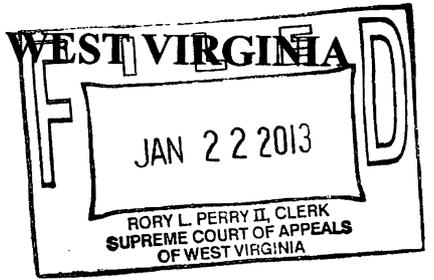


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



**DONALD R. BURGESS and  
PATRICIA L. BURGESS,**

**Petitioners,**

**v.**

**NO. 12-1278  
(Civil Action No. 11-C-421  
Circuit Court of Jefferson County)**

**CORPORATION OF SHEPHERDSTOWN,  
a municipal corporation, and JIM AUXER,  
Mayor, in his individual and official capacity,  
and JOHN DOE I-X,**

**Respondents.**

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**PETITIONERS' BRIEF ON APPEAL**

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**TABLE OF CONTENTS**

**Table of Contents** .....i

**Table of Authorities** .....ii

**I. ASSIGNMENTS OF ERROR** .....1

**II. STATEMENT OF THE CASE** .....1

**III. SUMMARY OF ARGUMENT** .....14

**IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION** .....15

**V. ARGUMENT** .....15

**A. The Circuit Court Erred in Ruling that Mandamus would not Lie to Challenge the Validity of the Building Code** .....15

**B. The Circuit Court Erred in Ruling that “Short-Term” Residential Rentals were not Permitted in the R-1 Zoning District, Where the Zoning Ordinance Contained No Provision Limiting Permitted Single-Family Residential Rental by length of Occupancy and did not Define “Short-Term”** .....21

**C. The Circuit Court erred in Refusing to Order the Town to Comply with the West Virginia Freedom of Information Act** .....29

**D. The Circuit Court Erred in Ruling that Prohibition would not Lie to Prohibit Enforcement of the Town’s Invalid Zoning Ordinance** .....32

**E. The Circuit Court Erred and Abused its Discretion when it Entered a Final Order with Insufficient Findings of Fact and Conclusions of Law** .....34

**F. The Final Order is Contrary to the Evidence and the Record** .....36

**G. The Circuit Court erred when it Denied Petitioners’ Motion for a New Trial** .....38

**VI. CONCLUSION** .....39

**VII. CERTIFICATE OF SERVICE** .....

## TABLE OF AUTHORITIES

### Case Law

<i>American Tower Corp. v. Common Council of the City of Beckley</i> , 210 W.Va. 345, 557 S.E.2d 752 (2001) .....	18, 33
<i>A.P. v. Canterbury</i> , 224 W.Va. 708, 688 S.E.2d 317 (2009) .....	30, 31
<i>Bank of Weston v. Thomas</i> , 75 W.Va. 321, 83 S.E. 985 (1914) .....	22
<i>Bellaire v. City of Treasure Island</i> , 611 So.2d 1285 (Fl.App. 2d Dist. 1992) .....	25
<i>Bd. of Supervisors of Madison County</i> , 244 Va. 545, 422 S.E.2d 760 (1992) .....	27
<i>Bittinger v. Corp. of Bolivar</i> , 183 W.Va. 310, 395 S.E.2d 554 (1990) .....	16, 18, 19
<i>Brown v. Sandy City Bd. of Adjustment</i> , 957 P.2d 207 (Utah App. 1998) .....	25, 27
<i>Burien Bark Supply v. King County</i> , 106 Wn.2d 868, 725 P.2d 994 (1986) .....	23
<i>Carter v. City of Bluefield</i> , 132 W.Va. 881, 54 S.E.2d 747 (1949) .....	16
<i>City of Portland v. Carriage Inn</i> , 67 Or.App. 44, 676 P.2d 943 (1984) .....	25
<i>Clark Apartments v. Walaszcsyk</i> , 213 W.Va. 369, 582 S.E.2d 816 (2003) .....	35
<i>Cogan v. City of Wheeling</i> , 166 W.Va. 393, 274 S.E.2d 516 (1981) .....	23
<i>Commonwealth Tire Co. v. Tri-State Tire Company</i> , 156 W.V. 351, 193 S.E.2d 544, (1972) .....	35
<i>Connally v. General Construction Co.</i> , 269 U.S. 385 (1926) .....	23
<i>County of Douglas v. Owen</i> , No. A08-1776 (Minn.App. 2009, Fastcase) .....	25
<i>County of Fairfax v. Parker</i> , 186 Va. 675, 44 S.E.2d 9 (1947) .....	27
<i>Crutchfield v. Clark</i> , Morgan County CA No. 10-C-5, Order Granting Summary Judgment (April 22, 2011) .....	25
<i>Dailey v. Harpers Ferry Town Council</i> , Civil Action No. 09-C-399 (Order of March 2, 2011) .....	17, 21, 37
<i>Davis v. Jackson County</i> (Or. LUBA 2011, Fastcase) .....	25

<i>Dianovich v. Grays Harbor County</i> , No. 24316-4-II (2000 Wash.App., Lexis 2443) .....	23, 25, 28
<i>Fayette County Nat'l Bank v. Lilly</i> , 199 W.Va. 349, 484 S.E.2d 232 (1997) .....	35
<i>Finney v. Arkansas Bd. of Correction</i> , 505 F.2d 194 (8th Cir.1974) .....	35
<i>Fleming v. Commissioners</i> , 31 W.Va. 608, 8 S.E. 267 (1888) .....	34
<i>Gangemi v. Zoning Board of Appeals of the Town of Fairfield</i> , 255 Conn. 143, 763 A.2d 1011 (2001) .....	24
<i>Garcelon v. Rutledge</i> , 173 W.Va. 572, 318 S.E.2d 622 (1984) .....	23
<i>G-M Realty, Inc. v. City of Wheeling</i> , 146 W.Va. 360, 120 S.E.2d 249 (1961) .....	16
<i>Hardin v. Foglesong</i> , 117 W.Va. 544, 186 S.E. 308 (1936) .....	16
<i>Harrison v. Leach</i> , 4 W.Va. 383 (1870) .....	22
<i>Harrison v. Town of Eleanor</i> , 191 W.Va. 611, 447 S.E.2d 546, (1994) .....	19
<i>Hutchison v. City of Huntington</i> , 198 W.Va. 139, 479 S.E.2d 649 (1996) .....	21, 22
<i>Kaufman v. Planning &amp; Zoning Comm'n of Fairmont</i> , 171 W.Va. 174, 298 S.E.2d 148 (1982) .....	19, 20
<i>Kellar v. James</i> , 63 W.Va. 139, 59 S.E. 939 (1907) .....	22
<i>Kilgore's Adm'r v. Hanley</i> , 27 W. Va. 451 (1886) .....	22
<i>Kirchner v. Smith</i> , 61 W.Va. 434, 58 S.E. 614 (1907) .....	34
<i>Laketon Township v. Advanse, Inc.</i> , No. 276986 (Mich.App. 2009, Fastcase) .....	25
<i>Landing Development Corp. v. City of Myrtle Beach</i> , 285 S.C. 216, 329 S.E.2d 423 (1985) .....	25
<i>Largent v. Zoning Bd. of Appeals for the Town of Paw Paw</i> , 222 W.Va. 789, 671 S.E.2d 794 (2008) .....	33, 34
<i>Lynch v. Town of North View</i> , 73 W.Va. 609, 81 S.E. 833 (1914) .....	20

<i>McGlone v. Superior Trucking Co., Inc.</i> , 178 W.Va. 659, 363 S.E.2d 736 (1987) .....	34
<i>McLeod v. Parnell</i> , No. S-13861 (Alaska, October 12, 2012) .....	32
<i>Milo v. City of Venice</i> , Case No. 2008 CA 552 SC (FL 12 <sup>th</sup> Jud. Circ., 2008) .....	25
<i>Mollick v. Township of Worcester</i> , No. 2265 C.D. 2010 (Pa. Commw. Ct., 2011) .....	32
<i>Mott v. Kirby</i> , 225 W.Va. 788, 696 S.E. 304 (2010) .....	35
<i>Phillips v. Larry's Drive-In Pharmacy, Inc.</i> , 220 W.Va. 484, 647 S.E.2d 920 (2007) .....	22, 23
<i>Pristavec v. Westfield Insur. Co.</i> , 184 W.Va. 331, 400 S.E.2d 575 (1990) .....	23
Public Access Opinion No. 11-006 (Ill. O.A.G., Nov. 15, 2011) .....	32
<i>Sams v. City of White Sulphur Springs</i> , 226 W.Va. 723, 704 S.E.2d 723 (2010) .....	29
<i>Singer v. Davenport</i> , 164 W.Va. 665, 264 S.E.2d 637 (1980) .....	19
<i>Shifflette v. Lilly</i> , 130 W.Va. 297, 43 S.E.2d 289 (1947) .....	22
<i>Spilka v. Town of Inlet</i> , 778 N.Y.S. 222, 8 A.D.3d 812 (2004) .....	25
<i>State ex rel. Allstate Insur. Co. v. Gaughan</i> , 203 W.Va. 358, 508 S.E.2d 75 (1998) .....	35
<i>State ex rel. Ammerman v. City of Philippi</i> , 136 W.Va. 120, 65 S.E.2d 713 (1951) .....	16, 20, 21
<i>State ex rel. Brown v. Bolivar</i> , 209 W.Va. 138, 544 S.E.2d 65 (2000) .....	16, 34
<i>State ex rel. Casto v. Town of Ripley</i> , 95 W.Va. 521, 121 S.E. 725 (1924) .....	20
<i>State ex rel. Kucera v. City of Wheeling</i> , 153 W.Va. 538, 170 S.E.2d 367 (1969) .....	16
<i>State ex rel. Nunley v. City of Montgomery</i> , 94 W.Va. 189, 117 S.E. 888 (1923) .....	20
<i>The Shepherdstown Observer, Inc. v. Maghan</i> , 226 W.Va. 353, 700 S.E.2d 805 (2010) .....	31
<i>Trozzi v. Board of Review</i> , 214 W.Va. 604, 591 S.E.2d 162 (2003) .....	38

