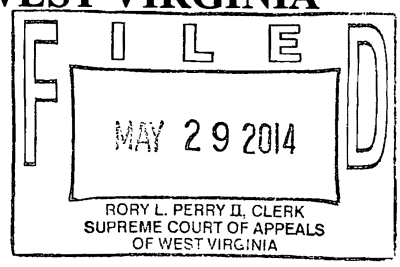
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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 IN REPLY TO RESPONSE OF FAR AWAY FARM, LLC

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PETITIONERS' BRIEF IN REPLY
TO RESPONSE OF FAR AWAY FARM, LLC

I. COUNTER-STATEMENT OF THE CASE

Far Away Farm, LLC (hereinafter, "FAF") opens with the detailed recounting of years-past proceedings that it includes in nearly every document it files. [App. 416, 560, 964] This early history was not in issue in the open meetings[1] case below and is not relevant to the assignments of error in this appeal. W.V.R.R.A.P. 10(c)(4) and 10(d); W.V.S.C.A. Administrative Order, December 10, 2012.

Prior proceedings related to FAF's land use permits have no bearing on the question of whether or not the Planning Commission violated the Act. However, FAF's persistent recounting of its entire history seems to be an effort to make it relevant. FAF asks us to believe that it has been mistreated by the legal process, and that, as a result, the Planning Commission's violation of the Act shouldn't be deemed a violation or be remedied, because it served to make amends to FAF. This theory permeates the entirety of FAF's argument here and below.

Understandably, FAF omits the facts that show that, far from being procedurally mistreated, FAF has been the beneficiary of preferential treatment at nearly every stage. Petitioners, within the limits of this brief, can address only a few of those countervailing facts.

FAF's predecessors in title, Alice and Dwayne Maesmer twice applied for a CUP to develop residential lots on the site. Their application for only 13 lots failed to achieve a passing LESA score. The Maesmers redesigned their plan to reduce impact on the inadequate road, applied again, and received a barely-passing LESA score to develop 32 lots. On each occasion, the Maesmers received a less favorable LESA score than did FAF (which proposes a far more

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[1] This is a case for violations of the Open Governmental Proceedings Act, W.Va. Code § 6-9A-1, *et seq.*, which will be referred to throughout this brief as "the Act."

intensive development of 152 lots). Each of the Maesmers' scores would have been a failing LESA score for FAF. [App. 694-712] The Maesmers received less favorable scores on LESA elements where neither the criteria nor the site conditions had changed.[2]

Although the staff report usually includes a review of any prior attempts to secure a CUP for a parcel, the staff report for FAF's application did not advise the BZA[3] or the public of the Maesmers' prior applications and outcomes. The BZA members who heard the appeal of FAF's LESA score[4] were not advised of the prior LESA scores so as to question the inexplicable differences. But, one of the members did know about the prior proceedings. The BZA member who led the LESA appeal hearing, Douglas Rockwell, had been counsel for the Maesmers on the earlier applications, [App. 697], but said nothing. The appealing parties did not learn of the Maesmers' attempts or Mr. Rockwell's role until years later, and then, only by pure chance.

While preparing their appeal to the circuit court of the BZA's ruling on the LESA score, the appellants learned that, prior to the BZA hearing, Mr. Rockwell had associated with the Crawford & Keller law firm, which had provided and continued to provide legal services to FAF. This conflict of interest was one of the grounds for the circuit court appeal, as appellants rightly argued that they had been denied a fair and impartial tribunal in their appeal of the LESA score. The circuit court, without the benefit of *Rissler v. Jefferson County Bd. of Zoning Appeals*, 225 W.Va. 346, 693 S.E.2d 321 (2010), ruled that Mr. Rockwell had no duty to disclose his association or to recuse himself from the BZA proceeding on FAF's LESA scores. Order

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[2] For example, the Maesmers received the least favorable score of 6 on the "distance to growth corridor" factor, while the Zoning Administrator gave FAF the most favorable score of 1. [App. 694, 698, 704] The designated growth corridor had not been changed in the interim. Neither, we can assume, had the FAF parcel moved closer to the growth corridor.

[3] "BZA" will be used throughout to refer to the Jefferson County Board of Zoning Appeals.

[4] Edward R. Moore and Edward E. Dunleavy, two of the Petitioners herein, were the named appellants.

