

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

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PUTNAM CO. CIRCUIT COURT  
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**B.A. MCCLURE AND  
CHERYL MCCLURE**  
Plaintiffs,

v.

CIVIL ACTION NO. 06-C-10

**CITY OF HURRICANE AND  
CITY OF HURRICANE SANITARY  
STORMWATER BOARD,**  
Defendants.

**ORDER GRANTING SUMMARY JUDGMENT FOR DECLARATORY  
JUDGMENT IN FAVOR OF THE PLAINTIFFS AND GRANTING LEAVE  
TO FILE AMENDED COMPLAINT**

On April 3, 2009, this matter came before the Court for a hearing on Plaintiffs' *Motion for Leave to File Amended Complaint*. The Plaintiffs appeared in person and by counsel, Harold Albertson, and the Defendants appeared by counsel, Bryan N. Price. At the hearing, this Court indicated it had extensively reviewed the Motion, together with the law relevant to the case, and that it was inclined to grant declaratory judgment in favor of the Plaintiffs. Because it was the first appearance in the case by the Defendants' counsel, the Court provided the Defendants with the opportunity to file an additional brief or response on or before May 1, 2009. The Defendants filed a Response on May 1, 2009, and the Plaintiffs filed a response on May 11, 2009. The Defendants then filed an additional reply.

Based upon the pleadings, stipulations of fact, and argument of counsel, the Court finds in favor of the Plaintiffs on their request for summary judgment granting declaratory judgment and finds that Article 936 of the Hurricane City Code approved as amended on June 6, 2005 is

not applicable to the Plaintiffs' B.A. McClure subdivision. The Court also grants leave to file an amended complaint.

The Court makes the following findings of fact and conclusions of law:

#### FINDINGS OF FACT

1. Plaintiffs filed the instant civil action seeking declaratory judgment and injunctive relief on or about January 13, 2006.

2. Briefs and argument of counsel in support of, and in opposition to, Plaintiffs' request for declaratory relief were made on behalf of the parties.

3. On or about August 17, 2006, the parties submitted an *Agreed Order of Findings of Facts and List of Issues of Law to be Relied Upon by the Court*.<sup>1</sup> Thereafter, Plaintiffs filed their memorandum on September 6, 2006. Defendants filed a response on September 12, 2006. Plaintiffs replied on December 21, 2006. A hearing was held before Judge Eagloski.

4. All stipulations of fact entered into by the parties are hereby adopted by the Court with the same force and effect as if the stipulations of fact were each individually set forth in this portion of this Court Order.

5. The City of Hurricane approved the subdivision plan for the Plaintiffs in 2001.

6. Article 936 was adopted on November 1, 2004 and adopted as amended on June 6, 2005.

7. The Plaintiffs' subdivision was approved and continuously under development since 2001. There is nothing in the record evidencing that the Plaintiffs abandoned or ceased work on

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<sup>1</sup> The Court notes that both parties drafted a joint request to Judge Eagloski for the Court to rule on all issues of law in the case on November 20, 2006. The issues raised by that request are now addressed by this Court in this Order.

the subdivision development. The Plaintiffs developed the subdivision until the Defendants stopped the development in 2006.

8. The Plaintiffs' work on the subdivision was a continued, ongoing project when Article 936 was adopted on November 1, 2004 and adopted as amended on June 6, 2005.

9. Plaintiffs filed the instant civil action seeking declaratory judgment and injunctive relief on or about January 13, 2006. Therein, Plaintiffs reserved the right to seek monetary damages and put the Defendants on notice of potential monetary damages.

10. Plaintiffs' *Motion for Leave to File Amended Complaint* was filed on behalf of Plaintiffs' counsel, Harold Albertson. Mr. Albertson was formally substituted as counsel for the Plaintiffs on or about January 27, 2009.

11. Plaintiffs filed their *Motion for Leave to File Amended Complaint* on or about March 26, 2009. In addition to seeking declaratory and injunctive relief, Plaintiffs' amended complaint sought monetary damages.

12. Defendants responded and objected to Plaintiffs' *Motion for Leave to File Amended Complaint* on or about April 2, 2009. Defendants' response and objection was filed on behalf of Defendants by Bryan N. Price and the law firm of Pullin, Fowler, Flanagan, Brown and Poe, PLLC. Bryan N. Price and the law firm of Pullin, Fowler, Flanagan, Brown and Poe, PLLC was substituted as counsel for the Defendants by *Notice of Substitution of Counsel* dated April 2, 2009.

