

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners,

v.

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

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

Respondents.

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I. STATEMENT OF THE CASE

Respondents' Statement of the Case is reflective of their presentation before the trial court: (1) an absence of evidence rebutting the facts proven by Petitioners' evidence (demonstrated by the paucity of citations to the record¹), and, (2) a reliance on inferences not supported by the evidence in the record. Page limitations compel Petitioners to stand upon their original, fully-cited Statement of the Case [Pet. Brief at 1-14] to rebut all but a few of Respondents' mischaracterizations.

Petitioners² never proposed to offer the house only for short-term rentals. [App.230:21-231:4; 314, 353] Petitioners received several requests for extended rentals from would-be long-term tenants who had temporary work assignments in or transfers to the area and required family housing. [App. 833-838] It was the inability to provide central heating and cooling that made these rentals infeasible. [App. 237:21-239:5]

Whatever the general statement of purpose for the R-1 district may be, the specific executing provisions enacted by the Town expressly permit duplexes, houses with an added apartment, and, as special permit uses, *inter alia*, professional offices. Shep. Ord. Sec. 9-503 [App. 630] No one from the Town told Petitioners that rental of the property, for any duration, was not permitted *by the Ordinance*, only that the Town's policy was to not allow short-term rental (a phrase that appeared no where in the Ordinance). [App. 223:10-20; 266:5-267:16; 356].

¹ Respondents also cite to the record for propositions not found at the cited page. For example: App. 517 (Resp. Brief at p. 3) does not support the assertion that the board of zoning appeals suggested that Petitioners seek a variance. App. 514-517 (Resp. Brief at 4) is not proof that Petitioners did not appeal the district court's dismissal of the § 1983 action, nor is there any evidence in the record of the disposition in that case (which was dismissed upon Respondents' motion, made on *res judicata* grounds and submitted after the filing of this appeal). Etc.

² Petitioners no longer live in Bolivar. Their home was partially destroyed by fire on January 13, 2013.

The assertion of a standing policy is contradicted by Mr. Heyser representation to the Planning Commission in April of 2011 that “*recent* happenings in Town have alerted Town staff of the need for Ordinance provisions to address these situations” [App. 679]

Landlords are exempted from the Town business license requirement. Shep. Ord. Sec. 8-209A. [App. 600] Mr. Burgess’s explanation as to why he applied for a Town business license only for short-term rentals [App. 230:16-233:6] was uncontradicted below. [Pet. Brief at 8]

Despite that the matter below was set as a show-cause hearing, Respondents presented no evidence to rebut the facts established in the *prima facie* petition and exhibits thereto, nor was there any indication that there was any intention of doing so. That is why there is none now.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners reassert the Statement set forth in their opening brief herein. [Pet. Brief at 15]

III. ARGUMENT

A. Petitioners do not Have an Adequate Alternative Remedy to Mandamus

The question of the right of petitioners to proceed in mandamus is argued, but *that question appears to have been so clearly settled* that we do not deem a full discussion thereof necessary.

Emphasis added. *State ex rel. Sheldon v. City of Wheeling*, 146 W.Va. 691, 695, 122 S.E.2d 427, 429 (1961)(citations omitted).³ Respondents continue to deny this “clearly settled” law.

Contrary to the assertion of Respondents, Petitioners have never argued that the circuit court failed to follow the mandates of *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969). Petitioners have argued, consistently, that the circuit court failed to follow the established law that is applicable to the particular context at issue in this case, that is, mandamus to challenge the constitutional or legal validity of a statute or ordinance. Respondents

³ The *Sheldon* petitioners’ mandamus action challenged the legal validity of a municipal ordinance requiring plumbers to take a City-offered test and secure a City plumber’s license in order to pursue their trade within the City limits.

continue to argue that such law does not exist. As a result, Respondents' brief is largely unresponsive to the arguments actually made by Petitioners.

In *W. Va. Dept. of Educ. v. Hechler*, 180 W.Va. 451, 376 S.E.2d 839 (1988), petitioners brought a mandamus action, *inter alia*, challenging the constitutionality of two statutory provisions. The respondent cited *Kucera's* three elements in opposition to the action. This Court summarily dispensed with the respondent's argument:

We need not decide, however, whether these three elements coexist in the case now before us, because the petitioners are challenging the constitutionality of [the statutory provisions]. It has been established that "mandamus may be used to attack the constitutionality or validity of a statute or ordinance." *West Virginia Citizens Action Group, Inc. v. Daley*, 174 W.Va. 299, 302, 324 S.E.2d 713, 717 (1984) (and authorities cited therein).

Therefore, mandamus is clearly a proper remedy in this case.

