motion that the request is consistent with the 2004 Comprehensive Plan and recommended the request be sent to the County Commission for approval.

A vote was taken and passed 7-1. Mr. Peter Fricke opposed.

Mr. Louthan called for a break at 8:40 p.m.

The meeting resumed at 8:50 p.m.

Mr. Stephen Stolipher returned to the meeting.

Mr. Stephen Stolipher stated a discussion will be held on Items 5, 6, & 7 simultaneously.

5. Public Hearing: Proposed amendment to the definition of "days" from business days to calendar days in Section 26.200 of the Jefferson County Subdivision and Land Development Regulations (File #STA15-01).
6. Public Hearing: Proposed amendment to Section 20.104, "Exceptions", of the Jefferson County Subdivision and Land Development Regulations, subsection "C", to "exempt" public utilities and private utility firms processing easements from these Regulations (File #STA15-02).
7. Public Hearing: Proposed amendment to Section 24.300, "Waivers", of the Jefferson County Subdivision and Land Development Regulations to change the last sentence of the introductory paragraph stating "No

process or procedural waivers shall be granted” to “Process and procedural waivers shall be reviewed and found consistent with the above criteria prior to approval” (File #STA15-03).

The floor was opened up to Public Comment

Ms. Sue Lawton – Jefferson County PSD. Ms. Sue Lawton supports the proposed amendment regarding “Exceptions” (Item # 6).

Mr. Peter Chakmakian – Attorney, Specialized in Land Use Law. Mr. Peter Chakmakian helped draft Chapter 8A of the West Virginia Code and supports the proposed Amendment regarding “Exceptions” (Item # 6). Mr. Chakmakian is also in support of the Amendment of “days” definition from business days to calendar days (Item #5).

Mr. Mike Shepp, Alleghany Surveys. Mr. Mike Shepp spoke in support of all 3 Amendments (Items # 5, 6 & 7).

Mr. David Hartley – Representative of the EPHBA (Eastern Panhandle Home Builders Association). The EPHBA is in support of all 3 Amendments (Items#5, 6, & 7).

Public Comment was closed to the Public.

A motion was made by Mr. Gary Phalen to forward all 3 Text Amendments (Items#5, 6 & 7) to the County Commission.

A vote was taken which passed unanimously.

8. Discussion and action on the County Commission’s recommended redlined version of the draft Envision Jefferson 2035 Comprehensive Plan (returned to the Planning Commission 01-14-15).

Discussion ensued.

Mr. Dale Manual made a motion that the Planning Commission agrees with the recommended red lined version of the Envision Jefferson 2035 Comprehensive Plan and requests the Plan be forwarded to the County Commission.

A vote was taken which carried unanimously. Jennie Brockman stated that this action means that the version of the Plan returned to the Planning Commission is now approved and a final version with no red-lined edits would be recorded at the courthouse.

9. Discussion and action was taken to form a citizen-based committee to review the Major Subdivision Process of the Jefferson County Subdivision and Land Development Regulations and recommend a draft amendment to the Planning Commission to more closely reflect the requirements of Chapter 8A of the WV State Code.

Appointees are as follows:

Suzanne Malesic
Paul Raco

Glen Hetzell
Deborah Hovatter

Neil Neilson

Mike Shepp

Katy Fidler

10. Discussion and action was taken to form a second citizen-based committee to develop proposed language regarding rural campground facility standards and processes in both the Jefferson County Zoning and Land Development Ordinance and Jefferson County Subdivision and Land Development Regulations and recommend a draft amendment to the Planning Commission.

Appointees are as follows:

| | | |
|---------------|---------------|---------------|
| Annette Gavin | Mike Shepp | Dwayne Marcus |
| Janis Schiltz | Randy Creller | Wayne Bishop |
| Jim Gibson | Mark Dyck | |

Mr. Stephen Stolipher asked that contact information for appointees to both of the above citizen based committees be provided to the Departments of Planning and Zoning.

11. Reports from Legal Counsel and legal advice to the Planning Commission :

- None

12. Directors Report:

- Ms. Brockman updated the staff in regards to the current open Zoning Administrator position.
- Recent/Upcoming CC Actions:
 - Mass Events (#ZTA 14-02)
 - David N. Slusher Zoning Map Amendment
- Planning Commission Training:
 - Next Scheduled Meeting: February 24, 2015 7 p.m. Proposed Topic: Aging in Place
 - Next Regular Meeting: March 10, 2015

13. Planning Commission and Liaison reports:

- None

14. President Report:

- None

15. Actionable Correspondence:

- None

16. Non Actionable Correspondence:

- None

17. Signing of approved Motions from previous meetings:

- None

Mr. Stephen Stolipher motioned to adjourn the meeting at 9:35 p.m.

A vote was taken and passed unanimously.

Draft Minutes

Jefferson County Planning Commission February 24, 2015

The Jefferson County Planning Commission met on February 24, 2015 with the following Commission members present: Steve Stolipher, President; Wade Louthan, Vice President; Dale Manuel, Gary Phalen, Donnie Fisher, and Peter Fricke. Staff members present included Jennifer Brockman, Director of Planning and Zoning; and Rhonda Greenholtz, Planning Clerk.

Mr. Dick Childs and Mike Chapman were absent with notice, Mr. Gene Taylor was absent without notice.

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

1. Mr. Stolipher opened the meeting by stating this meeting is for training purposes for Planning Commission members and turned the meeting over to Ms. Jennifer Brockman.

Ms. Jennifer Brockman stated that the County Commission requires 2 hours of training every year for Planning Commission members. Ms. Jennifer Brockman gave a brief introduction to the presentation entitled "Aging in Place: Planning's Role and Responsibilities". The original seminar occurred in 2012 at the National Building Museum located in Washington D.C.

A discussion ensued subsequent to the presentation regarding small houses in relation to Aging in Place within Jefferson County.

Ms. Suzanne Malesic spoke stating she intends to make a suggestion to the Planning Commission in writing requesting a committee be formed to review current small house standards.

Ms. Jennifer Brockman recommended that at the March 10, 2015 meeting the Planning Commission discuss the implementation of the Envision Jefferson 2035 Comprehensive Plan recommendations.

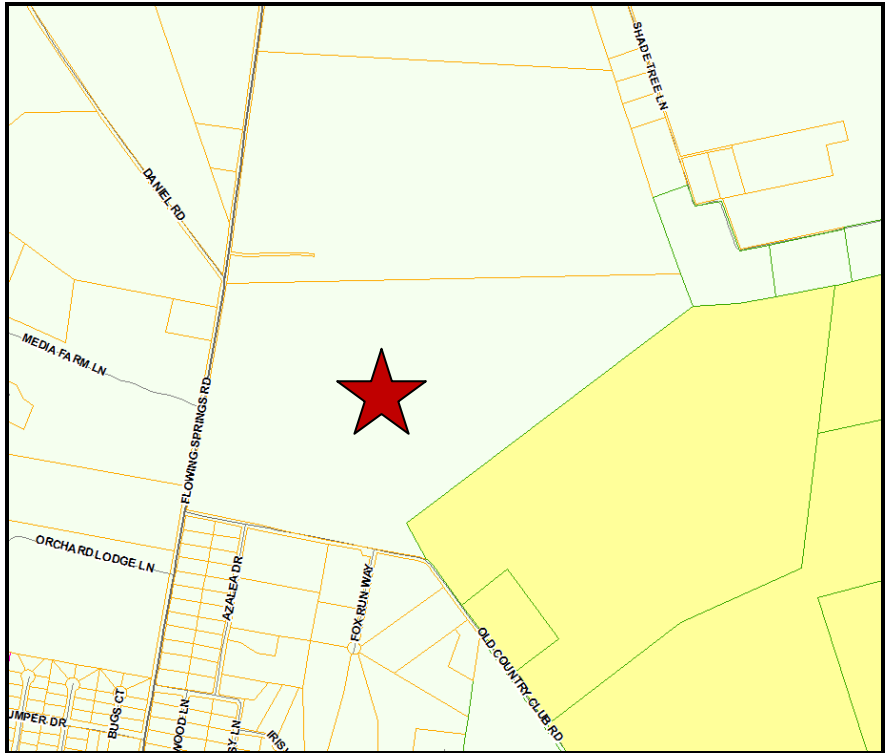
Mr. Stephen Stolipher adjourned the meeting at 9:00 PM.

This information is
Tab # 4 of your binder

Staff Report
 Jefferson County Planning Commission Meeting
 March 10, 2015

Aspen Greens Phase IIA PC File #07-15

Item #4: PCV14-01: Request by Roderick Planes, LLC, owner/developer for a variance to extend the time to hold a Final Plat public hearing for the next phase of Aspen Greens Phase IIA Subdivision (PC File #08-21). The applicant is requesting an extension of time from April 10, 2015 to June 10, 2016.

| | |
|-------------------------|--|
| APPLICANT: | Roderick Planes, LLC / Aspen Greens Phase IIA |
| OWNER: | Same as above |
| DEVELOPER: | Same as above |
| SURVEYOR/ENGINEER: | Gates Associated, Inc. |
| PROPERTY LOCATION: | The property is located northeast of the intersection of Old Country Club Road and Flowing Springs Road. |
| LEGAL DESCRIPTION: | District: Charles Town (02); Map: 4; Parcel: 19  |
| SURROUNDING PROPERTIES: | North: R South: R and RG East: RG West: R |
| LOT AREA: | ~110 Acres |
| APPROVED ACTIVITY: | 203 Single Family Lots |

