

## Judge Steptoe's Decision - January 2, 2001

*[[Page numbers in the Judge's original order are at the bottom of each page, in red. This document was mechanically scanned, which is subject to error. Paragraphs in blue were indented and single spaced in the original. Paragraphs in black were double spaced. The numbering of the black paragraphs, which reach 29 on page 12, then continue with 25 on page 14, is in the original. Please check the official copy in the Circuit Clerk's office for any legal research, and report any mistakes you find to: <mailto:listener-owner@egroups.com>]]*

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA Case No. 00-P-53

F&M BANK-WINCHESTER, A Virginia Banking Corporation and GREENVEST, L.C., A Virginia Corporation,

Petitioners,

vs.

JEFFERSON COUNTY PLANNING COMMISSION, a public body; and SCOTT COYLE, President; GINGER BURKER, Member; ARNOLD W. DAILEY, JR., Member; SAMUEL J. DONLEY, JR., Member; DAVID M. HAMMER, Member; DEAN HOCKENSMITH, Member; ROSELLA KERN, Secretary/Treasurer; F. MARK SCHIAVONE, Member; RENNY T. SMITH, Member; CHRISSTILES, Member; LYLE CAMPBELL TABB, III, Vice-President; ELIZABETH BLAKE, Member; MATTHEW W. WARD, Member; and P. DAVID MILLS, Member,

Respondents.

### **ORDER**

THIS MATTER came on for a decision this 2nd day of January, 2001 upon the papers and proceedings formerly read and had herein; upon the prior Order of this Court entered June 9, 2000, granting certiorari herein; upon a hearing held herein on July 10, 2000, setting a briefing schedule; upon receipt by the Court of the Briefs of Petitioners and Respondents and the Reply Brief of Petitioners; and upon the Court taking this matter under advisement.

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

1. This case is an appeal, by certiorari procedure pursuant to W. Va. Code Section 8-24-38, of a decision of the Jefferson County Planning Commission dated April 25, 2000.
2. Petitioner F&M Bank-Winchester, a Virginia Banking Corporation ("F&M"), is the owner, and Petitioner Greenvest, L.C., a Virginia Corporation ("Greenvest"), is the proposed developer and contract vendee under a real estate purchase agreement with F&M, of an approximately 1,000 acre parcel of West Virginia real estate ("the Huntfield Property") located one mile south of Charles Town, West Virginia, on the south side of secondary State Route 13.
3. The Respondents are the Jefferson County Planning Commission, a public body (the "Planning

Commission"), which has been established and exists pursuant to

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W. Va. Code section 8-24-1, et seq.; and the eleven voting members and three non-voting members of the Planning Commission.

4. The Huntfield Property is designated for residential use under Jefferson county's zoning: roughly 480 acres of Huntfield Property is zoned for Residential Growth; the remaining 519 acres is zoned Light Industrial-Commercial-Residential Growth.

5. The Huntfield Property is also planned for residential land use pursuant to the Jefferson County Comprehensive Plan enacted in 1994. The Comprehensive Plan recommends that Residential Land Use property be developed in a manner that "attract[s] new residents of all economic levels by encouraging a variety of housing types," and located "so as to maximize the use of existing public facilities and service investments such as schools, parks, sewer, and water." Comprehensive Plan at 111-109.

6. In 1999, Greenvest entered into a contract to purchase the Huntfield Property from F&M for the purpose of developing a planned unit development to be known as "Hunt Field."

7. As proposed, Hunt Field ultimately would consist of 3,300 single family, townhouse and multifamily residential units, 200,000 square feet of commercial office and retail space, and 142 acres of parks, open space, and community center components, including playgrounds, athletic courts, a swimming pool and a community center (the "Hunt Field Subdivision"). As proposed, the Hunt Field

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Subdivision would be phased in over a 17 year period, by annual submission of subdivision plat applications that would authorize recordation of approximately two to three hundred household units per year.

8. On February 17, 2000, Greenvest submitted its application for subdivision and a Community Impact Statement ("CIS") to the Planning Commission Office in accordance with the requirements of the subdivision review process set forth in the Jefferson County Subdivision Ordinance. Included with the application and CIS were a subdivision sketch plat and a soils study as required by the Ordinance at Section 6.1. In further support of its application, Greenvest also submitted an environmental assessment, a traffic impact analysis and an archeological study.

9. With respect to public school system capacity to serve the Hunt Field Subdivision, Greenvest submitted an offer to the Jefferson County Board of Education to set aside 75 acres of the Huntfield Property for future school sites.

10. With respect to sewage treatment service that would be needed for the Hunt Field Subdivision, and in attempted compliance with the CIS requirements, Greenvest obtained a completed form letter from the Jefferson County Public Service District, which operates the City of Charles Town Wastewater Treatment Plant, signed by Mr. Calvin Fleming, Jr., General Manager. The letter, dated January 27, 2000, and directed to Mr. Paul Raco, Director of the Planning Commission, provided: "This letter will serve to confirm that the Jefferson County Public

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Service District Will provide sewage collection services for the property owned by F&M Bank of Virginia, location described as Hunt Field." Greenvest attached this letter as an addendum to the CIS.

11. With respect to the planned provision of water to the Hunt Field Subdivision, Greenvest's CIS stated its intention to obtain water service from the City of Charles Town. (As an interim measure, Greenvest drilled two wells on the property.). Greenvest obtained a letter from Ms. Jane Arnett, City Manager, City of Charles Town, dated January 26, 1999 [sic] [presumably, 2000], addressed to officials of Greenvest and F&M Bank, which stated: "The Charles Town Water Department can furnish water service to the Huntfield property." Greenvest also attached this letter as an addendum to the CIS.