Hechler, 180 W.Va. at 456, 376 S.E.2d at 844. As this Court did in *Hechler*, Petitioners have, in part, relied upon *West Virginia Citizens Action Group, Inc. v. Daley*, 174 W.Va. 299, 302, 324 S.E.2d 713, 717 (1984), and the authorities cited therein. [Pet. Brief at 16] Respondents contend that reliance is misplaced. [Resp. Brief at 12]

1. Petitioners' appeal of the erroneous BZA decision does not provide an "equally convenient, beneficial and effective" remedy

Because Respondents incorrectly characterize Petitioners' facial and as-applied challenge to the validity of the Town's building code as a claim to remedy the partial denial of their building permit, they incorrectly conclude that the appeal of that denial provided a remedy equally convenient, beneficial and effective as Petitioners' mandamus counts. Respondents ignore the decisions of this Court, relying instead on decisions of other states.⁴ [Rep. Brief 12]

⁴ Ironically, Respondents criticize Petitioners for citing to decisions from other states for the two issues in this appeal for which there is no developed body of case law from this Court. [Rep. Brief at 13]

Respondents' argument is at odds with the decisions of this Court, as cited by Petitioners in their opening brief. [Pet. Brief at pp. 16-17] *See, also, Stowers v. Blackburn*, 131 W.Va. 328, 335, 90 S.E.2d 277, 282-283 (1955), and cases cited therein. The fact that Petitioners could have, some months later, asserted a declaratory judgment action to challenge the ordinances in addition to their W.Va. Code § 9-9-1 appeal, does not preclude the mandamus remedy sought by Petitioners below. *Myers v. Barte*, 167 W.Va. 194, 198, 279 S.E.2d 406, 409 (W.Va.1981). Respondents continue to ignore the fact that the case below was the first filed. [App. 91:19-92:22, 526-517, 882-883] Whatever Petitioners might have done in the later-filed § 9-9-1 appeal is irrelevant because the mandamus action was commenced first, asserting then-existing claims.

As shown by the decisions of this Court, the availability of an appeal from a decision under a local ordinance is not a bar to an action in mandamus to challenge the validity of that ordinance. And, Respondents did not properly raise an argument that it was to the court below.

Respondents did not plead such a bar as an affirmative defense in their answer to the Petition.⁵ Alternatively, if Respondents believed that resolution of the appeal from the BZA would have an operative effect on the case below, they could have moved to stay the proceedings below pursuant to W.Va. Code § 59-9-10, but they didn't do that either. *State ex rel. Piper v. Sanders*, 228 W.Va. 792, 723 S.E.2d 763, 767 (2012), *citing*, Syl. pt. 4, *Dunfee v. Childs*, 59 W.Va. 225, 53 S.E. 209 (1906); *see, also, Starcher v. United Fuel Gas Co.*, 113 W.Va. 397, 168 S.E. 383 (1933). Respondents could have openly moved at trial, orally, to amend their affirmative defenses, in a time and manner to afford Petitioners adequate opportunity to

⁵ Respondents in their answer affirmatively asserted that Petitioners had failed to exhaust their administrative remedies. [App. 655] However, the administrative remedy (the BZA process) was exhausted prior to trial below. Respondents did not move to amend their affirmative defenses to include the assertion that the circuit court appeal of the BZA decision operated as a bar to the mandamus claims.

respond.⁶ Syl. pt. 2, *Hanshaw v. City of Huntington*, 193 W.Va. 364, 456 S.E.2d 445 (1995).

Respondents didn't even make the argument in a timely fashion.

Respondents admitted in their opening remarks that the issues in the case below went to the "overall ordinance," while the appeal of the BZA decision dealt only with the application of set-back requirements to Petitioners' proposed placement of heat pump condensers.

MR. NOONEY: ... The second issue basically has to do with the heat pump condenser and the issue of where it's located as envisioned by Mr. and Mrs. Burgess on the property. That is a matter which went to the Commission, went up in front of the Board of Zoning Appeals and, of course, that is on appeal on a separate action which is actually in Judge Steptoe's court. That is Civil Action 12-C-23. That is already on appeal that part of the case.

* * * * *

... Basically our argument here, an overview of it, is whether or not that is enforceable. In other words, whether or not the building permit process is enforceable. *That is certainly an issue that Ms. Gutsell has raised in this one and relates to the overall ordinance and what the ordinance means and what the planning process means. So to that extent certainly it is germane for you to listen to what is, as far as whether or not a particular set-back requirement applies in this case by a definition how many feet back from a lot line, that is a matter that is on separate appeal in a separate action.*

Emphasis added. [App. 37:21-39:15; *see, also*, App. 36:15-24; 91:12-15] But, in closing remarks – just moments before the court announced its decision and there was no opportunity for rebuttal argument⁷ – Respondents contradicted themselves yet again. They argued, “[w]ithout having to go through all the mandamus law,” that Civil Action No. 12-C-23 was an adequate alternative remedy that barred the mandamus actions. [App. 294:15-205:15] Respondents failed

⁶ Petitioners would have objected to such motion, because Respondents (and the court) were fully informed of the appeal of the BZA decision months prior to the trial below. [App. 514-526] Such motion could not have been brought at trial on grounds of conforming the pleadings to the evidence.

