



Development Services
389 Spruce Street
Morgantown, WV 26505
304.284.7431

MEMORANDUM

Date: Thursday, August 30, 2012
To: Terrence Moore, City Manager
Linda Little, City Clerk
RE: September 25, 2012 Council Committee of the Whole Agenda
RZ12-03 / Monazam / 3566 Collins Ferry Road / from R-1 to O-I

During its August 23, 2012 hearing, the Planning Commission voted unanimously to forward a recommendation to City Council to **deny** the above referenced Zoning Map Amendment petition.

Attached herewith is the related ordinance along with supplemental information provided to the Planning Commission at its August 23, 2012 hearing.

The following dates will keep to standard Planning and Zoning Code Map Amendment protocol:

- Committee of the Whole Tuesday, September 25, 2012 at 7:00 PM
City Council Chambers
- First Reading: Tuesday, October 2, 2012 at 7:00 PM
City Council Chambers
- Public Hearing and Second Reading: Tuesday, November 6, 2012 at 7:00 PM
City Council Chambers

Please include the attached ordinance on the City Council meeting agendas noted above and include this communication and attached supplemental information in the meeting packet for the September 25th Committee of the Whole meeting.

Thank you.

cc: Esmail Monazam (via email to monazam@earthlink.net)

From the Desk of:
Christopher M. Fletcher, AICP
Director of Development Services

Page 1 of 1

ORDINANCE NO. _____

AN ORDINANCE PROVIDING FOR THE ZONING RECLASSIFICATION OF THREE PARCELS OF REAL ESTATE IN THE SEVENTH WARD OF THE CITY OF MORGANTOWN FROM R-1, SINGLE-FAMILY RESIDENTIAL DISTRICT TO PRO, PROFESSIONAL/RESIDENTIAL/OFFICE DISTRICT BY AMENDING ARTICLE 1331 OF THE PLANNING AND ZONING CODE OF THE CITY OF MORGANTOWN AS SHOWN ON THE EXHIBIT HERETO ATTACHED AND DECLARED TO BE A PART OF THIS ORDINANCE AS IF THE SAME WAS FULLY SET FORTH HEREIN.

Property included in this consideration is identified in the Monongalia County Assessor's records as Parcels 6, 6.1, and 6.2 of County Tax Map 51; Morgantown Corporation District.

THE CITY OF MORGANTOWN HEREBY ORDAINS:

1. That the zoning classification for Parcels 6, 6.1, and 6.2 of County Tax Map 51 of the Monongalia County tax assessment as described herein and illustrated on the exhibit hereto attached and declared to be a part of this Ordinance to be read herewith as if the same was fully set forth herein is reclassified from the R-1 Single-Family Residential District to the PRO, Professional/Residential/Office District.
2. That the Official Zoning Map be accordingly changed to show said zoning reclassification.

This Ordinance shall be effective from the date of adoption.

FIRST READING:

Mayor

ADOPTED:

FILED:

RECORDED:

City Clerk

ORDINANCE EXHIBIT: RZ12-03 / from R-1 to PRO

Unincorporated
portion of
Monongalia County

COLLINS FERRY RD

Parcels
6, 6.1, and 6.2

FLAGEL ST

MERRIFIELD ST



Planning Division
389 Spruce Street
Morgantown, WV 26505
304.284.7431

Legend



-  Realty to be rezoned from R-1 to PRO
-  Zoning Districts
-  Parcels



MORGANTOWN PLANNING COMMISSION

August 9, 2012
6:30 PM
City Council Chambers

President:

Peter DeMasters, 6th Ward

Vice-President:

Carol Pyles, 7th Ward

Planning Commissioners:

Sam Loretta, 1st Ward

Tim Stranko, 2nd Ward

William Wyant, 3rd Ward

Bill Petros, 4th Ward

Mike Shuman, 5th Ward

Ken Martis, Admin.

Jennifer Selin, City Councilor

STAFF REPORT

CASE NO: RZ12-03 / Monazam / 3566 Collins Ferry Road

REQUEST and LOCATION:

Request by Esmail Monazam for a Zoning Map Amendment from the R-1, Single-Family Residential District to the O-I, Office and Institutional District for property addressed as 3566 Collins Ferry Road and along Flagel Street

TAX MAP NUMBER(s) and ZONING DESCRIPTION:

Tax Map 51, Parcels 6, 6.1, 6.2; R-1, Single-Family Residential District

SURROUNDING ZONING:

North: O-I, Office and Institutional District

South and East: R-1, Single-Family Residential District

West: Monongalia County R-4, High Density Residential (unincorporated)

BACKGROUND:

The petitioner seeks to reclassify Parcels 6, 6.1, and 6.2 of Tax Map 51 from the R-1, Single-Family Residential District to the O-I, Office and Institutional District. Addendum A of this report illustrates the location of the subject realty.