<i>Vector Co. v. Board of Zoning Appeals</i> , 155 W.Va. 362, 184 S.E.2d 301 (1971) .....	19
<i>Wade v. Patterson</i> , No. E2007-02893-COA-R3-CV (2009 Tenn.App., Lexis 34) .....	23, 25, 28
<i>Wallace v. St. Clair</i> , 147 W.Va. 377, 127 S.E.2d 742, (1962) .....	25
<i>Wiley v. County of Hanover</i> , 209 Va. 153, 162 S.E.2d 160 (1968) .....	27
<i>Wolfe v. Forbes</i> , 159 W.Va. 34, 217 S.E.2d 899 (1975) .....	33
<i>Woodrum v. Johnson</i> , 210 W.Va. 762, 559 S.E.2d 908 (2001) .....	22
<i>W.Va. Citizens Action Group, Inc. v. Daly</i> , 174 W.Va. 299, 324 S.E.2d 713 (1984) .....	16

**Statutes**

W.Va. Code § 8-12-13 .....	5, 15, 18, 19
W.Va. Code § 8-12-14 .....	5, 18
W.Va. Code § 8-24-39(c) (former law) .....	19
W.Va. Code § 8-24-50 (former law) .....	29
W.Va. Code §§ 8-26A-5(c) .....	10
W.Va. Code § 8-26A-6 .....	20
W.Va. Code § 8-26A-7 .....	10, 20
W.Va. Code § 8A-7-2(b)(3) .....	19
W.Va. Code § 8A-7-2(b)(8) .....	19
W.Va. Code § 8A-7-8 .....	32
W.Va. Code § 8A-7-10(c) .....	29
W.Va. Code § 8A-8-9 .....	21
W.Va. Code § 8A-9-1 <i>et seq.</i> .....	18

W.Va. Code § 29-3-5b .....	19
W.Va. Code § 29B-1-1 .....	1, 29, 31
W.Va. Code § 29B-1-2(4) .....	30
W.Va. Code § 29B-1-3(1) .....	29
W.Va. Code § 29B-1-4 .....	29
W.Va. Code § 29B-1-5(2) .....	29
W.Va. Code § 53-1-1.....	33
W.Va. Code § 53-1-5 .....	34
W.Va. Code § 53-1-9 .....	33
 <b>Code of State Regulations</b>	
87 C.S.R. 4 .....	19
87 C.S.R. 4 § 6.1 (1989) .....	19
87 C.S.R. 4 § 7.5 .....	21
 <b>Shepherdstown Codified Town Ordinances</b>	
Sec. 9-902 .....	5, 19
Sec. 9-902-IV .....	6, 18, 20
Sec. 9-902-IX .....	21
Sec. 9-212.....	26
Sec 9-503.....	2, 26
 <b>Rules</b>	
<u>West Virginia Rules of Civil Procedure</u>	
W.V.R.Civ.P. 8(e)(2). .....	17

W.V.R.Civ.P. 52(a) .....	34, 35
<b><u>Trial Court Rules</u></b>	
T.C.R. 16.12 .....	12, 13
T.C.R. 24.01 .....	36
<b>Secondary Sources</b>	
<i>Access to Electronic Communications</i> (The Reporters Committee for Freedom of the Press, Spring, 2009) .....	32
<i>Agencies Face Challenges in Managing E-mail</i> (Government Accountability Office, April 23, 2008) .....	31
1 Yokley, ZONING LAW AND PRACTICE, § 1-4, p. 1-6 (4 <sup>th</sup> ed. 2000) .....	22
Ziegler, E.H., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 2:15 (4 <sup>th</sup> Ed. 2005).....	23

## **BRIEF OF PETITIONERS**

### **I. ASSIGNMENTS OF ERROR**

1. The circuit court erred in ruling that mandamus would not lie to challenge the validity of the building code.
2. The circuit court erred in ruling that “short-term” residential rentals were not permitted in the R-1 zoning district, where the zoning ordinance contained no provision limiting permitted single-family residential rental by length of occupancy and did not define “short-term.”
3. The circuit court erred in refusing to order the Town to comply with the West Virginia Freedom of Information Act, W.Va. Code § 29B-1-1, *et seq.*
4. The circuit court erred in ruling that prohibition would not lie to prohibit enforcement of the Town’s invalid zoning ordinance.
5. The circuit court erred and abused its discretion when it entered a final order with insufficient findings of fact and conclusions of law.
6. The final order is contrary to the evidence and the record.
7. The circuit court erred when it denied petitioners’ motion for a new trial.

### **II. STATEMENT OF THE CASE**

Donald and Patricia Burgess share a passion for historic preservation pursued for decades through participation in community organizations and their own purchase and restoration of old homes. [App. 217:10-15; 219:24-220:24; 250:11-20] Their experiences have allowed them to develop some familiarity with the common regulatory aspects of historic preservation from both the regulator’s and applicant’s side. [App. 220] At no time have the Burgesses expected to undertake a restoration and subsequent use without first identifying and complying with all applicable laws and ordinances. [App. 219:8-21] They do, however, reasonably expect to be able to locate those regulations in written codes, to secure straight answers to any remaining questions from the designated administrators, and to be treated the same as everyone else.

In March of 2011, the Burgesses found a house in Shepherdstown that they wished to purchase and restore. [App. 352] Their intent was to use the property as a second home and as a guest house for visiting family or friends, and to rent it at other times to defray the cost of the restoration. [App. 217:19-218:1; 232:21-233:6; 251:21-252:12; 255:8-10] Before finalizing the purchase, the Burgesses undertook to determine if their plans could be pursued under the applicable regulations. [App. 115:8-12]

Mr. Burgess studied the zoning, building and licensing ordinances posted on the Shepherdstown web site. [App. 219:17-21] The subject property is improved with a single-family residential dwelling, [App. 217:8], and is adjacent to a local bar/cafe. [App. 216:16-217:4] The property is located in the R-1 district under the Town's zoning ordinance. [App. 352] Mr. Burgess examined the zoning ordinance to determine if the intended uses of the property were allowed. [App. 219:17-21]

The R-1 district provisions expressly permit single-family residential use, duplexes, townhouses, and a main residence may include an apartment for not more than three (3) persons unrelated to the family residing in the main residence.<sup>1</sup> Shep. Ord. Sec. 9-503 [App. 630] Mr. Burgess found no provision in the zoning ordinance that would prohibit the single-family residential uses that the Burgesses intended to make of the property. [App. 219:17-21; 260:9-14; 264:5-13] The R-1 district provisions were silent as to single-family residential rental, expressing no limitation on residential occupation upon payment of rent save for the occupancy limitation for apartments. [App. 260:19-20; 630] Also, the Town's ordinances exempt landlords from Town business license requirement. Shep.Ord. Sec. 8-209A. [App. 360; 600]

Mr. Burgess did not rest upon his own reading of the ordinances, but inquired of Town authorities. By e-mail dated March 22, 2011, the Burgesses made inquiry to Zoning Officer

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<sup>1</sup> The R-1 district also allows professional offices as special permit uses. Shep.Ord. Sec. 505. [App. 631]

Harvey Heyser, stating that they wanted “to be clear about [their] rights and responsibilities” before making an offer on the house. [App. 354] On or about March 24, 2011, Mr. Burgess and Mr. Heyser spoke by telephone, at which time they discussed the issues, particularly the issue of “short-term” residential rental [App. 219:10-12; 222:4-23]. Mr. Heyser told Mr. Burgess that there was nothing in the zoning ordinance that disallowed “short-term” residential rentals, but said that it was not allowed as a matter of Town policy. [App. 223:10-20; 266:5-16] Mr. Burgess and Mr. Heyser had several subsequent conversations [App. 222:18], which Mr. Heyser appears to have regarded favorably. [App. 10:18-11:14; 125:1-9]

As it happens, when the Burgesses made their March 22 inquiry to Mr. Heyser, there was already another property owner in Shepherdstown, Nieltje Gedney, who rented her R-1 district house for short- or long-term durations. [App. 199:21-200:14; 201:15-16; 207:22-24] Ms. Gedney had been renting since June of 2008. [App. 200:15-19] The Town had been aware of her rentals at least since October of 2008, when the former Zoning Officer sent her a violation notice. [App. 202:20-203:15] Ms. Gedney responded to the October 2008 letter, and the Town did not pursue the violation allegation further. [App. 203:19-204:12] However, on March 23, 2011 – the day after the Burgesses’ initial e-mail inquiry – Mr. Heyser made a violation complaint against Ms. Gedney upon which a summons was issued commanding her to appear in municipal court. [App. 118:2-120:12; 204:13-205:1; 769-771]

Ms. Gedney met with Mr. Heyser and the Mayor prior to the hearing date and explained her residential rental of her entire house, distinguishing it from bed and breakfast or boarding house uses cited in the complaint. [App. 121:20-24; 205:5-206:17] Mr. Heyser indicated that he believed that the ordinance was ambiguous. [App. 207] The Town officials agreed to postpone

the scheduled hearing pending further investigation [App. 122:16-123:21; 206:21-23], and in August of 2011, the summons was dismissed. [App. 208:15-210:6; 808]

Despite their several conversations, Mr. Burgess was never able to secure from Mr. Heyser definitive answers regarding regulation of residential rentals that could be referenced to provisions of the zoning ordinance, and questions remained about necessary licenses and permits. Mr. Burgess also made inquiry via an e-mail to the Mayor on March 28 [App. 226:3-8; 356], and received no response. Mr. Burgess contacted Town Hall [App. 224:11-21], and the Burgesses' real estate agent made a similar inquiry. [App. 224:19-20]

Mr. Burgess submitted an e-mail inquiry to Town Clerk Amy Boyd, who responded, but advised that if he wanted something "more official" from the Town, he should provide a written request and the Town would provide a written response. [App. 224:4-10; 360] So, Mr. Burgess prepared yet another written inquiry, dated April 11, 2011, and addressed to the Mayor and Town Council [App. 226:16-19; 363]. Mr. Burgess also attended the April 12 meeting of the Town Council. [App. 226:22-227:10; 763] Still, the Burgesses never received the promised written response. *Id.* Instead, the Town Council referred the Burgesses to the Zoning Officer (Mr. Heyser). [App. 763]

On the agenda for the April 18, 2011, meeting, "short-term" residential rental was introduced to the Planning Commission by Mr. Heyser as an issue in need of attention, because, "[r]ecent happenings in Town have alerted staff of the need for Ordinance provisions to address these situations...." [App. 128:11-130:12; 676; 679] In the discussion that followed Mr. Heyser's report at the meeting, the Planning Commission expressed the need for study of current ownership and use patterns and indicated the need for guidelines (particularly parking) if people would be offering short-term rentals. [App. 686] The Planning Commission agreed to seek

