
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

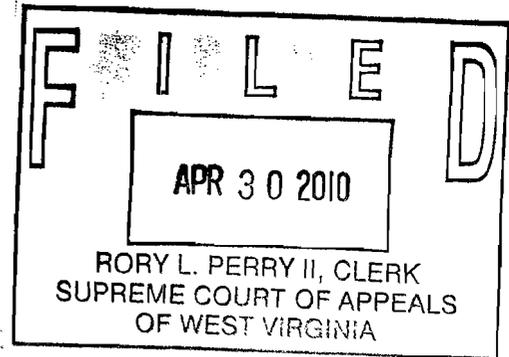
CITY OF HURRICANE and
CITY OF HURRICANE SANITARY
STORM WATER BOARD,

Appellants,

v.

B.A. MCCLURE and CHERYL MCCLURE,

Appellees.



**BRIEF OF APPELLANTS CITY OF HURRICANE AND
CITY OF HURRICANE SANITARY STORM WATER BOARD**

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CITY OF HURRICANE and
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Appellants-Defendants,

v.

Supreme Court of Appeals No. 35532

B.A. MCCLURE and CHERYL MCCLURE,

Appellees-Plaintiffs.

**BRIEF OF APPELLANTS CITY OF HURRICANE AND
CITY OF HURRICANE SANITARY STORM WATER BOARD**

NOW COMES the Appellants, the City of Hurricane and the City of Hurricane’s Sanitary Storm Water Board (hereinafter collectively referred to as “Appellants”), by and through its counsel of record, Johnnie E. Brown, Bryan N. Price, Andrew D. Byrd, and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, pursuant to Rule 3 and Rule 10 of the West Virginia Rules of Appellate Procedure, and timely files the following Brief in support of their appeal:

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

The underlying case remains pending before the Circuit Court of Putnam County, West Virginia, Civil Action No. 06-C-10, the Honorable Judge Phillip M. Stowers, presiding. This is an appeal from the Circuit Court of Putnam County’s *Order Granting Summary Judgment for Declaratory Judgment in Favor of the Plaintiffs and Granting Leave to File Amended Complaint*

dated July 30, 2009, which granted the Appellees'/Plaintiffs' Motion for Summary Judgment. Specifically, the Circuit Court ruled that the Appellees/Plaintiffs were "grandfathered" from complying with the provisions of Hurricane City Ordinance Article 936. The City of Hurricane exercised its plenary power and lawfully enforced Article 936 against the Appellees' subdivision in effort to uphold the very purpose and intent of this specific ordinance: "to safeguard the health, safety, and welfare of the public residing in the Hurricane and to prevent the pollution, impairment, and destruction of the natural resources and public trusts in the Hurricane." Nevertheless, the Circuit Court of Putnam County granted the Appellees' Motion for Summary Judgment holding that the Appellees' were "grandfathered" from having to comply with Article 936. It is Appellants' contention that granting the Appellees' Motion for Summary Judgment was erroneous, and must be reversed as is more fully set forth below.

II. STATEMENT OF THE FACTS

Appellees, B.A. McClure and Cheryl McClure (hereinafter collectively referred to as the "Appellees"), filed the underlying civil action seeking declaratory judgment and injunctive relief on or about January 13, 2006. Appellees' civil action arises from their development of a residential neighborhood within the city limits of the City of Hurricane, and the City of Hurricane's attempt to enforce certain ordinances relative to the same.

Following approval of the subdivision plat by the City of Hurricane in 2001, Appellees began development of the subdivision. Subsequently, the City of Hurricane enacted Article 936, which, in general, mandated stormwater retention ponds and set forth other requirements for land development projects, including the Appellees' subdivision. Appellees asserted that they should not be subject to the provisions of Article 936, and sought an order from the Circuit Court of Putnam County declaring the same.

On or about August 17, 2006, the parties submitted an “Agreed Order of Findings of Facts and List of Issues of Law to be Ruled Upon by the Court.” The parties stipulated and agreed that the matter should be submitted to the Circuit Court of Putnam County for purposes of ruling on the agreed list of issues of law and fact. With regard to said agreed order, the Circuit Court set a briefing schedule for the parties. The Appellees then filed “Plaintiffs’ Motion and Memorandum in Support of Motion for Summary Judgment” on September 8, 2006, the Appellants responded thereto on September 12, 2006, and the Appellees replied on December 21, 2006. Thereafter, a hearing was held before the Honorable N. Edward Eagloski. However, the Circuit Clerk’s file does not reflect the date of such hearing and the record is unclear as to the Court’s ruling on the filed pleadings.

