

COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13-1243

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

Petitioners,

v.

**Appeal from a Final Order
of the Circuit Court of
Jefferson County (11-C-325)**

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

And

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

Respondents.

FAR AWAY FARM'S RESPONSE BRIEF

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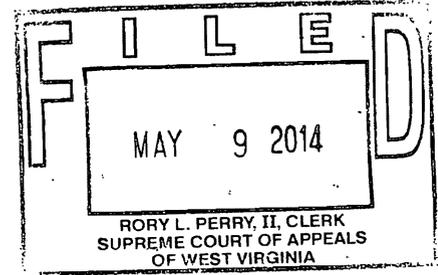


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I. STATEMENT OF THE CASE

A. Procedural History and Events leading to the Current Case

1. On June 23, 2004, Far Away Farm (herein “FAF”) filed an application for a Conditional Use Permit (herein “CUP”) to allow FAF to develop 122.8 acres in the Rural District for 152 residential lots.

2. On September 22, 2004, the Planning and Zoning Director evaluated the FAF property based on a scoring criteria in the Jefferson County Zoning Ordinance. Based on his evaluation, (called LESA) the FAF property was deemed suitable for development and the Zoning Director issued a LESA score of 46.2, which was passing.

3. On October 29, 2004, Dunleavy and Moore challenged the FAF approval and appealed FAF’s successful LESA score to the Board of Zoning Appeals (herein “BZA”).¹

4. On November 30, 2004, FAF filed a Motion to Intervene in the appeal to the BZA.

5. On August 9, 2005, the BZA denied FAF’s CUP and on September 15, 2005, the BZA issued its Findings of Fact and Conclusions of Law denying FAF’s CUP.

6. On October 12, 2005, FAF appealed the BZA’s decision by filing a Petition for Writ to the Circuit Court.

7. On September 18, 2006, the Circuit Court affirmed the decision of the BZA.

8. On January 12, 2007, FAF filed a Petition for Appeal of the Circuit Court’s

¹ Dunleavy and Moore have been consistent parties to the ongoing litigation against FAF.

decision to the West Virginia Supreme Court of Appeals.

9. On April 17, 2008, the West Virginia Supreme Court of Appeals reversed the Circuit Court's decision and ordered that the FAF CUP be issued.

10. On September 9, 2008, Dunleavy and the BZA filed a Petition for Writ of Certiorari with the United States Supreme Court of Appeals.

11. On October 6, 2008, the Planning Commission issued the CUP "under duress," having been ordered to do so by the West Virginia Supreme Court of Appeals. (*See opinion Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals*, 222 W. Va. 252, 664 S.E.2d 137 (2008).

12. On November 10, 2008, the United States Supreme Court denied Dunleavy's and the BZA's Petition for Writ of Certiorari.

13. On June 23, 2009, the Jefferson County Planning Commission (herein "Planning Commission") filed a lawsuit in the United States District Court for the Northern District of West Virginia against Far Away Farm. (*Jefferson County Planning Commission v. Far Away Farm, LLC*, Civil Action No. 3:09-CV-45.) (A.R. 305-309)

14. The Complaint in the United States District Court alleged that the West Virginia Supreme Court's decision in *Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals* violated its rights to due process of law as guaranteed to it by the Fourteenth Amendment to the United States Constitution and by U.S.C. §1983 in denying the Planning Commission's Motion to Intervene. However, the Planning Commission named FAF as the adverse party, instead of the West Virginia Supreme Court of Appeals.

15. On October 29, 2009, the United States District Court for the Northern District of

West Virginia dismissed the case in its Amended Order Granting FAF's Motion to Dismiss. The Court stated:

“...this Court finds that plaintiff's claims must be dismissed as an impermissible collateral attack of the judgment in *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W. Va. 252, 664 S.E.2d 137 (W. Va. 2008), as this Court is bound pursuant to the Full Faith and Credit Clause of the United States Constitution to accord the judgment of the West Virginia Supreme the same *res judicata* effect it would receive in West Virginia state courts. As this Court finds that it lacks jurisdiction to entertain the above-styled case, it need not consider the other arguments of the parties.”

(A.R. 437-454)

16. On November 4, 2009, the Planning Commission filed a Motion for Reconsideration of the Amended Order Granting FAF's Motion to Dismiss.

17. On May 10, 2010, the United States District Court for the Northern District of West Virginia denied the Jefferson County Commission's Motion for Reconsideration. The time for appeal of this decision to the United States Court of Appeals for the Fourth Circuit expired on or about June 9, 2010 and no appeal was filed.

B. The events that led to the Jefferson County Circuit Court certiorari case (No. 11-C-125) that led in turn to the claim of an Open Meetings Act violation in this case

18. Pursuant to a letter of July 26, 2010 from the Jefferson County Department of Planning, FAF's CUP would expire and that the expiration for Final Plat approval was December 19, 2010. (A.R. 455)

19. On November 9, 2010, FAF requested to be put onto the Planning Commission's agenda for the meeting of December 14, 2010 for the purposes of a Community Impact Statement (herein "CIS") extension and related matters.

20. On December 14, 2010, a hearing was held before the Planning Commission on

FAF's request for an extension of time for its CIS and related deadlines. At that hearing, the Commission denied the request for a variance of the expiration date of the Community Impact Statement and related deadlines. (A.R. 493:4-9)

21. After receiving the Staff Report and recommendation to extend FAF's time limits to July 1, 2012, the Planning Commission heard from counsel for FAF.

