

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

DONALD E. LARGENT,

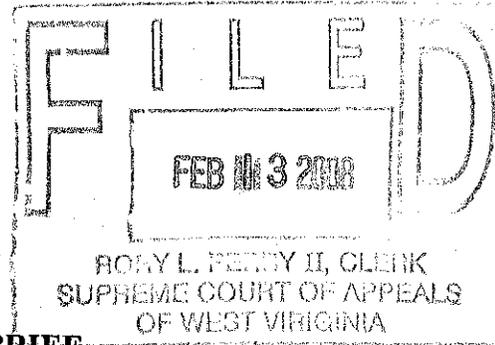
Appellant

v.

Appeal No. 33832

ZONING BOARD OF APPEALS
FOR THE TOWN OF PAW PAW
AND THE TOWN OF PAW PAW,
a municipal corporation,

Appellees.



APPELLANT'S BRIEF

Michael L. Scales, Esquire
Greenberg & Scales, P.L.L.C.
314 W. John Street
P.O. Box 6097
Martinsburg, WV 25402-6097
(304) 263-0000
WV Bar No. 3277

Counsel for Appellant

February 12, 2008

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

DONALD E. LARGENT,

Appellant

v.

Appeal No. 33832

ZONING BOARD OF APPEALS
FOR THE TOWN OF PAW PAW
AND THE TOWN OF PAW PAW,
a municipal corporation,

Appellees.

APPELLANT'S BRIEF

NOW COMES Appellant, Donald E. Largent, by counsel, Michael L. Scales, Esquire and the law firm of Greenberg & Scales, P.L.L.C., of Martinsburg, West Virginia, and respectfully presents Appellant's Brief pursuant to Rules 10(a) and Rule 28 of the Rules of Appellate Procedure, as follows:

**I. KIND OF PROCEEDING AND NATURE OF THE RULING
IN THE LOWER TRIBUNAL**

Appellant, Plaintiff below, filed a Complaint for Declaratory Relief against the Appellees in the Circuit Court of Morgan County, West Virginia, seeking to have the Zoning Ordinance of the Town of Paw Paw, West Virginia declared void *ab initio* on the grounds that the Appellees never adopted a comprehensive plan either prior to nor contemporaneous with the enactment of their zoning ordinance as required under §8-24-16 through 19 of the West Virginia Code of 1931, as amended. The parties below made cross-motions for summary judgment to the Circuit Court of Morgan County, West Virginia; and the Circuit Court granted Appellees' Motion for

Summary Judgment, and stated on the record that at the hearing on May 10, 2007, that §8A-7-12 of the *Code* was a “savings” statute for zoning ordinances adopted prior to Chapter 8A of the *Code* in 2004, which abrogated Article 24, Chapter 8 of the *Code*. A summary judgment order dated June 4, 2007 was entered from the May 10, 2007, hearing, granting Appellees’ Motion for Summary Judgment and denying Appellant’s Motion for Summary Judgment. From that final order, Appellant respectfully appeals to this Honorable High Court.

II. STATEMENT OF FACTS OF THE CASE

Appellant is a resident of Morgan County, West Virginia, and is the owner in fee of an undivided one-half (1/2) interest in approximately seventy (70) acres, along with his spouse who is the owner of the other undivided one-half (1/2) interest, which real estate is within the town limits of the Town of Paw Paw, Morgan County, West Virginia, and is subject to the zoning ordinance which was first adopted by the Town of Paw Paw in 1972.

Appellant’s property is zoned under the zoning maps for the Town of Paw Paw under the classification of “COS”, which refers to a conservation open district, and generally is not permitted to be developed. Appellant appeared at a meeting of the Appellee, Zoning Board of Appeals for the Town of Paw Paw, and requested a zoning variance and/or zoning map change to change the zoning map of the Town of Paw Paw for Appellant’s property to “RC” district, representing an area for uses of residential/commercial, and generally permitting development.

Appellant’s request was denied by the Appellee, Zoning Board of Appeals, by letter dated March 4, 2006. Appellant then filed a declaratory judgment action against Appellees in the Circuit Court seeking to have the zoning ordinance struck down because the Town of Paw Paw has never adopted a comprehensive plan.

