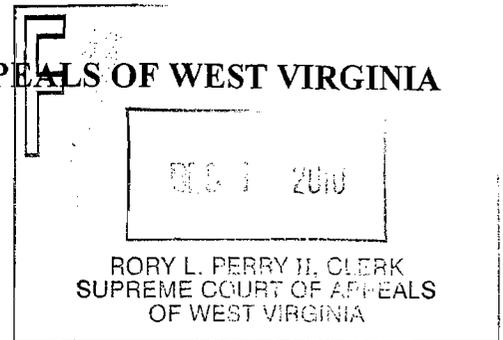


BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Corporation of Harpers Ferry,  
A West Virginia Municipal Corporation  
Appellants,**

v.

**Ralph Taylor,  
Appellee.**



**Appeal No. 101438**

**RESPONSE TO PETITION FOR APPEAL**

COMES NOW, Ralph Taylor, Appellee, by counsel, and files this Response to the Petition for Appeal filed by the Municipal Corporation of Harpers Ferry:

**I. KIND OF PROCEEDING AND NATURE  
OF RULING IN LOWER TRIBUNAL**

Plaintiff/Appellee, Mr. Ralph Taylor, filed a declaratory judgment action against the Town of Harpers Ferry (hereafter "Town") on November 20, 2007, after a lengthy attempt to gain access to his private real property via a publicly dedicated but unimproved street (paper street) within the corporate limits of Harpers Ferry. The Circuit Court heard evidence in the form of testimony from Mr. Taylor and the representatives of the Town at a Bench Trial conducted on September 15, 2009. On December 4, 2009, the Circuit Court made extensive Findings of Fact and Conclusions of Law. A copy of the Order is attached as Exhibit 1.

The Circuit Court ruled that the Town's actions in response to Mr. Taylor's request to use the paper street had been improperly influenced by an interested Town Council Member, that the Town had unreasonably deprived Mr. Taylor access to his

property, and that the deprivation was in violation of due process of law. The Circuit Court's Order outlines specific, egregious behavior by one of its Council Members (Robert DuBose) and details the Town's knowledge and complicity with Mr. DuBose to prevent Mr. Taylor from accessing his property. The Town did not appeal the Circuit Court's Order dated December 4, 2009. Therefore, the Circuit Court's Order declaring the rights of the parties sets forth the facts and law of the underlying case. Exhibit 1 is a Final Order.

Mr. Taylor filed a Motion for an Award of Attorney's Fees and Costs on December 23, 2009. A copy is attached as Exhibit 2. The Circuit Court entered a Rule 22 Scheduling Order on December 28, 2009 to allow the Town of Harpers Ferry to respond to the Plaintiff/Appellee's Motion. Both parties fully briefed the issue of attorney's fees, after which the Circuit Court granted Mr. Taylor's Motion. A copy of the Order dated April 9, 2010 is attached as Exhibit 3. The Town subsequently filed a Motion to Alter or Amend the Judgment Order Awarding Attorney's Fees. A copy of Appellee's Response Memorandum in Opposition is attached as Exhibit 4.

The Circuit Court refused to alter or amend the award of fees and costs, holding that there was "ample evidence of official misconduct on the part of Councilman DuBose *and the entire City Council* which would support the Plaintiff's Motion for Attorney's Fees and Costs." See Order Denying Defendant's Motion to Alter or Amend the Judgment Order Awarding Attorney's Fees to Plaintiff, page 2, attached as Exhibit 5. The Court elaborated, concluding that:

“[T]he Town Council of Harpers Ferry participated in the effort conducted by Councilman DuBose who wrongfully deprived Mr. Taylor of his Constitutional Rights. The evidence demonstrated that Mr. DuBose expressly stated that he intended to wrongfully deprive Mr. Taylor of access to his property. ***The Council understood that Mr. DuBose intended to act out on this wrongful purpose and did nothing to prevent it. In fact, the Court concludes that the Council actively supported this pattern of misconduct perpetrated by Mr. DuBose.***”

Order entered June 29, 2010, Exhibit 5 at page 4.

The Town now appeals the Circuit Court’s ruling granting attorney’s fees and costs, arguing that the Town was entitled to an additional evidentiary hearing on the issue of attorney’s fees and that there is no evidence that the Town acted in bad faith. This Court need look only to the Orders entered by the Circuit Court to address both assertions.