12. With respect to police protection to serve the Hunt Field Subdivision, Greenvest obtained a letter from William E. Senseney, Sheriff, Jefferson County, dated February 29, 2000, which stated (in part): "The Sheriff's Office can not service this proposed development!" Greenvest also obtained a letter from Sergeant S. E. Paugh, Detachment Commander, West Virginia State Police, dated March 1, 2000, which stated (in part): "The Charles Town Detachment is currently operating below normal staffing levels; however, we answer all calls for service and prioritize non-emergency calls. All calls received from residents of Hunt Field will be answered accordingly." These letters were attachments to Greenvest's CIS

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Addendum.

13. With respect to the provision of ambulance, fire and rescue services to serve the Hunt Field Subdivision, Greenvest obtained a Letter from Mr. E. D. Smith, Fire Chief, Independent Fire Company, dated March 14, 2000, stating:

"As all my past letters related to new development have stated, this will provide additional responses to an already over worked Fire and EMS System. However, [with fire hydrant placement and emergency flash features on residences' exterior door lights] we will continue to be able to provide the emergency services as needed. We can not guarantee that we will be able to respond to all calls in a timely manner. We request that we be included in planning meetings with the developer to enable our input in making this as fire safe as possible."

This letter was an attachment to Greenvest's CIS Addendum.

14. With respect to the provision of hospital, electricity and waste removal that would be needed to serve the Hunt Field Subdivision, Greenvest obtained letters of assurance from Jefferson Memorial Hospital, Allegheny Power and Waste Management that these respective services could be provided. These letters were attachments to Greenvest's CIS Addendum.

15. It appears from the record that Greenvest did not include with the CIS (as required by the terms of the Subdivision Ordinance) market and feasibility studies. Under this required item in its CIS, Greenvest stated only that it had performed its own investigation and "concluded that there is a demand for this type of product."

16. Pursuant to the provisions of the Subdivision ordinance, the subdivision review

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process to be conducted by the Planning Commission occurs in four stages: the pre-application conference, the community impact evaluation, the preliminary plat conference, and the final plat public hearing. Subdivision Ordinance at Section 6.0.

17. On March 17, 2000, representatives of Greenvest and the Huntfield Subdivision project met with Planning Commission staff for the pre-application conference.

18. On March 28, 2000, the Planning Commission held a "Community Impact Meeting" (the community impact evaluation stage of the process). At this public hearing, Greenvest presented its proposal to the Planning Commission through the testimony of three members of The Greenvest team, and approximately 40 members of the public who attended the meeting were given the opportunity to speak for a few moments each. The public comments primarily expressed concerns about the potential effects upon the community of such a large residential development. The public comments identified numerous specific problems or concerns with the Hunt Field Subdivision project. With respect to the land comprising the Huntfield Property, there were concerns about the conversion of farmland to residential use. Possible dangers to new residents were discussed resulting from: heavy train traffic on the railroad line that splits the property, and potential sinkholes, toxins and/or soil contamination on the property. Issues were raised about the potential negative impact on heritage tourism and upon historic properties in the vicinity of

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Hunt Field. Numerous comments addressed the potential unavailability of various essential services to serve a subdivision of Hunt Field's size, such as sewage treatment and water supplies, law enforcement, fire protection and emergency response services. People spoke of the strain on the foregoing essential public services as well as on parks and libraries that would be caused by the proposed development. The potential contribution of the development to the already overcrowded public school system was a concern, as was traffic and the potential for overcrowding of roads in the immediate vicinity of Huntfield. People also voiced concerns about the higher taxes that would be needed to fund the whole panoply of infrastructure improvements that might be necessary to serve the development.

19. With respect to the issue of sewage service, at the conclusion of the public comments, the Planning Commission heard from a Mr. Larry Johnson, Senior Project Manager at Chester Engineers. Mr. Johnson told the Planning Commission that an upgrade of the City of Charles Town Wastewater Treatment Plant was commencing (Chester Engineers being the engineer of record for the upgrade) and would be completed in approximately one year. The upgrade was designed to address issues of effluent quality and would not have resulted in increasing the capacity of the plant, which, he stated, was 1.2 million gallons per day. Regarding excess capacity, Mr. Johnson stated that current usage (60%) was such that the

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plant could serve an additional 2,200 household units (or a different number when combined with commercial usage). Mr. Johnson further stated his understanding that the City's policy for providing sewage service was "essentially first come first serve" as plats are recorded.

20. After the public comments, the Greenvest team was permitted to offer rebuttal testimony, and did so. Mr. Jim Duszynski, Vice-President of Greenvest, told those assembled at the meeting that the impact upon the County's public schools would not be as severe or as sudden as had been speculated. He insisted that people were viewing the proposed subdivision, in terms of numbers of school students generated, as fully

built, which, according to the Hunt Field proposal, would occur not right away, but over a period of seventeen years. He argued that Huntfield should not have to pay for schools. With respect to traffic, environmental issues, and historic preservation concerns, Mr. Duszynski denied that the Hunt Field Subdivision would cause the problems forecast. He indicated a willingness to investigate further whether the environmental testing of the soil on the Huntfield Property, which was part of the Environmental Assessment that had been submitted in support of the Hunt Field CIS, included testing for lead and arsenic in connection with the prior agricultural use of the Huntfield Property as orchards.

21. Toward the end of the Community Impact Meeting, the Planning Commission staff, represented by the Planning Director, Mr. Raco, reported to the Planning

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Commission that: "The staff recommendation is that content of the Community Impact Statement is consistent and complete with relationship to the Comprehensive or the Community Impact Statement requirements." Mr. Raco further stated his opinion that the Hunt Field CIS "meets, it far exceeds" the requirements" of the CIS provisions of the Ordinance. Unofficial Transcript of Community Impact Meeting at pp. 47-48.

22. During the latter part of the Community Impact Meeting, the Planning Commission directed its staff to prepare an additional report on issues that had arisen at the meeting, and to solicit letters from the City of Charles Town, the Jefferson County Public Service District and the West Virginia Department of Environmental Protection concerning Charles Town's sewage treatment capacity and the upgrade of the sewage treatment plant.

