

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

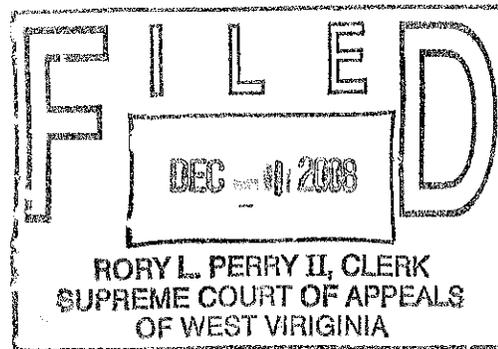
THE COUNTY COMMISSION OF
JEFFERSON COUNTY, a public body;
ARCHIBALD M. S. MORGAN, member;
DALE MANUEL, member;
JAMES SURKAMP, member;
GREGORY CORLISS, member;
FRANCES MORGAN, member,
Appellants,

Supreme Court Docket No.: 3458

*(Jefferson County Circuit Court Case
No. 05-C-143)*

v.

JEFFERSON COUNTY CITIZENS
FOR ECONOMIC PRESERVATION,
a non-profit corporation,
Appellee.



APPELLANTS' BRIEF
SEEKING REVERSAL OF LOWER COURT'S ORDER

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

This is an appeal seeking a reversal of the decision of the Jefferson County Circuit Court set forth in its Order, entered February 26, 2008 (hereinafter cited as “Order”), wherein the court granted summary judgment in favor of the Petitioner below and invalidated several 2005 amendments to the Jefferson County Zoning Ordinance (hereinafter cited as “Ordinance”). This Order was in part based on the Court’s interpretation of the Ordinance set out in the Court’s February 21, 2007 order. The relief sought is reinstatement of the amendments to the Ordinance.

STATEMENT OF FACTS

The Ordinance was originally adopted on July 7, 1988. Since that date it has been amended approximately twenty times. In 2004, the legislature made a major revision to the zoning statutes. It repealed *W. Va. Code § 8-24-1 et seq.* and passed chapter 8A. Chapter 8A went into effect 90 days after March 13, 2004. This chapter has a validation section in which an old ordinance would continue to be lawful until amended by action of the County Commission under the authority of Chapter 8A:

“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under the authority of the ordinance, are hereby validated and the ordinance shall continue in effect until amended or repealed by action of the governing body taken under authority of this article.”

W. Va. Code, § 8A-7-12 (2004).

On March 23, 2005 the Jefferson County Commission (hereinafter “Commission”) adopted an amended Ordinance that complies with Chapter 8A. These amendments went into effect on April 8, 2005 at 5:00 p.m.

Prior to adopting these amendments, the Commission together with the Jefferson County Planning Commission held two public hearings regarding the amendments. Notice was published in the Spirit of Jefferson Advocate on February 3, 2005 and February 10, 2005 for public hearings on February 23, 2005 and February 24, 2005 at 7:00 p.m. The hearings were to be at the Jefferson County Meeting Room on the ground floor of the Old Charles Town Library, at 200 East Washington Street, Charles Town, West Virginia. Notice also informed the public that the proposed amendments may be reviewed at the County Commission office or on the County Commission website.

On February 23, 2005 the first public hearing was held on the ground floor of the Old Charles Town Library at 7:00 p.m. regarding the amendments to the Ordinance. According to the minutes of that meeting, Mr. Mike Shepp, President of the Jefferson County Citizens for Economic Preservation (hereinafter "JCCEP"), the Petitioner below, was present at this hearing. All members of the County Commission were present. Planning Commissioners Arnie Dailey, Rosella Kern, Tom Kane, John Sims, and Bill Lewandowski were also present.

Due to a snow storm, the second public hearing for the proposed amendments was continued to March 3, 2005. This hearing was also held on the ground floor of the Old Charles Town Library at 7:00 p.m. At this hearing, according to the minutes, Lee Snyder appeared on behalf of the JCCEP. All members of the Commission were present. Arnie Dailey, Rosella Kern, Tom Kane, Dan Marken, John Sims, and Bill Lewandowski, Renny Smith, and Russell Roper of the Planning Commission were also present.