On January 27, 2009, the Appellees filed a notice of substitution of counsel, substituting Harold Albertson in place of Mitchell Lee Klein. Mr. Albertson subsequently filed a motion for leave to amend the Appellees’ Complaint on March 30, 2009 to assert claims for monetary damages. Undersigned counsel filed a notice of substitution of counsel and made an appearance on behalf of the City of Hurricane on April 2, 2009 and responded and objected to the Appellees’ motion for leave to amend their complaint. A hearing on the Appellees’ motion to amend the complaint was scheduled for April 3, 2009.

At the April 3, 2009 hearing, prior to taking up the Appellees’ “Motion for Leave to File Amended Complaint,” the Circuit Court advised the parties and counsel that Appellees’ request for declaratory judgment was ripe for consideration, and based on the pleadings in the Circuit Court’s file and transcripts of the prior hearing, the Circuit Court intended to find in favor of the Appellees on their request for declaratory judgment, holding that Article 936 of the Hurricane City Code passed on October 4, 2005 was not applicable to the Appellees. The Circuit Court

advised the parties that its intended ruling in favor of Appellees on their request for declaratory judgment was based on the application of applicable law to facts stipulated by the parties and prior counsel. The Court, by and through the Honorable Judge Stowers, acknowledged the recent appearance of new counsel for the Appellees and the Appellants, and recognized that neither the parties nor newly appearing counsel were prepared to address the specific issue of declaratory judgment at the April 3, 2009 hearing. In light of the foregoing, the Circuit Court provided the Appellants thirty (30) days to file a brief in response or objection to the Circuit Court's intention to rule that the Appellees were not subject to Article 936 of the Hurricane City Code.

Complying with the order of the Circuit Court, the Appellants respectfully submitted its memorandum of law to the Circuit Court for consideration asking the Circuit Court to properly deny the Appellees' motion for summary judgment and enter judgment in its favor. The Appellants filed its brief on or about May 1, 2009, Appellees filed their response to the same on or about May 11, 2009, and the Appellants filed its reply to the Appellees response on or about May 13, 2009. On or about July 30, 2009, the Circuit Court of Putnam County entered an *Order Granting Summary Judgment for Declaratory Judgment in Favor of the Plaintiffs and Granting Leave to File Amended Complaint*. The Circuit Court found that Article 936 of the Hurricane City Code approved as amended on June 6, 2005 was not applicable to the Appellees' subdivision and granted the Appellees leave to file an amended complaint. Subsequently, Appellees filed an *Amended Complaint* seeking monetary damages, and the Appellants filed a motion to dismiss the same based on applicable immunities under the Governmental Tort Claims and Insurance Reform Act. Appellants' motion to dismiss was granted by the Honorable Judge Stowers of the Circuit Court of Putnam County; however, Judge Stowers allowed the Appellees

to amend their Complaint thirty (30) days from the entry of the order granting the Appellants' motion to dismiss. Appellees filed a second amended complaint on or about January 4, 2010

The Appellants represent unto this Honorable Court that the Circuit Court of Putnam County, West Virginia, committed reversible error in the underlying matter by granting the Appellees' Motion for Summary Judgment declaring that the Appellees were "grandfathered" from having to comply with the provisions of Article 936, and hereby appeals to this Honorable Court for relief on the following grounds:

III. ASSIGNMENTS OF ERROR

The Circuit Court of Putnam County erred in granting summary judgment for declaratory judgment in favor of the Appellees finding that Article 936 of the Hurricane City Code was not applicable to the Appellees and their development project within city limits. More specifically, the Circuit Court of Putnam County erred in:

1. Finding that the building of individual residential dwellings in Appellees' neighborhood did not qualify as new development projects or redevelopment projects, thus invoking the provisions of Article 936.
2. Applying the legal principle of nonconforming use to find that Appellees were grandfathered from complying with Article 936.
3. Failing to recognize that the Appellants' responsibility to assure the health and safety of its citizens outweighs the interest of the Appellees' to be "grandfathered" from complying with the provisions of City Ordinance, Article 936.

IV. STANDARD OF REVIEW

The standard of review concerning summary judgments is well settled in West Virginia. Upon appeal, "[a] circuit court's entry of summary judgment is reviewed *de novo*." See Syl. Pt.

1, Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994); Koffler v. City of Huntington, 469 S.E.2d 645 (W.Va. 1996).

This Honorable Court has stated that in conducting a *de novo* review, "...we are mindful that, pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper where the record demonstrates 'that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law.'" See Perrine v. E.E. Du Pont De Nemours and Co., ___ S.E.2d ___, 2010 WL 1170661 (March 26, 2010). Applying Rule 56, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." See Syl. Pt. 3, Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York, 133 S.E.2d 770 (W.Va. 1963); Jackson v. Putnam County Board of Education, 653 S.E.2d 632 (W.Va. 2007). "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial. See Syl. Pt. 3, Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994).

With due consideration to the aforementioned standards, the Appellants now address the summary judgment ruling of the Circuit Court in granting the Appellees' Motion for Summary Judgment declaring that the Appellees did not have to comply with the provisions of Article 936, and why the same constitutes reversible error.

V. DISCUSSION OF THE LAW / POINTS OF AUTHORITY

1. The Appellees' Subdivision is a "Development" and/or a "Redevelopment" as Defined by Article 936.

Hurricane City Ordinance Article 936.20 provides, in pertinent part, that "[t]he requirements and standards of this section shall apply to all new developments and redevelopment projects including the disturbance of land activities of any kind, on any lot, tract,

parcel or land or any portion thereof.” [Emphasis Added]. The Circuit Court erred in ruling that the Appellees’ subdivision was “...neither a new development nor redevelopment as discussed in Article 936.20[,]” and therefore Article 936 did not apply to Appellees’ subdivision. The Appellants assert that the Circuit Court erroneously interpreted the terms “development” and “redevelopment” as defined by Article 936, and failed to apply the meaning of those terms consistent with the intent of Article 936.

a. “Development” Project

The term “Development” as defined by Article 936.03 means “any land disturbance that changes the runoff or erosion characteristics of a lot, tract, parcel of land, or any portion thereof, in conjunction with residential, commercial, industrial, or institutional construction, alteration, or modification that has the potential to change the runoff or erosion characteristics of a lot, tract, or parcel of land, or any portion thereof, in conjunction with residential, commercial, industrial or institutional construction, alteration or modification.” *See* Hurricane City Ordinance, Article 936.03(m).

Appellees’ contemplated construction of residential dwellings in the subdivision will undoubtedly result in “land disturbance that changes [or has the potential to change] the runoff or erosion characteristics” of the lots upon which each dwelling is built. In residential dwellings, rain water is typically collected in gutters and diverted away from the structure into lawns, streets, or stormwater drains. Concrete or asphalt driveways, patios, and sidewalks have different friction coefficients than lawns or undeveloped landscape surfaces, and thus surface water flows and absorption rates are impacted. Without question, Appellees’ “development” of new residential dwellings will cause changes in runoff and erosion characteristics.

Interestingly, the Circuit Court did not distinguish the erection of residential dwellings by the Appellees to fall outside the scope of the definition of “development.” Rather, in reaching its conclusion that the Appellees’ neighborhood project was *not* a development project as contemplated in Article 936.20, the Circuit Court focused on the term “new” which precedes the word “development.” In particular, Article 936.20 provides in part as follows:

“[t]he requirements and standards of this section shall apply to all *new* developments and redevelopment projects including the disturbance of land activities of any kind, on any lot, tract, parcel or land or any portion thereof.”

[Emphasis Added]

The Circuit Court rationalized that “[t]he project was in existence for several years prior to the enactment of the ordinance, so the project cannot qualify as ‘new.’” *See Order Granting Summary Judgment for Declaratory Judgment in Favor of the Plaintiffs and Granting Leave to File Amended Complaint* at pp. 5-6. The Circuit Court further states that “the [Appellees’] subdivision is an existing project that has been ongoing since prior to both the original ordinance and the amended ordinance[,]” and cites to Article 936.22 which provides that “[f]ollowing June 6, 2005, no building permit shall be issued without an approved stormwater management plan required under this Article” asserting that “[t]his section clearly recognizes that the stormwater ordinance would apply to only building permits issued after the date the ordinance was enacted...” The Appellants could not agree more that the ordinance was clearly intended to apply to only those building permits issued after the date the ordinance was enacted. The Appellants have denied Appellees’ application for building permits following enactment of Article 936 unless Appellees comply with the provisions thereof. What the Circuit Court failed to recognize is that each individual home that has been built in the Appellees’ subdivision was required to have a separate and individual building permit. Likewise, any homes built in the

future will require a separate and individual building permit, irrespective of the provisions of Article 936. Each building permit application sought for the erection of a residential dwelling in Appellees' neighborhood will be a *new* development project as contemplated by Article 936.22.