23. At the conclusion of the Community Impact Meeting, the Planning Commission tabled the matter of the Hunt Field Subdivision. A motion to table the proposal for 60 days was made; the motion was amended to place Hunt Field on the Planning Commission's agenda for the scheduled April 25, 2000, meeting; as amended, the motion was seconded and carried, and the meeting adjourned.

24. Subsequent to the March 28, 2000 meeting, the County Commission exercised its authority under W. Va. Code Section 8-24-6 to appoint two new members, Messrs. Hammer and Schiavone, to the Planning Commission's voting membership.

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25. At the Planning Commission's meeting on April 25, 2000, the Commission members, now numbering 11 voting members, took up the matter of the Hunt Field Subdivision proposal as Item number 4 on the Commission's agenda. No formal motion was made under Robert's Rules of Order to "take from the table" the Hunt Field matter that had been tabled at the March 28 meeting.

26. At the April 25 meeting, the members of the Planning Commission had, for their review, two additional letters addressing the sewage treatment capacity of the Charles Town plant. One letter, dated April 17, 2000, and addressed to Mr. Raco, was from the West Virginia Department of Environmental Protection (WVDEP). The second letter, also to Mr. Raco and dated April 21, 2000, was from Chester Engineers. Both letters, in similar terms, described the expected upgrade of the City of Charles Town Wastewater Treatment Plant. The letters indicated that the upgrade was designed to address wastewater treatment quality and would not result in an increase in the capacity of the plant. WVDEP's letter also stated:

The proposed upgrade will improve the quality of effluent that is discharged from the Charles Town Wastewater Treatment Plant. . . The capacity of the treatment plant will remain 1.2 million gallons-per-day and the discharge will remain to Evitt's Run. Any future expansion of the treatment plant will require a higher degree of treatment or extension of the effluent line to the Shenandoah River. . . The connection point of the Hunt Field development into Charles Town's system must be evaluated... . . The proposed development at Hunt Field could ultimately generate more wastewater than can be treated at the 1.2 million-gallons-per-day plant that

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currently serves Charles Town, Ranson and Jefferson County PSD. Additional wastewater treatment capacity must be evaluated and will be required as this area is developed.

The letter from Chester Engineers confirmed the earlier statement of Mr. Johnson that the Charles Town plant was currently operating at 60% of its quantitative capacity.

27. At the April 25 meeting, a motion was made and seconded to reject the CIS for Hunt Field. There ensued discussion of the Hunt Field proposal among the Planning Commission members and staff. At the conclusion of the discussion, the Commission voted, 6 to 5, to reject the Hunt Field CIS.

28. Petitioners brought this Petition for a Writ of Certiorari on May 22, 2000, challenging the Subdivision Ordinance's CIS requirements as exceeding the authority delegated by statute; and challenging the Planning Commission's administrative decision to reject the Hunt Field CIS on several grounds as delineated below.

29. On June 29, 2000, under order of this Court, the Planning Commission belatedly issued Findings of Fact and Conclusions of Law in support of its decision to reject the Hunt Field CIS. Due to their importance to this Court's decision, these Findings and Conclusions are excerpted here:

1. The Commission finds that the developer failed to include market and feasibility studies as required by the Ordinance.
2. The [CIS] indicates that the developer intends to obtain

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wastewater treatment services through the City of Charles Town Wastewater Treatment Plant. The Commission finds that the West Virginia Division of Environmental Protection [DEP] cited the Charles Town Wastewater Treatment Plant for seventeen (17) violations of various regulations from March 1999 through February 2000.

3. The Commission further finds that the [DEP] indicated that the Huntfield Development could ultimately generate more wastewater than can be treated at the plant that currently serves Charles Town, Ranson and the Jefferson County Public Service District [JCPSD].

4. Additionally, the Commission finds that the plans for upgrading the Charles Town Wastewater Treatment Facility are intended to address issues of quality and not quantity of wastewater treated at the facility. The Commission concluded that this upgrade will not address the increased wastewater treatment capacity

which would ultimately be needed to accommodate the Huntfield Development...

5. . . .The Commission finds that the Huntfield project would be overly burdensome upon the Jefferson County Schools pursuant to Section 8-24-1, West Virginia Code as Amended.

6. The Commission finds that the Sheriff's Office cannot serve the Huntfield Development. . . [and that the State Police are understaffed]... The Commission further finds that lack of police protection could pose a risk to the health and safety of the public pursuant to Section 8-24-1

7. The Commission further finds that emergency services and fire protection cannot be guaranteed for the Huntfield Subdivision... [and] that a threat to the health and safety of the public could be caused by additional burdens upon the fire and EMS systems in Jefferson County pursuant to Section 8-24-1

8. The Commission stated its concerns regarding the possibility of soil contamination at Huntfield and found that the information was inadequate and conflicting and therefore the Commission was unable to evaluate whether the health and safety of the public was protected pursuant to Section 8-24-1.

9. The Commission finds that there were concerns regarding the impact of the Huntfield Development at historic sites and

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resources in the immediate vicinity of the development. And the Commission finds that the failure to preserve historic sites would impact the educational and recreational resources of Jefferson County pursuant to Section 8-24-1

10. The General Manager of the Jefferson County Public Service District submitted a letter dated January 27, 2000 pertaining to sewage collection service for the Huntfield Development. Members of the Commission voiced concerns regarding the adequacy of the letter from the General Manager. Members questioned the authority of the General Manager to speak on behalf of the Public Service District.

11. Various members of the Commission also voiced concerns regarding the impact of additional retail, office, and flexible space at Huntfield upon existing family retail businesses located in and around Charles Town.

12. The Commission further finds that the increased traffic generated by the Huntfield Development could pose problems for the existing highway system. . . [and] could effect [sic] the health and safety of the public pursuant to Section 8-24-1

13. The Commission further finds that there was no public facilities plan in place to address future needs for roads and highways, schools, recreational facilities, drinking water, and wastewater treatment. The Commission finds that it could not adequately evaluate the impact of the Huntfield Development on the health and safety of the public pursuant to Section 8-24-1 . . . as a result of a lack of a public facilities plan to address roads, highways, schools, drinking water, and wastewater treatment facilities.