The March 22, 2005 agenda for the Jefferson County Planning Commission advertised the Planning Commission's consideration of the proposed amendment's consistency with the Comprehensive Plan. On March 22, 2005 the Jefferson County Planning Commission voted

unanimously that the amendments to the zoning ordinance were consistent with the Comprehensive Plan.

Following the County Commission's official adoption of the amendments on March 23, 2005, and their effective date of April 8, 2005, JCCEP filed suit in the Circuit Court of Jefferson County seeking to have the amendments deemed invalid. The Circuit Court ultimately found for the Petitioner below and entered an Order on February 26, 2008 (granting JCCEP's motion for summary judgment) invalidating the amendments. It is from this Order that the County Commission appeals to this Court.

ASSIGNMENTS OF ERROR

- A. The Circuit Court Erred in Finding that the Repealed W.Va. Code § 8-24-1, et seq., Applied to the Ordinance Amendment Process Rather than W.Va. Code § 8A-1-1, et seq.
- B. The Circuit Court Erred in Finding that the County Commission Failed to Comply with W.Va. Code § 8-24-19 through § 8-24-21 in Amending the Ordinance

POINTS AND AUTHORITIES RELIED UPON

Cases

State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.,

194 W.Va. 770, 461 S.E.2d 516 (1995).

Chrystal R.M. v. Charlie A.L.,

194 W.Va. 138, 459 S.E.2d 415 (1995).

Statutes

W.Va. Code § 8A-7-10(b)

W.Va. Code § 8A-7-12

W.Va. Code § 8-24-18 (repealed)

W.Va. Code § 8-24-19 (repealed)

W.Va. Code § 8-24-20 (repealed)

W.Va. Code § 8-24-21 (repealed)

W.Va. Code § 8-24-22 (repealed)

W.Va. Code § 8-24-23 (repealed)

STANDARD OF REVIEW

The circuit court's decision to grant a motion for summary judgment is subject to plenary review. See *Syl. Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of statute, we apply a *de novo* standard of review.” *Syl. Pt. 1, Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

DISCUSSION OF LAW

A. THE CIRCUIT COURT ERRED IN FINDING THAT THE REPEALED W.VA. CODE § 8-24-1, *ET SEQ.*, APPLIED TO THE ORDINANCE AMENDMENT PROCESS RATHER THAN W.VA. CODE § 8A-1-1, *ET SEQ.*

The Circuit Court's Order created an interaction between the Jefferson County Zoning Ordinance and state law that defies their logical and concurrent application. The Court essentially ruled that, since the Zoning Ordinance was enacted under *W.Va. Code § 8-24-1, et seq.* (which has been repealed), Chapter 8A has no bearing whatsoever (in perpetuity) unless and until a new ordinance is adopted pursuant to 8A rather than § 8-24-1, *et seq.* This misapplication of the law should be reversed by this Court.

Chapter 8A allows an ordinance adopted under *W.Va. Code § 8-24-1, et seq.*, to continue in effect after its passage, and validates prior actions:

“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.*” [emphasis added]

W.Va. Code § 8A-7-12. Further, *W.Va. Code § 8A-7-10(b)* states:

“All zoning ordinances, and all amendments, supplements and changes thereto, legally adopted under any prior enabling acts, and all actions taken under the authority of any such ordinances, are hereby validated and continued in effect ***until amended or repealed by action of the governing body of the municipality or the county taken under authority of this article***.”

[emphasis added]

In the instant case, the governing body amended a section of the Ordinance relating to the ratio of permitted lots per acre in the rural zone. The amendment decreased the number of lots permitted per acre. It is important to note that all action regarding this amendment occurred after 8A went into effect. After the amendment was proposed, two public hearings were held on the issue, on February 23, 2005 and March 3, 2005. Present at both hearings were representatives of the Petitioner. This amendment process was done in accordance with 8A, as required therein.

In accordance with the emphasized passages from 8A, cited above, the governing body amended the Ordinance under authority of 8A, which does not require a public hearing.

