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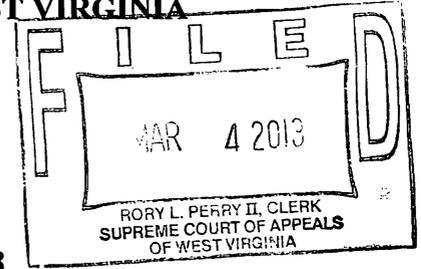
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**DONALD R. BURGESS and
PATRICIA L. BURGESS,
(Petitioners below),**

Petitioners,

v.

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



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

Respondents.

RESPONDENTS' BRIEF ON APPEAL

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I. STATEMENT OF THE CASE

The Petitioners, Donald and Patricia Burgess, appeal the Circuit Court of Jefferson County's decision dismissing their *Petition* seeking extraordinary remedies based on allegations that the Respondents, the Corporation of Shepherdstown ("the Town"), Mayor Arthur J. Auxer, III, and John Doe I-X, unlawfully prohibited the Petitioners from operating a short-term rental property in the R-1 Residential District of Shepherdstown, West Virginia. The Petitioners also allege that the Respondents prohibited them from installing a heat pump condenser on their property. Essentially, the gist of the Petitioners' case is that they would like to operate a disruptive commercial short-term rental business in a historic and residential area of Shepherdstown, West Virginia. They have used the Internet to advertise their lodging to the general public in a manner similar to hotels and motels. Shepherdstown's Ordinances do not permit this type of business activity.

The property in question is located at 202 East High Street, which is a residentially-zoned area of Town located in the R-1 Residential District. The Town's stated intention in creating the R-1 district is "to preserve and encourage the development of single family residential neighborhoods free from land usage which might adversely affect such development." Town Code § 9-501. The Petitioners are residents of Bolivar, West Virginia, and are active in historic preservation. In fact, Mr. Burgess is a member of the Board of Directors of the Harpers Ferry Historic Town Foundation. [App. 250]. Both Petitioners have prior knowledge of municipal requirements and permitting of historic properties. [App. 363].

Mr. Burgess first contacted the Town on March 22, 2011, indicating that he and his wife were interested in buying property in the R-1 residential district, and were considering several properties for sale in that specific district. Mr. Burgess e-mailed Harvey Heyser, the

Town's Zoning Officer, stating that the Petitioners wanted to rent a property as a short, medium, or long-term rental to accommodate transient guests. [App. 250-253]. The Town never indicated that the Petitioners could operate a property in the R-1 Residential District as a vacation rental. In fact, Mr. Heyser informed Mr. Burgess that short-term rentals are not permitted. [App. 266, 356].

Even though the Town informed the Petitioners that they could not use the property as a short-term rental, they entered into a contract to buy the 202 East High Street property on April 29, 2011. [App. 356]. Later, they purchased this property on or about June 24, 2011, and began operating their newly formed business - the Riverfall Guesthouse - as a short-term vacation rental property. They advertised the property on a website entitled VRBO (Vacation Rentals By Owner)¹ in order to reach interested potential vacationers. [App. 239-241]. Riverfall Guesthouse was issued a State business license on August 17, 2011. [App. 428]. The Petitioners applied for a Town Business License for the operation of the Riverfall Guesthouse, stating that the property was to be used as "short term traveler accommodation and guesthouse." [App. 427]. On September 8, 2011, the Town denied their application because, as indicated to the Petitioners before, short-term rental properties are not permitted in the R-1 Residential District. [App. 430-431].

Regarding the permitting aspect of their *Petition*, on July 12, 2011, the Petitioners applied for a building permit in order to install a heat pump condenser on the property. [App. 371]. The Town Planning Commission denied their permit as to the heat pump condenser, because it violated the setback requirements specified in Town Code § 9-508; the Petitioners appealed this decision to the Town Board of Zoning Appeals. [App 408-423]. The Board of

¹ The VRBO website is located at <http://www.vrbo.com/>.

Zoning Appeals also denied the building permit as to the heat pump condenser, but suggested that the Petitioners apply for a variance; the Petitioners declined. [App. 273, 517] On January 20, 2012, the Petitioners filed a Petition for Writ of Certiorari and declaratory judgment before the Circuit Court of Jefferson County, West Virginia: (J. Frye) *Donald and Patricia Burgess v. The Board of Zoning Appeals of the Town of Shepherdstown*, Civil Action No. 12-C-23 (“hereinafter *Burgess v. BZA*). [App. 514-526]. The *Burgess v. BZA* case was filed in order for the Petitioners to, *inter alia*, seek review of the denial of their building permit application. *Id.*

On or about November 10, 2011, the Petitioners filed their *Petition* in the underlying case, containing seven (7) counts. Count I seeks a writ of mandamus compelling the Respondents to allow the Petitioners to complete renovations on property within the R-1 Residential area and to remove a section from the Codified Ordinances, and compelling the Corporation of Shepherdstown to revoke any authority to administer the “building code.” Count II seeks a writ of mandamus compelling the issuance of a building permit. Count III seeks a writ of mandamus compelling the Corporation of Shepherdstown to issue written confirmation that the subject property is exempt from the business license requirement. Count IV seeks a writ of mandamus compelling issuance of a business license. Count V seeks a writ of prohibition prohibiting the Corporation of Shepherdstown from enforcing its zoning ordinance on the basis that the same was improperly adopted. Count VI seeks an injunction and a writ of mandamus requiring the Corporation of Shepherdstown to prohibit the destruction or deletion of e-mails, require disclosure of certain e-mails, and require compliance with a state law freedom of information act request. Finally, Count VII contains a claim against the Respondent Mayor, Hon. Arthur J. Auxer III, under 42 U.S.C. § 1983, for deprivation of property interest without due process of law. [App. 323-435].

The Respondents removed the case to the United States District Court of the Northern District of West Virginia on December 14, 2011. However, on February 28, 2012, the court remanded the case to the Circuit Court of Jefferson County, with the exception of Count VII, which alleges a federal 42 U.S.C. § 1983 claim. However, Count VII was dismissed by the United States District Court for the Northern District of West Virginia on December 21, 2012. The Petitioners did not appeal the dismissal of Count VII by the District Court. [App. 512-514].

In accordance with the District Court's Order, the Circuit Court of Jefferson County, West Virginia, held a final evidentiary hearing on the Petitioners' state claims - Counts I through VI - on June 15, 2012, and June 22, 2012. The Circuit Court heard testimony, reviewed evidence, and also heard arguments from counsel for the parties. At the close of the evidence and argument, the Circuit Court denied the relief requested by the Petitioners and dismissed, with prejudice, Counts I through VI of the *Petition*. On July 30, 2012, the Circuit Court memorialized its ruling in its *Order Dismissing Petition*. [App. 307-317]. After hearing testimony and examining the evidence, it was apparent to the Circuit Court that the Petitioners were only interested in starting a business entity in the R-1 Residential district. The Circuit Court also found that the Petitioners inquired of Shepherdstown officials whether short-term rental properties were permitted in the R-1 District. The Town clearly responded that such use was not permitted. Regardless of this explanation, the Petitioners proceeded to purchase the property and use it in such a way that was clearly prohibited by the zoning ordinances of Shepherdstown. *Id.*

On August 9, 2012, the Petitioners filed a *Motion for New Trial*. After briefing by the parties, the Circuit Court denied the Petitioners' *Motion for New Trial*, as set forth in the

Circuit Court's September 18, 2012 *Order Denying Petitioners' Motion for New Trial*. [App. 318].

