

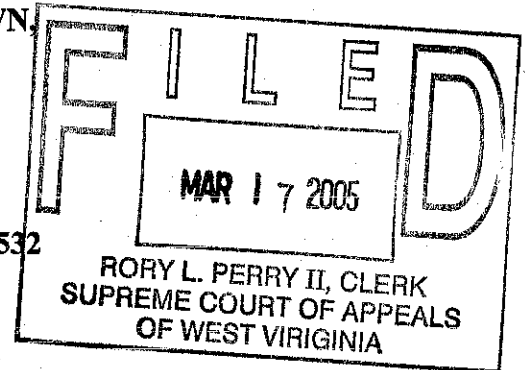
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA ex rel. ANITA D. BROWN,
Executrix of the Estate of Dixie D, Killam, and
PAUL ASHBAUGH,**

Petitioners,

v.

No. 32532



**THE CORPORATION OF BOLIVAR,
A West Virginia municipality,
TIMOTHY COLLINS, Mayor, individually and in his official capacity,
MARY RUTHERFORD, individually and in her official capacity,
ROBERT STEWART, in his official capacity,
JOHN HAEFER, in his official capacity,
CLARK DRAPER, III, in his official capacity,**

Respondents.

**John R. Fletcher, Chanda Wright, Don Owen,
Amy Owen, Jeffrey A. Aberle, Joe Rouch,
Scott L. Butts, Michael Lakey and Jeannette
Lakey,**

Intervenors

**INTERVENORS' RESPONSE TO
PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION**

**Lauren Clingan, Esq.
WV Bar No.6821
P.O. Box 3612
Shepherdstown, WV 25443
(304) 876-8754**

Counsel for Intervenors

Intervenors John R. Fletcher, Chanda Wright, Don Owen, Amy Owen, Jeffrey A. Aberle, Joe Rouch, Scott L. Butts, Michael Lakey and Jeannette Lakey, by and through undersigned counsel, submit the following response to the Writ of Mandamus and/or Prohibition sought by Anita D. Brown, the executrix of the Estate of Dixie D. Kilham, and Paul L. Ashbaugh. The Intervenors are citizens who reside near the proposed Marmion Hill development in a neighborhood whose narrow one-way streets will be rendered unsafe should the Petitioners be allowed to proceed with their proposed development plans which call for access to the subdivision through the Town's existing narrow streets. The proposed plat poses health and safety concerns which have not yet been addressed by the Petitioners and the Town of Bolivar has correctly and legally taken these concerns into consideration in their denial of the Plat. Accordingly, the Intervenors respectfully ask this Court to deny the Petitioners a writ of mandamus or a writ of prohibition.

I. Marmion Hill's Impact On The Narrow Streets of the Town of Bolivar

The subject Petition arises from a decision by the Town of Bolivar to decline to approve Petitioner's proposed plat for a thirty-six lot single-family residential development on land within the boundaries of the Town of Bolivar.¹

The Petitioners have insisted on providing ingress and egress to the development on both Taylor and Clay Streets². These existing streets are within the Corporation of

¹ To the extent this Court wishes the Intervenors to answer the factual allegations contained in the Petitioners' Statement of Facts, the Intervenors adopt the responses of the Respondents.

Bolivar. They are narrow, one-way streets running through one of the Town's residential neighborhoods.³ On these streets, older homes are built only a few feet from the existing pavement edges of these narrow lanes and people regularly walk these streets in the evening. Children often ride bicycles on these quiet streets. Intervenors Michael and Jeannette Lakey live on Clay Street with their two year-old son. The edge of Clay Street, which is currently eleven feet wide, already encroaches on the Lakey's property, with the edge of the roadway only twelve feet from the Lakey's front porch. The Lakeys' home appears in the photograph attached as Attachment 3 to the Affidavit of Donald J. Owen. See Affidavit of Donald J. Owen with Attachments (attached as Exhibit 11). Should the street be widened to safely accommodate the increased traffic volume created by the Marmion Hill development, the roadway would be merely seven feet from the Lakeys' porch and would completely eliminate all of the front yards of the Lakeys' neighbors across the street. See Attachment 4 to Exhibit 11.

A picture speaks a thousand words. The Court is encouraged to review the photographs attached as Exhibit 11. The Court will note that many of the homes of Clay and Taylor Streets have little or no front yards. See Attachments 1, 2, 3, 4, 6 and 7 to Exhibit 11. In addition, both streets include road segments with steep grades of between 12 and 18 percent. See Attachments 5, 8, 9, 10, 11 and 12 to Exhibit 11.

II. The Columbia Avenue Alternative

Another way residents of the proposed Marmion Hill development can get in and out of the proposed development is to enter and exit the subdivision on Columbia

² Parts of Taylor Street were once called "Jackson Street." On or about June 2004, all sections of Jackson Street are now referred to as Taylor Street.

