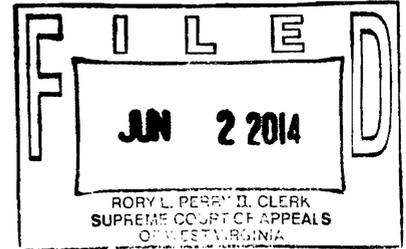


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**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 PLANNING COMMISSION**

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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
I. STATEMENT REGARDING ORAL ARGUMENT	1
II. COUNTER-STATEMENT OF THE CASE	1
III. STANDARD OF REVIEW	7
IV. SUMMARY OF ARGUMENT	8
V. COUNTER-ARGUMENT	9
A. There Were No Genuine Issues of Material Fact to Justify the Circuit Court’s Setting Aside its Order Granting Partial Summary Judgment	9
B. The Order Granting Partial Summary Judgment Did Not Ignore Any Relevant Exception in the Act	11
1. The Circuit Court’s Did Not Initially Ignore the Confidential Advice Exception of the Act	11
2. There is No Language in Surrounding Sections of the Act Which Exempts Exceptions 11 and 12 from Agenda Notice Requirements	12
3. The Circuit Court Did Not Initially Ignore the Settlement Exception of the Act	12
4. The Circuit Court Did Not Initially Fail to Consider Constituional Separation of Powers	12
5. The Order Granting Partial Summary Judgment Shows no Undue Reliance on <i>Peters</i> Instead of the Act	14
C. The Circuit Court did Reach Petitioners’ Motion for Remedies Due to It’s Conclusion that a De Minimus or No Violation Occurred	15
VI. CONCLUSION	17
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

Case Law

<i>Anderson v. Liberty Lobby</i> , 477 U.S. 242 (1986)	9
<i>Bd of Church Ext'n v. Eads</i> , 159 W.Va. 943, 230 S.E.2d 911 (1976)	9
<i>Brady v. Reiner</i> , 157 W.Va. 10, 198 S.E.2d 812 (1973)	9
<i>Chambers v. Sovereign Coal Corp.</i> , 170 W.Va. 537, 295 S.E.2d 28 (1982)	9
<i>Far Away Farm, LLC v. Jefferson Co. Bd. of Zoning Appeals</i> , 222 W.Va. 252, 664 S.E.2d 137 (2008)	16
<i>Hubbard v. State Farm Indemnity Co.</i> , 213 W.Va. 542, 584 S.E.2d 176 (2003)	7, 8
<i>Louk v. Cormier</i> , 218 W.Va. 81, 622 S.E.2d 788 (2005)	16
<i>Mountain America, LLC v. Huffman</i> ; 687 S.E.2d 768 (W.Va. 2009)	16
<i>Painter v. Peavy</i> , 192 W.Va. 189, 451 S.E.2d 755 (1994)	8
<i>Peters v. County Comm'n of Wood County</i> , 205 W.Va. 481, 519 S.E.2d 179 (1999)	13, 14
<i>PNGI Charles Town Gaming, LLC v. Reynolds</i> , 229 W.Va. 123, 727 S.E.2d 799 (2012)	16
<i>Sands v. Security Trust Company</i> , 143 W.Va. 522, 102 S.E.2d 733 (1958)	16
<i>Simpson v. W.Va. Off. Of Ins. Comm'r</i> , 678 S.E.2d 1 (W.Va. 2009)	16
<i>Sprout v. Bd. of Educ. of Co. of Harrison</i> , 215 W.Va. 341, 599 S.E.2d 764 (2004)	11, 13
<i>State v. Greene</i> , 196 W.Va. 500, 473 S.E.2d 921 (1996)	16
<i>State ex rel. Abraham Linc Corp. v. Bedell</i> , 216 W.Va. 99, 602 S.E. 2d 542 (2004)	9
<i>Wetzel County Solid Waste Authority v. W.Va. Div. of Natural Resources</i> , 184 W. Va. 482, 401 S.E.2d 227 (1990).....	13