Affirming Board of Zoning Appeals Decision, Jefferson County Civil Action No. 05-C-332, at p. 16. It was Petitioners, not FAF, who suffered procedural unfairness in their appeal of the passing LESA score that later became a deciding factor in this Court's decision in *Far Away Farm, LLC v. Jefferson Co. Bd. of Zoning Appeals,* 222 W.Va. 252, 662 S.E.2d 137 (2008).

In FAF's appeal to this Court, *Id.*, FAF argued that its CUP was subject to the prior version of the zoning ordinance, under which the Planning Commission, not the BZA, had jurisdiction over the CUP. This Court agreed and remanded with directions that the Planning Commission "immediately issue" the CUP sought by FAF. *Id.*, 662 S.E.2d at 145. Contrary to FAF's characterization of this mandate, the matter was not remanded to the Planning Commission "for further review." FAF Brief, 22. The Planning Commission was directed to issue the CUP, period, not to issue the CUP after review of the application it had never even seen or heard.

FAF neglects to mention that this was a primary motivator in the Planning Commission's decision to pursue its legal options. The record of the meeting at which this Court's mandate was presented to the Planning Commission demonstrates that the foremost point of consternation for the Commissioners was that they were being required to issue a CUP when they had never seen or heard the application.[5] The Commissioners objected to issuing a CUP without the opportunity to review the record or conduct a hearing so as to determine what conditions should be placed on the CUP. However, to comply with this Court's mandate, they issued the CUP, albeit "under duress." As a result, FAF became the only applicant ever to be issued a conditional use permit with no conditions imposed by the issuing authority. Most applicants would see a conditional use permit without conditions imposed as very favorable treatment.

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[5] *See*, the official video recording of the Planning Commission meeting of July 22, 2008, beginning at time marker 50:33, which is a public record available on the Jefferson County Commission's official website at: media.jeffersoncountywv.org/camera/archived_meeting.php.

Because of this Court's 2008 decision, *Id.*, Petitioners watched the Planning Commission's agendas to monitor any developments on FAF's CUP.[6] Despite this Court's ruling, however, when FAF needed to seek an extension of the time on its CUP, it made application to the BZA under the terms of the more favorable, revised zoning ordinance. [App. 419 at ¶ 18] That would be the same revised ordinance that FAF successfully argued to this Court did not apply to its CUP. By applying to the BZA for the extension, FAF avoided attendance at the hearing by interested neighbors, who were watching Planning Commission agendas.[7] Most developers would consider it very favorable to be allowed to choose which ordinance applies to them on an issue-by-issue basis, and to avoid the participation by neighbors.

The BZA granted the extension of the CUP on January 21, 2010, months after the Planning Commission had filed its federal court case. FAF could have asked the BZA to stay the running of the time limit on the CUP until the litigation ended, but it didn't. In fact, counsel for FAF represented to the BZA that there was no current litigation at the time, which is inconsistent with FAF's claim of continuous litigation, asserted here and in the court below.

FAF also neglects to mention that it was allowed to initiate its subdivision plat approval process under the 1979 subdivision regulations that had already been replaced by revised regulations. The revised regulations[8] were adopted on October 9, 2008, so as to replace obsolete

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[6] Which was particularly reasonable after the neighbors learned that FAF was pursuing a potential change to its development proposal for water and sewer that was significant and detrimental to neighboring landowners. [App. 53:13 – 55:13]

[7] And, for the record, none of the Petitioners herein would have objected to the extension that was granted by the BZA, which one-time extensions are routinely granted. This is not to be confused with the "reissued" CUP with a front-loaded extension that was given to FAF as part of the settlement agreement at issue in the case below with no application having been filed and no hearing ever held.

[8] The Subdivision and Land Development Regulations are a matter of public record, available on the official website at www.jeffersoncountywv.org. The Regulations have been amended four times since 2008, including on January 1 of this year.

design and engineering standards and to comply with State law, and became effective on November 1, 2008. FAF did not begin the process until December 15, 2008, but was allowed to proceed under the 1979 regulations [App. 51-52] – and, likely still would be but for Petitioners' attempt to intervene in FAF's appeal of the denial of its request for an extension of its final plat deadlines. Very favorable treatment.