14. The Commission finds that there is inadequate and/or insufficient information on the impact of the proposed Huntfield Development on fire, police, and emergency services. The Commission further finds that the health and safety of the public could be jeopardized by inadequate or insufficient fire, police, and

emergency services resources as above described, pursuant to Section 8-24-1

25. There follow Conclusions of Law:

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1. Pursuant to Section **8-24-1** . . . the Commission must consider that new community centers grow only with adequate highway, utility, health, educational, and recreational facilities.
2. Pursuant to Section 7.2(c) of the Jefferson County Subdivision Ordinance, the provisions of Section 8-24-30. . . must be considered by the Commission to determine whether or not the [CIS] is adequate. Specifically the Commission concludes that the [CIS] fails to provide adequate information pertaining to provisions for water, sewage, and other utility services, provision for schools, provision for emergency services, police and fire protection, and provisions for recreational facilities. The Commission further concludes that the [CIS] fails to provide adequate information pertaining to impact on proximate historic properties including the Claymont estate, local employment implications including the effect of the development on retail stores in downtown Charles Town and changes in property values associated with the development.
3. The Commission further concludes that the [CIS] fails to provide adequate information to comply with Section 1.1.(g) [of the Subdivision Ordinance, which provides, under Section 1, Purposes of the Ordinance: "To guide public and private policy and action in order to provide adequate and efficient transportation, water, sewerage, schools, parks, and other public requirements and facilities."].
4. The Commission further concludes that Section 7.1 [of the Ordinance] requires that the [CIS] should evaluate the adequacy of available public and private services to meet the demands expected from the subdivision proposal as fully developed.
5. The Commission concludes that the [CIS] fails to provide adequate information regarding the provision of drinking water and wastewater treatment services..
6. The commission concludes that the [CIS] fails to provide market surveys and feasibility studies as

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required in Article 7.1(a)18.

7. The Commission further concludes that the [CIS] fails to provide adequate information pursuant to [purposes and CIS provisions of the Ordinance].

26. In concluding the Findings of Fact and Conclusions of Law in support of its decision to reject the Hunt Field CIS, the Planning Commission found the CIS "not sufficiently detailed" and ruled that the proposal would be considered "unsuitable . . . unless substantial new or corrected information is revealed at a later date."

27. As an initial matter, the Court rejects Respondents' argument that Petitioners have, in effect, waived any objection to the Planning Commission's Findings of Fact and Conclusions of Law on the bass that Petitioners failed specifically to identify and challenge each individual finding. Petitioner's Brief challenges

most of the Planning Commission's findings and conclusions.

28. The Court will first consider Petitioners' challenge to the validity of the Subdivision Ordinance's CIS requirements.

29. By statute, the County Commission was authorized to create a Planning Commission. The Planning Commission shall have from five to fifteen members, "the exact number to be specified in the ordinance creating such commission." W. Va. Code Section 8-24-6.

30. Also by statute, the County Commission, with the advice of the Planning Commission, enacted a County Comprehensive Plan, Zoning Ordinance, and

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Subdivision Ordinance. W. Va. Code Sections 8-24-1, 21, 39. By operation of the statute, once the Comprehensive Plan and Subdivision Ordinance had been enacted and the Planning Commission had been created, the Planning Commission was granted exclusive authority to approve plats of subdivision within the County. In exercising its authority, the Planning Commission acts in an advisory capacity to the County Commission.

31. The terms of the Subdivision Ordinance adopted by the County Commission in 1979 and still in effect, and with which Greenvest attempted to comply, include, as noted above, in Articles 6 and 7, extensive provisions requiring submission of a Community Impact Statement by a subdivision applicant.

32. The Ordinance provides that "Planning Commission evaluation of a Community Impact Statement results in an opinion regarding overall community acceptability of a subdivision proposal." Section 6.0. The Ordinance further provides: "The Community Impact Statement is a complete report about a subdivision proposal which: (1) discloses all basic information about the subdivision; and (2) explains the physical, social and economic impacts the subdivision is expected to have on the community when the subdivision is fully developed." Section 7.1.

33. To prepare the CIS, a subdivision applicant is required to provide information on

45 separate issues such as: (a) subdivision layout; (b) subdivision regulation (covenants and restrictions, etc.); (c) the housing market and the developer's

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finances; (d) suitability of the ground to be developed for housing; (e) extent of anticipated disturbance by developer of topography and impact upon natural environment; (f) social impacts such as increased traffic and demand for additional school capacity; and (f) adequacy of essential services such as sewage treatment, water, etc., to service the proposed development.

34. After listing these 45 areas in which information is to be provided, the Ordinance states: "Particularly under the category of Social Impacts, the Community Impact Statement should evaluate the adequacy of available public and private services to meet the demands expected from the subdivision proposal as fully developed. Statements of adequacy from appropriate service agencies may be submitted in this regard." Section 7.1(b).

35. Petitioners' first claim is that the CIS provisions of the Subdivision Ordinance are invalid because they exceed the powers granted to the County Commission by the state enabling statute to enact the Subdivision Ordinance. As the term "Community Impact Statement" does not appear in the West Virginia Code, the power to enact these provisions was not expressly granted. Therefore, the Court must consider whether such a power was implied.

36. "[A] county commission is a corporation created by statute, and possessed only of such powers as are expressly conferred by the Constitution and legislature, together with such as are reasonably and necessarily implied in the full and proper

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exercise of the powers so expressly given. It can do only such things as are authorized by law, and in the mode prescribed." Syllabus Point 1, State ex rel. State Line Sparkler v. Teach, 187 W. Va. 271, 418 S.E.2d 585 (1992).

37. If any reasonable doubt exists as to whether a locality has a certain power, the power must be denied. Syllabus Point 2, Sharon Steel Corp. v. City of Fairmont, 175 W. Va. 479, 334 S.E.2d 616 (1985) (stating the rule as it applies to municipal corporations).