13. Plaintiffs' proposed amended complaint was virtually identical to a civil complaint filed in the Circuit of Putnam County by Plaintiffs on or about September 16, 2008 in Civil Action No. 08-C-312. The civil complaint filed in Civil Action No. 08-C-312 was dismissed by

the Honorable Judge Spaulding by order dated December 23, 2008 stating that such claims were barred by the applicable statutes of limitations.

14. The Court finds that the dismissal of Civil Action No. 08-C-312 by Judge Spaulding did not have any bearing on the instant civil action, or otherwise operate to preclude Plaintiffs from seeking leave to amend their complaint to assert claims for monetary damages in this matter.

15. Substantial delay has occurred in moving this matter to final resolution. The Court notes that Plaintiffs' *Motion for Leave to Amend Complaint* was filed more than three (3) years after the initial pleading instituting the instant civil action. Specifically, the Court noted substantial delay due to the inaction of the Court itself and the prior presiding judge. The Court does not attribute any delay to the Plaintiffs which would operate to preclude the Plaintiffs from amending their complaint. The Court also does not attribute any of the delay to the Defendants.

#### STANDARD OF REVIEW

Rule 56(c) of the *West Virginia Rules of Civil Procedure* allows a Motion for Summary Judgment to be granted to the Plaintiff if the pleadings, depositions, answers to interrogatories, and any admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the Plaintiff is entitled to a judgment as a matter of law. See *Angelucci v. Fairmont General Hosp., Inc.*, 217 W. Va. 364, 368, 618 S.E.2d 373, 377 (2005) (quoting *Redden v. Comer*, 200 W. Va. 209, 488 S.E.2d 484 (1997); Syl. Pt. 1, *Wayne County Bank v. Hodges*, 175 W. Va. 723, 388 S.E.2d 202 (1985)). The Court finds that based upon the findings of fact in this Order, the pleadings, and the stipulated facts agreed to by the parties, no genuine issue of material fact exists, and the McClures are entitled to judgment as a matter of law.

## CONCLUSIONS OF LAW

The McClures argue that the Defendants erred in applying Article 936 of the Hurricane City Ordinance to the B.A. McClure Subdivision. The McClures move for summary judgment and an Order of the Court that Article 936 does not apply to the subdivision. The Defendants argue that Article 936 applies to the subdivision.

The ordinance at issue is Article 936 "Stormwater Management and Surface Water Discharge Control." The ordinance details requirements for new developments and redevelopment projects in the City of Hurricane, specifically requirements of stormwater retainage ponds, which are at issue in this case. The ordinance, as adopted on November 1, 2004, specified that within twelve months the City would enact requirements and standards for stormwater management and drainage effective "upon all new developments and redevelopment projects." Article 936.20 (adopted November 1, 2004) (emphasis added). Thereafter, the City enacted those stormwater management standards on June 6, 2005. The June 6, 2005 version of Article 936.20 stated that the requirements and standards adopted "shall apply to all new developments<sup>2</sup> and redevelopment projects<sup>3</sup> including the disturbance of land activities of any kinds, on any lot, tract, and parcel or land or any portion thereof." (emphasis added). The Court finds that the McClure subdivision is neither a new development nor a redevelopment as discussed in Article 936.20. The project was in existence for several years

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<sup>2</sup> The ordinance states, "*Develop or development* 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." Hurricane City Ordinance, Article 936.03(m).

<sup>3</sup> The ordinance states, "*Redevelopment* 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." Hurricane City Ordinance, Article 936.03(ff).

prior to the enactment of the ordinance, so the project cannot qualify as “new.” The project is an ongoing, existing project, and therefore, cannot be classified as a “redevelopment.” Applying the plain meaning of the ordinance, the project is not a “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.” Therefore, the City cannot apply the stormwater ordinance to the McClure subdivision.