⁷ Petitioners' counsel objected to Respondents' raising the merits of Civil Action No. 12-C-23 at all in closing. [App. 294:21-24] Petitioners advanced their substantive rebuttal argument in their T.C.R. 24.01 objections to the entry of the final order. [App. 880]

to properly raise the issue of a bar below, and the argument is wrong as a matter of substantive law.⁸

Petitioners' claims in mandamus were fully mature by the end of October, 2011, and the BZA hearing had not yet occurred when Petitioners filed their Petition below.⁹ Respondents' argument is that Petitioners had to wait and see if they would have reason to appeal the decision of the BZA before pursuing the claims that were ripe in October. This Court has never suggested such a requirement for a challenge to the validity of an ordinance.

The chronology proves that Respondents' suggested procedure is not equally convenient, beneficial and effective to mandamus. Respondents' proposition would promote an unnecessary waste of the parties' and the courts' time and resources,¹⁰ because, if the ordinance is invalid, the BZA proceedings would not be necessary at all. Respondents' proposed process would cause unnecessary delays and exaggerated costs in the resolution of the matters of significant public (as opposed to just individual) concern. Meanwhile, Petitioners, as well as all of the other citizens of Shepherdstown, would continue to be subject to the imposition of invalid ordinances while waiting months for outcomes in the BZA hearing and a subsequent appeal to circuit court.¹¹

⁸ And, Respondents have applied their theory very selectively. Any other claim that Petitioners had against the Town, not just the declaratory judgment action suggested by Respondents, could have been joined with the appeal of the BZA decision. But, Respondents ignored their own theory when they vigorously sought a decision on the merits of the mandamus claim in Court IV of Plaintiffs' Petition.

⁹ Petitioners have repeatedly recited the correct chronology. [App. 90:23-92:22; 329-330; 441-449; Pet. Brief at 11]

¹⁰ Respondents suggest that had Judge Sanders ruled the building code invalid, it would risk a conflicting decision by Judge Frye in the appeal from the BZA. Obviously, Judge Frye would have been promptly notified of a decision that rendered the appeal of the BZA moot. However, if Respondents had this concern, they should have supported Petitioners' motion to consolidate the two civil actions. [App. 514]

¹¹ The appeal from the BZA decision that was filed on January 20, 2012, is still awaiting resolution. The case is not closed, as Respondents indicate in fn. 2 of their brief. An erroneous notation to that effect had been made in docket index, so that the case initially was overlooked in recent judicial reassignments. That error was corrected as soon as it was discovered, and the case is still pending.

2. The validity of the ordinances is inherent to the assignment of error and may be resolved herein

The mandamus sought below challenged the Town's building code as invalid because it contravenes the controlling state statutes and it is constitutionally infirm. The facts necessary to apply the proper law to this challenge were submitted to the record below. Because the circuit court incorrectly concluded that mandamus to challenge the validity of the building code was barred, it failed to decide the question on the merits. Admittedly, Petitioners cannot assign error to a decision that was not made, but have assigned error to the failure to make the decision. This Court may, in its discretion, decide the question.

Ordinarily, "[t]his Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syl. Pt. 2, *Sands v. Security Trust Company*, 143 W.Va. 522, 102 S.E.2d 733 (1958). Similarly, an issue may not be raised for the first time on appeal. *Whitlow v. Bd. of Educ. of Kanawha Co.*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993). However, this rule is not without exceptions, because, as Justice Cleckley explained in his concurring opinion in *State v. Greene*, 196 W.Va. 500, 505, 473 S.E.2d 921, 926 (1996), it is a rule of discretion; it is not jurisdictional or immutable, but serves as a judicial gatekeeper. Accordingly, where the issue is one of substantial public interest or of constitutional dimensions, presents a question of law, and the necessary facts appear in the record, this Court has resolved an issue despite there being no decision from the circuit court. *See, e.g., PNGI Charles Town Gaming, LLC v. Reynolds*, 229 W.Va. 123, 727 S.E.2d 799, 804 n. 15 (2012); *Simpson v. W. Va. Off. Of Ins. Comm'r*, 678 S.E.2d 1 (W.Va. 2009); *Mountain America, LLC v. Huffman*, 687 S.E.2d 768 (W.Va. 2009); *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005); *Whitlow*, 190 W.Va. 223, 438 S.E.2d 15.