Parcel 6.1 currently contains a single-family dwelling unit and is addressed as 3566 Collins Ferry Road. This address is not currently included on the City's Rental Residential Property Registration list. Parcels 6 and 6.2 are vacant, undeveloped properties fronting Flagel Street.

Adjoining and to the north of the petitioner's property is the "Research Ridge" office complex. To the south of the subject site are single-family dwellings. These areas are located within the City of Morgantown.

To the west of Collins Ferry Road from the petitioner's property, the area of which is located outside the City of Morgantown, are multi-family residential complexes and an adult entertainment establishment. This area is included in the Monongalia County West Run Planning District for which the County enacted zoning regulations that became effective on July 1, 2011.

According to Monongalia County Planning Director Rich Wood, the County's zoning classification for the area west of the petitioner's property is R-4, High Density Residential. Multi-family residential development is permitted in this County zoning district. However, the adult entertainment establishment adjacent to the petitioner's property is considered a pre-existing, non-conforming, grandfathered use.

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Director

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The petitioner advised Staff that he has made efforts to sell the property for single-family development. However, the petitioner maintains that the proximity of the adult entertainment establishment located outside the City of Morgantown has resulted in diminished market interest. As such, the petitioner seeks to amend the zoning classification for the subject property so that it can be marketed for development permitted in the O-I District.

In November 2001, the petitioner requested a zoning map amendment for the same property from the R-1 District to the B-1 District. After much deliberation and vocal public opposition, the Planning Commission voted unanimously to forward City Council a recommendation to deny the petitioner's request. The petitioner decided to withdraw the zoning map amendment petition prior to City Council's consideration of same.

In December 2001, the petitioner returned to the Planning Commission requesting a revised zoning map amendment from the R-1 District to the PRO District. Again, the Planning Commission voted unanimously to forward City Council a recommendation to deny the request.

In February 2002, City Council, having also heard vocal public opposition, concurred with the Planning Commission's December 2001 recommendation and voted unanimously to deny the petitioner's zoning map amendment petition.

In May 2002, the petitioner filed a Writ of Mandamus with the Circuit Court of Monongalia County seeking the Court to declare that the action taken by City Council in denying the petitioner's request for rezoning was unlawful, arbitrary, capricious, unreasonable, and discriminatory. Further, the petitioner requested the Court to order the City of Morgantown to rezone the subject property from the R-1 District to the PRO District. On January 13, 2004, Honorable Circuit Judge Robert B. Stone denied the petitioner's writ mandamus petition (see attached Order for Civil Action No. 02-C-375).

ANALYSIS:

Staff recognizes that the area north of the petitioner's property has experienced growth over the last decade including expansions by Mylan Pharmaceuticals, the U.S. Department of Energy's National Energy Technology Laboratory, and multi-family, offices, and commercial development. However, nearly all of this development occurred outside the City of Morgantown for which zoning regulations, until July 1, 2011, were not enacted by the Monongalia County Commission.

The "Timberline Apartments" complex and the adult entertainment establishment were present prior to the City of Morgantown's 1999 Comprehensive Plan Update and the petitioner's ownership of the subject property.

Specifically, the adult entertainment establishment adjacent to the petitioner's property appears to have been established there since at least the early 1990's. Staff's request to obtain related information prior to this period from the West Virginia Alcohol Beverage Control Administration is pending.

According to online data through the Monongalia County Assessor's Office, the petitioner purchased Parcel 6.1 in December 2000.

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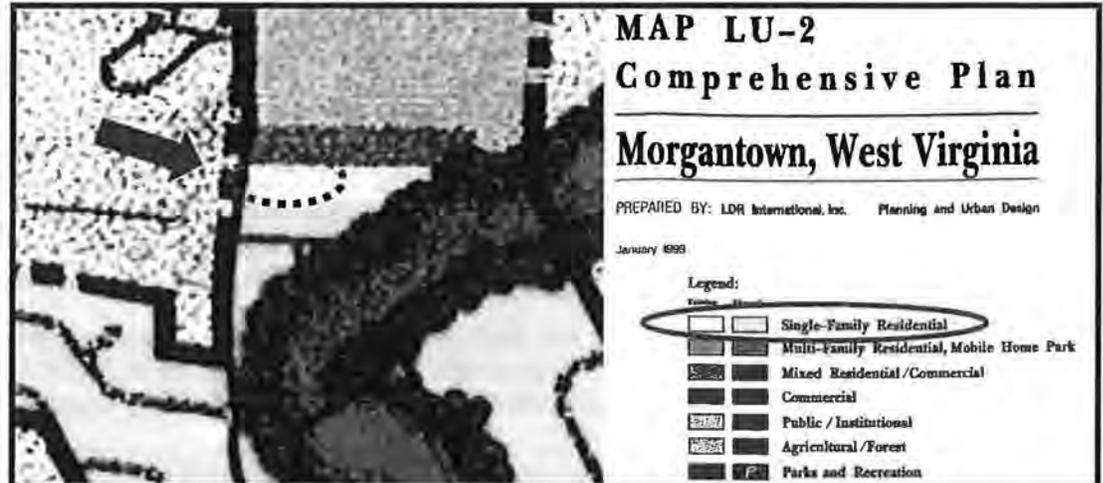
Bill Petros, 4th Ward

Mike Shuman, 5th Ward

Ken Martis, Admin.