22. FAF requested that the Planning Commission members who were involved in the Federal lawsuit or any related proceedings against FAF recuse themselves. It is noted on the record that on July 9, 2009, Mr. Maxey voted in favor of the Planning Commission going to Federal Court against FAF and was supported by Commissioners, Taylor, Trumble, Baty, and Etters. It is further noted that County Commissioner Morgan, who sits on the Planning Commission, moved the County Commission on June 3, 2010 to approve the thousands of dollars needed to fund an appeal to the Fourth Circuit Court of Appeals from the Federal Court's dismissal of the Planning Commission's lawsuit against FAF. (A.R. 468:9-23)

23. In the alternative, FAF, through counsel, asked that the matter be stayed so that FAF could seek a review of the matter through a writ of prohibition in the Circuit Court or other appropriate tribunal. (A.R. 470:9-16, and 764)

24. Counsel for FAF further stated, "This is a definite and direct conflict in my opinion and failure to recuse yourself would be in error." In answer to Mr. Smith's question about who should be recused, counsel stated: "...suppose it would go back to whether or not you have been involved or anyone else has been involved in any other discussions in executive session or discussions with – amongst the Commission regarding the FAF issue and anything related to the lawsuit." (A.R. 471:16-24)

25. Following an executive session and discussions with counsel for FAF, the members voted unanimously not to recuse themselves. This included Planning Commission members Maxey, Trumble, Ethers, Baty, and County Commission member, Frances Morgan, who constituted a majority or 5 out of the 9 members, refused to recuse themselves. (A.R. 475) The Planning Commission also unanimously refused to stay the case to allow the issue of recusal to be reviewed. (A.R. 478:10-12)

26. FAF, through counsel, also requested an extension of time pursuant to W. Va. Code §8A-5-12(f) which states as follows:

“Any subdivision or land development plan or plat, whether recorded or not yet recorded, valid under West Virginia law and outstanding as of January 1, 2010, shall remain valid until July 1, 2012, or such later date provided for by the terms of the planning commission or county commission’s local ordinance or for a longer period as agreed to by the planning commission or county commission. *Provided*, that the land development plan or plat has received at least preliminary approval by the planning commission or county commission by March 1, 2010.”

27. FAF further requested an extension of time based upon the Court’s ruling in *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W. Va. 436, 624 S.E.2d 873 (2005) wherein the Court stated:

“The trial court is hereby directed to enter an order approving the reissuance of the subject permits and adjust, where necessary, any time deadlines established in the Ordinance that may have passed during the pendency of this appeal so that the parties are not penalized for pursuing their statutory rights of appeal.”

Since FAF’s development had been delayed by litigation about 1876 days as of November 5, 2010, it was equitable for additional time to be added to the deadlines under the Zoning and Subdivision Ordinance.

28. In addition to failing to recuse themselves, the Commission by unanimous vote,

including the five tainted members, voted to deny the request for an extension of time pursuant to W. Va. Code §8A-5-12(f).

29. The Planning Commission then proceeded to hear a request for a variance which FAF filed at the request of the Planning Commission staff (although counsel made the argument subject to the position that the request for the variance was not needed since the extension of time was mandated pursuant to statutory and case law). Counsel further made the variance argument subject to the position that the request for recusal and stay should be granted pursuant to applicable conflict of interest laws and due process requirements of an unbiased adjudicator.

30. Following the presentation of arguments on the request for a variance, the request for variance was also denied by the Planning Commission.

31. On January 11, 2011, the Planning Commission moved to table acceptance of the December 14, 2010 minutes to the next meeting to give the Attorney and Staff an opportunity to revise the minutes, if necessary, to more closely correspond to the events that evening and to the legal document (Findings of Fact and Conclusions of Law) that the attorney was preparing.

32. At the January 25, 2011 Planning Commission meeting, the Commission again tabled the approval of the minutes of the December 14, 2010 meeting regarding FAF's variance request.

33. On March 22, 2011, the Planning Commission finally approved the minutes of the December 14, 2010 meeting, however, President John Maxey was not in attendance to sign the Order and, upon information and belief, did not do so until March 31, 2011.

34. Pursuant to an Order dated March 22, 2011, (which FAF did not receive until March 31, 2011) the decision was finally entered as a matter of record.

35. FAF had requested an Order from the Planning Commission following its hearing on numerous occasions. Upon information and belief, FAF believes that the Order was signed after March 22, 2011 since it was not received by FAF until March 31, 2011. (A.R. 497-498).²

² **Before the Planning Commission of Jefferson County, West Virginia**

In the Matter of: The Request by Far Away Farm, LLC for tolling of Deadlines and/or a Variance to Extend the expiration Date of the Community Impact Statement until March 2, 2015

On the 14th Day of December, 2010, the applicant, Far Away Farm, LLC, appeared and requested a tolling of the expiration date of the previously issued Community Impact Statement until March 2, 2015. In the alternative, the applicant requested a variance of the expiration date until the same date.

Prior to consideration the formal requests, applicant's counsel Nathan Cochran, Esquire, asked certain members of the Planning Commission recuse themselves because of their involvement in a lawsuit filed by the Planning Commission against the applicant. He specifically requested Mr. Maxey, Mr. Taylor, Mr. Trumble, Mr. Baty, Ms. Ethers, and Ms. Morgan recuse themselves. After an executive session to receive legal advice, each member individually declined to recuse themselves upon the record.

The Staff report was presented. The professional planning staff recommended denying the request for tolling until March 2, 2015 but recommended an extension July 1, 2012 as consistent with other recent extensions.

The Planning Commission then heard from the applicant on the merits of its requests for tolling and/or a variance to extend the expiration date of its Community Impact Statement. The heart of applicants request is that litigation caused delays to the project which justifies tolling of the deadlines on a day-for-day basis. During questioning, the applicant stated that it had made no progress on the project beyond the initial Community Impact Statement (CIS) and stated that the on-going litigation prevented further progress even during the periods of time in which litigation was not pending. Without waiving the claim for tolling, the applicant went on to set forth the basis for a variance addressing each of the four variance criteria as follows:

"1) The request is not contrary to public interest and that there would be public expense and time if the project had to start again from the beginning and that the development of the property had not been proven to violate any historic issues.

A literal enforcement of this Ordinance would result in an unnecessary hardship financially for the developer and require additional expense to the County.

The request is not the result of a self-imposed hardship due to the time in legal Proceedings which the applicant did not initiate.

The spirit of the Ordinance will be observed and substantial justice done because Far Away Farms had followed all the requirements presented to them in order to be allowed to proceed with the development."

The portion of the record of the Planning Commission meeting pertaining to this application and the official minutes thereof are incorporated herein by reference as if set forth in full herein.

