

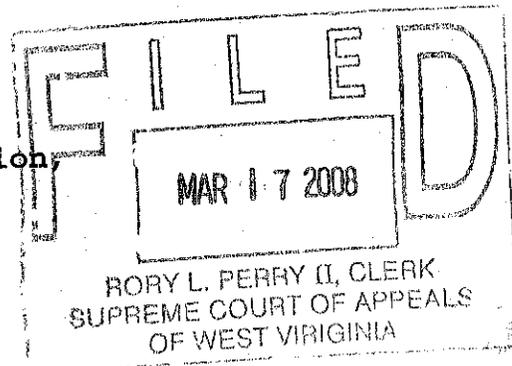
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
AT CHARLESTON

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.



APPELLEES' REPLY BRIEF

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Counsel for Appellees

Submitted: March 13, 2008

COME NOW the Appellees, Zoning Board of Appeals for the Town of Paw Paw and the Town of Paw Paw, by their counsel Christopher D. Janelle, Esq. And Sutton & Janelle, P.L.L.C. and for their reply to Appellant's Appeal Brief, state as follows:

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

Appellees concur in the statement set forth in Appellant's Appeal Brief.

STATEMENT OF FACTS

Appellees concur in the statement set forth in Appellant's Appeal Brief.

RESPONSE TO ASSIGNMENTS OF ERROR

1. It was not error for the Circuit Court to rule that, at the time of enactment, there was no requirement for a separate comprehensive plan to be enacted prior to or contemporaneous with a zoning ordinance.

2. It was not error for the Circuit Court to determine that, since the Town of Paw Paw zoning ordinance was lawfully adopted

prior to 2004, West Virginia Code § 8A-7-12 continues the ordinance in effect.

POINTS AND AUTHORITIES RELIED UPON

- West Virginia Code § 8-24-3(b) (1959);
- West Virginia Code §§ 8-24-16 to 19 (1959);
- West Virginia Code §§ 8-24-28 to 35 (1959);
- West Virginia Code §§ 8-24-39 to 65 (1959);
- West Virginia Code § 8A-7-4(a) (2004);
- West Virginia Code § 8A-7-5(a) (2004);
- West Virginia Code § 8A-7-12 (2004).

DISCUSSION OF LAW

The Appellees' position in this matter is quite simple. At the time that the Town of Paw Paw enacted its zoning ordinance, in 1972, there was no requirement in law for the prior or contemporaneous enactment of a separate comprehensive plan. Regardless of any alleged changes in that requirement thereafter, West Virginia Code § 8A-7-12 (2004) explicitly validates the prior ordinance.

Appellant's Complaint below alleged that, for various reasons associated with the recently enacted West Virginia Code § 8A-1-1,

et seq., and its predecessor statute found at § 8-24-1, et seq., the Town of Paw Paw zoning ordinance is void.

The Town of Paw Paw zoning ordinance has been in effect since 1972. At the time of enactment of the ordinance, West Virginia Code § 8-24-17 contained no mandatory components for a comprehensive plan. Even if it had, § 8-24-19 contained no requirement for the adoption of same prior to the adoption of a zoning ordinance. While that code section does refer to an "ordinance", the language of § 8-24-18, when read *in pari materia*, makes clear that this refers to the ordinance adopting the comprehensive plan, and not a zoning ordinance.

Further proof of the lack of a requirement for a pre-existing comprehensive plan appears in West Virginia Code §§ 8-24-39 through 65. These statutes existed under an entirely separate subpart of Article 24 of Chapter 8 of the Code, styled "*Part VIII [through Part XVII]. Urban and Rural Zoning*". It is critical to note that nowhere in these sections does there appear so much as one reference to a requirement for a pre-existing comprehensive plan.

In contrast, West Virginia Code §§ 48-24-28 through 35 (referred to as "*Part V: Subdivision Control*") dealt with subdivision control, and more specifically plat approval. Section 28 thereof stated:

"After a comprehensive plan and an ordinance containing provisions for subdivision control and the approval of plats and replats have been adopted by the governing body of the municipality or by the county court ... a plat of a subdivision shall not be recorded by the clerk of such county court unless it has first been approved by the planning commission having jurisdiction over the area." (Emphasis added).

In this part of the then-existing overall scheme of planning and zoning, it is clear that the legislature intended to create a clear requirement for a comprehensive plan and subdivision ordinance prior to the approval of subdivision plats. Comparable language is glaringly and fatally absent from *Part VIII* of chapter 48.

West Virginia Code §8-24-3(b) defined a "comprehensive plan" as, "a complete comprehensive plan or any of its parts, *such as a comprehensive plan of land use and zoning...*" (Emphasis added). This definition indicates that no separate, previously adopted document was necessary under the then-existing statute prior to the lawful adoption of a zoning ordinance. To put it succinctly, the two documents could be one in the same. It is crucial to note that in the 2004 amended Land Use Planning statutes, West Virginia Code §8A-1-1, et seq., this language was deleted from the definition of "comprehensive plan"<sup>1</sup>.