II. SUMMARY OF THE ARGUMENT

The Circuit Court of Jefferson County correctly dismissed the Petitioners' case. Both the Record below and applicable legal authorities show that each of the Petitioners' seven (7) assignments of error lacks merit. Accordingly, this Honorable Court should affirm the Circuit Court.

First, the court correctly denied the Petitioners' prayer for mandamus for the issuance of a building permit. The Petitioners had an equally convenient, beneficial, and effective remedy to address this issue, as another case was pending before the Circuit Court of Jefferson County, West Virginia: (J. Frye) *Donald and Patricia Burgess v. The Board of Zoning Appeals of the Town of Shepherdstown*, Civil Action No. 12-C-23. Therefore, a denial of mandamus was required pursuant to *State ex rel. Kucera v. City of Wheeling*. Syl. Pt. 2, 153 W. Va. 538, 170 S.E.2d 367 (1969).

Second, the Circuit Court correctly found that the operation of a short-term vocational rental property is not permissible in the R-1 Residential District of Shepherdstown. The plain language of the Town Ordinances confirms that the R-1 district is a low density, residential area, and that following businesses may operate only by special exception in the R-1 district: 1) home occupations; and 2) the offices of resident physicians, dentists, architects, engineers, attorneys, or similar professional persons operating in their homes, provided that certain requirements are met. It is clear from the Record that Shepherdstown's zoning ordinances permit only those uses which are specifically named. A short-term vacation rental does not fit within these permitted uses.

Third, the Circuit Court did not err in refusing to order the production of documents set forth in the Petitioners' West Virginia Freedom of Information Act request. Petitioners' counsel never arranged for an inspection that the Record shows that they deemed necessary. Moreover, the plain language of W. Va. Code § 29B-1-2 shows that documents not in possession or control of the public body are not public records subject to production. Finally, municipal officials' e-mails sent or received on their personal, web-based accounts are not documents of a "public body" under the Act. Accordingly, this claim is without merit.

Fourth, the Petitioners' argument that the trial court committed error by failing to prohibit the enforcement of an allegedly "invalid zoning ordinance" is completely without merit. Absolutely no evidence in the Record is provided to support this assignment of error. The Petitioners only claim that they have uncovered evidence through "[s]everal discoveries made during informal investigation le[ading] to considerable doubt of the legal validity of the Town's zoning ordinance." Petitioners' Brief, p. 32. No citations to the alleged "several discoveries" are made. In fact, the Petitioners did not even describe their "discoveries." Accordingly, this assignment of error should be rejected.

Fifth, the Circuit Court's *Order Dismissing Petition* contains legally sufficient findings of fact and conclusions of law, stating both facts and law to support the dismissal of each of the counts in the *Petition*. Therefore, the trial court complied with W. Va. R. Civ. P. 52(a) in making findings that are specifically supported by the law and evidence.

Sixth, the Petitioners claim that the *Order Dismissing Petition* is contrary to the evidence. This argument is also meritless. For example, the Petitioners argue that: (1) the trial court attributed the "inclusive-exclusive zoning dichotomy" argument to the Petitioners, when they did not make such an argument; (2) the trial court improperly made findings adopting the

“unsupported, speculative remarks of Respondents’ counsel;” and (3) they did not “demand” a ruling at the conclusion of the evidentiary hearing. However, a simple review of the Record demonstrates that this argument should be rejected; none of these alleged errors actually go to the merits of the case

Finally, the Circuit Court correctly denied the Petitioners’ *Motion for New Trial*. The Petitioners did not show the court that there was prejudicial error in the Record or that substantial justice has not been done. Accordingly, Assignment of Error No. 7 fails.

III. STATEMENT REGARDING ORAL ARGUMENT

The Respondents submit that review of the Record should allow this matter to be disposed of without oral argument. The specific findings of the Circuit Court on each of the Petitioners’ Assignments of Error fully illustrate the propriety of the Circuit Court’s decision. However, if oral argument is deemed necessary by this Honorable Court, the Respondents submit that the argument should proceed under Rule 19.

IV. POINTS AND AUTHORITIES AND LEGAL ANALYSIS

The seven (7) assignments of error set forth in the Petitioners’ Brief must be rejected because each one lacks merit. Each assignment of error is outlined below in the order referenced by the Petitioners in their Brief.

A. THE CIRCUIT COURT CORRECTLY RULED THAT THE PETITIONERS HAD AN ADEQUATE REMEDY TO CHALLENGE ALLEGED INVALID ORDINANCES.

As their First Assignment of Error, the Petitioners argue that the Circuit Court did not follow the mandate of *State ex rel. Kucera v. City of Wheeling* in denying their prayer for mandamus to issue a building permit for the installation of heat pump condensers, as set forth in Counts I, II, and V of the *Petition*. Syl. Pt. 1, 153 W. Va. 538, 170 S.E.2d 367 (1969).

Petitioners' Brief, p. 16. Specifically, the Petitioners argue that the Circuit Court erred because they did not have "another adequate remedy" which was "equally convenient, beneficial, and effective" in which to address their complaints pertaining to a denial of their building permit. *Id.* Since the Circuit Court declined to review this issue, the Petitioners complain that it did not review the alleged invalidity of the corresponding ordinances. *Id.* at 18. However, for the reasons set forth below, this argument has no merit.

The purpose of mandamus is to enforce "an established right" and a "corresponding imperative duty created or imposed by law." *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 398, 540 S.E.2d 917, 922 (1999) (citation omitted). "Mandamus [also] lies to control the action of an administrative officer in the exercise of his discretion when such action is arbitrary or capricious." *State ex rel. Affiliated Cons. v. Vieweg*, 205 W. Va. 687, 693, 520 S.E.2d 854, 860 (1999) (per curiam) (quoting Syllabus, *Beverly Grill, Inc. v. Crow*, 133 W. Va. 214, 57 S.E.2d 244 (1949) (additional citations omitted)). Finally, in determining the appropriateness of mandamus in a given case, this Court adheres to the following oft-repeated axiom:

A writ of mandamus will not issue unless three elements coexist- (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of 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). This Court has also noted that "[s]ince mandamus is an 'extraordinary' remedy, it should be invoked sparingly," and only "in extraordinary circumstances." *State ex rel. Crist v. Cline*, 219 W. Va. 202, 208, 632 S.E.2d 358, 364 (2006) (citations omitted).

In accordance with these well-settled legal principals, the Circuit Court of Jefferson County properly applied *State ex rel. Kucera v. City of Wheeling* in denying the Petitioners' prayer for mandamus.