The instant appeal meets all of the criteria that recommend this Court's resolution of the validity of the Town's building code. Additionally, unlike many of the cases cited above, the court below actually did have the opportunity to decide the issue in the first instance.

In the meantime, Shepherdstown remains convinced that the mandatory State law doesn't apply to its building code.¹² Shepherdstown's interpretation of W.Va. Code § 8-12-13, was related by its counsel at trial. [App. 290:22-292:7] Counsel stated:

What Ms. Gutsell looks at is (b) where it says notwithstanding the provisions of subsection (a) if you have basically a municipal building code a year after the state fire code is adopted then it's void and you have to have the state fire code. But it doesn't say that we're taking away the plenary power that you have in section (a). The word "notwithstanding" and I am citing from Merriam Webster's Collegiate Dictionary, notwithstanding means despite or nevertheless or however or all above. It doesn't say that you no longer have that authority.

[App. 219:16-292:2] Shepherdstown will continue to maintain and administer a building code of its own creation, despite the contrary mandate of the Legislature, until forced by a court to desist.¹³ This appeal offers that opportunity.

B. "Short-Term" Residential Rentals were not Excluded from the R-1 Zoning District

Respondents continue to mischaracterize Petitioners' argument regarding short-term residential rentals under the Shepherdstown zoning ordinance. Petitioners have never denied that

¹² The Town also continues to claim that its building code, adopted pursuant to W.Va. Code § 8-12-13 and -14, is actually a zoning ordinance. But, e.g., the Town uses the Secretary of the Interior's Standards as part of its building code, which Standards have been designated by the W. Va. Division of Culture and History as an alternative building code for historic properties, 82 C.S.R. 2 §4, in accordance with the State Building Code's exception in W.Va. Code § 29-3-5b(j). But, the Standards are intended only as an alternative code for historic properties, not a building code for all properties, as Shepherdstown uses it.

¹³ Respondents also continue to maintain that their interpretation was approved by this Court in *Bittinger v. Corp. of Bolivar*, 183 W.Va. 310, 395 S.E.2d 554 (1990). [Resp. Brief at 13, n. 3] *Bittinger* involved a moratorium on the town's building code as it existed in 1987, before W.Va. Code § 29-3-5b was enacted. The case gave no occasion for this Court to consider the invalidation provision of W.Va. Code § 8-12-13(b). [App. 61:16-22]

West Virginia's zoning enabling law, W.Va. Code § 8A-7-1, *et seq.* authorizes Shepherdstown to establish residential zoning districts.¹⁴ Nor have Petitioners ever denied that Shepherdstown can establish a residential use zoning district in which short-term residential rentals are excluded.

[App. 89:19-90:11] What Petitioners do argue is that Shepherdstown had not done so when they purchased and began using their property.¹⁵ [App. 89:19-90:11, App. 325, 337]

Petitioners, relying on established West Virginia law, argue that zoning ordinances are subject to the rule of strict construction, and must be drafted so as to avoid vagueness and to clearly define the uses intended to be included or excluded in a particular zoning district. [Pet. Brief at 21-23; App. 62-63] Petitioners contend that this long established law applies with equal force to the exclusion of short-term residential rentals from residential districts, a precise question not previously addressed by this Court. [Pet. Brief at 23-25] The review of extra-jurisdictional case law is necessary. *McClure v. City of Hurricane*, 227 W.Va. 482, 711 S.E.2d 552, 560 (2010)(Ketchum, J., dissenting) (“Lawyers can no longer rely only on West Virginia precedent [in land use cases]. They must consult decisions from other jurisdictions as well as the numerous articles and treatises on the subject.”) Petitioners have chosen to cite case law arising from similarly-worded “inclusive” ordinances in states which honor the same common law rules of construction that are solidly established by this Court’s decisions.

Respondents have cited *Ewing v. City of Carmel-by-the-Sea*, 234 Cal.App.3d 1579, 386 Cal.Rptr. 382 (1991) for contrary authority, but it is in accord. In *Ewing*, the City of Carmel had adopted a meticulously detailed zoning provision that specifically defined any residential rental

¹⁴ It is curious, however, that Respondents continue to cite to Chapter 8A as the authorization for the adoption of Shepherdstown’s zoning ordinance, even though it was adopted prior to the 2004 enactment of Chapter 8A of the Code. Shepherdstown’s zoning ordinance was adopted under the prior law, found at W.Va. Code § 8-24-1, *et seq.* In particular, *see*, W.Va. Code § 8-24-39 through 44. [App. 919-922]