## II. STANDARD OF REVIEW

Abuse of discretion is the standard of review for an award of attorney's fees. *See Sanson v. Brandywine Homes, Inc.*, 215 W.Va. 307, 599 S.E.2d 730 (2004). “The decision to award or not to award attorney's fees rests in the sound discretion of the Circuit Court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse.” *Beto v. Stewart*, 213 W.Va. 355, 359, 582 S.E.2d 802, 806 (2003).

A Circuit Court abuses its discretion when it acts “under a misapprehension of the law.” *State v. Varner*, 212 W.Va. 532, 575 S.E.2d 142 (2002)(quoting *State v. Swims*, 212 W.Va. 263, 267, 569 S.E.2d 784, 788 (2002); see also *State ex rel. Hoover v. Berger* 199 W.Va. 12, 17, 483 S.E.2d 12, 17 (1996)(“[A] circuit court by definition abuses its discretion when it makes an error of law.”).

Black's Law Dictionary defines abuse of discretion as "synonymous with a failure to exercise a sound, reasonable and legal discretion. It is a legal term indicating that appellate court is of the opinion that there was commission of an error of law by the trial court." Black's Law Dictionary Abridged Sixth Edition 1991, page 5.

Otherwise stated, a court "conducting review for abuse of discretion is not free to substitute its judgment for that of the trial court." 5 Am.Jur.2d Appellate Review §623 (July 2010). A discretionary act or ruling under review is presumptively correct. *See id.*

According to these definitions, Appellant would need to conclusively demonstrate that there was no basis in law for the Circuit Court's award of attorney's fees. As the cases outlined herein show, there is substantial authority in the law for an award of attorney's fees when there has been official misconduct, bad faith, vexatious, wanton or oppressive behavior. The Circuit Court's Final Order of December 4<sup>th</sup>, 2009 explicitly finds that the Town engaged in behavior that warranted an award of fees. Accordingly, the Circuit Court did not abuse of discretion, and there is no basis to overturn the award.

## **II. STATEMENT OF FACTS**

The Town failed to appeal the Final Order in which the Circuit Court declared the rights of the parties. The Final Order dated December 4, 2009, which was recorded on December 7, 2009 (Exhibit 1), sets forth the undisputed underlying facts of this case. The Order details the numerous and unsuccessful attempts made by Mr. Taylor to gain access to his property over a paper street within the town limits of Harpers

Ferry. The Order shows a concerted plan, conceived by one of the Town's council members, Robert DuBose, and supported by the Town, to illegally deprive Mr. Taylor of access to his property. The Circuit Court specifically found the following facts to be true in its December 4, 2009 Order (attached as Exhibit 1):

1. Mr. Taylor owns four contiguous Lots of real estate within the corporate limits of Harpers Ferry. The lots are not accessible by vehicle for ingress and egress, but could be accessed by Zachary Taylor Street—a publicly dedicated but unimproved street. December 4, 2009 Order, page 1.
2. On December 12, 2005, Mr. Taylor submitted a request to the Harpers Ferry Town Council for permission to create a path along Zachary Taylor Street to accommodate a truck in order to determine if the site was suitable for construction. December 4, 2009 Order, page 2.
3. At the time of Mr. Taylor's request, Mr. Robert DuBose was a Town Council Member who lived in a house adjacent to the proposed access path (Zachary Taylor Street) to Mr. Taylor's property. December 4, 2009 Order, page 2.
4. On January 9, 2006, the Town Council approved Mr. Taylor's request to access his property, on the condition that Mr. Taylor use erosion control silt fences and reseed with rye grass. The Council also requested that Mr. Taylor get an authorization letter from the Mayor documenting the

requirements. Mr. DuBose abstained from voting but participated in all discussions December 4, 2009 Order, Exhibit 1, pages 2-3.