Whitlow v. Bd. of Educ. of Kanawha Co.,
190 W.Va. 223, 438 S.E.2d 15 (1993)16

Williams v. Precision Coil, 194 W.Va. 52, 459 S.E.2d 329 (1995)9, 10

Statutes

W.Va. Code § 6-9A-1.....1, 12

W.Va. Code § 6-9A-2(4)2

W.Va. Code § 6-9A-2(4)(E)15

W.Va. Code § 6-9A-311

W.Va. Code § 6-9A-4(a)11

W.Va. Code § 6-9A-4(b)11

W.Va. Code § 6-9A-4(b)(11)6, 11, 12

W.Va. Code § 6-9A-4(b)(12)11, 13

W.Va. Code § 6-9A-811

Rules

West Virginia Rules of Civil Procedure

W.V.R.Civ.P. 56(e)9

W.V.R.Civ.P. 60(b)8

West Virginia Revised Rules of Appellate Procedure

W.V.R.R.A.P. 10(g)8

PETITIONERS' BRIEF IN REPLY TO RESPONSE OF PLANNING COMMISSION

I. STATEMENT REGARDING ORAL ARGUMENT

Petitioners reassert the Statement set forth in their opening brief. Petitioners' Brief, at 19.

II. COUNTER-STATEMENT OF THE CASE

The Planning Commission opens by reciting a lawyer's duty, under the West Virginia Rules of Professional Conduct ("W.V.R.P.C."), to promptly convey the receipt of a settlement offer to the client. Plan. Comm. Brief, 6. In so doing, the Planning Commission once again demonstrates a problem that has plagued the whole of this case. That is, that the Planning Commission fails to acknowledge the very real distinction between the duty of its lawyer under the W.V.R.P.C., and its own separate and distinct duties under the Open Governmental Proceedings Act, W.Va. Code § 6-9A-1, *et seq.* ("the Act").

This is not an attorney professional responsibility case. The lawyer's duty to promptly convey receipt of a settlement offer was never an issue in the case. Petitioners never denied the duty of the lawyer to promptly convey receipt of a settlement offer¹ to the Planning Commission – Petitioners repeatedly acknowledged this duty from the earliest days of the case below through the end of the case below.² [App. 32:10-33:10; 41:4-21; 108:9-111:13; 618-21; 980-981] The facts that are actually relevant to this case, however, are those things that occurred *after* the attorney fulfilled her duty to convey the receipt of the settlement offer.

¹ Petitioners certainly never suggested that counsel was barred from doing so. Plann. Comm. Brief, 7.

² Petitioners' counsel also provides legal counsel to a local municipal government, in which representation she routinely has to fulfill her duties without intruding upon the obligations of her client under the Act. [App. 32:20-33:10; 108:23-11:13] Petitioners' counsel has never experienced the angst of imagined difficulties that the Planning Commission seems to think would arise if its lawyer had to operate with regard for the client's duties under the Act. There is no such difficulty in accommodating both duties when a lawyer consults with a public body client, so long as both parties understand their respective responsibilities and observe minimal protocols for meeting those responsibilities.

The Planning Commission has duties under the Act, *separate and apart from* its lawyer's duties under the W.V.R.P.C. These duties are triggered whenever a quorum of the Planning Commission begins to "deliberate toward a decision on any matter which results in an official action." W.Va. Code § 6-9A-2(4).

The precipitating event in this case was not the Planning Commission's lawyer conveying receipt of a settlement offer at the meeting on July 26, 2011.³ If that was all that had happened, there would have been no violation of the Act, and this case would not exist. The issue in this case is that, after the lawyer fulfilled her duty under the W.V.R.P.C., the Planning Commission violated its duties under the Act. The Planning Commission immediately discussed, deliberated, and took official action (a vote) on the information conveyed, even though the topic of discussion (*Far Away Farm, LLC v. Planning Commission*) did not appear on the agenda for the meeting. That is what gave rise to this case, and the fact that this is what happened is in the public record and is indisputable. [App. 30:16-32:9; 33:9-35:14; 295, 1251 at time 2:02:50]

The Planning Commission, as did FAF, tries to make Petitioners say something they did not say by searching for an alternative meaning in the plain words that Petitioners have used in describing what the Planning Commission did at the July 26, 2011, meeting. Also, the Planning Commission attempts to interpretatively rewrite its own records.

The Planning Commission states as a fact that, after the executive session, it "voted in public session to authorize counsel to present a counter-offer to the proposed settlement." Plan. Comm. Brief, 6. In reality, the vote of the Planning Commission on July 26, 2011, was taken upon the following *verbatim* motion: "I move that we proceed with the order as drawn by counsel today and presented to the commission ... and authorize the President to sign it." [App.