1. The Petitioners had an “equally convenient, beneficial, and effective” remedy.

First, the Petitioners had an “equally convenient, beneficial, and effective” remedy to address their grievances regarding the denial of a building permit. First, the Petitioners concede that another case was pending before the Circuit Court of Jefferson County, West Virginia: (J. Frye) *Donald and Patricia Burgess v. The Board of Zoning Appeals of the Town of Shepherdstown*, Civil Action No. 12-C-23 (“hereinafter *Burgess v. BZA*). [App. 514-526]. Said case was filed on or about January 20, 2012, in which the Petitioners filed a *Petition for Writ of Certiorari* to appeal the decision of the Board of Zoning Appeals. *Id.*

The *Burgess v. BZA* case involves the same issues and facts as the case *sub judice* in the Petitioners' *Motion to Consolidate*, filed on or about April 5, 2012, the Petitioners state that:

20. Petitioners' appeal to the BOA was the final phase of the same regulatory transaction that is in issue in *Burgess I* [the instant case]; that is, the proceedings before the BOA were but one part of a single administrative process.

21. The appeal of the BOA decision and Count II of the *Burgess I* Petition revolve around a common set of facts, that being the express language of the relevant provisions of the Town's Ordinances.

Id. at p. 518.

Based on these facts, it is apparent that mandamus was not proper in the instant case on appeal. Here, the Circuit Court correctly found that the Petitioners clearly had another civil action with which to ask for the same relief prayed for in the instant case. Therefore, it

would only be logical for the Petitioners to proceed with their mandamus counts in *Burgess v. BZA*, Jefferson County Civil Action No. 12-C-23.² Certainly, judicial economy and consistent decisions are always paramount concerns. Therefore, *Burgess v. BZA*, seeking both a writ of certiorari and declaratory judgment, was the “equally beneficial, convenient, and effective” remedy that the Petitioners were bound to pursue.

“The existence of another remedy will not preclude resort to mandamus for relief unless such other remedy is specific and appropriate to the circumstances of the particular case and requires performance of the duty sought to be enforced.” *State ex rel. Vance v. Arthur*, 142 W. Va. 737, 749, 98 S.E.2d 418, 425 (1957) (overruled on other grounds) (emphasis added). Certainly, it would be in the best interest of the Petitioners to seek a ruling on the legality of the challenged ordinances from the same judge that would determine whether the Board of Zoning Appeals acted appropriately under the very same zoning ordinances in denying their building permit. In fact, the Petitioners acknowledge that the logical way of reviewing this issue is to first look at the validity of the ordinances:

THE COURT: Well, since there are so many arguments that are on top of each other in this case and build upon each other, wouldn't a fundamental way to attack this first would be to look directly at the zoning? It seems to me there is a fundamental difference in the interpretation that the parties are placing upon the fundamental zoning, the creation of the districts and how they are being interpreted, resolution of that by the Court would give great guidance for these other issues, wouldn't it?

MS. GUTSELL: Yes, Your Honor, you know what it certainly would. I am not trying to ignore that. But we sort of got lost in the weeds I thought last week trying to talk about the building permit aspect of this because that is one of the counts in the complaint.

²

This case is no longer pending; it was closed on November 30, 2012.

[App. 278-279]. This colloquy shows that the Court's decision to deny the Petitioners' request for mandamus is appropriate to the specific circumstances of the Petitioners' grievances. If the alternative situation proposed by the Petitioners would occur, they may have Judge Sanders rule that the ordinances are invalid, while Judge Frye might compel the Board of Zoning Appeals to reconsider its decision. Certainly, this result would be inconsistent, awkward, and a waste of the parties' and the court's resources. *See Hinkle v. Black*, 164 W. Va. 112, 118-119, 262 S.E.2d 744, 748 (1979) (in reviewing actions for extraordinary remedies, a trial court is to consider the "economy of effort among litigants, lawyers and courts.").

The Petitioners appear to have argued, and will argue in their Reply brief, that they cannot raise their allegation that the subject ordinances are illegal in *Burgess v. BZA* because it is an appeal. *See* Petitioner, p. 17. This is inaccurate and plainly wrong. While the Petitioners did appeal the Board of Zoning Appeals decision via certiorari, this was not the only issue in front of Judge Frye. In fact, the Petitioners included a declaratory judgment action in their initial pleading. [App. 517]. The Petitioners could have easily raised these issues in the *Burgess v. BZA* case, since they alleged that the Board of Zoning Appeals exceeded its jurisdiction by committing procedural and substantive error. Now, they allege that the Board of Zoning Appeals exceeded its jurisdiction by acting on invalid ordinances. This is the same type of argument being made in the instant case, and is more appropriately made in the *Burgess v. BZA* case.

When an unauthorized or illegal municipal proceeding is alleged, a citizen is entitled to assert prayers for relief via a petition for writ of certiorari. "Certiorari will lie to inquire into whether a determination was made without jurisdiction or an act was done in excess of jurisdiction. It is used to determine the lack or excess of jurisdiction not only of courts or

strictly judicial bodies but also of tribunals exercising quasi-judicial functions, such as public boards or commissions.” 14 *Am. Jur. 2d Certiorari* § 13. See also W. Va. Code § 53-3-2.

In support of their argument that certiorari is not “equally convenient, beneficial, and effective,” the Petitioners cite a criminal case, *West Virginia Citizens Action Group, Inc. v. Daley*, 174 W. Va. 299, 324 S.E.2d 713 (1984). See Petitioners’ Brief, p. 16. However, *Daley* is inapposite to the case *sub judice*. The Petitioners acknowledge that in *Daley*, this Court found that the availability of an appeal of a criminal conviction is not “an equally convenient, beneficial, and effective” remedy. The *Daley* court therefore held that mandamus was proper, despite the availability of a criminal appeal. *Daley*, 324 S.E.2d at 717. However, this case differs because it is a civil case. Criminal cases are limited to the conviction below, and do not have the available procedural and rule based options of civil cases. In *Daley*, the aggrieved party had no ability in criminal court to pray for civil relief – *to wit*: a civil constitutional challenge in order to compel the issuance of a building permit, or other like civil relief. Here, the Petitioners have this option. See, e.g., *Comly v. Lund*, 2002 WL 575798, *1 (Iowa App. 2002) (unreported) (affirming the trial court’s dismissal of a mandamus action for a civil constitutional challenge to Senate File 2276 because there was an equally convenient, beneficial and effectual remedy “available through certiorari or appeal.”); *Allen v. City of Panora*, 772 N.W.2d 16, 2009 WL 1677062 (Iowa App. 2009) (same result in an action by residents against a city alleging property nuisance and civil rights violations). Accordingly, there is no comparison between *Daley* and this case.

2. The validity of the Town’s ordinances are not assigned errors in this Appeal.

The Petitioners improperly argue that the Town’s “building code” provisions are invalid. Petitioners’ Brief, p. 18-21. However, this issue was never assigned as error, and hence,

must be disregarded.³ Assignment of Error No. 1 states that: “[t]he circuit court erred when it ruled that mandamus would not lie to challenge the facial validity of the Town’s building code.” *See*, Notice of Appeal. The Petitioners expand on Assignment of Error No. 1 in their *Summary of the Argument*: “[m]andamus 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.” *See* Petitioners’ Brief, p. 14. Accordingly, the Petitioners have only assigned error to the Circuit Court’s determination that mandamus was not available, not the actual legitimacy of Shepherdstown’s zoning ordinances. Therefore, this argument should be disregarded.