5. Mr. DuBose began a campaign to prevent Mr. Taylor from accessing his property. Two days after the Town's approval, Mr. DuBose sent e-mails complaining about Mr. Taylor's approval to a Member of the Planning Commission, the Chief of Police and all members of the Town Council, but did not copy Mr. Taylor on the e-mails. The e-mail to the Town Council Members made false accusations and was a clear attempt to induce the Town Council to withdraw its approval. The e-mail is evidence that Mr. DuBose tainted the deliberations of the Council Members from the outset. December 4, 2009 Order, pages 3-4.
6. Mr. Taylor sent multiple letters of reassurance to the Town Council, explaining the size of the truck, that the truck would stay within the confines of the public right-of-way, how he would access the property, that he would pay for a survey, and that he was willing to comply with additional requirements from the Mayor. December 4, 2009 Order, pages 4-5.
7. In a letter dated January 17, 2006, the Mayor required additional conditions of Mr. Taylor despite there being no basis in law to demand such requirements. Mr. Taylor consented to the additional conditions. On February 11, 2006, Mr. Taylor was instructed that he could proceed with his plan. December 4, 2009 Order, page 5.

8. On April 9, 2009, Mr. DuBose sent an angry e-mail to all Town Council Members, complaining of potential tree cutting and alleging that the slope of the proposed path was too steep. Mr. Taylor was not copied on the e-mail. In the e-mail, Mr. DuBose erroneously asserted that the slope of the path was eighty (80) degrees. Another Council Member, Mr. Barry Bryan, testified at trial that he later determined that the actual slope of the path was less than five (5) degrees. December 4, 2009 Order, pages 5-6.
9. In a letter responding to Mr. DuBose's April 9<sup>th</sup> letter, Councilman Bryan wrote that Mr. DuBose was clearly asserting a personal agenda to block Mr. Taylor's project and that Mr. DuBose had shown no interest in a similar project that did not personally affect him. December 4, 2009 Order, page 6.
10. The Town Council Members understood that Mr. DuBose was improperly using his position as a Town Council Member to protect his own private property interests. December 4, 2009 Order, page 6.
11. The Town admitted that there were no ordinances, guidelines, standards, rules or policies passed by the Town relating to tree removal or pertaining to a landowner's request to access his property over a paper street. December 4, 2009 Order, page 7.
12. Mr. Taylor's contractor was at the site and prepared to begin work on April 21, 2006, at which time the work was stopped at the demand of the

Town attorney. Mr. DuBose had lobbied the Town Attorney for the work stoppage. The attorney's letter vaguely accused Mr. Taylor of violating the terms of the agreement he signed with the Town. The Town never provided an explanation in writing describing the alleged violations. Mr. Taylor was unable to determine what conditions he allegedly violated; therefore, he was unable to work toward a remedy or cure of the "violations." December 4, 2009 Order, pages 7 and 10.

13. At the request of Mr. DuBose, the Town Council conducted a Special Meeting for the sole purpose of discussing Mr. Taylor's project on April 25, 2006. At the meeting, the Town decided to require additional conditions before Mr. Taylor could access his property. They included: (1) an additional survey; (2) a detailed description of the proposed work; (3) offers to plant numerous dogwoods and other tree species; (4) a fill-plan with specified materials to be used; (5) before and after drawings or photographs of all proposed changes to the land; (6) a topographic survey of the right-of-way with 2-4 ft. contours; and (7) a site drawing plan with the location of each tree proposed to be removed. Mr. Taylor was to submit these documents to the Planning Commission for review. The Town demanded additional requirements even though the Town did not consult with an engineer or other design professional to determine the necessity of the requirements. One of the Town Council Members admitted that no one on the Council had the necessary expertise to

determine what requirements would be reasonable. Mr. Taylor agreed to the additional terms. Mr. Dubose continued to participate in all meetings on Mr. Taylor's access to his property. December 4, 2009 Order, pages 8 and 10.

14. At the Special Meeting, the Town Council moved to discuss Mr. Taylor's access issue privately in Executive Session, Mr. DuBose seconded the Motion, and participated in the confidential executive session with the Town Council and Town attorney behind closed doors even though he stated that he had a personal interest in the proposal and had abstained from voting. December 4, 2009 Order, pages 10-11.
15. Councilman Bryan testified that a member of the Planning Commission was at the Special Meeting and indicated that the Planning Commission had no authority or expertise to review Mr. Taylor's drawings as required by the Town Council. December 4, 2009 Order, page 12.
16. Mr. Taylor agreed to provide the detailed documents that were requested at the Special Meeting. Mr. Taylor submitted a written, detailed description of the work, which included the Town's requirements, elevations, a detailed plan view and a detailed cross section of the work. Mr. Taylor and a professional surveyor compiled and prepared the information. December 4, 2009 Order, page 10.