The Circuit Court generically asserts that the subdivision was "approved" before Article 936 was enacted, and remained under continuous development from its initial approval in 2001. The presumption is that the subdivision as a whole is not a "new" development project, and thus is not subject to the provisions of Article 936. The Circuit Court is correct that the subdivision plat was approved by the Appellants in 2001, but it is incorrect that such approval provides a basis for Appellees to sidestep compliance with Article 936.

Appellees assert that Article 936 was enacted, albeit lawfully, *after* the Appellants had approved the plat for the proposed subdivision in 2001, and therefore the subsequently passed ordinance was not applicable to them. To the contrary, the Appellants respectfully submit that the Circuit Court's agreement with the Appellees argument in this regard is in error. The Court confuses two separate and distinct powers of municipalities.

Municipalities have only those powers conferred upon them by statute or pursuant to their charter. Approval of a subdivision plat is governed by West Virginia Code § 39-1-16. West Virginia Code § 39-1-16, "approval by city council or commissioners prerequisite to laying out subdivision," provides as follows:

"In case a proposed subdivision of any lot or parcel of land is situate within the corporate limits of any municipality, or abutting thereon, it shall be the duty of the owner, or owners, or his or their agent, to submit a plat or plan of such subdivision to the council or commissioners of such municipality, showing the street and alley connections that such subdivision makes with such municipality, and furnishing full information for the purpose of determining whether the proposed subdivision will impede or prevent the further development and extension of such municipality where such subdivision is situate. Before any such subdivision is finally laid out, it shall have the approval of the council or

commissioners of the municipality wherein the subdivision is situate, or upon which it abuts, and such approval and the date thereof shall be indicated on the plat or plan of such subdivision before the same is finally filed in the office of the clerk of the county court and the county assessor's office.”

See W.Va. Code § 39-1-16.

Under the statutory authority that governs the terms of a city’s consideration of a submitted subdivision plat, there are only two (2) considerations a city may evaluate to either approve or deny the same. First, the plat must “show[] the street and alley connections that such subdivision makes with such municipality...” Second, the proposed subdivision plat must provide “full information” so that the city may “determine[] whether the proposed subdivision will impede or prevent the further development and extension of such municipality where such subdivision is situate.” *See* W.Va. Code § 39-1-16. West Virginia Code § 39-1-16 outlines the parameters and limited scope of an approved subdivision plat. The Appellants’ approval of the Appellees’ submitted subdivision plat does nothing more than demonstrate that the subdivision plat satisfied the requirements of West Virginia Code § 39-1-16. This approval does not negate Appellees’ obligation to acquire building permits in accordance with ordinances in effect at the time such permits are requested. A subdivision plat approval has a very narrow and limited application. Simply stated, Appellees’ approved subdivision plat is not a valid basis to argue that the Appellees’ are “grandfathered” from complying with subsequently enacted building ordinances. The approved subdivision plat was merely a prerequisite for the Appellees to apply for individual building permits. The mere fact the subdivision plat was approved prior to passage of Article 936 does not negate Appellees’ obligation to comply with Article 936; the two are mutually exclusive in this regard.

As outlined above, the continued construction of residential dwellings in Appellees neighborhood clearly falls within the control and regulation of Article 936, and the Circuit Court's ruling to the contrary should be reversed. However, even assuming *arguendo* the project is not a new "development" project, it is a "redevelopment" project as outlined below. Regardless of the project classification, the Circuit Court's finding that Article 936 is not applicable to Appellees should be reversed.

b. "Redevelopment" Project

The term "Redevelopment" as defined by Article 936.03 means "any reconstruction, alteration, or improvement of land disturbance performed on any site or modification to an existing property that requires or would require a building permit under existing ordinance." *See* Hurricane City Ordinance, Article 936.03(ff). The individual lots in Appellees' neighborhood are clearly "sites" or "existing property." The construction of residential dwellings on those sites or existing properties would, at a minimum, require some "alteration" or result in the "improvement" of the land. And, in order for the Appellees to construct residential dwellings on the sites or existing properties, which are within Hurricane city limits, the Appellees would be required to obtain a building permit under existing ordinance. Each home that was built in the Appellees' subdivision was required to have a separate and individual building permit, and future homes will likewise require a separate and individual building permit. Even if the erection of residential dwellings in Appellees' neighborhood were not classified as "development" projects, there is no mistake that they are certainly "redevelopment" projects, and are subject to the provisions of Article 936. The Circuit Court erred in finding otherwise.

