IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

AUBREY E. HENRY, and
DEBORAH V. HENRY,

Plaintiff,

v.

CIVIL ACTION NO. 3:06-CV-33
(BAILEY)

JEFFERSON COUNTY COMMISSION, et al.,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

The above styled case is currently before the Court on a Motion for Summary Judgment by Shepardstown Men's Club, Ledge Lowe Homeowners' Association, William Lewandowski, Joyce Ann Lewandowski, Miriam Wilson, and Richard Super (collectively "Shepardstown Defendants") [Doc. 291]; plaintiffs' Motion for Partial Summary Judgment [Doc. 321]; Motion for Summary Judgment by the Jefferson County Commission and the Jefferson Planning and Zoning Commission [Doc. 323]; and Motion for Summary Judgment by defendants William Lewandowski in his official capacity, Dan Markin, John Simms, and Thomas Kane [Doc. 324]. After review of the record, the arguments of the parties, and the relevant law, the Court finds that the Motion for Summary Judgment by Shepardstown Men's Club, Ledge Lowe Homeowners' Association, William Lewandowski, Joyce Ann Lewandowski, Miriam Wilson, and Richard Super (collectively "Shepardstown Defendants") [Doc. 291] should be **GRANTED**; plaintiffs' Motion for Partial Summary Judgment [Doc.

321] should be **DENIED**; the Motion for Summary Judgment by the Jefferson County Commission and the Jefferson Planning and Zoning Commission (hereinafter the "Jefferson defendants") [Doc. 323] should be **GRANTED**; and the Motion for Summary Judgment by defendants William Lewandowski in his official capacity, Dan Markin, John Simms, and Thomas Kane [Doc. 324] should be **GRANTED**.

BACKGROUND

On March 31, 2006, plaintiff Aubrey Henry filed the instant action in the Northern District of West Virginia alleging: violation of his first Amendment Right to Petition (Count I); conspiracy to violate his First Amendment Right to Petition (Count II); violation of his Fifth and Fourteenth Amendment Right to Due Process to a fair and impartial hearing (Count III); conspiracy to violate his Fifth and Fourteenth Amendment Right to Due Process to a fair and impartial hearing (Count IV); violation of his Fifth and Fourteenth Amendment Right to Procedural and Substantive Due Process (Count V); conspiracy to deny access to the courts (Count VI); and a 'reservation' of his right to file a takings claim pursuant to § 1983 and the Fifth and Fourteenth Amendments to the United States Constitution (Count VII).

On May 16, 2007, plaintiffs amended the Complaint to add Deborah Henry as a plaintiff [Doc. 82]. On August 6, 2007, defendants filed a Second Amended Complaint adding substantive claims and modifying claims made in the original Complaint [Doc. 106].

The specific allegations in plaintiffs' Second Amended Complaint as to the defendants are as follows:

Count I: violation of plaintiffs' First Amendment Right to petition because the Jefferson defendants, the planning Commission members (William Lewandowski in his

official capacity, Dan Markin, John Simms, and Thomas Kane) allegedly denied plaintiffs' conditional use permit (hereinafter "CUP") application on January 11, 2005 by granting plaintiff a CUP for fourteen (14) townhouse units. Plaintiffs also allege defendant Lewandowski retaliated against plaintiffs by causing the Commission to vote 3-2 in favor of the fourteen (14) townhouse CUP. Plaintiffs also allege defendant Lewandowski posted something on a "public forum" after plaintiffs had sold the property at issue.

Count II: conspiracy to violate plaintiffs' First Amendment Right to petition by the Jefferson defendants, William Lewandowski in his official capacity, Dan Markin, John Simms, Thomas Kane, and the Shepardstown defendants, conspired to "take away [plaintiffs'] permit approval sought in the January 11, 2005 CUP application because plaintiffs exercised their "right of access to the Courts by filing Civil Actions Nos. 3:96CV40, stet [sic] 3:99CV25 and 3:03CV-55."

Count III: violation of plaintiffs' Fifth and Fourteenth Amendment Right to Due Process by a fair and impartial hearing by the Jefferson defendants, William Lewandowski in his official capacity, Dan Markin, John Simms, and Thomas Kane when they appointed defendant Lewandowski to the Commission and voted against plaintiffs' CUP application.

Count IV: conspiracy to violate plaintiffs' Fifth and Fourteenth Amendment Right to Due Process by a fair and impartial hearing by the Jefferson defendants, William Lewandowski in his official capacity, Dan Markin, John Simms, and Thomas Kane by appointing (and applying to be on the Commission) defendant Lewandowski to the Commission and voting against plaintiffs' CUP

application.

Count V: violation of plaintiffs' Fifth and Fourteenth Amendment Right to Procedural and Substantive Due Process. Plaintiffs essentially allege that the Jefferson defendants granted plaintiffs' 2001 CUP application for a fifty (50) townhouse development, intentionally failing to include findings of fact and conclusions of law so that the Jefferson defendants could get new Commission members appointed that would deny the CUP application; then when the Commission's decision was reversed and vacated as legally deficient, setting the CUP application for a new hearing with the purpose of denying the application because by that time (2005) the Commission had new members, including defendant Lewandowski, who would vote against plaintiffs' 50 townhouse CUP; and in denying plaintiffs' CUP application the Commission used its discretion to vary from a point system used to assist Commission members in making their determinations as to whether to grant variances–but then later *again* used their discretion to vary from the same point system used to assist Commission members in making their determinations to grant a CUP application of a purchaser of plaintiffs' property.[1]

Count VI: violation of plaintiffs' Fourteenth Amendment Right to Equal Protection by the Jefferson defendants, William Lewandowski in his official capacity, Dan Markin, John Simms, and Thomas Kane, because they denied plaintiffs' January 11, 2005 CUP application which had a lower Land Evaluation Site

[1] This claim cannot be asserted against William Lewandowski in his official capacity, Dan Markin, John Simms, and Thomas Kane as the decision on plaintiffs' 2001 CUP happened prior to the time those defendants were on the Commission.

Assessment (hereinafter "LESA")[2] score than that of the later purchaser of plaintiffs' property, and granted the purchaser's application which had a higher LESA score. Plaintiffs allege that the approval of the CUP application of the purchaser denied plaintiffs the right to equal protection provided by the Fourteenth amendment of the United States Constitution and "deprived [plaintiffs] of [their] rights privileges and immunities secured by... the Constitution of West Virginia" because the plaintiffs and the purchaser are "similarly situated" and "there [was] no rational basis" for denying plaintiffs' application while granting that of the purchaser.

Count VII: conspiracy to deny access to the United States District Court and neglect to prevent conspiracy brought pursuant to 42 U.S.C. §§ 1985(2) and 1986 by the Jefferson defendants, William Lewandowski in his official capacity, Dan Markin, John Simms, Thomas Kane, and the Shepardstown defendants, because they "participated with defendant William E. Lewandowski in retaliating against plaintiff Aubrey Henry, and injured him in his property and/or person, on account of his exercising his First and Fifth Amendment right to access the Courts, by filing Civil Actions Nos. 3:96CV40 and 3:99CV25, and 3:03CV55." Further, plaintiffs allege that the Jefferson defendants "have threatened to injure/or have injured plaintiffs in their

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[2] An applicant's proposed development must score 60 or lower to "pass for development." The lower the score, the more suitable for development the parcel is determined to be. (See Article 6 of the Jefferson County Zoning and Development Review Ordinance, detailing scoring criteria).

property... by rescinding the action taken to approve the [CUP] or by participating in the rescission, and ...[denying plaintiff] permission to rebuild his restaurant, in retaliation for his exercising his First and Fifth Amendment right to access the Courts by filing Civil Actions Nos. 3:96CV40 and 3:99CV25, and 3:03CV55." Plaintiffs also allege that the Jefferson defendants, William Lewandowski in his official capacity, Dan Markin, John Simms, Thomas Kane, and the Shepardstown defendants, "conspired to threaten to injure, and injured" plaintiffs for "the purpose of preventing plaintiff... from attending this Court as a party in lawsuits he has filed in this U.S. District Court, in violation of" §1985(2); and to the extent that the defendants did not injure/threaten to injure/ conspire to injure plaintiffs the defendants had knowledge and ability to prevent such actions and "neglected or refused to do so, all in violation of" § 1986.

Count VIII: taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution by the Jefferson defendants, William Lewandowski in his official capacity, Dan Markin, John Simms, and Thomas Kane, by 'precluding' plaintiffs from rebuilding their restaurant and "continuing [their] protected nonconforming commercial use."

Count IX: violations of the Fair Housing Act brought pursuant to 42 U.S.C. §§ 3604, 3613, and 3617, by the Jefferson defendants, William Lewandowski in his official capacity, Dan Markin, John Simms, and Thomas Kane, by acquiescing to public sentiment to deny plaintiffs' CUP application for reasons prohibited by the Fair Housing act such as "size of family, children, single parents, and sex preference," and "discriminating against the provision

of affordable housing based on familial status," and "interfering with [plaintiffs] and [their] project on account of him exercising rights protected by" § 3604.

Count X: alleges negligence on the part of the Shepardstown defendants for (1) the Men's Club failing to keep its own agenda separate from their responsibilities as regulators; (2) failure of the Men's Club to properly supervise its lease so that there were "spillover activities" infringing on the Town Run property; and (3) making comments to other individuals regarding the Town Run property. ([Doc. 301] at 44-45).

On December 29, 2008, the Shepardstown defendants filed a Motion for Summary Judgment [Doc. 291]. In their motion, defendants ask that the Court dismiss all plaintiffs' claims against the Shepardstown defendants (Count II: conspiracy to violate First Amendment right to petition; Count IV: conspiracy to deprive plaintiffs of a fair and impartial hearing; and Count VII: conspiracy to deny plaintiffs access to this United States District Court). (Id.) The Shepardstown defendants argue that plaintiffs' claims all fail as there is no evidence from which a jury could infer a conspiracy; and, therefore, the Shepardstown defendants are entitled to summary judgment. (Id.)

Plaintiffs filed a Response to the Shepardstown defendants' Motion for Summary Judgment on January 27, 2009, including a Cross-Motion for Summary Judgment against defendant William Lewandowski. [Doc. 301]. In their response plaintiffs argue there is sufficient circumstantial evidence for which a jury could infer a conspiracy including meetings among the defendants, and an agreement to appeal the Commission's granting of a CUP to plaintiffs for 50 townhomes in 2001. (Id. at 29-36). On February 25, 2009, the Shepardstown defendants filed a Reply. [Doc. 328].

On February 20, 2009, plaintiffs filed a Partial Motion for Summary Judgment on

their takings claim against the Jefferson defendants. [Doc. 321]. Plaintiffs argue that the Jefferson defendants were acting under color of law when they denied plaintiffs' application, the ordinance as applied resulted in a regulatory taking. On March 6, 2009, the Jefferson defendants filed a Response to plaintiffs' Motion for Partial Summary Judgment [Doc. 335]. In their response, the Jefferson defendants argue that they are entitled to summary judgment on the takings claim as plaintiffs had no right to a CUP and plaintiffs were not denied all economically viable use of their property. (Id.) Plaintiffs filed a Reply on March 13, 2009. [Doc. 341].

Finally, on February 20, 2009, William Lewandowski in his official capacity, Dan Markin, John Simms, and Thomas Kane filed a Motion for Summary Judgment [Doc. 324]. In their motion, defendants argued that they should be granted summary judgment with regard to all claims because they are immune from suit as they were acting in a quasi-judicial manner and, further, because plaintiffs had failed to establish sufficient facts to create an issue of material fact. (Id.) On March 6, 2009, plaintiffs filed a Response in Opposition to defendants' Motion for Summary Judgment [Doc. 332]. On March 13, 2009, defendants filed a Reply [Doc. 345].

On February 20, 2009, the Jefferson County Commission and the Jefferson Planning and Zoning Commission filed a Motion for Summary Judgment [Doc. 323]. In their motion, the Jefferson defendants ask the Court to grant summary judgment in their favor on plaintiffs' Due Process claims, Equal Protection claims, retaliation claims, conspiracy claims, Fair Housing Act claims, and Takings Claims. ([Doc. 323-2] at 15-35). On March 6, 2009, plaintiffs filed a Response in Opposition to the Motion for Summary Judgment [Doc. 331]. On March 13, 2009, the Jefferson defendants filed a Reply to plaintiffs' Response in Opposition to the Motion for Summary Judgment [Doc. 343].

In the Jefferson defendants' Motion for Summary Judgment [Doc. 323-2], defendants argue that all plaintiffs' claims are unsubstantiated and not legally cognizable. ([Doc. 323] at 15). As the Jefferson defendants' arguments are legally dispositive of plaintiffs' claims with regard to all the defendants the Court will summarize the parties arguments in detail.

With regard to Counts I and II, the Jefferson defendants argue that plaintiffs' claims are barred because the Jefferson defendants cannot be found liable for any violation of–or conspiracy to violate–plaintiffs' First Amendment Right to petition because plaintiffs have failed to demonstrate any restriction of their access to the courts, nor have they shown that they suffered any adversity in response to their exercise of protected rights. ([Doc. 323-2] at 24-25). In response, plaintiffs argue that they did suffer adversity because they were not granted a CUP for 50 units, but instead only for 14. ([Doc. 331] at 14-16). Further, plaintiffs argue that actions taken by the Jefferson defendants to retaliate against the plaintiffs for making use of the courts are actionable despite the fact that such actions did not keep plaintiffs out of court. (Id.) (citing ***Craft v. Wipf***, 836 F.2d 412, 419 (8th Cir. 1987); ***Silver v. Cormier***, 529 F.2d 161, 163 (10th Cir. 1976)). Plaintiffs also argue that 'retaliatory action' and/or a conspiracy can be inferred from defendant Lewandowski's statements at planning commission meetings and by the fact that plaintiffs, upon rehearing, were not granted a CUP for 50 townhomes. (Id. 14-17).