¹⁵ And, contrary to the claim of Respondents, Petitioners did cite the applicable zoning ordinance. [Pet. Brief at 24, 26]

of less than thirty (30) consecutive days as a commercial use. 234 Cal.App.3d at 1584. Affected property owners challenged the newly-enacted provision as an unlawful taking of their properties, for vagueness, and on other grounds. The court rightly denied the vagueness challenge to the well-defined ordinance provision, 234 Cal.App.3d at 1593-95, to which Shepherdstown's residential provision bears no resemblance. *Compare*, Shep. Ord. 9-503 [App. 630] to the Carmel ordinance provisions at 234 Cal.App.3d at 1584. The California court also rejected the takings claim, even though the new ordinance would apply equally to pre-existing uses. California, however, does not appear to have a nonconforming use statute equal in scope and force to that found in W.Va. Code § 8A-7-10 (formerly found at W.Va. Code § 8-24-50).

Ewing proves, rather than disproves, Petitioners' argument. It was not until Carmel adopted the ordinance provision that expressly defined residential use of less than thirty (30) days' duration upon remuneration to the owner as a commercial use that it was not permitted in the residential district. 234 Cal.App.3d at 1585. Until such defining provision was adopted, the owners of property zoned single-family residential could and did rent the homes without limitation on the duration of occupancy. This is exactly the outcome produced by operation of the majority rule that Petitioners urge this Court to adopt. [Pet. Brief at 25]

Respondents argue that under Petitioners' view, each use would have to be "spelled out" in the Shepherdstown ordinance. [Resp. Brief at 17] Actually, it is not Petitioners, but Respondents, who argued this view when promoting the overly-simplistic explanation of "inclusive" vs. "exclusive" zoning that the circuit court ultimately adopted in the Order below. It is Respondents who have argued that, under an "inclusive" zoning ordinance, any form of a categorically-defined use that is not specifically listed is not permitted. [App. 155:19-159:3, 193:11-16, 42:15-20]. It is this view that produces the difficulties described in their brief.

By contrast, Petitioners recognize that zoning relies upon categorical terms when designating zoning districts, because it is impossible to list every conceivable permitted or prohibited form of a categorically-defined use. All that Petitioners have argued is that any form of the categorical use identifier (e.g., “residential” or “commercial”) that drafters intend to exclude from the district must be expressly identified in some way. A drafter can accomplish this by defining the categorical identifier in a manner that clearly excludes some forms of the use, by including limiting caveats in the district provisions, or by any other mechanism that gives clear notice to property owners that not all forms of the category of use are permitted. Shepherdstown had not done this so as to exclude short-term single family residential use by rental from the general categorical descriptor of “single-family residential.”¹⁶

Shepherdstown has demonstrated that it does understand that this needs to be done. *See*, Shep. Ord. Sec. 9-503(b)’s caveat for occupancy of apartments. [App. 630] *See, also*, definition of “Bed-and-Breakfast Establishment,” which expressly includes “inns for which no *long-term* lease for rooms is executed by a guest....” Emphasis added.¹⁷ [App. 645] By the same token, if Shepherdstown intended to exclude short-term single-family residential use in the R-1 district, it should have expressly stated such a qualifier, as it did elsewhere in the ordinance. Its failure to do so rendered the ordinance impermissibly vague, and inadequate for excluding such use.

C. The Town Violated the Freedom of Information Act

Respondents’ focus is misplaced. The only material question is whether or not Shepherdstown complied with the production requirements of the Freedom of Information Act

¹⁶ Shepherdstown’s ordinance does not define “residential use” at all. Shep. Ord. at Title 9, Chptr. 13. [App. 643-652] The Supreme Court of Virginia has rejected the notion that the term “residential” inherently includes a duration component. *Scott v. Walker*, 274 Va. 209, 645 S.E.2d 278 (2007).

¹⁷ But, note, that the Town fails to define the demarcation point between permitted stays and prohibited “long-term” stays. What exactly is prohibited by the qualifier “long-term”? This is another example of the vagueness that permits arbitrary, inconsistent, *ad hoc* zoning decisions, as those challenged herein.

(“FOIA”). W.Va. Code § 29B-1-1, *et seq.* Whether or not Petitioners could have done more than is legally required to force the Town’s compliance is irrelevant.

Respondents’ suggestion that the Town did not extend the requested inspection of records because Petitioners’ counsel never “arranged for” it [Resp. Brief at 18], is preposterous. If the original FOIA request [App. 433-435], two follow-up letters [App. 549-551; 553] and a telephone call with the custodian of the records was not enough to secure the repeatedly requested physical inspection of even the unquestionably public records (copies of ordinances, e.g.), one wonders what would be.