Staff Report
 Jefferson County Planning Commission Meeting
 March 10, 2015

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|----------------------------|---|
| APPROVALS: | |
| Conditional Use Permit | Submitted: 08/08/02 Site Assessment Passed: 10/02/02 1 st Neighborhood Compatibility Scheduled: 10/30/02 2 nd Neighborhood Compatibility Scheduled: 05/10/06 Public Hearing Scheduled: 06/15/06 PH & BZA Action: Approved CUP Official Issuance Signature: 12/20/07 Expiration Date: 06/20/09 BZA Extended to: 12/20/10 BZA Extended to: 07/01/2012 Approval and Recordation of the Phase 1A Final Plat deems this CUP to be “commenced” |
| Community Impact Statement | Submitted: 06/15/07 Staff Review Meeting: 07/06/07 County Planner Approval: 02/2008 County Engineer Approval: 01/14/08 PC Approval: 03/25/08 Expires on: 07/06/09 PC Extended to: 12/31/09; 12/20/10; 07/01/2012 Approval and Recordation of the Phase 1A Final Plat enables the CIS to remain valid; provided that the Public Hearing for the next Phase of the project is held on or before 6/12/14 (two years from Phase 1A approval) unless extended. PC Extended for next phase Final Plat Public Hearing to: 04/10/15 |
| Preliminary Plat | 04/10/2012 |
| Final Plat | Phase 1A Final Plat Approved: 06/12/12 |
| Variance History | 05/26/09 - PC approved variance to extend the CIS file expiration date from 07/06/09 to 12/31/09. 06/18/09 - BZA approved a CUP extension request from 06/20/09 to 12/20/2010. 08/11/09 – PC approved variance to extend the CIS file expiration date from 12/31/09 to 12/20/10. 11/09/10 – PC approved variance to extend the CIS file expiration date from 12/20/10 to 07/01/12. 11/18/10 – BZA approved an extension of the CUP to 7/01/12. 06/10/14 – PC approved variance to extend the time to hold a Final Plat public hearing for the next phase to 4/10/15. |

The Development:

Aspen Greens Subdivision is located northeast of the intersection of Old Country Club Road and Flowing Springs Road. Since this Subdivision began processing before the 2008 Subdivision Regulations were adopted, the Subdivision is being reviewed under the 1979 Subdivision Regulations. The applicant has had the first phase of Aspen Greens Subdivision, known as Phase 1A approved,

Staff Report
Jefferson County Planning Commission Meeting
March 10, 2015

recorded and bonded for 20 lots and a residue of 93.654 acres. The applicant is currently working with staff toward approval of Phase II of the Preliminary Plat and then will submit a Final Plat for Phase IIA. The Preliminary Plat has received Planning, Zoning and Engineering staff comments; an approved DOH Highway Entrance Permit and NPDES is required for final approval. WV DOH has indicated to staff that their permit should be approved shortly.

The Request:

The applicant is requesting an extension from April 10, 2015 to June 10, 2016 to advance through the next Final Plat (Phase IIA) public hearing for this development. Per Section 6.3 of the Jefferson County Subdivision Ordinance of 1979, a Final Plat public hearing shall be processed within 24 months of the previous phase. The applicants' last Final Plat approval was at the June 12, 2012 Planning Commission meeting. In June, 2014, the applicant requested a one year extension which they stated was more than needed and the Planning Commission approved a variance to extend the time for the next Final Plat public hearing for eight (8) months to April 10, 2015.

It should be noted that this project is not impacted by changes in the state law in 2009, often referred to as Senate Bill 595, which provided automatic extensions of time for certain projects because it did not meet the definition of "valid" and "outstanding" as of January 1, 2010. As a result, this project must process a variance in order to be provided with an extension of time. Projects which do qualify for the SB 595 extension currently have a completion date of June 30, 2017 to complete their next phase due to a County Commission extension.

Variance Requirements:

The variance process in the 1979 Subdivision Ordinance is different from the waiver process outlined in the 2008 Subdivision Regulations. In order to grant a variance the following four criteria must be met. The comments below are Staff's comments related to the criteria:

The request is not contrary to the public interest.

The request for a variance to extend the time limit to submit a Final Plat from April 10, 2015 to June 10, 2016 is not contrary to the public interest. The applicant intends to continue the development as approved by the Planning Commission; no change has occurred to the Phase IIA site which would negatively impact the public interest; however, a fourteen month may not be necessary.

A literal enforcement of this Ordinance will result in unnecessary hardship.

A literal enforcement of the ordinance would require the applicant to start the project anew if a Final Plat is not scheduled for a public hearing by April 10, 2015. As outlined in the applicant's submittal and above, Roderick Planes, LLC has completed the first preliminary plat (Phase 1A) and recorded the Final Plat for Phase 1A. Phase 1A was bonded and is under construction. The applicant submitted the preliminary plat for Phase IIA on January 10, 2014. The second phase preliminary plat has undergone three staff reviews and staff is prepared to approve the Preliminary Plat upon receipt of a DOH Entrance Permit number and NPDES permit. If the appellant is denied an extension, the process would have to start over under the new Subdivision Regulations. Beginning the process over would not likely change the layout of the project from the currently approved preliminary plat layout and the Final Plat that has been recorded, but may require reengineering to meet current standards.

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

The request is not a self-imposed hardship. As noted above the applicant continues to make a good faith effort towards approval of a Preliminary and Final Plat for Phase IIA of the development. The

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applicant's continued effort in processing approvals shows a vested interest to proceed forward. A project of this size and scope requires significant, work and communication between the applicant and various departments and agencies.

The spirit of this Ordinance will be observed and substantial justice done.

Since the requested variance is for a time extension and not a variance of the site layout, the spirit of the ordinance will be observed. Staff finds substantial justice would be done in granting a time extension.

Recommendation

Staff believes that a 14-month extension is excessive and recommends granting the variance for eight months instead of the requested 14 months, to the regular December 2015 PC meeting (12-8-15). As noted in the applicant's request and shown by action, the applicant is creating a high quality development and has worked with the Jefferson County Public Service District (JCPSD) to oversize the sewer line in anticipation of future connections. The new sewer line will result in a reduction of the overall maintenance for the JCPSD. As stated above, the applicant and Staff are prepared to approve the preliminary plat, upon receipt of the WV DOH and the NPDES permit. The Final Plat could easily be approved by the end 2015. Without rushing the submittals, the applicant could process a Final Plat through the Public Hearing stage in 6 months; however, accounting for unseen issues, Staff recommends eight months. The requested 14 month extension seems unwarranted. This variance is for a time extension and not a variance to the site layout. Providing an extension of eight months for the developer would provide for the continuation of this development as approved by the Planning Commission.

ASPEN GREEN IIA Approval Extension Request

JEFFERSON COUNTY PLANNING COMMISSION

VARIANCE REQUEST

I/We request a variance from the provisions of the Jefferson County Subdivision and/or Salvage Yard Ordinance.

RECEIVED

Property Owner(s): Roderick Planes, LLC

FEB 13 2015

Address: 5509 Mt. Zion Road; Box 777
Frederick, Maryland 21705

JEFFERSON COUNTY PLANNING, ZONING & ENGINEERING

Phone Number: 1-301-663-6060

Location of Property: Northeasterly of the intersection of Old Country Club Road with Flowing Springs Road. See Attached USGS Map.

Lot Size: 0.41 Average; 203 Lots on 110 Acres

Deed Book Reference: Deed Book Number 952, Page Number 565

Tax Map Reference: District 2 - Charles Town Map 4, Parcel 19

Zoning District: Agricultural - (Was Residential on proposed draft)

Section of Ordinance: Subdivision Ordinance; Art. 6; Sect. 6.3

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

This request is for Phase IIA Approval Deadline extension to June 10, 2016, to provide time to overcome the delay of 'outside agency approvals' (#3 of JCPC Director J.M. Brockman Email attached). Additionally WVDOH Email from WVDOH Permit Reviewer Mr. Larry Alt cites his ongoing review that remains independent of JCPC timetables and beyond the control of developer. Numerous levels of new review and Design Directives unfolded on this IIA phase review differing from the 3-4 week entry permit issuance existing when the 24 month new phase limitation was created. This time need remains despite a previous grant by JCPC on June 10, 2014, for a years extension made by this developer Roderick Planes, LLC that permitted an additional 10 months for completion. WVDOH has requested added information, added preliminary plan sheet, multiple plan changes, pursuant reviews, bonding, POA, Design Directive applications, first time conveyance documents from survey computations on plats and independent legal deeds and several re-submission of complete Preliminary Plan Sets after reviewing exchanged PDFs of changes. Additionally all oversight wants the approval of all other reviews present before each provides their approval bringing a time execution conundrum. Phase IIA Final Plat and fees are now submitted to JCPC awaiting acceptance for that review.

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.

NOTE: Request is not identifiable on a sketch. Vicinity USGS Map Attached.

Please note variances to the Subdivision Ordinance must comply with Article 17 of the Ordinance; and, variances from the Salvage Yard Ordinance must comply with Article 6 of the Ordinance. To justify your variance request, please address the following items:

1. The request is not contrary to the public interest. It is contrary to the public interest to not allow time for subdivision design consistent with this project's upgraded options, to provide needed quality growth consistent with planning goals and to allow evaluation of oversight review required for public welfare.
2. A literal enforcement of this Ordinance will result in unnecessary hardship. Denying this extension request would harm ASPEN GREENS opportunity to optimize better growth infrastructure, often cited as the primary goal of all county planning expenditures and that this body seeks to apply. This project work has removed previously harmful drainage flooding of roads, improved roads, and requires completion to find any hope of redeeming the costs of numerous county requirements already accomplished.
3. The request is not the result of a self-imposed hardship. This request is the result of actions taken by others beyond developer control. Not only has the required oversight multiplied by quantity and time of review required, but the ordinance timelines have never been adjusted to include added time to address them. This alone forces developers to avoid better design inclusions.
4. The spirit of this Ordinance will be observed and substantial justice done. Derailment of better design due to circumstances beyond the control of the developer are an unintended consequence of this Ordinance. It is precisely in the spirit of added orderly oversight inclusions that this extension is sought. Serving utilities must review and observe proposed impacts to their own best technical interests taking their coordination meeting times on many levels. These require months of input.