With regard to Counts III, IV, and V, the Jefferson defendants argue that the Jefferson defendants cannot be found liable for violation of–or conspiracy to violate–plaintiffs' Fifth and Fourteenth Amendment Right to substantive due process by a fair and impartial hearing because plaintiffs can show neither an entitlement to a CUP nor that the Jefferson defendant's denial of the CUP was not related to a legitimate public

purpose. ([Doc. 323-2] at 18). Additionally, the Jefferson defendants argue that plaintiffs' procedural due process claims are barred because the Fourth Circuit has already considered the question and found that plaintiffs' procedural due process rights have not been violated. ([Doc. 323-2] at 16) (citing ***Henry v. Jefferson Co. Planning Comm., et. al.***, No. 99-2111, 2000 U.S. App. LEXIS 12844 (4th Cir., June 9, 2000)). In response, plaintiffs argue with respect to substantive due process that plaintiffs were denied an absolute right to rebuild the restaurant, and plaintiff Aubrey Henry was denied his property interest in a 50 townhome CUP (allegedly created by the original vacated decision of the Commission). ([Doc. 331] at 8-13). With respect to the procedural due process claims, plaintiffs argue that the Jefferson defendants failed to follow the procedures outlined in the ordinance with respect to plaintiffs' CUP application. (Id. at 9-10). Further, plaintiffs argue that the "open, notorious expression of hostility" by one of the Commission members irreparably tainted the decision of the Commission. (Id. at 11-12). Plaintiffs also argue that the decision by the Jefferson County Circuit Court finding no due process violations is not preclusive as it is not a final judgment on the merits and plaintiffs are not seeking to overturn the judgment. (Id. at 12-13).

With regard to Count VI, the Jefferson defendants argue they cannot be found liable for a violation of plaintiffs' Fourteenth Amendment Right to Equal Protection because plaintiff and the subsequent purchaser, Peter Corum, are not similarly situated; and because even assuming they are similarly situated, the Commission's decision passes the rational basis test; and because the Circuit Court of Jefferson County has already heard the issue and found no violation of plaintiffs' right to Equal Protection and that ruling should be given preclusive effect. ([Doc. 323-2] at 20-23; Ex. 12). In response, plaintiffs argue that plaintiffs and Peter Corum (hereinafter "Corum") were similarly situated because the

rejection of plaintiffs' proposal was based on its incompatibility with the area; and Corum's proposal would also have been incompatible. ([Doc. 331] at 13-14). Further, plaintiffs point to the Commission's granting of all other CUP applications with LESA scores as favorable as plaintiffs' as evidence of 'unequal application' of the law. (Id. at 14).

With regard to Count VII, the Jefferson defendants argue they cannot be found liable for any alleged conspiracy to violate plaintiffs' First and Fifth Amendment Right to petition because there is no evidence to support the existence of a conspiracy to deprive plaintiffs of any rights, privileges, or immunities or any neglect to prevent such a conspiracy. ([Doc. 323-2] at 25). In response, plaintiffs argue the Jefferson defendants did conspire to deny access to the United States District Court and/or neglect to prevent conspiracy brought pursuant to 42 U.S.C. §§ 1985(2) and 1986 because 'retaliatory action' and/or a conspiracy can be inferred from defendant Lewandowski's statements at planning Commission meetings and by the fact that plaintiffs, upon rehearing, were not granted a CUP for 50 townhomes. (Id. 14-17).

With regard to Count VIII, the Jefferson defendants argue that plaintiffs' takings claims fail for two reasons: (1) plaintiffs failed to timely pursue available state remedies, and (2) plaintiffs have not suffered a taking as they were not deprived all economically viable use of the land. ([Doc. 323-2] at 29-35). In response, plaintiffs argue they attempted to amend their complaint to add a writ of mandamus but their motion was denied by the circuit court. Additionally, plaintiffs argue that because the Commission prevented plaintiffs from rebuilding the restaurant, or making "any use of [the property]," they are entitled to damages for a temporary taking from 1993 until the time plaintiffs sold the property. Further, plaintiffs argue that the sale of the land does not go to the economic viability of the

land but to mitigation of plaintiffs' damages. ([Doc. 331] at 21-23).

With regard to Count IX, violations of the Fair Housing Act brought pursuant to 42 U.S.C. §§ 3604, 3613, and 3617, the Jefferson defendants argue they cannot be found liable as plaintiffs' claims are time barred and as there is no evidence of discriminatory purpose nor discriminatory impact. ([Doc. 323-2] at 27-29). In response, plaintiffs argue the Fair Housing Act claims relate back to the filing of the complaint in 2006. ([Doc. 331] at 18-21). Further, plaintiffs argue that statements made in depositions in 2001 show that the Commission in 2005 used discriminatory bases for denying plaintiffs' affordable housing proposal; allowing Corum's because it was merely one-third affordable housing. (Id.)

UNDISPUTED MATERIAL FACTS

1. The plaintiffs, Aubrey E. and Deborah V. Henry (hereinafter, collectively referred to as "the Henrys"), were, at all times relevant hereto, residents and citizens of the State of West Virginia.
2. Plaintiffs are now residents and citizens of the State of Florida.
3. Defendant, the Jefferson County Planning Commission (hereinafter, "the Planning Commission" of "the Commission"), is a public body established by the Defendant County Commission of Jefferson County, pursuant to the zoning enabling act then found at W. Va. Code § 8-24-1 et seq., and now found at W. Va. Code § 8A-2-1 et seq.
4. At the times relevant hereto, Aubrey Henry, was a co-owner of, or held an interest in, 13.69 acres of land fronting on State Route 480 in the Shepherdstown District of Jefferson County, situate approximately 0.6 mile from the municipal limits of Shepherdstown ("the subject property"); the plaintiff, Deborah Henry, subsequently

also became a co-owner of 11.69 acres of the subject property.

5. The 13.69 acres is comprised of four individual parcels, two parcels containing two (2) acres each (referred to herein as "Parcel A" and "Parcel B"), one parcel containing three (3) acres (referred to herein as "Parcel C"), and the fourth containing 6.69 acres (referred to herein as "Parcel D"). (See, [321] Ex. A).

6. At the times relevant herein, Parcel A was improved by a single family residence in which the plaintiffs resided, Parcel B was improved by a single family residence in which Mr. Henry's mother, Elsie Henry, resided until her death on September 20, 2004, and Parcel D was unimproved.

7. From 1968 until 1993, the Henry family operated a family-style restaurant on Parcel C, in which business Aubrey Henry worked after his honorable discharge from the U. S. Army and his return from deployment to Vietnam, and the operation of which restaurant Aubrey Henry took over in 1979.

8. The restaurant burned to the ground in February of 1993.

9. On July 7, 1988, the Jefferson County Commission enacted the Zoning and Development Review Ordinance (hereinafter, "the Ordinance"), which had become effective on October 8, 1988.

10. Pursuant to the zoning map adopted as part of the Ordinance, the subject property was included in the Rural District. (See [Doc. 321] Ex. B).

11. As a result of the subject property's inclusion in the Rural District, the ongoing restaurant business became a "nonconforming use" subject to the provisions found in W. Va. Code § 8-24-50, and Section 4.3 of the Ordinance. (See [Doc. 321] Ex. C § 4.3).

12. Intending to rebuild the family restaurant on Parcel C, Mr. Henry went to see Paul Raco, Zoning Administrator, of the Jefferson County Office of Planning, Zoning and Engineering, in or about April of 1993. (See , Depo. of Paul Raco [Doc. 323] Ex. 2).

13. Mr. Henry undertook to devise a plan for development of 76 townhouses on 11.69 acres of the subject property to make an application for a CUP.

14. On January 25, 1994, Mr. Henry submitted his CUP application for the moderate-income, affordable housing townhouse development to be called "Town Run Village". (See, Application and LESA Scoring Sheet, File No. Z94-01 in the Jefferson County Planning Commission, [Doc. 321] Ex. G).

15. The application proceeded through the Development Review System (hereinafter, "DRS") established in Article 7 of the Ordinance, including: (1) assessment of the site under LESA (Land Evaluation Site Assessment), resulting in a passing score of 39.04; (2) the Compatibility Assessment Meeting, which resulted in sixteen unresolved issues raised by members of the public; and, (3) a hearing before the Planning Commission on May 24, 1994, which resulted in the Planning Commission's denial of the CUP. (See, [Doc. 321] Ex. G, H).

16. The stated basis for the Planning Commission's denial of the CUP, set forth only in the minutes of the meeting, was "the density, the project's danger to the Town Run and Morgans Grove Park and the incompatibility of the project with the neighborhood." (See, [Doc. 321] Ex. G, H).

17. Mr. Henry appealed the Planning Commission's decision to the Jefferson County Board of Zoning Appeals (hereinafter, "BZA"), which on August 18, 1994, upheld the Planning Commission decision, merely restating the same grounds. (See, [Doc.

321] Ex. I).

18. Mr. Henry appealed the BZA decision to the Circuit Court, which affirmed the BZA decision by Order dated January 16, 1996. *See*, ***Henry v. Jefferson County Planning Commission***, 201 W. Va. 289, 296 S.E.2d 239 (1997).

19. In 1995, while the Circuit Court appeal was pending, Mr. Henry submitted another application for a CUP for the Town Run Village development, again achieving a passing LESA score of 39.04. (See, [Doc. 321] Ex. J)

20. The 1995 CUP application proceeded through the DRS, at the end of which, the Planning Commission denied the CUP. (See, [Doc. 321] Ex. K).

21. Mr. Henry appealed the Circuit Court's Order of January 16, 1996, to the West Virginia Supreme Court of Appeals ("WVSCA"), which reversed and remanded the matter, holding that the BZA decision was not supported by sufficient factual findings. *See*, ***Henry v. Jefferson County Planning Commission***, 201 W. Va. 289, 296 S.E.2d 239 (1997).

22. Following the WVSCA remand, Mr. Henry again appeared before the BZA on the 1994 CUP application, and the BZA, after reviewing the existing record, again denied the CUP, this time setting forth findings of fact and conclusions of law. (See, [Doc. 321] Ex. L).

23. Mr. Henry appealed the March 19, 1998, BZA decision denying the 1994 CUP application to the Circuit Court of Jefferson County, which affirmed the decision of the BZA by order dated August 27, 1999.

24. Mr. Henry appealed the order of the Circuit Court to the West Virginia Supreme Court of Appeals, which refused review on March 8, 2000. (See, Report of March

8, 2000, appearing on the WVSCA's official website at http://www.state.wv.us/wvsca/calendar/March_00.htm).

25. While the West Virginia Supreme Court appeal was pending, Aubrey Henry filed his first action in this Court on May 24, 1996, asserting, inter alia, claims for regulatory taking arising from the denial of the right to rebuild the restaurant and the denial of the CUP. *See*, ***Henry v. Jefferson County Planning Commission***, 3:96-CV-40 (hereinafter, "***Henry I***").

26. In ***Henry I***, this Court, citing ***Burford***[3] abstention, dismissed all counts except the procedural due process claim by Order entered September 24, 1998, and granted summary judgment on the procedural due process claim, on July 21, 1999. *See*, ***Henry v. Jefferson County Planning Commission***, 3:96-CV-40.

27. The Fourth Circuit Court of Appeals reversed the Burford abstention dismissal, and remanded the matter to this Court, but upheld the summary judgment rejecting the assertion that the § 7.6 compatibility provisions of the Ordinance were unconstitutionally vague. *See*, ***Henry v. Jefferson County Planning Commission***, 215 F.3d 1318 (4th Cir. 2000).

28. Meanwhile, on March 23, 1999, Mr. Henry filed his second civil action in this Court, again asserting his claims for regulatory taking, which was consolidated with ***Henry I*** by order entered September 6, 2000, and then proceeded upon the aforesaid remand from the 4th Circuit Court of Appeals. *See*, ***Henry v. Jefferson County, et al.***, 3:99-CV-25 (hereinafter, "***Henry II***").

29. By Memorandum Opinion and Order entered on June 26, 2001, this Court granted

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[3] *See* ***Burford v. Sun Oil Co.***, 319 U.S. 315 (1943)

summary judgment to the defendants. (See [Doc. 291-3])

30. During proceedings in ***Henry II***, counsel for the County entity defendants therein represented to the Court that there was nothing to prevent Mr. Henry from applying for a CUP yet again.

31. On January 12, 2001, Mr. Henry again applied for a CUP to build 76 townhouses on the subject property, pursuant to which the site was assessed and again earned a passing LESA score of 39.04. (See, [Doc. 303-4]).

32. The 2001 CUP application progressed through the DRS, including the Compatibility Assessment Meeting in April of 2001, at which members of the public raised a number of concerns.

33. Upon Mr. Henry's agreement to resolve all issues raised by the public at the Compatibility Assessment Meeting and to comply with additional conditions imposed by the Planning Commission, including an agreement to reduce the number of townhouse units from 76 to 51, the Planning Commission approved the grant of the CUP by a unanimous vote. (See, [Doc. 303-5]).

34. Six parties appealed the decision of the Planning Commission to the BZA, including the Shepherdstown Men's Club (which owns the adjacent property on which the Board of Parks and Recreation operates Morgan Grove Park), William and Joyce Lewandowski (residents of the Ledge Lowe subdivision located directly across Route 480 from the subject property, in the Residential Growth District), and Miriam Wilson (owner of an adjacent parcel on which Ms. Wilson has, during relevant times, conducted a publishing business).

35. The BZA was unable to render a legal decision on the appeal, because only three

of its five members were present to hear the case, and the ultimate vote was two votes for the permit and one vote against. (See, [Doc. 321] Exhibit N, O).

36. Because of the BZA's inability to act, the appeal was certified to the Circuit Court of Jefferson County. (*See*, ***Shepherdstown Men's Club, et al. v. Jefferson County Planning and Zoning Commission***, Civil Action No. 02-C-50 in the Circuit Court of Jefferson County).