³ That said, while the W.V.R.P.C requires the lawyer to promptly convey receipt of a settlement offer, there is nothing in the W.V.R.P.C. or the Act that requires the lawyer to do so at a meeting of the public body client. Counsel for the Planning Commission conceded this point below. [App. 79:23-80:6]

1251, at time 2:02:54] The actual motion bears no resemblance to the Planning Commission's retelling of it, above. No one could have gleaned the Planning Commission's interpretative version of the motion from the actual motion. [App. 35:5-14]

By contrast, the Petitioners, who were not privy to inside information and had to work solely from the Planning Commission's official records, alleged in their Petition that:

20. Upon belief, 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 settlement reflected in the aforesaid Agreed Settlement Order.

* * * * *

28. After the executive session ended and upon resuming the public meeting, the Planning Commission entertained the motion of a Commissioner, which was 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." *Id.*, at time marker 2:02:50.

[App. 278; 280; 1251 at time 2:02:54] Now, the Planning Commission can engage in all of the creative contortions of Petitioners' choice of wording that it wants, but anyone with eyes and ears can see which party has more accurately presented the motion upon which the July 26, 2011, vote was taken.⁴

Likewise, the Planning Commission states as a fact to this Court, "In the Complaint Capriotti erroneous [sic] claimed the settlement was agreed to on July 26th, 2011," – by which, the Planning Commission goes on to say, means that Petitioners asserted the settlement to have been concluded on July 26, 2011. Plan. Comm. Brief, 6, n. 2. The Planning Commission cites a number of paragraphs in the Petition as proof of its factual assertion, but none of those paragraphs actually get the Planning Commission to where it wants to go. In none of the cited paragraphs did Petitioners even mention the word "concluded" or any equivalent. It just is not there, and never has been.

⁴ Yet, somehow, Petitioners were supposed to know that the order reflected a counter-offer.

What Petitioners actually said in the Petition – in the paragraphs that the Planning Commission neglects to cite, but which are necessary to the context of the ones it does – is:

18. Before the Court had ruled upon the motion to intervene filed in Civil Action No. 11-C-125 by Petitioners herein, the Planning Commission and FAF submitted to the Court an Agreed Settlement Order, which the Court entered on August 3, 2011, thus resolving said civil action. *See*, Agreed Settlement Order, attached hereto as Exhibit A.

* * * * *

20. Upon belief, 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 settlement reflected in the aforesaid Agreed Settlement Order.

[App. 278]

We now know that the “order drawn by counsel today” [App. 1251 at time 2:02:54], is, in fact, the order that subsequently also was signed by FAF and then entered by the circuit court. It is and was a reasonable inference that the Planning Commission agreed to the terms set out in the order when it voted “to proceed with the order” and “to authorize the President to sign it.” *Id.* In authorizing the President to sign the order, the Planning Commission was, in fact, authorizing its President to enter into an agreement upon the terms set out in the document, even if FAF had yet to accept the terms and sign. Petitioners’ allegations were accurate.

Nothing in the paragraphs cited by the Planning Commission suggests that FAF had already signed the document, or that the authorized signature of the President would “conclude” the settlement. The allegations make no mention at all about whether FAF had already signed or would still have to accept the terms and sign. And, the reasons that the allegations do not make mention of this are that Petitioners had no way of knowing who accepted the terms first, and more importantly, *that it is absolutely irrelevant.* It does not matter when FAF signed the Agreed Settlement Order. Even if FAF had signed first, the signature of the Planning

Commission's President still would not have concluded the settlement, because the Agreed Settlement Order, *on its face*, required the signature of the judge before it would be final. Does the Planning Commission assume that Petitioners or their counsel did not notice that?

FAF's conduct is not at issue in this case. The Planning Commission's conduct is. The material point is that, on July 26, 2011, the Planning Commission discussed, deliberated, and took an official act – the vote to “proceed with the order” and authorizing its President to sign the order – when the topic of the discussion, deliberation and voting was not on the agenda.

The Planning Commission asserts that it did enter the settlement order into its minutes. Plan. Comm. Brief, 7. The terms of the settlement are not reported in the minutes. The complete “report” in the minutes of the October 11, 2011, meeting is:

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. 1096] This statement does not report the terms of the settlement. The order is not attached to the public minutes posted online.⁵ [App. 1098] The minutes also were not attached to the copy of the “official minutes” that the Planning Commission produced in response to Petitioners' Request for Production of Documents.⁶ [App. 1093] If the Agreed Settlement Order is not attached to the minutes posted on the Planning Commission's website for public access,

⁵ The minutes consist of four (4) pages, and the order is three (3) pages. If the order was attached to the minutes posted online, the pdf document would be seven (7) pages long, not four (4) as it is.