17. Councilman Bryan testified that the requirements imposed upon Mr. Taylor were not authorized by Town ordinance, policy or law.  
December 4, 2009 Order, page 11.
18. Mr. Taylor has been a professional construction manager for twenty years, during which time he has regularly communicated with engineers, architects, design professionals and other construction managers. Mr. Taylor is also a licensed architect. His occupation familiarized him with costs of materials, labor and other professional services relevant to construction projects. December 4, 2009 Order, page 8.
19. On June 12, 2006, despite Mr. Taylor's expertise and compliance with the requirements imposed at the Special Meeting, the Town told Mr. Taylor that he must retain a professional engineer to prepare a full set of construction engineering drawings sealed by the engineer, at a cost of \$25,000 to \$30,000. Based on Mr. Taylor's experience he concluded that the request was without merit because the professional engineer would have no standards or guidelines upon which to base his work. The Town never provided Mr. Taylor with a set of standards, guidelines, policies or any guidance that would aid him in preparing an acceptable application, and the Town had no professional engineer on staff and retained none as a consultant to review Mr. Taylor's drawings or proposal. Mr. Taylor objected to the engineer requirement.  
Additionally, the Town's ever-changing requirements and lack of

standards left him with no assurance that the Town would ever allow him access, even if he hired an engineer at an exorbitant cost. December 4, 2009 Order, pages 9-11.

20. Mr. DuBose participated in each and every council meeting and deliberated with the Council on all matters pertaining to Mr. Taylor's request for access. Mr. DuBose testified that he would do anything necessary to stop Mr. Taylor from accessing his property Exhibit 1. December 4, 2009 Order, pages 12-13.
21. Other similarly situated residents were not made to comply with the requirements imposed upon Mr. Taylor. There was a similar project on West Ridge Street in Harpers Ferry for which no conditions were imposed. According to Councilman Bryan, the improvement of that paper street "was just done." With regard to other properties, Councilman Bryan said that "in the past contractors just went ahead and did it." Exhibit 1, December 4, 2009 Order, pages 14-15.

The Circuit Court's Findings of Fact clearly demonstrate the Town's bad faith participation in and complicity with Mr. DuBose's scheme to deny Mr. Taylor access to his property. Based on the above findings of fact, the Circuit Court held that the "misconduct of Mr. DuBose tainted the entire process and the decisions of the Council should be declared void." Exhibit 1, December 4, 2009 Order, page 22.

The Town Council Members were aware of Mr. DuBose's bad faith and illegal effort to block Mr. Taylor's access to his property. Nevertheless, the Town aided in

Mr. DuBose's scheme by continually escalating the complexity and costs of the conditions required of Mr. Taylor, despite there being no basis in law to do so. Accordingly, the Circuit Court concluded that Mr. DuBose and the Town Council acted in bad faith, vexatiously, wantonly or for oppressive reasons, justifying the award of attorney's fees and costs pursuant to *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986). See April 9, 2010 Order Granting Plaintiff's Motion for an Award of Reasonable Attorney's Fees and Costs, attached as Exhibit 3.

The December 4, 2009 Final Order (Exhibit 1) specifically granted Mr. Taylor thirty (30) days in which to file for additional relief, including attorney's fees, costs and expenses (Exhibit 2, Motion for Attorney's Fees and Costs). Therefore, the Town should have appealed the Order (Exhibit 1) if it disagreed with any of the Findings of Fact and Conclusions of Law contained therein.

The Court also made Findings of Fact in its June 29, 2010 Order denying the Town's Motion to Alter or Amend the Judgment or Order Awarding Attorney's Fees, Exhibit 5. In that Order, the Court referenced its December 4<sup>th</sup> Final Order, stating that "this Court summarizes a systematic and persistent effort by Councilman DuBose and others to wrongfully deprive Mr. Taylor of access to his property." The Court specifically held that the Town was an active participant in carrying out Mr. DuBose's wrongful purpose, stating that, "the Court concludes that the Council actively supported this pattern of misconduct perpetrated by Mr. DuBose." See June 29, 2010 Order, page 3 (attached as Exhibit 5).

