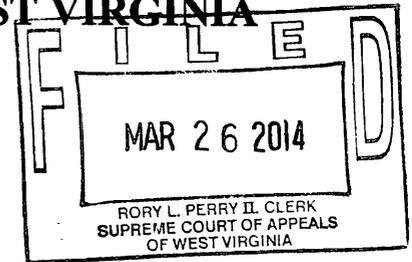


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**GARY L. CAPRIOTTI,
EDWARD R. MOORE,
EDWARD E. DUNLEAVY, and,
SHEPHERDSTOWN BATTLEFIELD
PRESERVATION ASSOCIATION, INC.,
Petitioners below,**

Petitioners,

v.

NO. 13-1243

**JEFFERSON COUNTY PLANNING
COMMISSION, a public body,
Respondent below,**

Respondent,

and

**FAR AWAY FARM, LLC,
Intervenor below,**

Respondent.

PETITIONERS' BRIEF ON APPEAL

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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF THE CASE	1
III. SUMMARY OF ARGUMENT	17
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	19
V. ARGUMENT	19
1. The circuit court erred in ruling that there was a genuine issue of material fact as to when the settlement was concluded, which determination was directly contrary to the record in the case.	19
2. The circuit court erred in setting aside the Partial Summary Judgment, thereby concluding that the Planning Commission had not violated the Open Governmental Proceedings Act.	21
a. Agenda Notice.	22
b. Announcement of Authorization for Executive Session.	28
c. Reporting the Terms of the Settlement.	29
3. The circuit court erred in concluding that the Planning Commission’s conduct was <i>de minimus</i> and did not merit a remedy	30
VI. CONCLUSION	32
VII. CERTIFICATE OF SERVICE	35

TABLE OF AUTHORITIES

Case Law

Far Away Farm, LLC v. Jefferson Co. Bd. of Zoning Appeals,
222 W.Va. 252, 664 S.E.2d 137 (2008).....3

Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995).....20

Kramer v. Board of Adjustment, Sea Girt,
80 N.J.Super. 454, 194 A.2d 26 (1963).....27, 28

McComas v. Bd. of Educ. of Fayette County,
197 W.Va. 188, 201, 475 S.E.2d 280, 293 (1996).....27

Nelson v. W.Va. Pub. Emp. Insur. Bd., 17 W.Va. 445, 300 S.E.2d 86 (1983).....30

Peters v. County Comm’n of Wood County,
205 W.Va. 481, 519 S.E.2d 179 (1999).....10, 12, 18, 22, 24

Sprout v. Bd. of Educ. of Co. of Harrison,
215 W.Va. 341, 599 S.E.2d 764 (2004).....23, 24

State ex rel. Marshall Co. Comm’n v. Carter,
689 S.E.2d 796, 802 (W.Va., 2010).....23

Wetzel County Solid Waste Authority v. W.Va. Div. of Natural Resources,
184 W. Va. 482, 401 S.E.2d 227 (1990).....24

Statutes

W.Va. Code § 6-9A-1.....1, 23, 31

W.Va. Code § 6-9A-2.....25

W.Va. Code § 6-9A-3.....12, 23, 25

W.Va. Code § 6-9A-4(a).....12, 23, 28

W.Va. Code § 6-9A-4(b).....23

W.Va. Code § 6-9A-4(b)(11).....6, 7, 19, 21, 23, 29, 30

W.Va. Code § 6-9A-4(b)(12).....22, 23

W.Va. Code § 6-9A-10.....	24
W.Va. Code § 6-9A-11.....	24
W.Va. Code § 8A-5-8.....	2
W.Va. Code § 8A-9-1.....	2, 11

OGMC Advisory Opinions

OMAO No. 2003-04.....	24
OMAO No. 2005-10.....	27, 28
OMAO No. 2006-11.....	27
OMAO No. 2006-13.....	24, 26
OMAO No. 2006-14.....	25
OMAO No. 2006-15.....	27
OMAO No. 2007-5.....	25
OMAO No. 2007-06.....	27
OMAO No. 2007-10.....	25
OMAO No. 2008-17.....	25
OMAO No. 2009-02.....	25
OMAO No. 2009-04.....	25
OMAO No. 2011-03.....	24

Rules

West Virginia Rules of Civil Procedure

W.V.R.Civ.P. 12(b)(6).....	6
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BRIEF OF PETITIONERS

I. ASSIGNMENTS OF ERROR

1. The circuit court erred in ruling that there was a genuine issue of material fact as to when the settlement was concluded, which determination was directly contrary to the record in the case.
2. The circuit court erred in setting aside the Partial Summary Judgment, thereby concluding that the Planning Commission had not violated the Open Governmental Proceedings Act.
3. The circuit court erred in concluding that the Planning Commission's conduct was *de minimus* and did not merit a remedy.

II. STATEMENT OF THE CASE

Petitioners brought this civil action against Respondent, the Jefferson County Planning Commission, asserting violations of the Open Governmental Meetings Act, W.Va. Code § 6-9A-1, *et seq.* (hereinafter, "the Act"). Specifically, Petitioners asserted that the Planning Commission, in executive session, deliberated upon and decided to settle a civil action in which Petitioners had interest, but that, in so doing, the Planning Commission failed to comply with the necessary notice requirements of the Act. In the months that followed the Planning Commission also failed to report the terms of the settlement with a reasonable time after the conclusion of the settlement, that conclusion being the date on which the circuit court entered the order setting out the agreed settlement. In fact, the Planning Commission never reported the terms of the settlement in its minutes.

By decision dated March 22, 2011, the Planning Commission denied the four-and-a-half-year extension of the Community Impact Statement deadlines sought by prospective developer, Far Away Farm, LLC (hereinafter, "FAF"). [App. at 276; 497] Pursuant to W.Va. Code § 8A-9-1, *et seq.*, FAF appealed the denial to the circuit court, which action was docketed at Civil Action No. 11-C-125. [App. at 276-277; 284]

Petitioners, being immediate neighbors to the FAF parcel and/or otherwise interested in the proposed development, timely filed a motion to intervene in Civil Action No. 11-C-125, so as to protect their interests. [App. at 277; 282, 523-526, 536-542] The motion to intervene was briefed to the circuit court by the parties therein, and argued to the circuit court at a hearing conducted on June 28, 2011. *Id.* Subsequently, the Planning Commission filed its response to the motion to intervene, in which it obliquely suggested that it might be intending to resolve FAF's appeal by a negotiated settlement.¹ [App. at 277; 1131 at n. 2] In their reply, Petitioners argued that a private settlement reversing a duly-rendered decision of the Planning Commission would exceed the lawful powers of the Commission, and would violate the Open Governmental Proceedings Act:

... it is now beyond dispute that [the Planning Commission] anticipated resolving the instant action through a negotiated compromise with FAF. It is equally clear that this is the primary reason for the Planning Commission's opposition to the intervention sought by Movants, who, it appears, are regarded as the potential spoilers in any negotiation. *See*, Defendant's Response at [fn. 2]. Unfortunately for the Planning Commission and FAF, even if Movants were not permitted to intervene in this civil action, the Commission's decision cannot be compromised through negotiation. To do so would be unlawful.

A planning commission has no inherent power to reopen a matter on which it has already rendered a decision, and it certainly cannot privately negotiate any change to that decision. The law affords only one procedure by which a planning commission can reopen and reconsider a prior decision, and that is upon the timely request of an applicant after denial of a major subdivision plan or plat. W.Va. Code § 8A-5-8. And, because a planning commission is subject to the Open Meetings law of this State, W.Va. Code § 6-9A-1, *et seq.*, any such authorized reconsideration would have to occur in a public meeting, not behind the closed doors of private negotiation.

[App. at 277-278; 1080-1081]

¹ Petitioners dispute the characterization of remarks that their counsel made regarding a private settlement of FAF's § 8A-9-1 appeal, and of when those remarks were made.