37. By Order entered on June 27, 2003, the Circuit Court held that the Planning Commission had failed to enter written findings of fact and conclusions of law sufficient to support its decision to grant the CUP, and accordingly reversed and remanded the matter to the Planning Commission for the entry of the necessary findings of fact and conclusions of law, with or without additional proceedings. (*See*, Order of June 27, 2003, ***Shepherdstown Men's Club, et al. v. Jefferson County Planning and Zoning Commission***, Jefferson County Civil Action No. 02-C-50, [Doc. 321] Ex. P).

38. On July 31, 2003, Aubrey Henry again asserted his federal causes of action, including his takings claim, in a complaint filed to this Court. (*See*, ***Henry v. Jefferson County, et al.***, Civil Action No. 3:03-CV-55 ("***Henry III***")).

39. At a special meeting held on September 2, 2003, the Planning Commission was presented with advice by its legal counsel regarding the Circuit Court's remand Order of June 27, 2003, after which the Planning Commission decided to conduct a hearing to consider anew the issues that were unresolved at the end of the April, 2001, Compatibility Assessment Meeting, instead of exercising its option to enter findings of fact and conclusions of law upon the record developed at the 2001

proceedings. (See, [Doc. 321] Ex. Q).

40. On September 2, 2003, the Planning Commission knew that Aubrey Henry had filed ***Henry III***, but nonetheless voted to comply with the remand Order of the Jefferson County Circuit Court and schedule the CUP application for a rehearing, having already been advised by its legal counsel that the pending federal action was a separate issue and that the CUP had to be decided on its own merits. (See, [Doc. 303-5]).

41. Because Mr. Henry decided to appeal the Circuit Court's order, the Circuit Court stayed its June 27, 2003 Order pending the decision of the West Virginia Supreme Court. (*See*, Order of Stay, ***Shepherdstown Men's Club, et al. v. Jefferson County Planning and Zoning Commission***, Jefferson County Civil Action No. 02-C-50, [Doc. 321] Ex. R).

42. The West Virginia Supreme Court denied review on April 15, 2004. (See, Petition Conference Report of April 15, 2004, appearing at the WVSCA's official website, at http://www.state.wv.us/wvsca/calendar/april15_04r.htm).

43. On April 3, 2003, William Lewandowski, a defendant herein and one of the persons whose appeal of the grant of the CUP resulted in the Circuit Court's remand order, was appointed to the Planning Commission. (See [Doc. 303-24]).

44. On October 12, 2004, Mr. Henry appeared, through counsel, before the Planning Commission to object to its refusal to schedule the hearing on his CUP application, as required by the Circuit Court Order of June 27, 2003, at which time Mr. Lewandowski refused to recuse himself, and spoke for several minutes against Mr. Henry personally and against the CUP application, including:

> MR. LEWANDOWSKI: . . . [F]rankly and for the record, I need to state that Mr. Henry is suing me and my wife for $20 million, which is rather interesting. And it is, in my opinion, what I would call a slap-suit, a strategic lawsuit against public participation. In my opinion, it's frivolous. In my opinion, it is an attempt to avoid me serving my duties as Commissioner on this Planning Commission without just cause.
> I feel that after careful consideration, that I have an obligation in an oath that I took when I took this office to uphold the West Virginia Constitution and the United States Constitution, and so I feel, after very careful consideration, that I should stay on this and I should hear this part of this.
> But more importantly, there is an issue here: if we, as Planning Commissioners, allow developers or anybody, not just developers but anybody, to turn around and sue us in an attempt to shake this Commission, as these things go forward, we've got a real problem in this county. So that's my position.
> PLANNING COMMISSION PRESIDENT ARNOLD DAILEY: So your position is you're staying?
> MR. LEWANDOWSKI: Yes sir.

(See, [Doc. 303-17]; Audiotape of Planning Commission Meeting of October 12, 2004, [Doc. 303] Exhibit V).

45. On November 9, 2004, the Planning Commission, met in executive session with its counsel in the federal action, Michael D. Lorensen, and its general counsel, J. Michael Cassell, to receive a briefing on Mr. Henry's pending federal court case and to decide if it should redocket Mr. Henry's CUP for hearing, given the pending federal court case. (See [Doc. 321] Exhibit X).

46. The official minutes of the November 9, 2004, meeting of the Planning Commission reflect that William Lewandowski recused himself from participation in the aforesaid

executive session, but did not do so voluntarily and was in the executive session until he was informed by counsel that he must recuse himself from any hearing, discussion or determination of plaintiffs' CUP application. (Deposition of William E. Lewandowski in Jefferson County Civil Action No. 04-C-372, at pp. 10:20-13:14, [Doc. 321] Ex. Y).

47. The Planning Commission scheduled the CUP application for hearing on December 14, 2004.

48. At the compatibility hearing, Mr. Henry again agreed to resolve all issues that were unresolved at the Compatibility Assessment Meeting in 2001 and, upon inquiry by the Planning Commission, again agreed to reduce the number of units in the development to 51. (See [Doc. 303-21]).

49. On January 11, 2005, the Planning Commission deliberated and announced its decision, stating that it was granting a CUP for one residential unit per 40,000 square feet of land in the 13.69 acre parcel, and imposing as a condition the requirement that Mr. Henry appeal the decision to the BZA. (See [Doc. 303-22]).

50. The stated reason offered for the reduction of the number of units to one for every 40,000 square feet was that it was the lot size that was allowed in the Rural Zone. (See, Official Audio CDs of Planning Commission Meeting of January 11, 2005, [Doc. 321] Ex. AA).

51. The Planning Commission entered its written findings of fact and conclusions of law on March 2, 2005. (See [Doc. 291-4]).

52. Mr. Henry appealed the Planning Commission's March 2, 2005, decision to the Circuit Court of Jefferson County, which affirmed the grant of the CUP, but reversed

the condition that Mr. Henry appeal that decision to the BZA for confirmation, ruling that the Planning Commission exceeded its jurisdiction in mandating an appeal to the BZA as a condition of a CUP. (*See*, Final Order, ***Henry v. Jefferson County Planning Commission***, Jefferson County Civil Action No. 05-C-100, at pp. 8-9, [Doc. 291-5]).

53. While the proceedings on the 2001 CUP application were ongoing, Mr. Henry, on October 27, 2003, filed an application for a variance so as to rebuild the restaurant on Parcel C as an alternative to the townhouse proposal, which application was responsive to the arguments of counsel for the County defendants in ***Henry III*** that his takings claim was not ripe because he had never sought a variance to rebuild his restaurant, and which application was denied by the BZA on December 18, 2003. (See, Application, File No. 2V03-42 in the Jefferson County Office of Planning, Zoning and Engineering, [Doc. 303-6]; see, BZA Decision on Variance Request, December 18, 2003, [Doc. 303-7]).

54. By Order entered on March 31, 2005, this Court dismissed the takings claim set forth in ***Henry III***, without prejudice, premised upon the finding that the claim was not ready for adjudication because Mr. Henry still had remedies available in the West Virginia state court. (*See*, Order of March 31, 2005, ***Henry v. Jefferson County, et al.***, Civil Action No. 3:03-CV-55, [Doc. 321] at Ex. BB).

55. On or about March 1, 2007, the plaintiffs herein brought their regulatory takings claim in the Jefferson County Circuit. *See* ***Henry v. Jefferson County Planning Commission***, Civil Action No. 07-C-63.

56. Despite having argued to this Court in ***Henry III*** that the Mr. Henry's takings claim

was not ripe because he had not first sought relief in state court, the Planning Commission then argued in the state court takings action that no such cause of action was recognized in West Virginia, and the circuit court thereupon granted the Planning Commission's Motion to Dismiss with prejudice. (*See*, Order of October 10, 2007, ***Henry v. Jefferson County Planning Commission***, Jefferson County Civil Action No. 07-C-63, [Doc. 321] Ex. CC).

57. In July of 2005, the plaintiffs entered into an agreement to sell the 11.69 acres owned by them to an investment venture led by Peter Corum. (See, Purchase and Sale Agreement, [Doc. 321] Ex. EE).

58. In January of 2006, the plaintiffs sold the lots previously identified herein as Parcel A, C and D of the subject property to Peter Corum and to other persons and entities acting as joint venturers for the purchase and development thereof, and the owners of Parcel B likewise sold to Peter Corum for the amount of one million dollars ($1,000,000.00). ([Doc. 99] ¶ 57).

59. At a hearing on August 17, 2006, the plaintiffs' successors in title, Peter Corum and his fellow investors, were granted a CUP to develop the subject property into a mixed-use development consisting of both 32 residential units and commercial structures, and the findings of fact and conclusions thereon were approved on October 19, 2006. (See, BZA Minutes of October 19, 2006, [Doc. 321] Ex. FF; BZA Decision entered on November 9, 2006, [Doc. 97-4]).

60. In support of its Decision granting a CUP for intense residential and commercial development on the subject property, the BZA cited that the parcel had been historically used for commercial purpose, a direct reference to the Henrys'

restaurant, the only commercial use known to have ever existed on the property. (See BZA Decision entered on November 9, 2006, [Doc. 97-4]).

61. On March 31, 2006, Mr. Henry filed the instant action, "***Henry IV***," and following the dismissal of the state takings action, the plaintiffs herein amended their Complaint to add the takings claim at issue in the instant Motion for Partial Summary Judgment. [Doc. 82].

62. Discovery in the instant civil action is complete.

STANDARD OF REVIEW

The moving party is entitled to summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). *See* ***Charbonnages de France v. Smith***, 597 F.2d 406, 414 (4th Cir. 1979). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986).

In considering a motion for summary judgment, the court is required to draw all reasonable inferences in favor of the nonmoving party and to view the facts in the light most favorable to the nonmoving party. ***Anderson***, 477 U.S. at 255. The moving party has the burden to show an absence of evidence to support the nonmoving party's case. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 325 (1986). The party opposing summary judgment must then demonstrate that a triable issue of fact exists; he may not rest upon mere allegations or denials. ***Anderson***, 477 U.S. at 248. A mere scintilla of evidence supporting the case is insufficient. ***Id.*** at 252.

CONCLUSIONS OF LAW

I. Plaintiffs' Takings Claims are Time Barred and Without Merit

Plaintiffs argue they are entitled to compensation because the defendants committed an unconstitutional taking of plaintiffs' property under the Fifth Amendment to the Constitution when they denied plaintiffs' permit(s). Plaintiffs allege they were entitled to develop the land in a certain fashion and were denied that opportunity due to actions by the Jefferson County Commission. Additionally, plaintiffs allege that due to the denial of the CUP they were denied all economically viable use of their property. Plaintiffs, therefore, allege a total regulatory taking. A regulatory taking occurs where a regulation denies a property owner all economically viable use of their property; or, if the regulation does not deny all economically viable use, where the Court finds "the regulations' economic effect on the landowner, the extent to which the regulation interferes with reasonable investment backed expectations, and the character of the government action," to be unjustified. ***Plazzolo v. Rhode Island***, 533 U.S. 606, 617 (2001). Plaintiffs' claims fail as they are time barred and without merit.

A. Plaintiffs' Claims are Barred for Failure to Timely Pursue Available State Remedies

As the Fourth Circuit found in ***Henry v. Jefferson County Planning Commission***, 34 Fed.Appx. 92, 96 (4th Cir. 2002), plaintiffs must first exhaust their state court remedies before seeking compensation in federal court. In fact, in 2002, the Fourth Circuit specifically found plaintiffs' takings claims unripe because plaintiffs had not brought a "mandamus action against a state official to compel that official to institute statutory eminent domain proceedings" ***Id.*** at 96. The Court held:

> While it appears that West Virginia does not have a statutory inverse condemnation procedure, a West Virginia landowner, at least in some circumstances, may seek compensation for damage to property by bringing a mandamus action against a state official to compel that official to institute statutory eminent domain proceedings. *See* ***Shaffer v. West Virginia Dep't of Transp.***, 208 W.Va. 673, 542 S.E.2d 836 (W.Va.2000); ***Carter v. City of Bluefield***, 132 W.Va. 881, 54 S.E.2d 747 (W.Va.1949). We do not speculate as to whether mandamus would be available in this particular case; it is enough to observe that the West Virginia courts have Generally recognized this compensation procedure in the past and that Henry has not demonstrated that the procedure is unavailable in this case. Accordingly, Henry has not established that his property has been taken without just compensation. Because the Fifth Amendment only prohibits the taking of property without just compensation, Henry's takings claim is not ripe and must be dismissed without prejudice.

Henry, 34 Fed.Appx. at 96. Currently, plaintiffs have still not brought a mandamus action in state court; and plaintiffs' claims are, therefore, still not ripe as there can be no taking without just compensation when plaintiffs have not sought compensation first from the state.

Plaintiffs did file a claim in state court, presumably with the intention of seeking an inverse condemnation action, but failed to request mandamus relief against any state official. (See [Doc. 323-2] Ex. 16). The Jefferson defendants then sought to dismiss the action because plaintiffs had already filed the instant action in the Northern District of West

Virginia, expressly reserving the right to assert a takings claim under federal law. [4] (See [Doc. 331] Ex. CC). In the face of defendants' motion to dismiss, plaintiffs sought to amend their state court complaint to add a request for mandamus relief. (See [Doc. 323-2] Ex. 17 at 11-12). The Circuit Court of Jefferson County denied this request stating such an amendment, "would be futile, since the Plaintiffs reserved the right to assert a takings claim in federal court." (See [Doc. 321] Ex. CC at 7). The Circuit Court of Jefferson County then dismissed plaintiffs' claims with prejudice. (Id.) Such an amendment would not have been futile as it was required in order for plaintiffs' takings claims before this Court to be ripe for adjudication. ***Henry***, 34 Fed.Appx. at 96.