Under the 1979 regulations, FAF had two years from the date of its initial meeting with staff (December 15, 2008) to secure final plat approval. The first step after the meeting with staff was the Community Impact Statement ("CIS"). FAF's CIS was approved subject to 22 conditions, 17 of which were recommended by the independent review of URS Corporation, a firm that provides engineering and related technical services to public and private sector entities (www.urs.com). [App. 57:3-59:7] FAF's CIS was approved on April 28, 2009 – months after the Planning Commission had decided to pursue its legal options relative to the CUP mandate – and received favorable votes from the Commissioners whom FAF sought to disqualify on the grounds of bias in December of 2010. At the April 28, 2009, hearing, FAF could have asked that the running of the final plat deadline be stayed until all litigation ended, but it didn't.

In November of 2010, when FAF submitted its request for an extension of its CIS deadlines, FAF had made no progress toward final plat approval. It had not resolved any of the conditions of its CIS approval, and had yet to even submit an application for plat approval. FAF was not entitled to the benefit of the vesting extension statute, FAF Brief, 5, which by its express terms only applied to parties who had secured at least preliminary plat approval. [App. 52:13-53:12; 56:3-21] FAF's request for an extension was handled in the same way as other such requests, which also were not granted where no progress had been made, even where the applicant had been involved in appeals or litigation. [App. 717-762]

FAF demanded that 1,876 days be added to its CIS/final plat deadline for time that had purportedly run against it due to litigation. FAF Brief, 5. But, in its calculation, FAF included time that had passed before any permit had been granted to FAF by any tribunal – that is, when there was no permit, and therefore, no permit deadlines against which the clock was running.[9] [App. 48-51] Of the 1,876 days that FAF demanded be added to its CIS/final plat deadline, 1,187 days passed before FAF even started the CIS process (September 15, 2005 – December 15, 2008). The 1,876 days sought by FAF as "reimbursement" included the 1,117 days that had passed before FAF was ever granted its very first permit, the CUP (September, 15, 2005 – October 6, 2008). FAF also sought to recoup 374 days when there was no pending litigation (November 10, 2008 – June 23, 2009, and June 9, 2010 – November 5, 2010). At the very most, FAF would be entitled to reimbursement of 350 days that ran against any existing permits while litigation was pending, which, from December 19, 2010, is an extension to December 4, 2011. Not the extension to July 1, 2015, that FAF demanded.[10] In demanding a "reimbursement" of 1,876 days, FAF was merely seeking more of the preferential treatment to which it had become accustomed. When it didn't get it, FAF appealed to the circuit court.

FAF continues to characterize the settlement agreement with the Planning Commission as merely a settlement of its appeal of the denial of the CIS/final plat deadline extension. However the settlement did more than that. The extension request to the Planning Commission was

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[9] Which is why FAF's demand for reimbursement is not in accord with *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d 873 (2005), which FAF cites as authority for its demand. In *Jefferson Utilities*, the BZA granted the CUP, but was overturned by the circuit court on appeal. This Court reversed the circuit court decision, and directed that the applicant get back the time that elapsed during the appeal from the circuit court – time that actually had run against the CUP that was previously granted by the BZA. [App. 48-52]

[10] However, for the record, had the Planning Commission even granted FAF an extension to July 1, 2012, Petitioners would not have appealed the decision, despite that the vesting statute did not apply to FAF. It was FAF's excessive and unjustified demand for three additional years past the vesting statute extension that led Petitioners to move to intervene in FAF's appeal of the extension denial. [App. 59:8-60:18]

limited to the CIS/final plat deadlines. At the time, the CUP extension previously granted by the BZA had not expired, and the CUP was not in issue. The BZA had invited FAF to apply again in the future if it needed an additional extension. [App. 419 at ¶ 18] FAF never applied for the additional extension on its CUP, and no hearing was ever held on further extension of the CUP. The Planning Commission merely gave FAF a newly "reissued" CUP with an initial term of 18 months and an 18-month extension already included. Preferential treatment is understatement.

II. SUMMARY OF ARGUMENT

No reply required. W.V.R.R.A.P. 10(g).

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners reassert the Statement set forth in their opening brief herein. Pet. Brief at 19.