2. The Circuit Court Misapplied the Legal Principle of “Nonconforming Use.”

In finding that the Appellees were not subject to the provisions of Article 936, the Circuit Court erroneously relied on the legal principle of “nonconforming use” as set forth in H.R.D.E., Inc. v. Zoning Officer of the City of Romney, 189 W.Va. 283, 430 S.E.2d 341 (1993). The case of H.R.D.E., Inc. v. Zoning Officer of the City of Romney and other West Virginia jurisprudence on the issue of “nonconforming use” is limited to zoning ordinances. Article 936 is not a zoning ordinance. Rather, it is an ordinance that indiscriminately places restrictions and regulations on all land development within the city limits of Hurricane. The Circuit Court’s reliance on H.R.D.E. is misplaced and irrelevant to the issues presented in this matter. As set forth below, the Circuit Court’s attempt to apply H.R.D.E. in this regard is incorrect.

H.R.D.E., also known as Human Resources Development and Employment, Inc., is a West Virginia non-profit corporation which engages in the construction and management of housing projects for the elderly and physically handicapped. 430 S.E.2d at 343. The executive director of H.R.D.E. met with the mayor of the City of Romney to discuss the possibility of constructing a multi-unit apartment building. The city council of the City of Romney and the mayor formally gave its support for the project on March 12, 1984. Relying on this support, H.R.D.E. began to work on making the project reality as it purchased land, culverts and storm sewers for the access road to the project site. Id.

In 1985, H.R.D.E. lost funding for the project because certain documents were not timely sent to the Charleston HUD office. On July 9, 1987, H.R.D.E. deeded a portion of the property which was to be used as a public street to the City of Romney and gave the city the storm sewers at no charge. In the fall of 1987, the access road was developed and the storm sewers and culverts were installed. Id.

The City of Romney began the process of enacting a zoning ordinance in 1989. By a letter dated January 31, 1989, the mayor assured H.R.D.E. that its project would be grandfathered under the proposed zoning ordinance so that there would be no codes or restrictions which would apply to the project. The mayor also assured the H.R.D.E. that the city would provide city services and would complete the street which had been given to the city by H.R.D.E. The executive director of the H.R.D.E. relied on the mayor's letters in continuation of the project. Id.

On July 17, 1989, the City of Romney passed into law a "Comprehensive Plan for the City of Romney Planning and Zoning Ordinance" (hereinafter zoning ordinance). Id. at 344. In August of 1989 H.R.D.E. submitted to the City of Romney a building permit application for the construction of a four-story, 32 unit apartment building which would house the elderly and physically handicapped. On September 5, 1989, the building inspector denied the application based upon articles V and VI, sections 501 ("Use Regulation for Residential District") and 601 ("Nonconforming Uses"), respectively, of the newly enacted zoning ordinance. The building inspector's decision was upheld by the Board of Zoning Appeals, city council and the Circuit Court. Id.

H.R.D.E. contended that the building project for the elderly and physically handicapped was a nonconforming use which it had a right to continue. Id. at 344. This Honorable Court found that the building project for the elderly and physically handicapped was started several years before the City of Romney enacted its zoning ordinance; however, the building itself was not completed nor started before the zoning ordinance was enacted. Thus, the issue before this Honorable Court in H.R.D.E. was whether the actions of the H.R.D.E. were sufficient to vest a nonconforming use. Id.

In H.R.D.E. this Honorable Court developed a four-part test to be treated on a case by case analysis when determining whether or not a landowner has acquired a vested right to a nonconforming use: (1) whether the landowner has made substantial expenditures on the project; (2) whether the landowner acted in good faith; (3) whether the landowner had notice of the proposed zoning ordinance before starting the project at issue; and (4) whether the expenditures could apply to other uses of the land. Id. at 346. Applying the facts in H.R.D.E. to the factors above, this Honorable Court found that the landowner had a vested right to complete the project as a nonconforming use when the landowner acted in good faith while expending approximately \$95,000 in preparation for the construction of a specially designed building for the elderly and physically handicapped before the municipality enacted the zoning ordinance. The Court emphasized the fact that the landowner's acts went beyond mere contemplated use or preparation. Id. Thus, this Honorable Court reversed the decision of the circuit which affirmed the order of the board of zoning appeals to deny H.R.D.E.'s building permit application. Id. at 347.