B. THE TRIAL COURT WAS CORRECT IN FINDING THAT SHORT-TERM RENTAL PROPERTIES ARE NOT PERMITTED IN SHEPHERDSTOWN’S R-1 RESIDENTIAL ZONING DISTRICT.

Next, the Petitioners argue that the Circuit Court committed error in finding that the operation of a short-term rental property is not permissible in the R-1 Residential District. The Petitioners reason that since the zoning ordinances do not specifically prohibit the operation of short-term rental properties, then such use must be permitted. Petitioners’ Brief, p. 21. Incredibly, the Petitioners fail to even cite the applicable ordinances that they are challenging. Instead, they cite a plethora of inapplicable cases from foreign jurisdictions, without looking to controlling authority in this case - West Virginia Code § 8A-7-2(b)(1). This statute expressly permits a municipality to adopt a zoning scheme that either: (1) permits certain uses; or (2)

³ Regardless, the Respondents have always contended that the Petitioners’ argument has no merit. [App. 53-59]. The Petitioners argue that the Town is required to adopt the State Building Code in order to enforce Town Code § 9-902. However, our State’s case law and statutes state that the State Building Code is not required to enforce such an ordinance. *See Bittinger v. Corporation of Bolivar*, 183 W. Va. 310, 395 S.E.2d 554 (1990); W. Va. Code §§ 8-12-13, 8-12-14.

prohibits certain uses. The Circuit Court correctly found that the Corporation of Shepherdstown adopted a permissive zoning scheme, where it permits only those uses which are specifically named.

Certain general legal principles are applicable to municipal ordinances. This Court has recognized that there is generally a presumption that an ordinance is valid when it appears that its subject matter is within a municipality's power and it has been lawfully adopted. The burden of proof is on the person asserting that the ordinance is invalid. *See, e.g., Perdue v. Ferguson*, 177 W. Va. 44, 48, 350 S.E.2d 555, 560 (1986); *Ellison v. City of Parkersburg*, 168 W. Va. 468, 472, 284 S.E.2d 903, 906 (1981); *Henderson v. City of Bluefield*, 98 W. Va. 640, 640, 127 S.E. 492, 493 (1925); 6 *McQuillin Municipal Corporations* § 20.06 (3d rev. ed. 1988).

West Virginia Code § 8A-7-2(b)(1) states that a municipal zoning ordinance may specify permitted or prohibited uses. "A zoning ordinance may include the following: (1) [r]egulating the use of land and designating or prohibiting specific land uses. . . ." (emphasis added). There is no dispute that that the use of the word "designating," as stated in § 8A-7-2, has the same meaning as "permissive." Additionally, the Petitioners concede that Town Code §§ 9-501, 9-502, and 9-503 are valid zoning ordinances. [App. 172-174]. Therefore, the interpretation of these ordinances is the only item disputed.

Section 9-501, entitled "[d]eclaration of public purpose" states:

(a) The Park-Residential District is to support the existing pattern of single family dwellings on large lots and to provide protection for and transition to the Conservation Open Space District.

(b) The R-1 (low density) District is intended to preserve and encourage the development of single family residential neighborhoods free from land usage which might adversely affect such development.

(c) The R-2 (medium density) District is intended to provide an attractive, pleasant living environment at a sufficient density to maintain a high standard of physical maintenance and the optimum utilization of land appropriate for residential use.

(emphasis added). Section 9-502, entitled, “[u]ses permitted in the PR (Park Residential) District” states that:

(a) Uses (a) through (d) permitted in the COS District

(b) A single family residence per existing lot as presently recorded with no construction on a slope greater than twelve (12) percent, or below the base flood level as determined by H.U.D.

Section 9-503 Uses permitted in the R-1 (low density) District states that:

(a) Any use permitted in the PR District.

(b) Single family, duplex dwellings, and/or single family dwellings of no less than one thousand five hundred (1,500) square feet with one (1) apartment of no less than one thousand (1,000) square feet, which apartment shall contain not more than three (3) additional persons not members of the family residing in the dwelling unit.

(c) Townhouses, each having its own lot and housing no more than one family.

(d) Accessory uses and buildings.

(emphasis added). Moreover, Town Code § 9-505 specifies that the following businesses may operate only by special exception in the R-1 district: 1) home occupations; and 2) the offices of resident physicians, dentists, architects, engineers, attorneys, or similar professional persons operating in their homes, provided that certain requirements are met.

It is clear from the Record that Shepherdstown’s zoning ordinances permit only those uses which are specifically named. Shepherdstown has clearly defined the R-1 Residential area as a low density district intended to preserve and encourage the development of single-family residential neighborhoods free from land usage which might adversely affect such development. Town Code § 9-501. Further, § 9-503, in part, allows “[s]ingle family, duplex

dwellings, and/or single family dwellings of no less than one thousand five hundred (1,500) square feet with one (1) apartment of no less than one thousand (1,000) square feet, which apartment shall contain not more than three (3) additional persons not members of the family residing in the dwelling unit.” This language shows a clear intent that the R-1 district is zoned to foster a single-family residential community and to preserve the historic nature of Shepherdstown. Further, these ordinances prohibit the commercial activity of short-term rentals in the R-1 Residential District.

Pursuant to well-settled authority, Shepherdstown is clearly permitted to vindicate and preserve single-family residential neighborhoods through the aforementioned zoning ordinances. *See, e.g.* W. Va. Code § 8A-7-1; W. Va. Code § 8A-1-1; *Bittinger v. Corporation of Bolivar*, 183 W. Va. 310, 313, 395 S.E.2d 554, 557 (1990) (“the purpose of zoning is to provide an overall comprehensive plan for land use, while subdivision regulations govern the planning of new streets, standards for plotting new neighborhoods, and the protection of the community from financial loss due to poor development”) (internal citations omitted). As this Court stated in *Stop and Shop, Inc. v. Board of Zoning Appeals of Westover*, “[t]he encroachment of a commercial use into a residential neighborhood is one of the occurrences that zoning laws are enacted to prevent.” 184 W. Va. 168, 170, 399 S.E.2d 879, 881 (1990). Other authorities recognize that short-term rental properties significantly damage the character of a residential district:

It stands to reason that the “residential character” of a neighborhood is threatened when a significant number of homes—at least 12% in this case, according to the record—are occupied not by permanent residents but by a stream of tenants staying a weekend, a week, or even 29 days. Whether or not transient rentals have the other ‘unmitigatable, adverse impacts’ cited by the Council, such rentals undoubtedly affect the essential character of a neighborhood and the stability of a community. Short-term tenants

have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow—without engaging in the sort of activities that weld and strengthen a community.

Ewing v. City of Carmel-By-The-Sea, 234 Cal. App. 3d 1579, 286 Cal. Rptr. 382, 388-389 (6th Dist. 1991).