IV. COUNTER-ARGUMENT

A. Standard of Review

Petitioners have not only assigned error to the circuit court's having set aside it earlier Order Granting Petitioners' Motion for Partial Summary Judgment, but also to its simultaneous grant of summary judgment to the Planning Commission. Petitioners note that W.V.R.Civ.P. 60(b), by its express terms, did not apply to the Planning Commission's Motion to Reconsider. The Motion was subject to the inherent power of the circuit court to reconsider interlocutory orders at any time before a final order is entered. *See, e.g., Hubbard v. State Farm Indemnity Co.*, 213 W.Va. 542, 584 S.E.2d 176, 184-185 (2003); *State ex rel. Crafton v. Burnside,* 207 W.Va. 74, 77, 528 S.E.2d 768, 771 (2000). [App. 978]

Petitioners concede that, having granted the Motion to Reconsider and Set Aside Partial Summary Judgment under the more stringent Rule 60(b) standard, the circuit court surely would have come to the same conclusion had it acted under its broader, discretionary power. However,

this only punctuates the degree of the circuit court's error in ultimately determining that the Planning Commission had not violated the Act and that no remedy should be awarded.

Petitioners trust in the sound discretion of this Court to identify and apply the proper standard(s) of review.

B. FAF is not Entitled to Rely upon a Negotiated Settlement Agreement with a Public Agency Acting in Violation of Law and in Excess of its Authority

FAF may not claim reasonable reliance on its settlement agreement with the Planning Commission. FAF was on notice of Petitioners' challenge to the legality of a settlement before the settlement was made, and assumed the risk of a challenge. FAF is not entitled to rely upon the *ultra vires* acts of the Planning Commission. [App. 508, 1111] *See, also, Wetzel County Solid Waste Auth. v. W. Va. Div. of Nat. Resources*, 184 W. Va. 482, 401 S.E.2d 227 (1990).

During the briefing of their motion to intervene in FAF's circuit court appeal, Petitioners spoke plainly to the Planning Commission's revelation that it might try to resolve the appeal by a negotiated settlement with FAF. [App. 1080-1081] Petitioners' Brief, 2. Petitioners pointed out that the Planning Commission had no authority to reverse the decision, and even if it did, reconsideration and reversal would have to occur at a public meeting. In short, a decision required to be made on evidence adduced at a public hearing in the first instance cannot simply be negotiated away, but would require a procedure of equal dignity (a public hearing on the evidence). Petitioners also noted that a private reversal of the Planning Commission's earlier decision would violate the Act. *Id.* The Planning Commission and FAF pursued and concluded the privately-negotiated reversal with advance notice of the Petitioners' legal challenges. Petitioners brought this action one month after receiving notice of the circuit court's entry of the Agreed Settlement Order.[11]

[11] Of which FAF had actual notice before March of 2012. [App. 499, 510, 1122, 1124]

FAF urges this Court to avoid a "disastrous precedent." FAF Brief, 15. The disastrous precedent would be to condone this wholesale abandonment of the open, public procedures guaranteed by both the governing statutes and ordinances for the grant of substantial land use and development permits. As this Court recognized in *Rissler v. Jeff. Co. Bd. of Zoning Appeals*, 225 W.Va. 346, 693 S.E.2d 321, 326 (2010), the governing statutes expressly recognize the interests of neighboring landowners, and afford them the opportunity to protect those interests. There is no opportunity and no protection when decision-makers can grant permits in back-rooms deals while the interested public is intentionally kept in the dark.

C. The Circuit Court Erred in Concluding that the Planning Commission did not Violate the Open Meetings Act

1. The Planning Commission did not Go into Executive Session upon a Proper Notice Stating the Authority for Closing the Public Meeting

FAF quotes the minutes of the Planning Commission meeting of July 26, 2011, to support its argument that the authority for closing the public portion of the meeting was properly announced. FAF Brief, 20. The minutes do not provide sufficient information to determine if there was an adequate announcement. What's more, the minutes are inaccurate. The official audio record of the meeting provides the needed information and is accurate:

> Presiding Officer: "Stephanie, this is your turn now. 'Reports from legal counsel and legal advice to PC.' Do you want to go now or do we maybe wait until ...."
>
> Atty. Grove: "You can wait, but, I will expect action at the end of the executive session, but I am (unintelligible, as other persons speaking at same time)"
>
> Presiding Commissioner: "OK, we'll go ahead and do it now. Alright ... so I'll, uh..." (Unknown speaker interrupts: "Do you want me to leave then?")
>
> Unknown Speaker: Can we have a motion?
>
> Presiding Commissioner: "What?"

> Commissioner Smith: "I move that we go into executive session." (As someone else also says, "I'm just waiting for a motion.")
>
> Presiding Commissioner: "Mr. Smith wants to go into executive session. Do I have a second?" (someone seconds) "All in favor of going into executive session?"