Before the circuit court ruled on Petitioners' motion to intervene in Civil Action No. 11-C-125, the Planning Commission and FAF submitted an Agreed Settlement Order, which the court entered on August 3, 2011, thus resolving said civil action. [App. at 278; 285] The Agreed Settlement Order was not served on Petitioners prior to its presentation to the circuit court. [App. at 799-800] Petitioners learned of the entry of the Agreed Settlement Order only because, on August 8, 2011, their counsel received a copy from the Circuit Clerk. [App. at 278]

The Agreed Settlement Order did not merely grant to FAF the full extension of its Community Impact Statement for which it had applied and been denied upon evidence adduced at a public hearing, and which denial was the only matter in issue in Civil Action No. 11-C-125. [App. at 285-287] The Agreed Settlement Order also granted to FAF a re-issued Condition Use Permit ("CUP") with an original term of eighteen (18) months and an advance extension of eighteen (18) months – a re-issued permit and extension for which no application had been made, no public hearing conducted, and which was not at issue in Civil Action No. 11-C-125.² *Id.*

Petitioners, not having seen the FAF case listed on any recent Planning Commission meeting agenda, undertook to discover when the settlement agreement had been approved, which investigation required review of several months of agendas, hundreds of pages of agenda packets, meeting minutes and recordings of meetings. [App. at 40:8-22] Petitioners found no agenda listing the FAF appeal as a topic that would be discussed at any meeting. [App. at 333]

Petitioners ultimately deduced that it was at its regular meeting of July 26, 2011, that the Planning Commission authorized its President and legal counsel to enter into the negotiated

² The Planning Commission issued a CUP to FAF on October 8, 2008, pursuant to this Court's mandate in *Far Away Farm, LLC v. Jefferson Co. Bd. of Zoning Appeals*, 222 W.Va. 252, 664 S.E.2d 137 (2008). [App. at 965, ¶ 12] FAF had already sought, and been granted an extension of its CUP from the Board of Zoning Appeals, pursuant to the provisions of the later-adopted zoning ordinance. [App. at 966, ¶ 18; 1105-1106] The BZA advised FAF that if it needed further extension, it could make application to the BZA in the future. *Id.* Such application would have been noticed in the agenda and heard at a meeting of the BZA.

settlement reflected in the aforesaid Agreed Settlement Order. [App. at 40:13-14, 278; 279, 1251 at time marker 2:02:02] The agenda of the Planning Commission for its meeting of July 26, 2011, gives no indication that the FAF appeal would be discussed at the meeting – the agenda only vaguely says, “Reports from Legal Counsel and legal advice to PC.” [App. at 278; 295]

The official audio recording of the meeting of July 26, 2011, reveals that the Planning Commission moved to go into executive session upon being told by its legal counsel then present that, “... I will expect action immediately after the session.” [App. at 280; 1251 at time marker 2:02:02] Prior to retiring into executive session, the presiding officer of the Planning Commission did not identify the authorization for the executive session under the Open Governmental Proceedings Act, *Id.*, let alone state that the pending FAF appeal was the subject of discussion. When the executive session ended and the public meeting resumed, the Planning Commission entertained the motion of a Commissioner, stated as follows: “I move that we proceed with the order as drawn by counsel today and presented to the Commission ... and to authorize president to sign it.” [App. 280; 293; 1251 at time marker 2:02:50] The aforesaid motion passed by unanimous vote. *Id.*

In short, nothing listed on the agenda for the July 26, 2011, meeting would have informed an interested person that the FAF appeal would be a subject of discussion at the meeting. Nothing said by the Planning Commissioners during the meeting would have enabled a person in attendance to discern that the FAF appeal was a subject being discussed at the meeting.³

Neither the Agreed Settlement Order nor its terms were revealed in the official minutes of the Planning Commission meeting of July 26, 2011, which were approved at the meeting of

³ By contrast, in the matter of litigation regarding the proposed Alstadt’s Corner development, where no interested persons had moved to intervene, the proposed settlement approved at the previous meeting was read, discussed and voted upon during the public meeting. [App. at 1003 at time marker 3:34:47; 1090] But, Alstadt’s Corner also did not appear on the agenda of either meeting at which it was discussed. [App. at 336, 338, 1018]

August 9, 2011, six days after the circuit court's entry of the order. [App. at 281; 289-293] Neither the Agreed Settlement Order nor its terms were revealed in the official minutes of the Planning Commission meeting of August 9, 2011, which were not approved until the September 13, 2011, meeting, more than a month after the Court's adoption of the settlement agreement. [App. at 393] Neither the Agreed Settlement Order nor its terms were revealed in the official minutes of the Planning Commission meeting of September 13, 2011, which were not approved until the October 11, 2011, meeting, more than two months after the Court's adoption of the settlement agreement, and a month after the filing of the Petition below. [App. at 401]

Finally, in the minutes of the Planning Commission meeting of October 11, 2011, which minutes were approved at the November 8, 2011, meeting (more than three months after the circuit court's entry of the Agreed Settlement Order), the following statement appears:

Ms. Grove stated that the order discussed at the July 26, 2011 Planning Commission meeting had been signed and should be included in the minutes. (Full text of the order is attached)

[App. at 411]⁴ Despite this statement, the minutes that are posted on the Planning Commission's official website do not include the Agreed Settlement Order. [App. at 991 at n. 17, 1097] Nor is the Order attached to the official hard copy of those minutes, which Petitioners secured in June of 2013, pursuant to a discovery request. [App. at 895; 1092]

On September 9, 2011, Petitioners filed their Petition alleging that the Planning Commission had violated the Act, and seeking remedies for the violations. [App. at 275] Petitioners sought the remedies provided by the Act, including the annulment of the Planning Commission vote of July 26, 2011. [App. at 282-283]

⁴ The minutes of the October 11, 2011, Planning Commission meeting also reveal that the Commission retired into executive session with its counsel "to discuss litigation," but the name of the litigation that would be the subject of discussion also is not listed on the meeting agenda. [App. at 413]

At the outset of the civil action, only one date was directly material to Petitioners' claims: July 26, 2011, the date of the meeting at which the Planning Commission voted to approve and enter into the Agreed Settlement Order, in violation of both W.Va. Code § 6-9A-4(a) and W.Va. Code § 6-9A-3, as described above. Initially, these were the only two violations for which Petitioners could have sought, and did seek, relief. [App. at 280-281, ¶¶ 37-38] July 26, 2011, was the date on which the 120 days in which Petitioners could bring an action for these violations of the Act began to run. W.Va. Code § 6-9A-6.

August 3, 2011 – the date on which the circuit court entered the Agreed Settlement Order, and dismissed Civil Action No. 11-C-125 from the docket – was not relevant to the claims based on advance notice violations. [App. at 278 ¶ 18, 285-287] August 3, 2011, being the date on which the settlement between the Planning Commission and FAF was concluded, [App. at 278 at ¶ 18] was the date from which it would be determined if the Planning Commission reported the terms of the settlement in its minutes “within a reasonable time.” W.Va. Code § 6-9A-4(b)(11). Petitioners stated the August 3 date and cited the subsequent reporting requirement in their Petition, [App. at 281], but Petitioners could not yet allege a violation of W.Va. Code § 6-9A-4(b)(11). Petitioners realized a violation of W.Va. Code § 6-9A-4(b)(11) might later be established if the Commission continued to delay reporting the terms of the settlement in its minutes.⁵ By the statements in their Petition, Petitioners intended to allow for this possibility and put the Planning Commission on notice of the issue. However, as of the date of filing their Petition, Petitioners believed it was premature to assert and pursue a claim that the Planning Commission had not reported the terms of the concluded settlement “within a reasonable time”

⁵ Although, Petitioners actually thought it more likely that, upon receiving the Petition, the Planning Commission would promptly report the terms of the settlement, so as to avoid a violation of its duty to report. Either way, Petitioners believed then, as they do now, that the notice violations alone were sufficient to sustain their case.