⁶ In the Request itself, Petitioners expressly stated that they were not requesting production of the minutes that appeared on the website. In a follow-up telephone call with Planning Commission staff (“Alex”), counsel emphasized that we wanted *to inspect* the official, approved/signed and complete minutes, or a response advising that the minutes on the website were true and complete copies, if that was the case. Undersigned counsel followed-up with a letter to counsel for the Planning Commission. The Order was not attached to the October 11, 2011, minutes produced in response to the discovery request. Nor was a correction of the discovery production made after Petitioners put those produced minutes into the record below, specifically to show that the order was not attached to the minutes. [App. 991] But, now, the Planning Commission wants to claim that the order was, in fact, attached? Plan. Comm. Brief, 7, n. 3. Petitioners object on several grounds to any such attempt.

and are not attached to the minutes produced in response to a discovery request (or, similarly, a FOIA request), then the minutes with the attached order are simply not available to the public, which is the whole point of the reporting requirement. Even if, somewhere in a file drawer in the Planning Commission office, there is an “official” copy of the October 11, 2011, minutes to which the order is attached, if that copy is not available to the public, even when they ask to see it, then there is no reporting to the public and it does not satisfy W.Va. Code § 6-9A-4(b)(11).

The Planning Commission continues its course of creative interpretation of the written word in its description of the rulings of the trial court. Plan. Comm. Brief, 8. The trial court did not, as the Planning Commission asserts, find “that it had erroneously adopted Capriotti’s position that the Open Meetings Act bars counsel from promptly communicating a settlement offer to their client and giving timely confidential legal advice about a settlement offer.”⁷ Plan. Comm. Brief, 8. The court acknowledged the duty to promptly convey the settlement offer, and, then, concluded: “The meeting on that day was of such nature as to warrant Exception 12 so that the public was not improperly excluded.” [App 1244] Insofar as Petitioners never, at any time, disputed either of these points of law,⁸ the Court’s ruling was, in essence, the resolution of legal contentions that were not in issue in the case. Unfortunately, important matters that were in issue were not so clearly resolved.

The principal issue in the case is (and was) whether or not the topic of discussion had to appear on the advance agenda in order for the Planning Commission to lawfully discuss and

⁷ The trial court expressly said that its earlier ruling was due to its own “misplaced reliance on Peters,” [App. 1239], not an argument that Petitioners had made.

⁸ And, Respondents, while repeatedly attributing these arguments to Petitioners, have not cited a single place in the record where Petitioners disputed the duty of counsel to promptly convey settlement offers, or the right of the Planning Commission to exclude the public from executive sessions convened to engage in privileged communications with its counsel. There is nothing in the record to which Respondents could direct this Court. Instead, the record below is rife with Petitioners’ denials and rebuttals of this false attribution. Petitioners contend that once should have been enough.

deliberate toward an official action, even if that discussion occurred in an executive session with counsel from which the public was properly excluded. [App. 30:3-19] The trial court never directly ruled on this primary issue. At the very best, the court’s ruling in the negative can only be implied from the ruling quoted above. However, this implication is contradicted elsewhere in the Order. The court’s earlier expression that “the *de minimus* nature of said violation and the Respondent’s efforts to cure the violation,” [App. 1239], plainly indicates that the Court did recognize that a violation had occurred, but merely decided that it was not worthy of a remedy.⁹

In point of fact, in the order leading to the “supplemental order” granting summary judgment to the Planning Commission [App. 1249], the court concluded that there was no violation of the Act, and also concluded that the violation of the Act was *de minimus* and did not merit a remedy.¹⁰ Petitioners contend that both conclusions are wrong, and have assigned error to both in this appeal. Petitioners’ Brief, 1.

III. STANDARD OF REVIEW

In the case below, only Petitioners argued the standard of review that should be applied to the Planning Commission’s Motion to Reconsider and Set Aside Partial Judgment (hereinafter, “Motion to Reconsider”). [App. 977-980] Petitioners argued that the decision to reconsider the prior order came within the court’s broad and inherent discretion to reconsider interlocutory orders at any time before the entry of a final order, as discussed in cases such as *Hubbard v.*

⁹ If there was no violation at all, then there was not a *de minimus* violation.