Plaintiffs should have appealed the decision of the circuit court dismissing their claims and denying plaintiffs' motion to amend the complaint. *See* ***Holliday Amusement Company of Charleston, Inc. v. South Carolina***, 493 F.3d 404, 406-07 (4th Cir. 2007). This is because a takings claim is not ripe until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue" and the State has failed "to provide adequate compensation for the taking." ***Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City***, 473 U.S. 172, 186 (1985). Thus, in order for plaintiffs' takings claim to be properly before this Court, plaintiffs must pass the following prudential hurdles: "First, the property owner must have a final administrative decision regarding the

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[4] Plaintiffs argue that because defendants previously argued that plaintiffs' request for mandamus at the state level was futile, they should now be estopped from now taking the position that such a claim was necessary. Although possibly appropriate, the issue upon which defendants have changed their position is a jurisdictional one; and as such, cannot be ignored by this Court.

application of the challenged regulations to the property. . . . Second, 'if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.'" ***Holliday Amusement Company of Charleston, Inc. v. South Carolina***, 493 F.3d 404, 406-07 (4th Cir. 2007), citing, ***Williamson***, 473 U.S. at 195.

Although plaintiffs allegedly 'reserved' their right to assert a federal takings claim when filing their claim in the Circuit Court of Jefferson County, as the law stands, this is not a practical reservation. As the Supreme Court noted in ***San Remo Hotel, L.P. v. City and County of San Francisco***, 545 U.S. 323, 338 (2005), "***England*** **[*v. Louisiana Bd. of Medicine Examiners***, 375 U.S. 411 (1964)] does not support [petitioners'] erroneous expectation that their reservation would fully negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in the future federal litigation." Most recently, the Supreme Court has denied certiorari in ***Agripost, LLC v. Miami-Dade County***, 525 F.3d 1049 (11th Cir. 2008), in which the Eleventh Circuit assumed petitioner's federal takings claim was preserved and affirmed summary judgment for the County on the grounds that the takings claim was barred by issue preclusion. ***Id.***, 525 F.3d at 1055-56.

Such issue preclusion has previously been held by the Supreme Court to pose no Constitutional problem. *See* ***San Remo Hotel***, 545 U.S. at 346. The Court in ***San Remo Hotel*** held that, "[w]ith respect to those federal claims that did require ripening, we reject petitioners' contention that ***Williamson County*** prohibits plaintiffs from advancing their federal claims in state courts. The requirement that aggrieved property owners must seek 'compensation through the procedures the State has provided for doing so,' 473 U.S., at

194, 105 S.Ct. 3108, does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution. Reading ***Williamson County*** to preclude plaintiffs from raising such claims in the alternative would erroneously interpret our cases as requiring property owners to 'resort to piecemeal litigation or otherwise unfair procedures.' ***MacDonald, Sommer & Frates v. Yolo County***, 477 U.S. 340, 350, n. 7, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986)." ***San Remo Hotel***, 545 U.S. at 346. The Fourth Circuit also recognized this principal in ***Holliday Amusement***, 493 F.3d at 406-07:

> In ***San Remo***, the Supreme Court declined to create an exception to the full faith and credit statute "solely to preserve the availability of a federal forum" for litigants' federal takings claims. *See* 545 U.S. at 347, 125 S.Ct. 2491. "It is hardly a radical notion," the Court noted, "to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts." ***Id.*** at 346, 125 S.Ct. 2491. Indeed, "there is scant precedent for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment's takings clause. To the contrary, most of the cases in our takings jurisprudence ... came to us on writs of certiorari from state courts of last resort." ***Id.*** at 347, 125 S.Ct. 2491.

Holliday Amusement, 493 F.3d at 409.[5]

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[5] Additionally, in an opinion authored by Judge Posner, the Seventh Circuit recently observed that "[t]he failure to complain of the taking under federal as well as state law is a case of 'splitting' a claim, thus barring by virtue of the doctrine of res judicata a

Plaintiffs cannot, therefore, argue their takings claims based on ***England*** reservations; and plaintiffs' takings claims are barred for failure to exhaust state remedies. Accordingly, this Court, finds that it lacks jurisdiction over plaintiffs' takings claim because plaintiffs failed to exhaust the remedies available to them to obtain just compensation from the State; thus, there is no case or controversy as defined by the United States Constitution.

In the event, however, that plaintiffs' allegation that the actions of the Commission constituted a "taking of Plaintiffs' property without just compensation, in violation of Section 9, Article III of the West Virginia Constitution" could be construed as an appropriate request for relief, and that plaintiffs failure to appeal the dismissal of the Circuit Court of Jefferson County does not bar their claim, the Court finds that plaintiffs' takings claim would also fail on the merits.

B. Entitlement to a CUP

The same taking standard applies whether plaintiffs were entitled to the permit and

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subsequent suit under federal law." ***Rockstead v. City of Crystal Lake***, 486 F.3d 963, 968 (7th Cir. 2007). The Seventh Circuit went on to note that "[t]he litigation in state court is the end of the road, see 28 U.S.C. § 1738, unless the state itself allows relitigation of the constitutional question." ***Id.***, citing, ***San Remo Hotel***, *supra*. The Fourth Circuit made a similar observation in the context of Title VII claims, when it held that: "Were we to focus on the claims asserted in each suit, we would allow parties to frustrate the goals of res judicata through artful pleading and claim splitting given that '[a] single cause of action can manifest itself into an outpouring of different claims, based variously on federal statutes, state statutes, and the common law.'" ***Pueschel v. United States***, 369 F.3d 345, 355 (4th Cir. 2004) (quoting, ***Kale v. Combined Ins. Co. of Am.***, 924 F.2d 1161, 1166 (1st Cir. 1991)).

it was wrongly denied or whether the plaintiffs were not entitled to the permit at all. *See* ***Torromeo v. Fremont***, 148 N.H. 640 (2002), *cert. denied*, 539 U.S. 923 (2003) (finding that no compensation is due for wrongful denial of building permit where the regulation was constitutional but permit was incorrectly applied). Here, plaintiffs argue that they were entitled to the permit under ***Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals,*** 222 W.Va. 252, 664 S.E.2d 137 (2008). In ***Far Away Farm***, the West Virginia Supreme Court found that when a commission is deciding whether to grant or deny permit under The Jefferson County Zoning and Land Development Ordinance (prior to the April 8, 2005 amendments), the only substantive criteria for whether to grant or deny the permit is the LESA score; and that the permit must, therefore, be granted where an applicant presents the commission with a favorable LESA score and any substantive objections to the development are rebutted by expert testimony. ***Id.*** 664 S.E.2d at 144.

In ***Far Away Farm***, the West Virginia Supreme Court reviewed a denial of a CUP by the Boarding Zone of Appeals ("BZA"). The Court held that the BZA did not have the authority to grant or deny the permit because that authority was delegated to the County Commission. Additionally, the West Virginia Supreme Court read the ordinance to require issuance of a permit where the developer had come forward with a favorable LESA score and expert testimony addressing all issues raised at the Compatibility Assessment Meeting; and the only evidence presented to support denying the permit was merely anecdotal. Essentially, what this clarification of the law amounts to is a requirement that when there is competent evidence on one hand (including a favorable LESA score) and merely anecdotal evidence on the other hand, it is an abuse of discretion to deny the permit.

Plaintiffs present ***Far Away Farm*** as a new "definitive statement of the state law,"

previously unavailable to the Court. ([Doc. 321-2] at 42). In deciding ***Far Away Farm***, however, the West Virginia Supreme Court relied on a 1975 case, ***Wolfe v. Forbes***, 159 W.Va. 34, 217 S.E.2d 899 (1975). As such, it can hardly be read as a 'new' law; but instead is merely a clarification of the way in which the ordinance is to be applied[6]: where an applicant presents a favorable LESA score and provides reports and documentation addressing the concerns of the community and the board, and is met with mere anecdotal evidence, the commission is without authority to deny the permit. ***Far Away Farm***, 664 S.E.2d at 144. The commission is granted the authority to deny the permit under the ordinance, but a denial in such circumstances would be an abuse of discretion as a matter of law. ***Id.*** (citing ***Wolfe v. Forbes***, 159 W.Va. 34, 217 S.E.2d 899 (1975)).

This Court finds ***Far Away Farm*** to be distinguishable from the case at bar because, although plaintiffs' application included a favorable LESA score, there was no other testimony by experts or otherwise that dictated the burden shift as the Court found in ***Far Away Farm***. In the event, however, that ***Far Away Farm*** is found not to be distinguishable, and would entitle plaintiffs to the CUP, plaintiffs have still failed to show a compensable taking.

C. Plaintiffs Were Not Subject to a *Per Se* Taking

In ***Tahoe-Sierra Preservation Counsel, Inc. v. Tahoe Regional Planning***, 535 U.S. 302 (2002), the United States Supreme Court rejected the argument that a *per se* taking occurs when the government prevents all economically viable use of private property for a set period of time. ***Id.*** at 335. The Court instead reasoned that its holding that "the

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[6] Defendants' argument that a takings claim is to be decided based on the law as it stood when the taking allegedly occurred, therefore, fails as there is no new law at issue.

permanent 'obliteration of value' of a fee simple estate constitutes a categorical taking does not answer the question whether a regulation prohibiting any economic use of the land for a 32-month period has the same legal effect." ***Id.*** at 331-32. The Court found that an inquiry into whether or not a taking had occurred in such circumstances required the Court to look at the "parcel as a whole." ***Id.*** (citing ***Penn. Cent. Transp. Co. v. City of New York***, 438 U.S. 104, 130-31 (1978)).

The Court noted that looking at a 'parcel as a whole' required the Court to look at the entirety of what the land owner possessed in terms of both physical and temporal rights. ***Tahoe-Sierra***, 535 U.S. at 132. The Court reasoned that looking at the land during a set period of time (the time that development was prohibited) would automatically result in a finding of a taking which was unreasonable because "every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings." ***Id.*** "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." ***Id.*** at 332. The Court ultimately found that the "starting point for the court's analysis should [be] to ask whether there was a total taking of the entire parcel; if not then ***Penn Central*** [is] the proper framework." ***Id.***

Here, assuming *arguendo*, plaintiffs were wrongly denied a CUP for 50 townhomes, there was no taking of the entire parcel. Plaintiffs were denied a permit to develop the land as they desired, but they did not suffer a categorical taking. The permit denial cannot amount to a categorical taking because plaintiffs were not denied all use of the property but were in fact *granted* a CUP for 14 townhomes.

Further, plaintiffs could make any other use of the property allowed under the zoning

ordinance or make application for other CUPs or variances. As compared to the 32-month moratorium at issue in ***Tahoe-Sierra***, it cannot be argued that plaintiffs suffered a categorical taking. As such, any takings claim made by plaintiffs must be analyzed under the ***Penn Central*** framework.

D. Plaintiffs Fail To Show a Taking Under the ***Penn Central*** Framework

The Fifth Amendment takings clause does not prohibit all takings, but only takings without due compensation. *See* ***Tahoe-Sierra***, 535 U.S. at 335, ***Penn. Cent. Transp. Co. v. City of New York***, 438 U.S. 104, 123-24 (1978). In ***Penn Central***, the Supreme Court laid out a framework for regulatory takings. ***Penn. Cent.***, 438 U.S. at 123-124 (1978). The Court held that the determination of whether a regulatory taking had occurred depends on "several factors" including: "the economic impact of the regulation on the claimant[,]" the "extent to which the regulation has interfered with distinct investment-backed expectations[,]" and "the character of the governmental action[.]" ***Id.*** *See also*, ***Plazzolo v. Rhode Island***, 533 U.S. 606, 617 (2001). Here, as the regulation's economic effect and its interference with any 'investment-backed expectations', is not substantial enough to constitute a temporary taking that entitles plaintiffs to compensation, plaintiffs takings claim must be denied. *See* ***Tahoe-Sierra***, 535 U.S. at 335, ***Penn. Cent.***, 438 U.S. at 123-24.

In determining the economic impact a regulation has, the Court must set up a ratio of sorts with the value of the parcel as the denominator and the diminished value of the parcel as the numerator. *See* ***Tahoe-Sierra,*** 535 at 303, 331. It is not enough, however, to show some diminution in value–and it certainly falls short of a taking to merely show a denial of a right to enhance value. ***Id.;*** *see also* ***Euclid v. Ambler Co.***, 272 U.S. 365 (1926) (holding that a municipal ordinance restricting commercial development of plaintiff's

property was not a taking, despite an alleged 75% diminution in value of the owner's land), ***Agins v. City of Tiburon***, 447 U.S. 255 (1980), overruled on other grounds by ***Lingle v. Chevron U.S.A. Inc.***, 544 U.S. 528 (2005) (holding a city's zoning ordinance which placed privately owned land in a zone limited to single family dwellings, accessory buildings, and open space uses, and which permitted the owners to build several single family residences upon the property, did not constitute a taking of the owners' property without just compensation in violation of the Fifth and Fourteenth Amendments, where (1) the ordinances substantially advanced the legitimate governmental goal of protecting the city's residents from the ill-effects of urbanization and (2) the ordinances did not deny an owner "economically viable use of his land." ***Id.***, 447 U.S. at 260 (citing ***United States v. Causby***, 328 U.S. 256, 262 n. 7 (1946) and ***Kaiser Aetna v. United States***, 444 U.S. 164, 179-180 (1979))). Here, plaintiffs have presented no evidence as to the diminution in value of the parcel aside from allegations that they were denied all economically viable use of the property.

1. The Regulation Did Not Deny Plaintiffs All Economically Viable Use of the Land

Plaintiffs' argument that the Commission's denial of a CUP for 50 townhomes denied plaintiffs all economically viable use of their property cannot be sustained. First, plaintiffs were not denied all economically viable use because during the period at issue (in fact from the time plaintiffs' restaurant burned down in 1993) there have been two single family homes on the property. Single family homes are an economically viable use of the land. *See generally*, ***Village of Euclid, Ohio v. Ambler Realty, Co.***, 272 U.S. 365 (1926); ***Tahoe-Sierra,*** 535 U.S. 302.