Attorney review, but opined that changing the Ordinance would require a longer process of detailed consideration, not immediate action. *Id.*

Absent from the discussion was a declaration that short-term residential rental was already disallowed by the existing zoning ordinance. *Id.* The Planning Commission acknowledged that regulation targeting short-term residential rental would require changing the Ordinance. *Id.* Nothing in the comments of the Planning Commission gave reason to believe that the Planning Commission necessarily would approve and recommend such changes to the zoning ordinance after studying the issue as it proposed to do. *Id.*

The Planning Commission discussion confirmed the conclusions of Mr. Burgess's own study of the zoning ordinance. After two months of investigation and inquiry, it became clear to the Burgesses that their intended uses of the property were not disallowed by any expression in the zoning ordinance, but were allowed [App. 227:15-19]. Accordingly, they purchased the property and went forward with their plans. [App. 227:20-24; 348]

The house was in a neglected condition [App. 365-367] and alterations made by the prior owner had removed or obscured many of its historic period attributes. [App. 798] The Burgesses immediately began preparation of their building permit application, as required by the Town's building code, so that they could commence the work on the house. Shep.Ord. Sec. 9-902. [App. 634-640] Section 9-902-IV of the Town Ordinances is the building code, asserted to have been adopted in accordance with W.Va. Code § 8-12-13 and § 8-12-14. [App. 636] Citation to the authorizing statute notwithstanding, Shepherdstown has not adopted the State Building Code. [App. 58:21-24; 403-406; 662]

In an effort to insure that their building permit application would satisfy all requirements and progress through the approval process without unnecessary delay, the Burgesses again

consulted Mr. Heyser. [App. 243:2-9; 269:16-23] At his direction, the Burgesses listed every item of intended work, even routine repair or interior work which did not require a building permit. [App. 369-382] The Burgesses submitted their building permit application with the required fee on or about July 12, 2011. *Id.*

Mr. Heyser also informed the Burgesses that their application would have to be reviewed by the Historic Landmarks Commission (“HLC”) before being heard and considered by the Planning Commission. [App. 243:10-16] Neither the building code nor the HLC provisions of the Town’s Ordinances required applicants to submit to HLC review [App. 627-628; 634-640; 734-735], and the HLC was not created with the power to grant certificates of appropriateness. [App. 735] Mr. Heyser, however, testified that it was the custom of the Planning Commission to require HLC review, and that he believed the requirement to be “implied” in the provisions of Sec. 9-902-IV. [App. 179:3-180:22]

The HLC reviewed the Burgesses’ building permit application at its meeting of August 8, 2011, and recommended its approval. [App. 798-799] The Planning Commission considered the application at its meeting of August 15, 2011. [App. 729-730] The Planning Commission heard the presentation of Mr. Burgess and the remarks of Mr. Heyser, who had inspected the premises and filed a report. [App. 729] After the hearing was closed, a motion to approve the application was made and seconded. [App. 730] During discussion on the motion, Mr. Heyser raised the issue of applying the building set-back provisions of the zoning ordinance to the placement of the heat pump condensers. *Id.* The Planning Commission then amended the motion, and approved the building permit except for the proposed installation of the condensers. *Id.*

The Burgesses then submitted a modified building permit application so as to change the originally-proposed front door, and to again address the heat pump condensers. [App. 472-474]

They had not been able to comment on the set-back issue at the August 15 hearing [App. 243:17-244:11], and included their counter-argument in the second application. [App. 245:21-247:15; 472] Again, the building permit was denied as to the condensers. [App. 413-415; 746]

Having observed many other similarly-located heat pump condensers and tanks in the neighborhood, the Burgesses were surprised by the Planning Commission's application of building line set-backs to their proposed placement of heat pump condensers. Mr. Burgess examined past records of the Planning Commission and discovered that the set-backs were not applied to heat pump condensers for other building permit applicants [App. 665], and that several had been installed without permit hearings at all. [App. 663-64] No other instance in which heat pump condensers had been subject to building set-back lines was found.

While awaiting the hearing on their original building permit application, the Burgesses undertook other activities necessary to their planned uses of the restored house. They secured an F.E.I.N. and applied for the West Virginia business license that was necessary for any of their residential rentals that would be categorized by the State as "short-term." [App. 228:12-23; 428; 825] They subscribed to an online service that provided a contact point for rental inquiries, and that compiled a comprehensive record of all inquiries made and renters accepted. [App. 229:3-24; 830-838] They also sent follow-up inquiries to the Town to secure the written response to the questions that they had first asked in March and April of 2011, [App. 384-385; 387], but again did not receive a written response. [App. 162:15-24]

Subsequent to the Planning Commission's partial approval of the building permit application on August 15, the Burgesses immediately undertook the repairs and restoration of the house. They began accepting rental inquiries [App. 236:23-24], and contracted with their first renter to take possession on or about November 13, 2011. [App. 237:1-4] Although the

remarks of the public and the discussion of the Planning Commission members, Mr. Heyser observed that there were factors that had not been taken into consideration during review by staff and the Town's Attorney, and supported postponement pending further study. [App. 733]

The Planning Commission concluded that it needed to be better informed and decided to create a committee to study the issue. [App. 733-734] The Short-Term Rental Committee convened meetings on August 19 and August 24, 2011. [App. 772-773] The Planning Commission scheduled the public hearing on proposed revisions to the ordinance to address short-term housing rentals for its regular meeting of September 19, 2011. [App. 742-744]

The Planning Commission heard the report and recommendations of the Short-Term Rental Committee. [App. 748-49] The Committee recommended that the Planning Commission recommend the proposed ordinance revisions to the Town Council, and also recommended that the Planning Commission look deeper into the issue and consider further ordinance revisions. [App. 749] The minutes do not reflect that the Planning Commission took public comment at the noticed public hearing, but it said that citizens had been able to speak at the Committee meetings and that it had received numerous e-mails on the issue. [App. 749] Concluding that short-term rental housing was not intended by the original drafters, the Planning Commission voted to recommend the zoning ordinance revisions to the Town Council. [App. 749-750] It also decided to study the issue at an upcoming special meeting. *Id.* At its special meeting of September 26, 2011, the Planning Commission determined that the recommended study could be part of the process when the Town updated its Comprehensive Plan. [App. 759]

In sum, in April of 2011, the Planning Commission asserted that changing the zoning ordinance to address and regulate short-term residential rental would require "a longer process" of "detailed consideration." [App. 686] In the end, however, the entire process – from the first

mention of the issue to the recommendation of proposed zoning ordinance revisions – was concluded by September 19, 2011. By contrast, revisions to the zoning provisions addressing fences, which were under consideration during this same time period, had been the subject of study and consideration for well over a year before being finalized and recommended to Town Council for adoption. [App. 139:21-140:10]

It was at the August 15 and September 26, 2011, meetings that the Planning Commission also discussed proposed amendments to the Historic Landmarks Commission provisions lodged in the zoning ordinance. [App. 734-735; 756] The HLC Chairman stated that the proposed changes were intended to make the review process less regulatory [App. 734], noting that Shepherdstown’s HLC does not have authority to make appealable decisions as do such commissions in other communities.<sup>2</sup> [App. 735] Mr. Heyser indicated that the revisions were instigated by complaints about decisions based upon personal taste. [App. 734] However, Mr. Heyser emphasized that he had observed both Commissions “struggling to look at objective standards *wherever those could be found* (the Secretary of the Interior’s Standards, the National Park Service’s Preservation Briefs, etc.)” *Id.*, emphasis added. The Planning Commission voted to recommend the proposed revisions, to add to the Ordinance an HLC review requirement that was not there at the time. [App. 181:6-184:5; 627-628; 634-640; 734-735]

The Planning Commission’s proposed amendments to the Ordinance, including the short-term rental and historic preservation amendments, were accepted at the Town Council meeting of October 11, 2011. [App. 775; 780] Following the first reading at the November 8, 2001, Town Council meeting, both Mr. Burgess and Ms. Gedney made comments about the proposed provisions to regulate short-term residential rentals. [App. 785] Council member Josh Stella,

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<sup>2</sup> In other words, was not created with the power to issue certificates of appropriateness, which are appealable to circuit court. W.Va. Code § 8-26A-7.

who also was President of the Planning Commission, stated that the purpose of the amendments was to clarify the existing ordinance, because there was a “technical loophole” for residential districts. [App. 785] Following the second reading on December 13, 2011, an individual who had served on the Planning Commission when the zoning ordinance was rewritten, spoke to the purported intent of the provisions at the time. [App. 793] Mr. Stella stated again that the purpose of the revisions were to remove ambiguity. *Id.* The Town Council voted to adopt the short-term rental amendments. *Id.* The amendments defined “short-term” as anything less than four (4) months and outlawed month-to-month leases. [App. 605-606]

Throughout their interactions with Town officials and regulatory bodies, the Burgesses were not represented by legal counsel. [App. 917-919; 941-943] It was not until after the partial denial of their building permit application on August 15, 2011, that the Burgesses first contacted undersigned counsel. [App. 941] However, it was not until the end of September – after the second building permit denial as to the heat pump condensers and receipt of the Mayor’s September 8, 2011, letter – that they decided to, and did, retain counsel. [App. 942]

Faced with an impending deadline, the Burgesses hastened to appeal the Planning Commission’s partial denial of their building permit application to the Shepherdstown Board of Appeals (“BOA”). [App. 420-422] The BOA was created as a board of zoning appeals, [App. 642], but without a grant of powers in the creation provisions. *Id.* It is the body designated to hear appeals of decisions arising under the Town’s building code. [App. 638] The Burgess appeal challenged the denial of the heat pump condensers installation as an erroneous application of the set-back definitions in the zoning ordinance. [App. 420-422] The appeal to the BOA could not and did not challenge the validity of the Ordinance.