The McClure subdivision is an existing project that has been ongoing since prior to both the original ordinance and the amended ordinance. The ordinance itself states, “Following June 6, 2005, no building permit shall be issued without an approved stormwater management plan required under this Article.” Article 936.22 (adopted June 6, 2005). This section clearly recognizes that the stormwater ordinance would apply to only building permits issued after the date the ordinance was enacted that actually required a stormwater management plan (new developments and redevelopment projects). The McClures project began before both the date the ordinance was approved and the date stated in the ordinance. In its argument, the Defendants treat each residential building as a separate construction project apart from the subdivision project that the McClures planned, thus claiming that each individual home fell *after* the approved ordinance. However, the Defendants have blocked the completion of the remaining thirty homes under the claim that the City will not issue individual building permits without a stormwater retention plan *for the entire subdivision*, treating the project as a whole. The Defendants also raise the issue that the subdivision may have been built in phases as a reason to apply the new ordinance to the McClures’ *entire* project. The Defendants cannot treat the project as one project for purposes of requiring and implementing a stormwater pond and then treat the

construction project as individual homes under individual building permits for purposes of applying the ordinance to the project.

Under the Defendants' reading of the ordinance, if the McClures' completed eighty residential lots and needed a building permit to complete one final lot after the date of June 6, 2005, the City would require the McClure's to design and dedicate a total of three building lots for a stormwater retention pond. This reading of the ordinance is contrary to West Virginia Court of Appeals jurisprudence on grandfathering clauses. Instead, the City must evaluate the McClure subdivision as an existing, ongoing, and continuous project for purposes of permitting and stormwater management requirements. Therefore, the Court finds that Article 936.20, by its very language, incorporates a "grandfathering" clause which excludes the McClure subdivision from its application.

Moreover, the Court finds that independent of the grandfathering language in the ordinance, West Virginia Supreme Court jurisprudence recognizes rights obtained by landowners for nonconforming uses. In *H.R.D.E., Inc. v. Zoning Officer of the City of Romney*, 189 W.Va. 283, 430 S.E.2d 341 (1993),<sup>4</sup> the Supreme Court of Appeals found that landowners acquire a right to a "nonconforming use" under zoning ordinances.<sup>5</sup> The Supreme Court found that a nonconforming land use existed in *H.R.D.E.* in a case with far less "actual use" than the use the McClures have established. In *H.R.D.E.*, the landowner was still in the planning and

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<sup>4</sup> Defendant contends that the holding in *H.R.D.E.* is no longer applicable because W.Va. Code § 8-24-50 was repealed on June 13, 2004. However, the Court finds that W.Va. Code § 8A-7-10, effective June 13, 2004, provides similar grandfathering protections to landowners. Therefore, *H.R.D.E.* remains good law.

<sup>5</sup> The Court notes that the Supreme Court of Appeals has not specifically addressed the legal effect of newly-enacted stormwater management ordinances on an approved subdivision under construction. However, the same concerns arise for stormwater management ordinances as 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. Therefore, the Court finds the closest precedents to guide this Court are zoning regulations, even though stormwater regulations are not zoning regulations *per se*.

development stage when the City's ordinance was amended. Unlike the McClure subdivision, no building or construction had begun on the *H.R.D.E.* property. Under *H.R.D.E.*, the Supreme Court of Appeals recognized four factors to be applied on a case-by-case basis for nonconforming land uses when "there is something less than actual 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, and (4) whether the expenditures could apply to other uses of the land.

The stipulated facts of this case leave no dispute that the McClures have met the first factor. The McClures completed two of the three streets and a total of forty-one houses. The McClures obtained and complied with numerous permits for the subdivision, including NPDES and City of Hurricane permits. They also obtained approvals from various utility companies, the City of Hurricane, the Department of Environmental Protection, and the Department of Highways. Clearly, the McClures have spent a considerable amount of money and time on this project. As to the second prong, there are no facts that support that the McClures did not act in good faith. The McClures began planning the subdivision in 2000 and secured subdivision approvals in 2001. There is no indication that the McClures acted in bad faith in planning or beginning the subdivision. For the third prong, whether the McClures had notice of the proposed zoning, no facts indicate that the McClures knew of the proposed stormwater ordinance provisions any time before the project began in 2001. In fact, no facts indicate that the City even had plans to implement a stormwater management ordinance prior to the McClure subdivision project. The ordinance was not even codified until *four* years after the McClures secured the land, planned, and worked on their project. Therefore, the McClures meet the third prong.

Finally, the Court addresses whether the expenditures could apply to other uses of the land. The Court finds that the McClures' expenditures for developing residential buildings on these lots cannot be applied to designing, building, and maintaining stormwater retention ponds. The McClures planned to sell these lots for profit, but the requirement of a stormwater retention pond would prevent the land from being sold for residential use. Stormwater retention ponds raise issues of land ownership, pond maintenance, compliance with laws, as well as potential tort liability. The construction of a stormwater retention pond could also create liability from existing landowners in the subdivision. The considerations and planning for a residential building differs from that used for stormwater retention pond, so the McClures meet the final factor. The Court finds that the McClure subdivision has met all four factors of the *H.R.D.E.* test.