38. "A grant of the police power to a local government or political subdivision necessarily includes the right to carry it into effect and empowers the governing body to use proper means to enforce its ordinances." Syllabus Point 2, Teach, supra.

39. The Subdivision Ordinance is entitled to a presumption of constitutionality and enforceability.

40. Petitioners base their argument for a limited interpretation of the authority of the County Commission in regard to the Subdivision Ordinance upon the Dillon Rule. This is a rule used in the construction of statutes delegating authority to local government: "[A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation--

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not simply convenient ,but indispensable . . . Merriam v. Moody's Executors, 25 Iowa 163, 170 (1868)." Black's Law Dictionary, Fifth Edition, p. 412.

41. It is apparent from the Court's research that the Commonwealth of Virginia, whose common law, after all, forms the basis of West Virginia's common law, follows the Dillon Rule explicitly. See Resource Conserv. Mgt. v. Bd. Of Supervisors, 238 Va. 15, 17, 380 S.E.2d 879, 881, n. 2 (1989); Bd. Of Supervisors v. Home, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975). It appears, however, that in West Virginia, while still maintaining a rule (not explicitly known as the Dillon Rule) of limitation regarding the powers of local governing bodies, the Courts have nonetheless had a willingness to recognize that local governing bodies such as County Commissions have been granted by the legislature, and need to exercise, a delegated portion of the state's general police powers in order to carry out their statutory duties. The authority to promulgate and enforce ordinances is a principal means given by the state legislature to local governments toward this end.

42. This Court views the Community Impact Statement requirements from this perspective. Referring to the purposes clauses of the enabling statute, clearly the County Commission and the Planning Commission have been charged with extensive responsibilities:

43. § 8-24-1. Planning commissions authorized; statement of objective.

The...county [commission] may by ordinance create a Planning commission in order to promote the orderly

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development of its governmental units and its environs. It is the object of this article to encourage local units of government to improve the present health, safety, convenience and welfare of their citizens and to plan for the future development of their communities to the end that highway systems be carefully planned; that new community centers grow only with adequate highway, utility, health, educational and recreational facilities; that the needs of agriculture, industry and business be recognized in future growth; that residential areas provide healthy surroundings for family life; and that the growth of the community is commensurate with and promotive of the efficient and economical use of public funds.

In accomplishing this objective, it is intended that the planning commission shall serve in an advisory capacity to the. . . county [commission], that certain regulatory powers be created over developments affecting the public welfare and not now otherwise controlled, and that additional powers and authority be granted to the governing bodies of. . . counties to carry out the objective and overall purposes of this article.

44. The Court concludes that the language quoted above is, in effect, the delegation of a portion of the state's police power to the County Commission in an area --land use--that is of local concern.

45. Petitioners' argument that the CIS provisions of the Ordinance are invalid revolves around whether the CIS requirements wander too far from the explicit statutory bases for the Planning Commission's actions in ruling on plats in W. Va. Code Section 8-24-30. Yet the Court sees no reason that the County Commission, in enacting the Subdivision Ordinance, should be constrained by the explicit statutory factors enumerated in Section 8-24-30, which apply by to action of the Planning

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Commission in deciding subdivision applications. The County Commission's delegated power derives from Section 8-24-1 and is much broader. also Singer v. Davenport, 164 W. Va. 665, 668, 264 S.E.2d 637, 640 (1980) ("...subdivision regulations govern the planning of new streets, standards for plotting new neighborhoods, and the protection of the community from loss due to poor development.").

46. As described above, the CIS provisions do require a subdivision applicant to provide extensive information to the Planning Commission, as follows:

1. Name, address, and telephone number of owner/developer
2. Name, address and telephone number of contact person
3. Tract size, shape, location and zoning

4. Project design or layout
5. Number, approximate size and location of proposed lots or building sites
6. General description of surface conditions (topography)
7. Soil and drainage characteristics
8. Existing natural or man-made features including, vegetative cover, water bodies, quarries, and rock outcroppings
9. General location and description of existing structures
10. General location and description of existing easements or rights-of-way
11. Existing covenants and restrictions
12. Approximate size, location and purpose of areas to be dedicated
13. Intended improvements
14. Intended land uses
15. Intended earthwork that would alter the natural topography
16. Proposed covenants and restrictions

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17. Tentative development and construction schedule --(Provide a bar chart for projects exceeding 50 dwelling units showing milestone activities versus time in months and years)
18. Market surveys and feasibility studies
19. Anticipated project costs
20. Anticipated funding sources

(b) A discussion of the relationship of the proposed subdivision to the community (County) and the area around the subdivision shall consider the following items:

### Physical Impacts

1. Earthwork: Will project strip entire site? Will blasting be extensive? Will the project be a borrow or a waste job? Will drainage be affected? Will terrain be altered?
2. Conversion of farm land to urban uses

3. Wildlife populations and DNR endangered species check

4. Groundwater and surface water resources: Number of reported water contamination problems within 1000 feet, major surface water sensitive areas, i.e., wetlands, marshes and existing ponds, within one mile of the site. Describe the storm water management concept.

5. Compatibility of the project with the surrounding area in terms of land use and visual appearance

6. Impact on sensitive natural areas such as sink holes, water recharge areas, stream and river banks, hillsides, forests, wetlands and water bodies will be described. A sink hole inventory check will be requested and obtained from the local office of the Natural Resources Conservation Service. The applicant will describe the condition of channel and banks of streams on property or within 500 feet of discharge point from property.

### Social Impacts

7. Demand for schools and educational facilities

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8. Traffic Impact Data...