36. FAF thereupon filed a Petition for Writ of Certiorari with the Circuit Court to obtain review of the Planning Commission's actions.

C. Events after the Petition for Writ of Certiorari in Case No. 11-C-125 was filed that led to the summary judgment from which this appeal arises in Case No. 11-C-325

37. Upon FAF filing the Petition for Writ of Certiorari in Case Number 11-C-125 arising from the December, 2010 meeting of the Planning Commission, and during subsequent briefing, the Petitioners in this case moved to intervene in the FAF Petition for Writ of Certiorari case. (Jefferson County Civil Action No. 11-C-125)

38. A hearing was held on June 28, 2011 wherein the Court heard argument on the issues in the certiorari case and also heard argument on the Motion to Intervene.

39. The parties in the certiorari Case Number 11-C-125 (the Planning Commission and FAF) meanwhile reached an agreement and settled the lawsuit. The Planning Commission met at a regularly scheduled meeting on or about July 26, 2011 (although the Planning Commission met in executive session to obtain their attorney's advice). FAF had sought an agreement from the Planning Commission granting equitable tolling of the deadlines pursuant to the principles in *Jefferson Utilities, supra*. Instead, the proposed agreed settlement order that came from the July 26, 2011 executive session meeting was a counter-offer to FAF signed by the

After questioning the applicant and after discussion and deliberation, the Planning Commission by unanimous vote, DENIED the tolling request because the applicant failed to convince the Planning Commission tolling of deadlines was justified. Furthermore, the Planning Commission DENIED the applicants request for a variance because the applicant failed to meet its burden to demonstrate that the request for variance satisfied all four variance requirements. Specifically, the applicant did not prove that granting the variance was in the public interest since granting the variance would allow the development to proceed under 30-year-old subdivision regulations that do not conform with the current subdivision regulations.

Planning Commission President and was faxed to FAF's counsel on July 27, 2011 (A.R. 372-374) and agreed to by FAF on or about July 29, 2011.

40. The Order memorializing the agreement and dismissing case number 11-C-125 was signed by the Circuit Court on August 3, 2011. (A.R. 284-287)

41. On October 26, 2011, Petitioners filed a Petition for Writ of Prohibition with the West Virginia Supreme Court of Appeals, seeking to effectively set aside this Court's August 3, 2011 Order.

42. On January 12, 2012, this Court rejected the Petition and dismissed the appellate case.

43. In the meantime, on September 9, 2011, Petitioners filed the lawsuit against the Planning Commission, in Case No. 11-C-325, but did not name FAF as a party.

44. On March 22, 2012, Petitioners notified FAF that the lawsuit from which this appeal arises (in Case No. 11-C-325) was proceeding to trial by sending a letter to FAF's counsel. (A.R. 499)

45. FAF moved to intervene on April 5, 2012 and was granted intervention status on May 22, 2012.

46. Petitioners moved for summary judgment on April 2, 2012. Both FAF and the Planning Commission filed counter motions on April 18, 2012.

47. The Jefferson County Circuit Court granted Petitioners' Motion for Partial Summary Judgment, holding that the July 26, 2011 Planning Commission meeting (executive session) violated the W. Va. Open Governmental Proceedings Act, W. Va. Code 6-9A-1, et seq. ("Open Meetings Act" herein)

48. Both FAF and the JCPC filed a petition for appeal with this Court in October of 2012.

49. This Court rejected the appeal as interlocutory, since the Circuit Court's Order Granting Summary Judgment to the Petitioners did not contain a remedy for the supposed violation.

50. The issue of the appropriate remedy therefore came back to the Circuit Court. After argument and further consideration, the Circuit Court corrected its own error in initially granting summary judgment to the Petitioners, and reversed its Order, denying the Motion for Summary judgment on November 8, 2013.

51. It is from that reversal and denial of summary judgment that the Petitioners now appeal.

II. SUMMARY OF ARGUMENT

The stated issue in the appeal is simple, even though it is wrong. The Petitioners claim that they, as concerned citizens, were improperly noticed about a meeting of the Planning Commission, amongst other technical issues.

But that is not the whole story.

The Planning Commission and FAF were negotiating a settlement of a case between them.³ The July 26, 2011 executive session meeting of the Planning Commission occurred in the

³ FAF had appealed a decision of the Planning Commission regarding the Planning Commission's decision to deny an extension of time for FAF to meet certain deadlines under the Jefferson County Subdivision Ordinance. FAF had requested this extension because protracted litigation (some of which had been initiated by the Planning Commission) had delayed the normal progression of the subdivision through the procedural steps of the Ordinance.

midst of those settlement negotiations. During the meeting, the Planning Commission met in executive session with its counsel to consider a settlement proposal that had recently been made by FAF. The Planning Commission then directed its counsel to return a settlement counter-offer to FAF. The FAF representative had not yet agreed to the terms that came out of the executive session, so the litigation was ongoing, and the Open Meetings Act did not require the Planning Commission to disclose the ongoing settlement negotiations at that point.

It was only after the Planning Commission's terms had been presented to FAF,⁴ subsequent to the executive session on July 26, 2011, that the FAF representative formally agreed to the terms. The settlement agreement was then signed by FAF, on or about July 29, 2011, (in the form of an Agreed Order) and then returned to counsel for the Planning Commission, who then presented the Agreed Order to the Court for signature.

The Circuit Court subsequently memorialized the agreement in an Agreed Settlement Order on August 3, 2011. The Agreed Settlement Order of August 3, 2011 was the culmination of the negotiated settlement between FAF and the Planning Commission.

The details of the July 26, 2011 executive session were not made public at the Planning Commission meeting, simply because the matter was in ongoing litigation, a settlement offer had recently been made to the Planning Commission by FAF, and the executive session amounted to settlement discussions about FAF's offer, and resulted, not in a settlement, but a counter-offer.

⁴ (A.R. 372-374) Note the proposed Order (Dated in the stamped fax header July 27, 2011 – the day after the July 26, 2011 executive session of which Petitioners complains) that contains the signature of the Planning Commission President. It does not contain the signature of Far Away Farm because the faxed copy was in fact a counter-offer, sent to Far Away Farm the day after the executive session.