Unable, through informal investigation, to secure all information relevant to the legality of the Town's conduct and ordinances, counsel submitted a Freedom of Information Act ("FOIA") request to inspect certain public records of the Town. [App. 433-435] The Town responded through its legal counsel, [App. 437], and undersigned counsel attempted to work with the Town Clerk to arrange the requested inspection, [App 553], but the requested inspection was never afforded. Instead, the only production made was of certain meeting agendas and minutes, most all of which were those already appearing on the Town's website, and most of which were not official records. [App. 558-564] Furthermore, the Town's legal counsel maintained that e-mails in the conduct of Town business, but sent or received via private e-mail accounts, were not public records. [App. 437] The Town offered no explanation for the failure to produce the other requested records that were indisputably public records. [App. 70:11-72:1; 74:6-75:8; 79:5-85:24]

Subsequently, on November 7, 2011, the Burgesses filed their verified petition in the circuit court. [App. 323-437] The circuit court ordered the petition filed [App. 440] and entered a rule to show cause setting the matter for a show-cause hearing on December 15, 2011, [App. 438-439], in general compliance with the time standards of T.C.R. 16.12. On December 14, 2011, Respondents removed the case to federal district court, [App. 505-507], where they filed their responsive pleading. [App. 653-659] The district court remanded all but Count VII, which asserted a claim pursuant to 42 U.S.C. § 1983. [App. 512] Petitioners, through counsel, alerted the circuit court that the matter had been returned to the docket and requested rescheduling of the show-cause hearing. [App. 513] The circuit court set the show cause hearing for May 4, 2012, [App. 528-531], which was continued upon the request of Respondents, and reset for June 8,

2012. [App. 532-533] Due to a continuing trial in the circuit court, the matter was reset for June 15, 2012, [App. 1, 3], at the end of which it recessed until June 22, 2012. [App. 105]

While the Burgesses awaited a hearing date following the remand, the Town issued a Cease and Desist Notice against them for their rentals on the property [App. 145:3-11], in spite of the court's entry of a Rule to Show Cause upon the verified petition. [App. 438-439] The Burgesses stopped renting as commanded.<sup>3</sup> *Id.* By the time that the hearing concluded on June 22, 2012, the Burgesses had been unable to rent their house for over three (3) months, and were still without central heating and air conditioning. It had been seven (7) months since their petition for mandamus and prohibition relief had been presented, far beyond the 30 days contemplated by T.C.R. 16.12.

At the end of the argument, Petitioners proposed that the parties submit their points of law for the court's consideration in reaching its decision. [App. 287:22-288:15] Respondents proposed that they have the opportunity to secure a transcript and then submit a proposed order (findings of fact and conclusions of law). [App. 296:15-21] Because securing a transcript would (and did) take months to produce,<sup>4</sup> thus delaying a decision for several months more, Petitioners' counsel objected, asking that if the court was going to order the submission as proposed by Respondents, that Petitioners be given preliminary relief so as to be able use the property while awaiting a decision. [App. 300:6-11] Petitioners' counsel also argued that the FOIA productions should be ordered before a final decision was rendered. [App. 298:21-299:11] The circuit court denied the requested temporary relief [App. 304:8-9], and announced the ruling ultimately reflected in the final order below. [App. 307]

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<sup>3</sup> The Town, nonetheless, initiated a civil action against the Burgesses to enjoin their renting the property. Civil Action No. 12-C-136, Circuit Court of Jefferson County. The action was later dismissed after opposition from Petitioners' counsel.

<sup>4</sup> Petitioners requested the transcript on July 3, paid for it on July 19, and received it on November 26.

Petitioners objected to entry of the final order without success. [App. 878-883]  
Petitioners timely filed a motion for new trial [App. 908], which likewise was denied. [App. 318] Thereafter, Petitioners timely filed the Notice of Appeal herein.

### **III. SUMMARY OF ARGUMENT**

1. Mandamus is proper to challenge the validity of an ordinance, and is not precluded by the availability of an appeal under the challenged ordinance. The circuit court ignored this settled law when it ruled that Petitioners' actions in mandamus would not lie. As a result, the circuit court failed to decide the invalidity of the building code on its merits.

2. If a zoning authority wants to qualify a permitted use so as to exclude some forms of the use, it must do so by express provisions in a valid zoning ordinance. Where the zoning ordinance failed to define "short-term" residential use, or to express an exception for such use by renters, Shepherdstown could not lawfully prohibit such use. It also could not retroactively apply amendments which introduced such definition and exception.

3. West Virginia's Freedom of Information Act mandates the production of public records upon request. Public records include e-mails, if they relate to the conduct of the public's business, even if public officials send and receive such e-mails by use of their private e-mail accounts. Where the Town failed to produce requested public documents without justification, it violated the Act and the production should have been compelled by the circuit court.

4. Prohibition will lie to prohibit judicial and quasi-judicial proceedings to enforce a zoning ordinance where the ordinance is invalid. An invalid zoning ordinance confers no authority on a board of zoning appeals or municipal judicial officers. Accordingly, such boards or officials would be without jurisdiction to enforce the ordinance, and prohibition may rightly issue against them to prevent such proceedings.

5. Appealable orders entered upon proceeding before the court must contain specifically stated factual findings, based upon the evidence in the case, and separately stated conclusions of law, demonstrating the application of the proper law to the facts. The final order of the circuit court below failed to comply with these requirements.

6. The final order is contrary to the evidence and the record, making factual findings for which there is no supporting evidence. The evidence in the case is contrary to these findings.

7. The circuit court erred when it denied petitioners' motion for a new trial. The case below presented questions of law. The circuit court failed to apply the settled law to the questions presented, and failed to decide the FOIA count at all. Petitioners attempted first to prevent the entry of the erroneous order, without success. The motion for a new trial should have been granted.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This appeal invokes settled rules of law, but includes issues of first impression in the application of that law: (1) the mandatory effect of W.Va. Code § 8-12-13(b); (2) the necessity of express provisions in a zoning ordinance to qualify and prohibit otherwise permitted residential rentals; and (3) e-mails in the conduct of public business transmitted via private e-mail accounts as "public records" under the Freedom of Information Act. The residential rental issue has produced inconsistent decisions in the 23d Circuit. Accordingly, this appeal is appropriate for Rule 20 Argument.

#### **V. ARGUMENT**

##### **A. The Circuit Court Erred in Ruling that Mandamus would not Lie Challenge the Validity of the Building Code.**

This Court's criteria for the grant of a writ of mandamus is long established:

... (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969). In *W.Va. Citizens Action Group, Inc. v. Daly*, 174 W.Va. 299, 302, 324 S.E.2d 713, 716-717 (1984), the Court summarized the decisions that provide guidance in the application of the mandamus criteria.

“Another adequate remedy” does not mean any other available cause of action. “Mandamus will not be denied on the ground that there is another remedy unless such other remedy is equally convenient, beneficial, and effective.” *Id.*, quoting Syl. pt. 5, *Hardin v. Foglesong*, 117 W.Va. 544, 186 S.E. 308 (1936). Moreover, “[t]his Court has consistently held that mandamus may be used to attack the constitutionality or validity of a statute or ordinance.” *Id.*, at 302, 324 S.E.2d at 717. Accordingly, in *Daly*, the availability of appeal from a criminal conviction for violation of the local ordinance did not preclude an action in mandamus to challenge the constitutional validity of the ordinance. *Id.* Such an appeal is not “equally convenient, beneficial, and effective.” [App. 880, 882]

Mandamus also has been used to challenge the validity of land use and development ordinances. *See, e.g., State ex rel. Brown v. Corp. of Bolivar*, 183 W.V. 310, 395 W.Va. 554 (2000)(moratorium on building permits); *Bittinger v. Corp. of Bolivar*, 183 W.Va. 310, 395 S.E.2d 554 (1990)(building code); *G-M Realty, Inc. v. City of Wheeling*, 146 W.Va. 360, 120 S.E.2d 249 (1961)(zoning ordinance); *State ex rel. Ammerman v. City of Philippi*, 136 W.Va. 120, 65 S.E.2d 713 (1951)(building code); *Carter v. City of Bluefield*, 132 W.Va. 881, 54 S.E.2d 747 (1949)(zoning ordinance). In none of these cases has the Court suggested that mandamus

was not a proper action by which to challenge the validity of the ordinance in question, despite the availability of *certiorari* review in circuit court.

In *Carter, Id.*, this Court held that mandamus could be sought to challenge the validity of a zoning ordinance as applied to the petitioner’s property, even though the denial of a necessary permit by the zoning board could be appealed to the circuit court. As this Court explained, the validity of the ordinance could not be questioned in an appeal to the zoning board of adjustment, because such boards lack authority to decide the question. *Id.*, at 898, 54 S.E.2d at 757-58. Because the issue could not be raised to the board, it could not be raised in an appeal of the board’s decision to the circuit court. *Id.*, at 899, 54 S.E.2d at 758. *Carter* recognized that an appeal of a zoning decision and a mandamus to challenge the validity of the ordinance seek different and distinct forms of relief. *Id.*, at 900, 54 S.E.2d at 758. Far from providing “another adequate remedy,” an appeal of a decision offers no opportunity to challenge the validity of the ordinance. *Id.*, at 899-900, 54 S.E.2d at 758. Therefore, appeal of a zoning decision does not bar a separate mandamus action to challenge the validity of the ordinance.

Owing to the procedural rules of the time, the petitioner in *Carter* could not have appealed an adverse zoning decision to the circuit court and pled an alternative count in mandamus to challenge the validity of the ordinance. The modern Rules of Civil Procedure, however, expressly permit pleading alternative claims. W.V.R.Civ.P. 8(e)(2).

In an earlier case quite similar to that at issue in this appeal, the circuit court below favorably ruled upon a petition seeking both *certiorari* and mandamus relief. *See, Dailey v. Harpers Ferry Town Council*, Civil Action No. 09-C-399 (Order of March 2, 2011). [App. 986-990] The circuit court ruled favorably on Dailey’s as-applied challenge and also granted relief in *certiorari*. [App. 986-990] However, in the case below, the circuit court, completely *volte-face*,

ruled that mandamus would not lie because the Burgesses had appealed the BOA's decision upholding the partial denial of the building permit application.<sup>5</sup> [App. 310-11]

Because the circuit court dismissed the case on procedural grounds, it did not address the challenge to the validity of the Town's building code on the merits. The record is clear that the building code is invalid on its face and as applied to the Burgesses. [App. 19:22-31:22]

The Ordinance declares that the Town's building code provisions are "specifically" adopted in accordance with W.Va. Code § 8-12-13 and § 8-12-14. Shep. Ord. at Sec. 9-902-IV [App. 636]. W.Va. Code § 8-12-13 grants municipalities the authority to enact a building code, while § 8-12-14 grants the authority to require building permits. [App. 575] Respondents admitted in their verified joint answer that Sec 9-902 IV was the building code. [App. 327 at ¶28; 654 at ¶ 2] At the hearing, however, Respondent's counsel contradicted the sworn admission, claiming that the provisions were actually zoning regulations. [App. 55:11-16] Counsel offered no evidence to substantiate this contradictory assertion.