The Circuit Court found that, since the Ordinance references § 8-24-1, *et seq.*, that its requirement for a hearing on ordinance amendments trumps 8A in this regard unless and until the Ordinance is amended in accordance with 8A. This finding does not comport with the clear language and intent of 8A. To accept the Court’s position would be to enforce any provision of an existing ordinance, regardless of the fact that such provision may contravene state law. That existing ordinances and prior acts under such ordinances may be validated by 8A does not mean that any provisions in such ordinances may continue in effect absolutely and contravene state law.

W.Va. Code § 8-24-1 through *§ 8-24-85* have been repealed effective June 11, 2004 and recodified in *8A*, so they have no application to the facts of this case. Therefore, the Circuit Court erred in finding that the repealed statute, rather than Chapter *8A*, applied to the Ordinance amendment process.

B. THE CIRCUIT COURT ERRED IN FINDING THAT THE COUNTY COMMISSION FAILED TO COMPLY WITH W.VA. CODE § 8-24-19 THROUGH § 8-24-21 IN AMENDING THE ORDINANCE

While the Commission maintains that Chapter *8A* applied to the amendment procedure contrary to the Circuit Court's February 21, 2007 Order, it nevertheless complied with *W.Va. Code § 8-24-1, et seq.*, in amending the Ordinance. Accordingly, the Circuit Court erred in finding that the Commission failed to comply with *W.Va. Code § 8-24-1, et seq.*

Incorporating *W.Va. Code § 8-24-1, et seq.*, § 12.2 of the Ordinance stated:

“(a) After the adoption of this ordinance, all amendments to it shall be adopted according to the procedures set forth in sections eighteen through twenty-three of Chapter 8, Article 24 of the West Virginia Code, as amended; except that public publication of notice of the date, time and place of hearing upon amendment of the zoning ordinance need by only fifteen or more days prior to the date set for such hearing; and except that if the County Commission desires an amendment, it may direct the Planning and Zoning Commission to prepare an amendment and submit it to the public hearing with sixty (60) days after formal written request by the County Commission.”

Section 12.2 of the Ordinance is taken directly from *W.Va Code § 8-24-23*, entitled “Amendment of plan and ordinance after adoption.” Both require the compliance with *W.Va. Code § 8-24-18* through *W.Va. Code § 8-24-22* when amending the Ordinance. It should be noted, however, that *W.Va. Code § 8-24-18* through *W.Va. Code § 8-24-22* require a public

hearing prior to amending a zoning ordinance; Chapter 8A contains no such public hearing requirement. Notwithstanding the lack of a public hearing requirement in Chapter 8A, the County Commission decided to hold two public hearings in order to ensure that both 8A and *W.Va. Code § 8-24-1, et seq.*, were complied with, so that regardless of which statute applied to the amendment process, the County could be certain it had complied. A discussion of each relevant section of *W.Va. Code § 8-24-1, et seq.*, is given below, indicating that the County Commission complied entirely with the requirements therein.

W.Va. Code § 8-24-18 provides that a planning commission shall give notice and hold a public hearing on the proposed amendments to the ordinance.¹

The County Commission together with the Jefferson County Planning Commission (hereinafter "Planning Commission") held two public hearings regarding the amendments. Notice was published in the *Spirit of Jefferson Advocate* on February 3, 2005, and February 10, 2005, for public hearings on February 23, 2005, and February 24, 2005, at 7:00 p.m. The hearings were to be at the Jefferson County Meeting Room on the ground floor of the Old Charles Town Library, at 200 East Washington Street, Charles Town, West Virginia. Notice also informed the public that the proposed amendments may be reviewed at the County Commission office or on the County Commission's website.

¹ The full text of § 8-24-18, entitled "Same – Notice and public hearing," is as follows:

"Prior to the adoption of a comprehensive plan, a commission shall give notice, as hereinafter in this section specified, and hold a public hearing on the plan and the proposed ordinance for its enforcement.

At least thirty days prior to the date set for hearing, the commission shall publish a notice of the date, time and place of the hearing as a Class I legal advertisement in compliance with the provisions of article three [§§ 59-3-1 et seq.], chapter fifty-nine of this code, and the publication area for such publication shall be the municipality or county, as the case may be."