¹⁰ The court’s first order granted the Motion to Reconsider, and made seemingly final rulings in the case, but did not state that it was a final order and did not grant judgment to any party. [App. 1138-1245] Petitioner’s counsel wrote to the court noting that the order “seems to address all issues,” and asking that the court “clarify its intention as to the finality of the order.” The court then issued the supplemental order. [App. 1246-1249] Petitioners do not know which party wrote to the court to say that the first order “left one issue unresolved,” [App. 1246], only that it was not Petitioners.

State Farm Indemnity Co., 213 W.Va. 542, 584 S.E.2d 176, 184-185 (2003).¹¹ Even though the order was not a final order, the circuit court instead chose to determine if reconsideration was appropriate pursuant to the provisions of W.V.R.Civ.P. 60(b). [App. 1240-1243]

The Planning Commission now agrees with Petitioners. Plan. Comm. Brief, 10. However, the Planning Commission seems to suggest that the “practically unbridled discretion,” *Id.* at 552, 584 S.E.2d at 186, to reconsider an interlocutory order also applies to the ruling on the merits of the case that the court enters upon reconsideration. Plan. Comm. Brief, 11.¹² A court that exercises its broad discretion to reconsider an earlier order still must correctly identify the facts and apply the correct law to those facts to reach its substantive ruling on the merits. A court’s final ruling on the merits of the case does not escape the applicable standard of review on appeal just because the erroneous ruling was made upon the reconsideration of an earlier, interlocutory order. Abuse of discretion, applicable to the decision to reconsider the interlocutory order, is not the standard of review applicable to the circuit court’s ultimate grant of summary judgment to the Planning Commission. A court’s entry of summary judgment is reviewed *de novo*. Syl Pt 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

As we’ve said previously, Reply Brief to FAF, 8, Petitioners trust in the sound judgment of this Court to identify and apply the proper standards of review to the issues in this appeal.

IV. SUMMARY OF ARGUMENT

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

¹¹ Petitioners argued that, even under the less restrictive standard, the Motion to Reconsider should not be granted. [App. 977-980]

¹² “The trial court correctly *exercised its discretion* when it determined that Planning Commission counsel did not violate the OMA when she” Emphasis added. Petitioners note again that the conduct of counsel was *never* the issue in this case, because it is the Planning Commission, the governmental body, that is subject to the Act, not its non-member attorney. W.Va. Code § 6-9A-2(3). The Planning Commission continues to conflate its lawyer’s duties under the W.V.R.P.C. with its own duties under the Act.

V. COUNTER-ARGUMENT

A. **There Were No Genuine Issues of Material Fact to Justify the Circuit Court's Setting Aside its Order Granting Partial Summary Judgment**

In its Motion to Reconsider, the Planning Commission asserted that the court should not have granted Partial Summary Judgment to Petitioners because there was a genuine issue of material fact regarding the date on which its settlement with FAF was concluded. [App. 920-922] The Planning Commission had not raised this argument in response to the Motion for Partial Summary Judgment. [App. 543] The argument is without merit as a matter of law, and provided no grounds for the grant of the Motion to Reconsider.

To prevent entry of summary judgment upon a properly-supported motion, the nonmovant must, by affidavits or evidence in the record, point to specific facts that show that there is a genuine issue for trial. W.V.R.Civ.P. 56(e). The nonmovant

... must present some evidence to indicate to the court that facts are in dispute, when the moving party's evidence shows no disputed facts. *The mere contention that issues are disputable is not sufficient to deter the trial court from the award of summary judgment.* (citation omitted)

Emphasis added. *Chambers v. Sovereign Coal Corp.*, 170 W.Va. 537, 541, 295 S.E.2d 28, 31 at n. 4 (1982), *quoting Brady v. Reiner*, 157 W.Va. 10, 30, 198 S.E.2d 812, 824 (1973), *overruled on other grounds, Bd of Church Ext'n v. Eads*, 159 W.Va. 943, 230 S.E.2d 911, 918, n. 6 (1976).

The nonmovant's burden is not met by showing the existence of factual disputes that are not material. *Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E.2d 329 (1995), *citing Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *State ex rel. Abraham Linc Corp. v. Bedell*, 216 W.Va. 99, 602 S.E. 2d 542, 553 (2004), *quoting Liberty Lobby*, 477 U.S. at 248. "[T]he term 'material' means a fact

that has the capacity to sway the outcome of the litigation under the applicable law.” *Precision Coil*, 194 W.Va. 52, 60, 459 S.E.2d 329, 337, at n. 13.