In its *Order Granting Summary Judgment for Declaratory Judgment in Favor of the Plaintiffs and Granting Leave to File Amended Complaint*, the Circuit Court stated that this Honorable Court has not specifically addressed the legal effect of newly-enacted stormwater management ordinances on an approved subdivision under construction. As such, the Circuit Court attempted to argue that stormwater management ordinances were similar to zoning ordinances, proclaiming that the same concerns for stormwater management ordinances arise in zoning ordinances: permanent restrictions and burdens on the use of land, the hardship of immediate compliance with new ordinances regulating existing uses, and the reduction on the value of property with the ordinance in place. The Circuit Court used H.R.D.E. as its guide "even

though stormwater regulations are not zoning regulations *per se*,” and despite the fact that the case of Ashbaugh v. Bolivar, 679 S.E.2d 573 (W.Va. 2009), is directly on point.

The Circuit Court’s application of H.R.D.E. and its attempt to analogize zoning ordinances to stormwater management ordinances is flawed. Zoning ordinances are a device used by governmental entities to attempt to regulate land use based upon separate zones in a town, city or state. Zoning ordinances can regulate uses on land, building height, lot coverage, and similar characteristics, or a combination of these, and are usually discriminatory in nature for a particular area. Zoning is used to prevent new development from interfering with existing residences or businesses in effort to preserve the character of a community. Contrary to the purpose and intent of zoning ordinances, a stormwater management ordinance is not discriminatory in nature to certain zones of land, it applies to all individuals and/or businesses that are developing or redeveloping land within a community. Most importantly, the stormwater management ordinance was enacted to safeguard the health, safety, and welfare of the public and to prevent the pollution, impairment, and destruction of the natural resources and public trusts, not to prevent new development from interfering with existing residences or businesses. In this regard, the Circuit Court’s attempted application of H.R.D.E. in the case at hand is erroneous

Instead, the Appellants contend that this Honorable Court’s recent precedent of Ashbaugh v. Bolivar, 679 S.E.2d 573 (W.Va. 2009), is directly on point and instructive in this case. In Ashbaugh v. Bolivar, Ashbaugh appealed an order of the Circuit Court of Jefferson County granting summary judgment to the town of Bolivar in a property development case. 679 S.E.2d 573 (W.Va. 2009). Ashbaugh instituted a civil action seeking declaratory judgment with regard to his right to access the town’s streets based upon the Town Council’s approval of the subdivision plat, which depicted access points to public roadways. At issue was whether the

enactment of an ordinance by the Bolivar town council that prevented the connection of privately constructed roads, streets, and alleys to public roadways was improper and unenforceable. Importantly, the ordinance at issue was, like in the instant case, enacted *after* Bolivar had approved Ashbaugh's submitted subdivision plat, which depicted certain public street access. Regardless of the approved subdivision plat, the lower court ruled in favor of Bolivar upholding enforcement of the disputed ordinance, and this Honorable Court affirmed. Id.

Relying on the Town Council's approval of the Marmion Hills subdivision plat, Ashbaugh argued that he was entitled to access the streets depicted on the approved plat for purposes of ingress and egress to the development.¹ This Honorable Court specifically stated that "[w]hile [Ashbaugh] seeks a ruling from this Court requiring that all streets, avenues, and roads designated on the approved and properly recorded subdivision plat must forever remain accessible and subject to use in the exact manner as depicted on the plat, we find no basis in the law for such a ruling." Id. at 577. This Court recognized that the Legislature has expressly delegated authority over issues of road use and maintenance to municipalities such as Bolivar in West Virginia Code § 8-12-2(a)(5) and § 8-12-5(1), and despite the fact that the approved subdivision plat depicted certain public roadways, there is no recognition or obligation imposed to require Bolivar to maintain the status quo. Id. at 576.