[App. at 327-328; 30:6-18; 990] – especially in the absence of a case decision determining what constitutes a reasonable time under W.Va. Code § 6-9A-4(b)(11). [App. at 30:12-15]

Before Petitioners' sense of the prematurity of the reporting issue had passed, the Planning Commission filed its Motion to Dismiss the Petition. The Planning Commission put the reporting question directly in issue in its motion – seeming to treat it as the only violation of the Act claimed in the Petition. [App. at 304-305] Petitioners corrected this misapprehension in their Response to Defendant's Amended Motion to Dismiss. [App. at 319, 327-328] Because the Planning Commission had argued the issue in its Motion to Dismiss, however, Petitioners responded to the argument, noting that the terms of the settlement still had not been reported in the minutes of any intervening meeting. [App. at 328] In noting the passage of time prior to approval of each meeting's minutes, Petitioners solely referred to the circuit court's entry of the Agreed Settlement Order as the starting point. *Id.*

Shortly after the conclusion of briefing on the Motion, the circuit court, by correspondence, invited counsel to comment upon Petitioners' standing to bring the case. [App. at 370] Counsel for Petitioner responded, discussing the applicable provisions of the Act, summarizing the ways in which Petitioners were personally interested in the challenged vote of the Planning Commission, and explaining how the lack of notice on the meeting agenda prevented Petitioners from protecting those interests. [App. at 640] Counsel for the Planning Commission did not respond to the circuit court's invitation to comment.

Three months later, at the February 10, 2012, hearing on the Commission's Motion to Dismiss the Petition [App. 1, 377], counsel for the Planning Commission again argued that the reporting requirement was the "essence of" Petitioners' case:

I think it is fairly straightforward. I think the real essence of it is talks about whether the settlement was entered into the Minutes in a reasonable time after it was arrived at.

The complaint as I laid out in my motion speaks to what happened in July. And the math, no matter what the issue of reasonable time thereafter could be, I don't see what happened in July is before the Court entered the order is before the settlement was concluded.⁶

[App. at 2:24-3:9] Counsel argued that, before the circuit court entered the settlement order, the Planning Commission had no obligation to do anything under the Act. [20:7-11]

In response, Petitioners' counsel again emphasized that their claims primarily were directed to the notice violations of the July 26, 2011 meeting. [App. at 30:3-32:9; 33:15-34:12] That is, those violations that deprived Petitioners of information that would have led them to attend the meeting and would have enabled them to protect their interests in Civil Action No. 11-C-125, especially giving them an opportunity to convince the circuit court to forgo entry of the Agreed Settlement Order before allowing Petitioners to be heard. [App. at 35:15-38:10, 39:2-21, 40:4-7, 42:1-21] By the February 10, 2012, hearing, however, enough time had passed to address the question of whether or not the Planning Commission had reported the terms of the settlement within a reasonable time.⁷ [App. at 30:9-15]

At the hearing of February 10, 2012, the circuit court permitted counsel for the Planning Commission to make arguments that far exceeded those set out in the Motion to Dismiss, and the

⁶ As this shows, the Planning Commission erroneously argued that Petitioners were measuring from the July 26, 2011, meeting to determine the reasonable time for reporting the terms of the settlement in the minutes – which Petitioners had not done. [App. at 328] This was the birth of a purported dispute, and it was wholly a product of the Planning Commission's mistake. The Planning Commission later resurrected its erroneous attribution as an established fact, despite that Petitioners repeatedly showed it to be in error.

⁷ However, by the end of the hearing, the Planning Commission also had reversed its initial argument, and argued that the statutory requirement of reporting within a reasonable time was not even mentioned in the Petition. [App. at 105:20-106:1] Of course, the Petition not only cited that statutory provision, but quoted it in its entirety. [App. at 281]

scope of W.V.R.Civ.P. 12(b)(6). [App. at 4:18-21] Although argument was made regarding the limited scope of review under W.V.R.Civ.P. 12(b)(6) [App. at. 21:6-16], Petitioners' counsel also appreciated the opportunity to respond and expound upon a case where, literally, all of the facts relevant and necessary to Petitioners' claims appeared in the Planning Commission's own records and the Agreed Settlement Order entered by the circuit court in Civil Action No. 11-C-125. [App. at 21:1-5, 23:11-16, 65:17-66:5]

Two of the "outside of the motion" arguments would characterize the Planning Commission's defense for the remainder of the case. Counsel argued that Petitioners lacked standing to bring the case. Counsel premised the argument upon the "aggrieved" standard found in Chapter 8A of the Code. [App. at 4:15-9:1] Petitioners argued in rebuttal that the Act bestowed the right to bring the case, not the aggrieved standard of Chapter 8A, but explaining in detail that Petitioners' interests would rise to the level of aggrievement even if that were the criteria for standing under the Act. [App. at 23:11-12, 23:17-19, 35:15-38:10; 39:2-24, 40:4-7, 42:1-21, 43:13-44:1, 51:16-52:3, 54:18-55:12, 58:12-63:2, 113:20-114:2]

Counsel for the Planning Commission also argued that attorney-client privilege would defeat Petitioners' claims. [App. at 73:24-74:12, 75:14-17] Counsel represented that he had received the settlement offer the day of the meeting of July 26, 2011, and that, because he had a duty to promptly convey it to his client, the Planning Commission also was entitled to retire into executive session to discuss and make a decision regarding the settlement offer on that same night, even though the FAF case was not listed as a topic of discussion on the meeting agenda. [App. 79:12-93:7; 97:19-98:23, 99:2-7] Although counsel asserted that the FAF case had been on the agenda several times, [App. at 11:11-12], and had been discussed at prior meetings, [App. at 11:5-9], under questioning by the court, counsel admitted that none of the agendas identified

FAF as a topic of discussion. [App. at 78:10-20] Counsel admitted that the agendas only contained the entry “Reports from legal counsel and legal advice to PC,” and admitted that the entry was a holding spot for any legal issues that might be discussed. [App. at 78:10-20, 110:19-111:13] Counsel argued, however, that because the Planning Commission was entitled to meet privately with its counsel, under this Court’s decision in *Peters v. County Comm’n of Wood County*, 205 W.Va. 481, 519 S.E.2d 179 (1999), it wasn’t required to provide any more specific notice on its agendas, [App. at 79:12-82:4, 80:12-85:19], and that the Act and case law say that the attorney-client relationship defeats the requirements of the Act. [91:12-17] In fact, counsel argued, because members of the public could not participate in executive sessions, the Planning Commission did not have to give any notice of the subject of discussion. [App. at 97:19-99:7]

In rebuttal, Petitioners’ counsel pointed out that Petitioners did not assert a right to participate in executive sessions, or even that an executive session had to be on the agenda – only that the topics to be discussed at a meeting had to be identified on the agenda. [App. at 108:9-20] Petitioners’ counsel disputed the Planning Commission’s contention that attorney-client privilege relieved it of all notice requirements of the Act. [App. at 31:1-13, 32:10-19] Counsel argued that the lawyer’s duty to promptly relate receipt of a settlement order and the Planning Commission’s separate duty under the Act to give advance notice of the intended topics of discussion at a meeting were not mutually exclusive, and that both could be satisfied relatively easily. [App. at 32:10-34:12, 35:18-21, 41:4-21, 108:23-110:8]

The undeniable results of the February 10, 2012, hearing were two-fold. First, that the Planning Commission believed that discussion of any legal matter was immune to the notice provisions of the Act, and that, as a matter of standard practice, the Commission did not list such topics on its agenda. Secondly, that the material facts needed to prove violations of the Act were

fully identified, exposed and proven at the hearing. The circuit court asked if the case would require a petit jury or was purely a matter for the court, presenting only legal issues. [App. at 65:14-16, 106:14-16] Petitioners counsel answered that the case presented only questions of law because all of the necessary facts were in the official records of the Planning Commission, and were indisputable. [65:17-66:5] Counsel for the Planning Commission also answered that there were no questions of fact, stating that:

.... it's purely on the record, ... it's not like there is a different set of facts, whether there was a meeting at the Iron Rail on September 25th with four Planning Commissioners or not ... this was a public meeting.... I don't see how there is a question of fact.

[App. at 106:18-107:4] However, the Planning Commission later changed its position – and, in the final phase of the case, also repeated all of the arguments that it had made at the hearing of February 10, 2012, which the circuit court accepted in its final rulings.