The Planning Commission’s assertion of a genuine issue of material fact fails on all of the necessary particulars. First and foremost, the Planning Commission has never pointed to anything in the record to show that there was competing evidence regarding the August 3, 2011, date on which the settlement was concluded. Instead, the Planning Commission asserts that there was a genuine issue of material fact because Petitioners’ alleged that the settlement concluded on July 26, 2011. Even if Petitioners had alleged that the settlement was concluded on July 26, 2011 – and they didn’t – the bare allegation would not have been sufficient to create a genuine factual issue in the face of a record that provided no supporting evidence for it.

Secondly, in this case, the difference between July 26 and August 3, 2011, is virtually immaterial to the issue of whether or not the Planning Commission reported the terms of the settlement in its minutes within a reasonable time. The first Planning Commission meeting to occur after July 26, 2011, was the meeting of August 9, 2011. The first Planning Commission meeting to occur after August 3, 2011, was the meeting of August 9, 2011. Therefore, whether the Planning Commission had concluded the settlement on July 26 or August 3, its first opportunity to report the terms of the settlement in the minutes was the meeting of August 9.

Finally, the reporting issue could have been thrown out altogether, and there still would have been a meritorious case for resolution by the court. Petitioners’ principal allegation that the Planning Commission violated the agenda notice requirement, standing alone, was sufficient to carry the case to a proper adjudication and to warrant the grant of a remedy. It is nothing short of absurd that, in the end, the case came down to a made-up dispute that was insignificant in its own right, and unnecessary to the survival of the case as a whole. But, that is what happened.

The circuit court erred when it embraced the Planning Commission's significantly flawed argument as a reason for its ultimate rulings.

B. The Order Granting Partial Summary Judgment Did Not Ignore Any Relevant Exception in the Act

1. The Circuit Court Did Not Initially Ignore the Confidential Advice Exception of the Act

The exceptions enumerated in W.Va. Code § 6-9A-4(b), including subparagraph (12), are exceptions to the requirement that all meetings be open to the public. W.Va. 6-9A-3. They are not exceptions to the other requirements of the Act, such as the agenda notice requirement. *Id.* Where the Legislature wanted to exempt an executive session from one of the other requirements of the Act, it did so expressly within the text of the particular exception. *See, e.g.*, W.Va. Code § 6-9A-4(b)(11), which exempts the approval of a settlement from strict adherence to the requirements of W.Va. Code § 6-9A-8.

The Legislature did not exempt executive sessions under W.Va. Code § 6-9A-4(b)(12) from the agenda notice requirements of § 6-9A-3, or from the prior announcement requirement of § 6-9A-4(a). This Court has not found executive sessions with legal counsel to be exempt from the agenda notice requirement of the Act, but has said that the agenda requirement does apply. *Sprout v. Bd. of Educ. of Co. of Harrison*, 215 W.Va. 341, 599 S.E.2d 764, 768, n. 2 (2004).

The circuit court did not ignore the confidential consultation exception to the Act when it granted Petitioners' Motion for Partial Summary Judgment. The Planning Commission was not found at fault for meeting in closed session with its counsel. The fault was found in doing so in violation of the advance notice requirements of the Act.

2. There is No Language in Surrounding Sections of the Act Which Exempts Exceptions 11 and 12 from Agenda Notice Requirements

In this section of its argument, the Planning Commission continues to equate the exemption from the open meeting requirement of Act, which the Act does provide, with a wholesale exemption from all requirements of the Act, which the Act does not provide. See Petitioners' rebuttal, immediately above.

3. The Circuit Court Did Not Initially Ignore the Settlement Exception of the Act

In this section of its argument, the Planning Commission continues to press the faux argument that there was a genuine dispute about the date on which the settlement was concluded. As fully discussed *supra*, there was not such dispute, the clear record permitted no such dispute, and there was no genuine dispute for the circuit court to have ignored when granting Petitioners' Motion for Summary Judgment. The Planning Commission never reported the terms of the settlement in its minutes, which is *per se* not within a reasonable time, regardless of the date of the settlement's conclusion. W.Va. Code § 6-9A-4(b)(11). The circuit court erred when, in its ultimate rulings, it ignored the clear and unequivocal language of the statute, *Id.*, and concluded that submitting the Agreed Settlement Order to the court for entry was a sufficient equivalent to satisfy the requirement to report the terms of the settlement in the Planning Commission's minutes. [App. 1248]