During the discovery phase of the civil action below, Appellant made the following requests for admissions pursuant to WVRCP Rule 36, and the following responses by Appellees were made thereto:

1. That the Town of Paw Paw did not adopt a comprehensive plan either contemporaneous with nor prior to the adoption of its Zoning Ordinance.

RESPONSE: Admit.

2. That the Town of Paw Paw has never adopted a comprehensive plan that conforms to the requirements of §8-24-16 and 17 of the West Virginia Code.

RESPONSE: Admit.

3. That the Town of Paw Paw has never adopted a comprehensive plan that conforms to the requirements of §8A-3-3 and §8A-3-4 of the West Virginia Code.

RESPONSE: Admit.

Appellant filed a Motion for Summary Judgment with the Circuit Court below asking the Circuit Court to hold the zoning ordinance for the Town of Paw Paw void *ab initio* on the grounds that there was never a comprehensive plan adopted prior to nor contemporaneous with the adoption of its zoning ordinance. The Circuit Court denied the Motion for Summary Judgment and granted Appellees' Cross-Motion for Summary Judgment. From that decision, Appellant respectfully appeals to the Honorable Justices of this High Court.

III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL

1. That a zoning ordinance may not be adopted by a municipality [or a county commission] unless and until a comprehensive plan has been adopted; and the zoning ordinance may be adopted either contemporaneously with or after the adoption of a comprehensive plan which conforms to the provisions of that comprehensive plan.

2. That §8A-7-12 of the *Code* [2004] requires that all prior zoning ordinances which were adopted by municipalities [or county commissions] prior to the enactment of Chapter 8A of the *Code* must be “legally adopted under prior acts” in order to be grandfathered and continue to be enforced under Chapter 8A of the *Code* as lawful, which includes the necessity of the adoption of a comprehensive plan for zoning ordinances enacted after the Urban and Rural Planning and Zoning Act of 1959, re-codified in 1969 in Article 24, Chapter 8 of the *Code*.

IV. MANNER IN WHICH THE ASSIGNMENTS OF ERROR WERE DECIDED IN THE LOWER TRIBUNAL

1. At the May 10, 2007 Summary Judgment hearing, the Circuit Court ruled that §8A-7-12 of the *Code* was a “savings” statute; and that if the Town of Paw Paw’s Zoning Ordinance was adopted prior to the adoption of Chapter 8A of the *Code* in 2004, then it is lawful under Chapter 8A of the *Code*.
2. That statutes §8-24-16 through §8-24-19 of the *Code* were repealed in 2004; and even if they were enforceable at the time of the enactment of the Town of Paw Paw’s Zoning Ordinance in 1972, they do not stand for the propositions which are asserted by Appellant.
3. That at the time of the first enactment of the Town of Paw Paw’s Zoning Ordinance in 1972, §8-24-1, *et seq.* of the *Code* contained no mandatory requirement for the adoption of a comprehensive plan prior to or contemporaneous with a zoning ordinance.

V. POINTS AND AUTHORITIES RELIED UPON ON APPEAL

Appellant relies upon the following points and authorities:

1. §8-24-16 to §8-24-19 of the West Virginia *Code* of 1931, as amended (1969);

2. §8-24-49 of the West Virginia *Code* of 1931, as amended (1969);
3. §8A-7-12 of the West Virginia *Code* of 1931, as amended (2004);
4. The Urban and Rural Planning and Zoning Act of 1959, re-codified in 1969 in Article 24, Chapter 8 of the *Code*;
5. *Singer v. Davenport*, 164 W.Va. 665, 667-68, 264 S.E.2d 637, 640 (1980);
6. *State ex rel. MacQueen v. City of Dunbar*, 167 W.Va. 91, 94, 278 S.E.2d 636, 638 (1981);
7. *Grady v. City of St. Albans*, 171 W.Va. 18, 20-21, 297 S.E.2d 424, 426-27 (1982);
8. *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 708, 398 S.E.2d 532, 534 (1990);
9. *McFillan v. Berkeley County Planning Comm'n*, 190 W.Va. 458, 462-63, 438 S.E.2d 801, 805-06 (1993);
10. *Harrison v. Town of Eleanor*, 191 W.Va. 611, 618, 447 S.E.2d 546, 553 (1994); and,
11. *Lower Donnally Ass'n v. Charleston Mun. Planning Com'n*, 212 W.Va. 623, 626-27, 575 S.E.2d 233, 236-37 (2002);