Any perceived vagueness in the public notice could have made no difference since the petitioners who now claim to be aggrieved could not have been part of the executive session – both by law and by attorney client privilege.

That is the substance of the stated appeal, which amounts to no substance at all.

The Circuit Court (wrongly) granted summary judgment to the Petitioners in this case on June 19, 2012 as to a violation of the Open Meetings Act, (apparently based on an erroneous belief that a settlement was reached in the July 26, 2011 executive session). Both the Planning Commission and FAF appealed the initial grant of summary judgment in October of 2012.

Ultimately, this Court dismissed the October 2012 appeal as interlocutory, since the Circuit Court’s Order Granting Summary Judgment to the Petitioners crafted no remedy for the supposed violation.

The issue of the appropriate remedy then came back to the Circuit Court. After argument and further consideration, the Circuit Court corrected its own error in initially granting summary judgment to the Petitioners, and reversed its Order, denying the Motion for Summary Judgment on November 8, 2013. It is from that reversal that the Petitioners now appeal.

The real issue underlying the appeal is even simpler than the stated issue. FAF has been trying to develop its property since June, 2004. Some of these same persons who filed the appeal, (or those in league with them) have been trying to stop FAF since 2004, and have taken every opportunity to sue FAF in State and Federal court, apparently under a mistaken belief that the FAF property is a historical site.⁵

⁵ The issue of historicity has been laid to rest since the Circuit Court of Jefferson County ruled in 2006 in Civil Action No. 05-C-332, that the property is not within the definition of “historical” under the then existing 1988 ordinance. That ruling was never appealed and is *res judicata*. Of course, it is true that

This case is therefore less about truly concerned and injured citizens claiming a violation of the Open Meetings Act, but is more about yet another thinly veiled attack on FAF in an attempt to stop the development by any means necessary. In so doing, they assert they are aggrieved by not being notified of a settlement discussion held in executive session – a settlement discussion in a case where they were not yet parties, that they could in no wise have participated in, and in which even explicit personal notice by certified mail would have made absolutely no difference. And a case in which they - through counsel - received a copy of the Order containing the settlement terms within a few days after the Order was signed.

The Circuit Court correctly realized its mistake in initially granting summary judgment to the Petitioners on June 19, 2012, and then made that decision right by reversing itself and denying Plaintiffs' Motion for Partial Summary Judgment.

This Court should reject the appeal and recognize that FAF should be allowed to rely on the negotiated settlement agreement that it made with the public body, the Jefferson County Planning Commission. Even if there was a technical violation of the Open Meetings Act (which there was not), FAF should not be punished by this Court for relying on the action of the Planning Commission in its executive session. To do otherwise violates West Virginia public policy to uphold settlements and is unfair to FAF.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case contains issues of fundamental public importance about the exceptions to disclosure of information by public bodies pursuant to the Open Governmental Proceedings Act,

nearly every square foot of the Eastern Panhandle saw the presence of troops during the Civil War, and Far Away Farm is no exception. The core of the battlefield, however, is believed by FAF to be some distance from the Far Away Farm site.

W. Va. Code § 6-9A-1, et seq. (especially of ongoing settlement negotiations) and the Act's interplay with a government attorney's duties of representation and confidentiality. It is therefore appropriate for Rule 20 Argument.

IV. ARGUMENT

A. Standard of Review

The standard under an appeal from a decision pursuant to West Virginia Rules of Civil Procedure, Rule 60(b) is an abuse of discretion standard. In *Coffman v. West Virginia Division of Motor Vehicles*, Syl. Pts. 1-3, 209 W. Va. 736, 551 S.E.2d 658 (2001) this Court held:

1. "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual finding under a clearly erroneous standard. Questions of law are subject to a de novo review." Syllabus point 2, *Walker v. West Virginia Ethics Commission*, 201 W. Va. 108, 492 S.E.2d 167 (1997).
2. "A motion to vacate a judgment made pursuant to Rule 60(b), W.Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Syllabus point 5, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85
3. "In reviewing the judgment of a lower court this Court does not accord special weight to the lower court's conclusion of law, and will reverse the judgment below when it is based on an incorrect conclusion of law." Syllabus point 1, *Burks v. McNeel*, 164 W. Va. 654, 264 S.E.2d 55 (1996)

Id. at 209 W. Va. 737, 551 S.E.2d 659 (2001)

B. FAF has a right to rely on a negotiated settlement agreement

FAF has a right to be able to rely on the settlement agreement that was reached in the certiorari case, Civil Action No. 11-C-125. The Court should therefore uphold the Circuit

Court's October 8, 2013 Order reversing its own June 19, 2012 Order that Granted Summary Judgment to Petitioners.

Upholding the Circuit Court's August 3, 2011 and October 8, 2013 Orders will enforce the settlement agreement reached between FAF and the Planning Commission. Failure to do otherwise results in a disastrous precedent – no settlement or agreement between public bodies and a private party will be certain, and no planning commission attorney will be freely able to negotiate settlements with a public body without reporting negotiations on the public record, even before a settlement is finalized – thereby abrogating the confidentiality of settlement negotiations authorized in the Open Meetings Act and the Planning Commission's attorney-client privilege.

Settlement agreements are conclusive and enforceable as any other contract:

9. “ ‘Where parties have made a settlement ..., such settlement is conclusive upon the parties thereto as to the correctness thereof in the absence of accident, mistake or fraud in making the same.’ Syllabus point 1, in part, *Calwell v. Caperton's Adm'rs*, 27 W.Va. 397 (1886).” Syllabus point 7, *DeVane v. Kennedy*, 205 W.Va. 519, 519 S.E.2d 622 (1999).

