

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners,

v.

Docket No. 05-0067

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 HEAFER, in his official capacity,
ROBERT HARDY, in his official capacity,
CLARK DRAPER, III, in his official capacity,

Respondents.

RESPONSE TO RULE TO SHOW CAUSE

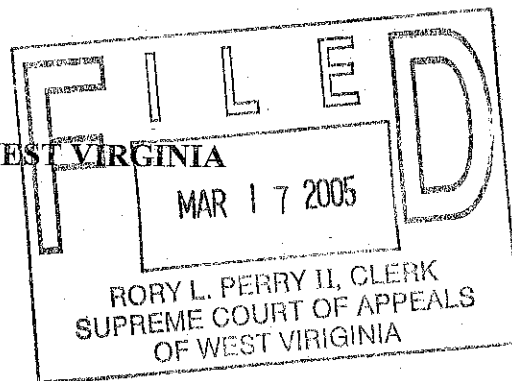
The Respondents have previously submitted "Opposition to Petition for a Writ of Mandamus and/or Prohibition" with various attachments. The Respondents do not wish to needlessly repeat what was stated in their previous brief or to unnecessarily clutter the record with duplicate submissions of exhibits and so submit the following additional authority to be read together with their previous filing and exhibits referenced.

I.

ARGUMENT

The Corporation of Bolivar has Plenary Authority to, *inter alia*, Regulate the Streets within the Municipality and to Inquire and Investigate Matters of Concern to the Municipality or its Inhabitants.

The Respondents' various formulations of their proposal to develop Marmion Hill and to utilize existing one way streets necessarily implicated numerous concerns of the



Municipality and its residents. Those concerns include, among others, emergency vehicle access and the sufficiency of turning radii based upon the width of the streets, the impact of on-street parking upon narrow streets and the impact of such parking upon the access of emergency vehicles; issues related to widening of narrow streets between historic homes; pedestrian safety and particularly the safety of the numerous children in the residential areas proposed by the Respondents for two-way ingress and egress from Marmion Hill.

To address various concerns Bolivar responded in a logical, methodical manner. For example, the Town hired a reputable engineering firm that frequently consults with developers in Jefferson County to review various Marmion Hill proposals, approximately nine in total. See Exhibits 7 - 11 in the Respondents' initial brief. The Town requested that the Petitioners provide documentation from the Petitioners establishing that Friendship Fire Company could provide emergency services protection to the future residents of Marmion Hill. In response to that request, the Fire Chief expressed serious concerns about the route of access, particularly if on-street parking was allowed. Specifically, the Chief urged that a different route of access be used – Columbia Street. See Exhibit 1 of the Respondents' initial brief.

The Town also engaged in an interactive process with the Petitioners, the Town Council, and municipal residents through a series of public meetings and workshops to explore the competing concerns, safety issues, and possible solutions to those concerns and issues. Bolivar is a small community of only about 1100 residents and it is the long-standing practice of the Town to involve the community in matters of Town business.¹

¹ To learn more about the historic town of Bolivar, situated adjacent to Harpers Ferry and surrounded by the Harpers Ferry National Park, visit www.bolivarwv.us.

Indeed, this interactive process was reasonable and necessary given that the West Virginia Supreme Court had previously specifically affirmed the validity of the 1987 building ordinance at issue here: "For the reasons set out below, we hold that the ordinance in question is a valid building ordinance...." *Bittinger v. Corp. of Bolivar*, 183 W. Va. 310, 312, 395 S.E.2d 554, 556 (1990). The 1987 ordinance specifically contemplates a process that provides for notice, due process, and the protection of the health, safety and welfare of the citizens of Bolivar: "WHEREAS, this process needs to be set forth in law to provide notice and due process as well as to provide for the health, safety and welfare of the citizens of Bolivar."

Various provisions of the West Virginia State Code make it perfectly clear that municipalities have "plenary"² powers with regard to, *inter alia*, municipal business, roads, and investigations:

West Virginia Code § 8-12-2 (a) "...any city shall have plenary power and authority...to provide for the government, regulation and control of the city's municipal affairs, including, but not limited to, the following:

- (2) The transaction of the city's business;
- (5) The acquisition, care, management and use of the city's streets, avenues, roads, alleys, ways and property;
- (9) The government, protection, order, conduct, safety and health of persons or property therein;

(c) Any city is hereby authorized and empowered to require, for the purpose of inquiring into and investigating matters of concern to the city or its inhabitants, the attendance and testimony of witnesses and the production of evidence....

See West Virginia Code § 8-12-5 "...every municipality and the governing body thereof shall have plenary power and authority therein by ordinance or resolution, as the case may require, and by appropriate action based thereon:

² "Plenary powers. Authority and power as broad as is required in a given case." Black's Law Dictionary, Fifth Edition.

- (1) To lay off, establish, construct, open, alter...streets, avenues, roads, alleys, ways...for the use of the public....
- (4) To regulate the use of streets, avenues, roads, alleys, ways, sidewalks, crosswalks and public places belonging to the municipality....
- (5) To regulate the width of streets, avenues and roads....
- (7) To provide for the construction and maintenance of water drains...and drainage systems;...
- (43) To exercise general policy jurisdiction over any territory without the corporate limits owned by the municipality or over which it has a right-of-way;...
- (48) To investigate and inquire into all matters of concern to the municipality or its inhabitants.