9. Demographic Impact

10. Health and emergency medical services

11. Fire protection

12. Police Protection

13. Trash Removal

14. Electrical power service

15. Telephone service

16. Sewer and water services

17. Relationship of the project to the Comprehensive Plan

18. Housing supply and demand

19. Proximity and relationship to known historic features

20. Recreation

### Economic Impacts

21. Property tax evaluation

22. Anticipated bank deposits and loans

23. Anticipated local spending (construction, retail, service, etc.)

24. Local employment implications

25. Expected changes in property values

47. The Court, having considered each of the above separately delineated requests for information contained in the CIS provisions of the Ordinance, is of the view that each and every one of them falls squarely within the statutory grant of authority and responsibility given to the County Commission to: "improve the health, safety, convenience and welfare of [its] citizens...and to plan for the future development of their communities to the end that highway systems be carefully planned; that new community centers grow only with adequate highway, utility, health, educational and recreational facilities. . . that residential areas provide

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healthy surroundings for family life; and that the growth of the community is commensurate with and promotive of the efficient and economical use of public funds", W. Va. Code Section 8-24-1. Consequently, Petitioners' challenge to the validity of the CIS provisions of the Subdivision Ordinance is rejected.

48. The Court will next consider whether, as Petitioners argue, the Planning Commission exceeded its authority in rejecting the Hunt Field CIS.

49. On appeal to this Court, the actions of the Planning Commission are entitled to a presumption of correctness. The Court will disturb an administrative decision of the Planning Commission only where the Commission has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction. Kaufman v. Planning & Zoning Comm'n, 171 W. Va. 174, 298 S.E.2d 148 (1982). Review in this Court by certiorari procedure is a review of the record below, and this Court will not conduct a trial de novo. See W. Va. Code Section 8-24-64.

50. In delineating what a subdivision applicant must submit to the Planning Commission, the Code states only that: "A person desiring approval of a plat shall submit a written application for approval, together with a copy of the proposed plat, to the planning commission having jurisdiction." W. Va. Code Section 8-24-29.

51. At this point, a threshold issue arises as to whether the Planning Commission's

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decision to reject the Hunt Field CIS is a decision that is ripe for this Court's review. The Respondents' Brief raises the ripeness issue indirectly, mostly through footnotes noting that there is nothing to prevent this developer from going forward to the preliminary plat stage. As the Court has previously noted in a different case, the acceptance or rejection of the Community Impact Statement is a material decision in the administration of the subdivision ordinance. The terms of the Ordinance itself provide several indications of this materiality. For example, the Ordinance at Section 6.0 states that "The Commission's opinion serves as a basis for a final plat decision." Further, at Section 7.1, the Ordinance states: "Changes in a subdivision

proposal can be accomplished with a minimum of cost and effort if they are accomplished during CIS review early in the subdivision process. Acceptance or rejection of a CIS by the Planning Commission informs the developer that his subdivision proposal is generally suitable / unsuitable and will be so considered during the review process, unless substantial new or corrected information is revealed at a later date." (Emphasis added.) In addition, the Code simply provides at Section 8-24-38: "A decision of a commission may be reviewed by certiorari procedure...[in circuit court]." Consistent with the statute and with the Court's position in Harper's Ferry Conservancy et al. v. Jefferson County Planning Commission, Case No. 99-C-1 14, Order dated August 11, 1999, this Court holds that acceptance or rejection by the Planning

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Commission of a developer's CIS is a material decision with serious financial implications for a subdivision applicant, and that even though the Ordinance states that CIS acceptance or rejection is an "informal opinion," Subdivision Ordinance at Sections 6. 1(a).6 - 6. 1(a).7, that opinion is reviewable in this Court by certiorari procedure.

52. Petitioners emphasize that the Code provides, at Section 8-24-30: "Basis for commission's action upon application for approval":

In determining whether an application for approval shall be granted, the commission shall determine if the plat provides for:

- (1) Coordination of subdivision streets with existing and planned streets;
- (2) Coordination with and extension of facilities included in the comprehensive plan;
- (3) Establishment of minimum width, depth and area of lots within the projected subdivision;
- (4) Distribution of population and traffic in a manner tending to create conditions favorable to health, safety, convenience and the harmonious development of the municipality or county; and
- (5) Fair allocations of areas for streets, parks, schools, public and semipublic buildings, homes, utilities, business and industry.

As a condition of approval of a plat the commission may specify:

- (1) The manner in which streets shall be laid out, graded and improved;
- (2) Provisions for water, sewage and other utility services;
- (3) Provision for schools;
- (4) Provision for essential municipal services; and
- (5) Provision for recreational facilities.

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53. Petitioners allege that the Planning Commission exceeded its authority in evaluating the Hunt Field CIS in that it did not limit itself to consideration of the ten statutory factors listed in Section 8-24-30. For example, Petitioners complain, the Planning Commission insisted upon compliance with the Ordinance's requirement that the developer provide "market surveys and feasibility studies; anticipated project costs, funding sources, and bank deposits and loans; demographic impact, local employment implications, and expected changes in property values." Respondents' view is that the Planning Commission is within its authority to rely upon the Ordinance, which derives its multi-factor analysis from the enabling statute at Section 8-24-1. Respondents assert that this broad statement of purposes supports the wide-ranging "impact" analysis that the CIS sections of the Ordinance demand.

54. This Court has already related its view that the broad statutory purposes in Section 8-24-1 provide sufficient justification for the County Commission to have enacted the Ordinance with the CIS provisions. Petitioners argue that even if the County Commission is within its rights to require submission of a CIS, the County Commission nevertheless exceeded its authority by including in the CIS requirements items of requested information that the Planning Commission, under Section 8-24-30, is not authorized to consider in reviewing applications for subdivision plats. See Kaufman, 171 W. Va. at 182, 298 S.E.2d at 156 ("planning

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commissions may consider only evidence presented for the record which bears on the grounds authorized by statute for plat approval or disapproval.").