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The definition of "comprehensive plan" in the 2004 enactment states:

A comparison of the general purposes of a comprehensive plan per West Virginia Code §8-24-16 and the Town of Paw Paw zoning ordinance itself is also instructive. The statute then in existence provided that:

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 and 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 of the uses of land for urbanization, trade, industry, habitation, recreation, agriculture, forestry and other purposes as will tend:

(1) To create conditions favorable to health, safety, transportation, prosperity, civic activities, and recreational, educational and cultural opportunities;

(2) To reduce the waste of physical, financial or human resources which result from either excessive congestion or excessive scattering of population; and

(3) Toward the efficient and economic utilization, conservation and production of the supply of food and water and of drainage, sanitary and other facilities and resources.

The Town of Paw Paw zoning ordinance, which Appellant claims

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"Comprehensive Plan" means a plan for physical development, including land use, adopted by a governing body, setting forth guidelines, goals and objectives for all activities that effect growth and development in the governing body's jurisdiction.

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West Virginia Code § 8A-1-2(c) (2004).

violates West Virginia law because it was not enacted after a separate comprehensive plan, states as its purpose the following:

The purpose of the following chapters in this title are the following:

- (a) Protection of the health, safety and general welfare of the present and future citizens of the town.
- (b) Promotion of the economic stability and growth of the community.
- (c) Provision for appropriate, efficient and compatible land use.

Ordinance to Regulate Planning and Zoning, Town of Paw Paw, April 4, 1972.

In keeping with the definition of a comprehensive plan as set forth in the statute, the goals of the Town of Paw Paw ordinance and those espoused in the code are identical. By the then-existing statutory definition, "comprehensive plan" and a zoning ordinance may be one in the same. In this case, the comprehensive plan is the town's zoning ordinance.

In comparing the sections of the West Virginia Code dealing specifically with zoning ordinances in the 1959 version (West Virginia Code §§ 8-24-39 through 65) with the 2004 version (West Virginia Code §§ 8A-7-1, et seq.) the newly enacted requirement for a separate, previously approved comprehensive plan is obvious. The 2004 statutes specifically refer to the comprehensive plan as a

prerequisite to a zoning ordinance in two instances:

*"After the adoption of a comprehensive plan and before enacting a zoning ordinance, a governing body with the applicable planning commission must study the land within its jurisdiction..."* West Virginia Code § 8A-7-4(a) (2004) (emphasis added); and

*"After the study and the report, and before the governing body enacts the proposed zoning ordinance, the governing body shall hold at least two public hearings and give public notice..."* West Virginia Code § 8A-7-5(a) (2004) (emphasis added).

At the time the Town of Paw Paw enacted its zoning ordinance in 1972, these requirements simply did not exist. When enacted, then, the zoning ordinance at issue was legally adopted.

The language of West Virginia Code § 8A-7-12, enacted in 2004, as follows, is clear and unambiguous:

All zoning ordinances, all amendments, supplements and changes to the ordinance, legally adopted under prior acts, and all action taken under the authority of the ordinance, are hereby validated and the ordinance shall continue in effect until amended or repealed by action of the governing body taken under authority of this article.

Accordingly, when the Town of Paw Paw zoning ordinance was adopted, it was legally adopted and it is expressly validated by the clear language of West Virginia Code § 8A-7-12.

Appellant, while citing cases which touch on various aspects of planning and zoning, cannot cite one single point of law which required that a separate document known as a comprehensive plan be adopted prior to or contemporaneous with a zoning ordinance. The

cases cited do appear to presuppose that a comprehensive plan often precedes a zoning ordinance. However, that is far different from Appellant's proposition that same was *required* in 1972.

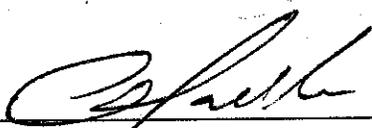
Appellant goes to great lengths to attempt to weave together a non-existent statutory requirement. His Petition states time and again that a comprehensive plan must be in effect prior to the enactment of zoning. At each and every citation, however, it is important to note that the cases and statutes Appellant relies upon do not stand for this proposition. Had the legislature intended for the comprehensive plan to be a mandatory prerequisite, or had this Court so held, there would be clear language to that effect in then existing law. The legislature clearly added such language to the 2004 zoning laws, but specifically validated prior, lawfully adopted ordinances.

#### CONCLUSION

Appellant essentially asks this Court to create a new requirement, heretofore nonexistent, for the passage of a separate comprehensive plan before the passage of a zoning ordinance. In so doing, Appellant would have this Court potentially invalidate an ordinance around which the Town of Paw Paw has been developed for the past thirty four years.

WHEREFORE, Appellees respectfully pray that the judgment of the Circuit Court of Morgan County be affirmed.

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municipal corporation,  
BY COUNSEL



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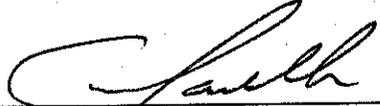
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CERTIFICATE OF SERVICE

I, Christopher D. Janelle, do hereby certify that a true copy of the foregoing REPLY BRIEF OF APPELLEES has been served upon the following named counsel of record, by United States first class mail, this 13<sup>th</sup> day of March, 2008.

Michael Scales, Esquire  
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Post Office Box 6097  
Martinsburg, WV 25402

  
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Christopher D. Janelle