Here, the trial court correctly reviewed each Town Ordinance at issue, as well as the above-referenced case law and statutes, in coming to the determination that short-term rental properties are prohibited in the R-1 Residential District. The court looked to the plain language of the controlling authorities, which govern this situation, and not the intentions of the Town solicited after-the fact.⁴ [App. 311-314]. The ordinances and controlling State law at issue is not even comparable to the foreign authorities cited by the Petitioners. Each of these cases deals with a different set of facts and ordinances than those before this Court today. Petitioners' Brief, p. 25-28.

If this Court were to adopt the Petitioners' view of the law – that each stated use must be spelled out in the ordinance – then an unreasonable burden would be placed on all municipalities in this State. Not only would a municipality be required to list every possible use, but it also would be required to amend their ordinances on a regular basis, as new uses over time arise. Moreover, this argument ignores West Virginia Code § 8A-7-2(b)(1), which expressly permits a municipality to adopt a zoning scheme that either (1) permits certain uses; or (2) prohibits certain uses.

⁴ The Petitioners suggest that the trial court inappropriately considered the Town's interpretations of the ordinances offered post-lawsuit. See Petitioners' Brief, p. 23. However, the face of the *Order Dismissing Petition* makes no such reference to this type of evidence. [App. 311-314]. The court only considered the plain language of the ordinances in making its decision.

The trial court simply followed well-settled law in finding that the operation of a short-term rental property operation is not permissible in the R-1 Residential District. Accordingly, it should be affirmed, and Assignment of Error No. 1 should be rejected by this Honorable Court.

C. THE CIRCUIT COURT DID NOT ERR IN REFUSING TO ORDER THE PRODUCTION OF DOCUMENTS SET FORTH IN THE PETITIONERS' FREEDOM OF INFORMATION ACT REQUEST.

Petitioners' Assignment of Error No. 3 fails for several reasons. First, their argument that the Town never provided documents is factually inaccurate, as their counsel never arranged for an inspection that the Record shows that they deemed necessary. Second, the plain language of the FOIA shows that private documents not in possession or control of the public body are not subjected to production. Finally, municipal officials' e-mails sent or received on their personal, web-based accounts are not documents of a "public body" under the Act. Accordingly, the Petitioners' FOIA claim is without merit.

First, the Petitioners argue that the Respondents failed to produce certain public records in response to their FOIA request. This is the extent of their argument, with the exception of some brief testimony elicited by the Petitioners. *See* Petitioners' Brief, p. 29-30. The Petitioners acknowledge that a physical inspection was requested because the online documents did not allegedly satisfy their request:

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.

Petitioners' Brief, p. 30. However, the key information omitted by the Petitioners is that their counsel never made arrangements to inspect the records. The Town has never objected to the

Petitioners' counsel's physical inspection of the records. In fact, it invited such an inspection, informing Ms. Gutsell that she simply had to arrange a mutually agreeable time and date with Amy Boyd, the Town Clerk. [App. 548]. Ms. Boyd called Ms. Gutsell to arrange an inspection, as documented in Ms. Gutsell's October 20, 2011 letter to the Town's Counsel. [App. 549]. She then indicated that she will "reserve judgment" of the adequacy of the responsive documents when they are "received and reviewed." *Id.* Ms. Gutsell also indicated that she would "deal with Ms. Boyd as to the arrangements for securing those materials that she appears able to produce." *Id.* Upon information and belief, this is the last time that she corresponded with the Town or its attorney to make such arrangement. Essentially, the Petitioners never pursued the physical inspection of documents that they deemed was necessary in order to satisfy their FOIA request. Moreover, they cite to no evidence indicating that an inspection request was ignored or refused. Accordingly, the Petitioners' allegation that the Town violated the FOIA is without merit.

Next, the Petitioners devote most of their argument to the Town's alleged withholding of Town official's e-mails from their private e-mail accounts. However, these documents were not produced because they are not prepared, owned and retained by a public body. *See* Petitioners' Brief, p. 30-32; [App. 548]. In other words, the Town never had possession of these documents, as they are contained in the Town officials' private e-mail accounts. While the Petitioners cite foreign authorities, they ignore the clear statutory language of the FOIA, stating that a "public body" must "control" the documents requested in order to have the request fall under the Act. *See* W. Va. Code § 29B-1-1, *et seq.*

Under W. Va. Code § 29B-1-3, except as otherwise expressly provided by W. Va. Code § 29B-1-4, "every person has a right to inspect or copy any public record of a public body in this State." A "public body" includes:

every state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof; and any other body which is created by state or local authority or which is primarily funded by the state or local authority.

W. Va. Code § 29B-1-2(3) (emphasis added). While the Corporation of Shepherdstown is included in this definition of “public body,” it is important to observe that the individual Town officials are not included in the definition of a “public body.” *Id.*

A “public record” includes 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). The West Virginia legislature defined “public record” liberally so that it applies to any record which contains information ‘relating to the conduct of the public’s business.’” *Daily Gazette Co., Inc. v. Withrow*, 177 W. Va. 110, 115, 350 S.E.2d 738, 742-43 (W. Va. 1986) (superseded by statute on other grounds).

While a record must relate to the conduct of the public’s business, it must also be “prepared, owned and retained by a public body” to be subject to the FOIA. *Id.* A record is “retained” if it is subject to the control of the public body. *Id.* at 744. Therefore, the “lack of possession of an existing writing by a public body at the time of a request under the FOIA is not by itself determinative of the question of whether the writing is a ‘public record.’” *Id.* In sum, a record prepared, owned, or retained by the Town is subject to the FOIA if it relates to the conduct of the public's business. Moreover, to be considered “retained” by the Town, it is not necessary that the Town actually retain the record, as long as the record is subject to the Town’s control.

Here, the Town does not retain or control the Town Council and Planning Commission's members' e-mails. Nor does it retain or control e-mails of individual officials that are located within a private, password-protected web-based service, such as Outlook, Yahoo, or Gmail. It is impossible to withhold documents that the Town never had possession of in the first place. Accordingly, these documents are not covered under the FOIA.

The Petitioners cite *Shepherdstown Observer, Inc. v. Maghan*, which states that a "public record" includes any writing in the possession of a public body that relates to the conduct of the public's business which is not specifically exempt from disclosure by W. Va. Code § 29B-1-4, even though the writing was not prepared by, on behalf of, or at the request of, the public body." 226 W. Va. 353, 359, 700 S.E.2d 805, 811 (2010). However, this case does not apply to compel disclosure of the documents at issue because the individual officials' personal e-mail accounts are not in the possession of the Town. *Maghan* does provide instructions relevant to this case, however:

Our decision in *Associated Press* sets forth a useful model of the analysis that should be applied by public bodies responding to a FOIA request. This model, succinctly stated, is as follows: A writing in the possession of a public body is a public record required to be disclosed under the Act where the writing relates to the conduct of the public's business and is not specifically exempted from disclosure pursuant to W. Va.Code § 29B-1-4. Conversely, a writing in the possession of a public body is not a public record and need not be disclosed under the Act where the writing does not relate to the conduct of the public's business or where the writing is specifically exempt from disclosure pursuant to W. Va.Code § 29B-1-4.

Id. at 359. This language emphasizes that the document requested must be "in the possession of a public body." Here, individual Town official's e-mails that are not in possession or control of the Town are exempted from the Act.