55. The Court believes that to permit Petitioner's argument would be tantamount to saying that the broad statement of purposes in the Code at Section 8-24-1 has been superceded by the narrower statement of basis for decision at Section 8-24-30. This Court reads Kaufman in light of its factual context, as holding that a Planning Commission must approve or disapprove a plat based upon "evidence presented to it and for the reasons authorized by law." What was disapproved in Kaufman was not consideration of factors duly set forth in a Subdivision Ordinance and clearly applicable to the case at hand (as we have here); but in Kaufman, it was evident that Planning Commission members had considered evidence outside the record, including members' life experiences, which "would prevent plat applicants from knowing what matters they would need to refute in order to gain commission approval." 171 W. Va. at 182, 298 S.E.2d at 156. This Court sees no such danger in the Planning Commission members' consideration of all the factors set forth in the Subdivision Ordinance's CIS provisions. And the Court believes that the Ordinance is justified in requesting information on all of those factors based upon the enabling language of Section 8-24-1. In other words, the Ordinance itself provides "reasons" for the Planning Commission's decision that are "*authorized by law.*"

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56. In summary, the Court rejects Petitioner's argument that the Planning Commission exceeded its authority in requiring submission of, and using as a basis for evaluation of the Petitioners' subdivision application, all of the information requested in the CIS provisions of the Subdivision Ordinance.

57. On a related point, Petitioners next argue that the Planning Commission exceeded its authority by rejecting the Hunt Field CIS notwithstanding that Petitioners had met all of the technical requirements of the Ordinance. In other words, Petitioners assert that the Hunt Field CIS provided all the requested information, was correct and complete. In support of this contention, Petitioners point out that the Planning Commission staff recommended acceptance of the CIS to the Planning Commission members at the March 28 Community Impact Meeting. To the extent that Petitioner's argument is based upon the notion

that a Planning Commission is not free to reject the opinion of its own staff, the Court finds it without merit. To the extent that Petitioners are again relying upon a statement of the Supreme Court of Appeals in Kaufman, the Court disagrees with Petitioner's reading of that opinion. In Kaufman, the Planning Commission had made a finding that the subdivision applicant "had complied with all technical requirements of the statute and ordinance." The Kaufman Court then stated: "When an applicant meets all requirements, plat approval is a ministerial act and a planning commission has no discretion in approving the submitted application." 171 W. Va. at 184, 298 S.E.2d

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at 158. This conclusion, while inescapable, is inapplicable here. This Court has no trouble in discerning from the Planning Commission's Findings of Fact and Conclusions of Law that in the instant case that Respondents do *not* agree that the Hunt Field CIS met all the technical requirements of the Ordinance. Therefore, the matter had simply not proceeded to the point where the Planning Commission no longer had the benefit of its decision-making discretion and its duty had become merely "ministerial." In summary, the Court rejects Petitioners' argument that the Hunt Field CIS was correct and complete and that therefore, the Planning Commission was compelled to accept it.

58. Petitioners have raised three procedural errors as a basis for overturning the Planning Commission's decision to reject the Hunt Field CIS.

59. The first assignment of procedural error is that when the Planning Commission resumed consideration of the Hunt Field CIS at its meeting of April 25, 2000, it failed to follow Robert's Rules of Order in that no motion was made to take from the table the Hunt Field CIS which had previously been tabled for sixty (amended to thirty) days at the March 28, 2000 meeting. While procedural niceties such as the one under discussion here are certainly beneficial, it does not follow that every such violation is reversible error. The Court finds this error (which the Planning Commission appears to acknowledge) to have been harmless.

60. In another procedural challenge, Petitioners complain that the Planning

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Commission did not provide any written documentation of its reasons for rejecting the Hunt Field CIS until *after* the Petitioners had filed this action. This Court held a show cause hearing on the Petition for a Writ of Certiorari on June 9, 2000, and the Planning Commission issued written Findings of Fact and Conclusions of Law in support its decision within the twenty-day time period ordered by the Court at that hearing. All told, more than sixty days elapsed between the date of the Planning Commission's decision and the date that it issued written findings in support of that decision.

61. W. Va. Code Section 8-24-31 provides that, upon disapproval of an application for approval of a plat, the Planning Commission "shall set forth its reasons in its own records and provide the applicant with a copy thereof."

62. In Harding v. Bd. Zoning Appeals, 159 W. Va. 73, 219 S.E.2d 324 (1975), the Supreme Court of Appeals, in the context of a conditional use permit under the zoning laws, held that when the statute has established circuit court review by certiorari procedure, this necessarily implies that the decision-making local body is required to make written findings of fact in support of its decision. Written findings are needed so that "a reviewing court may ascertain whether the administrative decision conforms to the standards in

the ordinance for the particular action taken." Syllabus Point 4, in part, Harding, supra.

63. W. Va. Code Section 8-24-31 applies, by its terms, to the Planning Commission's

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decision approving or disapproving plats, not to its acceptance or rejection of a CIS. Given this Court's view of the materiality of the Planning Commission's decision with respect to a CIS, given the logic of Code Section 8-24-31, and given the holding in Harding, supra, this Court will insist that the Planning Commission issue written findings of fact and conclusions of law in support of its decision to reject a subdivision applicant's CIS. This Court will construe the thirty-day appeal period in Section 8-24-3 8 as commencing from the date that the Planning Commission has served such written findings upon the parties involved.

64. Applying these principles to the present case, the Court is concerned that the Petitioners were placed in a quandary: they needed to respond to the statutory deadline to appeal to this Court within 30 days of the date of the Planning Commission's decision, April 25, 2000; yet Petitioners did not have the benefit of written findings specifying the grounds upon which the Planning Commission rejected the Hunt Field CIS. As noted, those Findings were finally filed in this action on June 29, 2000. To excuse the late filing, Respondents contend (though Petitioners deny it) that by attempting to notice the deposition of Mr. Cassell, the Planning Commission's legal counsel, Petitioners disqualified Mr. Cassell, leaving the Planning Commission without counsel and thus causing (or contributing to) the delay. Without acknowledging that this or any similar excuse for this procedural lapse on the part of the Planning Commission is justified, the Court finds this

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problem to have been mooted, because under the briefing schedule set by the Court on July 28, 2000, Petitioners had ample time (more than three months, plus the month from June 29 to July 28) to consider the Planning Commission's Findings and to frame their appeal from the Findings. Thus any alleged error due to the delay either was, or has become, harmless.