[App. 1251, beginning at time marker 2:01:57]

Petitioners have never disputed the Planning Commission's right to engage in privileged consultation with its legal counsel in executive session. The Act protects this right. W.Va. Code § 6-9A-4(b)(12). But, the Act also warns, "Nothing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is a participant." W.Va. Code § 6-9A-4(b)(11). Every conversation with counsel is not *per se* a privileged consultation that entitles a governmental body to close the public meeting, even if the communication relates to pending litigation.[12]

The Act requires the presiding officer, during the open portion of the meeting, to identify the authorization for holding an executive session, and to "present it to the governing body *and the general public*." W.Va. Code § 6-9A-4(a). This requirement serves two important purposes: (1) to insure that the public body actually considers and determines that an executive session is authorized; and, (2) to assure the public that the body is not closing the meeting without legal justification. The Planning Commission failed to satisfy this requirement on July 26, 2011.

The statements quoted above informed the public only that the Planning Commission's lawyer was going to participate in a discussion. This alone does not inform the public that an executive session is authorized. Had the Planning Commission properly listed the topic(s) of

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[12] For example, the outcome of a motion hearing conducted in an open courtroom is not privileged information. The lawyer can and should convey such information to the public body during the public portion of the meeting. It is only when the lawyer needs to advise the client about the information – how it will impact the client's legal position, chosen strategy in the case, etc. – that the communication becomes privileged, and retiring into executive session becomes appropriate. [App.106:17-110:8]

discussion on the meeting agenda, this deficiency would have been diminished somewhat, but the announcement by the presiding officer is still required.

The statutory requirement easily could have been met with meaningful remarks by the participants. For example:

> Atty. Grove: We've had a development in the Far Away Farm appeal, and I need you to decide how you want me to proceed. I will have to explain your legal options so that you can make the decision.
>
> Presiding Officer: The open meetings act authorizes us to consult with our lawyer to receive legal advice in executive session. Is there a motion to go into executive session?

Contrary to the exaggerated claims of difficulty that characterize the arguments below and in this appeal, compliance with W.Va. Code § 6-9A-4(a) really is that simple. The Planning Commission has no legitimate excuse for failing to comply.

2. <u>The Agenda Notice was not Adequate</u>

The agenda entry, "Reports from Legal Counsel and legal advice to PC," [App. 341], is a meaningless entry that appeared on every agenda, [App. 333-336; 1017-1031] without intent to refer to any specific topic, and without regard to whether or not there would be any topic presented by legal counsel and discussed by the Commission at all. Counsel for the Planning Commission candidly admitted that the entry was nothing more than a "hold spot" on every agenda. [App. 86:17-89:2] This does not – and, was never intended to – inform the public of the topics that actually would be discussed at a meeting so that interested members of the public or press could attend and observe or comment. It defies the very purpose of an advance agenda. W.Va. Code § 6-9A-3. It also is contrary to the guidance of this Court. *See, e.g., Sprout v. Bd. of Educ. of Co. of Harrison*, 215 W.Va. 341, 599 S.E.2d 764, 768, n. 2 (2004).

FAF argues that a specific agenda entry would be unreasonable because the topic was ongoing settlement negotiations which were within the scope of attorney-client privilege. FAF

exaggerates the agenda requirement, implying that the Planning Commission is being asked to reveal the specifics of the terms being considered in negotiations. FAF Brief, 21. Of course, that would be ridiculous. But, there is a vast difference between listing "Far Away Farm v. Planning Commission" as a topic of discussion on the agenda – which would satisfy the Act – and the illogical extreme portrayed by FAF as the only other choice. This Court certainly knows the difference, as it has consistently recognized the duty to list the topic of discussion even when the discussion will be a privileged consultation with counsel. *Sprout, Id.*(which also involved an executive session with counsel to discuss settlement of a legal dispute). *See, also, Peters v. County Comm'n of Wood County,* 205 W.Va. 481, 519 S.E.2d 179 (1999).