Sec. 9-902-IV of the Ordinance is a building code, but it is an invalid building code. "It has been well established that municipalities in West Virginia have no inherent power." *Bittinger*, 183 W.Va. at 314, 395 S.E.2d at 558. Their authority is conferred by the legislature, including such grants of the police power that the legislature may choose to bestow. *Id.* Such granted powers must be exercised in the manner directed by the legislature in order to be valid. *See, e.g.,* Syl. pt. 2, *American Tower Corp. v. Common Council of the City of Beckley*, 210

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<sup>5</sup> The deadline for the W.Va. Code § 8A-9-1 *et seq.* appeal of the BOA decision expired while the parties were awaiting the federal district court's ruling on the pending remand motion. Accordingly, the appeal could not be joined by amendment to the original petition. Following remand, the Burgesses attempted to join the actions, but their motion to consolidate [App. 514] was never addressed by the circuit court. [App. 91:19-92:22] As of this writing, the certiorari appeal of the building permit decision is still pending.

W.Va. 345, 557 S.E.2d 752 (2001), *citing*, Syl. pt. 1, *Vector Co. v. Board of Zoning Appeals*, 155 W.Va. 362, 184 S.E.2d 301 (1971). [App. 21:19-22]

By legislation enacted in 1988, the power of municipalities to enact a building code was significantly limited. One year after designation of a State Building Code by the State Fire Marshal, every local building code became void and a municipality that wished to have a building code had to adopt the State Building Code. W.Va. Code § 29-3-5b; W.Va. Code § 8-12-13(b); 87 C.S.R. 4 §6.1 (1989). The regulations establishing the State Building Code became effective on April 28, 1989, 87 C.S.R. 4 (1989). As of April 28, 1990, if Shepherdstown wanted to have a building code, it had to adopt the State Building Code. It never did so [App. 403-06; 662], but continued to administer its own building code, found in Sec. 9-902 of the Ordinance.

Sec. 9-902 is not a zoning ordinance. [App. 27:10-28:4] The current zoning enabling statute allows an ordinance to include architectural and design regulations, especially in historic districts. W.Va. Code § 8A-7-2(b)(3) and (8). *See, also*, former law at W.Va. Code § 8-24-39(c). But, Shepherdstown's building code goes beyond the mere regulation of architectural design and imposes criteria involving construction methods. The latter is the province of a building code. Syl. pt. 7, *Harrison v. Town of Eleanor*, 191 W.Va. 611, 447 S.E.2d 546, (1994); *Bittinger*, 183 W.Va. at 314, 395 S.E.2d at 558. *In accord*, Syl. pt. 1, *Kaufman v. Planning & Zoning Comm'n of Fairmont*, 171 W.Va. 174, 298 S.E.2d 148 (1982); *Singer v. Davenport*, 164 W.Va. 665, 669, 264 S.E.2d 637, 640 (1980). [App. 29:23-30:10]

In considering building permit applications, the Shepherdstown Historic Landmarks Commission<sup>6</sup> and the Planning Commission refer to various sources for criteria to apply to

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<sup>6</sup> The HLC was not created with the power to grant certificates of appropriateness, necessary for it to have the power to review and approve building plans. W.Va. Code §§ 8-26A-5(c) and -7. Where such power is granted, specific procedures must be followed to enact the regulations used in its reviews, W.Va.

building permit applications, including the Secretary of the Interior's Standards and Guidelines.<sup>7</sup> Included are such measures as rebuilding original elements as opposed to replacing them with visually faithful reproductions, which standards involve construction techniques,<sup>8</sup> not mere architectural style and design. Using such criteria, Section 9-902-IV is a building code.

Section 9-902-IV of the Ordinance would be invalid either as a zoning ordinance or a building code, because it fails to specifically and definitely prescribe the rules, standards or regulations against which the request for a permit will be evaluated. [App. 28:5-13] *See, e.g.,* Syl.Pt. 1, *Lynch v. Town of North View*, 73 W.Va. 609, 81 S.E. 833 (1914); Syl. Pt. 2, *State ex re. Nunley v. City of Montgomery*, 94 W.Va. 189, 117 S.E. 888 (1923); Syl.Pt. 1, *State ex re. Casto v. Town of Ripley*, 95 W.Va. 521, 121 S.E. 725 (1924); Syl. Pt. 1, *State ex rel. Ammerman v. City of Philippi*, 136 W.Va. 120, 65 S.E.2d 713 (1951). *In accord, Kaufman v. Planning & Zoning Comm'n of Fairmont*, 171 W.Va. 174, 181-82, 298 S.E.2d 148, 155 (1982). Instead, Sec. 9-902-IV(a)(1)-(3) set out generalized descriptions, and then, in subparagraph (4), allows the Planning Commission apply “any other factors including aesthetic factors which the Commission deems to be pertinent.” Emphasis added. “Ordinances which invest a city council or board of trustees or officers with a discretion which is purely arbitrary ... are unreasonable and invalid.” *Casto*, 95 W.Va. at 523, quoting *Lynch v. Town of North View*, 73 W.Va. at 612.

Mr. Heyser stated that, in reviewing building permit applications, the HLC and the Planning Commission, struggled “to look at objective standards wherever those could be found....” [App. 734] It apparently had never occurred to Shepherdstown that such standards are

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Code § 8-26A-6, which also were not followed. Such an HLC's power is limited to historic districts, W.Va. Code § 8-26A-7, but Shepherdstown requires HLC review in all areas of the Town. [App. ]

<sup>7</sup> The current Standards and Guidelines may be found at <http://www.nps.gov/tps/standards.htm>.

<sup>8</sup> For example, early-1800s era windows were typically constructed with mortise and tenon joints secured by dowel pins, and rebuilding them requires application of the same technique. The Burgesses avoided this by deciding to not address certain windows at this time.

supposed to be found within the provisions of a lawfully-adopted ordinance. Instead, building permit applicants in Shepherdstown are subject to the unfettered discretion of the Planning Commission to apply any factors that it deems appropriate, wherever it finds them.

Such unfettered discretion results in arbitrary decision-making, by which the Planning Commission can “grant the permit to one applicant and, in the same circumstances, withhold it from another.” *Ammerman*, 136 W.Va. at 124, 65 S.E.2d at 715. The denial of the Burgesses’ heat pump condensers presents one example of such arbitrary decision-making. [App. 28:19-29:20] Shepherdstown’s building code is invalid, both facially and as-applied to Petitioners.

Applicants aggrieved by an adverse decision on their permit application must appeal to the BOA, a body created pursuant to zoning enabling statutes. Shep. Ord. Sec. 9-902-IX [App. 638] The enabling statutes do not include review of building code decisions as a power allowed boards of zoning appeals. W.Va. Code § 8A-8-9. The circuit court so ruled in *Dailey, supra*. [App. 975-77] A lawful building code requires creation of a building code board of appeals. 87 C.S.R. 4 § 7.5. [App. 578] [App. 21:8-18]

Petitioners should be allowed to complete the work on their property without reference to Shepherdstown’s invalid building code.

**B. The Circuit Court Erred in Ruling that “Short-Term” Residential Rentals were not Permitted in the R-1 Zoning District, Where the Zoning Ordinance Contained No Provision Limiting Permitted Single-Family Residential Rental by length of Occupancy and did not Define “Short-Term.”**

“[O]ur law of real property confers on [an owner] a right, subject to reasonable regulation, to use his property as he sees fit and to build on it what he wants. *Hutchison v. City of Huntington*, 198 W.Va. 139, 154, 479 S.E.2d 649, 664 (1996). Reasonable regulation includes valid zoning and permitting laws. *Id.*

Zoning laws and ordinances are statutes in derogation of common law property rights. 1  
Yokley, ZONING LAW AND PRACTICE, § 1-4, p. 1-6 (4<sup>th</sup> ed. 2000). Statutes in derogation of the  
common law must be strictly construed. [App. 279:14-281:12] Syll. Pt. 3, *Phillips v. Larry's  
Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920 (2007); *Woodrum v. Johnson*, 210  
W.Va. 762, 559 S.E.2d 908, n. 21 (2001); *Shifflette v. Lilly*, 130 W.Va. 297, 303, 43 S.E.2d 289  
(1947); Syll. Pt. 3, *Bank of Weston v. Thomas*, 75 W.Va. 321, 83 S.E. 985 (1914); Syll. Pt. 1,  
*Kellar v. James*, 63 W.Va. 139, 59 S.E. 939 (1907); *Kilgore's Adm'r v. Hanley*, 27 W. Va. 451  
(1886); Syll. Pt. 1, *Harrison v. Leach*, 4 W.Va. 383 (1870). Statutes in derogation of the  
common law are given effect only to the extent clearly expressed by their terms, and may not be  
expanded by implication to matters not referred to or indicated by their terms. Syll. Pt. 4,  
*Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920; *Shifflette*, 130 W.Va. at 304;  
Syll. Pt. 3, *Bank of Weston*, 75 W.Va. 321, 83 S.E. 985; Syll. Pt. 2, *Kellar*, 63 W.Va. 139, 59  
S.E. 939. "Where there is any doubt about the meaning or intent of a statute in derogation of the  
common law, the statute is to be interpreted in the manner that makes the least rather than the  
most change in the common law." Syll. Pt. 5, *Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484,  
647 S.E.2d 920.

The rule of strict construction precludes restrictions on the use of land through  
unexpressed policies or interpretations that capitalize upon ambiguities in the express language  
of the written regulations. Property rights are fundamental rights entitled to due process of law.  
*Hutchison*, 198 W.Va. at 154, 479 S.E.2d at 664. Vague or ambiguous regulations offend basic  
notions of due process:

As a matter of basic procedural due process, a law is void on its face if it is so  
vague that persons 'of common intelligence must necessarily guess at its meaning  
and differ as to its application.'

*Garcelon v. Rutledge*, 173 W.Va. 572, 574, 318 S.E.2d 622, 625 (1984), quoting, *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Like building regulations, zoning ordinances must specifically and definitely prescribe the rules to be applied to land uses. The vagueness or ambiguity of zoning regulations cannot be overcome by the explanations or justifications of administrators attempting to impose restrictions that are not clearly expressed in the ordinance itself. "A citizen should be able to determine the law by reading the published code. A citizen should not be subjected to *ad hoc* interpretations ... by officials." *Dianovich v. Grays Harbor County*, No. 24316-4-II, at 12 (2000 Wash.App., Lexis 2443), quoting, *Burien Bark Supply v. King County*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986).