Certain Underwriters at Lloyd's, London, Subscribing to Policy No. B0711 v. Pinnoak Resources, LLC, 223 W.Va. 336, 339, 674 S.E.2d 197, 200 (W.Va., 2008)

There was no accident, mistake or fraud in the settlement reached between FAF and the Planning Commission. FAF relied on the settlement when it gave up its rights in the certiorari case to accept the Planning Commission's July 26, 2011 counter-offer and enter into the settlement. Part of the rights FAF gave up included an extension of FAF's deadlines based on an

equitable tolling of these deadlines, caused by the litigation that has plagued this project.⁶ While FAF sought the extension based on the equitable tolling principle in *Jefferson Utilities*, FAF ultimately agreed to the counter-offer presented to it on July 27, 2011 by the Planning Commission in the form of the Agreed Settlement Order. (A.R. 588-590): By giving up its rights, settling the certiorari case, and relying on the settlement agreement, FAF entered into a good faith contract with the Planning Commission which should be enforced by the Court.

It is undisputed that FAF's giving up its legal right to pursue the certiorari case was consideration for entering into the contract with the planning commission. *Cochran v. Ollis Creek Coal Co.*, 157 W.Va. 931, 206 S.E.2d 410 (1974). The settlement was therefore enforceable as a contract and Petitioners should be stopped from asserting otherwise.

West Virginia public policy encourages settlement. 'The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.' Syl. Pt. 1, *Sanders v. Roselawn Mem'l Gardens, Inc.*, 152 W.Va. 91, 159 S.E.2d 784 (1968)." Syllabus point 5, *Riner v. Newbraugh*, 211 W.Va. 137, 563 S.E.2d 802 (2002).

It is therefore the public policy of West Virginia to uphold settlements unless the settlement meets one of two exceptions – either (1) the settlement is unfair, or (2) it violates the law or public policy of West Virginia.

⁶ This concept was utilized by the Supreme Court in *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d 873 (2005), where the Court extended the deadlines in that case, stating "the trial court is hereby directed to enter an order approving the reissuance of the subject permits and adjust, where necessary, any time deadlines established in the Ordinance that may have passed during the pendency of this appeal so that the parties are not penalized for pursuing their statutory rights of appeal."

Here, there is no allegation that the settlement was unfairly made as between the parties, so the settlement does not fall under that first exception.

As to the second exception, and contrary to Petitioner's claims, the settlement was not made in contravention of law or public policy, for two reasons.

First, the public policy of West Virginia encourages settlements, as stated above.

Second, this particular settlement was "not in contravention of some law or public policy" *Id.* because the settlement did not violate the Open Meetings Act - instead, it conformed to the Act, as FAF discusses in the next section of this brief.

This Court will punish FAF if it reverses the Circuit Court's October 8, 2013 Order – and for no fault of FAF. Instead, the Court should uphold the Circuit Court's October 8, 2013 Order reversing summary judgment and thereby enforce the settlement agreement.

C. The Circuit Court correctly recognized that the Planning Commission did not violate the Open Meetings Act

The Planning Commission was well within its rights to obtain legal counsel, and to consult with that legal counsel as part of the settlement of a lawsuit to which it was a party. The Open Meetings Act allows what is, in effect, an exception from the public disclosure provisions of the Act for an executive session:

To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the freedom of information act as set forth in article one, chapter twenty-nine-b of this code.

W. Va. Code § 6-9A-4(12)

Because of the ongoing settlement negotiations in an active lawsuit, (which Petitioners admit⁷ in their appeal brief were not concluded until the Circuit Court signed the Order approving settlement on August 3, 2011), the Planning Commission is entitled by statute^{8 9} to meet confidentially to discuss settlements and obtain the advice of its counsel.

⁷ Petitioners affirmatively state that “there was no evidence that the settlement was concluded on any date but August 3, 2011.” (See Petitioner’s brief at p. 21)

⁸ The petitioner relies heavily on the Open Governmental Meeting Committee’s Advisory Opinions. However, the Open Meetings Act statute (W. Va. Code, § 6-9A-4) would doubtless trump the advisory opinions, and there seems to be no definitive ruling that states that the Advisory Opinions bind this Court in its decision under the statute, which would be a dubious proposition. Of course, the Advisory Opinions do provide the Planning Commission some basis for a claim of good faith if the Planning Commission relies on them. The Petitioners have no similar ability to rely on them.

⁹ *Peters v. County Com'n of Wood County*, 205 W.Va. 481, 489, 519 S.E.2d 179, 187 (W.Va., 1999), contains a definitive analysis of the operations of the open meetings act. However, *Peters* seem to have been absorbed into the revised open meetings act that was enacted the same year as *Peters* has been superceded by statute, then the Planning Commission’s argument in this case – i.e., that it had an absolute right to confer with counsel and that the Open Meetings Act did not require disclosure of the settlement negotiations under the circumstances of this case – is made stronger. Nonetheless, in *Peters*, this Court found that the attorney-client privilege applies to executive sessions under the Act “The common law of our state clearly recognizes the attorney-client privilege. See n. 9, *supra*. Thus, the attorney-client privilege falls within the parameters of the phrase “otherwise provided by law.” *Id* at 205 W.Va. 481, 489, 519 S.E.2d 179, 187 (W.Va., 1999). This Court also developed or reaffirmed the standard for privileged communications under the Open Meetings Act:

Accordingly, we hold today that privileged communications between a public body subject to the requirements of the Open Governmental Proceedings Act, West Virginia Code §§ 6-9A-1 to -7 (1993 and Supp.1998), and its attorney are exempted from the open meetings requirement of the Act. Such executive session may be closed to the public only when the following statutory requirements are met: 1) a majority affirmative vote of the members present of the governing body of the public body, as required by West Virginia Code § 6-9A-4; 2) the notice requirements as found in West Virginia Code § 6-9A-3 shall be followed; and, 3) the written minutes requirements as found in West Virginia Code § 6-9A-5 shall be followed. However, a public agency is not permitted to close a meeting that otherwise would be open merely because an agency attorney is present.