Signature of Property Owner


Signature of Property Owner
As agent for Roderick Planes, LLC

For official use only: Amount of fees paid \$100.00

Date of meeting/public hearing TUESDAY, MARCH 10, 2015 @ 7:00 pm

Official/Administrative body PLANNING COMMISSION

Posting requirements BY TUESDAY, FEBRUARY 24, 2015 - 2 PLACARDS

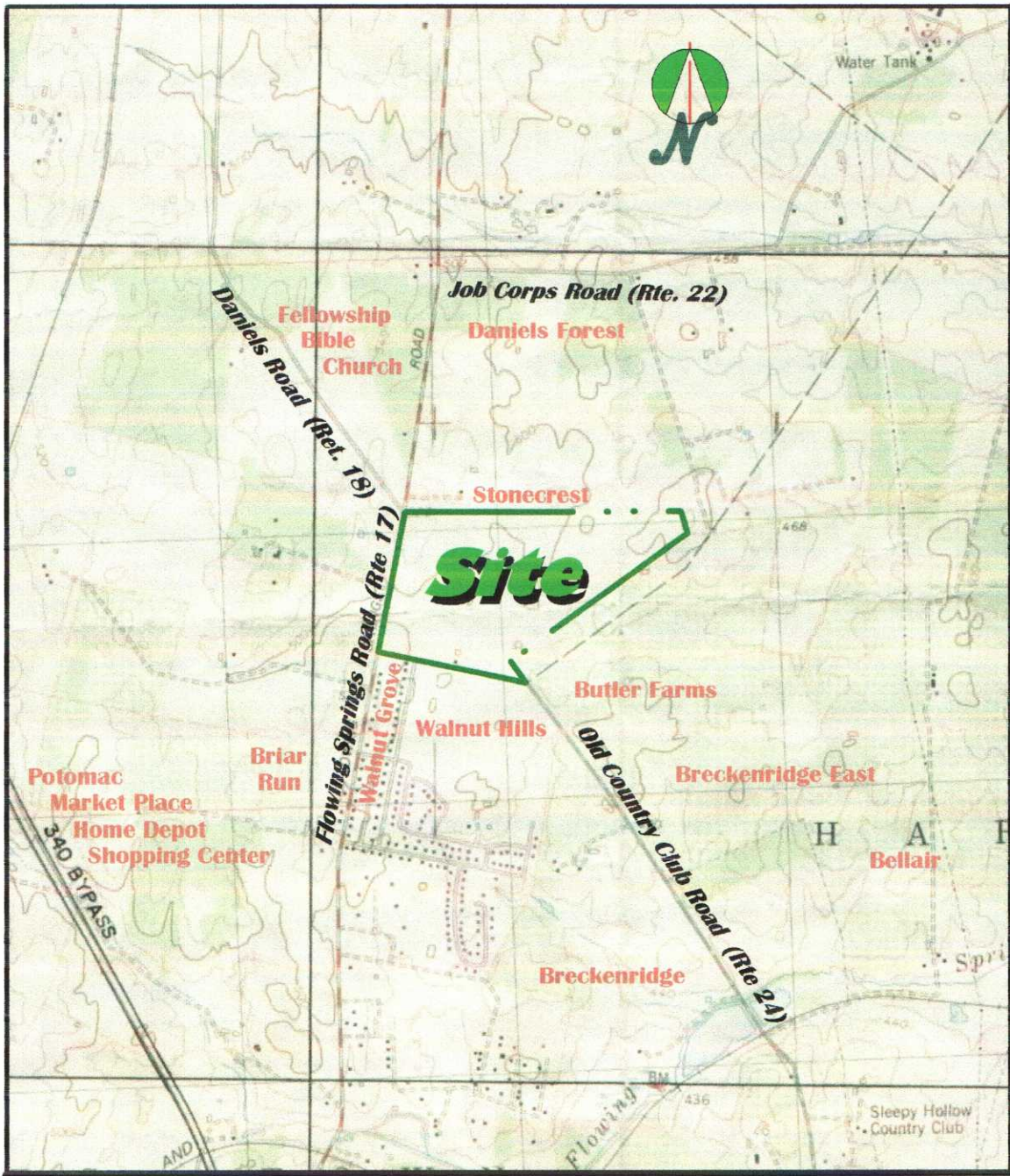
Advertising dates _____

Official Signature and Seal _____

Effective 6/72 Subdivision Ordinance - 8/94 Salvage Yard Ordinance

ASPEN GREENS Site Location

EXHIBIT EB



USGS Charles Town Quad Map

Scale 1" = 2000'

(Roads & Development Names Added)



Gates Associated, Inc.

288 Venice Way (off Rte. 45)

Shepherdstown, West Virginia 25443

[email: gatesassociated@aol.com phone/fax/voicemail: 1-304-876-6124]

Subj: RE: FW: Prompt Reply Please
Date: 2/6/2015 5:25:14 P.M. Eastern Standard Time
From: jbrockman@jeffersoncountywv.org
To: GatesAssociated@aol.com
CC: planningdepartment@jeffersoncountywv.org

Fred

I will try to clearly state our issues with accepting your Final Plat at this time and to explain the various time frame issues:

- 1) Due to the 10 month extension given by the Planning Commission in June 2014, your CIS will expire if a Public Hearing is not held on the Phase IIA Final Plat at or before the April 14, 2015 PC meeting (my interpretation of the due date).

RESULT: If the Preliminary Plat is not approved by or before February 17, 2015, you will need to submit a Subdivision Variance requesting an additional time extension for your CIS and the requirement for a Final Plat Public Hearing. This variance is due by 2/17/15 with a \$100 fee to be placed on the March 10, 2015 PC agenda.

- 2) The Final Plat Public Hearing requires a 30 day notice so the Final Plat would need to be accepted for publication by March 6, 2015 in order to be on the April 14, 2015 PC meeting agenda. This public notice cannot occur unless and until the Preliminary Plat has been approved.

RESULT: Submit all outside agency documentation in order for staff to approve the Preliminary Plat by March 6, 2015 to stay on the April 15, 2015 PC agenda (If this occurs, the Subdivision Variance in item #1 can be withdrawn).

- 3) There is a long standing policy that the Planning and Zoning Departments do not accept a Final Plat submission until the Preliminary Plat is actually approved (including all outside agency approvals), in part because the 1979 Subdivision Ordinance requires the Planning Commission to hold a public hearing and take action within 60 days from the date a Final Plat application was received, unless the applicant provided a written waiver to the Planning Department waiving this required time frame.

RESULT: In order for us to allow the Phase IIA Final Plat and fees to be held in our office, please submit written documentation stating that the Applicant is waiving the 60 day Public Hearing requirement. Otherwise, the Plat and check will be returned.

I hope that this clarifies the variety of issues and time frames impacting the submittal and processing of your Phase IIA Final Plat. The very first thing that has to happen is that we need to receive written documentation ASAP stating that the Applicant is waiving the 60 day Public Hearing requirement. Otherwise, the Plat and check will be returned.

Have a nice weekend

Jennie

Jennifer M. Brockman, AICP
Director, Planning and Zoning
116 E. Washington St. PO Box 338
Charles Town, WV 25414

Friday, February 06, 2015 AOL: GatesAssociated

Subj: **RE: Permit Number would help us with County timeline.**
Date: 2/5/2015 9:39:48 A.M. Eastern Standard Time
From: Larry.A.Alt@wv.gov
To: GatesAssociated@aol.com

Mr. Gates, I have received your plans and are working on getting you approval. I understand that you are in a crunch with time, but please understand I have many projects ongoing. I take these projects on first come first serve basis. I will not give a permit number until I all things are in order, which includes a signed copy of the permit. I can only hope that we are able to help you with your deadline. Larry

From: GatesAssociated@aol.com [mailto:GatesAssociated@aol.com]

Sent: Tuesday, February 03, 2015 11:39 AM

To: Alt, Larry A; mgladhill@aol.com

Subject: Permit Number would help us with County timeline.

Mr. Larry Alt,

Although I have not received any confirmation from you directly of your receipt of our Preliminary Plan copies as revised with your requested information plus developer/owners original signed copy of both POA and Bonding documents; our dialogue with Jefferson County approval is continuing. They are apparently holding back approval for their need for us to show your permit number for our IIA ASPEN GREENS entrance on their PP copy. This is important because of required time to advertise the FINAL PLAT for Planning Commission approval vote is running out. So, even though you may be proceeding in a timely manner with the documents sent to you, would it be possible to provide us with a permit number we may submit to JCPC to allow their scheduling of other required steps. In the meantime our project is stymied from avoiding harmful ordinance deadline consequences.

Please advise where we are on your processing. Obviously we are more than willing to help our project proceed should you have specific steps we may do for WDOH to move forward.

Cordially,

Fred W. Gates, P.S., President

GATES ASSOCIATED, Inc.

153 Venice Way

Shepherdstown, WV 25443

304-876-6124 (voicemail)

240-720-5801 (voicemail)

gatesassociated@aol.com (email)

From: [Jennifer Brockman](mailto:Jennifer.Brockman@jeffersoncountywv.org)
To: rgreenholtz@jeffersoncountywv.org
Cc: [Christine Chalmers](mailto:Christine.Chalmers@jeffersoncountywv.org)
Subject: FW: PC Ext. Signs Posted
Date: Monday, February 23, 2015 9:15:05 AM

Jennie Brockman
Director, Planning and Zoning

From: GatesAssociated@aol.com [mailto:GatesAssociated@aol.com]
Sent: Sunday, February 22, 2015 4:41 PM
To: jbrockman@jeffersoncountywv.org; mgladhill@aol.com
Subject: PC Ext. Signs Posted

Jennifer,

For the record, both public notice signs were today placed before more freeze:





Ahead of Tuesday deadline.

Fred W. Gates, P.S., President

GATES ASSOCIATED, Inc.