In an instructive case, *In re Silberstein*, the Commonwealth Court of Pennsylvania held that e-mails and documents on a township commissioner's personal computer were not public records subject to disclosure, pursuant to the State's Right-to-Know Law. 11 A.3d 629, 634 (Pa. Commw. Ct. 2011). In affirming the trial court's decision, the Commonwealth Court of Pennsylvania narrowed the definition of "local agency," excepting individual members from the statutory scheme. The court reasoned:

Commissioner Silberstein is not a governmental entity. He is an individual public official with no authority to act alone on behalf of the Township.

Consequently, emails and documents found on Commissioner Silberstein's personal computer would not fall within the definition of record as any record personally and individually created by Commissioner Silberstein would not be a documentation of a transaction or activity of York Township, as the local agency, nor would the record have been created, received or retained pursuant to law or in connection with a transaction, business or activity of York Township. In other words, unless the emails and other documents in Commissioner Silberstein's possession were produced with the authority of York Township, or were later ratified, adopted or confirmed by York Township, said requested records cannot be deemed "public records" within the meaning of the RTKL as the same are not "of the local agency."

Id. at 633.

Here, like *In re Silberstein*, individual Town Council or Planning Commission members, alone, have no authority to act on behalf of the Town. The fact remains that therefore, each members' connection with the larger public body cannot be imputed upon the entirety of the public body. In that vein, individual members' e-mails are not records of the public body. *See Withrow*, 177 W. Va. at 116, 350 S.E.2d at 744 (1986). ("A writing is not a "public record" under the Freedom of Information Act unless it also has been prepared, owned and retained by a public body."). Any e-mails sent by individual members acting alone cannot be said to be that of

the group, or the Town's public body. Hence, these are not e-mails of the Town Council or the Planning Commission, and are not within the Town's control.

D. THE PETITIONERS' ARGUMENT THAT THE CIRCUIT COURT COMMITTED ERROR BY FAILING TO PROHIBIT THE ENFORCEMENT OF AN ALLEGEDLY INVALID ZONING ORDINANCE IS NOT SUPPORTED BY ANY EVIDENCE.

Next, the Petitioners argue that the trial court committed reversible error by failing to prohibit the enforcement of an allegedly "invalid zoning ordinance." *See* Petitioners' Brief, pp. 32-34. However, they provide absolutely no evidence in the Record to support this assignment of error. Accordingly, this argument must be rejected.

"An appellate court will not reverse the judgment of a trial court unless error affirmatively appears from the record. A plaintiff in error bears the burden of showing error in the judgment of which he complains." Syl. Pt. 5, *Morgan v. Price*, 151 W. Va. 158, 166, 150 S.E.2d 897, 902 (1966) (citing Syl. Pts. 3, 4, *Rollins v. Daraban*, 145 W. Va. 178, 113 S.E.2d 369 (1960); Syl. Pt. 4, *Alexander v. Jennings*, 150 W. Va. 629, 149 S.E.2d 213 (1966)). *See also* Syl. Pt. 2, *Benson v. AJR, Inc.*, 226 W. Va. 165, 166, 698 S.E.2d 638, 639 (2010) (citing *Morgan*); Syl. Pt. 4, *Pozzie v. Prather*, 151 W. Va. 880, 157 S.E.2d 625 (1967) ("An appellant or plaintiff in error must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment."); Syl. Pt. 2, *Shrewsbury v. Miller*, 10 W. Va. 115 (1877) ("An Appellate Court will not reverse the judgment of an inferior court unless error affirmatively appear upon the face of the record, and such error will not be presumed, all the presumptions being in favor of the correctness of the judgment.").

The Petitioners cite to neither testimonial or documentary evidence to support their allegation that the Corporation of Shepherdstown has an invalid zoning ordinance, making the decisions of Town officials, the Planning Commission, and the Historic Landmarks Commission null and void. The Petitioners only claim that they have uncovered evidence through “[s]everal discoveries made during informal investigation le[ading] to considerable doubt of the legal validity of the Town’s zoning ordinance.” Petitioners’ Brief, p. 32. No citations to the alleged “several discoveries” was made. In fact, the Petitioners did not even describe their “discoveries.” They only claim that “[i]nformation uncovered by investigation also indicated that the Town had not adopted a comprehensive plan prior to 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.” *Id.* at 32-33. Again, no citations to the Record are made.

Nor could the Petitioners cite to evidence in the Record, because they have none, failing to meet their burden. *State ex rel. Godfrey v. Rowe*, 221 W. Va. 218, 221, 654 S.E.2d 104, 107 (2007). (“In prohibition proceedings, the party seeking the writ has the burden of proving the allegations of his petition.”).⁵ Accordingly, the Court and the Respondents are left with absolutely no evidence, other than the Petitioners’ unsupported allegations, showing that the Town’s zoning ordinance is indeed invalid. The Petitioners cannot show that the trial court committed error by prohibiting the Town from acting beyond its jurisdiction. In light of this absence of evidence, Assignment of Error No. 4 fails.

⁵ The Respondents have always denied the Petitioners’ allegations that their ordinances are invalid. [App. 52-55].

1. The Petitioners failed to discover the documents that they now complain were made unavailable to them.

Moreover, the Petitioners claim that they did not have an opportunity to collect evidence of the allegedly invalid zoning ordinance, since the Town has allegedly been illegally withholding documents requested through their FOIA request. *Id.* at 41. However, this argument is fatally defective for two reasons. First, as explained in response to Assignment of Error No. 3, *supra*, the Town never violated the Freedom of Information Act. *See* Subsection C. To the contrary, the Petitioners' counsel never pursued their FOIA request, since she failed to set up an appointment with the Town to physically review the documents, per her preference. Moreover, the Town officials' e-mails are not public records subject to the FOIA, as they are not prepared, owned and retained by a public body.

Second, the Petitioners could have easily sought documents they were pursuing through the discovery process, which allows for a 30 day response time. W. Va. R. Civ. P. 34. *See also* W. Va. R. Civ. P. 71(b) (noting that the West Virginia Rules of Civil Procedure apply to actions for extraordinary writs). Rather, the Petitioners opted to serve an invalid subpoena *duces tecum*, with an unreasonable return time 17 days before the final evidentiary hearing. [App. 534-541; 566-570]. *See Powell v. U.S.*, 2009 WL 5184338, at *1 (E.D. La. 2009) (unreported) (citations omitted) ("Rule 45 subpoenas, although not technically precluded by the language of Rule 45 from being served upon parties to litigation, are generally used to obtain documents from non-parties and are 'clearly not meant to provide an end-run around the regular discovery process under Rules 26 and 34.'"). However, they did not properly discover the documents that they now complain were unavailable. Accordingly, this argument also fails.

2. The Petitioners cannot complain that the Circuit Court failed to rule on their request for an injunction because they acknowledge that it was moot.