See also West Virginia Code § 8-12-13(a)(1):

(a) The governing body of every municipality shall have plenary power and authority by ordinance or a code of ordinances to: (1) Regulate the...construction...or alteration of structures of every kind within the corporate limits of the municipality.

There can be no legitimate dispute that the Marmion Hill project caused the Town Council, public officials such as the Fire Chief, and many, many individual inhabitants to have *bona fide* concerns about matters of health, safety, and welfare caused by the narrow streets, possible alteration of those streets,³ the serviceability of existing roads for the project, traffic flow, and emergency services access. Section 5(b) – (j) of the 1987 ordinance contemplate review of these very issues.

Thus, the Town duly gave full consideration to the competing interests of Bolivar, Bolivar's inhabitants, and the Petitioners. By the Petitioners recitation of the dates and types of hearings (meeting vs. workshop) they appear to be implying that there was too

³ Streets do not, of course, consist solely of the visible top layer of material. There are subsurface layers, reinforcements, subsurface utilities, water control features, etc. engineered by trained professionals to provide a safe means of travel under different weather conditions, traffic volume, and loads for a calculated number of years. "Streets" are obviously a type of "structure".

much due process. The state code, however does not provide any fixed rule regarding the number or length of public meetings and indeed, no such rule is possible as the number, length, and subject matter of hearings upon a matter of public concern depend in large part upon the complexity and importance of the issues presented. Indeed, had Bolivar failed to provide due process to all concerned, there can be little doubt that Bolivar would have been hailed into court by one or more other parties upon a claim of *denial* of due process.

Thus, under the plenary authority granted by W. Va. Code 8-12-5, Bolivar proceeded to investigate, evaluate, and seek to resolve the competing concerns. The upshot of that effort was a solution that perhaps made no one happy, but did address the safety issues presented by the use of narrow, hilly streets with their poor sightlines: the Petitioners were publicly advised verbally and in writing that their most recent plat submission was rejected, however, it would likely be approved if Columbia Avenue was used for ingress and Clay and Jackson Streets for egress. *See* Respondents' Exhibit 4 [March 2, 2004 letter]. Remarkably in light of the bona fide concerns of citizens for the safety of their children and the integrity of their properties, the Petitioners' representative John Kusner brazenly objected to the "aesthetic" insult that might be suffered by potential home buyers arising from the approximately three to five seconds of driving time that it would take to pass a scrap yard along the Columbia Avenue route! All that is really at issue in this case is this: the Petitioners could build every single house that they propose to build on Marmion Hill if they would only respect the legitimate health and safety concerns of Bolivar and its residents and use an existing road for ingress and other existing roads for egress. Instead, they are motivated by unsubstantiated concerns that a

potential house purchaser would be so disillusioned by a few second portion of his or her drive as to refuse to pay the purchase price sought for houses in Marmion Hill.⁴

For this Court to grant the relief requested by the Petitioners it must find that the above cited statutes [§§ 8-12-2; 8-12-5; 8-12-13] are unconstitutional such that municipalities do not have plenary authority over the subject matter provided therein, or the Court must hold, without any statutory authority, that Bolivar gave too much attention to this project through consultation with experts, public hearings and workshops and impermissibly allowed the residents to instruct their elected representatives and apply for redress of grievances notwithstanding the absolute and inviolate terms of Section 16 of Article III of the West Virginia Constitution: "The right of the people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate."

Thus, given the plenary powers conferred upon municipalities by the Legislature, the Petitioners have failed to establish a clear legal right to the relief requested; failed to establish a legal duty on the part of the Respondents to grant them the requested building permit given the unique conditions on the ground in Bolivar; and, failed to establish the absence of another adequate remedy because it would be a minor matter to use Columbia Avenue for ingress. *See* Syllabus Point 1, *State ex rel. City of Huntington v. Lombardo*, 149 W.Va. 671, 143 S.E.2d 535 (1965). By contrast, "[a] writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus Point 2, *State ex rel.*

⁴ No support data whatsoever for this revealing outburst by Mr. Kusner was provided to the Town.

Kucera v. City of Wheeling, 153 W.Va. 538, 170 S.E.2d 367 (1969), quoted in *State ex rel. Brown v. Corporation of Bolivar*, 209 W. Va. 138, 142, 544 S.E.2d 65, 69 (2000).

The Respondents respectfully request that no writ issue and that the Petitioners be denied all of the relief that they seek.⁵

II.