153 Venice Way

Shepherdstown, WV 25443

304-876-6124 (voicemail)

240-720-5801 (voicemail)

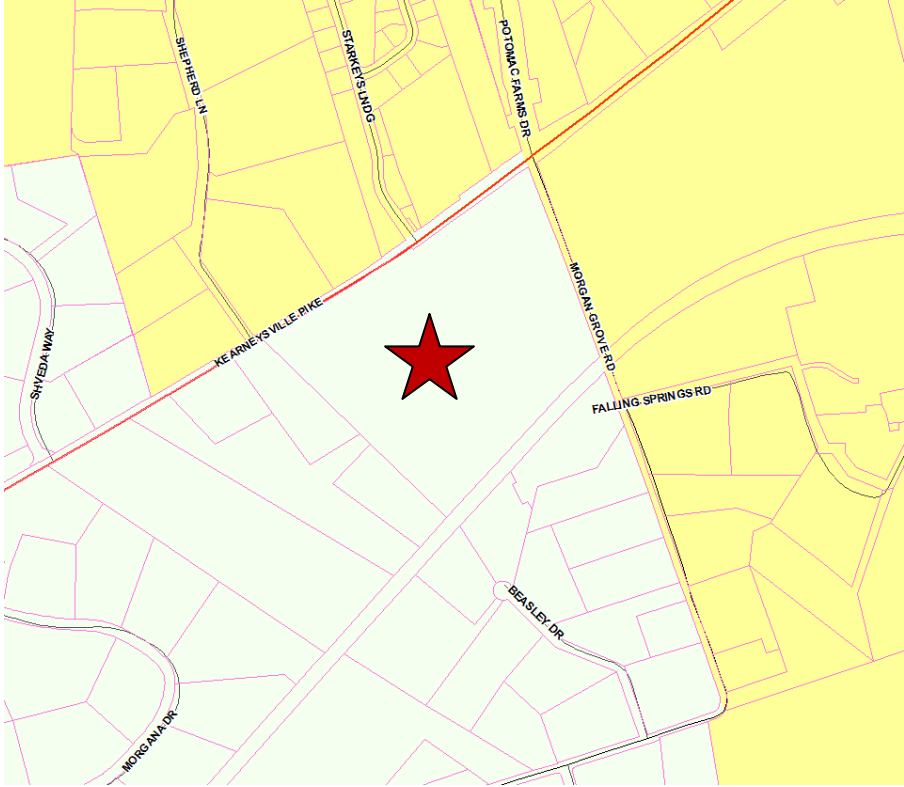
gatesassociated@aol.com (email)

This information is
Tab # 5 of your binder

Staff Report
 Jefferson County Planning Commission Meeting
 March 10, 2015

Shepherdstown Community Club (File# PCV-15-02)

Item #5: Request by applicant Shepherdstown Community Club (File #PCV15-02) related to the Morgan’s Grove Park property for a variance from Article 8, Section 8.2.c.1.d., of the 1979 Jefferson County Subdivision Ordinance (storm water management regulations). The applicant is requesting to install four – 50 gallon rain barrels in lieu of constructing an infiltration trench required as a part of the site plan for the kitchen and bathroom building.

| | |
|-------------------------|--|
| APPLICANT: | Shepherdstown Community Club |
| OWNER: | Same as above |
| DEVELOPER: | Same as above |
| SURVEYOR/ENGINEER: | Ed Johnson & Associates, Inc. |
| PROPERTY LOCATION: | The property is located southwest of the intersection of Kearneysville Road and Morgan Grove Road. |
| LEGAL DESCRIPTION: | District: Shepherdstown (09); Map: 13; Parcel: 28  |
| SURROUNDING PROPERTIES: | North: Residential Growth South: Rural East: Residential Growth West: Rural |
| LOT AREA: | 25.9 Acres |
| APPROVED ACTIVITY: | Installation of four – 50 gallon rain barrels in lieu of constructing an infiltration trench for stormwater management purposes. |

Staff Report
 Jefferson County Planning Commission Meeting
 March 10, 2015

| | |
|--|---|
| APPROVALS: | |
| Site Plan for Morgan’s Grove Park | Submitted: 09/09/1998 Approved: 10/28/1998 |
| Limited Site Plan for the Shepherdstown Mens Club Kitchen and bathroom building. | Approved: 01/18/2002 |

The Property:

Morgan’s Grove Park is a 25 acre park located south of Shepherdstown and owned by the Shepherdstown Community Club (SCC). The SCC purchased the property in 1961 and named the new park Morgan’s Grove Park after a prominent early settler who had lived on the property, Captain Richard Morgan. The Park is part of the Morgan’s Grove Historic District. While the SCC is responsible for the capital improvements and many of the operating expenses, the Park is currently operated and programmed under lease by the Jefferson County Department of Parks and Recreation. The Park includes a children’s playground, a walking path, soccer fields, a volley ball court, a covered pavilion and kitchen, barbecue grills, playground equipment, and picnic tables.

In 2002, when the SCC decided to construct the kitchen and bathroom facilities, a Limited Site Plan, including stormwater management provisions was required. The SCC has held a bond on the required drainage trench since the Plan was approved but it was never constructed.

The Request:

The Shepherdstown Community Club (SCC) is requesting that the storm water management requirements that resulted from the addition of the 960 sq. ft. kitchen and bathroom building in 2002 be addressed by the installation of rain barrels at the building's roof drainage downspouts instead of the previously approved trench. The SCC believes that the rain barrels will be less disruptive to the existing soils and vegetation and more in line with current acceptable methods of storm water management, providing a robust ecological balance to the existing area by mitigating any excavation requirements. Rain barrels will also provide an inexpensive source of water that is required by the SCC to irrigate the young trees that are planted on the property each year (approximately 125 in the last 2 years).

Variance Requirements:

The variance process in the 1979 Subdivision Ordinance is different from the waiver process outlined in the 2008 Subdivision Regulations. In order to grant a variance the following four criteria must be met. While the recommendations related to this request are primarily from Engineering, the comments below are the Planning and Zoning Staff’s comments related to the criteria:

The request is not contrary to the public interest.

The purpose of the stormwater requirements is to ensure there is no increase in off-site run-off quantity and no negative water quality impacts. If the proposed rain barrels adequately meet the engineering requirements, the request variance is not contrary to the public interest.

A literal enforcement of this Ordinance will result in unnecessary hardship.

There are a number of alternative stormwater designs that can meet the intent of the subdivision regulations. The newly adopted Stormwater Regulations allow for more low impact designs such as

Staff Report
Jefferson County Planning Commission Meeting
March 10, 2015

rain barrels. A literal enforcement of the older regulations would not allow this lower impact design which is now acceptable.

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

While the development of the kitchen/bathroom facility created the need for the stormwater facility, the requested variance to utilize the rain barrels is an alternative design is not a self-impose hardship.

The spirit of this Ordinance will be observed and substantial justice done.

The spirit of the Ordinance is to effectively address the stormwater requirements with the least negative impact. The rain barrels do meet the spirit of the Ordinance and achieve substantial justice.

Recommendation

Planning and Zoning staff defer to the Engineering staff regarding this Variance request.

VARIANCE REQUEST

I/We request a variance from the provisions of the Jefferson County Subdivision and/or Salvage Yard Ordinance.

Property Owner(s): SHEPHERDSTOWN COMMUNITY CLUB

Address: PO BOX 463

SHEPHERDSTOWN, WV 25443

Phone Number: 304-876-3323

Location of Property: 4198 KEARNEYSVILLE ROAD

SHEPHERDSTOWN, WV 25443

Lot Size: 20+ ACRES 25.9 acres

Deed Book Reference: Deed Book Number 249, Page Number 93

Tax Map Reference: District SHEPHERDSTOWN (09) Map 13, Parcel 28

Zoning District: RURAL

Section of Ordinance: 8.2.c.1.d

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

PLEASE SEE ATTACHMENT 1.

RECEIVED


FEB 17 2015

JEFFERSON COUNTY PLANNING,
ZONING & 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 variances to the Subdivision Ordinance must comply with Article 17 of the Ordinance; and, variances from the Salvage Yard Ordinance must comply with Article 6 of the Ordinance. To justify your variance request, please address the following items:

1. The request is not contrary to the public interest. _____
The use of a Rain Barrel will have a better
ENVIRONMENTAL OUTCOME.
2. A literal enforcement of this Ordinance will result in unnecessary hardship. _____
Regulations have changed since the
original Design approval in 2000.
3. The request is not the result of a self-imposed hardship. _____
This request is a MORE ENVIRONMENTALLY FRIENDLY
option.
4. The spirit of this Ordinance will be observed and substantial justice done. _____
This is a MORE ENVIRONMENTALLY FRIENDLY
option.


MARK A. SHIELDS, PRESIDENT SCC
Signature of Property Owner

Signature of Property Owner

For official use only: Amount of fees paid _____
Date of meeting/public hearing _____
Official/Administrative body _____
Posting requirements _____
Advertising dates _____
Official Signature and Seal _____

Effective 6/72 Subdivision Ordinance - 8/94 Salvage Yard Ordinance

Jefferson County, West Virginia

Department of Planning

116 East Washington Street, Suite 201

P.O. Box 338

Charles Town, West Virginia 25414

planningdepartment@jeffersoncountywv.org

Phone: (304) 728-3228

Fax: (304) 728-8126

Staff Assignment #: _____

Please be advised that staff from the Department of Planning is authorized to make necessary revisions to the enclosed submission if required for processing. I understand that said revisions will be discussed with me prior to content modification.

Applicant PRINTED Name: _____

Applicant SIGNATURE: _____

Contact Number: _____

Date: _____

ATTACHMENT 1

Shepherdstown Community Club
PO Box 463
Shepherdstown WV 25443

Location of Property: Morgan's Grove Park
4198 Kearneysville Road
Shepherdstown, WV 25443

The Shepherdstown Community Club(SCC) (formally known as the Shepherdstown Mens Club) built a 960 sq. ft. structure on the park property in the early 2000 time period. At the time the structure was build the site plan called for a Storm Water Management Filtration Trench to be built approximately 140 feet downhill from the structure. This trench would be 65 feet long, 1 foot deep and require a cut and fill area of approximately 14 feet in total width. The current design requirements are detailed on "*sheet 2 (redline revision January 16, 2002) of the limited site plan.*"

The SCC agrees that any storm water management requirements need to be fulfilled. The SCC is requesting that any storm water problems that may have been introduced by the addition of the 960 sq. ft. building be managed by the installation of Rain Barrels at the building's roof drainage downspouts. The addition of rain barrels is less disruptive of the existing soils and vegetation. A rain barrel is more in line with current acceptable methods of storm water management and provides a robust ecological balance to the existing area by mitigating any excavation requirements. Rain barrels will also provide an inexpensive source of water that is required by the SCC to irrigate young trees that are yearly planted on the property (approximately 125 in the last 2 years).