The Petitioners also mention that the Circuit Court failed to prevent the Board of Zoning Appeals from reviewing their building permit denial, since it did not rule on their *Motion for Preliminary Injunction and for Expedited Hearing Thereon*. Petitioners' Brief, p. 33 (citing W. Va. Code § 53-1-9); [App. 441-449]. However, they fail to disclose that their Motion became moot after the case was removed to the United States District Court of West Virginia on December 14, 2011. In fact, in the Petitioners' counsel's opening statement to the trial court, she acknowledged that the Motion became moot:

We filed a motion or a preliminary injunction which would have stopped the BZA from – we actually went to one hearing, they held it over to another, we asked you to stop it and not allow them to continue to the end, but then of course the case was removed so you never even got to rule on that.

So after the case was removed then when we had to go on forward and allow the BZA to make the decision, because you weren't able to rule on our motion for preliminary injunction while the case has been taken to federal court, they went on and they made a final decision and we then appealed it. At that time the this case was still in federal court. It was always our plan to bring that in under this case if you did not grant the preliminary injunction to keep them from ever hearing a building permit appeal in the first place.

[App. 92] (emphasis added).

Notwithstanding the fact that the Motion was moot, the Petitioners also treated their *Motion for Preliminary Injunction* as moot after the case was remanded. For example, upon information and belief, they never renewed their Motion or filed a notice of hearing so that the Court could hear argument and make a decision. Essentially, the Petitioners did not pursue their Motion, just as they did not pursue the discovery of documents that they now complain were unavailable. The Petitioner cannot now claim that they were unlawfully prevented from

gathering evidence and were ignored by the trial court when they never acted to pursue their claims. Accordingly, Assignment of Error No. 4 has no merit.

E. THE TRIAL COURT STATED PROPER FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Next, the Petitioners argue that the Circuit Court committed reversible error by making insufficient findings of fact and conclusions of law in its *Order Dismissing Petition*. See [App. 307-317]. In support of their position, they claim that the Court violated the “structural requirements” of W. Va. R. Civ. P. 52(a). See Petitioners’ Brief, p. 35. Upon review of the face of the Order, it is clear that the trial court’s findings are completely supported by the evidence.

Rule 52(a) of the West Virginia Rules of Civil Procedure states that “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Further, “in a case tried without the aid of a jury, the trial court, and not the appellate court, is the judge of the weight of the evidence.” *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996). “When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court’s findings.... Deference is appropriate because the trial judge was on the spot and is better able than an appellate court to decide whether the error affected substantial rights of the parties.” *In re Faith C.*, 226 W. Va. 188, 699 S.E.2d 730, 737 (2010) (citing *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 231, 470 S.E.2d 177, 185 (1996)). If there are two or more plausible interpretations, the trial court’s choice controls. *Id.*

Here, the Petitioners do not point to any allegedly deficient finding of fact or conclusion of law in the Circuit Court’s *Order Dismissing Petition*. Instead, they make an unsupported ‘catch-all’ argument alleging that the entire order violated W. Va. R. Civ. P. 52(a).

Upon review of the Order, it is clear that the Circuit Court of Jefferson County sufficiently stated both facts and law to support the dismissal of each of the Counts in the Petition. Not only did the trial court make these findings of fact and conclusions of law on the record at the conclusion of the evidence, but it also entered an Order setting forth its decision with particularity. [App. 300-305; 307-317].

For example, the court began its *Order Dismissing Petition* by setting forth the high threshold for issuing a writ of prohibition, as well as the *State ex rel. Hoover v. Berger* five (5) factor test that all courts must consider. 199 W. Va. 12, 21, 483 S.E.2d 12, 21 (1996) [App. 309-310]. The court then set forth the three (3) factor test that it must consider in entertaining petitions for writs of mandamus, as set forth more specifically in *State ex rel. Kucera v. City of Wheeling*. Syl. Pt. 2, 153 W. Va. 538, 170 S.E.2d 367 (1969). [App. 309-310].

With the *Hoover* and *Kucera* tests providing a backdrop for the trial court's remaining findings, the *Order Dismissing Petition* considered each and every count set forth in the *Petition*.⁶ First, Counts III, IV, and VI were considered. In dismissing those counts, the trial court: (1) restated the Petitioners' arguments; (2) cited and discussed the ordinances at issue – *to wit*, Town Code §§ 9-501, 9-502, 9-503, and 9-505; (3) cited additional applicable law, *inter alia*, West Virginia Code § 8A-7-2(b) and *Bittinger v. Corporation of Bolivar*; and (4) weighed and considered the applicable evidence, including the testimony of Petitioner Donald R. Burgess. 183 W. Va. 310, 395 S.E.2d 554 (1990). Regarding the remaining counts of the Petition - I, II, and V - the trial court considered the parties' arguments and representations, reviewed the Petitioners' *Motion to Consolidate*, and determined that mandamus was not an appropriate

⁶ The Circuit Court did not consider Count VII of the Complaint (Petitioners' 42 U.S.C. § 1983 claim) since this claim was stayed by the United States District Court for the Northern District of West Virginia. [App. 309].

remedy since the decision of the Board of Zoning Appeals was already being reviewed in *Donald and Patricia Burgess v. The Board of Zoning Appeals of the Town of Shepherdstown*, Jefferson County Civil Action No. 12-C-23.

The trial court complied with Rule 52(a) in making findings that are specifically supported by the law and evidence. *See Mott v. Kirby*, 225 W. Va. 788, 793, 696 S.E.2d 304, 309 n. 8 (2010) (a trial court cannot simply note that there was “ample evidence” to support findings; it must actually state the evidence). Upon review of the *Order* itself, it is evident that the trial court made well-supported findings of fact and conclusions of law. Accordingly, Assignment or Error No. 5 should be rejected, and the Circuit Court’s *Order Dismissing Petition* should be affirmed.

F. THE FINAL ORDER IS SUPPORTED BY THE EVIDENCE.

Next, the Petitioners claim that the trial court’s *Order Dismissing Petition*, is contrary to the evidence. [App. 307-317]. Specifically, the Petitioners claim there are three areas that were “contrary to the evidence and the record.” Petitioners’ Brief, p. 36. First, the Petitioners argue that the trial court attributed the “inclusive-exclusive zoning dichotomy” argument to the Petitioners, when they did not make such an argument. Second, the Petitioners claim that the trial court improperly made findings adopting the “unsupported, speculative remarks of Respondents’ counsel.” Third, they argue that they did not “demand” a ruling at the conclusion of the evidentiary hearing. *See* Petitioners’ Brief, p. 36-38. However, after a simple review of the Record before this Court, the Petitioners’ claimed errors fail.

Petitioners’ Assignment of Error No. 6 must be rejected because none of these alleged errors actually go to the merits of this case. Regarding the first alleged error, it matters not which party made the “inclusive-exclusive” zoning dichotomy argument. This is certainly a

lawful distinction that the Judge was bound to apply to the facts at hand. In fact, West Virginia Code § 8A-7-2(b)(1) states that a municipal zoning ordinance may specify permitted or prohibited uses: “[a] zoning ordinance may include the following: (1) [r]egulating the use of land and designating or prohibiting specific land uses. . . .” Therefore, it is irrelevant who actually made the argument; the determination needed to be made.