The circuit court denied the Amended Motion to Dismiss. [App. 378] Shortly thereafter the court set the matter for final hearing. [App. at 380] Drawing upon the express statements of counsel, the court accurately concluded that “both counsel represented that the facts of this case are not in dispute.” *Id.* The Planning Commission made no objection to this finding.

Subsequently, FAF moved to intervene in the case. [App. at 416] Petitioners' did not object to FAF's intervention, [App. at 507], and the circuit court granted FAF's motion. [App. at 674] While not objecting to FAF's intervention, Petitioners strongly objected to any attempt on FAF's part to interject the substantive merits of Civil Action No. 11-C-125⁸ (or even earlier matters) into the open meetings case, insofar as the merits of FAF's Code § 8A-9-1 appeal had no bearing on whether or not the Planning Commission had violated the Act in approving the Agreed Settlement Order as had been done. [App. at 122:8-124:19; 770-771; 779-782]

⁸ That is, whether or not the Community Impact Statement deadlines extension sought by FAF should have been granted by the Planning Commission. [App. at 133:8-15]

Petitioners' objection was not without grounds.⁹ [App. at. 416-426; 432-498; 560-570; 586-587; 594-612; 964-971]

The circuit court having found that the facts were not in dispute, [App. at 380], Petitioners then submitted their Motion for Partial Summary Judgment. [App. at 381] In said Motion, Petitioners asked the Court to rule upon the undisputed, record facts that the Planning Commission had committed three precise violations of the Act: (1) failing to identify the topic to be discussed on the advance agenda notice of the meeting, as required by W.Va. Code § 6-9A-3; (2) failing to announce the authority for going into executive session, as required by W.Va. Code § 6-9A-4(a); and, (3) failing to report the terms of the settlement in the minutes within a reasonable time after it's conclusion.¹⁰ *Id.* In presenting the facts showing that the Planning Commission had failed to report the terms of the settlement within a reasonable time, Petitioners' motion repeatedly referred to the date on which the circuit court entered the Agreed Settlement Order as the date from which the elapsed time was measured. [App. at 385]

In its response to the motion and for its cross-motion, the Planning Commission again stated that the evidence was in the public records, although it disagreed with Petitioners' characterization of those records. [App. at 544] The Planning Commission even explained why it had not reported the terms of the concluded settlement at its September, 2011, meeting.¹¹

⁹ Which, prompted Petitioners, for the protection of their own interests, to respond in kind, challenging the factual averments of FAF, and even presenting material evidence serendipitously discovered long after this Court's decision in *Far Away Farm*, 222 W.Va. 252, 664 S.E.2d 137. [App. at 509; 515-517, 677-681, 691-715]

¹⁰ At the time, Petitioners took at face value the statement in the posted minutes of October 11, 2011, that the Agreed Settlement Order was, indeed, attached to the official record minutes. As noted *supra*, Petitioners later learned that the Agreed Settlement Order was not attached to those minutes – in fact, had never been attached to any minutes. [App. at 991]

¹¹ The minutes, however, do not bear out the explanation. [App. at 406] And, the Planning Commission incorrectly identified the September 13, 2011, meeting as the “first meeting following the entry of the

[App. at 547 n. 3] But, significantly (and germane to the final orders of the court), the Planning Commission did not assert that there was a genuine issue of material fact regarding the date on which the settlement was concluded. Had the Planning Commission made such assertion, Petitioners in their reply brief would have corrected the error, restating that they agreed that the settlement was concluded on August 3, 2011, but the Commission provided no occasion for doing so. [App. at 613]

Petitioners' Motion for Partial Summary Judgment was fully briefed by all parties. [App. at 381, 543, 559, 613, 675] By order entered on June 19, 2012, the circuit court granted partial summary judgment to Petitioners, thus resolving the issue of whether or not the Planning Commission had violated the Act. [App. at 786] Also, because the Planning Commission and FAF had both asserted that Petitioners lacked standing to bring the open meetings case, [App. at 551-554; 570-575], the circuit court, *sua sponte*, entered a separate order ruling that Petitioners did have standing to bring their action. [App. at 798] As a result of these two orders, the remedy for the violations was the only matter still in issue to be tried at the final hearing in the case.

The Planning Commission, and then FAF, each appealed the interlocutory Order Granting Petitioners' Motion for Partial Summary Judgment to this Court. [App. at 814; 843] This Court dismissed the appeals, which Petitioners' counsel reported to the circuit court by letter dated November 9, 2012. [App. at 866] Subsequently, the circuit court set the case for a status conference for May 15, 2013. [App. at 869]

At the telephonic status conference of May 15, 2013, counsel for all parties agreed that this issue of remedies was the only issue remaining for adjudication at the final hearing. [App. at 121:19-122:7, 125:5-6, 125:20-21, 131:20-21, 132:2, 132:9-12; 132:17, 132:22-23; 873] There

settlement." The first meeting to occur after the circuit court's entry of the Agreed Settlement Order on August 3, 2011, was the meeting of August 9, 2011. [App. 385; 393]

was, however, disagreement about the proper scope of a hearing on remedies, particularly to the extent that the merits of Civil Action No. 11-C-125 would be relevant. [App. at 122:9-124:19, 125:20-130:10, 131:1-8, 132:13-17, 133:6-135:13, 136:6-137:14] Petitioners' counsel continued to dispute that the substantive merits of that earlier case should be part of the final hearing in the case below, but did not dispute that it was proper to consider the potential impact that the remedy of annulment would have on the resolution of the earlier case. It appeared that counsel and the Court agreed that this was the proper role of argument regarding Civil Action No. 11-C-125 in the final hearing of the case below. [App. at 137:15-17] Because the final hearing would be limited to remedies, counsel for the Planning Commission suggested that the issue might be further narrowed by written submissions, to which Petitioners' counsel agreed, and the Court encouraged. [App at 05/15/13 Tr. at 21:5-24; 22:16-19; 26:1-11]¹²

During the May 15, 2013, telephonic status conference counsel for the Planning Commission suggested that annulment of the vote of July 26, 2011, was a moot point, because "the Planning Commission has already affirmed the decision in a separate matter that was properly noticed under the Open Meetings Act." [App. at 129:16-18, 129:22-130:2] When counsel for Petitioners requested clarification, the Planning Commission's counsel indicated that he was not sure if another vote had been taken, but believed that it had, at least, been discussed. [App. at 145:19-146:11] Petitioners' counsel stated that she would like to know if a vote had actually happened [App. at 146:13-14], and counsel for the Planning Commission assured her that he would find out. [App. at 146:22-23] However, Petitioners' counsel received no further information from counsel for the Planning Commission, and found no mention of a re-vote in the agenda or minutes of any Planning Commission meeting.

¹² Nonetheless, as of the subsequent scheduling conference more than two months later, convened to continue the final hearing originally set for August 15, 2013 [App. at 870], neither of Petitioners' opponents had filed any motions to further narrow the issues for the final hearing. [App. at 157:10-158:9]

As it turned out, as of May 15, 2013, the Planning Commission had not already taken a vote to affirm its vote of July 26, 2011. The agenda for the Planning Commission meeting of June 11, 2013, included the following entry:

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

Active Litigation:

- Far Away Farms – Open Meetings Act Litigation/Dispute re: public notice of consideration of settlement of FAF litigation (discussion and possible action).