FAF argues that compliance with the agenda requirement wouldn't have made a difference, because Petitioners could not participate in executive session. FAF Brief, 21. There is no such "if it would make a difference" proviso to the agenda notice requirement. Moreover, FAF's speculative conclusion that a meaningful agenda entry wouldn't have made a difference is pure wishful thinking. Petitioners have repeatedly described the actions that they would have taken to protect their interests had they had notice that the FAF appeal was going to be discussed at the meeting. [App. 37:8-38:10; 39:2-24; 1109-1111; 185:3-189:23] On what basis can FAF say that Petitioners would not have taken such steps?[13] And, it is not for FAF to decide that it doesn't matter if the Planning Commission fails to do what the Legislature has decreed it must do. What really doesn't matter is a party's opinion that the law doesn't matter.

FAF next argues that this Court should consider its rights. FAF Brief, 22. What right does FAF or any other applicant have to expect a public body to violate the Act so as to conceal its efforts to secure land use permits ***outside of the normal, prescribed public process*** –

[13] Not to mention that the suggestion that Petitioners would not have done is entirely at odds with FAF's description of Petitioners as the perpetual hounds on its heels.

especially permits that will have significant impact on its immediate neighbors? *Rissler*, 225 W.Va. 346, 693 S.E.2d 321, 327.

Of course, FAF has never conceded that its immediate neighbors have property interests that they also have the right to protect through prescribed proceedings. *Rissler*, 693 S.E.2d at 326. This is why FAF doesn't believe that Petitioners or other members of the public were entitled to proper agenda notice for the July 26, 2011, meeting, or any of the other meetings when the Planning Commission discussed a private deal to award permits to FAF. [App. 570, 802] This is also why FAF perseverates in reciting the whole of its history in every document, casting itself as a victim just because its neighbors have acted lawfully to protect their own property rights.

3. <u>The Terms of the Settlement were Never Reported in the Minutes</u>

The Act unequivocally requires that the terms of a settlement approved in executive session be reported *in the minutes*:

> 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....

W.Va. Code § 6-9A-4(b)(11). The Act makes no exception for settlements that also may be submitted to the court in which the settled matter was docketed, as many are.

The case files of the circuit court that are maintained by the circuit clerk are not, by any stretch of the imagination, the minutes of the Planning Commission, and do not provide the vehicle for the Planning Commission to keep the public at large informed of its activities. FAF continues to ignore that the public at large was entitled to a report of the terms of the settlement, which is not fulfilled by the circuit clerk's having provided a copy of the Agreed Settlement

Order to Petitioners. FAF Brief, 24-25. Petitioners never claimed that they personally were adversely affected by the Planning Commission's failure to timely report the terms of the settlement in its minutes – and FAF does not and cannot point to a single instance in the record where Petitioners so claimed. Petitioners rightly argued that the public at large also was deprived of its right to be informed. [App. 198:3-9; 1119]

Despite the statement in the October 11, 2011, minutes to the contrary, Petitioners proved below that the Agreed Settlement Order was ***not*** attached to those minutes, [App. 183:22-184:9; 1093; 1098], and that the terms of the settlement were ***never*** reported in any minutes of the Planning Commission. Neither FAF nor the Planning Commission presented a single shred of rebuttal evidence to disprove these facts. Bald assertions of counsel are not evidence.

Even now, there may be interested members of the public who are wholly unaware of the fact that the Planning Commission secretly reversed a decision that was duly-rendered upon evidence adduced at a public hearing, and, additionally, privately negotiated to give FAF a "reissued" CUP, with a front-loaded extension, for which no application had ever been made and no public hearing ever held. The public has a recognized interest in its local ordinances being administered faithfully, without preference or prejudice. It is not hard to imagine, then, why the Planning Commission and FAF would not have wanted the public to be aware of the settlement.

D. The Order Granting Partial Summary Judgment was not Based upon The Circuit Court's Misperception of a Genuinely Disputed Fact, Because There was no Genuine Issue of any Material Fact

FAF claims that the Order Granting Petitioners' Motion for Partial Summary Judgment was based, in part, on the circuit court's "manifest" belief that the final settlement occurred at the Planning Commission meeting of July 26, 2011. FAF Brief, 25. But, where is that belief manifest? It is not manifest in the Order, as FAF claims.

To support the argument that the circuit court's misperception was "manifest" in the Order, FAF quotes selected provisions of the Order. FAF Brief, 26. The quoted provisions do not even mention the word "concluded" or "final" or any equivalent. The quoted provisions quite accurately describe exactly what the Planning Commission did on July 26, 2011: it *approved* the proposed terms for a settlement and *authorized* its president to sign the proposed order reflecting those terms. Such approval and authorization is no different than what most parties do when their attorney is negotiating settlement with an opposing party.