Second, the land was zoned rural agricultural which allows for a particular set of

economically viable uses: agriculture, single family dwellings, mobile homes, home occupations, private riding stables, hatcheries for fish, game and poultry, forestry, markets for the sale of farm products, greenhouses, and hospitals. ([Doc. 323-3] § 5.7(a)). Plaintiffs have presented no evidence why such uses were not available to them during the period in question.

Third, plaintiffs were granted a CUP for fourteen townhomes. Certainly where two single family homes is an economically viable use, the development of fourteen townhomes is, likewise, an economically viable use. Plaintiffs' unwillingness to develop only fourteen townhomes does not, in and of itself, mean that the use was not economically viable. *See e.g.* ***William C. Hass & Co., Inc. v. City and County of San Francisco***, 605 F.2d 1117 (finding a reduction in value of plaintiff's property from $2,000,000 to about $100,000 not to constitute a taking). Finally, plaintiffs sold the property in question for a total of $1,000,000.00. The sale of the property is *per se* evidence of its economic value–specifically–a value of at least $1,000,000.00. Plaintiffs in the face of this argument have simply replied that they were doing so to 'mitigate their damages.' In order to have such damages, however, they must first show a taking which requires compensation.

2. Plaintiffs' Property Suffered No Significant Diminution In Value

Where the regulated land still has economically viable uses, whether a taking occurred depends on: "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment backed expectations, and the character of the government action." ***Plazzolo v. Rhode Island***, 533 U.S. 606, 617 (2001). Here, the regulation's economic effect is not substantial enough to constitute a temporary taking that entitles plaintiffs to compensation. *See* ***Tahoe-Sierra***, 535 U.S. at 335, ***Penn.***

Cent., 438 U.S. at 123-24.

In determining diminution in value, the Court must first determine what the value of the parcel was prior to the regulation being imposed. ***Penn. Cent.***, 438 U.S. at 130. Here, that is an especially easy inquiry which also forecloses any argument by plaintiffs that the property lost value: the value of the 'parcel as a whole' is the value of rural agricultural land with a non-conforming use of a restaurant because that is the value of the property without the incumbrance. ***Id.*** at 130; *see also* ***Rose Acre Farms, Inc. v. United States***, 373 F.3d 1177, 1185-86 (Fed. Cir. 2004)

Any argument that the value should be that of the property before it was zoned rural agricultural is unavailing. In 1993, plaintiffs' property was the location of two single family residences and a restaurant. The restaurant was completely destroyed by fire in 1993. It was only after Mr. Henry purportedly asked the opinion of the Zoning Administrator, Paul Raco, about rebuilding the restaurant that plaintiffs thought to build townhomes at all. It was, therefore also only after the property was zoned rural agricultural that plaintiffs sought to develop it–barring any claim that the 'denominator' should be that of the property prior to its being zoned rural agricultural. *See* ***Tahoe-Sierra***, 535 U.S. at 312, 342 (noting that developers bought the property prior to the issuance of the moratorium and finding the regulation not to be a taking).

Next, the Court must consider what-if any–diminution in value plaintiffs suffered as a result of the denial of the permit. At the time that plaintiffs sought to develop the property, the property was zoned rural agricultural and development of townhomes was not a permitted use; as such, it cannot be argued that the denial of the permit (whether proper or improper) diminished the value of the property. At best, plaintiffs could argue that the

denial of the permit prevented them from adding value to the property, which according to the Supreme Court in ***Euclid*** and ***Tahoe-Sierra*** does not constitute a taking.

Additionally, the Commission did not deny plaintiffs' CUP in its entirety but issued the CUP with conditions, including a condition limiting the development to 14 townhomes. The fact that plaintiffs found this number of townhomes unpalatable does not make it a taking. In fact plaintiffs have presented no evidence that a CUP 'diminished' the value of the property at all, aside from bald assertions that they were denied 'all economic use' of the property (an argument which was disposed of above).

3. Plaintiffs Suffered No Destruction of Distinct Investment-Backed Expectations

Plaintiffs argue that they had the right to develop 50 townhomes on the property and the right to reestablish the restaurant as a non-conforming use (this Court is construing this as an allegation of destruction of distinct investment-backed expectations). Both arguments fail.

i. Plaintiffs Had No Investment-Backed Expectation in a 50 Townhome Development

A CUP is not an entitlement, and by definition, is not included in the 'bundle of rights' granted to a property owner. ***Tahoe-Sierra***, 535 U.S. 302, 327. Plaintiffs would have this Court believe that the granting of plaintiffs' CUP for 50 townhomes by the Jefferson County Commission in 2001 which was then **REVERSED** by the Circuit Court of Jefferson County as improper, somehow created for plaintiffs an entitlement to a CUP for 50 townhomes. That is simply not the case.

By Order dated June 27, 2003, the Jefferson County Circuit Court **REVERSED** the decision of the Jefferson County Commission to grant plaintiffs a CUP for 50 townhomes because the decision failed to include findings of fact and conclusions of law. ([Doc. 323]

Ex. 7 at 6). The decision of the Commission was, therefore, legally deficient, and the Jefferson County Circuit Court did away with the decision in its entirety. As such, upon rehearing, the Commission was not bound by its previous decision–and it was certainly not bound by any 'findings' as there were none. Plaintiffs hang many of their arguments on the fact that because 'the Commission granted the CUP before, it should have granted it again.' This is a nonsensical argument. The general purpose for a land use commission is to make rigid zoning laws more flexible. Plaintiffs' application was granted–without findings of fact or conclusions of law–and upon reconsideration in 2005, the Commission denied plaintiffs' CUP for 50 townhomes, instead granting a CUP for 14 townhomes. Plaintiffs argue that the 'about-face' of the Commission is evidence of conspiracy, retaliation, and bias. (See e.g. [Doc. 321-2] at 37). In fact, it is simply the legal process in action: plaintiffs were granted an improper CUP, the CUP was vacated, and a legally sufficient CUP for 14 townhomes was granted.[7]

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[7] Plaintiffs also argue that the 14-unit CUP was a CUP for something plaintiffs were already entitled to. This is an incorrect statement. Plaintiffs applied to develop the property in 1994. According to the zoning ordinance in effect at the time, plaintiffs would have only been able to divide the 13.69 acre property into a total of 10 lots by 2004, not 14 lots: Lot 26.1 (6.69 acres) could have been subdivided into 3 lots by 1999, with the residue lot having 211,416.40 square feet. The residual lot of 26.1 could then have been divided into 3 total lots by 2004, with the residue lot containing 131,416.40 square feet. Lot 26.1 could then have been subdivided into a total of 5 lots by 2004, when plaintiffs' CUP application was considered. Lots 26.2 and 26.4 (2 acres each) could have been subdivided only once into a total of 2 lots each (for a total of 4), because the residue of 47,120 square feet would not permit additional subdivision under § 5.7(b).

Further, at the time the CUP was granted plaintiffs had not sought to divide the property at all, so plaintiffs were not even entitled to 10 lots at the time the Commission

Plaintiffs also point to the 2008 decision of ***Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals***, 222 W.Va. 252, 664 S.E.2d 137 (W.Va. 2008) as a previously unavailable 'definitive statement of the law' which requires this Court to find that plaintiffs were entitled to the permit, and therefore suffered some harm. It is true that a possible reading of ***Far Away Farm*** would entitle plaintiffs to a CUP for 50 townhomes; however, as plaintiffs note this was not the clear statement of the law at the time plaintiffs went before the Commission in 2005, so it cannot constitute the basis of some 'investment-backed expectation' on the part of the plaintiffs.

Further, even if it were the basis of some expectation, when reviewing the significant investment-backed expectations interfered with by other zoning ordinances, such as those in ***Tahoe-Sierra***, that the Supreme Court has found insufficient to find a taking, this Court cannot find plaintiffs' alleged 'expectations' as sufficient in this case.[8] As noted in section I, *supra*, this Court finds ***Far Away Farm*** distinguishable, and the opinion was not issued until years after plaintiffs' application went before the board (and nearly a decade after plaintiffs first sought to develop the townhomes).

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granted plaintiffs' 14-unit CUP.

[8] The Court also has to question plaintiffs' assertion that they believed they were entitled as a matter of law to a 50 townhome development when plaintiffs failed to appeal the 14-unit CUP to the West Virginia Supreme Court. Plaintiffs argue ***Far Away Farm*** shows that they should have prevailed, but plaintiffs cannot rely on a decision that did not exist at the time they were supposedly relying on the entitlement, when they also failed to seek such a decision from the West Virginia Supreme Court themselves. Admittedly, litigants will on occasion choose not to appeal a decision they feel was wrongly decided simply because of costs or other factors; but here plaintiffs filed several other claims both in federal and state court.

ii. Plaintiffs Had No Investment-Backed Expectation in Rebuilding the Restaurant in 2003

Plaintiffs also seem to imply that the defendants 'tricked' plaintiffs into applying for a CUP for townhomes when they really wanted to rebuild the restaurant; and that, therefore, they should be compensated for the Commission's denial of the variance to reestablish the restaurant. (See [Doc. 321] at 34 (stating "Were it not for the wrongful denial of the right to rebuild his restaurant, and to regain his primary source of income, Mr. Henry might well have never sought a CUP to develop the subject property as a townhouse community.")) This argument is without merit.

Plaintiffs argue that "[t]he absence of a prohibition in Jefferson County's Ordinance against the rebuilding of a non-conforming use was fatal to the validity of any decision or contention that [plaintiffs were] not entitled to rebuild [their] restaurant as a matter of right, or that he could only rebuild upon the grant of special permission such as a variance or conditional use permit." ([Doc. 321-2] at 30)(footnote omitted). There was, however, an express provision preventing plaintiffs from rebuilding the restaurant.

Plaintiffs were 'grandfathered' into the new zoning regulations in 1988; this allowed plaintiffs to continue their nonconforming use from 1979 to 1993 (the restaurant itself was established in 1968), despite the new zoning laws. Permission to continue the nonconforming use, however, expired when the restaurant was destroyed in 1993 and plaintiffs failed to reestablish the restaurant within a year. (See [Doc. 321] Ex. C, § 4.3; W.Va. Code § 8-24-50). It was not until 2003, that plaintiffs went through any formal process to rebuild the restaurant. ([Doc. 335] Ex. 2 at 134), ([Doc. 303-6]).

Plaintiffs argue they suffered a taking when they were denied a variance to rebuild the restaurant in 2003. Plaintiffs were entitled to rebuild the restaurant, despite the fact that

it was a nonconforming use, but that window closed *one year* after the structure was destroyed–not ten years later. (See [Doc. 321] Ex. C, § 4.3). When the BZA denied the variance on December 18, 2003, it found: (1) the use had been abandoned for ten years; and (2) plaintiffs were seeking a variance to avoid the CUP process. (See [Doc. 303-7]). As plaintiffs failed to file for a variance to rebuild the restaurant within the one year allotted by the grandfather clause of the Ordinance, plaintiffs cannot now assert a takings claim on that basis. *See* ***Wilson v. Garcia***, 471 U.S. 261 (1985) (holding that the statute of limitations for 42 U.S.C. § 1983 claims is the state statute of limitations for personal injury actions); W.Va. Code § 55-2-12(b) (two year statute of limitations for personal injury); ***Sattler v. Johnson***, 857 F.2d 224 (4th Cir. 1988).

II. The Conditional Use Permit Granted by the Commission in 2005 Was Granted According to Substantive Due Process and Procedural Due Process.

Plaintiffs' claims fail because the Jefferson defendants granted plaintiffs' January 2005 CUP according to the dictates of substantive and procedural due process.

A. Plaintiffs Fail to State a Substantive Due Process Claim

As the Fourth Circuit noted in ***Sylvia Development Corp. v. Calvert County, Md.***, 48 F.3d 810, 827 (4th Cir. 1995), "[t]o make out a claim that [the] County's action violated substantive due process, [plaintiffs] must, in the circumstances of this case, demonstrate (1) that they had property or a property interest; (2) that the state deprived them of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency. *See*

Love v. Pepersack, 47 F.3d 120, 122 (4th Cir.1995)." ***Id.*** at 827.[9] Put another way, in order for state action to be a violation of substantive due process it must be "so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies." ***Rucker v. Harford County***, 946 F.2d 278, 281 (4th Cir.1991), *cert. denied*, 502 U.S. 1097 (1992).

This bar is even higher in the context of zoning challenges where such decisions are within the purview of the state police power. As quoted in ***Sylvia Development***, 48 F.3d at 827, for a substantive due process challenge to succeed, "it must be clear that the state's action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" ***Nectow v. Cambridge***, 277 U.S. 183, 187-88 (1928) (quoting ***Village of Euclid v. Ambler Realty Co.***, 272 U.S. 365, 395 (1926)). Further, the Fourth Circuit noted: "the Supreme Court has narrowed the scope of substantive due process protection in the zoning context so that such a claim can survive *only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of*

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[9] Plaintiffs, in their Response [Doc. 331] attempt to distinguish ***Sylvia Development Corp. v. Calvert County, Md.***, 48 F.3d 810, 827 (4th Cir. 1995) by noting that in ***Sylvia Development*** the plaintiff "received his permit after 11 months" but that Mr. Henry "did not receive a CUP for which he was fully qualified for over six years and was denied an absolute right to rebuild his restaurant for over 14 years." (Id. at 8-9). This 'distinction' is irrelevant as the Court finds that even if plaintiffs were entitled to a CUP in 2005, plaintiffs have failed to use the post-deprivation processes available to them at the state level, and as plaintiffs never had any "absolute" right to rebuild his restaurant. (*See*, I, *supra*).

the state's traditional police power through zoning." ***Sylvia Development,*** 48 F.3d at 827 (emphasis added) (citing ***Village of Belle Terre v. Boraas***, 416 U.S. 1 (1974); *cf.* ***Moore v. City of East Cleveland***, 431 U.S. 494 (1977) (city's requirement that families exclude blood relatives violates substantive due process)).