VI. DISCUSSION OF LAW

A. The Circuit Court misinterpreted §8A-7-12 of the *Code* [2004] because if a zoning ordinance was not properly adopted at the time it was enacted, it will not be “saved” by §8A-7-12 of the *Code*.

The Circuit Court below took the position that §8A-7-12 of the *Code* [2004] was a “savings” statute for all zoning ordinances adopted prior to that time, including the 1972 act adopted by the Appellees¹.

¹ The Summary Judgment Order entered by the Circuit Court on June 4, 2007 suggests that the statutory procedures under Article 24, Chapter 8 of the *Code* were adopted **after** the Appellees’ Zoning Ordinance in 1972. Article 24, Chapter 8 of the *Code* was initially adopted by the Legislature in 1959 as part of the Urban and Rural Planning and Zoning Act of 1959, and re-codified in 1969, three years before the Town of Paw Paw’s Zoning Ordinance was first adopted.

The Circuit Court's decision appears to totally disregard the provision of §8A-7-12 of the *Code* which states as follows: "...legally adopted under prior acts". Appellant asserted below that the Town of Paw Paw's Zoning Ordinance was not entitled to a "savings" provision because its zoning ordinance was not "legally adopted under prior acts", being specifically §8-24-16 through 19, inclusive, of the *Code*. This appears to be the only reasonable interpretation of that provision because §8A-7-1, *et seq.*, of the *Code* [2004] substantially changes the zoning ordinance and comprehensive plan requirements, but does not render improperly enacted zoning ordinances valid and lawful which were invalid and unlawful based upon the enabling statute in effect at the time of their adoption.

This conclusion must be reached based upon a review of the prior statute which was adopted at the time at which the original 1959 act was adopted under §8-24-49 of the *Code*. This Honorable High Court need look no farther than to compare §8-24-49 of the *Code* with the present statute §8A-7-12 of the *Code* [2004] that those two statutes grandfathering prior zoning ordinances are virtually the same except the last sentence of §8-24-49 of the *Code* states as follows: "These ordinances shall have the same effect as though previously adopted as a comprehensive plan of land use or parts thereof." The new statute, §8A-7-12 of the *Code* does not contain that provision. Apparently, the Legislature recognized that it was possible that prior to 1959, there may be zoning ordinances adopted in municipalities which were not predicated upon a comprehensive plan since the requirement for a comprehensive plan prior to or contemporaneous with the adoption of the zoning ordinance was a new provision in the 1959 act; and, for zoning ordinances adopted prior to 1959, those ordinances *themselves* would be considered comprehensive plans and not abrogated by the adoption of the 1959 act requiring comprehensive plans. However, the Town of Paw Paw may not benefit from that statute because the first adoption of its zoning ordinance was 1972, and clearly after the 1959 act was adopted by

the Legislature requiring comprehensive plans contemporaneous with or prior to the adoption of a zoning ordinance.²

This Honorable High Court has struck down zoning and land use ordinances which have not been properly enacted under prior enabling acts as with the case where a municipality failed to give proper statutory publication and public notice of the pendency of the adoption of a zoning ordinance. *Cf., Grady v. City of St. Albans*, 171 W.Va. 18, 20-21, 297 S.E.2d 424, 426-27 (1982).

Here, Appellant asserts that Paw Paw's Zoning Ordinance was not "legally adopted under prior acts", because a comprehensive plan was not adopted contemporaneous with nor prior to the adoption of the zoning ordinance itself. The Appellees' responses to requests for admissions below admitting that it has never adopted a comprehensive plan is fatally defective to its zoning ordinance that was first passed in 1972.