Nothing in any of the quoted provisions means that the settlement was finalized or concluded on July 26, 2011. Whether or not the terms of the settlement approved by the Planning Commission still had to be accepted by the opposing party is not suggested one way or the other by the quoted provisions. In the first place, that fact couldn't be gleaned from the video/audio records of the meeting, because it wasn't mentioned at the meeting. Secondly, that fact is irrelevant to establishing that the Planning Commission discussed and voted to approve the terms of a settlement at a meeting where the topic of discussion did not appear on the agenda. What FAF did or did not do during negotiations of the settlement, and in what order, is wholly irrelevant to this open meetings case. It is what the Planning Commission did that is in issue.[14]

Furthermore, the Agreed Settlement Order which the Planning Commission authorized its president to sign clearly was intended to be approved and entered by the circuit court once all parties had signed it. Dismissal of the appeal was an express term of the settlement. [App. 286] So, it is difficult to imagine how a seasoned judge (and previously-practicing lawyer) could have been confused about the final act – his signature – that had been necessary to conclude the settlement. How else would the conclusion – i.e., dismissal – occur?

[14] That said, we now know that the settlement subsequently accepted by FAF and entered by the circuit court on August 3, 2011, was, in fact, the same Agreed Settlement Order approved by the Planning Commission on the night of July 26, 2011.

The circuit court acknowledged that the date on which the settlement was concluded was relevant only to the issue of timely reporting the terms of the settlement in the minutes. [App. 1244, 1248] The relevant findings of fact in the Order – the ones that FAF neglects to mention – are those that address the delay in reporting the terms of the settlement. Each of these relevant findings cites the circuit court's entry of the Agreed Settlement Order as the triggering event:

> 12. Neither the order, which was entered by the Court on August 3, 2011, nor the terms of the order were revealed in the official minutes of the Planning Commission meeting of July 26, 2011, which were approved at the meeting of August 9, 2011. Verified Petition at ¶ 32, and the July 26, 2011, Minutes attached thereto.
>
> 13. Neither the order nor the terms of the order 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. *See*, Minutes of August 9, 2011.
>
> 14. Neither the order nor the terms of the order 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 this civil action. *See*, Minutes of September 13, 2011.
>
> 15. The agreed settlement order was finally revealed 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 Court's adoption of the settlement agreement, and two months after the filing of this civil action. *See*, Minutes of October 11, 2011.[15]

[App. 791-791] These facts supported the conclusion of law regarding the delay in reporting. [App. 794] So, where, exactly is the circuit court's confusion about which event triggered the reporting requirement "manifest" in the partial summary judgment Order? It isn't. If the circuit court truly was confused – and there's no reason that it should have been – there's no evidence of it in the Order granting partial summary judgment.

[15] Which Petitioners later learned had not been done when they sought the official record in discovery.

At no time did Petitioners labor under any confusion regarding which dates were relevant to which requirements of the Act.[16] The date on which settlement was concluded was relevant only to the duty to report the terms of settlement in the minutes, and Petitioners never once referred to any date but August 3, 2011, for this requirement.[17] The only way that FAF could think that this understanding is "newly found" by Petitioners, FAF Brief, 27, is if it failed to read every document that Petitioners filed in the case below, beginning with the Petition.

E. The Planning Commission's Violations were not *De Minimus*

The circuit court said that, even before it determined that a genuine issue of material fact should have precluded the grant of partial summary judgment, it still would not have awarded a remedy due to the *de minimus* nature of the violation and the efforts to cure it. [App. 1239] FAF seems not to have noticed that this is the *only* decision that the circuit court made on the principal issue in Petitioners' case below, that is, the violation of the agenda notice requirements. This was the sum total of the circuit court's treatment and resolution of the notice violation issue.

FAF continues to assert that Petitioners sought the "most extreme remedy available" under the Act. Petitioners would contend that criminal prosecution, provided by W.Va. Code § 6-9A-7(a), is the "most extreme." Petitioners did not seek the imposition of criminal charges. Petitioners have no doubt that the Planning Commission (as well as FAF) intended to settle

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[16] It was counsel for the Planning Commission, not Petitioners' counsel, who expressed confusion about the two dates and their respective relevance to the allegations of violations. [App. 2:23-3:10] This confusion seemed to arise from counsel's belief that none of the Act's requirements applied to the Planning Commission's settlement with FAF except for the reporting requirement. [App. 97:19-99:7] Counsel for the Planning Commission contended that the advance notice requirements did not apply, and, therefore, counsel could not see why the activities of July 26, 2011, had any bearing on Petitioner's claims. FAF has now joined this chorus. FAF Brief, 27-28. Clearly, this was never Petitioners' position, and Respondents' should not be allowed to project their confusion about the dates onto Petitioners.