In reviewing the history of this long overdue project and the park experiences of rain events over the last 15 years (since the installation of the Kitchen/rest rooms/ utilities shelter) there has been no evidence of erosion, flooding or other adverse events on the land and surrounding environment in the area around the structure. The current surrounding vegetated area, recognized as Best Practice Management of storm water, has for the last 15 years effectively treated any storm water no matter how severe (including the storm of Spring 2012). The excavation and introduction of a water filtration trench risks disturbing the ecological balance presently existing in the area.

The SCC maintains that the project as now designed will present a greater risk of introduction of silt and sediment into the surrounding watershed. The placement of four – 50 gal rain barrels at the 960 sq. ft. building is a preferred storm water management option.

NEW BLDG
FLOOR EL. 448
860 SQ. FT.

Approved for
Revised Revision
By: *Edward L. Johnson, P.E.* 01/12/02
County Engineer Date

EXISTING PAVILION
FLOOR EL. 448.7
60'
EXISTING WALK
NEW WALK
EL. 448.7
EL. 448.7

442
440
438
436
437
438
440
442

STORM WATER
MANAGEMENT
Filtration TRENCH
USE AS A TEMPORARY
SEDIMENT BASIN
DURING CONSTRUCTION

TRENCH
TO BE RELOCATED

NEW
STORM WATER
MANAGEMENT

NOTE: NO DIV
OF TR
OR DIST
VEGETAL
A PLAN
AND
HAS TO
ENGINEER
RECORD

MORGAN'S GROVE PARK
LIMITED SITE PLAN FOR NEW BUILDING - KITCHEN

SCALE 1" = 20'

0 BOTTOM 336.5 L=65'
TOP 337.5
RIP RAP
OUTLET

EDWARD L. JOHNSON, JR.
LICENSED
NO. BCG
STATE OF
WEST VIRGINIA
PROFESSIONAL SURVEYOR

ED JOHNSON & ASSOCIATES, INC.
LAND SURVEYORS
331 NORTH GEORGE STREET
P.O. BOX 1277

JEFFERSON COUNTY

EL HORSESHOE COURTS (3 COURTS)

STRUCTURE REMOVED

POWER
POLE TO BE
REMOVED

TREE
A370

WALLS

Engineering Report

Morgan's Grove Park Waiver for Stormwater Management 03/10/2015

Request:

Shepherdstown Community Club (formally Shepherdstown Men's Club) is requesting a waiver from the JEFFERSON COUNTY SUBDIVISION ORDINANCE (1979), Section 8.2. Design and Construction Requirements (a) Roads and Rights-of-way. More specifically 8.2.c.1.d Stormwater Management (Quantity) which states:

8.2 c. 1.

&^= (d) Stormwater Management (Quantity)--See Table 8.c.1 on Page #61 [[page# changed in electronic version; table is immediately below]]. Contributing watershed shall be approved by the Engineer based on drainage data and design proposals submitted by the subdivider. The Engineer may reduce the allowable release rates based on evidence that conventional computations are not consistent with field conditions, a complete hydrological model of the stream basin within which the project is located and the need to balance flows within said stream in order to protect existing structures or the integrity of FEMA floodplain in delineations. The need for said balance would be related to the threat of downstream flooding. An off-site stormwater management facility may be used instead of an on-site facility when (1) an adequate route of conveyance between the site and the off-site facility exists, or will be built, as part of the project, (2) the off-site facility has the capacity or can be retrofitted to meet the criteria stated above and (3) the developer has the right to use the off-site facility.

The applicant is requesting a waiver to substitute a current low impact development technology (rain barrels) in-lieu-of an infiltration trench.

Findings:

- The approved site plan shows a 65' in length, 3' bottom with 4 to 1 side slopes , and a berm of 3' width infiltration trench.
- The volume of water stored from the bottom of trench to the weir elevation is 227.5 CF.
- The plans state there is a power pole to be relocated where the trench is to be placed.

- The estimated disturb area for installation of this infiltration trench would be about 18' in width and 73' in length, totaling over 1300 SF.
- Leaving the area grass/lawn is a form of SWM in the current regulation. Especially if it is in a sheet flow form.
- The applicant is proposing to place 4, 55 gal rain barrels to catch the water from the proposed roof.
- Current subdivision regulation encourages the use of low impact development devices.
- The project is currently bonded. With this waiver and installation of the rain barrel, the bond could be release and this project closed.

Conclusion:

My understanding is that the applicant wants to provide stormwater management through the use of four rain barrels instead of the proposed infiltration trench. The issue is the rain barrels will not have the volume capacity the infiltration trench was designed for. However, the impact of installing the infiltration trench will have more soil disturbance compared to the rain barrels and leaving trench area in grassy condition is a SWM practice also. Leaving the area in grassy/lawn conditions would minimize/eliminate erosion of the soil and will help compensate for the volume capacity difference.

The engineering department recommendation is to grant this waiver.

This information is
Tab # 8 of your binder



Jefferson County, West Virginia

Departments of Planning and Zoning

116 East Washington Street, 2nd Floor

Charles Town, WV 25414

Email: planningdepartment@jeffersoncountywv.org

Phone: (304) 728-3228

Email: zoning@jeffersoncountywv.org

Fax: (304) 728-8126

Director's Report Planning Commission Meeting March 10, 2015

1) Status of Zoning Administrator/Planner Search

Three interviews held on Friday February 27, 2015

2) Revisiting Robert's Rules of Order Procedures for Small Boards

- a. Consideration of requiring a second prior to discussion for PC actions related to land development applications

3) Recent/Upcoming CC Actions relevant to Planning:

- a) *Envision Jefferson 2035 Comprehensive Plan* – APPROVED

Link for the signed version of Envision Jefferson 2035:

<http://www.jeffersoncountywv.org/government/departments/planning-and-zoning-department.html>

If you would like a printed copy of the Plan and/or the Future Land Use Guide or if you would like to bring in your USB memory stick so that we can transfer the files for you, please let the staff know.

- b) County Commission Public Hearing on the landowner-initiated petition to amend the County Zoning Map for a 0.98 acre property owned by David N. Slusher located on the southwest corner of the Route 340/Straithmore Farm Lane/Wheatland Road from Rural to General Commercial (*County Commission action scheduled for 3/5/15*)
- c) County Commission Public Hearing on the landowner-initiated petition to amend the County Zoning Map for a 404.69 +/- acre property owned by Standard Land Company, LLC located on the east side of Millville Road (Route 27), ½ mile south of the intersection with Route 340 in Harpers Ferry from Rural and Residential Growth to Residential-Light Industrial-Commercial (*County Commission Public Hearing 3/19/15 7:00 pm*)

- d) Request to schedule three public hearings on Planning Commission initiated text amendments to the Subdivision and Land Development Regulations (*3/5/15 CC Meeting to set PH dates*)
 - i. Recommendation to amend the definition of “days” from business days to calendar days in Section 26.200 of the Jefferson County Subdivision and Land Development Regulations for the purpose of setting a public hearing to be held by the County Commission (STA15-01).
 - ii. Recommendation to amend Section 20.104, “Exceptions”, of the Jefferson County Subdivision and Land Development Regulations, subsection “C”, to “exempt” public utilities and private utility firms processing easements from these Regulations for the purpose of setting a public hearing to be held by the County Commission (STA15-02).
 - iii. Recommendation to amend Section 24.300, “Waivers”, of the Jefferson County Subdivision and Land Development Regulations to change the last sentence of the introductory paragraph stating “No process or procedural waivers shall be granted” to “Process and procedural waivers shall be reviewed and found consistent with the above criteria prior to approval” for the purpose of setting a public hearing to be held by the County Commission (STA15-03)
- b) County Commission discussion/action on proposed Zoning Ordinance text amendment regarding Mass Events (#ZTA 14-02) (*County Commission workshop TBD in early 2015*)

3) Upcoming BZA meetings

- a) Next Regular Meeting: **April 14, 2015**

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**GARY L. CAPRIOTTI; EDWARD R. MOORE;
EDWARD E. DUNLEAVY; AND SHEPHERDSTOWN
BATTLEFIELD PRESERVATION ASSOCIATION, INC.,
Petitioners Below, Petitioners**

FILED
February 26, 2015
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 13-1243 (Jefferson County No. 11-C-325)

**JEFFERSON COUNTY PLANNING COMMISSION,
Respondent Below, Respondent**

**FAR AWAY FARM, LLC,
Intervenor Below, Respondent**

MEMORANDUM DECISION

The petitioners herein, Gary L. Capriotti; Edward R. Moore; Edward E. Dunleavy; and Shepherdstown Battlefield Preservation Association, Inc. (“the Petitioners”), by counsel Linda M. Gutsell, appeal from orders entered November 8, 2013, and November 27, 2013, by the Circuit Court of Jefferson County. By those orders, the circuit court reversed its earlier ruling granting partial summary judgment to the Petitioners and found, instead, that the respondent herein, Jefferson County Planning Commission (“Planning Commission”), who is represented herein by Stephen V. Groh, had not violated the West Virginia Open Governmental Proceedings Act, W. Va. Code § 6-9A-1 *et seq.* (“the Act”). On appeal to this Court, the Petitioners contend that the circuit court erred by setting aside its prior ruling and by concluding that the Planning Commission had not violated the Act. The Planning Commission and the additional respondent herein, and intervenor below, Far Away Farm, LLC (“FAF”), by counsel Richard G. Gay and Nathan P. Cochran, maintain that the circuit court’s rulings were proper.

Upon our review of the parties’ arguments, the appendix record, and the pertinent authorities, we affirm, in part, and reverse, in part, the rulings of the Jefferson County Circuit Court. We affirm the circuit court’s ruling reversing its prior order and finding that the Planning Commission had not violated the Act’s provisions regarding executive session proceedings. However, we reverse the remaining portions of the circuit court’s order and find that the Planning Commission did violate the Act’s requirement that it provide agenda

notice of the topics it planned to consider during its meeting and that it disclose the terms of the subject settlement. Accordingly, we remand this case for further proceedings consistent with this opinion. Because this case does not present a new or significant issue of law, and for the reasons set forth herein, we find this case satisfies the “limited circumstances” requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure and is proper for disposition as a memorandum decision.