³ These streets are eleven feet wide, with grades in excess of 12% in some places, with no curbs, gutters or sidewalks.

Avenue. Columbia Avenue is an existing two-way street that was previously one of the main roads into the Town of Bolivar before the construction of Route 340. Columbia Avenue is a more direct path into the proposed subdivision, has better sightlines and can be easily widened to accommodate traffic into and out of the proposed Marmion Hill development. Photographs of the Columbia Avenue approach are attached as Attachments 13 through 18 to Exhibit 11. The photographs show a wide, flat roadway with no barriers to widening. This is the logical means of ingress and egress. Use of Columbia Avenue poses no safety concerns and has little effect on residents of Bolivar.

III. Legitimate Citizen Concerns About Safety

Understandably, residents of Clay Street and Taylor Street and the adjacent neighborhood are concerned about the adverse effects a development would have on the safety of their streets. These residents regularly attended Town Council meetings where the Marmion Hill development was on the agenda to express their concerns about the safety of pedestrians and motorists on these narrow streets, which are ill-suited to the volume of traffic which would be reasonably caused by the proposed subdivision.

Traffic studies have indicated that the proposed Marmion Hill development would bring an additional 180 cars per day on these narrow streets through the Taylor and Clay street neighborhood, home to many children and senior citizens. The Town of Bolivar has been provided substantial evidence that the subdivision's use of Clay and Taylor Streets posed a safety concern. In a September 6, 2002 letter to the Mayor and Town Council of Bolivar, the Chief of the Friendship Fire Company, the company that services Bolivar, indicated that the Company's engines could not access the development on Clay and Taylor Streets due to their widths. The Chief stated, "I think that the entrance off of

Columbia Street would be the most practical and would allow us the most mobility of apparatus during an emergency.” See December 6, 2002 letter from Friendship Fire Company (attached as Exhibit 1). Similarly, the traffic study prepared by a consultant for the developer indicated that the best access into the proposed development is from Columbia Avenue.⁴

In their Petition for Mandamus and/or Prohibition, Petitioners complain of the number of meetings at which the Marmion Hill proposal has been discussed. Contrary to Petitioners’ suggestion that these meetings were merely to “abuse” the Petitioners, Petitioners fail to mention that as many as seventy (70) community members, including the undersigned residents, have attended those same meetings in order to address the serious and complex issues presented by the proposed development within the corporate limits of the historic town of Bolivar. The length of the review process was not punitive or vindictive. Rather, it simply reflects the serious public health, safety and welfare issues presented by the proposed Marmion Hill development and the Petitioners’ unwillingness to address these issues.

The Town of Bolivar repeatedly asked Petitioners to address significant public safety questions regarding increased traffic on these narrow, one-way streets, emergency vehicle access, parking, drainage, and many other concerns associated with the proposed 36-lot development. Indeed, in the September 12, 2003 Reasons for Denial offered by the Town of Bolivar, the Town listed a number of substantive deficiencies in the

⁴ A Facility Design Group, Inc. traffic impact study dated August 5, 2003 indicates that “Columbia Street is the best road for access to the proposed Marmion Hill project.” (Attached as Exhibit 2) The Facility Design Group indicated that the estimated traffic on Taylor, Clay and Jackson Streets would be of such low volume as to not be a problem. This opinion, however, relied on a traffic count taken by John Kusner, a representative of the Petitioners who is not a professional traffic engineer, during the severe snowstorm of February 2003 that necessarily skewed the traffic volume estimates. Mr. Kusner’s traffic study merits criticism and was appropriately viewed as dubious by the Town of Bolivar. Accordingly, any conclusions by the Facility Design Group based on Mr. Kusner’s study are, likewise, dubious.

proposed plat that precluded the Town from even assessing whether the proposed development was safe. These issues related to, among other things, Petitioners' failure to meet industry standards as they relate to access and turnabout of emergency vehicles. See September 12, 2003 Reasons for Denial (Exhibit 3). These deficiencies in the proposed plat were also identified in reports submitted by Appalachian Surveys of West Virginia, LLC. See Exhibits 4, 5, 6 & 7. The Petitioners did not address most of the issues listed in this September 2003 denial. In addition, the Town repeatedly asked the Petitioners to have an engineer sign and affix a seal to the plat. The Petitioners have never done so. The need for the Petitioner to provide professionally engineered plans for the extensions, upgrades or construction of town streets prior to allowing access on town streets is essential. Moreover the existence of steep streets within the development, with some of the grades as much as thirty (30) percent, also requires a professional engineer.