B. A municipality which has adopted a zoning ordinance under Article 24, Chapter 8 [1959] and re-codified in 1969, must have enacted a comprehensive plan contemporaneous with or prior to the zoning ordinance; and the Town of Paw Paw has never adopted a comprehensive plan so its zoning ordinance must be struck down as unlawful.

The prior act involved is the enabling act provisions of §8-24-16 of the *Code* through §8-24-19 of the *Code*, which enable a county planning commission or municipality to adopt a zoning ordinance based upon a comprehensive plan.

§8-24-16 of the *Code* is mandatory: "A planning commission *shall make and recommend for adoption to the governing body of the municipality...a comprehensive plan...*". [Emphasis added here]³.

§8-24-19 of the *Code* states as follows:

² This Honorable High Court discussed this matter in *Lower Donnally Ass'n v. Charleston Mun. Planning Com'n* 212 W.Va. 623, 627, 575 S.E.2d 233, 237 (2002)

³ The Legislature has reiterated the necessity of adopting a comprehensive plan before a zoning ordinance in the 2004 amendments. See §8A-7-1(a)(1) of the *Code* [2004].

§8-24-19. Comprehensive plan for physical development of territory – Adoption by commission.

After a public hearing has been held, the commission may by resolution adopt the comprehensive plan and recommend the ordinance to the governing body of the municipality or to the county court.

Hence, the enabling act procedures, §8-24-16 through §8-24-19 of the *Code*, require the adoption of a comprehensive plan before the planning commission may recommend a zoning ordinance to the governing body of the municipality, who may adopt or reject the zoning ordinance.

Consequently, if there is no comprehensive plan, the planning commission of the municipality may **NOT** recommend the ordinance to the governing body of the municipality.

This Honorable High Court has repeatedly stated that a comprehensive plan is necessary before a land use ordinance may be enacted. In the often cited case of *Singer v. Davenport*, 164 W.Va. 665, 264 S.E.2d 637 (1980), wherein the developers brought suit challenging the county planning commission's power to deny an application to record a plat for a residential development, this High Court in the opinion, 164 W.Va. at 667-68 and 264 S.E.2d at 640, stated as follows:

The first issue which we must address is whether the developer's plan conflicts with the Jefferson County Comprehensive Plan. The argument that the subdivision failed to comply with the restrictions on lot size in the comprehensive plan is not compelling since the Commission failed to mention such a problem in their letter of 14 March 1977 which rejected the proposal. If indeed the subdivision lot size conflicted fatally with the comprehensive plan one wonders why the Commission allowed the hearings to progress in such detail. However, even if the comprehensive plan were shown directly to conflict with the subdivision, our Court agrees with the lower court's interpretation of the statutory scheme, namely that ***the comprehensive plan is to be used by the Planning Commission to aid them in drawing up their subdivision ordinances.*** The comprehensive plan was never intended to replace definite, specific guidelines; instead, ***it was to lay the ground work for the future enactment of zoning laws.*** Where the lower court's two-step inquiry into the validity of a rejection of a subdivision proposal seems to suggest that the comprehensive plan has

any effect as a legal instrument, we respectfully disagree.

It is stipulated that the voters of Jefferson County have defeated every attempt to enact a countywide zoning ordinance. When the voters have rejected zoning ordinances, the Planning Commission may not enforce zoning under the guise of the comprehensive plan. It would be absurd to suggest that the consultants who drew up the comprehensive plan were empowered to determine the future land use of Jefferson County. This interpretation is supported in the conclusion of the comprehensive plan when the consultants state that “[t]he single and most important tool for Plan Implementation is a zoning ordinance. Immediate consideration shall be given to the enactment of the proposed ordinance to provide the County with a legal instrument for controlling development in accordance with the Land Use Plan”. Jefferson County Comprehensive Plan, Phase II, 115 (1971). ***Thus, the comprehensive plan is merely the foundation for the control of future development and growth in Jefferson County.*** [Emphasis added here].