65. Petitioner's final assignment of procedural error is that the Planning Commission should not have permitted its two newly appointed members, Messrs. Hammer and Schiavone, to vote on the Hunt Field CIS. Petitioners complain that these two new members were appointed by the Planning Commission after the Community Impact Meeting of March 28, 2000, but before April 25, 2000, and that therefore, the two new members would not have been in a position to have heard the oral presentation testimony of Greenvest's team or other testimony. (No testimony from the Greenvest team was permitted at the April 25 meeting.) Petitioners argue that this error violates their rights to procedural due process. The Court understands Respondents' point in this regard, that the power under Code Section 8-24-14(13) to delegate matters to a committee implies that it would not always be necessary for all Planning Commission members to have heard direct oral testimony from applicants. But the Court finds Respondents' point is inapplicable as in this case, there was no committee designated and the Hunt Field CIS was presented to the full Planning Commission. Thus, the Court is persuaded that the

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Petitioners should have had the opportunity to present their plan, address members' concerns, and offer rebuttal to *all* the Planning Commission members who voted on the matter of the Hunt Field CIS. The Court agrees that the action taken was thus inconsistent with Petitioners' procedural due process rights and for

this reason, the Court must remand this matter for a fair hearing.

66. Petitioners have also claimed that the decision rejecting the Hunt Field CIS violated Petitioners' rights to equal protection. In this regard, the Court takes umbrage with Respondents' Brief, which refers throughout to Greenvest as the "Virginia Developer" and to F&M as the "Virginia Bank." The Court hopes that the Respondents are not implicitly asking or expecting this Court to treat Petitioners differently because they are not West Virginians. Further, however, it is impossible for this Court to determine from this record whether or not Petitioners were denied equal protection below. The burden of proving such denial is upon Petitioners.

67. The remainder of Petitioners' contentions the Court considers together. Petitioners argue that the Planning Commission erred in that by rejecting the Hunt Field CIS, the Planning Commission was either surreptitiously enacting a moratorium on mixed-use development in Jefferson County, or alternatively, acted as if there were in place in Jefferson County a so-called "adequate public facilities" ordinance, or alternatively, effectively "downzoned" the Huntfield Property. Petitioners further

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claim that the Planning Commission's review of and decision upon the Hunt Field CIS reflects standards with respect to the assurance of essential public services that were impossible for Petitioners to meet. Certainly, the Planning Commission's Findings of Fact and Conclusions of Law indicate that one major basis for its decision on the Hunt Field CIS was its concern that with a development the size of Hunt Field, the County, at this time, simply lacks the resources and infrastructure (including sewage treatment capacity, school capacity, roads, law enforcement, fire protection and emergency services capacity) to assure (consistent with its statutory duty under Section 8-24-1) that "new community centers grow only with adequate highway, utility, health, educational, and recreational facilities." The problem was compounded by the Subdivision Ordinance which requires a proposed development to be considered "*as fully developed*." This meant that the Planning Commission review was conducted as if Hunt Field would have contained 3,300 household units *overnight*; whereas Greenvest's proposal was to phase the development in over a 17 year period, submitting subdivision plat applications at a rate of two or three hundred household units per year. At this time, the Court cannot tell from the record whether the Planning Commission's decision was that Greenvest could *never* develop the Huntfield Property, or whether it could proceed successfully under certain conditions. Thus the Court cannot rule, at this time, upon the remainder of Petitioners' contentions. The Court is of the opinion that at

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a minimum, when the Planning Commission decides to reject a subdivision applicant's CIS, fundamental fairness and procedural due process require that the Planning Commission tell the applicant in a straightforward manner if its conclusion is that the proposed subdivision could never be acceptable in the community. The Court finds that the interplay of the West Virginia Code at Section **8-24-1 et seq.** with the Subdivision Ordinance suggests that it would be within the Planning Commission's authority, under appropriate circumstances, to thus reject a proposed development outright. On the other hand, if the Planning Commission's decision is that the proposed development is considered "unsuitable" but that, with changes or concessions, it could find that the development could go forward, then it is the Planning Commission's obligation to set out explicitly what changes within the developer's power might cause the Planning Commission to accept it. Without suggesting in any way what the Court's ultimate position might be, upon review of any subsequent Planning Commission decision, such changes might, for example, involve a longer phase-in period; scaling down the proposal; suggesting that the developer be responsible

for sewage treatment at a plant within the development; or other changes.

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For the reasons stated above, this case is remanded to the Jefferson County Planning Commission, which shall, following normal procedures but after allowing a reasonable period of time to Petitioners to prepare, accept and consider a revised Community Impact Statement, should Petitioners wish to submit one. Whether or not Petitioners choose to submit a revised Community Impact Statement, the Planning Commission shall, again following normal procedures, conduct an entirely new Community Impact Meeting to consider Petitioners' Community Impact Statement and subdivision application for the proposed Hunt Field Subdivision, after which the Planning Commission shall consider its obligations under the terms of this opinion to provide the subdivision applicant with feedback and shall, after full consideration, conduct another vote on the Hunt Field CIS. If, after the new hearing, the Planning Commission votes to again reject the Hunt Field CIS, the Planning Commission shall issue written Findings of Fact and Conclusions of Law within fifteen (15) days of such vote. This Court will construe the appeal period for any appeal to be filed in this case from a subsequent decision of the Planning Commission as beginning to run on the date that such Findings of Fact and Conclusions of Law are served upon the parties and filed with the keeper of the Planning Commission's records. REVERSED AND REMANDED. It is so ORDERED.

The Court notes the timely exception of all parties to any and all adverse rulings

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herein contained.

The Clerk shall enter this order as and for the day and date first above written and shall transmit attested copies thereof to all counsel of record.

[signed]

THE HONORABLE THOMAS W. STEPTOE, JR.

JUDGE, TWENTY-THIRD JUDICIAL CIRCUIT

The Clerk is directed to retire this Action from the active docket and place it among causes ended.

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