This substantive due process bar is one which plaintiffs fail to meet on the undisputed material facts. Plaintiffs have failed to carry their burden on all three requirements because even crediting plaintiffs' reading of ***Far Away Farm,*** plaintiffs have failed to show a property interest in the CUP. Additionally, even granting a property interest in the CUP, plaintiffs have failed to show that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency.

1. Plaintiffs Have Failed to Show a Property Interest in the CUP

As discussed above, this Court finds ***Far Away Farm*** to be distinguishable and inapplicable to the above-styled case; and, therefore finds plaintiffs to have no property interest in a CUP of any kind, let alone the 50 townhome CUP originally granted by the Commission in 2001 (then vacated by the Jefferson County Circuit Court). (*See*, I, *supra*). In the interest of fully vetting this issue, however, the Court notes that should ***Far Away Farm*** be found to apply to the case at bar, plaintiffs' claim would still fail on the merits.

In order for plaintiffs to be able to bring a substantive due process claim pursuant to the Fourteenth Amendment they must first have a property interest created "by existing rules or understandings that stem from an independent source such as state law..." ***Board of Regents v. Roth***, 408 U.S. 564, 577 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement

to it." ***Id.*** Here, plaintiffs can show no such entitlement.

Plaintiffs argue that the West Virginia Supreme Court's decision in ***Far Away Farm*** showed that plaintiffs had an entitlement to a CUP for 50-townhomes in 2005. Even if ***Far Away Farm*** is read to find that a denial of plaintiffs' permit under the circumstances in 2005 was an abuse of discretion, the Fourth Circuit's decision in ***Gardner v. City of Baltimore Mayor and City Counsel***, 969 F.2d 63, 68 (4th Cir. 1992) forecloses any argument that plaintiffs have a claim of entitlement on which to base a substantive due process claim. In ***Gardener***, the Fourth Circuit addressed a "claim of entitlement" by plaintiffs to a permit approval and held that "whether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks *all* discretion to deny issuance of the permit or withhold its approval." ***Gardner***, 969 F.2d 63 (emphasis in original). Under the ordinance governing plaintiffs' CUP, the commission is explicitly given authority to "issue, issue with conditions, or deny the conditional use permit." ([Doc. 323-3] Ordinance § 7.6(f)).

Plaintiffs' reading of ***Far Away Farm***, is that when an applicant provides a favorable LESA score to the commission and only anecdotal evidence is presented in opposition to the applicant's proposal, it is an abuse of discretion under West Virginia law to deny the permit, but that is *not* the equivalent of an *absence of authority* to deny the permit. Thus, plaintiffs' interpretation of ***Far Away Farm***, when looked at through the lens of ***Gardner***, still results in no legitimate claim of entitlement on the part of plaintiffs to a CUP. The Fourth Circuit further noted: "the standard focuses on the amount of discretion accorded the issuing agency by law, not on whether or to what degree that discretion is actually exercised. 'Even if in a particular case, objective observers would estimate that the

probability of issuance was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest.'" ***Gardner***, 969 F.2d at 68 (quoting ***RRI Realty Corp. v. Incorporated Village of Southhampton***, 870 F.2d 911, 918 (2d Cir. 1989)). Based on the Fourth Circuit's holding in ***Gardner***, therefore, the ordinance would have to deny the commission the discretion to refuse to issue the permit. Here, the ordinance provides the commission with the authority to "issue, issue with conditions, or deny the conditional use permit" ([Doc. 323-3] Ordinance § 7.6(f)), and thereby forecloses any claim of entitlement by plaintiffs[10]. *See also,* ***Scott v. Greenville County***, 716 F.2d 1409 (4th Cir. 1983) (finding a claim of entitlement, but distinguished by the Court in ***Gardner*** because "the county was required by state law to issue a building permit 'upon presentation of an application and plans showing a use expressly permitted under the then-current zoning ordinance.'" ***Gardner***, 969 F.2d at 69 (quoting ***Scott***, 716 F.2d at 1418)).

2. Plaintiffs Have Failed to Show That Any Deprivation Was Incurable Through Post-Deprivation Process

Additionally, even were this Court to find that plaintiffs had a claim of entitlement, plaintiffs' substantive due process claim would also fail because plaintiffs have not shown that the alleged deprivation was incurable by post-deprivation process. In order for the

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[10] This conclusion is strengthened by the fact that ***Far Away Farm*** was not decided until 2008, three years after plaintiffs' CUP application came before the Commission. That fact weighs in favor of a finding that "objective observers" might disagree on whether the Commission should have issued the CUP; and that "opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest." ***Gardner***, 969 F.2d at 68 (quoting ***RRI Realty Corp.***, 870 F.2d at 918).

"state's action [to fall] so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency," the "alleged purpose behind the state action [must have] no conceivable rational relationship to the exercise of the state's traditional police power through zoning." ***Sylvia Development***, 48 F.3d at 827. Here, although plaintiffs allege the "purpose" of the Commission was retaliation, they have offered no evidence upon which a jury could find such retaliation. (*See*, IV (A), *infra*). As such, the only "purpose" the Court is left with is that stated by the Commission in its Findings of Fact and Conclusions of Law as its basis for granting a CUP for 14 townhomes as opposed to for 50 townhomes:

> 6. Ledge Lowe Estates is a low density residential subdivision across State Route 480 from the Town Run Commons property. The townhouse development proposed by Town Run Commons is not compatible with Ledge Lowe Estates or any other real estate adjacent to the Town Run Common's [sic] property.
>
> 7. The Commission concluded that the Town Run property should be a transitional parcel that should be improved by lower density residential uses.
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> 8. The Commission concludes that the construction of a culvert to enclose the Town Run stream should be avoided. The Town Run Stream should be left in its natural state.

([Doc. 323-13] at 4). As found by the Fourth Circuit in ***Sylvia Development***, "the impact of development on traffic safety and water supply is quintessentially a legitimate zoning concern"; therefore, the Commission's decision falls well within the bounds of legitimate governmental action.

Even if the Court were to accept plaintiffs' argument that these reasons are not sufficient to substantiate the Commission's denial of the permit because, as in ***Far Away Farm***, the reasoning of the commission was based on merely anecdotal evidence and, therefore, insufficient as a matter of law, plaintiffs have failed to show that this error was irrectifiable by post-deprivation process. In fact, if plaintiffs still had possession of the property at issue this Court could enter a Writ of Mandamus requiring the Commission to issue the CUP. Plaintiffs instead of pursuing that remedy, however, opted to sell the property in 2006. That decision cannot now result in a successful substantive due process claim simply because plaintiffs chose not to pursue the post-deprivation remedies available to them.[11]

B. Plaintiffs Fail to State a Procedural Due Process Claim

In order to state a claim for violation of procedural due process plaintiffs must show that the Commission failed to provide the process required by Jefferson County Zoning and Development Review Ordinance [Doc. 323-3]. *See* ***United States v. Heffner***, 420 F.2d 809, 811-2 (4th Cir. 1970); ***Powell v. Brown***, 160 W.Va. 723, 238 S.E.2d 220 (1977). Plaintiffs argue they were denied the required process because: (1) no hearing was required as all issues had been resolved in 2001 and, therefore, no hearing was required on 'unresolved issues' and; (2) the Commission failed to hear the staff report from the zoning staff as required by Ord. Sec. 7(e) "vitiating the remaining procedures"; and (3)

[11] Here again, the Court notes the failure of plaintiffs to appeal the 14-unit CUP to the West Virginia Supreme Court for review. Presumably, if plaintiffs' reading of the ***Far Away Farm*** decision is correct, the West Virginia Supreme Court would have remedied the denial of the 50 townhome CUP on appeal. Plaintiffs, therefore, abandoned at least two post-deprivation remedies.

plaintiffs were denied a fair hearing by the commissioners because defendant Lewandowski's statements before the Commission tainted the process. ([Doc. 331] at 10). Plaintiffs' arguments fail on all three grounds.

First, plaintiffs' argument that no hearing was required as the 'unresolved issues' had been resolved in 2001 is simply inaccurate. The CUP granted by the Commission was reversed and the Jefferson County Circuit Court stated in its Order that the Commission could either provide findings of fact and conclusions of law, or hold another hearing on the issue. Second, the Commission's 'failure' to 'hear' the report was not a violation of the procedures set out in the ordinance. Section 7.6(e) cited by plaintiffs states, ".... The purpose of the meeting is to hear the staff's report of the issues and concerns raised at the Compatibility Meeting. Any comments relative to the validity of the staff's report should be presented at this meeting..." Ord. Sec. 7.6(e) (See [Doc. 323-3]).

As highlighted by plaintiffs in their first argument, the same staff report had already been approved by the Commission in May of 2001. ([Doc. 326-3]). At the 2005 hearing, the previously approved report was submitted to the Commission. To the extent that there is an ambiguity in the ordinance as to the meaning of "hear the staff's report of the issues" the Court must assign to that portion of the statute its reasonable meaning. *See* ***Aremu v. Dep't of Homeland Sec.***, 450 F.3d 578, 583 (4th Cir. 2006) (noting that the legislature cannot be presumed to have intended an absurd or manifestly unjust result). Here, it is reasonable to find that the portion of the statute requiring the commission to 'hear' the staff's report of the issues was satisfied when the report accepted by the Commission was submitted to the Commission for consideration; and then argument on the 'unresolved issues' of that report was heard by the Commission. This Court, therefore, finds that the

Commission complied with the procedures prescribed by the ordinance when the 2001 staff report was submitted to the Commission and the Commission heard argument on the issues.[12]

Finally, plaintiffs' claims that they were denied a fair hearing on the CUP due to comments and participation of defendant Lewandowski, are unsupported by the record. Plaintiffs argue they were denied a fair hearing because defendant Lewandowski made an "open, notorious expression of hostility" and was "one of the six commissioners who participated in two of the administrative body's proceedings which preceded rejection of the ... permit." ([Doc. 331] at 11).

First, the Court would acknowledge that defendant Lewandowski was a petitioner of plaintiffs' 2001 CUP; and, therefore, he should have recused himself from consideration of the CUP when it was remanded by the Jefferson County Circuit Court. (See [Doc. 303-3]). That said, however, the regulations also provide that a commission member is to state why he is, or is not, recusing himself when a conflict issue arises. (Id. IV § 4). This would be the point at which defendant Lewandowski's statements that he would not recuse himself because of plaintiffs' 'slap suit' come into play. These statements were not in good taste, but despite plaintiffs' allegations that they were calculated to 'poison the new members of the Commission' against plaintiffs, there is no evidence that they had any impact.[13] Further, at the meeting where such statements were made, the Commission did

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[12] The Court notes that specifically, plaintiffs were allowed 30 minutes to make a presentation; the public was then given 15 minutes to respond; and plaintiffs were allowed 15 minutes of rebuttal.

[13] Nor is there any evidence that comments made by plaintiffs' counsel (also in poor taste) threatening Commission members with further litigation should the Commission

not vote on–or even consider–plaintiffs' CUP application. Instead, the issue was tabled for later discussion.

It was only *after* defendant Lewandowski had the advice of counsel that he decided to recuse himself. ([Doc. 323-2] Ex. 21 at 11-12; Ex. 22 at 21).[14] As the Commission then considered the CUP–without defendant Lewandowski–and rendered a decision–without defendant Lewandowski–this Court finds that plaintiffs cannot show violation of due process based solely on the denial of a permit.

Even assuming, *arguendo*, that plaintiffs were correct that defendant Lewandowski was attempting to taint the Commission in retaliation for the law suits filed by plaintiffs, plaintiffs' claims still fail. Plaintiffs argue based on ***Strivers v. Pierce***, 71 F.3d 732 (9th Cir. 1995), that defendant Lewandowski's comments irreparably tainted the entire CUP hearing process in violation of plaintiffs' procedural due process rights. ([Doc. 331] at 11). In ***Strivers***, the Ninth Circuit held that a private investigator whose license had been denied by a three-member board, one of whom had a bias against the plaintiff, was denied due process. ***Strivers***, is distinguishable, however, and inapplicable due to the 'presumptions' standard set out by the Supreme Court in ***Winthrow v. Larkin***, 421 U.S. 35, 47 (1975).

In ***Winthrow***, the Supreme Court held that in order to show bias on the part of an administrative tribunal, the person "must overcome a presumption of honesty and integrity

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persist in seeking an opportunity to consult with counsel before voting on the re-docketing of the application influenced the Commission members. (See [Doc. 303] Ex. V).

[14] Contrary to plaintiffs' representations, therefore, it could just as easily be found that defendant Lewandowski was not putting on a show for the new Commission members but instead actually believed that he could vote on the issue before the Commission until he was advised otherwise.

in those serving as adjudicators." 421 U.S. at 47. Given the presumption set out in ***Winthrow***, and the fact that defendant Lewandowski *did not participate in the deliberation and decision*, the statement in ***Strivers*** that "[w]hether actual or apparent, bias on the part of a single member of a tribunal taints the proceedings and violates due process" is inapplicable to the case at bar.[15] *See* ***Strivers***, 71 F.3d at 747-48. Here, defendant Lewandowski recused himself from both the deliberations and the rendering of a decision; and, as such, plaintiffs have shown no procedural due process violation with regard to plaintiffs' CUP application.

IV. Plaintiffs Fail to State a Claim for Retaliation or Conspiracy

Plaintiffs also fail to state a claim for retaliation or conspiracy under 42 U.S.C. §§ 1983, 1985, and 1986. In order to state a claim under 42 U.S.C. § 1983, a plaintiff must first show that the act was "committed by a person acting under color of state law," and that the conduct, "deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." ***Avery v. County of Burke***, 660 F.2d 111 (4th Cir. 1981) (quoting ***Parratt v. Taylor***, 451 U.S. 527, 535 (1981)), *overruled on other grounds*, ***Daniels v. Williams***, 474 U.S. 327 (1986)). Additionally, "to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." ***Hafer v. Melo***, 502 U.S. 21, 25 (1991)

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[15] The Court notes also that the ***Strivers*** cites as authority ***Aetna Life Insurance Co. v. Lavoie***, 475 U.S. 813 (1986). In the ***Aetna*** decision, however, the Supreme Court expressly declined to address the issue of whether bias on the part of one member would 'taint' the decision of the tribunal without evidence that the one member's bias actually influenced the other members of the tribunal.