The safety of pedestrians and small children present in significant numbers along Clay and Taylor Streets and the inappropriateness of these narrow streets as means of ingress and egress were foremost in the public's comments. Bolivar residents' comments highlighted at least twenty reasons to deny the proposed Marmion Hill subdivision. (See Exhibit 8) This list of public concerns was submitted to the Town of Bolivar for its consideration and expressed in many public meetings when the Marmion Hill development was on the Town Council's monthly meeting agenda. First and foremost, the list addresses the development's threat to the safety of Taylor and Clay Streets. Petitioners failed to adequately address these public safety concerns and failed to meet the requirements set out in the Town's 1987 Building Ordinance.

IV. The Town of Bolivar's Denial

Despite being given the opportunity to address the concerns raised by the Appalachian Surveys reports and the reasons for denial offered by the Town in September 2003, the Petitioners continued to ask the Town to consider essentially the same plat over and over again. Petitioners failed to address the particular points raised by the community or the Town.

It is these legitimate concerns regarding public welfare and safety which resulted in the Town of Bolivar denying the Petitioner's application for approval of their plat. See March 2, 2004 Letter of Bolivar Mayor Timothy Collins (attached as Exhibit 9).⁵ The denial cited concern for the safety of pedestrians along the residential streets proposed to be used for ingress and egress to the subdivision, the dangers presented by use of narrow streets that are ill-suited to the expected higher volumes of traffic and concerns about insufficient access by fire and emergency vehicles.⁶ This denial reflected legitimate safety concerns never addressed by Petitioners.

⁵ The letter is erroneously dated March 2, 2003. It was actually forwarded to the Petitioners on March 2, 2004. The date represents a typographical error.

⁶ Even after this denial, the Town of Bolivar took the extra step of securing a professional traffic engineer, David Wooster of David Wooster and Associates, Inc., to review the proposed Marmion Hill development with respect to the Building Ordinance of the Town of Bolivar, July 1987, and professional traffic engineering standards. Wooster and Associates conclusions reinforce the Town's March 2, 2004 denial. Mr. Wooster concluded that the plans submitted by the Petitioners in this action do not conform with the requirements of the Building Ordinance, do not depict road access, do not depict access for emergency and service vehicles, do not adequately depict topography, do not provide adequate access for parking without endangering people, do not document the serviceability of the existing and proposed roads expected to serve the site, and do not conform with current professional traffic engineering standards. See April 6, 2004 report of David Wooster of David E. Wooster and Associates, Inc. (hereinafter, "Wooster Report") (attached as Exhibit 10). The Wooster Report indicates that the traffic impact study that was prepared by the Petitioners in support of the proposed development was not prepared consistent with current traffic engineering standards as its trip generation estimates were not determined using established traffic engineering guidelines. In addition, intersection capacity analyses were not prepared and speed determination studies were not performed. These studies are critical in the proper determination of adequate corner and stopping sight distances. Indeed, corner and stopping sight distance evaluations at existing and proposed intersections were not performed. This independent study also reviewed the plans to determine with the applicable July 1987 Building Ordinance of the Town of Bolivar, as that Ordinance relates to safe access to and from the site, parking and emergency and service vehicle access within and

Most telling of the Petitioners' position before the Town of Bolivar and, indeed, before this Court, is captured in the Town of Bolivar's March 2, 2004 denial. The Town contended, in its denial, that Columbia Avenue is a more direct path that is both wider and has better sightlines than Clay and Taylor Streets. It also would not present the same health and safety risks to children and other pedestrians as Columbia Avenue passes through an area zoned and utilized as industrial. In response, John Kusner, the Petitioners' representative, as noted in the Town's March 2, 2004 denial, stated that purchasers of homes in this subdivision would not appreciate the "aesthetics" of driving along Columbia Avenue. Not only was there no factual basis for this opinion, but it is clear that it is this "aesthetic" concern, not any legal concern regarding the Town of Bolivar's right to apply its 1987 Ordinance, that is at the heart of Petitioners' petition for mandamus.

The Petitioners' representative's response to the Town's entirely reasonable concern about safety and the availability of a safe and direct route into and out of the subdivision undermines the Petitioners' argument before this Court that their development aspirations have been foiled by the "contumacious conduct of [the Bolivar] Town Council." Rather, the Petitioners would impose greater safety risks on the subdivision's own residents and the existing residents of Bolivar than utilize the obvious choice of ingress and egress, Columbia Avenue.⁷ Put simply, aesthetics cannot and

through the site. The plans were not in conformance with Subsections (e), (f), (i) and (j) of Section 5 of the Ordinance. See Wooster Report at 1-2.

Based on this review of the plans as they relate to the applicable Ordinances of the Town of Bolivar, the Wooster Report recommended denial of the plans as submitted. The Wooster Report confirmed what the Town of Bolivar already determined—that the proposed plat did not meet the requirements of the 1987 Ordinance and posed significant public safety concerns.