[App. at 885]

Petitioners were not sure if this agenda entry was intended as a notice that the Planning Commission planned to take a curative, or do-over, vote of the July 26, 2011, vote to approve the Agreed Settlement Order in Civil Action No. 11-C-125. [App. at 909, 1177-1178] However, owing to the remarks of the Planning Commission’s counsel at the May 15, 2013, conference, Petitioner Gary L. Capriotti and Petitioners’ counsel attended the June 11, 2013, meeting of the Commission so as to observe. [App. at 876; 909, 1178] When the agenda item, which was moved to the end of the meeting [App. at 1189, 1202, 1191 beginning at time marker 1:19:50 of chapter 2], came on, the Planning Commission retired to executive session with its counsel. When the Commission reopened the public meeting, it voted to affirm and ratify its vote of July 26, 2011, without admitting any defect in its original action. [App. at 1191, *Id.*]

The Planning Commission did not discuss the vote of July 26, 2011, during the public portion of the June 11, 2013, meeting. *Id.* The Planning Commission did not reveal the terms of the settlement approved on July 26, 2011, either before or at the time of voting to affirm and ratify it, though it did state that the earlier vote was to approve a settlement of Civil Action No. 11-C-125. *Id.* [App. at 1179, 1202] The Planning Commission did not provide for public

comment on the issue prior to voting to reaffirm and ratify.¹³ [App. at 1188, 1202, 1191] And, even though the Planning Commission directed that the Agreed Settlement Order be attached to the minutes of the June 11, 2013, meeting [App. at 1191, 1201], the Order was not attached to the minutes. [App. at 1179-1180, 1193, 1204]

Less than two weeks later, Petitioners filed their Motion for Leave to File Supplemental Pleading, alleging that, in its conduct of the do-over vote of June 11, 2013, the Planning Commission committed additional violations of the Act that were relevant to those already in issue. [App. at 874] The Planning Commission and FAF both opposed the motion. [App. at 898, 904] The circuit court denied the motion, noting that it had already granted summary judgment on the past violations of the Act, that the sole remaining issue in the case was the proper remedy for those violations, and that Petitioners could argue the alleged subsequent violations as a factor to be considered in fashioning a remedy. [App. at 1100]

Despite that the Planning Commission had argued, in opposition to Petitioners' Motion for Leave to File Supplemental Pleading, that summary judgment had already been granted on the earlier violations, and despite that the circuit court denied the motion, in part, on that ground, the Planning Commission next filed its Motion to Reconsider and Set Aside Partial Summary Judgment ("Motion to Reconsider"). [App. at 915] The Commission later moved to disallow Petitioners from making argument at the final hearing about the do-over vote of June 11, 2013. [App. at 1144] Petitioners responded to both motions, disputing the Planning Commission's arguments, many of which repeated those made at the hearing of February 10, 2012. [App. at 977, 1168,]

¹³ Petitioners acknowledge that, due to the lack of any direct reference or description of the matter under discussion, Petitioners' counsel would likely have been the only member of the audience who could have made pertinent comments prior to the vote. This is especially true given that, because of moving the agenda item to the end of the meeting, Petitioners' counsel was the only person left in the audience. [App. at 1178]

In addition to the Planning Commission's Motion to Reconsider, FAF filed its own dispositive motion. In its Motion to Limit Remedy, [App. at 950], FAF argued that Petitioners should not be granted any of the remedies sought in the case because they were not harmed – or, at most, that the Planning Commission should be admonished. Petitioners responded, including their own Counter-Motion for Summary Judgment Granting Remedies. [App. at 1102]

All of the final motions were fully briefed by all parties. [App. at 915, 950, 977, 1102, 1138, 1141, 1144, 1150, 1160, 1168] None of the motions were resolved by the circuit court prior to the final hearing that was set to address remedies. [App. 870, 973] Accordingly, the hearing proceeded as a *de facto* hearing on the outstanding motions. [App. at 169]

By Order entered on November 11, 2013, the circuit court granted the Planning Commission's Motion to Reconsider. [App. at 1238] The court noted that it had initially been convinced that the Planning Commission had violated the Act, and “was poised at hearing of October 18, 2013 to grant [FAF's] Motion to Limit Remedy,” because of the *de minimus* nature of the violation and the Planning Commission's attempt to cure it. [App. at 1239] On November 26, 2013, the court entered a supplemental order [App. at 1247], in which it concluded that the Planning Commission had reported the terms of the settlement within a reasonable time. The circuit court stated that it was persuaded by the Commission's argument that the requirement was met because the settlement was disclosed in the public record of the court. [App. at 1248-1249]

Petitioners timely filed the instant appeal.

III. SUMMARY OF ARGUMENT

1. Petitioners repeatedly acknowledged that the settlement was concluded upon the circuit court's entry of the Agreed Settlement Order on August 3, 2011. Entry of the Order was the event that Petitioners repeatedly cited when calculating the time that had elapsed without the

Planning Commission reporting the terms of the settlement in its minutes. The Planning Commission also asserted that August 3, 2011, was the date on which the settlement was concluded, but, argued that the date on which the settlement was concluded was in dispute. The complete lack of evidence notwithstanding, the circuit court ultimately concluded that a genuine issue of material fact existed as to when the settlement was concluded, which should have precluded summary judgment on the issue of the timely reporting of the settlement. The circuit court's factual predicate was plainly wrong, and led the court to an erroneous legal conclusion. In fact, the concluded settlement actually was *never* reported in the minutes of the Planning Commission, which is *per se* not "within a reasonable time," regardless of the date on which the settlement was concluded.

2. Petitioners' allegations of violations of the Act were predicated upon the express provisions of the Act, as were the legal conclusions set out the Order Granting Petitioners' Motion for Partial Summary Judgment. The circuit court's subsequent conclusion that it had granted partial summary judgment due to a misplaced reliance *Peters v. County Comm'n of Wood County*, 205 W.Va. 481, 519 S.E.2d 179 (1999), which had a "cascading effect" on other points of law, is not apparent from the order. Furthermore, *Peters* imposed no agenda notice requirement on governmental bodies that was not imposed by the applicable provisions of the Act that were in effect at the time of the events at issue in this civil action. The Planning Commission violated three mandatory, statutory requirements, and the circuit court should have preserved the partial summary judgment on the basis of those statutory requirements.

3. It is beyond dispute that, on July 26, 2011, the Planning Commission took action on a matter that did not appear on the meeting agenda, and retired into executive session without stating the authority for closing the public meeting. It is beyond dispute that the terms of the

settlement agreement were never reported in the minutes of the Planning Commission – not even when the Commission took a purported reaffirmation vote at its meeting of June 11, 2013. The record in the case below established that the Planning Commission, as a matter of standard operating practice, routinely violated the notice provisions of the Act. The violations at issue below were substantial, as they offend the very purpose of the Act. The Planning Commission’s violations required a meaningful remedy.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal rests upon express statutory law. However, this appeal also involves open meetings issues which this Court has not yet addressed. Of these, the principle issues involved in this matter are: (1) The authoritative effect of the statutorily-authorized Open Meetings Advisory Opinions of the West Virginia Ethics Commission’s Committee on Open Governmental Meetings, W.Va. Code § 6-9A-10 and -11; (2) The passage of time that is reasonable, under W.Va. Code § 6-9A-4(b)(11), for reporting the terms of a concluded settlement that was approved in executive session; and (3) The required elements and conduct for an effective, curative “do-over” vote by a governmental body. If the Court wishes to fully examine any of these issues, then this appeal is appropriate for Rule 20 argument and decision.

V. ARGUMENT

- 1. The circuit court erred in ruling that there was a genuine issue of material fact as to when the settlement was concluded, which determination was directly contrary to the record in the case.**

W.Va. Code § 6-9A-4(b)(11), in relevant part, provides:

... If the public agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded;

As is amply shown by the record citations in the Statement of the Case, *supra*, Petitioners consistently cited to the circuit court's entry of the Agreed Settlement Order, which occurred on August 3, 2011, as the event from which the "reasonable time" to enter the terms of the settlement into the minutes should be measured. Petitioners never cited to any other event or date in its allegations regarding the elapse of time between the conclusion of the settlement and the reporting of its terms in the minutes of the Planning Commission. Petitioners never disputed that August 3, 2011, was the date on which the settlement was concluded. [App. at 989, n. 14]

The Planning Commission, in asserting that there was a "genuine dispute" regarding the date on which the settlement was concluded, did not cite to a single instance in the record where Petitioners had alleged the settlement to have been concluded at any time prior to the circuit court's entry of the Agreed Settlement Order. [App. at 921-922] This may be because there was no such instance. Nor, as the Planning Commission baldly claimed, *Id.*, did the circuit court's Order Granting Petitioners' Motion for Partial Summary Judgment cite to any other event or date as the conclusion of the settlement. [App. at 790-791, ¶¶ 12-14]. There was absolutely nothing to support the Commission's claim that there was a genuine issue of material fact regarding the date on which the settlement was concluded.