In June 2004, FAF applied for a conditional use permit (“CUP”) to allow it to develop a residential subdivision. The Jefferson County Planning and Zoning Director determined that FAF’s property was suitable for the proposed development, but, before the CUP was issued, certain of the Petitioners herein appealed the suitability determination to the Jefferson County Board of Zoning Appeals (“the BZA”) based upon their status as owners of land adjacent to the FAF property and also believing that FAF’s property was the site of a Civil War battlefield.¹ During those proceedings, the CUP requested by FAF was denied. Protracted litigation ensued culminating in this Court’s decision in *Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals*, 222 W. Va. 252, 664 S.E.2d 137 (2008), in which the Court approved the issuance of FAF’s requested CUP. Following the issuance of this Court’s opinion, the case was unsuccessfully appealed to the United States Supreme Court. *See Dunleavy v. Far Away Farm, LLC*, 555 U.S. 1012, 129 S. Ct. 573, 172 L. Ed. 2d 431 (2008) (denying certiorari). Thereafter, the Planning Commission filed a federal lawsuit against FAF seeking to have this Court’s decision overturned, which suit was dismissed. *See Jefferson Cnty. Planning Comm’n v. Far Away Farms, LLC*, No. 3:09-CV-45 (BAILEY), 2009 WL 3617749 (N.D. W. Va. Oct. 29, 2009) (unreported decision).

Following the conclusion of the federal court proceedings, FAF made two requests to the Planning Commission for consideration at its December 14, 2010, meeting: (1) that all Planning Commission members who had been involved in the federal lawsuit recuse themselves and (2) that the impending deadlines associated with FAF’s CUP be extended insofar as it had been unable to proceed with its development plans due to the ongoing and protracted litigation or that it be granted a variance therefrom.² The Planning Commission denied both of these requests. FAF then requested an order from the Planning Commission

¹It since has been determined that the Civil War battle believed to have occurred on FAF’s property in fact occurred on nearby property and not on the property that FAF seeks to develop.

²FAF based its request for the extension of its deadlines and/or a variance therefrom on W. Va. Code § 8A-5-12(f) (2010) (Repl. Vol. 2012) and this Court’s prior decision in *Jefferson Utilities, Inc. v. Jefferson County Board of Zoning Appeals*, 218 W. Va. 436, 624 S.E.2d 873 (2005).

memorializing its decisions and filed a petition for writ of certiorari in the Jefferson County Circuit Court to obtain relief from the Planning Commission's rulings. Although the Petitioners moved to intervene in FAF's certiorari proceeding, and a hearing was held on their motion, the circuit court did not render a final ruling on said motion.

Thereafter, FAF tendered a settlement offer to the Planning Commission's attorney on July 26, 2011, shortly before the Planning Commission's regularly scheduled meeting for that night. When it reached its listed agenda item entitled "Reports from Legal Counsel and legal advice to P[lanning]C[ommission]," a motion was made to go into closed executive session to discuss legal matters; the motion carried. During the executive session, counsel for the Planning Commission presented FAF's settlement offer and conferred with the Planning Commission, and the Planning Commission reportedly discussed a counteroffer. Upon a successful motion to end the closed executive session and return to public session, an additional motion was made "to proceed with the order as presented by Counsel in executive session and to authorize [the Planning Commission] President to sign the order"; this motion also passed. Following the meeting, a counteroffer was tendered to FAF. By order entered August 3, 2011, the circuit court approved the parties' settlement³ and dismissed the certiorari proceeding. By notation on the court's order, a copy of the settlement order was sent to counsel for each of the two parties and to counsel for the Petitioners. Thereafter, on September 21, 2011, the Petitioners filed a petition in the Circuit Court of Jefferson County against the Planning Commission alleging violations of the Open Governmental Proceedings Act and requesting that the settlement between FAF and the Planning Commission be annulled due to such alleged violations. FAF moved to intervene in the Petitioners' suit and was granted intervenor status.

By order entered June 19, 2012, the circuit court granted partial summary judgment to the Petitioners finding that the Planning Commission had violated the Act's advance notice requirements of W. Va. Code § 6-9A-3 (1999) (Repl. Vol. 2010)⁴ because the Planning Commission had not listed the specific topic of the FAF litigation on its July 26, 2011, meeting agenda. The court additionally found that the Planning Commission had failed to comply with W. Va. Code § 6-9A-4(b)(11) (1999) (Repl. Vol. 2010) insofar as it did not reveal that it had received a settlement offer that it would be considering. Finally, the court determined that the Planning Commission had failed to disclose the terms of the settlement within a "reasonable time after the settlement is concluded" as required by W. Va. Code § 6-

³The agreed settlement resulted in the reissuance of FAF's CUP, permission for FAF to use its prior documentation in lieu of the alternate documentation required under the county's new subdivision ordinance, and the resetting of the applicable deadlines.

⁴*See infra* note 6.

9A-4(b)(11). While the circuit court denominated this ruling as an appealable, final order, the court did not grant any relief to the Petitioners other than an award of partial summary judgment. The Planning Commission and FAF appealed the circuit court's rulings to this Court, but this Court dismissed the appeal upon the Petitioners' motion. On June 11, 2013, the Planning Commission held a curative meeting in an attempt to remedy the violations of the Act that the circuit court had identified in its partial summary judgment order.

The Petitioners then requested the circuit court to determine the proper remedy to award to them as a result of the Planning Commission's violations of the Act. During the course of the proceedings, the Planning Commission filed a "Motion to Reconsider and Set Aside Partial Summary Judgment," which the circuit court treated as a motion made pursuant to Rule 60(b)(6) of the West Virginia Rules of Civil Procedure.⁵ Additionally, FAF moved to limit the remedy to be awarded to the Petitioners. By order entered November 8, 2013, the circuit court determined that it had improperly relied upon this Court's prior opinion in *Peters v. County Commission of Wood County*, 205 W. Va. 481, 519 S.E.2d 179 (1999), which was decided under the predecessor to W. Va. Code § 6-9A-4 and which statute did not contain exceptions 11 and 12 that are at issue in the case *sub judice*. In reconsidering its prior decision, the circuit court found that the Planning Commission had not violated the Act because W. Va. Code § 6-9A-4(b)(12) (1999) (Repl. Vol. 2010) permitted it to hold a closed executive session to confer with its attorney and to receive legal advice insofar as such communications are protected by the attorney-client privilege and are deemed to be confidential. The circuit court then determined that it need not decide whether the Planning Commission's disclosure of the parties' settlement at its October 2011 meeting had violated the requirement of W. Va. Code § 6-9A-4(b)(11) that settlement terms be disclosed in a "reasonable time after the settlement is concluded" because there existed a genuine issue of material fact as to when the subject settlement was concluded, *i.e.*, at the Planning Commission's meeting of July 26, 2011, or on August 3, 2011, when the circuit court approved the parties' settlement, that rendered the court's earlier grant of summary judgment on that issue improper. Finally, the circuit court concluded that the Planning Commission had not commenced its executive session on July 26, 2011, merely because its attorney was present as expressly prohibited by W. Va. Code § 6-9A-4(b)(11). Accordingly, the circuit court vacated its earlier decision granting partial summary judgment to the Petitioners.

By supplemental order entered November 27, 2013, the circuit court conclusively determined that the Planning Commission also had not violated W. Va. Code § 6-9A-

⁵Rule 60(b)(6) of the West Virginia Rules of Civil Procedure permits a court to "relieve a party . . . from a final judgment . . . for . . . any other reason justifying relief from the operation of the judgment."

4(b)(11), which matter had been left unresolved by its prior order. In so deciding, the circuit court determined that the date of the settlement's conclusion was rather inconsequential, and that, upon the court's approval of the parties' settlement, the settlement was entered into the public records of the circuit court. Thus, the court determined that the settlement terms were made a matter of public record within a "reasonable time" of its conclusion. Moreover, the circuit court noted that the Petitioners, by counsel, had received a copy of the settlement order upon its entry. Therefore, the circuit court explained, the terms of the settlement had been disclosed to the public well before the Planning Commission referenced the settlement at its October 11, 2011, meeting and its "official publication of the meeting minutes." From these two orders, the Petitioners now appeal to this Court.

On appeal to this Court, the Petitioners contend that the circuit court erred by vacating its prior partial summary judgment order. The court reached this decision in the context of considering and granting the Planning Commission's Rule 60(b)(6) motion for relief from the court's earlier ruling. This Court previously has held that "[a] motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Syl. pt. 5, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974).

Before this Court, the Petitioners assert that the circuit court erred by finding there exists a genuine issue of material fact regarding the conclusion date of the settlement between the Planning Commission and FAF; determining that the Planning Commission had not violated the Act; and concluding that any violation of the Act in the case *sub judice* was *de minimis* and did not entitle the Petitioners to a remedy.

The Petitioners first contend that, throughout these proceedings, they have always maintained that August 3, 2011, is the date upon which the Planning Commission and FAF concluded their settlement. The settlement conclusion date is referenced in W. Va. Code § 6-9A-4(b)(11) as the date from which the "reasonable time" begins to run and as the time within which the Planning Commission was required to disclose the settlement's terms. Thus, the Petitioners contend that the circuit court erred by concluding that there exists a genuine issue of material fact as to the settlement conclusion date because all parties agree that the settlement was concluded when the circuit court approved and entered the parties' agreed settlement order on August 3, 2011, and not during the Planning Commission's meeting on July 26, 2011. While the circuit court acknowledged a possible issue of fact regarding the settlement's conclusion date, this factual issue did not form the basis of the circuit court's initial decision to vacate its partial summary judgment order nor preclude it from ultimately determining whether a violation had occurred under W. Va. Code § 6-9A-4(b)(11). Rather, the circuit court based its initial decision to vacate its partial summary

judgment order upon its perceived misplaced reliance on this Court’s prior decision in *Peters v. County Commission of Wood County*, 205 W. Va. 481, 519 S.E.2d 179 (1999). In this regard, the circuit court found that its reliance on *Peters* was misplaced because the prior version of the Act, upon which the *Peters* decision relied, does not contain exceptions 11 and 12, which are set forth in the current version of the Act, W. Va. Code §§ 6-9A-4(b)(11-12), and which apply to the facts of this case. Moreover, in its subsequent order, the circuit court nevertheless determined that even if a factual dispute exists as to the date of the settlement’s conclusion, it did not preclude the circuit court from deciding whether the Planning Commission had violated the Act’s requirement that it disclose the settlement’s terms within a “reasonable time” of its conclusion. *See* W. Va. Code § 6-9A-4(b)(11). We agree with the circuit court’s ultimate conclusion that the issue of when, precisely, the parties consummated their settlement agreement does not preclude our determination of the fundamental issue presented by the case *sub judice*: whether the Planning Commission violated the Act. Therefore, we affirm the circuit court’s orders in this regard.