Hence, the importance of a comprehensive plan was dictated by this High Court that it is “the ground work for future enactment of zoning laws”, which presupposes that there must be a comprehensive plan adopted prior to or contemporaneous with the enactment of a zoning ordinance.

This Honorable High Court was even more emphatic as to the role of enacting a comprehensive plan prior to or in concert with the enactment of a land-use ordinance in the decision in *McFillan v. Berkeley County Planning Com'n*, 190 W.Va. 458, 462-463, 438 S.E.2d 801, 805-806 (1993), which stated as follows:

The Regulations at issue in this case are subdivision regulations enacted pursuant to W.Va. Code, 8-24-28 through -35. Among these statutory provisions is the following requirement contained in W.Va. Code, 8-24-33 (1969):

“After a comprehensive plan and ordinance containing provisions for subdivision control and the approval plats and re-plats have been adopted and a certified copy of the ordinance has been filed with the clerk of the county court [county commission] as aforesaid, the following in recording of a plat involving the subdivision of lands covered by such comprehensive plan ordinance shall be without legal effect unless approved by the commission”. [Emphasis added in original].

The subdivision control provisions are part of a larger statutory scheme dealing with planning, zoning, and development of a comprehensive plan. See W.Va. Code, 8-24-1, *et seq.* Initially, under W.Va. Code, 8-24-1 (1969), the “governing body of every municipality and the county court [county commission] of every county may by ordinance create a planning commission”[.] The creation and composition of municipal and county planning commissions are outlined in W.Va. Code, 8-24-5 (1986), and W.Va. Code, 8-24-6 (1986). Under W.Va. Code, 8-24-16, a planning commission “**shall make and recommend for adoption to the governing body...a comprehensive plan for the physical development of a territory within its jurisdiction**”.

It is clear from the comprehensive nature of the provisions in W.Va. Code, 8-24-1, *et seq.* that the historic distinction which we have made between the planning and zoning has been largely obliterated because **both concepts are now incorporated into a comprehensive plan.** W.Va. Code, 8-24-39 (1988), gives broad zoning authority power over a variety of difference subjects. Moreover, a comprehensive subdivision plan under W.Va. Code, 8-24-28, may contain both zoning and building restrictions through its use of the term “comprehensive plan”.

Thus, we believe that under W.Va. Code, 8-24-1, *et seq.*, the governing body of a municipality or the county commission may create a planning commission to develop a comprehensive plan for zoning, building restrictions, and subdivision regulations. Thereafter, the governing body or the county commission may adopt all or parts of such a comprehensive plan. [Emphasis added here].

The statutory scheme to which this Court refers is that which includes §8-24-16 of the Code, which states as follows:

§8-24-16. Comprehensive plan for physical development of territory – Generally

A planning commission shall make and recommend for adoption to the governing body of the municipality or to the county court, as the case may be, a comprehensive plan for the physical development of the property within its jurisdiction. Any county plan may include the planning of towns or villages to the extent to which, and the commission’s judgment, they are related to the planning of the unincorporated territory of the county as a whole: Provided, That The plan shall not be considered as a comprehensive plan for any town or village without the consent of any planning commission and the governing body of such town or village. The county plan shall be coordinated with the plans of the state road commission, insofar as it relates to highways or thoroughfares under the jurisdiction of that commission. A county planning commission may prepare, and the county court is empowered and authorized to adopt, a comprehensive plan and zoning ordinance for either the entire

county, or for any part or parts thereof which constitute an effective region or regions for which planning and zoning purposes without the necessity of adopting a plan and ordinance for any other part... [Emphasis added here].

In the preparation of a comprehensive plan, a planning commission shall make careful and comprehensive surveys and studies of the existing conditions and probable future changes of such conditions within the territory under its jurisdiction. The comprehensive plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the area which will, in accordance with present, future needs and resources, best promote the health, safety, morals, order, convenience, prosperity or general welfare of the inhabitants, as well as efficiency and economy in the process of development, including, among other things, such distribution of population and the uses of land for urbanization, trade, industry, habitation, recreation, agriculture, forestry and other purposes as will tend...

The statutory scheme clearly reflects that without a comprehensive plan, a zoning ordinance may not be enacted.