Likewise, after-the fact expressions of intent are not a substitute for specifically expressed regulations. As observed by the Tennessee Appellate Court:

... courts attach great significance to the local officials' prior interpretations of an ordinance, see Anderson, [*American Law of Zoning*] § 18.09 [(3d ed. 1986)], but attach little weight to after-the-fact statements by local officials concerning their intentions or motivations for enacting an ordinance.

*Wade v. Patterson*, No. E2007-02893-COA-R3-CV, at 12 (2009 Tenn.App., Lexis 34). This Court has similarly observed that a court cannot consider the views of members of a legislature to determine the original intent of a statute or ordinance "after its passage and after litigation has arisen over its meaning and intent." Syll. Pt. 1, *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920 (2007), quoting, Syll. Pt. 1, *Cogan v. City of Wheeling*, 166 W.Va. 393, 274 S.E.2d 516 (1981). See, also, *Pristavec v. Westfield Insur. Co.*, 184 W.Va. 331, 400 S.E.2d 575, n. 9 (1990).

Zoning regulates use, not users. Ziegler, E.H., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 2:15 (4<sup>TH</sup> Ed. 2005). [App. 283:19-284:1] Consequently, a use that is permitted if undertaken by the owner of a property also is lawful if undertaken by a tenant or licensee. [App.

284:5-7; 13-24] Permissible deviations from this general rule require express provisions in the ordinance.<sup>9</sup> [App. 285:1-287:4]

The Shepherdstown zoning ordinance provisions for the R-1 district expressly permit single-family residential use, but makes no distinction between owner users and renting users. Shep. Ord. Sec 9-503. [App. 630] In fact, the word “rent” or “lease” does not appear in the R-1 regulations at all. [App. 156:4-159:3] However, Respondents did not dispute that single family residential rental (the rental of the entire dwelling to a single family) was permitted in the R-1 district. As the Ordinance contained no mention of single-family residential rental, it also did not contain a provision that defined such permitted use by length of residency.

The R-1 district also does not refer in any way to use of single-family dwellings as part-time, second or vacation homes. However, the evidence showed that the Town both acknowledges and accommodates temporary residency in the R-1 district, because such owners are entitled to parking permits available only to residents. [App. 281:13-282:21; 609] Also, no one suggested that the Burgesses could not use the house as guest quarters for visiting family and friends. [App. 282:22-283:19]

In sum, the R-1 district provisions did not expressly permit residential rentals or part-time residency at all. And yet, the Town acknowledged that both were allowed under its “inclusive” ordinance. But, somehow, the Town insists that the same ordinance provisions give notice that “short-term” residential rental occupancy were not permitted. [App. 16:14-23; 880-881]

Petitioners did not claim that Shepherdstown could not restrict single-family residential rental on the basis of a defined length of tenancy, but correctly claimed that it had not done so. [App. 89:19-90:11] This Court has not addressed this question, which has received increasing

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<sup>9</sup> Generally, absolute prohibition against renting property for permitted uses is not deemed to be within the scope of permissible restrictions. *See, e.g., Gangemi v. Zoning Board of Appeals of the Town of Fairfield*, 255 Conn. 143, 763 A.2d 1011 (2001). *See, also*, RATHKOPF’S, § 2:15 (4<sup>th</sup> Ed. 2005).

attention in recent years in courts across the country. A clear majority rule has emerged: restriction on permitted residential rental based on length of residency must be expressly stated in the zoning ordinance. The Circuit Court of Morgan County adopted this majority rule in *Crutchfield v. Clark*, Civil Action No. 10-C-5 (Order, April 22, 2011).<sup>10</sup> [App. 840-41; 847-863]

Courts from across the country have refused to uphold the assertion that “single family residential use” excludes “short-term” residential rentals, without express limiting provisions. *County of Douglas v. Owen*, No. A08-1776 (Minn.App. 2009, Fastcase); *Laketon Township v. Advanse, Inc.*, No. 276986 (Mich.App. 2009, Fastcase); *Wade v. Patterson*, No. E2007-02893-COA-R3-CV, at 12 (2009 Tenn.App., Lexis 34); *Spilka v. Town of Inlet*, 778 N.Y.S. 222, 8 A.D.3d 812 (2004); *Dianovich v. Grays Harbor County*, No. 24316-4-II, at 12 (2000 Wash.App., Lexis 2443); *Brown v. Sandy City Bd. of Adjustment*, 957 P.2d 207 (Utah App. 1998); *Bellaire v. City of Treasure Island*, 611 So.2d 1285 (Fl.App. 2d Dist. 1992); *Landing Development Corp. v. City of Myrtle Beach*, 285 S.C. 216, 329 S.E.2d 423 (1985); *City of Portland v. Carriage Inn*, 67 Or.App. 44, 676 P.2d 943 (1984).<sup>11</sup> See, also, *Crutchfield, supra*. [App. 847-863]

Applying the same majority rule, courts have upheld restriction of “short-term” residential rentals where the zoning ordinance contained express definitions or occupancy time limits which clearly operated to exclude such rentals from permitted residential uses. See, e.g., *Davis v. Jackson County*, No. 2011-028 (Or. LUBA 2011, Fastcase).

The majority rule, recognizing the necessity for express provisions to exclude residential rentals from permitted residential uses on the basis of length of occupancy, is consistent with this

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<sup>10</sup> *Crutchfield* arose in the context of private restrictive covenants. Because both zoning and private covenants restrict the free use of land, and both are subject to strict construction, *Wallace v. St. Clair*, 147 W.Va. 377, 389, 127 S.E.2d 742, 751 (1962), the interpretive analysis in either context is analogous to that in the other.

<sup>11</sup> See, also, *Milo v. City of Venice*, Case No. 2008 CA 552 SC (FL 12<sup>th</sup> Jud. Circ., 2008), an unpublished decision that has been made available for online viewing at [http://www.inversecondemnation.com/inversecondemnation/files/Milo\\_order\\_CA552SC\\_3\\_2008.pdf](http://www.inversecondemnation.com/inversecondemnation/files/Milo_order_CA552SC_3_2008.pdf).

Court's body of general law of restrictions on the free use of land. That restriction on the use of land must be specifically and definitely stated. That basic due process requires such restrictions to be free of vagueness, so that people of ordinary intelligence need not guess at their meaning and differ as to their application. That statutes in derogation of the common law be strictly construed. In fact, the majority rule requiring express terms to restrict "short-term" residential rentals in residential districts is merely a natural product of the universally-accepted legal principles applicable to restrictions on the use of land generally.

The Town's position would exempt its zoning ordinance from the general rules, because the ordinance is written in the "inclusive" rather than the "exclusive" style (i.e., permissive vs. prohibitive terms), such that only expressly listed uses are permitted. By its reckoning, if a town decides to write its zoning district regulations in the permissive, then property owners have no right to any use of their property until the right is expressly bestowed. [App. 156:12-157:11] The problem with this argument is that it is not an accurate depiction of the Town's zoning ordinance, and it is a gross distortion of the inclusive-exclusive zoning dichotomy.

Contrary to the Town's representation, the zoning ordinance does expressly list prohibited uses as well as permitted uses. Shep. Ord. Sec. 9-212. [App. 625] More to the point at hand, the permissively-worded district provisions of the zoning ordinance do qualify and limit some permitted uses by express language. *See, e.g.*, Shep. Ord. Sec. 9-503(b). [App. 630] Nonetheless, the circuit court accepted the Town's argument, [App. 311-14], citing an entry in Michie's Jurisprudence<sup>12</sup> that exclusively relies upon a body of Virginia law. Even those Virginia authorities do not apply the inclusive-exclusive distinction as urged by Shepherdstown and adopted by the circuit court.

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<sup>12</sup> The court did not cite the Michies section, but counsel later found statements in § 5 of the Zoning and Planning entry.

“Of course, the ordinance prohibits certain uses of the land. All zoning laws do this.” *County of Fairfax v. Parker*, 186 Va. 675, 682, 44 S.E.2d 9, 13 (1947)(the earliest of the Virginia decisions cited in MICHIE’S, in a challenge to an inclusive ordinance). In *Wiley v. County of Hanover*, 209 Va. 153, 162 S.E.2d 160 (1968), the court rejected the overly-simplistic view of the inclusive-exclusive distinction and examined an inclusive ordinance to determine if the owner’s accessory use was prohibited. The *Wiley* court, citing the vagueness standard, *supra*, concluded:

It is certainly doubtful, to say the least, whether a person of ordinary intelligence would know from the language of the ordinance whether the keeping of homing pigeons on his residential lot would be ... permitted, or whether such activity was prohibited. Had it been the purpose of the ordinance to prohibit the raising, sheltering or harboring of pigeons ..., as the county claims, *this could easily have been accomplished by a simple and direct provision to that effect. Here there was no such provision and the matter is left in doubt by the language employed....*

Emphasis added. *Wiley*, 209 Va. At 156-57, 162 S.E.2d at 163. In *Bd. of Supervisors of Madison County*, 244 Va. 545, 422 S.E.2d 760 (1992), a concurring justice examined the nature of use classifications, *Id.*, at 552-53, 422 S.E.2d at 764-65, and warned that, by relying only on the inclusive-exclusive distinction, “a governmental entity can secure the exclusion of any land use simply by assigning it a label not found in the ordinance.” *Id.*, at 553, 422 S.E.2d at 765.

Most of the cases cited, *supra*, adopting the majority rule regarding the prohibition of “short-term” residential rental, also involved “inclusive” or “permissive” zoning ordinances. Like the Virginia cases, immediately above, the majority rule decisions also put the issue in its proper context – one of interpreting the ordinance as a question of law, not as a mechanical operation of the structure of the ordinance. *See, e.g., Brown*, 957 P.2d at 210-11, where the court rejected as “untenable” the argument that because the ordinance did not specifically permit

single family rental occupancy for less than thirty (30) days, such rental occupancy was proscribed by the ordinance.

*Dianovich*, (2000 Wash.App.) is factually similar to the instant case, and also instructive. The *Dianovich* court applied the vagueness test to the ordinance at issue, and concluded that it failed on both the uncertain meaning and different applications prongs of vagueness.

"[W]here the language of an ordinance creates a serious question regarding the inclusion of a certain prohibition, but alternative language is plainly available which would clarify doubt, we believe that failure to utilize such language is constitutionally infirm." ... Similarly, here it is not unusual to rent single family dwellings for short term vacation use. Thus, a property owner would expect a county ordinance to clearly state a prohibition against such rentals.