The Defendants raise the recent Supreme Court of Appeals decision, *Ashbaugh v. Corp. of Bolivar*, 2009 WL 290413 (W.Va. 2009), as a bar to the McClures claim. In *Ashbaugh*, the Supreme Court upheld a decision by the town to deny access from Ashbaugh's subdivision streets to town streets and roads after *Ashbaugh* made plans and secured approval for his subdivision. The town instituted a plan which established certain requirements for all private streets connecting to town streets and roads. The Supreme Court found that Ashbaugh had no right to a nonconforming use and his connection to the streets was not capable of being grandfathered. This Court finds *Ashbaugh* inapplicable to this case. In *Ashbaugh*, the town sought to regulate city property and roads for traffic-related issues, whereas in this case, the City seeks to regulate the use of the McClures' own property. Ashbaugh sought to prevent the town from making changing to town streets that might affect his subdivision's use. The Court in *Ashbaugh* was concerned that a ruling in favor of the plaintiff would entitle him to access to the

town's roads in the exact same manner forever. The Supreme Court found that the town must have the ability to make traffic-related changes to the town streets without concern for individual existing uses by private streets. In this case, the McClures seek to continue the use of their own property, independent of any property owned by the City of Hurricane. The McClures' nonconforming use of their own property does not in any way affect the ability of the City to make future stormwater changes to the City's ordinances. Therefore, this Court finds *Ashbaugh* inapplicable to the facts of this case.

### DECISION

Therefore, based upon the foregoing, the Court concludes that the Defendants erred in applying Article 936 to the McClure subdivision. The Court GRANTS Plaintiffs' *Motion for Summary Judgment*. Declaratory Judgment is hereby GRANTED in favor of the Plaintiffs, and the Court hereby ORDERS that City of Hurricane Ordinance, Article 936 does not apply to the Plaintiffs' subdivision.

Based on the pleadings, arguments of counsel, and the foregoing, the Court does hereby FIND and ORDER that the Plaintiffs shall be granted leave to file an amended complaint. Plaintiffs shall file their amended complaint regarding Plaintiffs' request for declaratory relief within ten (10) days of entry of this Order. The amended complaint shall be against the current named Defendants for monetary damages directly and proximately arising from and related to the facts, acts, and events referenced in the original complaint. Plaintiffs shall file their amended complaint taking into consideration the fact that this Court has granted the Plaintiffs' request for declaratory relief. The Court GRANTS thirty (30) days for the Defendants to answer the amended complaint. The Defendants are not precluded, prevented or barred from raising, asserting or preserving any defenses to the amended complaint. The parties shall comply with

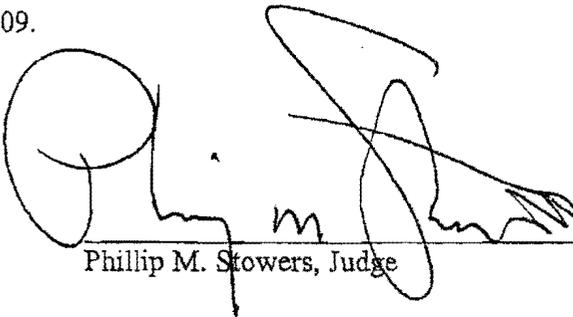
the Court's Scheduling Order dated April 9, 2009. Objections to rulings of this Court adverse to the parties are noted and preserved.

The Clerk is hereby ORDERED to send certified copies of this Order to all Counsel of record:

Harold Albertson  
P.O. Box 1989  
Charleston, WV 25327

Bryan N. Price  
Pullin, Fowler, Flanagan, Brown and Poe, PLLC  
James Mark Building  
901 Quarrier St.  
Charleston, WV 25301

ENTERED THIS 30<sup>th</sup> DAY OF July, 2009.



Phillip M. Stowers, Judge

STATE OF WEST VIRGINIA  
COUNTY OF PUTNAM, SS:  
I, Ronnie W. Matthews, Clerk of the Circuit Court of said  
County and in said State, do hereby certify that the  
foregoing is a true copy from the records of said Court.  
Given under my hand and the seal of said Court  
this 30 day of July 20 09  
Ronnie W. Matthews Clerk  
Circuit Court  
Putnam County, W.Va.