Peters v. County Com'n of Wood County, 205 W.Va. 481, 489, 519 S.E.2d 179, 187 (W.Va., 1999)

In defining the nature and extent of the Attorney Client Privilege within the Open Meetings Act, this Court balanced the competing need for privacy versus open government. The *Peters* Court observed:

And, since a settlement agreement is fundamentally just a contract, and it is hornbook law that a contract has to have both an offer and an acceptance based on consideration, there was no settlement to announce after the executive session concluded on July 26, 2011. There was merely a counter-offer, in the midst of ongoing litigation, that the Planning Commission was fully protected from disclosing by the terms of the Open Meetings Act. The settlement did not exist until FAF ultimately accepted the agreement and signed the proposed Agreed Order on or about July 29, 2011.

And, since a part of the settlement was that the case would be dismissed, and the dismissal did not occur until the Court signed the Agreed Order on August 3, 2011, the settlement was not fully finalized or official until August 3, 2011.

The Planning Commission's executive session meeting of July 26, 2011 therefore met the requirements of W. Va. Code § 6-9A-4(12). There is no violation; instead, the Planning Commission is effectively exempt from the open meetings requirement by statute.

However, as set forth below, even if the Court were to analyze the Petitioners' issues

In drawing the line between those conversations outside the requirements of the Open Governmental Proceedings Act, W.Va. Code, 6-9A-1, *et seq.*, and those meetings that are within it, a common sense approach is required; one that focuses on the question of whether allowing a governing body to exclude the public from a particular meeting would undermine the Act's fundamental purpose.

While it is clear that the Act's fundamental purpose is to ensure the right of the public to be fully informed regarding the conduct of governmental business, it is also clear that to require every gathering between members of public body to be open will "hamper the functioning of any government entity."

Peters v. County Com'n of Wood County, 205 W.Va. 481, 487, 519 S.E.2d 179, 185 (W.Va., 1999) citing *McComas v. Board of Education*, 197 W.Va. 188, 475 S.E.2d 280 (1996) at 197, 475 S.E.2d at 289.

under the statute, there was still no violation.

1. There was an Announcement of Authorization of Executive Session

First, there was a majority affirmative vote by the Planning Commission to go into executive session, as reflected in the meeting minutes for July 26, 2011. Paragraph 10 of the minutes¹⁰ state:

Reports from Legal Counsel and legal advice to PC.

Mr. Smith moved to go into executive session to discuss legal matters. Mr. Burns seconded the motion which carried unanimously. The executive session began at 9:09 PM.

The procedure utilized by the Planning Commission substantially complied with West Virginia Code § 6-9A-4, which states in sub paragraph (a) and (b) in relevant part that:

(a) The governing body of a public agency may hold an executive session during a regular, special or emergency meeting, in accordance with the provisions of this section. 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.

(b) An executive session may be held only upon a majority affirmative vote of the members present of the governing body of a public agency. A public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions:

While Planning Commission member Smith did not cite a specific chapter of the West Virginia Code, he did “identify the authorization” by saying that the executive session was to

¹⁰ (A.R. 292)

“discuss legal matters” – which does provide the authorization for the session within the meaning of the statute.

2. The Agenda notice was adequate.

The Planning Commission agenda contained a notice that the Planning Commission intended to meet to discuss legal issues. The Agenda for the July 26, 2011 meeting states:

“10. Reports from Legal Counsel and legal advice to PC.”¹¹

While the Agenda is not extremely specific, the public was notified that the Planning Commission intended to obtain legal advice. Since the litigation between FAF and the Planning Commission was ongoing at that time, and settlement was being discussed back and forth between the parties at various times, it was certainly within reason not to be overly specific, simply because it is the nature of settlement negotiations not to disclose the terms to persons outside the litigation. In fact, to reveal the nature and extent of the negotiations would violate the attorney-client privilege and negate the entire public policy reason for executive sessions.

It is important to realize that, had the Petitioners been sitting in the July 26, 2011 Planning Commission meeting, it would have made no difference, since Petitioners had no right, authority, or ability to act or even speak in the executive session, since it is closed to the public.

The executive session was likewise closed to FAF. No persons other than the Planning Commission and their counsel were allowed to attend. Consequently, the dozens of trees that have died so far in this case have made no difference to the outcome, nor could they have, no matter what specific “notice” was provided to the Petitioners. Petitioners’ arguments to the contrary are pure speculation. Likewise, Petitioner’s numerous arguments that the perceived

¹¹ (A.R. 987, at fn 11).

violation cannot be remedied, other than by setting aside the entire agreement, are likewise spurious since the perceived violation has and could have had no effect on the Petitioners.

The Court should likewise consider FAF's rights. FAF has been in litigation almost continuously in this case since 2004. FAF has simply tried to create a lawful subdivision by following the development procedures promulgated by Jefferson County to obtain the right to develop its property. FAF has followed those development procedures throughout the tortured history of this development. However, disregarding FAF's rights to act in its own interest with its own property, time and again, some of the Petitioners or those in league with them have spared no expense in their dogged attempt to thwart this development.

While FAF will not repeat the entire convoluted history of this case at this point, some highlights include:

- A failed Petition by Dunleavy and Moore for a Writ of Certiorari to the United States Supreme Court, claiming that the West Virginia Supreme Court did not have the authority to remand the ultimate decision of the Board of Zoning Appeals to the Planning Commission for further review.
- A direct lawsuit by the Planning Commission against FAF in Federal District Court, claiming that the West Virginia Supreme Court somehow violated the Planning Commission's rights - in a frivolous attempt to hold FAF responsible for the actions of the West Virginia Supreme Court in its purported violation of the Planning Commission's rights.

The Federal suit by the Planning Commission against FAF leads to the underlying reason that FAF is now before this Court. FAF requested an extension of planning and zoning deadlines since FAF was effectively unable to proceed through the normal development process while tied up in litigation – especially litigation initiated by the Planning Commission against FAF. When FAF appeared before the Planning Commission (which has since partly changed membership) to request the extension of deadlines, FAF requested that the Planning Commission members who

were involved in the direct lawsuit against FAF recuse themselves from the consideration of FAF's request – hardly an unreasonable request, since those members were on the Planning Commission when the Planning Commission had sued FAF directly in Federal Court and FAF reasonably believed that they were prejudiced against FAF's interests. Not only did the Planning Commission deny FAF's request for extension of deadlines, but the Planning Commission also denied the very basic request to recuse the members of the Planning Commission who were actively involved in the lawsuit against FAF.