Second, the Petitioners take issue with the Circuit Court’s adoption of certain evidence regarding Petitioner Donald Burgess’ intentions and actions. Different views were presented to the court by both the Petitioners and the Respondents regarding the Petitioners’ knowledge of historic preservation, ordinance interpretation, and intended use of the property. Based on the evidence presented, the trial court agreed with the Respondents’ evidence. Certainly, this is the very responsibility charged to the trial court. If there are two or more plausible interpretations, the trial court’s choice controls. *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 231, 470 S.E.2d 177, 185 (1996). Moreover, “[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings...” *In re Faith C.*, 226 W. Va. 188, 195, 699 S.E.2d 730, 737 (2010) (citing *id.*).

Here, the trial court made factual findings from the evidence presented, as well as findings as to Petitioner Donald Burgess’ credibility and intentions. Unquestionably, the Circuit Court was entitled to find from the evidence presented that Mr. Burgess was determined to interpret the ordinance to allow for short-term rentals, no matter how the Town responded to his inquiries. For instance, Mr. Burgess testified that he informed the Town’s Zoning Officer that he planned to use the property for short, medium, and long-term traveler accommodations. [App. 251-252]. Even without assurances that he could operate his property as a short-term rental in

the R-1 Residential District, Mr. Burgess went ahead and purchased the property anyway. [App. 266]. In fact, he even directed the Town to his current counsel, Linda M. Gutsell, Esq., to “talk about” the strict interpretation of ordinances. [App. 253, 839]. Essentially, the trial court took these actions as an attempt to pressure the Town into seeing the ordinance his way, that is, to permit the use of his property as a short-term vacation rental. Accordingly, the trial court’s rulings are justified by the evidence. Nevertheless, these findings have no influence over the real issue at hand – the actual language of the ordinances. *See* Petitioners’ Assignment of Error No. 2, Petitioners’ Brief, p. 1.

Finally, the Petitioners argue that it was error for the Circuit Court to find that they “demanded” a ruling at the conclusion of the evidentiary hearing.⁷ Again, this point is irrelevant to the issue at hand - whether the Petitioners sufficiently proved their allegations in consideration of the standards imposed by the law. The trial court correctly found that they did not. Therefore, whether the Petitioners’ counsel “demanded” a ruling from the bench is wholly irrelevant.

G. IT WAS NOT ERROR TO DENY PETITIONERS’ MOTION FOR A NEW TRIAL.

Finally, the Petitioners appeal from the Circuit Court’s order denying their motion to award a new trial. *See* Brief, p. 38. However, they fail to acknowledge the high hurdle that must be overcome in order to have a motion for a new trial granted. Indeed, they never met this stringent standard, and Petitioners’ Assignment of Error No. 7 must be denied.

This Honorable Court “review[s] the rulings of the circuit court concerning a new trial and its conclusions as to the existence of reversible error under an abuse of discretion

⁷ The Petitioners’ counsel stated that she “strongly objected” to the trial court’s decision to allow the parties to submit proposed findings of fact and conclusions of law. [App. 298]. In support of her objection, she noted, at length, several detailed reasons. [App. 298-300].

standard, and [it] review[s] the circuit court's underlying factual findings under a clearly erroneous standard." *Williams v. Charleston Area Med. Ctr.*, 215 W. Va. 15, 18, 592 S.E.2d 794, 797 (2003). The ruling of the Circuit Court of Jefferson County denying the Petitioners' Motion for New Trial is "entitled to great respect and weight." *Id.*

"[U]nder the abuse of discretion standard, [this Court] will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances." *Graham v. Wallace*, 214 W. Va. 178, 182, 588 S.E.2d 167, 171 (2003) (internal citations omitted). Moreover, a "finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." *Weaver v. Ritchie*, 197 W. Va. 690, 690, 478 S.E.2d 363, 366 n. 11 (1996).

Here, the Circuit Court, which afforded the Petitioners a full evidentiary hearing over a span of two (2) days, fully considered the Petitioners' position and correctly concluded that their *Petition* has no merit. The Petitioners were afforded adequate time and, in fact, examined numerous witnesses and offered a plethora of documents in support of their claims. Then, they had another chance to present their evidence and arguments in their *Motion for New Trial*. [App. 908-948]. In their *Motion*, they basically reargued their case in a manner similar to that offered both at trial and in their alternative proposed *Order to Dismiss the Petition*. [App. 885-907]. They did not show the court that there was prejudicial error in the Record or that substantial justice has not been done. *See Morrison v. Sharma*, 200 W. Va. 192, 194, 488

S.E.2d 467, 469 (1997) (per curiam) (“Indeed, a new trial should not be granted ““unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done[.]””)

The Circuit Court - which reviewed the Petitioners’ case in both a two (2) day evidentiary hearing and by reviewing their briefs – correctly denied the *Motion for New Trial*. [App. 318-320]. To prevail on appeal, the Petitioners must demonstrate that the Circuit Court’s decision was “a clear error of judgment or exceed[ed] the bounds of permissible choices in the circumstances,” and leave this Court with a “firm conviction that an abuse of discretion has been committed.” *Graham*, 214 W. Va. at 182, 588 S.E.2d at 171; *Covington v. Smith*, 213 W. Va. 309, 322-23, 582 S.E.2d 756, 769-70 (2003). The Petitioners have not made such a showing. Accordingly, for the reasons set forth herein, this Court should affirm the Circuit Court’s decision.

V. CONCLUSION

This Honorable Court should affirm the Circuit Court of Jefferson County and reject each of the assignments of error presented in the Petitioners’ Brief. First, the court correctly denied the Petitioners’ prayer for mandamus for the issuance of a building permit. Second, the Circuit Court correctly found that the operation of a short-term rental property is not permissible in the R-1 Residential District of Shepherdstown. Third, the Circuit Court did not err in refusing to order the production of documents set forth in the Petitioners’ West Virginia Freedom of Information Act request. Fourth, the Petitioners’ argument that the trial court committed error by failing to prohibit the enforcement of an allegedly “invalid zoning ordinance” is completely without merit. Fifth, the Circuit Court’s *Order Dismissing Petition* contains legally sufficient findings of fact and conclusions of law, stating both facts and law to

support the dismissal of each of the counts in the *Petition*. Sixth, the Petitioners' claim that the *Order Dismissing Petition* is contrary to the evidence is also meritless. Finally, the Circuit Court correctly denied the Petitioners' *Motion for New Trial*.

For the foregoing reasons, the Respondents respectfully request that the decisions of the Circuit Court of Jefferson County be affirmed.



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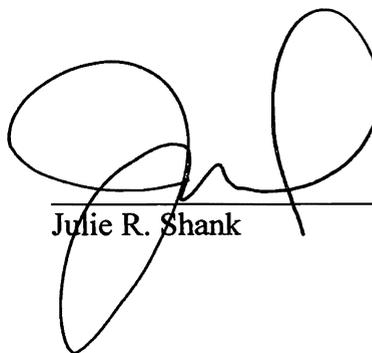
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CERTIFICATE OF SERVICE

I, Julie R. Shank, hereby certify that a true and exact copy of the foregoing **RESPONDENTS' BRIEF ON APPEAL** has been served by United States mail, postage prepaid, upon the following individual:

Linda M. Gutsell, Esquire
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This 1st day of March, 2013.



Julie R. Shank