Even if Petitioners had tried to dispute that the settlement was concluded on August 3, 2011, their effort would have been for naught. The date of entry is plain upon the Agreed Settlement Order. An attempted dispute of this fact would not have raised a genuine issue.

Only a "genuine" issue of material fact will preclude entry of summary judgment. W.V.R.Civ.P. 56(c); Syl. Pt. 2, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995). This Court has clearly defined a "genuine" issue:

An issue is "genuine" when the evidence relevant to it, viewed in the light most favorable to the party opposing the motion, is

sufficiently open ended to permit a rational factfinder to resolve the issue in favor of either side.

Id., at 519, 466 S.E.2d 178. The evidence of the date of the conclusion of the settlement was not open-ended, but was definitive and incontrovertible. No reasonable fact-finder could have resolved the factual issue in favor of any date except August 3, 2011.

There was no evidence that the settlement was concluded on any date but August 3, 2011. There was nothing from which a genuine issue could have arisen. The circuit court should have rejected the false claim of a disputed fact, and sustained its earlier ruling that the Planning Commission violated the reporting requirement of W.Va. Code § 6-9A-4(b)11.

Furthermore, by the time that the circuit court entered its Order Granting Jefferson County Planning Commission's "Motion to Reconsider" [App. at 1238], Petitioners' had shown that the Planning Commission had not attached the settlement to its minutes of the October 11, 2011, meeting, notwithstanding the remark in the minutes that it was doing so. [App. at 1092, 1097] The fact is that the Planning Commission *never* reported the terms of the settlement in any of its minutes. Accordingly, the Planning Commission violated the requirement of W.Va. Code § 6-9A-4(b)(11), whether the settlement had been concluded on July 26, 2011, August 3, 2011, or some date in between. If the circuit court was inclined to revise its prior grant of partial summary judgment in any way, the fact that the Planning Commission never reported the terms of the settlement should have been the focus of the revision.

2. The circuit court erred in setting aside the Partial Summary Judgment, thereby concluding that the Planning Commission had not violated the Open Governmental Proceedings Act.

The material facts necessary to the determination of whether or not the Planning Commission violated the Act are fully established by the official records of the Planning Commission – the agenda, the minutes, and the official recordings of meetings. The indisputable

facts appearing in these official records establish, without any room for doubt, that the Planning Commission committed three specific violations of the Act in relation to its meeting, discussion and vote to approve a settlement agreement in Civil Action No. 11-C-125, and in reporting the terms of the concluded settlement.¹⁴

a. Agenda Notice

From the outset of the case below, Petitioners' primary emphasis was the Planning Commission's failure to include FAF as a topic of discussion on the agenda for the July 26, 2011, meeting at which the settlement agreement was discussed and approved. Petitioners never disputed that settlement offer was a proper topic for an executive session with counsel. Petitioners only asserted that the Planning Commission was not entitled to discuss any topic that did not appear on the agenda. [App. at 31:1-13, 32:10-19, 108:9-20]

The circuit court ruled that the July 26, 2011, executive session with counsel warranted the public meeting exception found in W.Va. Code § 6-9A-4(b)(12). [App. at 1244] The circuit court's reasoning suggests that it accepted the Planning Commission's argument that an executive session to consult with counsel need not comply with the advance notice requirements of the Act. [App. at 1239-1240, 1244] The court concluded that there was a "disconnect" between this Court's holding in *Peters v. County Commission of Wood County*, 205 W.Va. 481, 519 S.E.2d 179 (1999), and the "more permissive" version of the Act applicable to the facts of the case below. [App. at 1240] In sum, the circuit court concluded that *Peters* imposed agenda notice requirements that the amended Act does not. Petitioners contend that this is a misinterpretation of the provisions of the Act.

¹⁴ In addition to the record citations appearing in the Statement of the Case, *supra*, Petitioner's arguments herein also were fully set out in final briefs in the case. [App. at 980-992, 1102-1106, 1107-1115, 1169-1180]

The Legislature recognized that it would be unrealistic to require every communication or consultation of a governmental body to occur in a public meeting. W.Va. Code § 6-9A-1. Accordingly, the Act was crafted so as to “balance these interests in order to allow government to function and the public to participate in a meaningful manner in public agency decisionmaking.” *Id. See, also, State ex rel. Marshall Co. Comm’n v. Carter*, 689 S.E.2d 796, 802 (W.Va., 2010). In balancing the interests, the Legislature identified specific circumstances under which a governing body could meet in executive session instead of an open public meeting. W.Va. Code § 6-9A-4(b). Where the Legislature also intended to exempt a meeting conducted under one of the 4(b) exceptions from other requirements of the Act, it expressly provided for the additional exception. *See, e.g.,* W.Va. Code § 6-9A-4(b)(11), expressly allowing approval of a settlement in executive session, which otherwise would violate 6-9A-4(a)’s prohibition against making a decision in executive session.

W.Va. Code 6-9A-3 provides:

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

Emphasis added.

An executive session with counsel to discuss settlement of pending litigation is not an event that the Legislature has chosen to exempt from the agenda notice requirements of W.Va. Code § 6-9A-3. No express exception to the agenda notice requirement appears in W.Va. Code § 6-9A-4(b)(11) or (12). *Sprout v. Bd. of Educ. of Co. of Harrison*, 215 W.Va. 341, 599 S.E.2d 764 (2004), involved a school board’s having discussed a settlement with its counsel in executive session. This Court noted,

... the record does clearly demonstrate that the Board members discussed this issue during executive session for more than two hours and that the Board's legal counsel was present at the meeting. To this end, with regard to the Board's contention that *it acted on measures that were not on the agenda*, we caution the Board and its counsel to familiarize themselves with W.Va.Code § 6-9A-3 (requiring an agency to give notice of the agenda)

599 S.E.2d 764, 768, at n. 2.¹⁵ This dicta from *Sprout*, issued years after the 1999 amendments to the Act, is entirely consistent with the holding found in Syl. Pt. 2, *Peters*, 205 W.Va. 481, 519 S.E.2d 179 as to the agenda notice requirement.¹⁶

The Open Governmental Meetings Committee (“the OGMC”) of the W.Va. Ethics Commission issues interpretive instruction to governmental bodies through its Open Meetings Advisory Opinions.¹⁷ W.Va. Code § 6-9A-10 and -11. As to agenda notice, there is no Advisory Opinion that supports the arguments of the Planning Commission, or the ruling of the circuit court below.

The OGMC has advised that a matter that does not appear on the agenda may not be discussed at a meeting if the discussion will ultimately require official action, OMAO¹⁸ No. 2011-03; *see, also*, OMAO No. 2003-04. If a matter does not appear on the agenda, it may be discussed only for “logistical purposes,” such as deciding to place the matter on the agenda of a future meeting. OMAO No. 2006-13. General agenda entries are not sufficient notice, because

¹⁵ Petitioners cited this instructive dicta of *Sprout* for the agenda notice requirement in their Petition, [App. at 279], and throughout the case below. [App. at 325, 387, 619, 683-683, 1108, 1165]

¹⁶ *See, also, Wetzel County Solid Waste Authority v. West Virginia Division of Natural Resources*, 184 W. Va. 482, 401 S.E.2d 227 (1990), in which a settlement agreement entered into by a public body during an executive session, in violation of W. Va. Code §§ 6-9A-1 et seq., had been held to be void *ab initio* by a circuit court. *Wetzel County* shows that the agenda notice requirement was applied to executive sessions with counsel long before *Peters*, just as *Sprout* shows that the requirement has continued to apply to executive sessions after the 1999 amendments to the Act.

¹⁷ The Advisory Opinions, indexed by year and by topic, are available on the Ethics Commission website at <http://www.ethics.wv.gov/advisoryopinion/Pages/OpenMeetingsOpinions.aspx>.

¹⁸ “OMAO” is the acronym for “Open Meetings Advisory Opinion.”

“items must be stated in a manner that makes the public aware of particular matters to be dealt with at the meeting.” OMAO No. 2006-14, at p. 2. *In accord, see also*, OMAO 2007-10; OMAO 2008-17; OMAO 2009-02. The agenda requirement also applies to matters that may be discussed in executive sessions. OMAO No. 2009-04; OMAO No. 2008-17.