¹ Ashbaugh obtained approval of the subdivision plat through a writ of mandamus filed against the city. See State ex rel. Brown v. Corporation of Bolivar, 614 S.E.2d 719 (W.Va. 2005). The Court relied on West Virginia Code § 39-1-16 stating that under the statutory authority that governs the terms of a city's consideration of a submitted subdivision plat, there are only two (2) considerations a city may evaluate to either approve or deny the same. First, the plat must "show[] the street and alley connections that such subdivision makes with such municipality..." Second, the proposed subdivision plat must provide "full information" so that the city may "determine[] whether the proposed subdivision will impede or prevent the further development and extension of such municipality where such subdivision is situate." If these requisites are met and it is determined that the proposed subdivision will not impede or prevent the further development and extension of such municipality where such subdivision is situate, the plat shall be approved. The city had attempted to withhold approval of the subdivision plat based on certain traffic concerns. While the Court recognized the authority of the city to control the use of its streets, the traffic concerns were not a basis to withhold approval of a submitted subdivision plat under West Virginia Code §39-1-16.

Ashbaugh contended that the subsequent passage of the ordinance at issue would effectively render the Town Council's approval of the plat meaningless. Id. at 578. This Court stated that "[o]f specific import to the trial court in rejecting this argument was the availability of two other streets for purposes of ingress and egress to the Marmion Hills development..." Ashbaugh objected to using these alternate streets based on development costs and aesthetics [both issues raised by Appellees in the instant matter]. This Honorable Court found that the ordinance was passed with a valid municipal objective in mind, i.e. limiting access to city streets for purposes of controlling traffic and promoting safety, and thus must be upheld. Id. The approval of the plat was not meaningless, as the development could proceed with slight modifications to comport with the requirements of subsequently passed ordinances. Moreover, the approval of the plat only served a very limited and specific function given the provisions of West Virginia Code § 39-1-16.

The Circuit Court summarily dispensed with the holding in Ashbaugh as factually distinguishable from the instant matter. Specifically, the Circuit Court distinguished Ashbaugh as the city attempting to regulate city property, whereas the instant case involves the City of Hurricane's attempt to regulate the Plaintiffs' own private property. This reasoning is flawed. In Ashbaugh, the town sought to regulate access to public streets from private roadways, i.e. the ingress and egress of vehicle traffic to and from private property. In the instant matter, the Appellants are seeking to regulate the intrusion of surface water from private property, i.e. individual residential dwellings (or future, yet to be constructed residential dwellings), within Appellees' subdivision into city controlled storm sewers and upon other public and private lands within city boundaries. Ashbaugh is the perfect analogy to this case: vehicle traffic is to Ashbaugh as surface and stormwater is to the instant matter.

Simply stated, the facts and circumstances of Ashbaugh v. Bolivar are remarkably similar and analogous to the case at hand, and a consistent ruling from this Honorable Court should be applied to overrule summary judgment in favor of the Appellees. Like Ashbaugh, the Appellees secured approval of a subdivision plat from the Appellants. Like Ashbaugh, the Appellants subsequently passed an ordinance, Article 936, placing additional requirements on the Appellees to continue development of the individual lots within the subdivision. Like Ashbaugh, where West Virginia Code § 8-12-5 provided the city plenary power and authority to regulate the use of streets, avenues, roads, etc., the same statute provides the Appellants authority over water drainage, drainage systems, flood control works, and the elimination of hazards to public health and safety. *See* W.Va. Code § 8-12-5. Likewise, as in Ashbaugh, this Honorable Court should find that the Circuit Court erred in finding that the Appellees were grandfathered from complying with Article 936; the Appellants were properly exercising their plenary power to regulate water drainage, drainage systems, and flood control works to eliminate any potential hazards to its citizens.²

The Circuit Court's reliance on H.R.D.E. is flawed in light of Ashbaugh. This Honorable Court should properly apply the holding of Ashbaugh to the facts of this case and reverse judgment in favor of Appellees.

3. The Circuit Court has Failed to Recognize that the Appellants' Responsibility to Assure the Health and Safety of its Citizens Outweighs the Interest of the Appellees' to be "Grandfathered" from Complying with the Provisions of the Appellants' City Ordinance Article 936.

Hurricane City Ordinance Article 936, "Stormwater Management and Surface Water Discharge," was enacted to "to safeguard the health, safety, and welfare of the public residing in the Hurricane Watershed; to satisfy the requirements set forth by the State of West Virginia; and

² This public policy argument is further addressed in Section "3" of this Brief.

to prevent the pollution, impairment, and destruction of the natural resources and public trusts in the Hurricane Watershed.” The intent of Article 936 is “to control non-stormwater discharges to storm drain systems, reduce pollutants in stormwater discharges, control stormwater runoff by providing design, construction and maintenance criteria for permanent and temporary stormwater facilities, to maintain and improve the stormwater collection system in order to protect and improve water quality in the receiving streams and to reduce or eliminate local flooding resulting from stormwater accumulation, and to fully comply with Federal and State statutory and regulatory requirements and schedules regarding stormwater management and the water quality of the receiving streams.” In granting the Appellees’ Motion for Summary Judgment, the Circuit Court failed to consider the aforesaid purpose and intent of Article 936 and the Appellants’ responsibility to safeguard the health, safety, and welfare of the public.