(internal quotations omitted).

"To establish a civil conspiracy under section 1983, [plaintiffs] must present evidence that [defendants] acted jointly in concert and that some overt act was done in furtherance of the conspiracy which resulted in [plaintiffs'] deprivation of a constitutional right." ***Hinkle v. City of Clarksburg***, 81 F.3d 416, 421 (4th Cir. 1996). And, "to prove a section 1985 conspiracy, a claimant must show an agreement or a meeting of the minds by defendants to violate the claimant's constitutional rights." ***Simmons v. Poe***, 47 F.3d 1370, 1377 (4th Cir. 1995) (internal quotations omitted).

A. Plaintiffs' Retaliation Claim Fails Because Plaintiffs Cannot Show Any Detriment

In order to state a claim for retaliation plaintiffs must show that (1) there was an intention to retaliate against plaintiffs, and (2) that plaintiffs suffered some detriment as a result. *See* ***Huang v. Board of Governors of Univ. of North Carolina***, 902 F.2d 1134, 1140 (4th Cir. 1990). Here, assuming *arguendo* that the statements made by defendant Lewendowski show an 'intent to retaliate,' against plaintiffs for exercising their right to petition, plaintiffs' claims still fail because there is no showing that plaintiffs suffered a detriment as a result.

Plaintiffs argue that detriment suffered was the 2005 rejection of plaintiffs' 76 townhome CUP application. Plaintiffs reason that the Commission members and defendant Lewendowski conspired with other defendants to retaliate against plaintiff for filing suit to challenge the Commission's prior decisions, and for filing suit against the individuals who challenged the grant of plaintiffs' 2001 CUP for 50 townhomes. If under ***Far Away Farm***, plaintiffs were entitled to the CUP, that would be a denial of a valuable benefit; if plaintiffs were not entitled to the CUP, then the denial cannot constitute a denial of a benefit because

plaintiffs at no time were entitled to such a CUP and plaintiffs' claims would immediately fail as a matter of law. (*See*, I, *supra*).

Either way, however, plaintiffs' claims fail as plaintiffs have presented no evidence that the decision of the Commission was influenced by the comments of defendant Lewendowski or otherwise motivated by anything other than a finding that a denial of the 50 townhome CUP was appropriate due to concerns about water flow, traffic, and compatibility with the area. The only evidence plaintiffs have presented in support of their conspiracy and retaliation claims is that their CUP was denied, that defendant Lewandowski made comments at a Commission hearing, and that a CUP for a mixed-use development including 32 townhome units was granted to a subsequent purchaser of the property. That showing is not enough to withstand defendants' motion for summary judgment.

Plaintiffs argue that defendant Lewandowski's comments "made in the presence of the three new Planning Commission members.... implied that an example should be made of Mr. Henry to deter others from seeking to vindicate their land-use rights in federal court." ([Doc. 331] at 15). Plaintiffs then take the leap that because the "three new members subsequently voted 3 to 2 to take Mr. Henry's permit approval away[16], while the two old members... voted to allow him to keep his permit approval," that "an inference can be drawn from [this] direct evidence" that the defendants sought to retaliate against plaintiffs for exercising their right to petition and were successful in getting plaintiffs' CUP for 50 townhomes denied. Plaintiffs cite no law in support of this proposition, and the Court knows

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[16] The Court would note that at the time the Commission was deciding the issue plaintiffs had no permit for the Commission to take away. (*See*, I, *supra*).

of no law that would support such a conjectured finding. *See* ***Keith v. Town of Knightdale***, 1998 WL 112815, *1, *1-2 (4th Cir. March 16, 1998) (unpublished).

In ***Keith***, the Fourth Circuit affirmed a district court decision finding the evidence adduced at trial in support of appellant's claims of retaliation insufficient as a matter of law. In its opinion the Fourth Circuit stated:

> Well-established principals of causation guide our analysis. Under the standard established in ***Mt. Healthy City Bd. of Educ. v. Doyle***, 429 U.S. 274 (1976), a claimant must demonstrate that conduct protected by the First Amendment "was a 'substantial factor'–or, to put it in other words, a 'motivating factor'" in the town's adverse decisions. ***Id.*** at 287. The burden then shifts to the defendants to prove, by a preponderance of the evidence, that the allegedly retaliatory actions would have been taken in the absence of the protected conduct. ***Id.***
>
> Notwithstanding the factual nature of the inquiry into motive, the question may not be determined by the jury if the evidence fails to show a reasonable probability of improper motive. *See* ***Lovelace v. Sherwin-Williams Co.***, 681 F.2d 230, 241-42 (4th Cir. 1982). We have explained that "if the inference sought to be drawn lacks substantial probability, and attempted resolution of the question may well lie within the area of surmise and conjecture, so that issue should not be submitted to a jury for consideration." ***Id.*** at 242 (internal quotation marks and citation omitted).

Keith, 139 F.3d 890, at *1-2.

The Court then went on to discuss the evidence presented by appellant that his first amendment activities were the cause of the counsel's adverse actions taken with respect

to appellant's development projects. The Court found that despite the fact that appellant had "established the intent of various counsel members to drive [him] out of business" appellant had not been able to "forge even a tenuous link between his first amendment activities and adverse actions taken with respect to [his] development projects." ***Id.*** The Court went on to note that appellant would "have [the Court] infer causation from the bare juxtaposition of his protected conduct, appellees' expressed antagonism, and the town's adverse actions." ***Id.*** at 2.

Here, plaintiffs have likewise presented no evidence that would amount to a "tenuous link between [their] first amendment activities and adverse actions taken with respect to [their] development projects." Had defendant Lewandowski participated in the decision, or had the Commission members that voted in favor of plaintiffs' project refused to speak to the issue of whether plaintiffs had a fair hearing this Court might be willing to grant plaintiffs some "tenuous link," but plaintiffs cannot even show that. (See [Doc. 323-2] Marken Depo., 10/13/05, Ex. 19, at 10-13; Sims Depo., 10/13/05, Ex. 20, at 9-10; Lewandowski Depo., 10/14/05, Ex. 21, at 9-10, 13; Dailey Depo., 10/13/05, Ex. 22, at 14, 22-23; Roper Depo., 10/13/05, Ex. 23, at 40, 42-43. (all Commission members stating that they had not discussed plaintiffs' application outside the Commission meetings); *see also* V, *supra* (discussing the fact that defendant Lewandowski left the meeting and there is a presumption that officials act with "honesty and integrity." ***Winthrow***, 421 U.S. at 47)).

In the absence of a showing of any tenuous link between plaintiffs' first amendment activities and the denial of plaintiffs' permit, plaintiffs' retaliation claim fails.

B. Plaintiffs' Conspiracy Claim Fails Because Plaintiffs Have Not Shown Evidence From Which Conspiracy Can Be Inferred.

Here again, the only evidence plaintiffs have presented in support of their claim is

that the 50 townhome CUP was denied by the Commission in 2005; that action, without more, is not enough to create an issue of material fact as to the existence of a conspiracy. "To establish a civil conspiracy under section 1983, [plaintiffs] must present evidence that [defendants] acted jointly in concert and that some overt act was done in furtherance of the conspiracy which resulted in [plaintiffs'] deprivation of constitutional right." ***Hinkle v. City of Clarksburg***, 81 F.3d 416, 412 (4th Cir. 1996). The proponents of such a claim "have a weighty burden to establish a civil rights conspiracy." ***Hinkle***, 81 F.3d at 421. In ***Simmons***, the Fourth Circuit warned that, under that standard, it "has rarely, if ever, found that a plaintiff has set forth sufficient facts to establish a section 1985 conspiracy, such that the claim can withstand a summary judgment motion." ***Simmons***, 47 F.3d at 1377. The Court concluded that "we have specifically rejected section 1985 claims whenever the purported conspiracy is alleged in a merely conclusory manner, in the absence of concrete supporting facts." ***Id.***

Plaintiffs have presented no "concrete supporting facts" in support of their conspiracy claim. In fact, based on the record before the Court, the opposite is true: the individual members of the Commission testified that they did not discuss the merits of plaintiffs' CUP application outside the deliberative process and open meetings. ([Doc. 323-2] Marken Depo., 10/13/05, Ex. 19, at 10-13; Sims Depo., 10/13/05, Ex. 20, at 9-10; Lewandowski Depo., 10/14/05, Ex. 21, at 9-10, 13; Dailey Depo., 10/13/05, Ex. 22, at 14, 22-23; Roper Depo., 10/13/05, Ex. 23, at 40, 42-43.) Defendant Lewandowski, in fact, recused himself from participation in the evidentiary hearing on plaintiffs' CUP application and all deliberations on the matter. ([Doc. 323-2] Ex. 21, at 11-12; Ex. 22, at 21.) The Commission members who heard evidence from plaintiffs at the hearing and who

deliberated on plaintiffs' application specifically denied any outside influence on their decision, including denying that any of the pending lawsuits affected their deliberations. ([Doc. 323-2] Ex. 19, at 14-15; Ex. 20, at 14; Ex. 22, at 25-27; Ex. 23, at 43-45.) Additionally, Arnold Dailey and Russell Roper, Commission members who were not named as defendants by plaintiffs, testified that plaintiffs' application was treated with same status as any other conditional use permit application and the same process was followed as with any application. (Ex. 22, at 27, 32; Ex. 23, at 44-45.)

In response plaintiffs provide little more than rhetoric: "[g]iven the taint of the Lewandowski tirade, the disregard of Henry's automatic right to develop the Town Run Commons site and to rebuild his restaurant and the procedural irregularities that accompanied the administrative procedures, one should expect a more convincing rebuttal [than defendants' denials of participating in a conspiracy]." ([Doc. 331] at 17). The Court has addressed, and dismissed, plaintiffs' allegations of "taint," plaintiffs' "automatic right to develop," plaintiffs' right to "rebuild [their] restaurant," and allegations of "procedural irregularities." The Court can in fact think of no other more convincing rebuttal than the agreement of all defendants–as well as Commission members not party to the suit–that there was no conspiracy afoot. Defendants cannot present evidence that does not exist.

Further, the cases plaintiffs cite in support of their argument that there is an issue of material fact with regard to the conspiracy are inapplicable. Plaintiffs cite to ***Thomas v. City of New Orleans***, 687 F.2d 80, 83 (5th Cir. 1982), noting that the Fifth Circuit found evidence that defendants had participated in private meetings and had discussed matters related to plaintiff's claims was sufficient to support inference of alleged conspiracy. ([Doc. 331] at 16). Here, there is no such evidence. There is evidence to the contrary: that

plaintiffs' application was treated just like any other application and it was not discussed outside Commission meetings and public hearings. The other cases cited by plaintiffs are likewise distinguishable.

Plaintiffs argue that because the "existence of a conspiracy need not be proved by direct evidence, but may be inferred from the facts and circumstances of the case... knowledge and participation may also be proved by circumstantial evidence." ([Doc. 331] at 16) (quoting ***Clark v. Milam***, 847 F.Supp. 409, 418 (S.D.W.V. 1994) and citing ***Poller v. Columbia Broadcasting Sys. Inc.***, 368 U.S. 464, 473 (1962)). Plaintiffs, however, have provided the Court with no such evidence. In ***Clark***, the court was deciding a motion to dismiss, and in the complaint plaintiffs alleged defendants had knowingly concealed racketeering activities. The court, therefore, found that the allegation of knowing concealment was sufficient to support a conspiracy claim. Here, we are not faced with a motion to dismiss, but a motion for summary judgment. Plaintiffs cannot simply allege that there is circumstantial evidence from which a jury could infer knowledge and participation: plaintiffs must come forward with evidence sufficient to support such a jury finding; and no such showing has been made.

Further, in ***Hoffman-La Roche, Inc. v. Greenberg***, 447 F.2d 872, 875 (7th Cir. 1971), another case cited by plaintiffs, the court examined an alleged conspiracy involving drug wholesalers buying stolen merchandise. The court stated:

> The law does not demand proof that each conspirator knew the exact limits of the illegal plan or the identity of all participants therein. But it does require that there be a single plan, the essential nature and General scope of which is known to each

> person who is to be held responsible for its consequences. Repetitive or parallel transactions may establish the existence of such a joint venture, but *isolated instances, explicable without reference to a continuing or broader program, may not.*

Id. (emphasis added).

Here, plaintiffs argue (1) the 'reversal' of the 50-unit CUP, (2) the fact that the new members were the members who voted against the CUP, (3) the fact that one of the members was 'unfamiliar with the LESA scoring system,' and (4) the statements of Mr. Lewandowski are sufficient circumstantial evidence to allow a jury to find the existence of a conspiracy. Thus, only real 'act' that plaintiffs allege as circumstantial evidence of the conspiracy is the voting of the Commission.[17] It is the job of the Commission to vote on CUPs. Just as the court in ***Hoffman-La Roche*** found, this "isolated instance[], [is] explicable without reference to a continuing or broader program, [and therefore,] may not" establish the existence of a conspiracy; so no such connection can be made in the case at bar. ***Id.*** at 875.

If plaintiffs had presented some evidence from which a malicious, retaliatory, or conspiratorial agreement between the new members to deny the permit could be inferred such as in ***Thomas*** where the parties met and discussed plaintiffs' claims in private meetings; or some evidence that there was a suspicious pattern that gave rise to an

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[17] The remarks of defendant Lewandowski have been discussed previously, and an individual is incapable of constituting a conspiracy. Further, as discussed above, defendant Lewandowski recused himself before any decision on the CUP was made; as such he could not be said to have 'conspired' to deny the permit unless plaintiffs could show that his statements had any impact (which they have not (*see*, IV, *supra*)).

inference of knowledge on the part of the alleged co-conspirators as in ***Hoffman-La Roche***, there might be an issue of material fact. Plaintiffs, however, have failed to carry this burden with regard to any of the defendants–whom plaintiffs essentially allege should be tried for conspiracy because they 'conveniently don't remember conspiring.'