§8-24-18 of the *Code* requires a public hearing on the comprehensive plan and proposed zoning ordinance for its enforcement.

§8-24-19 of the *Code* requires that a public hearing be held, and the planning commission by resolution, adopt the comprehensive plan and recommend the ordinance to the governing body of the municipality or to the county court.

In the case of *State ex rel. MacQueen v. City of Dunbar*, 167 W.Va. 91, 94, 278 S.E.2d 636, 638 (1981), this Honorable High Court, in striking down a provision of the City of Dunbar's zoning ordinance permitting an amendment to that ordinance by a referendum from the citizens, stated that the procedures in adopting an amendment to a zoning ordinance ***must follow the enabling statute***, as follows:

[W]e find that the procedure for adoption of all amendments to a comprehensive plan or ordinance is clearly set forth in *W. Va. Code*, 8-24-23 [1969] which says that "after the adoption of a comprehensive plan and ordinance, all amendments to it shall be adopted according to the procedures set forth in §§ 18 through 22 of this article...". Under *Code*, 8-24-18 through -22 [1969] there is no provision for a public referendum and the involvement of the public is limited to public hearings at which objections to the adoption of the plan may be voiced...

It is clear that this Honorable Court believes that the procedures employed for adopting both zoning ordinances and amendments thereto must strictly adhere to the enabling statute.

In the case of *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 708, 398 S.E.2d 532, 534 (1990), this Honorable High Court found that the City of Parkersburg Zoning Ordinance was properly enacted "...based upon a comprehensive plan", and footnote 1 therein, described the statutory provisions for adopting the comprehensive plan [W.Va. Code, §8-24-16 to -27] as well as the adoption of the zoning ordinance thereafter [W.Va. Code, §8-24-39 to -71].

In the case of *Lower Donnally Ass'n v. Charleston Mun. Planning Com'n*, 212 W.Va. 623, 627, 575 S.E.2d 233, 237 (2002), this Honorable High Court again addressed the statutory requirements for adopting a zoning ordinance when it stated as follows:

[T]he statute vests in the planning commission the duty to prepare the comprehensive plan after possible consideration of a long list of factors, and requires that any amendments to the plan after it has been adopted be considered under the procedures set forth in the statute for the initial adoption of the comprehensive plan. The final adoption of the comprehensive plan is left to the city council or county commission. However, pursuant to West Virginia Code §8-24-22 (1969), if the council or commission amends or rejects the plan, it must return it to the planning commission with a written statement of reasons for its action for review by the planning commission. The planning commission in turn may consider those reasons and submit a response to the city council or county commission, which body then has the final say regarding amendment, adoption or rejection of the plan. The statute further provides that any amendment, supplement or change of the rules and regulations of the *zoning ordinance* adopted by city council or county commission constitutes an amendment of the *comprehensive plan*.

In the process of adopting the comprehensive plan or a later amendment to it, the planning commission is required to publish notice of and hold a hearing. If the planning commission wishes to sanction the plan or amendment to it after the hearing, the planning commission is required by West Virginia Code §8-24-19 (1969) to "*adopt*" the plan or amendment by resolution and "*recommend*" the enabling ordinance to the city council or county commission. Of course, only a city council or county commission may "*adopt*" or enact the ordinance enacting or amending the comprehensive plan. However, if a city council or county commission initially rejects or amends the recommendation of a planning commission, even with dealing only with an amendment to a

previously adopted comprehensive plan, it is required to adhere to the above-related provisions of West Virginia Code §8-24-22 (1969). In other words, a city council or county commission in such circumstances is to submit its action to the planning commission, with a statement of its reasons, for further consideration by the planning commission (conceivably by both again “*adopting*” the plan or amendment and “*recommending*” it) and possible re-submission to the city council or county commission, as the case may be. [Emphasis added here].