Even assuming that fantastical suggestion had merit, what would it have accomplished? The Town Clerk admitted that the records had not been kept in fully indexed, bound volumes as required by State law at the time,¹⁸ and she didn’t know where some of them were. [App. 70:11-71:21; 73:19-24; 79:5-81:21] The Town Clerk also admitted that at no time between the receipt of the FOIA request in October, 2011, and the hearing on June 15, 2012, had she even searched for the requested ordinances or collected the other requested records. [App. 81:22-82:2]

Respondents have merely chosen to ignore the clear dictates of the Act:

...The custodian, upon demand for records made under this statute, shall as soon as is practicable but within a maximum of five days not including Saturdays, Sundays or legal holidays:

- (a) Furnish copies of the requested information;
- (b) Advise the person making the request of the time and place at which he or she may inspect and copy the materials; or
- (c) Deny the request stating in writing the reasons for such denial.

W.Va. Code § 29B-1-3(4). The Town made no response for six (6) days [App. 548], and after more than two full weeks, still had not offered a time to inspect the records nor denied the request.

¹⁸ W.Va. Code § 8-9-3.

As to the public business e-mails exchanged via private e-mail accounts, Petitioners have made clear that they are asking this Court to decide a question of first impression. [Pet. Brief at 30] Does the Act contemplate or intend that a governmental body's routine practice of relying upon the use of members' private e-mail accounts for the conduct of public business would exempt such e-mails from production under FOIA?

Respondents assert that the e-mails need not be produced because the Town does not have control over the documents. [Resp. Brief at 19] That is not entirely true, because in some instances, members of, e.g., the Planning Commission, acting on their own volition, have placed the e-mails that they have received about an issue under discussion on the record of the meeting. These were not produced either, because the Town only produced digital copies of the drafts of meeting minutes instead of the official, physical copies of the complete meeting minutes that were requested pursuant to FOIA. [App. 75:9-22; 433-435]

As to the other such e-mails, Petitioners would agree that the Town does not have possession of the documents, but would not agree that the Town does not have control.¹⁹ If the Town will not provide an e-mail account for each of its various bodies and commissions (as it could and should), then members of the public who wish to comment on issues under consideration will continue to send e-mails – to be shared with the body for its deliberations – to one, more or all of the individual members of Town bodies, via private e-mail accounts. The Town, having the duty to insure its compliance with FOIA, absolutely does have the power to control this practice by the imposition of a policy requiring such e-mails to be submitted to the

¹⁹ Even the case law relied upon by Respondents acknowledges that the document need not be in the possession of the public body at the time of the request so long as it is subject to the control of the public body. *Daily Gazette Co., Inc. v. Withrow*, 177 W.Va. 110, 115, 350 S.E.2d 738, 744 (1986).

public record. Even now, the Town could require the submission of such documents as still exist to the public record of the particular body.

This is particularly important in the case of statutorily-mandated public hearings (e.g., W.Va. Code §§ 8A-3-6, 8A-4-3, 8A-7-5), where the establishment of local regulatory law is at issue. Where the public hearing is for deciding individual applications for land use permits under such ordinances (e.g., W.Va. Code §§ 8A-5-7(c), 8A-8-11), the failure to reveal to the applicant the public comments, submitted via e-mail and available for consideration by the deliberating body, arguably would violate the fundamental due process rights of the applicant.²⁰

The intent of the Act is to insure the public's access to the records of the "instruments of government." W.Va. Code § 29B-1-1. The failure of Shepherdstown, or any public body that relies upon private e-mail accounts for the conduct of public business, to institute protocols for bringing such documents into the public record, defeats the core intent of the Act. The absence of such protocols should not preclude the production of the documents pursuant to a FOIA.

**D. The Town Unlawfully withheld and the Circuit Court
Erroneously Failed to Order Production of the Evidence
Necessary to Petitioners' Prohibition Count**

Respondents argue that Petitioners cannot sustain their assignment of error to the circuit court's dismissal of Count V of the Petition below [App. 337-339) because there is no evidence in the record to support it. Petitioners contend that there is a great deal of evidence in the record that demonstrates noncompliance with the State enabling laws. The evidence is in the ordinance itself. [App. 611-652] As to the definitive evidence of irregularity or illegality in the original adoption of the zoning ordinance, that evidence is in the public records that were unlawfully withheld by the Town after receiving a lawful FOIA request.

²⁰ That is, notice and the opportunity to be heard. *Bailey v. Norfolk and Western Ry. Co.*, 206 W.Va. 654, 527 S.E.2d 516, 538-39 (1999). Applicants cannot rebut opposition that is concealed from them.