### III. SUMMARY OF THE ARGUMENT

The Town appeals the award of attorney's fees on two bases. First, the Town argues that it did not act in acted in bad faith, vexatiously, wantonly or for oppressive reasons as described in Sally-Mike Properties v. Yokum (Supra). The error of this argument can be seen in the numbered paragraphs in the above Statement of Facts which are the precise Findings of Fact made by the Circuit Court after hearing extensive evidence and testimony from Town representatives and Mr. Taylor. The Findings of Fact explicitly show that the Town actively, oppressively and in bad faith, participated in the effort to deprive Mr. Taylor of access to his property. The Findings of Fact were not appealed, and the Order entered December 4, 2009 (Exhibit 1) is final. If the December 4<sup>th</sup> Order were not plain enough, the Court further explained its Findings in the June 29<sup>th</sup> Order Denying Plaintiff's Motion to Alter or Amend the Judgment Order Awarding Attorney's Fees (Exhibit 3), unequivocally stating that the Council was an active participant in the wrongdoing.

The Town also appeals the award of attorney's fees on the basis that it was deprived of the right to an additional Evidentiary Hearing. The Circuit Court rejected this argument in its June 29<sup>th</sup> Order, holding that "At every phase of the proceedings in this case, the Town of Harpers Ferry fully participated and had every opportunity to present evidence and legal arguments in opposition to the Plaintiff's case in chief and the Motion for Attorney's Fees. The Town of Harpers Ferry had a full opportunity to participate in the Bench Trial and in the post Trial Motions." (Exhibit 5, page 4) The Court held that the cases cited by the Town in its opposition to the award of attorney's

fees involved lack of *any* opportunity for the presentation of evidence. In this case the Town had an opportunity to present all of its evidence at the Bench trial. See June 29<sup>th</sup> Order Denying Plaintiff's Motion to Alter or Amend the Judgment Order Awarding Attorney's Fees Exhibit 5, page 4.

#### IV. ARGUMENT

A. Award of attorney's fees is proper because the Circuit Court's Findings of Fact clearly show that the Town acted in bad faith, vexatiously, wantonly or for oppressive reasons

In its objection to an attorney's fees award, the Town implies that an award is only available when conduct was vexatious, wanton, or oppressive *during the course of the litigation*. However, "[b]ad faith' may be found in conduct leading to the litigation or in conduct in connection with the litigation." *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986)(citing *Hall v. Cole*, 412 U.S. 1, 15, 93 S.Ct. 1943, 1951, 36 L.Ed.2d 702, 713 (1973)). The Circuit Court's Findings of Fact and Conclusions of Law in its December 4, 2009 Order (Exhibit 1) contains numerous examples of official misconduct, bad faith, vexatious, and oppressive conduct leading to the litigation, which caused Mr. Taylor to file the Complaint in this case.

The Court's Findings demonstrate a concerted plan to deny Mr. Taylor access to his property by Mr. Dubose and the Town. The Town admitted that there was no ordinance related to tree trimming, cutting or removal that was applicable to Mr. Taylor's request. See December 4, 2009 Order, page 7. Likewise, there was no Ordinance or Policy to support the Town's requirements to provide a survey, a detailed

description of the proposed work, a fill-plan with materials to be used, before and after drawings of all proposed changes, a topographic survey of the right of way, a sight drawing plan with the location of the trees, and ultimately a full set of engineering drawings sealed by a professional engineer at great expense to Plaintiff. The Circuit Court found that the costly, complicated and unlawful demands are evidence of the oppressive and unreasonable nature of the Town's actions. See December 4, 2009 Order, Exhibit 1, page 8.

Additional evidence of the Town's bad faith includes Finding of Fact numbers 54 through 57 of the Court's December 4<sup>th</sup> Order, which show that the Town required Mr. Taylor to take steps that were not required of other similarly situated citizens. See December 4, 2009 Order, pages 14-15.

Perhaps the most obvious evidence of the Town's bad faith and oppressive conduct can be found in the repeated pattern of requirements imposed on Mr. Taylor followed by Mr. Taylor's concessions to such plans, which only triggered more requirements and more concessions. As the pattern emerged and continued, it became clear that the Town was merely attempting to prevent Mr. Taylor's access with unreasonably burdensome requests. As a result, the Circuit Court found that "the Town's actions substantially and unreasonably deprived Mr. Taylor of access to his property by denying him access to a public street." See December 4, 2009 Order, page 23.