While this section refers to a comprehensive plan and notice of at least thirty days, § 8-24-23 provides that it shall additionally apply to ordinance amendments and require only fifteen days notice of the public hearing.

On February 23, 2005, consistent with the notice published in the *Spirit of Jefferson Advocate*, the first public hearing was held on the ground floor of the Old Charles Town Library at 7:00 p.m. regarding the amendments to the Ordinance. According to the minutes of that meeting, Mike Shepp, President of the Jefferson County Citizens for Economic Preservation (JCCEP), was present at this hearing. All of the then members of the County Commission were present, namely Archibald "Rusty" Morgan, C. Dale Manuel, James Surkamp, Gregory Corliss, and Jane Tabb. Five of the nine Planning Commissioners, Arnie Dailey, Rosella Kern, Tom Kane, John Sims, and Bill Lewandowski, were also present.

Due to a snow storm, the second public hearing for the proposed amendments was continued from February 24, 2005, to March 3, 2005. This hearing was also held on the ground floor of the Old Charles Town Library at 7:00 p.m. At this hearing, according to the minutes, Lee Snyder appeared on behalf of JCCEP, the Petitioner herein. Again, all members of the then County Commission were present. Additionally, eight of the nine Planning Commissioners, Arnie Dailey, Rosella Kern, Tom Kane, Dan Marken, John Sims, and Bill Lewandowski, Renny Smith, and Russell Roper, were also present.

In addition to holding the required hearings, the notices for the same were legally sufficient. Notice was published twice, on February 3, 2005 and February 10, 2005, for two separate hearings. Notice of the first hearing, held on February 23, 2005, was published twenty (20) days prior to the hearing. Notice of the second hearing ultimately held March 3, 2005 after a postponement due to weather was published twenty-one (21) days in advance. Accordingly, notice for both hearings complied with the fifteen (15) day requirement set out in § 12.2 of the Ordinance and *W.Va. Code § 8-24-23*. There is no dispute that the notices were proper and placed in an acceptable publication, the *Spirit of Jefferson Advocate*.

Further, while *W.Va. Code § 8-24-18* requires only the Planning Commission to hold a public hearing, the public hearings held on February 23, 2005 and March 3, 2005 involved both the Planning Commission and the County Commission. A quorum of the Planning Commission was present at each hearing, satisfying the requirements of *W.Va. Code § 8-24-18*. Further, notwithstanding that Fred Blackmer, who provided an affidavit in support of Petitioner's allegations, stated that the public hearings were not "meaningful," they were held specifically as public hearings concerning the proposed ordinance amendments, and the public had an opportunity to specifically address the proposed amendments which had previously been made available to the public. Therefore, the hearings were compliant with the statutory requirements.

The County Commission also complied with *W.Va. Code § 8-24-19*, which provides that the Planning Commission may by resolution adopt the ordinance amendments and recommend them to the County Commission, and with *W.Va. Code § 8-24-20*, which provides that, upon adoption, the secretary of the Planning Commission shall certify a copy of the amendments and present them to the County Commission.² This is precisely the procedure that was followed in the instant case.

² § 8-24-19 provides:

"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 [county commission]."

§ 8-24-20 provides:

"Upon the adoption of the comprehensive plan and recommendation of the ordinance, the secretary shall certify a copy of the plan to the governing body of the city or to the county court [county commission]."

At the first meeting of the governing body of the municipality or of the county court after adoption of the plan, the secretary or a member of the commission shall present the plan and ordinance to the governing body or to the county court."

Again, § 8-24-23 makes the preceding requirement applicable to ordinance amendments by indicating that "all amendments to [the ordinance] shall be adopted according to the procedures set forth in sections eighteen through twenty-two of this article[.]"

On March 22, 2005, the Planning Commission considered the proposed amendments and voted unanimously that they were consistent with the Comprehensive Plan and should be recommended to the County Commission for adoption. Notwithstanding that the Planning Commission may have felt it was required to act pursuant to Chapter 8A, its actions were also in accord with *W.Va. Code § 8-24-19* and *W.Va. Code § 8-24-20*.

Additionally, the amendments were in fact properly certified by the Planning Commission to the County Commission in compliance with *W.Va. Code § 8-24-19* and *W.Va. Code § 8-24-20* as discussed below.