It is for this reason that FAF filed the Petition for Certiorari before the Circuit Court, and subsequently settled the lawsuit as a result of the Planning Commission's July 26, 2011 counteroffer agreeing to provide an extension to time to FAF because of the intervening litigation.

Since the litigation between FAF and the Planning Commission was ongoing at that time, and the one purpose of the executive session was to discuss FAF's settlement proposal, with the resultant counter offer by the Planning Commission, the agenda notice was reasonable.

3. The reporting of the settlement was timely

The Planning Commission met the requirements of the statute because the disclosure of the settlement was timely. According to W. Va. Code §6-9A-4(11): "If a public agency has approved or considered a settlement in closed session and the terms of the settlement permit disclosure, the terms of the settlement shall be reported by the public agency and entered into the minutes within a reasonable time after the settlement is concluded." This section clearly allows a public body to discuss litigation in closed session but merely requires that the settlement terms be reported a reasonable time after the settlement is concluded.

The terms of the settlement were disclosed.

First, the terms were disclosed in the public record of the Circuit Court after the Court signed the Order.

Second, it is undisputed that Petitioners received word of the settlement – in fact, a copy of the Agreed Order containing the complete terms of the settlement only a few days after the settlement was finalized on August 3, 2011. (A.R. 278 at #19) How then can Petitioners claim to be harmed, or that the settlement was not reported, when Petitioners received word of the settlement only a few days after it was finalized?

Finally, the Planning Commission placed the settlement in the Planning Commission record on October 11, 2011, when minutes¹² were published that reflected the requirements of W. Va. Code § 6-9A-5. That Code section provides for minutes to be prepared and states:

. . . minutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting.

W. Va. Code § 6-9A-5

Since the settlement was not official until the Circuit Court signed the Agreed Order on August 3, 2011, the delay is not unreasonable, and Petitioners were not harmed thereby.

Nothing shows the Petitioners' real purpose in this entire lawsuit as a continuation of their attack on FAF more than this point, since Petitioners – through their counsel - had the signed August 3, 2011 Order in their possession just days after the Order was signed, yet Petitioner's appeal on this issue is based on the claim that the official settlement agreement was not attached to the October 11, 2011 minutes, (though the Planning Commission remarked in its

¹² (A.R. 1096 at #9)

minutes that it was doing so). How is this a violation of the Act, especially when the Petitioners had the terms in hand for about two months at that time? So Petitioners claim on this issue that they are injured by the supposed failure of the Planning Commission to attach the Settlement Agreement to its October 11, 2011 minutes, when the Petitioners had the actual Settlement Agreement in their hands for about two months prior to the October 11, 2011 meeting – hardly a valid claim.

And, the Circuit Court found, in its supplemental Order dated November 26, 2013, that the disclosure of the settlement terms did not violate the reporting requirements, under the facts of this case, especially because of the public Settlement Order and the fact that the Petitioners were in possession of the Settlement Order within a few days after August 3, 2011.

Consequently, the Planning Commission met the requirements of the statute because the disclosure of the settlement was timely, and Petitioner's claim is spurious.

D. The Circuit Court's Order Granting Partial Summary judgment was based on the Court's perception of a material disputed fact

The Circuit Court's Order Granting Partial Summary judgment (the reversal of which is the basis for the instant appeal) is based in part on a material disputed fact that precludes summary judgment. That disputed fact is the Court's manifest belief that a final settlement was made at the Planning Commission's meeting on July 26, 2011.

The Circuit Court's Order granting summary judgment is predicated throughout on the concept that a final decision and settlement of the case was reached by the Planning Commission at the July 26, 2011 meeting. *See* the Order Granting Petitioner's Motion for Partial Summary Judgment (A.R. 786-797), where the Court states in its Findings of Fact #5 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 settlement* reflected in the aforesaid Agreed Settlement Order.” (Emphasis added)

Other provisions support the conclusion that the Circuit Court’s Order Granting Partial Summary Judgment is predicated on a material disputed fact – a fact that was made known to the Court in FAF’s Opposition to Petitioner’s Motion for Partial Summary Judgment and FAF’s Cross Motion for Summary Judgment. (A.R. 559-612)

Note the following statements in the Court’s Order Granting Partial Summary Judgment to Petitioners:

- The Court finds that the relevant facts are not in dispute ... the clear expressed provisions of the act leave no room for doubt that the conduct of the Planning Commission in relation to the *approval of an Agreed Settlement Order* ... was a violation. (Emphasis added)
- The Planning Commission then emerged from that executive session to make its decision – that is, to *approve the proposed Agreed Order to resolve* Civil Action No. 11-C-125. (Emphasis added)
- There is nothing in the act which suggests that the fact that a *settlement has been made* is, itself, allowed to be concealed. (Emphasis added)
- The Planning Commission also violated the act when they concealed that it had *approved an agreed settlement* in the Far Away Farm case. (Emphasis added)

Consequently, the Circuit Court apparently believed that the Planning Commission finalized an agreement at the July 26, 2011 meeting, when in fact, the Planning Commission merely authorized its President to sign an Order in the nature of a counter-offer, which, if it was accepted by FAF and approved by the Court, would resolve the case.

More importantly for this case, the issue as to whether the certiorari case was formally

settled at the July 26, 2011 meeting matters, since that may have triggered a disclosure requirement – but the ongoing settlement negotiations and counter-offer did not trigger a disclosure requirement. The Court's apparent belief that the matter was settled resulted in the Court's apparent belief that a settlement had been reached in the Planning Commission meeting of July 26, 2011 – and an erroneous grant of summary judgment to Petitioners, over a materially disputed fact.

Petitioner's newfound assurance (and judicial admission) that the settlement actually occurred on August 3, 2011 bolster's respondent's case, since it proves that there was no final settlement at the time of the July 26, 2011 Planning Commission meeting and supports Respondent's statement that negotiations were under way at that time, cumulating and resulting in the August 3, 2011 Order.