The Court also found that the Town deprived Mr. Taylor of his due process rights by imposing restrictions for which there were no guidelines or standards to

judge their reasonableness. See December 4, 2009 Order, page 29. While the Town argues that Mr. DuBose acted independently and in his personal capacity, it was the numerous actions of the Town Council that unconstitutionally deprived Mr. Taylor of access to his property by knowingly conceding to Mr. DuBose's wrongful scheme. The restrictions and requirements imposed on Mr. Taylor and the deprivation of his Constitutional rights were the result of official actions taken by the Town Council not merely DuBose as an individual. The Town's actions, in addition to those of Councilman Dubose, were vexatious, oppressive and taken in bad faith.

Mr. Taylor's right to due process of law was also violated by the Defendant's failure to provide an impartial decision-making body. See Exhibit 1, December 4, 2009 Order, page 28. Even if some of Mr. DuBose's actions were taken as a citizen of the Town and a property owner, various representatives of the Town consciously cooperated a Council Member they knew to be an interested party. Councilman Bryan expressly acknowledged Mr. DuBose's improper purpose. Yet the Town Council repeatedly followed Mr. DuBose's demands. As the Circuit Court held, "there was ample evidence of misconduct on the part of Councilman DuBose and the entire City Council which would support the Plaintiff's Motion for Attorney's Fees and Costs." See Jun 29, 2010 Order Denying the Plaintiff's Motion to Alter or Amend the Judgment Order Awarding Attorney's Fees (Exhibit 5, page 2).

Accordingly, the misconduct referred to in the Circuit Court's Findings of Fact were not limited to Mr. DuBise but can also be directly attributed to the Town Council and the Mayor. The Circuit Court concluded that, "[t]hroughout this process Barry

Bryan and others on the Council understood that Robert DeBose was improperly using his position as a Town Council Member to protect his own private property interests.” See December 4, 2009 Order, page 6. Yet the Town catered to Mr. DuBose as a preferred citizen, and placed Mr. DuBose’s private interests above the legitimate interests of someone the Town deemed to be an outsider (Mr. Taylor).

The official misconduct, bad faith, vexatious, and oppressive conduct outlined in the Court’s December 4, 2009 Order was not based on unsettled or unique property law issues, as suggested by the Town. The Circuit Court found that there was *no* basis in law for the Town’s actions. Specifically, the Circuit Court found that, “the requirements imposed upon Mr. Taylor as a result of the Council’s special meeting were not authorized by any Town Ordinance, policy or law.” See December 4, 2009 Order, pages 11-12.

There is precedent for awarding attorney’s fees to individuals when the government has consciously disregarded the rights of its citizens. For example, the court awarded fees in *Nelson v. West Virginia Public Employees Ins. Bd.*, 171 W.Va. 445, 300 S.E.2d 86 (1982), for the government’s refusal to perform a clear statutory duty. Similarly, the Department of Health and Human Service’s intentional withholding of relevant documents for a due process hearing deprived the complainant of her due process rights, therefore warranted an award of attorney’s fees. See *Gainer v. Walker*, 2009 WL 1543924 (W.Va.).<sup>1</sup>

---

<sup>1</sup> *Gainer* further defined vexatious conduct as “without reasonable or probable cause or excuse.” The Town’s imposition of a laundry list of preconditions before allowing

In fact, Harpers Ferry has been Ordered to pay attorney's fees in the past when it deprived a citizen of his due process rights. In *Alden v. The Harpers Ferry Police Civil Service Com'n*, 219 W.Va. 67, 631 S.E.2d 625 (2006), the government's failure to provide a mandated pre-termination hearing entitled the complaining employee to the attorney's fees expended to secure the hearing. Explaining the award, this Court emphasized that when citizens must resort to law suits to force government officials to perform their duties, "the government ought to bear the reasonable expense incurred by the citizen in maintaining the action." *Alden* 219 W.Va. at 70, 631 S.E.2d at 628.