The record is simply devoid of any evidence that the defendants engaged in a conspiracy to deprive plaintiffs of their rights, privileges or immunities; as such, plaintiffs' claims pursuant to 42 U.S.C. §§ 1983, 1985, and 1986 fail.

V. Plaintiffs Have Failed to State A Claim for Violation of Their Right to Equal Protection

Plaintiffs allege that their right to equal protection pursuant to the Fourteenth Amendment was violated when the planning Commission denied their CUP and then later granted a CUP to the subsequent purchaser of the lot. Plaintiffs allege that such actions unfairly discriminated against them in violation of the Equal Protection clause of the Fourteenth Amendment, but plaintiffs' claim fails for the following reasons: (1) plaintiffs and the subsequent purchaser (Corum) are not similarly situated; and (2) even if plaintiffs and Corum were similarly situated and defendants had subjected plaintiffs to some facial classification, plaintiffs have failed to raise an issue of material fact as to the rational basis of the Commission's decision.

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from "denying to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §§ 1. The purpose of the Equal Protection Clause is to "require[ ] that the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application [] be justified by the law's purpose." ***Sylvia Development***, 48 F.3d at 818.

A. Plaintiffs and Corum Are Not Similarly Situated

In order for plaintiffs to have a viable equal protection claim, they must show that the zoning laws were applied in an unequal way to "persons similarly situated." ***Sylvia Development***, 48 F.3d at 818. Plaintiffs argue defendants violated their equal protection rights by treating plaintiffs differently than another developer, Peter Corum, who was granted a conditional use permit to develop a mixed-use project on plaintiffs' lot after purchasing the lot. ([Doc. 99] ¶¶ 57, 109). Plaintiffs' equal protection claims fail as a matter of law because plaintiffs are not similarly situated to Peter Corum.

Plaintiffs never presented a comprehensive multi-use development proposal; whereas, Corum did present such a proposal. Thus, plaintiffs' and Corum's applications were not evaluated under the same version of the applicable Ordinance (both due to date of the application–2001 versus 2002–and the substance of the proposal). That distinction operates to defeat plaintiffs' equal protection claims as a matter of law because the Constitution only requires the law to be applied equally to those similarly situated. *See* ***Sylvia Development***, 48 F.3d at 818.

B. Plaintiffs Have Failed to Raise an Issue of Material Fact as to the Rational Basis of the Commission's Decision

Assuming, *arguendo*, that plaintiffs are similarly situated to Corum and that there was some facial classification of their permit application, plaintiffs' equal protection claim still fails because the decision of the Commission satisfies rational basis scrutiny. The first step in assessing plaintiffs' equal protection claim is determining if the government created a classification that singles out a particular group of individuals for unique treatment under the law. ***Sylvia Development***, 48 F.3d at 819. Next, the Court must analyze the government's action according to the appropriate degree of scrutiny. *See* ***Id.*** at 820.

Where, as in Count IX, there is no contention that the government has burdened a fundamental right or employed a suspect classification, the Court should apply rational basis scrutiny, which presumes the decision is valid so long as "the classification ... is rationally related to a legitimate state interest." ***City of Cleburne v. Cleburne Living Ctr., Inc.***, 473 U.S. 432, 440 (1985) (citations omitted); *see also*, ***Front Royal***, 135 F.3d 275, 290 (4th Cir. 1998) (citations omitted). Under rational basis scrutiny, the decision of the Commission must be sustained "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." ***International Science & Tech. Inst. v. INACOM Communications, Inc.***, 106 F.3d 1146, 1157 (4th Cir. 1997) (quoting ***Thomasson v. Perry***, 80 F.3d 915, 928 (4th Cir. 1996)).

Here, in the Commission's Findings of Fact and Conclusions of Law, the Commission states that it is denying the permit because the proposed townhouse development would create a density of 5.2 townhouses per acre; that the property is next to a park and a low density single family home development; that the proposed development is not compatible with Ledge Lowe Estates or any of the other real estate adjacent to plaintiffs' property; and that the parcel should be improved with lower density residential uses and that the proposed enclosure of Town Run stream in a culvert should be avoided. ([Doc. 323-2] Ex. 11) This reasoning passes rational basis scrutiny because that 'classification' is rationally related to a legitimate government interest. (*See,* II(A), *supra*) (noting that "the impact of development on traffic safety and water supply is quintessentially a legitimate zoning concern" and that zoning is a part of the traditional police power).

VI. Plaintiffs Have Failed to State A Claim for Violation of the Fair Housing Act

Plaintiffs' claims pursuant to the Fair Housing Act, 42 U.S.C. § 3604, *et. seq.*, fail because: (1) the claims are time barred; and (2) plaintiffs have presented no evidence that defendants "have engaged in and are engaging in a pattern or practice of resistance to full enjoyment of federal rights granted by the Fair Housing Act, by among things, acquiescing and giving into strong public sentiment to deny Mr. Henry a permit for reasons that violate the Fair Housing Act." ([Doc. 99] ¶ 129).

A. Plaintiffs' FHA Claims Are Time-Barred

A civil action claiming violation of the Fair Housing Act, 42 U.S.C. § 3604, *et seq.*, must be filed "not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice. . ." 42 U.S.C. § 3613(a)(1)(A). The last decision on plaintiffs' application for a CUP by defendants occurred on March 2, 2005, when the Commission issued its Findings of Fact and Conclusions of law in support of the January 11, 2005 decision to award Mr. Henry his CUP for 1 townhouse unit for every 40,000 square feet of the total 13.69 acre parcel, in addition to the 2 single family residences on the property. ([Doc. 323-2] Ex. 11). Based on the pleadings, it is this Court's understanding that plaintiffs are challenging *only* the permit denial that happened in January of 2005.

Plaintiffs did not reserve a right to file a Fair Housing Act claim when they filed the above-styled case. [18] [Doc. 1]. The first time that plaintiffs asserted a Fair Housing Act

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[18] Plaintiff Aubrey Henry asserted a Fair Housing Act claim in his prior federal litigation. (C.A.No. 3:03CV55, Am. Compl. [Doc. 13] Count I). Plaintiff's Fair Housing Act claim in that case was dismissed without prejudice by Order of this Court on March 31, 2005. (C.A.No. 3:03CV55, [Doc. 36]).

claim in this action was in their Second Amended Complaint, filed August 6, 2007. ([Doc. 99], Count IX). Accordingly, plaintiffs failed to assert their Fair Housing Act claim within the prescribed two (2) year time-frame.

In their response [Doc. 331], plaintiffs contend, however, that the statute of limitations did not begin to run until December 6, 2005, the date on which the Jefferson County Circuit Court issued its decision on plaintiffs' FHA claims previously dismissed without prejudice by this Court in March of 2005. ([Doc. 331] at 20-21). If it is plaintiffs' contention that the claim asserted in this case relates to the 2001 denial of plaintiffs' CUP application–not the 2005 denial–then plaintiffs have certainly not presented any evidence to that effect. In fact, the only evidence plaintiffs have presented in support of their claim is deposition testimony related to the 1994 denial of plaintiffs' permit, and the 2005 application which was denied. (Id. at 19). As such plaintiffs' claims fail as either time barred (because relating to the 1994 denial) or for failure to present a material issue of fact (because no evidence relating to the 2001 denial has been presented to the Court).

Plaintiffs also argue that with respect to the 2005 denial, their claim is not time barred as it relates back to the claim filed in March of 2006. (citing to Fed. R. Civ. P. 15(c)(2)). This argument lacks merit as the evidence presented by plaintiffs–if applicable to the 2005 action–was available to plaintiffs at the time the original complaint was filed and plaintiffs are not alleging a failure to bring the claim against the proper party, but alleging a new claim. (See [Doc. 97] at 8-9).

In their motion to amend [Doc. 97], plaintiffs alleged that the claim was being added because Corum's CUP application had been granted by the Commission whereas plaintiffs' application had been denied. In their Response [Doc. 331], however, plaintiffs

argue facts unrelated to the issuance of the permit to Corum and such a claim would not relate back. To the extent that plaintiffs challenge the 2005 denial based on evidence that their application was denied and that of Corum was granted, plaintiffs' claim arguably relates back to the March 2006 date. Plaintiffs' FHA claim with respect to the 2005 denial, however, still fails on the merits.

B. There Has Been No Violation of the Fair Housing Act.

Plaintiffs' Fair Housing Act claim fails because plaintiffs have not presented any evidence from which a jury could infer that the 2005 denial of plaintiffs' CUP application was motivated by a discriminatory purpose or had a discriminatory impact. ***Betsey v. Turtle Creek Assocs.***, 736 F.2d 983, 986 (4th Cir. 1984). Plaintiffs argue that their 76 townhome CUP, which went before the Commission in 2005, was denied because the Commission succumbed to the pressure from the community to deny affordable housing that would bring single parent families and non-white families into the community. ([Doc. 331] at 20). Plaintiffs fail, however, to present any evidence to back up this assertion.

To the contrary, the Commission–when denying plaintiffs' CUP for a 76 unit development and granting plaintiffs a CUP for a 14 unit development–stated the basis for its decision in its Findings of Fact and Conclusions of Law: the proposed townhouse development would create a density of 5.2 townhouses per acre; that the property is next to a park and a low density single family home development; that the proposed development is not compatible with Ledge Lowe Estates or any of the other real estate adjacent to the Town Run Common's property; and that the parcel should be improved with lower density residential uses and that the proposed enclosure of Town Run stream in a culvert should be avoided. ([Doc. 323-2] Ex. 11). Denying plaintiffs' CUP due to "density"

concerns and the fact that the development would be next to "a low density single family home development" does not amount to evidence from which a jury could infer discriminatory intent.

The only evidence plaintiffs have presented of such discriminatory intent is that the application submitted by Peter Corum, the subsequent purchaser of plaintiffs' property, received approval for 32 townhomes in a mixed-use development, despite the fact that Corum's proposal received a less favorable LESA score than plaintiffs' application.[19] That fact alone is not enough to sustain a colorable claim for equal protection violation. *See* ***Snowden***, 321 U.S. at 8.

"To prove that a statute has been administered or enforced discriminatorily, more must be shown than the fact that a benefit was denied to one person [plaintiffs] while conferred on another [Corum]." ***Snowden***, 321 U.S. at 8. The Fourth Circuit has held that a "violation [of the FHA] is established only if the plaintiff can prove that the state *intended* to discriminate." ***Sylvia Development***, 48 F.3d at 819 (citing, ***Snowden v. Hughes***, 321 U.S. 1, 8 (1944)).

Plaintiffs argue the intent to discriminate was the Commission's intent to deny

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[19] Additionally, in their response plaintiffs argue they were treated differently in their CUP application than others in the Rural-Agricultural District because "[i]n the years between 1993 and 2005, no CUP application for residential development in the Rural Zone with a LESA score as favorable as Henry[s'] had ever been denied." ([Doc. 331] at 14 (citing (Doc. 321-2] Ex. DD)). This exhibit, as defendants point out, is simply organized hearsay which cannot be considered on a Motion for Summary Judgment. ***Maryland Highways Contractors Assoc., Inc. v. Maryland***, 933 F.2d 1246, 1251-52 (4th Cir. 1991); ***Rohrbough v. Wyeth Laboratories, Inc.***, 916 F.2d 970, 973-74 n. 8 (4th Cir. 1990).

affordable housing that would bring "large-family" and "non-white" individuals into the community. ([Doc. 331] at 20). Also in their brief, however, plaintiffs note that the affordable housing component of Corum's application was looked upon favorably by the Board of Zoning Appeals. ([Doc. 331] at 20). Plaintiffs complain that the 30 percent affordable housing in Corum's proposal was permitted, but plaintiffs' CUP application was denied because it was 100 percent affordable housing. (Id.) This argument is simply not supported by the evidence: plaintiffs were granted a CUP for 14 townhouses which, according to plaintiff, would be one-hundred percent affordable housing.

Based on the evidence, it is apparent the total density and the type of construction differentiated the application, of plaintiffs and Corum. The fact that the applications of both plaintiffs and Corum were approved by the Commission (which both included affordable housing) runs against any conclusion that discriminatory animus was a part of defendants' decision making process; as such, there is no evidence from which a jury could infer a violation of the Fair Housing Act.

CONCLUSION

Based on the foregoing reasoning, this Court finds:

- the Motion for Summary Judgment by Shepardstown Men's Club, Ledge Lowe Homeowners' Association, William Lewandowski, Joyce Ann Lewandowski, Miriam Wilson, and Richard Super (collectively "Shepardstown Defendants") [Doc. 291] should be, and hereby is, **GRANTED;**
- plaintiffs' Motion for Partial Summary Judgment [Doc. 321] should be, and hereby is, **DENIED**;
- the Motion for Summary Judgment by the Jefferson County Commission and the

Jefferson Planning and Zoning Commission [Doc. 323] should be, and hereby is, **GRANTED**; and

- the Motion for Summary Judgment by defendants William Lewandowski in his official capacity, Dan Markin, John Simms, and Thomas Kane [Doc. 324] should be, and hereby is, **GRANTED**.

As the Court disposed of plaintiffs' claims on the merits, there is no need for the Court to reach the issues of qualified immunity and immunity under the ***Noerr-Pennington Doctrine***[20] raised by defendants.

It is so **ORDERED.**

This action is hereby **DISMISSED with prejudice** and stricken from the active docket of this Court.

The Clerk is hereby directed to transmit copies of this Order to counsel of record herein.

DATED: April 14, 2009.

JOHN PRESTON BAILEY
CHIEF UNITED STATES DISTRICT JUDGE

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[20] *See* ***Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.***, 365 U.S. 127 (1961), ***United Mine Workers of America v. Pennington***, 381 U.S. 657 (1965).