Consistent with the plain language of W.Va. Code § 6-9A-3, quoted above, the OGMC has advised that “[a]bsent a *bona fide* emergency requiring immediate official action ... a governing body may neither add an item to the meeting agenda in the course of a public meeting ... nor convene an emergency meeting ... to take official action on a matter that does not require immediate official action.” OMAO No. 2007-05, at p. 3. “Ordinarily, an ‘emergency’ involves an unexpected situation or sudden occurrence of a serious nature, such as an event that threatens public health and safety” where the “governing body must be required to take immediate official action in response to the situation.”¹⁹ *Id.*, at p.2.

The Act’s agenda notice requirements applied to the Planning Commission’s July 26, 2011, executive session with its counsel to discuss settlement of the FAF appeal. The hold-spot entry on the agenda, “Reports from Legal Counsel and legal advise to PC,” was insufficient to inform the public of the particular matters that would be discussed. The OGMC has advised:

Where the [body] is going to discuss possible settlement of a pending lawsuit with its attorney, the agenda may state ‘consider resolution of the federal lawsuit filed by John Doe’ or ‘discuss pending lawsuit of Doe v. Board with legal counsel.’ The governing body should identify the party or parties who have filed suit against the [body] by name on the meeting agenda, whenever the identity of such persons is a matter of public record.

OMAO No. 2007-10, at p. 2. The public body merely has to identify, *by name*, the litigation that will be the subject of discussion, even if the discussion will occur in an executive session with

¹⁹ It is noteworthy that, during its 2013 Regular Session, the Legislature amended Section 2 of the Act in order to define an “emergency meeting,” which definition is consistent with the OGMC’s explanation in OMAO No. 2007-05. *See*, W.Va. Code § 6-9A-2. [App. at 1110, n. 15]

legal counsel. This modest requirement does not intrude upon the ability of the Planning Commission to secure timely consultation with its counsel, as the Planning Commission persistently argued through the end of the case below. [App. 917-919, 922-931]

The error in the Planning Commission’s argument is that it conflates the duty of the lawyer with the obligation of the Planning Commission under the Act. Nothing in the Act prevents a lawyer from promptly conveying receipt of a settlement offer to his/her client, or even requires the offer to be conveyed at a scheduled meeting – a fact that counsel admitted below. [App. at 79:23-80:6] Counsel for the Planning Commission could have related the settlement offer to the client by any expedient means. However, once counsel did so, it was the Act that dictated what the Planning Commission could do in regard to the offer. The lawyer’s duty to promptly advise does not translate into the Planning Commission’s right to immediately act. This is the distinction that the Planning Commission has persistently failed to acknowledge.

What the Planning Commission could not do is what it did: immediately retire into executive session²⁰ to discuss the settlement offer with its counsel, when the FAF appeal did not appear on the agenda as a topic that would be discussed at the meeting. The receipt of this settlement offer, which was discussed for some time prior to the meeting of July 26, 2011, [App. at 11:5-9], is not an “emergency” that permitted the Planning Commission to discuss and take action on the matter without meaningful advance agenda notice.²¹

What the Planning Commission should have done was to decide to schedule the settlement offer for discussion and possible action at a future meeting. OMAO No. 2006-13.

²⁰ ... upon being told by its counsel, “I will expect action immediately after the session.” [App. at 1251 at time marker 2:02:02]

²¹ Petitioners also would note that the Planning Commission’s new practice of listing all pending litigation on every agenda as a “hold spot” is not meaningful notice, either. [App. at 1032-1072] An agenda is to inform the public of the business and the subjects that will be discussed.

The Planning Commission could have set the matter for a special meeting as soon as three days later, upon notice posted for two days. OMAO No. 2007-06; OMAO No. 2006-15; OMAO No. 2006-11. This is a reasonable accommodation of the legislative intent that the needs of the public body be balanced with the right of the public to be informed of the activities of the body.

Moreover, the Planning Commission did not cure the defective July 26, 2011, vote by the perfunctory reaffirmation vote it took some twenty-three (23) months later.²²

This Court has acknowledged that a public body can correct a violation by curative action, but found that a later public meeting that was perfunctory and did not recount the discussion had at the improper private meeting, did not correct the improper meeting. *McComas v. Bd. of Educ. of Fayette County*, 197 W.Va. 188, 201, 475 S.E.2d 280, 293 (1996). The Court cited *Kramer v. Board of Adjustment, Sea Girt*, 80 N.J.Super. 454, 194 A.2d 26 (1963), for its analysis of an attempted curative vote, which analysis is particularly instructive in the instant case. The *Kramer* court rejected a rubber stamp vote on a verbatim resubmission, taken nearly four months later. To accept such a vote as curative, the *Kramer* court warned, would invite violations of the law – if the body was then challenged, it could just convene and take a hasty revote. *Id.*, at 464, 194 A.2d at 31. In short, if perfunctory re-votes are accepted as curative, a public body has an incentive to ignore the Act, and play the odds that it won't be challenged.

The OGMC also has addressed the situation where a public body desires to correct a prior violation of the Act. OMAO 2005-10. The OGMC advised that the elements of a curative action include: (1) The body taking “reasonable remedial measures over and above ceremonial and perfunctory ratification of the official action previously taken;” (2) Notice of the meeting that “include[s] a description of the matters being reconsidered;” and, (3) “[B]efore any decision

²² As an initial matter, the Planning Commission follows *Roberts Rules of Order*, which require a reconsideration vote to be taken at the same or the very next meeting. *See, also*, Petitioner's argument at 1175-1176.

is made or vote taken, there shall be an opportunity for public comment *on the matter being reconsidered.*” OMAO 2005-10, at p. 3, emphasis added.

The Planning Commission’s re-vote of June 11, 2013, had none of the elements of an effective curative vote described in OMAO 2005-10. The agenda notice did not describe the matter (the settlement) that would be reconsidered. [App. at 1188-1189] The agenda item was one not open for public comment. *Id.* at ¶ 2. The settlement under consideration was not identified or described until the motion to vote to reaffirm it was made, effectively precluding public comment before the vote, even during the open comments period that occurred at the top of the meeting agenda. [App. at 1179, 1202, 1191 beginning at time marker 1:19:50 of chapter 2] The vote taken did not rise above a ceremonial, perfunctory act. The re-vote occurred long after the original vote had been challenged by Petitioners – and, the Planning Commission, through its counsel, fundamentally admitted that it was done to defeat Petitioners’ remaining claim for remedies. [App. at 129:15-130:2, 145:19-146:23] The re-vote represents everything of which the *Kramer* court warned.

The re-vote of June 11, 2013, was not a good-faith or effective effort by the Planning Commission to cure its violation of July 26, 2011. It did not merit consideration as a factor in the Planning Commission’s favor in determining the seriousness of the original violation, or the propriety of the remedies sought by Petitioners. It did not diminish the Planning Commission’s violations in any degree, and the circuit court erred in deeming that it did. [App. at 1239]

b. Announcement of Authorization for Executive Session

W.Va. Code § 6-9A-4(a), in relevant part, provides:

... During the open portion of the meeting, prior to convening an executive session, the presiding officer of the governing body shall identify the authorization under this section for holding the executive session and present it to the governing body and to the

general public, but no decision may be made in the executive session.

The authorization announcement requirement is plain, direct and unequivocal. The Planning Commission failed to comply with this requirement prior to retiring into executive session on July 26, 2011.²³ This fact is beyond dispute, and the circuit court should have so ruled.

c. Reporting the Terms of the Settlement

W.Va. Code § 6-9A-4(b)(11), in relevant part, provides:

If the public agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded....

