

No. 35532

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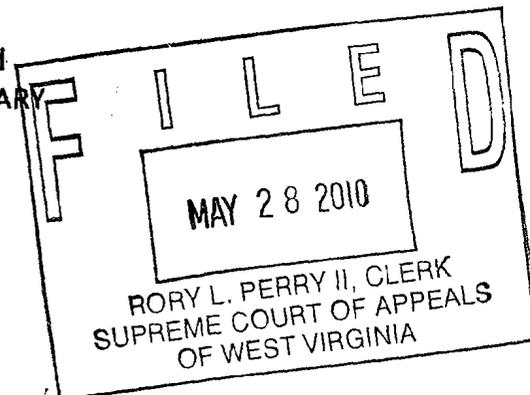
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

v.

B.A. MCCLURE and CHERYL MCCLURE,  
Appellees.



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BRIEF OF APPELLEES B.A. MCCLURE  
AND CHERYL MCCLURE

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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.

**BRIEF OF APPELLEES B.A. MCCLURE AND  
CHERYL MCCLURE**

NOW COMES the Appellees, B.A. McClure and Cheryl McClure (hereinafter collectively referred to as "Appellees"), by and through its counsel of record, Harold Albertson, and timely files the following Brief:

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

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. We submit that the Circuit Court of Putnam County correctly concluded that Article 936 by its very own language and terms did not apply to the Appellees' subdivision.

**II. STATEMENT OF THE FACTS**

The 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 arose from their development of a residential subdivision within the city limits of the City of Hurricane. The City of Hurricane attempted to enforce certain ordinances relative to the Appellees' residential subdivision.

The subdivision plat of the Appellees was approved in 2000. Thereafter, the City of Hurricane enacted Article 936, which required stormwater retention ponds and set forth other requirements. Appellees asserted that they were not 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". Thereafter the parties filed briefs and a hearing was held before Judge N. Edward Eagloski.

On January 27, 2009, the Appellees filed a notice of substitution of counsel, substituting Harold Albertson in place of Mitchell Lee Klein. On March 30, 2009, Appellees filed a motion for leave to amend the complaint to assert monetary damages. Bryan N. Price filed a notice of substitution of counsel on April 2, 2009. A hearing on the Appellees' motion to amend the complaint was scheduled for April 3, 2009.

At the April 3, 2009 hearing, Judge Stowers advised the parties that the Circuit Court intended to find in favor of the Appellees on their request for declaratory judgment and hold that Article 936 of the Hurricane City Code was not applicable to the Appellees' subdivision. The Circuit Court provided the City of Hurricane thirty (30) days to file a brief in response or objection to the Circuit Court's intention to rule that the Appellees' subdivision was not subject to Article 936.

The parties filed briefs and on 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 Appellees represent to this Honorable Court that the Circuit Court of Putnam County correctly determined that the provisions of Article 936 do not apply to the subdivision of the Appellees.

**III. ASSIGNMENTS OF ERROR**

In the brief of the Appellants, the Appellants assert that the Circuit Court of Putnam County erred in:

1. Finding that the building of individual residential dwellings in Appellees' subdivision did not qualify as a new development or redevelopment.
2. Applying the legal principle of nonconforming use.
3. Failing to recognize the Appellants' responsibility to assure the health and safety of its citizens outweighs the interest of the Appellees.

**IV. STANDARD OF REVIEW**

The standard of review concerning summary judgments is that the review is *de novo*.

**V. DISCUSSION OF THE LAW/POINTS OF AUTHORITY**

1. **The Appellees' Subdivision is not a "New Development" and/or "Redevelopment" as defined by Article 936.**

Hurricane City Ordinance Article 936.20 provides that the requirements and standards shall apply to all new developments and redevelopment projects. The Circuit Court correctly

ruled that the Appellees' subdivision was neither a new development or redevelopment and therefore Article 936 did not apply to Appellees' subdivision.

**a. "New Development" Project**

The Circuit Court correctly concluded that the fully approved subdivision project was in existence for several years prior to the enactment of the ordinance, so the project cannot qualify as new. The Appellants argue that each house in the subdivision represents a new development. The Circuit Court rejected this argument and we submit that it should likewise be rejected by this Court. The use of the word "new" should be considered in light of the context in which it appears and the plain language of Article 936 makes reference to a development project and in this case the project was the entire collection of building lots within the subdivision.

**b. "Redevelopment" Project**

There is no evidence that the subdivision project of the Appellees was changed in any way since it was approved in the Year 2000. The continuation of the subdivision project of the Appellees is evidenced by the building permits issued by the City of Hurricane. Appellees had developed and or constructed and sold over 47 lots or houses in accordance with the approved subdivision plan and the Circuit Court relied upon the stipulation of the parties to conclude that the subdivision project was not a new development or a redevelopment.

**2. Appellants assert that the Circuit Court Misapplied the Legal Principle of Nonconforming Use.**

We submit that the Circuit Court correctly concluded that stormwater management

ordinances are similar to zoning ordinances and the concerns of individuals should be considered (permanent restrictions and burdens on the use of land, the hardship of immediate compliance with new ordinances regulating existing uses and the reduction of the value of property). We further submit that the Circuit Court was correct in concluding that Ashbaugh v. Bolivar, 679 S.E.2d 573 (W. Va. 2009) was factually distinguishable from the instant case because in Ashbaugh the city was attempting to regulate city property and in the instant case the City is attempting to regulate private property. In addition, in the instant case, the provisions of Article 936 themselves indicate that the Article does not apply to this subdivision which existed 5 years before the enactment of the Article.

**3. The Appellants assert that the Circuit Court failed to Recognize that Appellants' Responsibility to Assure Health and Safety Outweighs the interests of the Appellees.**

We submit that the stipulation of the parties in this case do not establish that there is any health and safety issue relating to this subdivision. The City of Hurricane never attempted to obtain a stipulation regarding stormwater run off in the area of this subdivision because they knew that in the entire history of the subdivision, from the Year 2000 to the year 2010, there has never been any threat to the health and safety of the public due to stormwater run off in the area of this subdivision. In addition, Article 936 itself, by its specific language, indicates that the provisions of the Article apply only to new development projects and redevelopment projects.

**VI. CONSLUSION AND RELIEF PRAYED FOR**

The Circuit Court of Putnam County correctly concluded that the specific language of

Article 936 indicates that Article 936 does not apply to the subdivision of the Appellees.

**WHEREFORE**, the Appellees , by and through counsel, submit that the Order of the Circuit Court of Putnam County should be affirmed.

B.A. MCCLURE and  
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BY COUNSEL

  
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CERTIFICATE OF SERVICE

The undersigned, counsel for Appellees, does hereby certify that on this 28<sup>th</sup> day of May, 2010, that a copy of the foregoing brief was served upon the 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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