The reasonable inquiry requirement of W.V.R.Civ.P. 11(b) does not mean that all evidence must be secured in advance of filing. The scope of certification upon signing and filing the pleading is that “the allegations ... have evidentiary support or, of specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery....” W.V.R.Civ.P. 11(b)(3). The Petition unequivocally discloses that the definitive evidence of the legality of the original adoption of the zoning ordinance is the public records that were unlawfully withheld before trial [App. 338], the production of which records the circuit court erroneously declined to compel.

The Petition filed below relates some, but not all of the illegalities found in the Shepherdstown zoning ordinance. [App. 328 at ¶¶32, 329-331 at ¶¶ 41-50, 333-334 at ¶¶ 62-68] Others were pointed out to the circuit court at trial. [App. 19-23, 27-31, 35, 274:20-278:18] It is incorrect to say that there was no evidence of the invalidity of the ordinance.

1. The Production Issue was Already Submitted to the Circuit Court

Respondents would have us believe that, even though the Town disobeyed the mandatory dictates of FOIA, *supra*, it would have scrupulously complied with the dictates of Rules 26 through 35 of the Rules of Civil Procedures.

Petitioners submitted the issue of the production of the public records sought pursuant to FOIA to the circuit court for resolution in Count VI of the Petition. [App. 339-340] The Act mandates that “[e]xcept as to causes the court considers of greater importance,” such actions “shall be assigned for hearing and trial at the earliest practicable date.” W.Va. Code § 29B-1-5(3). Having submitted the issue to the circuit court for timely decision, Petitioners were not required to pursue a duplicative discovery procedure to secure the records.

2. Petitioners have not Complained of the Circuit Court’s Failure to Rule on the Motion for Preliminary Injunction

The Motion for Preliminary Injunction and Expedited Hearing Thereon was intended to avoid potentially unnecessary proceedings. [App. 441-450] It would have, if promptly granted, halted proceedings in the BZA pending the determination of the issues presented in the mandamus counts of the Petition. [App. 447-449] However, the BZA proceeded to conclusion, and the motion became moot, while the case below was still pending in the federal district court. Petitioners fail to see logic in the suggestion that they should have renewed the then-moot motion after the remand from the federal district court. [Resp. Brief at 26]

E. The Circuit Court Order Lacks Sufficient Findings of Fact and Conclusions of Law

This Court has established the criteria against which the sufficiency of a final order, in a matter tried to the court, is determined. These criteria are discussed in Petitioners' opening brief. [Pet. Brief at 34-36] The Order Dismissing Petition [App. 307-317] fails to meet the established criteria, as is apparent from, *inter alia*, the failure to include specifically-stated factual findings that cite to the evidence in the record,²¹ and the failure to make any factual findings or conclusions of law at all to support dismissal of Petitioners' FOIA claim.

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

Respondents first argue that the incorrect attribution to Petitioners of what was Respondents' argument at trial is irrelevant. [Resp. Brief at 29-30] In fact, it is quite relevant when that argument is directly contrary to Petitioners' arguments below, [App. 919; 920 at n. 28] and the incorrect attribution, if not pointed out as such, could be used against Petitioners as a contradiction or waiver of their arguments in this appeal.

²¹ Prepared without a transcript, the order could have referred to numbered exhibits or to the witnesses whose testimony established each necessary fact, as Petitioners did in their proposed alternative order. [App. 885-905]. The circuit court indicated that he had taken extensive notes during the first day of hearing [App 108:17-18], which, it is presumed, would have provided a source for such reference.

Respondents suggest that the circuit court's conclusions regarding Petitioner, Donald Burgess, were the result of the circuit court's weighing the competing evidence offered by Petitioners and Respondents. [Resp. Brief at 30] Respondents, however, do not cite to the record to show the competing evidence that they presented. That may be because there wasn't any. [App. 912-913; 916-918; 927-928] By contrast, Petitioners' arguments are fully supported by citation to the record below, [Pet. Brief at 37]

Finally, Respondents continue to try to rewrite the record. [Resp. Brief at 31] Petitioners do not deny that they objected to the proposal to secure a transcript and then submit proposed orders, on the ground that the process would delay a decision for several more months in a case that had already been delayed repeatedly, while Petitioners remained under a *de facto* injunction by the Town,²² and the production of evidence that was the subject of the FOIA request still had not been compelled. [Pet. Brief at 38; App. 298:9-300:11] However, that objection was qualified by the request for a ruling to allow Petitioners to use their property pending final resolution in the case, and for compelled production of the public records. *Id.* The qualified objection was appropriate to the circumstances, and had it been granted, the final decision could have been delayed without causing Petitioners to sustain continuing harm.