As discussed previously herein, it is beyond dispute that the Planning Commission never reported the terms of its settlement with FAF at a meeting, and never entered a report of the terms in its minutes. Nonetheless, the circuit court concluded that the Planning Commission did report the terms of the settlement within a reasonable time, because the Agreed Settlement Order was submitted to the circuit court for entry in the FAF appeal and became part of the public record of the court. [App. at 1248-1249]

The Act anticipates that the public and media will be kept informed of the activities of government bodies through the official records of those bodies – the agenda and minutes. There is no suggestion in the Act that the Legislature intended for the public to have to search through the records maintained in the circuit clerk’s office to discover the actions that have been taken by a governmental body. It would seem likely that the members of the Legislature would be aware

²³ Also, the Planning Commission went into executive session after the start of a break in the meeting. [App. at. 1251 at time marker 2:01:31] So, it is arguable that the decision to retire into executive session did not occur during the public portion of the meeting at all, insofar as the meeting was on break.

that settlements are often submitted to the court for entry in the case being settled, and yet, the Legislature did not see fit to make this common event an exception to the statutory requirement of reporting in the minutes.

Code § 6-9A-4(b)(11) is clear and unequivocal. It provides that the terms of a settlement “shall” be reported and entered in the minutes. “It is well established that the word ‘shall,’ in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.” Syl. Pt. 1, *Nelson v. W.Va. Pub. Emp. Insur. Bd.*, 17 W.Va. 445, 300 S.E.2d 86 (1983). W.Va. Code § 6-9A-4(b)(11) provides no occasion to deviate from its plain terms. The circuit court erred in concluding that submission of the settlement to the court was the equivalent of reporting the terms of the settlement in the minutes of the Planning Commission.

3. The circuit court erred in concluding that the Planning Commission’s conduct was *de minimus* and did not merit a remedy.

The West Virginia State Legislature has declared open government to be the law of this State, and has thoroughly articulated the important public policies that the Act is intended to serve:

The Legislature hereby finds and declares that public agencies in this state exist for the singular purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions. The Legislature hereby further finds and declares that the citizens of this state do not yield their sovereignty to the governmental agencies that serve them. The people in delegating authority do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government created by them.

Open government allows the public to educate itself about government decisionmaking through individuals' attendance and

participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government.

Public access to information promotes attendance at meetings, improves planning of meetings, and encourages more thorough preparation and complete discussion of issues by participating officials. The government also benefits from openness because better preparation and public input allow government agencies to gauge public preferences accurately and thereby tailor their actions and policies more closely to public needs. Public confidence and understanding ease potential resistance to government programs.

Accordingly, the benefits of openness inure to both the public affected by governmental decisionmaking and the decision makers themselves....

W.Va. Code § 6-9A-1, Declaration of legislative policy.

The Planning Commission's violations of the Act were such as strike at the core purposes of the Act. Petitioners, who were directly interested in FAF's appeal, were directly harmed by the Planning Commission's failure to provide advance agenda notice that the case would be discussed at the July 26, 2011, meeting. The public at large was harmed by each of the three violations, insofar as there still may be interested members of the public who are uninformed of the actions that the Planning Commission secretly took in regard to the Far Away Farm project. Even those members of the public who have no interest in the Far Away Farm project have been deprived of the right, guaranteed to them by the Act, to know what is being done by an instrument of their government in the execution of its duties. This right is not a mere nicety to be observed or not at an agency's convenience – it is essential to maintain the informed and engaged populace that is necessary to our participatory form of government.

The Planning Commission's violations were not *de minimus*. Nor, as the record below showed, were they isolated. The Planning Commission's violations that were at issue below were shown to be part of an established, standard practice of violations. This fact – and not the

perfunctory “do-over” vote of June 11, 2013 – should have influenced the circuit court’s view of the conduct of the Planning Commission in relation to its settlement with FAF.

Petitioners’ case provide an opportunity to grant a meaningful remedy for the harms done to Petitioners personally, and to protect the public at large from the pernicious effects of the Planning Commission’s institutional practices in violation of the Act. In view of the Planning Commission’s long-standing practice of violating the Act at will, the remedies sought by Petitioners below were not only reasonable and appropriate, but would have inured to the benefit of the public as well as Petitioners. [App. at 1115-1120] The continuing course of violations would have been brought to an end that is long overdue for the people of Jefferson County.

The circuit court erred in ruling that the Planning Commission’s conduct was *de minimus*, on the basis of which it refused to grant the reasonable and necessary remedies for a very serious and ongoing violation of the law.

VI. CONCLUSION

The official records of the Planning Commission prove, beyond any iota of a doubt, that the Planning Commission violated the Open Governmental Proceedings Act by three specific omissions committed in relation to its approval of an Agreed Settlement Order in an appeal brought against it by Far Away Farm, LLC. The Planning Commission did not identify the Far Away Farm case as a subject of discussion on the agenda for the Commission’s meeting of July 26, 2011. Nonetheless, the Planning Commission discussed the Far Away Farm case – specifically, approval of a private settlement of the case – at its meeting of July 26, 2011. The Planning Commission failed to announce the reason for retiring into executive session with its counsel, wherein the discussion of the Far Away Farm appeal occurred. The Planning Commission then failed to ever report the terms of the settlement in its minutes, let alone within

a reasonable time after the settlement was concluded by the circuit court's entry of the Agreed Settlement Order. These are the facts, and they are incontrovertible.

Because the circuit court declined to enforce the Open Governmental Proceedings Act against these violations, their cessation can be secured only upon a favorable ruling for Petitioners by this Court.

The refusal of the circuit court to enforce the Act has policy implications that transcend the facts of the instant case and the interests of the parties involved. The Act makes provision for the instruction and assistance of public bodies that must comply with its requirements, and does so for good reason. The realization of the purposes of the Act depends primarily on faithful compliance by governmental bodies. Failing that, the law relies upon the enforcement of its requirements through actions brought by citizens. Few private citizens would be willing to endure the procedural excess of the case below, where the violations were so clearly beyond dispute in the earliest days of the case, only to have a court diminish the seriousness of the law by calling multiple violations "*de minimus*." The decision of the circuit court below provides an incentive for violators of the Act, and a disincentive for citizens who might otherwise bring a corrective enforcement action.

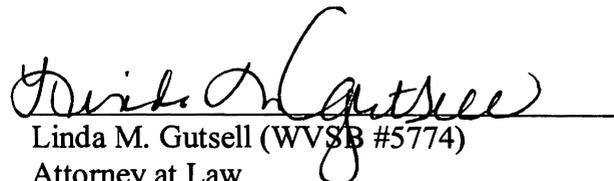
Petitioners pray that this Court will remain steadfast in the message of its precedents: The Open Governmental Proceedings Act is a critical part of our body of law, not to be dismissed lightly, but to be enforced to the full extent of its reach and purpose.

WHEREFORE, Petitioners respectfully ask this Honorable Court to:

1. Reverse the circuit court's final rulings below, both the Order Granting Jefferson County Planning Commission's "Motion to Reconsider" and the Supplemental Order to Order Granting Jefferson County Planning Commission's "Motion to Reconsider;"

2. Hold that the Planning Commission violated the Act as asserted by Petitioners;
3. Direct that the proper remedies be awarded to Petitioners, including,
 - a. Annulment of the Planning Commission's July 26, 2011, approval of the settlement agreement with Far Away Farm to resolve Civil Action No. 11-C-125;
 - b. Injunction compelling the Planning Commission to comply with all requirements of the Act in the future;
 - c. The costs and attorney fees incurred in this case, including for this appeal, upon application therefor; and,
4. Require the Planning Commission to promptly enter into its minutes the decision of this Court.

GARY CAPRIOTTI, et al.,
The Petitioners,
By counsel.

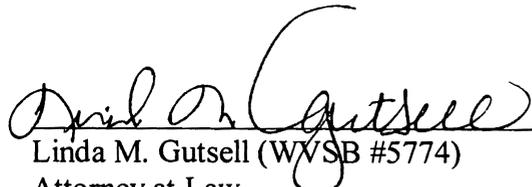

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CERTIFICATE OF SERVICE

I, Linda M. Gutsell, counsel for Petitioners, Gary L. Capriotti, *et al.*, do hereby certify that I have served the foregoing BRIEF OF PETITIONERS upon Respondents, by sending a true and accurate copy thereof by U.S. Mail, Priority postage prepaid, to the counsel of record for Respondents at the addresses/fax numbers shown below, this 25th day of March, 2014:

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