Petitioners cannot have it both ways. Either the Circuit Court was factually correct in its Order granting Partial Summary Judgment, and the issue between the JCPC and FAF was settled on July 26 2011, in which case there is a disputed fact over when the settlement occurred, (and whether the Planning Commission should have announced the settlement at that meeting, thus precluding summary judgment), and the Petitioner is wrong about that.

Or the underlying case was not settled until August 3, 2011, in which case the settlement was actually under negotiation at the July 26, 2011 meeting, and the Petitioners are wrong about the need for public notice disclosure of the contents of the executive session, in which case there is no Open Meeting Act violation (which is the true state of affairs).

Said another way, if there is no dispute about when the settlement occurred, and the settlement actually was finalized on August 3, 2011 (which all parties apparently now concede),

there could have been no violation of the Open Meetings Act on July 26, 2011, since the matter was merely brought before the Planning Commission in executive session for the settlement consideration and counter-offer, therefore under the exception provisions of W. Va. Code §6-9A-4(12) and, as stated above, any required notice provisions (if any were required) were adequately met.

E. The *de minimus* nature of the remedy

The Circuit Court did not directly rule on the *de minimus* nature of the remedy and the Petitioner's remedies, but instead correctly recognized the unpersuasive arguments raised by Petitioners below and commented that it would have granted FAF's motion *below* to limit remedy based on what is, at most, a *de minimus* violation, ". . . no sanction appeared to be merited in light of both the *de minimus* nature of said violation and the [Jefferson County Planning Commission's] efforts to cure the violation." (A.R. 1239 at p. 2)

Since the Court did not directly rule on the *de minimus* nature of the purported violation, there is no basis for an appeal on this point.

However, this Court should consider the Circuit Court's apparent recognition that this case is much ado about very little in its consideration of the issues presented herein.

In the alternative, if the Court's observation amounts to a ruling, then this Court should give the factual finding of the Circuit Court the deference it deserves. The standard of review in the factual findings of the Circuit Court under a "clearly erroneous standard." Syl. Pt. 1, *Coffman v. West Virginia Division of Motor Vehicles*, 209 W. Va. 736, 551 S.E.2d 658 (2001). Therefore, the violation, if it existed at all, (which FAF does not concede) is *de minimus*, and the Court

should not invalidate the proceedings below to address this *de minimus* violation, but should at most admonish the Planning Commission to be more careful in its notices.

Even assuming without admitting that there was a technical violation of the Open Meetings Act, the question for the Circuit Court was this: What is the remedy?

Petitioners requested that the Court take the most extreme remedy available under the statute, which is to enter summary judgment in favor of Petitioners and effectively void the Planning Commission decision. This, the Circuit Court initially did in its June 19, 2012 Order, but corrected itself in its October 8, 2013 Order.

But let us engage in a hypothetical. What if the Petitioner is correct that a technical violation occurred? How would the legal landscape now be different?

We know that the Petitioners were aware that the Planning Commission made the erroneous decision that led to FAF filing the initial Petition for Writ of Certiorari. We know this because Petitioners filed a Motion to Intervene in that certiorari case (though they did not appear at the Planning Commission meeting that led to the Petition for Writ of Certiorari being filed).

And, we know that, with regard to the Planning Commission's July 26, 2011 meeting, even if:

- (1) Petitioners or their counsel had been sent a notice by certified mail that the Planning Commission was to consider a specific settlement proposal of that case regarding Far Away Farm, and
- (2) Even if Petitioners had been provided a copy of the proposed settlement prior to the July 26, 2011 Planning Commission meeting, and
- (3) Even if the Planning Commission had read a copy of the proposed settlement into the record prior to entering into executive session, and

that it would have made absolutely no difference in the legal landscape of the case at this point, for this simple reason – even if all of the above had been done prior to the Planning Commission’s July 26, 2011 executive session meeting, Petitioners would still not have been allowed to sit in on the executive session, and would not have been allowed to have a part in the decision by the Planning Commission to send FAF their proposed counter-offer to settle the case.

And, we also know that Petitioners were not a party to the case between the Planning Commission and FAF at the time the parties agreed to settle the case.

Because of all of the above, the “issues” that Petitioners insist were such egregious violations of the Open Meetings Act make absolutely no difference in the legal landscape of this case.

V. CONCLUSION

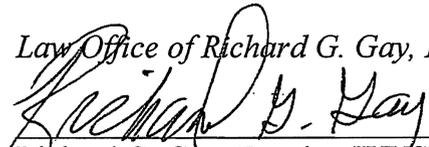
FAF has the right to rely on a negotiated settlement agreement that it made in its lawsuit against the Planning Commission. Additionally, there was no violation of the Open Meetings Act and the Circuit Court was in error to grant summary judgment to Petitioners on June 19, 2011. The Court recognized and corrected this error in its October 8, 2013 60(b) Order. There is therefore nothing to appeal, because the error has been corrected. In the alternative, if there was a violation, (which FAF denies) the violation was *de minimus* and does not merit any sanction beyond an admonishment of the Planning Commission.

Based on the foregoing, the Circuit Court’s October 8, 2013 Order should be upheld, and the actions of the Planning Commission in settling the case as set forth herein should be declared lawful and the settlement agreement upheld.

For the same reasons, this Court should award FAF its costs and attorney fees in this matter.

Respectfully submitted,
Far Away Farm, LLC,
Respondent, by Counsel.

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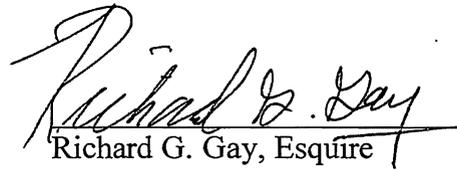
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CERTIFICATE OF SERVICE

I, Richard G. Gay, Esquire and/or Nathan P. Cochran, Esquire, do hereby certify that a true and accurate copy of the foregoing **FAR AWAY FARM'S RESPONSE BRIEF** was deposited into the U.S. mail on this 8th day of May, 2014 contained in a postage prepaid envelope addressed to all counsel for all other parties to this appeal as follows:

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