Similarly, the Dunbar FOP collected attorney's fees when it showed that a city's refusal to negotiate an agreement, which it was contractually obligated to do, was in bad faith. See *Dunbar Fraternal Order of Police, Lodge No. 119 v. City of Dunbar*, 218 W.Va. 239, 624 S.E.2d 586 (2005).

Additionally, attorney's fees are appropriate in the context of declaratory judgments, as in any other civil action, if the requesting party can demonstrate conduct justifying such relief. *Security Nat. Bank & Trust Co. v. Willim*, 153 W.Va. 299, 168 S.E.2d 555 (1969); also *Kalwar v. Liberty Mutual Ins. Co.*, 203 W.Va. 2, 506 S.E.2d 39 (1998). West Virginia case law suggests that a Circuit Court should award attorney's fees when there has been a conclusive showing of bad faith or vexatious, wanton or oppressive conduct. *Bowling v. Ansted Chrysler-Plymouth*, 188 W.Va. 468, 425 S.E.2d 144 (1992).

---

Plaintiff to access his property were without reasonable or probable cause or excuse, which is particularly evident when one considers that the Town imposed *no* conditions on similarly situated citizens.

The Defendant's explanation of its conduct was completely inadequate to negate Mr. Taylor's evidence of bad faith and oppressive conduct. The Town essentially shrugged its shoulders and defended Mr. DuBose's misconduct as simply the way the Town did business. The Town's reaction is particularly concerning given the importance of the Constitutional rights at issue and in light of *Shannondale, Inc. v. Jefferson County Planning and Zoning Com'n*, 199 W.Va. 494, 485 S.E.2d 438 (1997), which specifically requires that any interested member of a government body who has recused himself must also "absent himself or herself physically from the discussion by leaving his or her customary seat and the general discussion area." *Shannondale* at 500, 485 S.E.2d at 444; see also Exhibit 1, Final Order dated December 4, 2009, Conclusion of Law 6, page 18.

The Town's assertion that "there are simply no facts that should cause this Court to deviate from the [American Rule]" has no support in light of the Circuit Court's Findings of Fact (Petition for Appeal page 12 emphasis added). The Town seems to have completely ignored the Circuit Court's Findings of Fact, including the multiple times the Town granted then retracted permission to Mr. Taylor to access his property, and the Town's treatment of Mr. Taylor in a manner completely different from other similarly situated citizens.

Likewise, the Town's position that "[t]here is no statutory or common law authority for Plaintiff to build a road on the Town's property as a matter of law" is unsupported in light of the extensive case law and the Circuit Court's holding to the contrary. See Petition for Appeal page 12; see also *Flowers v. City of Morgantown*,

166 W.Va. 92, 272 S.E.2d 663 (1980)(holding that owners of land abutting upon public streets have a special right of access thereto and to light, air, and view therefrom; those rights are property rights and exist regardless of the ownership of the fee in the highway); *State ex rel. Ashworth v. State Road Commission*, 147 W.Va. 430, 128 S.E.2d 471 (1962)(same); *Davis v. Spragg*, 72 W.Va. 672, 79 S.E. 652 (1918)(same).

The Circuit Court repeatedly emphasized that the right to access one's property is a fundamental, constitutionally protected right that may not be deprived under West Virginia law without just compensation, and that the Town's actions substantially and unreasonably deprived Mr. Taylor of access to his property. December 4, 2009 Order, page 22-23.

**B. The Town had every opportunity to be heard on the issue of attorney's fees**

The Town complains that it should have had an opportunity for an additional Evidentiary Hearing on the issue of attorney's fees and costs. It cites two cases in support of its allegation that it was deprived of the ability to adequately present evidence. Neither case holds that a separate, additional hearing is necessary when the Circuit Court has made a clear finding of bad faith against a party that participated in the original action who had every opportunity to develop the facts and present witnesses at trial.