The Petitioners next assign error to the circuit court’s rulings finding that the Planning Commission did not violate the Act. In support of their argument, the Petitioners assert that the Planning Commission committed three separate violations of the Act. Because the Act is a body of statutory law, our well-established rules of statutory construction will guide our consideration of these assigned errors. *See generally* Syl. pt. 1, *Smith v. State Workmen’s Comp. Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975) (“The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.”). *See also* Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968) (“Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.”); Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959) (“When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.”).

First, the Petitioners contend that the Planning Commission violated the Act’s agenda notice provision. The agenda notice requirement is set forth in W. Va. Code § 6-9A-3:

Each governing body shall promulgate rules by which the date, time, place and *agenda of all regularly scheduled meetings* and the date, time, place and purpose of all special meetings *are made available, in advance, to the public* and news media, except in the event of an emergency requiring

immediate official action.^[6]

(Emphasis and footnote added). The Petitioners assert that the Planning Commission failed to include in its July 26, 2011, meeting agenda any reference to the FAF litigation or to the Planning Commission's intention to discuss the same during that meeting. The July 26, 2011, meeting agenda item corresponding to the Planning Commission's consideration of FAF's proposed settlement was titled "Reports from Legal Counsel and legal advice to PC."⁷

Considering the referenced agenda item together with the pertinent statutory language, we agree with the Petitioners' contention that the noticed agenda item was insufficient to notify the public that the Planning Commission intended to discuss the FAF litigation during its meeting of July 26, 2011. The plain language of W. Va. Code § 6-9A-3 expressly requires a public body to make available to the public, in advance of a scheduled meeting, the agenda for said meeting. The purpose of this notice requirement is to fulfill the Legislature's stated policy of maintaining an "[o]pen government" and providing "public access to information." W. Va. Code § 6-9A-1 (1999) (Repl. Vol. 2010). Such openness is intended to "allow[] the public to educate itself about government decisionmaking through individuals' attendance and participation at government functions . . . and public debate on issues deliberated within the government." *Id.* By the same token,

[p]ublic access to information promotes attendance at meetings . . . and encourages more . . . complete discussion of issues by participating officials. The government also benefits from openness because . . . public input allow[s] government agencies to gauge public preferences accurately and thereby tailor their actions and policies more closely to public needs. . . .

Id. Despite these statutory directives aimed at providing notice to interested individuals of the topics to be discussed at the meetings of public bodies, the agenda notice provided by the Planning Commission in the case *sub judice* was not adequate to inform the Petitioners, and other members of the public, that it planned to discuss the FAF litigation or a proposed settlement thereof. Rather, the agenda's generic reference to "legal advice" provided no indication whatsoever that the ongoing FAF proceedings would be a topic of discussion at

⁶In 2013, the Legislature amended W. Va. Code § 6-9A-3, placing the pertinent agenda notice language in subsection (d). *See* W. Va. Code § 6-9A-3(d) (2013) (Supp. 2014). However, because the events giving rise to the case *sub judice* occurred in 2011, we will apply the prior version of the operative statutory language to our decision of this case.

⁷The appendix record contains numerous Planning Commission meeting agendas which contain the same general entry: "Reports from Legal Counsel and legal advice to PC."

the Planning Commission's July 26, 2011, meeting. Because the agenda notice did not adequately inform the public of the specific items to be considered at the Planning Commission's July 26, 2011, meeting, we find that the Planning Commission violated W. Va. Code § 6-9A-3 and reverse the circuit court's contrary ruling.

The Petitioners next contend that the Planning Commission did not properly announce the authorization for its executive session as required by W. Va. Code § 6-9A-4(a) (1999) (Repl. Vol. 2010). W. Va. Code § 6-9A-4(a) details the procedure for convening an executive session:

The governing body of a public agency may hold an executive session during a regular, special or emergency meeting, in accordance with the provisions of this section. During the open portion of the meeting, prior to convening an executive session, *the presiding officer of the governing body shall identify the authorization under this section for holding the executive session and present it to the governing body and to the general public*, but no decision may be made in the executive session.

(Emphasis added). W. Va. Code § 6-9A-4(b) (1999) (Repl. Vol. 2010) further directs “[a]n executive session may be held only upon a majority affirmative vote of the members present of the governing body of a public agency. A public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions[.]” The exceptions set forth in W. Va. Code §§ 6-9A-4(b)(11-12) are within the “following actions” referenced by W. Va. Code § 6-9A-4(b). During the Planning Commission's July 26, 2011, meeting, Commissioner “Mr. Smith moved to go into executive session to discuss legal matters.” The motion was seconded and unanimously approved.

W. Va. Code § 6-9A-4(b)(12) allows an executive session to be held “[t]o discuss any matter which . . . is rendered confidential.” Thus, conferring with counsel “to discuss legal matters” would be included within the confidential matters contemplated by W. Va. Code § 6-9A-4(b)(12). Therefore, the explanation for the Planning Commission's decision to hold an executive session was properly communicated during the open public meeting, and, while the corresponding statutory section was not cited, the motion accurately identified the statutorily-authorized reason for convening an executive session: to discuss legal matters. When coupled with the agenda item under which this motion was made, which concerned reports from the Planning Commission's counsel and advice therefrom, it is clear that the intended purpose of the executive session was to discuss legal matters with the Planning Commission's counsel that are protected by the attorney-client privilege and that come within

the purview of W. Va. Code § 6-9A-4(b)(12). Accordingly, we affirm the circuit court's conclusion that the Planning Commission did not violate this portion of the Act.

The third alleged violation of the Act raised by the Petitioners asserts that the Planning Commission violated the Act by not reporting the settlement's terms within a "reasonable time" of its conclusion as required by W. Va. Code § 6-9A-4(b)(11). Pursuant to the relevant portion of W. Va. Code § 6-9A-4(b)(11), "[i]f the public agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, *the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded.*" (Emphasis added). In concluding that the Planning Commission had complied with this disclosure requirement, the circuit court determined that the inclusion of the settlement's terms in the public record of the court, when the court entered the agreed settlement order on August 3, 2011, satisfied the Planning Commission's obligation to disclose such terms. The Petitioners argue that such disclosure does not fulfill the statutory requirements. We agree.

Pursuant to the plain language of W. Va. Code § 6-9A-4(b)(11), a public body entering into a non-confidential settlement must (1) report the settlement's terms and (2) include the settlement's terms in its minutes. All of the parties agree that the terms of the settlement entered into by the Planning Commission and FAF were *not* confidential. While the Planning Commission referenced the settlement at its meeting of October 11, 2011, and indicated that it would attach the final settlement to the minutes of that meeting, it has yet to do so. Specifically, the October 11, 2011, meeting minutes reflect that "Ms. Grove [counsel for the Planning Commission] stated that the order discussed at the July 26, 2011 Planning Commission meeting had been signed and should be included in the minutes. (Full text of the order is attached)." The referenced order presumably is the counteroffer proposed by the Planning Commission which ultimately became the agreed settlement order entered by the circuit court. Despite this language indicating that a document would be attached to the Planning Commission's October 11, 2011, meeting minutes, such minutes, as they appear on the Planning Commission's website, do not contain the terms of the parties' settlement nor do they have any attachments containing the settlement's terms. While the Planning Commission has placed on its website numerous documents entitled "PC Packets," the packet that pertains to the October 11, 2011, meeting, which does contain the settlement's terms, also includes the agenda of the October 11, 2011, meeting and the minutes from the *previous* month's meeting that were approved at the October 11, 2011, meeting. The subsequent month's packet, referencing the Planning Commission's November 8, 2011, meeting, contains both the October 11, 2011, minutes *and* the parties' agreed settlement order, but its description as a "packet" for the November 8, 2011, meeting makes it virtually impossible to ascertain that it actually contains the meeting minutes for the October 11, 2011, meeting with the referenced attachments.

It is apparent, then, that the Planning Commission has, in fact, disclosed the terms of the parties' settlement. However, we do not agree with the circuit court's decision finding no violation of the disclosure requirements of W. Va. Code § 6-9A-4(b)(11). This statutory language very simply and explicitly requires that "the terms of that settlement shall be reported by the public agency and *entered into its minutes* within a reasonable time after the settlement is concluded." (Emphasis added). **This statutory language does *not* contemplate the disclosure of settlement terms in any other type of document, be it a meeting agenda, press release, or compilation of papers considered at the disclosure meeting.** Rather, the statute expressly requires that the public body "enter [the settlement terms] into its *minutes*." (Emphasis added). A review of the Planning Commission's minutes for its meeting of October 11, 2011, standing alone, reveals that while the settlement is referenced in general terms therein, and is required to be attached thereto, the minutes contain no attachments or language detailing the settlement's terms. Accordingly, we find that the Planning Commission has violated the reporting requirements set forth in W. Va. Code § 6-9A-4(b)(11), and we reverse the circuit court's contrary ruling.

Although we have found two violations of the Act, the violations **do not necessarily require that the actions taken at the July 26, 2011, meeting be invalidated.** The remedies provided in W. Va. Code §§ 6-9A-3, 6-9A-6 (1999) (Repl. Vol. 2010),⁸ and 6-9A-7 (1999) (Repl. Vol. 2010)⁹ are left to the discretion of the circuit court. Moreover, as we explained in *McComas v. Board of Education of Fayette County*, 197 W. Va. 188, 475 S.E.2d 280 (1996), "[a] finding that a violation [of the Open Governmental Proceedings Act] occurred . . . does not necessarily require invalidation of all actions taken during or following from the wrongfully held . . . meeting." 197 W. Va. at 201, 475 S.E.2d at 293.¹⁰

For the foregoing reasons, we affirm, in part, and reverse, in part, the November 8, 2013, and November 27, 2013, orders of the Circuit Court of Jefferson County, and remand this case to the circuit court for further proceedings to **determine the remedy, if any, the circuit court may deem appropriate under the facts and circumstances of this case.**

⁸W. Va. Code § 6-9A-6 (1999) (Repl. Vol. 2010) provides remedies for violations of the Act.