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

This Court has observed that

... a Rule 59 motion for a new trial or to alter or amend a judgment is the only post-trial motion that permits the trial judge to consider errors that the judge is alleged to have committed during trial It can thus also be argued that Rule 59(f) is an appropriate mechanism through which to encourage, if not require, litigants to bring such alleged errors first to the attention of the trial judge who

²² Petitioners contend that the Town's issuance of a cease and desist order, in the face of the circuit court's rule to show cause, was improper. *State ex rel. Underwood v. Silverstein*, 167 W.Va. 121, 127, 278 S.E.2d 886, 890 (1981). The Town should have stayed its hand pending the court's resolution of the mandamus actions. Petitioners should not have had to ask for this relief.

they claim made them, thus giving the trial judge the first opportunity to address the alleged errors, decide if they actually were errors, determine if any errors need to be corrected, and, if so, decide upon the best way of doing so.

Miller v. Triplett, 203 W.Va. 351, 507 S.E.2d 714, 718 (1998), *quoting*, The 1997 Advisory Committee Note to W.V.R.Civ.P. 59(f). The observation is equally apt as to Rule 59 motions generally. The circuit court erred in failing to take the opportunity afforded by Petitioners' Motion for a New Trial [App. 908-948] to correct the factual and legal errors committed in the proceedings below.

This Court also has determined that

[a]lthough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.

Syl. Pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976). This Court reviews the decision to deny a motion for a new trial pursuant to the same standard that applies to the underlying judgment. *Troisi v. Bd. of Review of W.Va. Bureau of Emp. Programs*, 214 W.Va. 604, 591 S.E.2d 162, 165 (2003). The established standard following a bench trial is:

The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syl Pt. 1, in part, *Public Citizen, Inc., v. First Nat'l Bank of Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996). *See, also, Caples v. Locust Hill Unit Owners Assoc.*, No. 11-1712, p. 4 (2013).

Petitioners Motion for New Trial, which followed upon their detailed T.C.R.24.01 opposition to the entry of the final order [App. 878-884], asked the circuit court "to open the

judgment herein to take additional testimony and entertain legal argument, so as to amend or make new findings of fact and conclusions of law, and to direct the entry of a new judgment in the case.” [App. 908, 929]

Nothing in the whole of this appeal, or in the Motion for New Trial filed below, asks a court to weigh competing evidence so as to reverse a factual finding for which there is sufficient evidence in the record. [Resp. Brief at 32] The challenges to the factual findings of the circuit court were and are that the record is devoid of evidentiary support. Even now, Respondents claim that such evidence exists, but fail to cite to where we might find it in the record below. As Petitioners correctly claimed in their opening brief herein, the Order Dismissing Petition makes findings that are contradicted by the only evidence in the record on the issues, and appear, instead to have been premised upon the unsubstantiated remarks of Respondents’ counsel. [Pet. Brief at 37-38] Respondents submitted no evidence that rebutted the facts stated and supported by documentary evidence in the verified Petition filed below. [App. 323-437]

Granting the Motion to Dismiss would have afforded the opportunity for correcting the factual and legal errors, and may have made the instant appeal unnecessary.

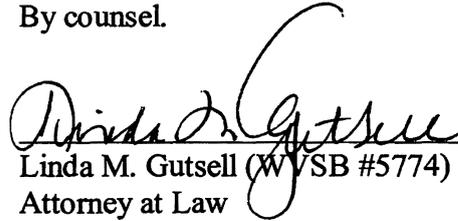
IV. CONCLUSION

The instant appeal presents issues of substantial public importance that transcend the wrong done to Petitioners by the municipality of Shepherdstown. Each issue presented is worthy of this Court’s attention.

Respondents have not rebutted the facts upon which Petitioners’ presentation of their case, here and below, have relied. Respondents have not defeated Petitioners’ legal arguments with controlling statutory or case law, and have ignored controlling decisions of this Court.

In view of the foregoing, Petitioners pray that this Honorable Court grant the relief sought by them in this appeal. [Pet. Brief at 39]

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


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners Below/Petitioners,

v.

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

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

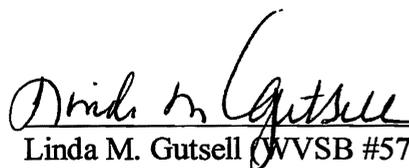
Respondents Below/Respondents.

CERTIFICATE OF SERVICE

I, Linda M. Gutsell, counsel for the Petitioners, Donald R. and Patricia L. Burgess, do hereby certify that I have served the foregoing REPLY BRIEF OF PETITIONERS upon Respondents, by sending a true and accurate copy thereof by U.S. Mail, first-class postage prepaid, to the counsel of record for Respondents at the addresses shown below, this 19 th day of March, 2013:

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