[17] And, FAF doesn't cite to a single instance in the record where Petitioners referred to any event but the circuit court's entry of the Agreed Settlement Order on August 3, 2011, as the conclusion of the settlement. Should that not be an indispensable prerequisite to attributing an argument to an opponent?

FAF's appeal without Petitioners' knowledge, before the court granted Petitioners' motion to intervene. Yet, they did not seek the "most extreme remedy" of criminal prosecution.

Petitioners did seek annulment of the vote taken on July 26, 2011, which would have put all parties in the same position as they were before the private settlement. [App. 62:10-16] Because *all* of the evidence necessary to resolve the case was in the official records of the Planning Commission, and was indisputable, the case could have and should have been resolved in a relatively short period of time. Perhaps the Planning Commission could have revisited the issue at a properly-noticed meeting. Or, FAF could have pursued its appeal to conclusion, without inordinate delay. [App. 508] That is what Petitioners anticipated when they filed this case on the indisputable evidence. But, that did not happen, and it did not happen because of the procedural choices made by the Planning Commission and FAF.[18]

FAF then speculates, once again, that even if the Planning Commission had complied with the notice provisions of the Act, it would have made no difference. FAF Brief, 29-30. FAF begins by once again asserting that Petitioners did not attend the Planning Commission hearing on FAF's request for an extension of its plat deadline. FAF Brief, 29. Petitioners proved that this is untrue, [App. 1127], and FAF offered no evidence to rebut Petitioners' proof.

FAF's argument has no basis in fact or law. FAF cannot say that it would have made no difference if Petitioners had been allowed to intervene and be heard before the circuit court entered the Agreed Settlement Order and dismissed FAF's appeal. Petitioners were deprived of that opportunity because of the Planning Commission's violation of the notice requirements of the Act. FAF's own conduct belies its argument. It is abundantly obvious that both FAF and the Planning Commission did believe that it would have made a difference if Petitioners had been

[18] Neither FAF nor the Planning Commission made an effort to expedite this case, as Petitioners did. Although, when FAF speaks of this case in the future, it undoubtedly will say that it was Petitioners who prolonged this case just to cause further delay to its development.

heard before FAF's appeal was dismissed. Otherwise, there would have been no reason for all of their efforts to make sure that Petitioners never got the chance.

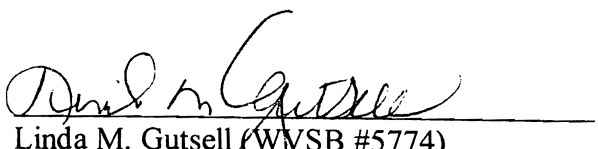
V. CONCLUSION

The whole of FAF's argument is premised on one over-riding theory: FAF has been mistreated by the regulatory and legal process, largely because of the neighbors who wrongly believe that they have the right to protect their own legal interests. And, it's only fair that the Planning Commission helped FAF to even the score by ignoring the requirements of the Open Governmental Proceedings Act so that the neighbors could not interfere once again.

Even if FAF had been unfairly treated in past proceedings – and it hasn't – past history would not excuse the Planning Commission from compliance with the Act in later matters. FAF has not shown that the violations of the Act did not occur, but relies on its opinion that it didn't matter. FAF offers no reason why the violations should not be remedied, except to further claim a right to rely upon a decision made in violation of the law.

This Court has never indicated that compliance with the Act doesn't matter. Petitioners pray that it does not accept FAF's invitation to do so now.

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 PETITIONERS' BRIEF IN REPLY TO RESPONSE OF FAR AWAY FARM, LLC, 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 21st day of May, 2014:

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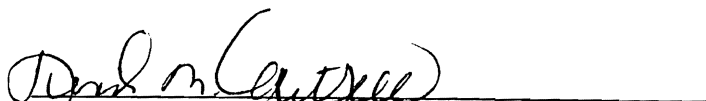

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