This Honorable Court has recognized the inherent ability of a governmental agency to protect the health, safety and welfare of its citizens. Foundation for Independent Living, Inc., et al v. Cabell Huntington Board of Health, 591 S.E.2d 744, 755 (W.Va. 2003)(*recognizing the reluctance of the Court to place limits on what may be done in the interests of the health of a community so long as unreasonable methods are not employed nor the natural and constitutional rights of the citizens invaded*). Simply stated, the Appellants did not use unreasonable means in exercising its plenary power to enforce Article 936 upon Appellees’ subdivision. In furtherance of its responsibility to safeguard the health, safety, and welfare of its citizens, the Appellants’ simply required compliance with Article 936 before continued construction of individual residential dwellings within Appellees’ subdivision. To safeguard the health, safety, and welfare of the public residing within city limits and to prevent the pollution, impairment, and destruction of the natural resources and public trusts, the Appellants lawfully enacted and enforced

Hurricane City Ordinance, Article 936, “Stormwater Management and Surface Water Discharge to the Plaintiffs subdivision.”

VI. CONCLUSION AND RELIEF PRAYED FOR

The Appellants approved the subdivision plat submitted by the Appellees for their subdivision, and subsequent thereto, the Appellants lawfully enacted Article 936. Approval of a subdivision plat pursuant to the provisions of West Virginia Code § 39-1-16 does not negate the responsibilities of the developer from complying with ordinances then in effect, or thereafter enacted. This is made apparent by this Honorable Court’s holding in Ashbaugh, where this Court found that West Virginia Code § 8-12-5 provided a city plenary power and authority to regulate the use of streets, avenues, roads, etc. Similarly, the same statute provides the Appellant authority over water drainage, drainage systems, flood control works, and the elimination of hazards to public health and safety.

Hurricane City Ordinance Article 936, “Stormwater Management and Surface Water Discharge,” was enacted to “to safeguard the health, safety, and welfare of the public residing in the Hurricane Watershed; to satisfy the requirements set forth by the State of West Virginia; and to prevent the pollution, impairment, and destruction of the natural resources and public trusts in the Hurricane Watershed.” This Honorable Court has consistently held that governmental agencies have the inherent ability to protect the health, safety and welfare of its citizens. In recognizing its responsibility to protect the health, safety and welfare of its citizens, the Appellants’ lawfully enacted and enforced Hurricane City Ordinance Article 936, “Stormwater Management and Surface Water Discharge,” upon the Appellees’ subdivision.

WHEREFORE, the Appellants, by and through counsel, submit that the Circuit Court of Putnam County committed reversible error in granting summary judgment for declaratory

judgment in favor of the Appellees, incorrectly finding that Article 936 of the Hurricane City Code was not applicable to the Appellees' subdivision. Therefore, the Appellants respectfully requests that this Honorable Court reverse the Circuit Court's ruling that the Appellees are not subject to the provisions of Article 936, and enter an Order declaring that Appellees' neighborhood project is a "development" and/or "redevelopment" project as defined by Article 936, that Appellees' neighborhood project is subject to all provisions of Article 936, and such other and further relief as deemed appropriate.

CITY OF HURRICANE and
CITY OF HURRICANE SANITARY
STORM WATER BOARD, Appellants

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CITY OF HURRICANE and
CITY OF HURRICANE SANITARY
STORM WATER BOARD,

Appellants-Defendants,

v.

Supreme Court of Appeals No. 35532

B.A. MCCLURE and CHERYL MCCLURE,

Appellees-Plaintiffs.

CERTIFICATE OF SERVICE

The undersigned, counsel for Petitioners and Defendants, does hereby certify on this 30th day of April, 2010, that a true copy of the foregoing ***BRIEF OF APPELLANTS CITY OF HURRICANE AND CITY OF HURRICANE SANITARY STORM WATER BOARD*** was served upon opposing counsel by depositing the same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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