Respondents' Responses to Enumerated Allegations in the Writ

1. The Respondents admit the allegations in ¶ 1 of the Statement of Facts.
2. The Respondents admit the allegations in ¶ 2 of the Statement of Facts, with the exception that Jennifer Bruell is no longer a councilperson.
- 3-8. These paragraphs appear to be partial excerpts from the decision of the West Virginia Supreme Court in *State ex rel. Brown v. Corporation of Bolivar*, 209 W. Va. 138, 544 S.E.2d 65 (2000) to which no response is necessary.
9. The Respondents admit upon information and belief that Mr. Ashbaugh is the contract purchaser on the date referenced. The respondents deny that Mr. Ashbaugh has always or only sought to develop 36 houses. To the contrary, Mr. Ashbaugh has made various verbal and written statements about the number of houses sought to be built.
10. The Respondents admit that a "concept plan" was submitted to the Town Council on or about May 7, 2002. Respondents deny the remainder of the allegations in ¶ 10 of the Statement of Facts.
11. The Respondents are without information or knowledge to admit or deny who was in attendance at every one of its meetings alleged as such meetings are open to the public and no roster of attendees is made and therefore, allegations regarding the attendance of "Petitioners, Petitioners' attorneys, and/or their surveyor engineer" are denied. The Respondents deny that Petitioners were "cooperative" and deny that to the extent that the Petitioners did provide such information as was requested, that such requests were unduly burdensome given the issues presented by the Petitioners' application. The Respondents do not understand the use of the term "participate" in the context of footnote 5 to ¶ 11 of the Petitioners' allegation and, therefore, such allegation is denied. In general, the

⁵ The Petitioners bad faith conduct in conducting a "traffic study" during a snowstorm and presenting it as if it was *bona fide* should preclude them from attorneys' fees in any event. As to the individual respondents, Collins and Rutherford, no allegation has been made against them and thus, there can be no basis for any award of any type against them.

summarized minutes of Town Council meetings are the best source of information as to who addressed the Town Council.

12. The Respondents admit that a total of ten additional meetings were scheduled; however, there is at present some uncertainty as to whether all ten meetings were in fact held. The respondents deny the remainder of the allegations contained in ¶ 12 of the Statement of Facts.
13. The Respondents deny the allegations contained in ¶ 13 of the Statement of Facts.
14. Upon information and belief the Respondents admit that Petitioners or John Kusner “solicited and obtained” from “government and professional entities” “documentation” that references one degree or another the various topics alleged. The Respondents deny the remaining allegations contained in ¶ 14 of the Statement of Facts.
15. The Respondents admit that Mr. Laughland “addressed results of a preliminary assessment” concerning stormwater management but denies any inference that the conclusions referenced in ¶ 15 of the Statement of Facts are authoritative.
16. The Respondents deny that the purported “traffic counts” or traffic study were *bona fide* and denies any inference that such traffic counts/study were authoritative.
17. The Respondents admit that the excerpt from the referenced letter is accurately quoted in ¶ 17 of the Statement of Facts. The Respondents deny any inference that the referenced quote is pertinent to the unique issues presented by the proposed Marmion Hill subdivision.
- 18-19. The Respondents admit the allegations contained in ¶s 18-19 of the Statement of Facts.
20. The Respondents deny the allegations contained in ¶ 20 of the Statement of Facts.
21. The Respondents specifically deny that any vote taken on the Marmion Hill project was final. To the contrary, the Respondents specifically informed the Petitioners what steps were required to gain approval.
22. The correct date of the letter was March 2, 2004. The excerpt contained in ¶ 22 of the Statement of Facts is accurately quoted, however, it is not complete and, therefore, the inference that the quoted section is denied is the sole reason for denial is itself denied.


23. The Respondents deny any inference that Mr. Kusner was denied the opportunity to address the Town Council. There was no motion made and therefore no action taken upon the conclusion of the Petitioners' counsel's reading of his comments delivered at the May 4, 2004 Council meeting.

24. The Respondents are without sufficient information or knowledge to admit or deny the allegations contained in ¶ 24 of the Statement of Facts and they are therefore denied. The Respondents deny any implication that now former Jefferson County Clerk Ott's statements are in way binding or dispositive of the issues presented by the Marmion Hill application as Mr. Ott would have no factual basis upon which to opine about the unique challenges posed by Marmion Hill project.

25-26. The Respondents deny the allegations contained in ¶s 25-26 of the Statement of Facts.

WHEREFORE, the Respondents respectfully request that no writ be granted.

Dated this the 16th day of March, 2005.


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Counsel for the Respondents

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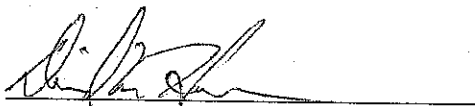
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MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO RULE TO SHOW
CAUSE

Due to other litigation matters in which the Respondents' counsel had responsibility, the undersigned counsel previously telephoned the Clerk of Court and requested until March 17, 2005 to file their response. Upon instruction, the undersigned files this motion and requests that the enclosed responsive brief be deemed timely filed on March 17, 2005.

Dated this the 16th day of March, 2005.



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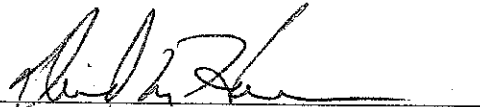
Certificate of Service

The undersigned hereby certifies that on March 16th, 2005, he served a true copy of the foregoing "Response to Rule To Show Cause" and "Motion for Extension of Time To File Response To Rule to Show Cause" via United States mail, postage prepaid, to the following counsel of record:

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