The first case, *Horkulic v. Galloway*, 222 W.Va. 450, 665 S.E.2d 284 (2008), involved a malpractice claim against an attorney and a subsequent third-party

bifurcated bad faith action against the attorney's insurance company. The insurer was not a party to the malpractice action; therefore, the confessed judgment to the malpractice claim was not binding on the insurer. The court remanded the case to give the insurer a chance to challenge the insured's confessed judgment. Additionally, the bad faith claim for which attorney's fees were being considered involved the insurer's alleged bad faith breach of a settlement agreement. In its defense, the insurance company pointed to the fact that it had been precluded from participating in the plenary hearing. It had never been granted an opportunity to present issues pertinent to whether it had postponed final settlement in bad faith, and there was confusion regarding the precise parameters and terms of the settlement agreement. Based on the specific facts of the case, the court held that the insurer was entitled to be heard on the issue of bad faith. Clearly, the case has no applicability to the case at bar, in which the Town was a party to the underlying action and presented extensive evidence on all relevant issues at trial, and in all post trial proceedings.

The second case cited by the Town, *Daily Gazette Co., Inc. v. Canady*, 175 W.Va. 249, 332 S.E.2d 262 (1985), involved the dismissal of a defamation case. The defendant in the case requested attorney's fees from the attorney who filed the Complaint, alleging that it was filed in bad faith. The Circuit Court Judge rejected the request on the ground that he lacked the jurisdiction and authority to do so. On appeal, this Court recognized the "inherent power" of the judiciary to do all things necessary to administer justice, including taxing fees against counsel who willfully abuses the judicial process. See *Daily Gazette*, 175 W.Va. at 251, 332 S.E.2d at 264.

However, there had been no record upon which to develop the attorney's bad faith, vexatious, wanton or oppressive conduct. The defendant had succeeded in obtaining the dismissal of the claim for its frivolity, which was not sufficient to justify attorney's fees. Accordingly, this Court remanded the case for a hearing on the issue of bad faith. Again, the facts of the *Daily Gazette* are remarkably dissimilar to those of the case *sub judice*, and in no way aid the Town's position that it was deprived of the ability to present evidence to rebut its oppressive conduct.

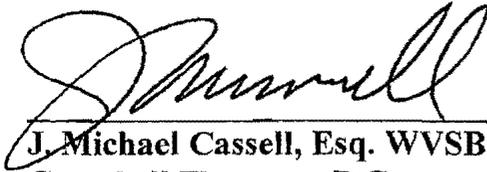
As underscored in the Circuit Court in its June 29, 2010 Order, Mr. Taylor's Complaint alleged official misconduct in eight (8) separate paragraphs, and requested attorney's fees and costs in its prayer for relief. See June 29<sup>th</sup> Order Denying the Motion to Alter or Amend the Judgment Order Awarding Attorney's Fees, Exhibit 5, page 2. Accordingly, the Town was on notice that Mr. Taylor had made a claim for attorney's fees from the outset of the case.

#### V. CONCLUSION

Based on the Town's disregard of the right to Constitutional Due Process for one of its taxpayers and its blatant attempt to deprive the Plaintiff of his constitutionally protected right to access his property, an award of attorney's fees is appropriate. Mr. Taylor should not be burdened with the cost of protecting his Constitutional Rights when the Circuit Court's Findings of Fact explicitly detail the Town's official

misconduct, bad faith, and unequivocally shows that the Town acted vexatiously and oppressively. Your Appellee respectfully requests that this Court deny the Appeal filed by the Corporation of Harpers Ferry.

**RALPH TAYLOR**  
**By Counsel**



**J. Michael Cassell, Esq. WWSB 670**  
**Campbell Flannery, P.C.**  
**201 N. George Street, 2<sup>nd</sup> Floor**  
**Charles Town, West Virginia 25414**  
**304-725-5325/telephone**  
**304-724-8009/facsimile**

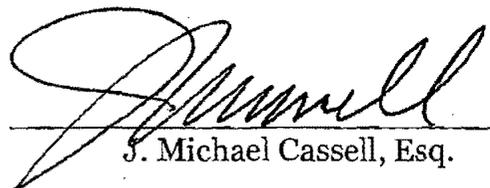
**CERTIFICATE OF SERVICE**

Type of Service: Federal Express – WV Supreme Court of Appeals  
United States Regular Mail – Greg Bailey, Esq.

Date of Service: December 16, 2010

Persons served and address: Greg Bailey  
P. O. Box 69  
Shepherdstown, WV 25443

Item Served: RESPONSE TO PETITION FOR APPEAL



J. Michael Cassell, Esq.

**EXHIBITS**  
**ON**  
**FILE IN THE**  
**CLERK'S OFFICE**