\* \* \* \* \*

... the County could not define the demarcation point between short term and long term or point to any criteria in the ordinance for making this distinction.

*Id.*, at 10-11, citations omitted.<sup>13</sup> See, also, *Wade* (2009 Tenn.App.), which also applied a vagueness analysis, rejecting the notion that the inclusive-exclusive distinction precluded standard interpretive analysis of the zoning ordinance.

As to short-term residential rentals, Shepherdstown officials described the ordinance as “not clear,” “ambiguous,” or containing a “loophole.” [App. 130:16-131:6; 207:3-5; 785; 793] Accordingly, the circuit court erred when, without performing any interpretive analysis, it ruled that the Shepherdstown zoning ordinance prohibited “short-term” residential rentals in the R-1 district [App. 313], even prior to the December 13, 2011, amendments to the ordinance. [App. 605-06] In so ruling, however, the circuit court, like the ordinance itself, was silent as to the demarcation point between “short-term” and “long-term” residential use – something the court

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<sup>13</sup> The expectation of a clearly-stated provision is particularly reasonable in the instant case. The Town was aware of “short-term” residential rental in the R-1 district as early as October of 2008. [App. 202:20-203:15] It had plenty of time to amend its ordinance to add a limiting caveat or to establish an interpretive precedent through an enforcement action prior to 2011. See, also, App. 119:2-7. It did neither.

could not have done unless it had simply provided such a term of its own making. The circuit court was plainly in error as a matter of law.

The amendments of December 13, 2011, also could not lawfully be applied to the Burgesses' use of their property, because they commenced their use prior to those enactments. [App. 16:14-23; 287:5-15] West Virginia's zoning enabling statute protects pre-existing lawful uses against the enactment of or later amendments to a zoning ordinance. W.Va. Code § 8A-7-10(c) (formerly found in W.Va. Code § 8-24-50). Petitioners provided substantial evidence that they had begun their planned use of the property prior to the adoption of the December, 2011, amendments, which evidence was not rebutted. [App. 228:12-23; 230:1-231:22; 237:1-4; 237:15-20; 240:5-242:1; 256:5-22; 426; 428; 825; 830-838] *See, Sams v. City of White Sulphur Springs*, 226 W.Va. 723, 704 S.E.2d 723 (2010). Because the use was lawful when commenced, it remained lawful after the later amendments to the zoning ordinance. Petitioners were entitled to a Town business license, and entitled to continue their rentals. [App. 6:1-7:18; 34:15-35:19]

**C. The Circuit Court erred in Refusing to Order the Town to Comply with the West Virginia Freedom of Information Act**

West Virginia's Freedom of Information Act, W.Va. Code § 29B-1-1, *et seq.* ("FOIA") grants every person the "right to inspect or copy any public record of a public body in this State," save for enumerated exceptions. W.Va. Code § 29B-1-3(1). The circuit courts have the duty to enforce the right. W.Va. Code § 29B-1-5(2). In a FOIA action, the burden is on the public body to sustain its withholding of the records sought. *Id.* Shepherdstown failed to meet this burden, offering no explanation for failing to produce requested public records. [App. 70:11-72:1; 74:6-75:8; 79:5-85:24]

Of the documents sought from Shepherdstown, most were indisputably public records, not subject to any of the exceptions of W.Va. Code § 29B-1-4. Nonetheless, the requested

inspection of these public records was not afforded. Instead, the Town's made a responsive production of non-official and incomplete website copies which omitted accompanying documents – such as reports and citizen comments submitted in writing or e-mail – that were referred to or made part of the record of a meeting. The original enactments of the Town's comprehensive plan, zoning ordinance, and planning commission are not available online at all, and were not produced.

In attempts to coordinate the requested inspection, through correspondence and calls, counsel emphasized that a physical inspection of the records was requested, and that the online documents would not satisfy the request. The Town never disputed that these were public records. It simply didn't produce them.

The FOIA requests for certain e-mails provoked the only dispute by the Town that the documents sought were public records. Town officials use their private e-mail accounts for Town business. [App. 437] Because the Town has no control over the private e-mail accounts, the Attorney indicated that they could not be produced. [App. 437] This precise question has not been decided by this Court, but withholding these e-mails is not consonant with existing law.

FOIA defines "public record" to include "any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body." W.Va. Code § 29B-1-2(4). In Syl. pt. 2, *A.P. v. Canterbury*, 224 W.Va. 708, 688 S.E.2d 317 (2009), this Court held that the definition of a "writing" found in W.Va. Code § 29B-1-2(5) includes an e-mail communication. However, "a personal e-mail communication by a public official or public employee, which does not relate to the conduct of the public's business, is not a public record subject to disclosure under FOIA," *Id.*, at Syl. pt. 3, even if it is sent or received on an e-mail account provided by the public body.

This Court also has determined that a document does not have “to be prepared by, on behalf of, or at the request of” a public body in order to satisfy the FOIA definition of public record. Syl. pt. 2, *The Shepherdstown Observer, Inc. v. Maghan*, 226 W.Va. 353, 700 S.E.2d 805 (2010)(a public referendum petition was a public document subject to FOIA production).

The context of *Canterbury, supra*, is the inverse of that presented in the instant case. However, the dispositive holding of *Canterbury* can fairly be said to stand for the proposition that it is the “public business” attribute that makes an e-mail a public record, and not the identity of the e-mail account from which the e-mail is sent or received. If this is not the rule, then public officials can shield otherwise public records from production under FOIA merely by transmitting them on personal e-mail accounts instead of accounts, if any, provided by the public body. This would be the norm where, as here, the public body does not provide individual e-mail accounts to its various officials, and the use of private e-mail accounts for communication relating to the public’s business is the standard procedure.

A “private e-mail account” exception would frustrate the core policy and purpose of FOIA, which Act is to be liberally construed. W.Va. Code § 29B-1-1. The harm done is substantial when, as here, members of the public convey their opinions for consideration at public hearings (even quasi-judicial hearings) via e-mails sent to individual members of a body, and those undisclosed communications influence members’ opinions on the matter at hand. Granted, these e-mails are in the possession of the individual officials. However, that is only because the Town, as standard practice, relies on the use of private e-mail accounts, but has no rule requiring that such e-mails be surrendered to the Town’s record-keeping.

The issue of conducting the public’s business through private e-mail has begun to receive attention from scholars, interest groups, government agencies and courts. *See, e.g., Agencies*

*Face Challenges in Managing E-mail*, at pp. 10-11 (Government Accountability Office, April 23, 2008);<sup>14</sup> *Access to Electronic Communications* (The Reporters Committee for Freedom of the Press, Spring, 2009).<sup>15</sup> Decisions from state courts of last resort are as yet few. However, it appears that decisions addressing the issue generally have embraced the conclusion urged by Petitioners herein. *See, e.g., McLeod v. Parnell*, No. S-13861 (Alaska, October 12, 2012)(“private emails regarding State business are no different than any other records...”); *Mollick v. Township of Worcester*, No. 2265 C.D. 2010 at p. 25 (Pa. Commw. Ct., 2011)(regardless of whether personal e-mail accounts and computers were used, emails documenting Township business could be public records); Public Access Opinion No. 11-006 (Ill. O.A.G., Nov. 15, 2011)(a binding opinion of the Attorney General under Illinois State law).

Recognition that e-mails pertaining to the public’s business are public records, regardless of the e-mail account used, is consistent with the stated purpose of FOIA and this Court’s FOIA decisions. The contrary rule undermines the goal of FOIA.

**D. The Circuit Court Erred in Ruling that Prohibition would not Lie to Prohibit Enforcement of the Town’s Invalid Zoning Ordinance.**

Several discoveries made during informal investigation led to considerable doubt of the legal validity of the Town’s zoning ordinance.<sup>16</sup> The zoning ordinance included regulations that are not authorized by the zoning enabling statutes and which cannot be administered under zoning powers. The building code and Historic Landmarks Commission provisions are two prominent examples. [App. 29:22- 31:6; 274:20-279:175] Information uncovered by investigation also indicated that the Town had not adopted a comprehensive plan prior to or at

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<sup>14</sup> Available at <http://www.gao.gov/assets/120/119711.pdf>.

<sup>15</sup> Available at <http://www.rcfp.org/rcfp/orders/docs/ELECCOMM.pdf>.

<sup>16</sup> The Town’s passage of the short-term rental amendments, without complying with W.Va. Code § 8A-7-8, also gave doubt of the Town’s adherence to the enabling statutes. [App.137:13-138:11]

the time of the enactment of its zoning ordinance, and it could not be confirmed that the planning commission was created before the enactment of the zoning ordinance.

Any one of these flaws would be fatal to the legal validity of the Town's zoning ordinance. Syl. pt. 3, *Largent v. Zoning Bd. of Appeals for the Town of Paw Paw*, 222 W.Va. 789, 671 S.E.2d 794 (2008); Syl. pt. 2, *American Tower Corp. v. Common Council of the City of Beckley*, 210 W.Va. 345, 557 S.E.2d 752 (2001). An official or body created by an invalid zoning ordinance would have no lawful jurisdiction to exercise the powers granted to it therein. *Largent, supra*. A board of zoning appeals created by such ordinance could not exercise its quasi-judicial functions, *Wolfe v. Forbes*, 159 W.Va. 34, 45, 217 S.E.2d 899, 906 (1975), and the municipal magistrate could not issue summonses on alleged zoning violations to be heard and decided in municipal court.

The FOIA request to Shepherdstown was intended, in large part, to secure the records necessary to prove or disprove the information discovered in preliminary investigation. [App. 298:21-299:11] However, the circuit court refused to order production of the requested records before ruling that prohibition would not lie to prohibit Shepherdstown, acting through its BOA, magistrate (the Mayor), municipal court or other like parties, from enforcing the zoning ordinance. The circuit court did not address the Burgesses' motion to enjoin the BOA from further proceedings in the Burgess appeal pending resolution of the questions of validity raised in the Petition below. [App. 441] *See*, W.Va. Code § 53-1-9. The lack of analysis in the circuit court's final order makes it impossible to discern if the court would even agree that prohibition would lie to prohibit enforcement proceedings upon an invalid zoning ordinance.

Prohibition would lie to prevent enforcement proceedings under an invalid zoning ordinance. W.Va. Code § 53-1-1 provides:

The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.