⁷ The Petitioners have further rejected the Town's offer to pay for improvements to Columbia Avenue and to construct screening (both fencing and evergreen vegetation) to mitigate the Petitioners' concerns about the adverse visual effects of using Columbia Avenue. See Exhibit 8 at no. 11.

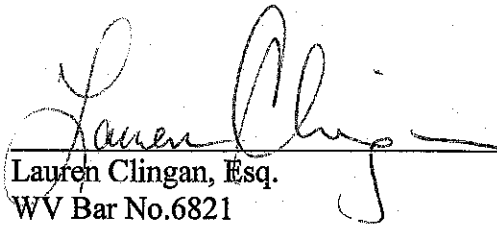
should not outweigh public safety and welfare. The Town of Bolivar was charged, in reviewing the Petitioners' plat, with providing for the health, safety and welfare of the citizens of Bolivar. See 1987 Bolivar Ordinance, Preamble. The Town of Bolivar has consistently and conscientiously assumed its responsibilities under the applicable Ordinance.

The Bolivar Town Council has clearly and repeatedly indicated to Petitioners that the Council would approve the proposed plat if Petitioners provided the requested information relating to safety concerns and provided access to the Marmion Hill property by way of Columbia Avenue, where legal access exists and where physical access can be improved without endangering the current residents of the community. Petitioners have refused to accept this option despite its safety benefits.

The Town of Bolivar has acted reasonably and conscientiously in denying the Petitioners' use of these narrow streets but has imposed no impediment to development should the Petitioners choose to access the subdivision via a wider and less hilly street. The Town of Bolivar has not imposed a moratorium, which was at issue in the previous litigation between these parties. Nor has the Town of Bolivar used its 1987 Ordinance as a zoning ordinance. Rather, the Town of Bolivar has merely upheld its obligations under its 1987 Ordinance and has reviewed "how the use of a certain area is undertaken." See Bittinger v. Corporation of Bolivar, 183 W.Va. 310, 313-14, 395 S.E.2d 554, 557-58 (1990). Public safety is a legitimate and legal concern of the Town of Bolivar and the Town has reasonably and legally applied its Ordinance.

Accordingly, the Intervenors, who are all residents of Bolivar directly affected by the Petitioners' proposed development plan, respectfully ask this Court to decline to decline to issue an order of mandamus and/or prohibition.

Respectfully submitted,



Lauren Clingan, Esq.
WV Bar No.6821
P.O. Box 3612
Shepherdstown, WV 25443
(304) 876-8754

Council for John R. Fletcher, Chanda Wright, Don Owen, Amy Owen, Jeffrey A. Aberle, Joe Rouch, Scott L. Butts Michael Lakey and Jeannette Lakey

Date: March 16, 2005

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA ex rel. ANITA D. BROWN,
Executrix of the Estate of Dixie D, Killam, and
PAUL ASHBAUGH,**

Petitioners,

v.

No. 32532

**THE CORPORATION OF BOLIVAR,
A West Virginia municipality,
TIMOTHY COLLINS, Mayor, individually and in his official capacity,
MARY RUTHERFORD, individually and in her official capacity,
ROBERT STEWART, in his official capacity,
JOHN HAEFER, in his official capacity,
CLARK DRAPER, III, in his official capacity,**

Respondents.

**John R. Fletcher, Chanda Wright, Don Owen,
Amy Owen, Jeffrey A. Aberle, Joe Rouch,
Scott L. Butts, Michael Lakey and Jeannette
Lakey,**

Intervenors

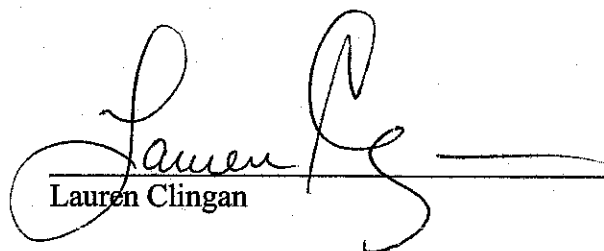
CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on March 16, 2005, the foregoing INTERVENORS' RESPONSE TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION was served on the following counsel of record via first-class mail, postage prepaid:

Richard G. Gay, Esq.
Nathan P. Cochran, Esq.
R. Greg Garretson, Esq.
Law Office of Richard G. Gay, L.C.
31 Congress Street
Berkeley Springs, WV 25411

Peter L. Chakmakian, Esq.
P.O. Box 547
Charles Town, WV 25414

David M. Hammer, Esq.
Hammer, Ferretti & Schiavoni
408 West King Street
Martinsburg, WV 25401



Lauren Clingan