⁹W. Va. Code § 6-9A-7 (1999) (Repl. Vol. 2010) establishes criminal penalties for violations of the Act, as well as allowing for an award of fees and expenses to a prevailing party in a civil action alleging violations of the Act.

¹⁰While W. Va. Code §§ 6-9A-3, 6-9A-6, and 6-9A-7 were amended subsequent to *McComas*, the amendments did not impact the permissive and discretionary nature of the remedies provided for therein.

Affirmed, in part; Reversed, in part; and Remanded.

ISSUED: February 26, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

CONCURRING AND WRITING SEPARATELY:

Justice Brent D. Benjamin

DISSENTING AND WRITING SEPARATELY:

Justice Robin Jean Davis

Benjamin, Justice, concurring:

I completely concur with the majority decision. I write separately to urge the Legislature to amend what I consider to be a troubling provision of the State's Open Governmental Proceedings Act.

As the majority recognizes, W. Va. Code § 6-9A-4(b)(11) permits a public agency to convene a closed session to consider and even approve a settlement of pending litigation, and the terms of the settlement then must be reported within "a reasonable time." This provision appears to me to be at odds with the policy underlying the Open Governmental Proceedings Act which recognizes that it is "in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions." W. Va. Code § 6-9A-1 (1999). Of course, the government has a legitimate interest in closing a meeting on certain occasions, and the Legislature has attempted to balance the government's interests in doing so with the public's right "to participate in a meaningful manner in public agency decisionmaking" in fashioning the provisions of the Act. *Id.* However, I can discern no legitimate governmental interest in permitting public agencies to vote on the terms of non-confidential legal settlements in closed meetings.

For this reason, I encourage the Legislature to amend W. Va. Code § 6-9A-4(11) to provide that while a public agency may go into closed session to discuss the terms of a settlement, the public agency must in most cases disclose and vote on the settlement terms in an open meeting. Accordingly, I concur to the decision in this case.

Davis, Justice, dissenting:

In 2004, Far Away Farm (“FAF”) first obtained permission to develop its property into a residential subdivision. Despite its best efforts to comply with the governing zoning ordinances, FAF has been stymied at every stage of the process by citizens who oppose the development and the governmental bodies they have elected. Even rulings by this Court¹ and the United States Supreme Court² have not dissuaded the nay sayers’ unrelenting campaign of harassment with the intent of forestalling FAF’s development plans. For eleven years, FAF patiently has waited for the seemingly endless litigation to cease, finally offering concessions to the Jefferson County Planning Commission (“Planning Commission”) in an attempt to attain the temporal extensions granted to it by the Legislature³ but which the Planning Commission vehemently had refused to recognize. **Yet, through no fault of its own, FAF’s development project once again has been relegated to the shadows while the perpetual litigation lingers on: this time, as a result of the majority’s decision to defer to the circuit court’s final resolution of this case,** FAF, who had no power over the Planning Commission’s compliance with the provisions of the West Virginia Open Governmental Proceedings Act, W. Va. Code § 6-9A-1 *et seq.* (“the Act”), may nevertheless be forced to re-negotiate with the Planning Commission to achieve the deadline extensions to which it is statutorily entitled. I disagree with the majority’s decision to punish FAF, the innocent bystander in the case *sub judice*, by forcing it to expend even more time and resources in the pursuit of its most basic right to develop its property as permitted by the governing zoning law and the prior decision

¹See *Far Away Farm, LLC v. Jefferson Cnty. Bd. of Zoning Appeals*, 222 W. Va. 252, 664 S.E.2d 137 (2008).

²See *Dunleavy v. Far Away Farm, LLC*, 555 U.S. 1012, 129 S. Ct. 573, 172 L. Ed. 2d 431 (2008) (denying certiorari).

³See generally W. Va. Code § 8A-5-12(f) (2010) (Repl. Vol. 2012). See also *Jefferson Utils., Inc. v. Jefferson Cnty. Bd. of Zoning Appeals*, 218 W. Va. 436, 450, 624 S.E.2d 873, 887 (2005) (directing circuit court “to enter an order approving the reissuance of the subject permits and adjust, where necessary, any time deadlines established in the Ordinance that may have passed during the pendency of this appeal so that the parties are not penalized for pursuing their statutory rights of appeal”).

of this Court recognizing the same.⁴ I further disagree with the majority's decision to intrude upon the fundamental right of a public body to confer with its counsel and to erode the associated attorney-client privilege inherent in such confidential communication.

I. Adequacy of Agenda Notice

The majority first concludes that the Planning Commission failed to provide advance notice of its agenda for its July 26, 2011, meeting because, in the majority's estimation, the Planning Commission's agenda did not adequately describe the topics to be covered under the agenda item, "Reports from Legal Counsel and legal advice to P[lanning]C[ommission]." See W. Va. Code § 6-9A-3 (1999) (Repl. Vol. 2010).⁵ While I appreciate the majority's concern that the Planning Commission should have more specifically mentioned FAF and the pending litigation in its meeting agenda, I nevertheless agree with the circuit court's conclusion that there was no violation of the meeting notice provision in this case. Pursuant to W. Va. Code § 6-9A-4(b)(12) (1999) (Repl. Vol. 2010), the Planning Commission was permitted to confer with its attorney during a closed, executive session. See W. Va. Code § 6-9A-4(b)(12) (permitting closed executive session "[t]o discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the Freedom of Information Act as set forth in article one [§§ 29B-1-1 et seq.], chapter twenty-nine-b of this code."). See also W. Va. R. Prof'l Conduct 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation.")⁶

Moreover, W. Va. Code § 6-9A-4(b)(11) (1999) (Repl. Vol. 2010) contemplates that settlements negotiated by a public body are not subject to disclosure until after such

⁴See *Far Away Farm, LLC v. Jefferson Cnty. Bd. of Zoning Appeals*, 222 W. Va. 252, 664 S.E.2d 137 (2008).

⁵To maintain consistency with the majority's decision, I, too, will rely upon the version of W. Va. Code § 6-9A-3 that was in effect at the time of the events giving rise to the instant proceeding. Compare W. Va. Code § 6-9A-3 (1999) (Repl. Vol. 2010) with W. Va. Code § 6-9A-3(d) (2013) (Supp. 2014).

⁶The West Virginia Rules of Professional Conduct were amended effective January 1, 2015. Because the events at issue herein occurred prior to the effective date of these amendments, I will cite to the version of the Rules that was operative at that time. However, the amended language of Rule 1.6(a) also contemplates the confidentiality of an attorney-client relationship. See W. Va. R. Prof'l Conduct 1.6(a) (2015) ("A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent").

settlements have been concluded. *See* W. Va. Code § 6-9A-4(b)(11) (“If the public agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, *the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded.*” (emphasis added)). Thus, to the extent that the discussions pertaining to the pending litigation with FAF and the settlement, itself, were protected both by the attorney-client privilege and the Act’s provisions safeguarding settlement negotiations, inclusion of detailed information on the meeting agenda pertaining thereto would contravene the express exemptions allowed by W. Va. Code §§ 6-9A-4(b)(11-12), which permit both the contemplation of pending legal matters with counsel and their resolution through settlement in a closed, executive session. Accordingly, the majority should have affirmed the circuit court’s ruling finding no violation of the Act’s agenda notice requirement under the facts of this case.

II. The Majority’s Failure to Determine a Remedy Deprives FAF of Finality

While I applaud the majority’s decision to leave intact the parties’ hard fought negotiated settlement, I am deeply disappointed that my brethren have decided to prolong FAF’s agony by not settling the question of a remedy in this tribunal but, rather, remanding the case to the circuit court for even more litigation to determine whether the Planning Commission’s perceived transgression deserves to be punished. As I mentioned earlier in this separate opinion, FAF has been trying, *for eleven years*, to develop its property and has been thwarted at every step by unrelenting litigation instigated by the Petitioners and the Planning Commission. At this juncture, there still is no end in sight to the parade of FAF legal proceedings because the majority has ceded its authority to fashion a remedy and directed the circuit court to conduct “further proceedings to determine the remedy, if any, the circuit court may deem appropriate under the facts and circumstances of this case.” And, despite the majority’s laudable efforts to refrain from annulling the Planning Commission’s decision to settle stemming from its allegedly improperly noticed meeting of July 26, 2011, such a sanction is still a very real and distinct possibility authorized by the statutes designed to remedy violations of the Act. In its haste to remand this case for the circuit court to render the final verdict, the majority neglects to acknowledge that both W. Va. Code § 6-9A-3 and W. Va. Code § 6-9A-6 (1999) (Repl. Vol. 2010) authorize the annulment of a decision that has been made in violation of the Act. *See* W. Va. Code § 6-9A-3 (“Upon petition by any adversely affected party *any court of competent jurisdiction may invalidate any action taken at any meeting for which notice did not comply with the requirements of this section.*” (emphasis added)); W. Va. Code § 6-9A-6 (“*The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation of this article.*” (emphasis added)).

Insofar as the majority is convinced that the Planning Commission made its settlement

decision in violation of the Act's agenda notice provisions, the parties' agreed settlement remains at risk of annulment if the circuit court determines that that is the remedy befitting the Planning Commission's supposed violation of the Act. Imposition of such a remedy is undeniably harsh and would unfairly punish FAF, who, as a mere bystander to these proceedings, has had no control over the Planning Commission's actions in complying with or violating the Act's provisions. I only hope that the circuit court, who has had numerous opportunities to interact with the parties to these proceedings, appreciates the consequences of its actions in fashioning a remedy, if it deems the circumstances of this case even warrant reproach. In considering this case on remand, I urge the circuit court to be cognizant of FAF's role in these proceedings as an innocent intervenor who neither had a duty to comply with the Act's requirements nor an obligation to compel the Planning Commission's adherence thereto.

For the foregoing reasons, I resolutely dissent from the majority's decision in this case.



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