W.Va. Code § 8-24-1, et seq., does not contain a definition of “certify” or “certification,” so one must make inferences from the Planning Commission’s actions as to whether the proper procedure was followed. First, the Planning Commission voted unanimously to approve the amendments and that the amendments were consistent with the comprehensive plan. Next, the vote, recommendation, and amendments were officially forwarded by the Planning Commission to the County Commission for its consideration. The aim of the statutory requirements of *W.Va. Code § 8-24-19* and *W.Va. Code § 8-24-20* was undeniably satisfied when the Planning Commission relayed its vote on the amendments to the County Commission.

The purpose of the statute is to ensure that the Planning Commission takes official action, and that such action is properly and officially delivered to the County Commission. There is little room to argue that such official action and transference did not take place in this case. Additionally, the statute ensures that the County Commission receives a copy of any amendment proposed and recommended by the Planning Commission. In this case, the County Commission had been involved from the very beginning of the process and was completely familiar with the proposed amendments; there was no need for the Planning Commission to provide the

amendments on paper to the County Commission. The facts, taken together, indicate that the Planning Commission's actions complied with both Chapter 8A and *W.Va. Code § 8-24-1, et seq.*

Finally, *W.Va. Code § 8-24-21* requires the County Commission to consider the amendments and either adopt, reject, or amend them.³ At its regular meeting on March 23, 2005, the County Commission considered the proposed amendments. The item was properly on the agenda for the meeting, and after consideration by its members, the County Commission voted unanimously to adopt the amendments with an effective date of April 8, 2005. *See Exhibit D, Jefferson Co. Comm'n minutes, 2/23/05.*

For these reasons, the Circuit Court erred in its finding that the Commission failed to comply with the requirements of *W.Va. Code § 8-24-1, et seq.*, in amending its Ordinance.

RELIEF PRAYED FOR

For the reasons set forth herein, the County Commission of Jefferson County and its individual members respectfully request that this Court reverse the circuit court ruling invalidating the 2005 amendments to the Jefferson County Zoning Ordinance.

**COUNTY COMMISSION OF
JEFFERSON COUNTY, et al.,**

By Counsel:

³ § 8-24-21 provides:

“After certification of the plan and ordinance to the governing body of the municipality or to the county court [county commission], the governing body of the municipality or the county court shall proceed to a consideration of the plan and ordinance and shall either adopt, reject or amend the same. If the ordinance adopting the comprehensive plan is published, the plan may be incorporated by reference in the ordinance and the full text of said plan not published.”

Again, § 8-24-23 makes the preceding requirement applicable to ordinance amendments by indicating that “all amendments to [the ordinance] shall be adopted according to the procedures set forth in sections eighteen through twenty-two of this article[.]”



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CHARLESTON, WEST VIRGINIA

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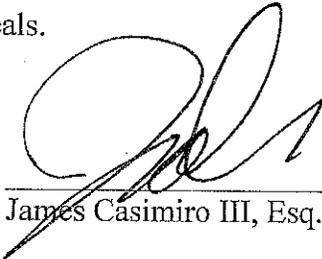
*(Jefferson County Circuit Court Case
No. 05-C-143)*

v.

JEFFERSON COUNTY CITIZENS
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a non-profit corporation,
Appellee.

DESIGNATION OF THE RECORD

The Appellants hereby designate the entire record in the above referenced matter on appeal to the West Virginia Supreme Court of Appeals.



James Casimiro III, Esq. (WVSB#8965)

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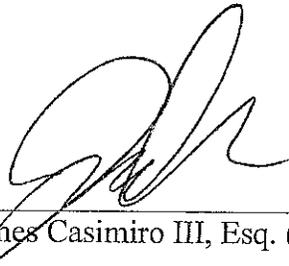
JEFFERSON COUNTY CITIZENS
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CERTIFICATE OF SERVICE

I do hereby certify that I have, on this 25 day of November, 2008, served the foregoing "Appellants' Brief Seeking Reversal of Lower Court's Order" upon all counsel and parties listed below by depositing a true and exact copy thereof in the United States mail, postage prepaid.

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