Hence, it is eminently clear that the adoption of a comprehensive plan must take place before any zoning ordinance is adopted. *Id.*, 212 W.Va., at 626 and 575 S.E.2d, at 236, when this Honorable High Court stated:

The 1959 legislature scheme for full implementation of the planning and zoning activities of cities and counties *contemplates an initial adoption of a comprehensive plan for a city or county*, the consequent development of subdivision regulations and their adoption, *followed by a zoning ordinance drawn in accord with the comprehensive plan* [Emphasis added here].

Lastly, this Honorable High Court in the case of *Harrison v. Town of Eleanor*, 191 W.Va. 611, 618, 447 S.E.2d 546, 553 (1994) in determining whether a certain ordinance of the Town of Eleanor which contained certain setback requirements was a building code ordinance or a zoning ordinance, stated the following in distinguishing the two:

[W]hile West Virginia Code §8-24-1 grants municipalities the authority to create planning or zoning commissions and to enact comprehensive zoning plans, the appellant has never undertaken to establish either a planning or zoning commission or *to enact a comprehensive plan*. This fact establishes additional support for Ordinance 75-2 being a building rather than a zoning ordinance, **given that the implementation of these statutory mechanisms necessary to and are an integral part of the enactment of zoning.** [Emphasis added].

This Honorable Court has again clearly stated that the implementation of a comprehensive plan is “an integral part of the enactment of zoning”.

Because the original enabling statute provisions requiring a comprehensive plan were first adopted in 1959 and re-codified in 1969 by the Legislature, and the fact that the Town of Paw Paw’s Zoning Ordinance was first adopted in 1972, the adoption by the Town of Paw Paw

of its zoning ordinance was undoubtedly under the authority granted in the 1959 act, §§8-24-16 through -19 of the *Code*, requiring a comprehensive plan to be adopted before its zoning ordinance.

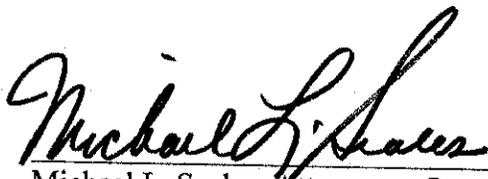
VII. CONCLUSION

Because the Appellees have never adopted a comprehensive plan, Paw Paw's zoning ordinance must be struck down as not being legally adopted under prior acts §8-24-16 through §8-24-19 of the *Code*, pursuant to §8A-7-12 of the *Code* [2004].

Because the Appellees have admitted that they have never adopted a comprehensive plan in their responses to requests for admissions, there are no factual issues remaining. Appellant prays that this Honorable High Court remand this case to the Circuit Court of Morgan County, West Virginia with instructions to Circuit Court of Morgan County, West Virginia to grant Appellant's Motion for Summary Judgment, and strike down the zoning ordinance of the Town of Paw Paw as being unlawful and void *ab initio* for the lack of the adoption of a comprehensive plan.

Most respectfully submitted.

Donald E. Largent, Appellant
By Counsel



Michael L. Scales, Attorney at Law
Counsel for Appellant
Greenberg & Scales, P.L.L.C.
314 W. John Street; P.O. Box 6097
Martinsburg, WV 25402-6097
(304) 263-0000
WV Bar No. 3277

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

DONALD E. LARGENT,

Appellant

v.

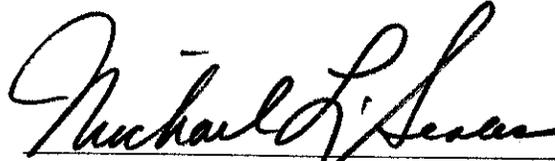
Appeal No. 33832

ZONING BOARD OF APPEALS
FOR THE TOWN OF PAW PAW
AND THE TOWN OF PAW PAW,
a municipal corporation,

Appellees.

CERTIFICATE OF SERVICE

I, Michael L. Scales, Attorney for Appellant, Donald E. Largent, do hereby certify that I have served a true copy of the foregoing APPELLANT'S BRIEF upon Appellees, by mailing a true copy thereof to their counsel, Christopher D. Janelle, Esquire, at his address of Sutton & Janelle, P.L.L.C., 125 E. King Street, Martinsburg, WV 25401, this 12th day of February, 2008.



Michael L. Scales, Attorney at Law