4. The Circuit Court Did Not Initially Fail to Consider Constitutional Separation of Powers

The Legislature recognized the need to balance the policy of open, public access to the conduct of governmental bodies, and the need for those public bodies to sometimes carry on their business outside of a public meeting. W.Va. Code § 6-9A-1. For example, governmental bodies sometimes need to consult privately with legal counsel, and the Legislature specifically provided

for doing so in a closed meeting. § 6-9A-4(b)(12). The Legislature limited the reach of the Act to those instances where a quorum of the governmental body “is required in order to make a decision or to deliberate toward a decision on any matter which results in official action.” The Legislature has balanced the sometimes competing goals and needs in the provisions of the Act.

This Court – as the Planning Commission rightly points out – is the body that is empowered by the State Constitution to regulate the practice of law. This Court has done so, via adoption of the W.V.R.P.C. and other Rules. Consequently, it is safe for us to conclude that this Court was well aware of the requirements of the Rules that it has promulgated when it has decided appeals arising under the Act.

If there was a Constitutional separation of powers conflict between a lawyer’s duty under the W.V.R.P.C. and a governmental body’s duty to list topics of discussion on an advance agenda, this Court would be the authority with the power and incentive to so declare. However, in the 30+ years since the Act’s enactment, and several opportunities to do so, this Court has never held that a public body can meet in executive session with counsel to discuss and deliberate toward an official act on a topic that is not listed on the advance agenda. On the contrary, this Court has stated, held or upheld the application of the agenda notice requirement to discussions and deliberations that take place in executive session consultations between a public body and its legal counsel. *Sprout v. Bd. of Educ. of Co. of Harrison*, 215 W.Va. 341, 599 S.E.2d 764, 768, n. 2 (2004); *Peters v. County Comm’n of Wood County*, 205 W.Va. 481, 519 S.E.2d 179 (1999); *Wetzel County Solid Waste Authority v. West Virginia Division of Natural Resources*, 184 W. Va. 482, 401 S.E.2d 227 (1990).

The Planning Commission is not asking this Court to consider a legal issue that has never before been considered and decided. The Planning Commission is asking this Court to change

the law so that it can be relieved of the obligation to abide by the plain requirements of the Act and the prior pronouncements of this Court.

5. The Order Granting Partial Summary Judgment Shows no Undue Reliance on *Peters* Instead of the Act

Petitioners do not claim the ability to read the circuit court’s mind. The circuit court stated that it had over-relied on *Peters, supra*, [App. 1239], and Petitioners cannot say that the circuit court did not consider *Peters* more than it considered the provisions of the amended Act when it granted Petitioners’ Motion for Partial Summary Judgment. Petitioners can only say that such reliance is not apparent on the face of the Order Granting Petitioners’ Motion for Partial Summary Judgment [App. 786], which cites to the amended Act for each violation found to have occurred [App. 793-796] – and that the result reached was the correct one. Petitioners also contend that, as to the advance notice violations in issue in this case, reliance on the holding of *Peters* would produce the same outcome as reliance on the amended Act, because the amended Act is not “more permissive.” [App. 1240]¹³

Adherence to the agenda notice requirement does not prevent the Planning Commission from receiving prompt notice of receipt of a settlement offer. [App. 980-988] As stated previously, counsel could have promptly conveyed the settlement offer by any means, including at the meeting. Having received such notice at a meeting where the topic did not appear on the agenda, the Planning Commission could have set the matter for discussion and deliberation at its next regular meeting, or could have scheduled a special meeting for such purpose in as few as three days. [App. 987] Discussions of logistical matters, such as those to set a topic for

¹³ And, unlike the circuit court, Petitioners does not regard this Court’s footnote in *Peters* as “curiously prospective,” given that the *Peters* case arose before the non-retroactive 1999 amendments were enacted. Nor do Petitioners find a “disconnect” between this Court’s holding and the 1999 amendments. It appears to Petitioners that the Legislature merely codified the common-law attorney-client privilege that this Court expressly applied in *Peters*, such that there was no disconnect between the two.

discussion at a future meeting, are not “meetings” under the Act. W.Va. Code § 6-9A-2(4)(E). Because they do not fall within the definition of “meeting,” such discussions are not required to occur at public meetings and do not require advance agenda notice if they do.