Moreover, as this Court long ago held:

The writ of prohibition lies from a superior court not only to inferior judicial tribunals properly and technically so denominated but also to inferior ministerial tribunals possessing incidentally judicial powers, such as are known in the law as quasi judicial tribunals, and even in extreme cases to purely ministerial bodies, when they attempt to usurp judicial functions.

Syl. pt. 1, *Fleming v. Commissioners*, 31 W.Va. 608, 8 S.E. 267 (1888). *See, also*, Syl. pt. 1, *State ex rel. Brown v. Bolivar*, 209 W.Va. 138, 544 S.E.2d 65 (2000).

Upon the information available to them, Petitioners assert that the zoning ordinance was void *ab initio*, as was the ordinance in *Largent*, 222 W.Va. 789, 671 S.E.2d 794. If the public records would prove otherwise, it was incumbent upon the Respondents to have come forward with such proof, pursuant to the plain terms and effect of the Rule to Show Cause. W.Va. Code § 53-1-5. This is especially true given the Town's unjustified refusal to produce the records pursuant to the FOIA request. Respondents' failure to produce such records at the hearing permits the inference that those records would not be favorable to the Town's position. *See, McGlone v. Superior Trucking Co., Inc.*, 178 W.Va. 659, 664-665, 363 S.E.2d 736, 741-742 (1987); *Kirchner v. Smith*, 61 W.Va. 434, 450-451, 58 S.E. 614, 621 (1907).

The circuit court erred in ruling that prohibition would not lie to prohibit enforcement of the invalid zoning ordinance. [App. 309-311]

**E. The Circuit Court Erred and Abused its Discretion when it Entered a Final Order with Insufficient Finding of Fact and Conclusions of Law.**

"In all actions tried upon the facts without a jury ... the court shall find the facts specially and state separately its conclusions of law thereon ...." W.V.R.Civ.P. 52(a). Although noticed as

a show-cause hearing, the hearing on the case below was conducted as a final evidentiary proceeding. The final order entered upon the case, however, fails to comply with the structural requirements of W.V.R.Civ.P. 52(a). [App. 307-317]

In *Mott v. Kirby*, 225 W.Va. 788, 696 S.E. 304, n. 8 (2010), this Court emphasized that specific, evidence-based findings of fact and separately-stated conclusions of law on the facts were indispensable to a final order upon a matter tried to the court. This Court noted that citation to specific evidence that supported its factual findings was required. *Id.* In *Commonwealth Tire Co. v. Tri-State Tire Company*, 156 W.V. 351, 358, 193 S.E.2d 544, 548 (1972) the Court characterized the trial court's failure to comply with Rule 52(a)'s requirements as "a neglect of duty." *In accord*, *Clark Apartments v. Walaszczyk*, 213 W.Va. 369, 582 S.E.2d 816, 818 (2003).

"The purpose of findings of fact and conclusions of law is to provide an appellate court with a clear understanding of the lower court's decision." *State ex rel. Allstate Insur. Co. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75, 84 (1998). "It also serves the purpose of prompting the lower court 'to fully and conscientiously consider the basis for [the] decision.'" *Id.*, at 508 S.E.2d 84-85, quoting *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 212 at n. 15 (8th Cir.1974).

Accordingly, this Court has extended the requirement for specifically stated findings of fact and conclusions of law to contexts not addressed by Rule 52(a). *See, e.g.*, Syl. pt. 3, *Fayette County Nat'l Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997)(orders granting summary judgment); *Gaughan*, 508 S.E.2d at 83-84 (upon request of a party that intends to seek an extraordinary writ). In accord with the purpose of specifically stated findings of fact and conclusions of law, the Court has regarded with favor the application of the requirement to any appealable interlocutory order. *Id.*, 508 S.E.2d at 84. As an appealable order, the final order

below should have complied with the requirement of specifically stated factual findings and separately stated conclusions of law. [App. 883]

The final order entered in the case below fails to allow this Court “a clear understanding” of the decision. It also fails to demonstrate a full and conscientious consideration of the evidence and issues presented. Although the record developed below and submitted in this appeal may allow this Court to dispose of the issues presented, it obstructs the ability to make legal argument herein that is designed to demonstrate error in the circuit court’s reasoning.

Pursuant to T.C.R. 24.01, Petitioners submitted their objections to the entry of the order below [App. 878], and submitted a proposed alternative order. [App. 885] Although Petitioners’ proposed order could not express conclusions contrary to those already announced by the court, it did set out specific factual findings that were established by the unrebutted evidence.

Petitioners contend here that, at the very least, the circuit court should have included such enumerated factual findings with reference to the evidence – whether proposed by Petitioners or on its own determinations. If the facts proven by the evidence were set out in the order, the lack of factual support for the court’s conclusions would be apparent upon the face of the document.

The final order entered by the court below was not interlocutory, but disposed of the whole of Petitioner’s case. As it was a final order, the circuit court below should have set forth specifically-stated findings of fact and separately-stated conclusions of law, whether or not urged by Petitioners. The circuit court erred and abused its discretion when it failed to do so.

**F. The Final Order is Contrary to the Evidence and the Record**

The final order of the circuit court is contrary to the evidence and the record. These errors include, but are not limited to the following, which seemed to have significantly impacted the ultimate decision in the case.

The order attributes to Petitioner an argument they never made. [App. 311 at ¶ 7] The argument was an attribution by Respondents. [App. 42:15-43:8; 51:16-22] Petitioners' case was never premised on a semantic argument (inclusive-exclusive zoning dichotomy), but on the rules of interpretive analysis discussed herein, *supra*. [App. 62:3-63:6; 89:16-90:11; 325 at ¶ 10; ]

The final order makes findings regarding Mr. Burgess [App. 314-15 at ¶¶ 13-14] that are based upon the unsupported, speculative remarks of Respondents' counsel [App. 40:24-41:16; 46:8-47:7], but unsupported by the actual evidence. The Burgesses did not determine to buy property in the R-1 district, lawyer-up early, and do whatever they wanted despite the ordinances. Petitioners did not specifically seek property in the R-1 district -- Petitioners found properties of interest and then, upon checking the zoning map, discovered that they "appeared to be" in the R-1 district. [App. 353] Petitioners did not hire counsel until after their earnest efforts to work with the Town's regulators had failed. [App. 126:4-8; 941-948] There is nothing high-handed in any of their communications with those regulators – in fact, Mr. Heyser, who had the most dealings with Mr. Burgess, spoke positively of their conversations. [App. 10:18-11:14; 125:1-9] And – perhaps as important as the evidence – common experience teaches that persons intent on a course of action that may be legally dubious do not tend to reveal their plans to authorities, or seek official guidance so persistently as did the Burgesses.

The only thing the Mr. Burgess actually did that seems to have given offense was to read the ordinances himself, and to draw conclusions from the express language based upon his past experiences and familiarity with similar local cases (like *Dailey, supra*). In a State that holds to the rule that regulations should be sufficiently clear so that persons of ordinary intelligence need not guess at their meaning, Mr. Burgess should not be subject to character attack for having

studied the ordinances himself and having come to a different conclusion than Town officials. The reach of the ordinance should have been determined only upon the facts and the law.

Petitioners did not demand a ruling in the case from the bench. [App. 307] Petitioners asked for temporary relief pending final decision if the Court was going to order the post-hearing procedure proposed by Respondents [App. 296:15-21], insofar as that procedure would delay a ruling for several more months. [App. 300:6-11] The circuit court even acknowledged the nature of Petitioners' request when it announced its denial of the "temporary" relief sought. [App.304:8-9]

**G. The Circuit Court erred when it Denied Petitioners' Motion for a New Trial**

Petitioners timely filed a Motion for a New Trial [App. 908], asking the circuit court "to open the judgment and to take additional evidence and hear legal argument, thereafter to amend or make new findings of fact and conclusions of law in this civil action as may be dictated by the whole of the evidence in this matter, and by the applicable law." [App. 908] The court denied the motion. [App. 318]

At the end of the hearing on June 22, the circuit court referred to its ruling as "preliminary" and stated, "[t]here may be parts of this that we might then entertain some briefing and some proposed orders on." [App. 300:15-19] The motion presented the opportunity for such briefing and proposed orders, and to correct the clear errors of law discussed in this appeal. Yet, the court denied it.

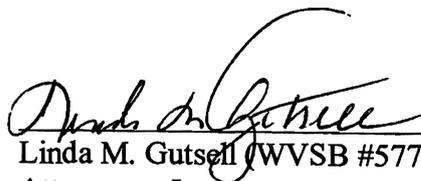
Measured against the same standard as applies to the errors assigned to the circuit court's final order herein, *Trozzi v. Board of Review*, 214 W.Va. 604, 591 S.E.2d 162, 165 (2003), the motion should have been granted.

## VI. CONCLUSION

For the reasons stated herein, the circuit court erred in ruling that mandamus would not lie, because of which ruling the challenges to the validity of the ordinance were never decided. The circuit court failed to enforce the Freedom of Information Act, as a result of which, material evidence was not available in the case. The circuit court then entered an insufficient final order, in which the ruling was premised on facts not supported by the evidence. The court refused to revisit the final order upon Petitioners' Motion for a New Trial.

In view of the foregoing, Petitioners pray in this appeal that this Honorable Court reverse the final order of the circuit court. [App. 307] Petitioners further ask that, to the extent made possible by the record in this case, this Honorable Court decide the matters at issue herein without remand, as it is in the Court's discretion to do. Finally, Petitioners pray for an award of reasonable fees and costs as have been incurred by them in the proceedings below and in this appeal.

DONALD R. BURGESS, *et al.*,  
The Petitioners,  
By counsel.



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DONALD R. BURGESS and  
PATRICIA L. BURGESS,**

**Petitioners Below/Petitioners,**

**v.**

**NO. 12-1278  
(Civil Action No. 11-C-421  
Circuit Court of Jefferson County)**

**CORPORATION OF SHEPHERDSTOWN,  
a municipal corporation, and JIM AUXER,  
Mayor, in his individual and official capacity,  
and JOHN DOE I-X,**

**Respondents Below/Respondents.**

**CERTIFICATE OF SERVICE**

I, Linda M. Gutsell, counsel for the Petitioners, Donald R. and Patricia L. Burgess, do hereby certify that I have served the foregoing BRIEF OF PETITIONERS upon Respondents, by sending a true and accurate copy thereof by U.S. Mail, Priority postage prepaid, to the counsel of record for Respondents at the addresses shown below, this 18<sup>th</sup> day of January, 2013:

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