Moreover, any party, including FAF, who deals with a public body, should be prepared for such minor delays in closing a deal. It comes with the territory. The only thing that made such a minimal wait unendurable in this case was that the parties to the settlement were afraid that the court might grant Petitioners’ motion to intervene before they could settle the case without Petitioners’ knowledge or opportunity to be heard. All of the arguments about conflicts between the Act and a lawyer’s duty are just after-the-fact justifications for conduct that the Planning Commission should have known was improper from the outset.

C. The Circuit Court did Reach Petitioners’ Motion for Remedies Due to It’s Conclusion that a De Minimus or No Violation Occurred

The circuit court clearly concluded that the Planning Commission did not violate the Act, and/or that the Planning Commission’s violations were “*de minimus*.” *Supra*, p. 7. As a result, the circuit court concluded that no remedy was warranted, [App. 1239], and that Petitioners’ Cross-Motion for Summary Judgment Granting Remedies was rendered moot. In fact, the circuit court revealed that it had decided that no remedy was warranted even before the final hearing that originally was set solely to address remedies. *Id.* The end result is that Petitioners were denied any remedy for the Planning Commission’s clear violations of the Act, which violations harmed Petitioners personally, and deprived the general public of information to which it is entitled under the Act.

Contrary to the argument of the Planning Commission, this Court is not bound by the circuit court’s erroneous failure to award proper remedies in this case. The record below is fully developed, and the material facts – all of which appear in the public record – are unassailable.

Petitioners put remedies in issue below. The circuit court had the opportunity to properly decide the issue, but didn't. It cannot be said that the circuit court did not address remedies at all.

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

Just as it did in *Far Away Farm, LLC v. Jefferson Co. Bd. of Zoning Appeals*, 222 W.Va. 252, 662 S.E.2d 137 (2008), this Court, upon the record developed below, can determine the relief that should have been granted by the circuit court, and can mandate that such relief be granted. This would be the most expedient and definitive way to bring this case to finality. Upon consideration of all of the facts and circumstances surrounding this civil action, Petitioners assert that a decision from this Court addressing all issues would be both legally appropriate, and most equitable to all involved.

VI. CONCLUSION

The fully-developed record below shows, beyond any iota of a doubt, that the Planning Commission violated the Open Governmental Proceedings Act at and in relation to its meeting and vote of July 26, 2011. The record shows that the Planning Commission's conduct on that date was consistent with its standard operating procedures, in accordance with which the FAF case also had been discussed at earlier meetings when it also was not listed as a topic of discussion on the meeting agenda. The record shows that the Planning Commission believed that a meaningless "hold spot" entry on the agenda for its meetings was sufficient to satisfy the Act. The record shows that the Planning Commission still uses meaningless "hold spot" entries on its meeting agenda. The record shows that the Planning Commission still does not accept that the topics of its intended discussions at a meeting must be specifically identified on its agenda, even if the discussion might occur in executive session with legal counsel. The record shows that the Planning Commission still believes that oblique and ambiguous statements, designed to avoid providing straightforward information to the public, is good enough to satisfy the Act, so long as there is at least one possible interpretation that could bring the reader somewhere in the near vicinity of the facts.

The circuit court had the opportunity to correct all of these violative practices, but, despite its early and correct grant of Partial Summary Judgment, ultimately did not do so. Instead, two undisputed issues – the Planning Commission's right to receive prompt advice of counsel and the irrelevant difference between July 26, 2011, and August 3, 2011 – were allowed to dominate the final stage of the case below. The Partial Summary Judgment was vacated, and the important matters in issue were never again analyzed and decided in their proper context.

The people of Jefferson County deserve better. Without the intervention of this Court, however, it does not appear that the people will ever get what they deserve. For who will bring a case to challenge these violations in the future? The circuit court's order not only denied a remedy in Petitioners' case, but, is a deterrent to other members of the public who otherwise might be inclined to complain about violations of the Act. The relief prayed for by Petitioners in this appeal would correct all of the continuing violations, and insure that citizen complaints receive the consideration that they deserve.

Petitioners renew and restate the prayer in their opening brief, including that this Court direct that their attorney fees and costs, including those incurred in this appeal, be awarded upon proper application therefor.

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



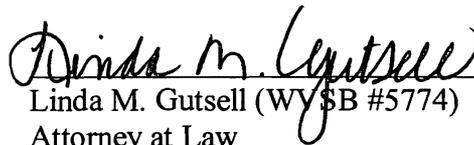
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CERTIFICATE OF SERVICE

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 PLANNING COMMISSION, 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 30th day of May, 2014:

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