Jennifer Selin, City Councilor

The following figure is a portion of Map LU-2 of the 1999 Comprehensive Plan and illustrates that the planned use for the subject property was "Single-Family Residential."



Because the O-I, Office and Institutional District adjoins the petitioner's property, the requested zoning map amendment is considered a zoning district boundary adjustment.

According to Article 1343.01 of the Planning and Zoning Code, the purpose of the O-I, Office and Institutional District is to:

- (A) Provide for office and institutional uses and customary accessory uses on appropriately-sized lots; and,
- (B) Provide for a suitable environment for office and institutional uses that can be located adjacent to residential uses without undue harmful effects to such residential uses.

West Virginia State Code §8A-7-8 provides that if a zoning amendment is inconsistent with the adopted Comprehensive Plan, then City Council, with the advice of the Planning Commission, must find that there have been major changes of an economic, physical or social nature within the area involved which were not anticipated when the comprehensive plan was adopted and that those changes have substantially altered the basic characteristics of the area.

Zoning map amendment requests should be evaluated on their land-use merits alone. The petitioner's development intentions are extraneous and the Commission should consider the request on its merits as a land-use decision. In conducting such an analysis, the Commission should determine whether or not the O-I, Office and Institutional District is the most appropriate zoning classification for the petitioner's realty, weighing all possible future development and land use scenarios as permitted by the Planning and Zoning Code; particularly, Article 1343 "O-I, Office and Institutional District" and Table 1331.05.01 "Permitted Land Uses".

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Jennifer Selin, City Councilor

STAFF RECOMMENDATION:

The Planning Division advises the Planning Commission to determine the following:

1. That the petitioner's zoning map amendment request is inconsistent with the 1999 Comprehensive Plan Update.
2. That the economic, physical, and social character of the development and land uses west of the petitioner's property and outside the City of Morgantown, the nature for and basis on which the petitioner has and presently seeks a zoning map amendment, has remained comparatively unchanged since:
 - a. The January 1999 adoption of the City of Morgantown Comprehensive Plan Update;
 - b. The December 2000 acquisition of the subject property by the petitioner;
 - c. The February 2002 City Council denial of the petitioner's zoning map amendment request for same;
 - d. The January 2004 Circuit Court denial of the petitioner's related Writ of Mandamus; and,
 - e. The January 2006 City Council enactment of the present Planning and Zoning Code.
3. That the reclassification of the realty along Flagel Street from the R-1 District to any other district within which office, commercial, and/or institutional development is permitted would enable transformational encroachment of same onto a well-established single-family residential area.
4. That the orderliness of maintaining the R-1 District classification for the realty along Flagel Street in support of single-family residential development; the stabilization of single-family residential property values; the promotion of desirable home surrounds; and, the happiness and comfort of citizens within the area immediate to the petitioner's property transcend the private interest and benefit of the petitioner.
5. That the zoning reclassification of the realty along Flagel Street to any other district within which office, commercial, and/or institutional development is permitted would be arbitrary and would solely benefit the private interest of the petitioner.

Therefore, the Planning Division advises the Planning Commission to forward a recommendation to City Council to deny the petitioner's zoning map amendment request RZ12-03.

Development Services

Christopher Fletcher, AICP
Director

Planning Division

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Morgantown, WV 26505
304.284.7431



City of Morgantown, West Virginia
APPLICATION FOR
FOR ZONING MAP AMENDMENT

OFFICE USE	
CASE NO.	RZ12-03
RECEIVED:	6/13/12
COMPLETE:	_____

Zoning Map Amendment Process – See Addendum A of this Application

(PLEASE TYPE OR PRINT IN BLACK INK)

I. OWNER / APPLICANT			
Name:	Esmail Monazam	Phone:	304-398-8882
Mailing Address:	308 Rotary St.	Mobile:	304-709-2211
	Morgantown WV 26505	Email:	Monazama@earthlink.net
	<small>City State Zip</small>		
II. AGENT / CONTACT INFORMATION			
Name:		Phone:	
Mailing Address:		Mobile:	
		Email:	
	<small>City State Zip</small>		
Mailings –	Send all correspondence to (check one): <input type="checkbox"/> Applicant OR <input type="checkbox"/> Agent/Contact		
IV. PROPERTY			
Street Address (if assigned):	3566 Colling Ferry Rd.		
Tax Map(s) #:	51	Parcel(s) #:	6, 6.1, 6.2
		Size (sq. ft. or acres):	0-75
Current Zoning Classification:	RI	Proposed Zoning Classification:	O-I
Current Land Use:	Single Family	Proposed Land Use*:	
<small>*The Planning Commission does not take proposed use into consideration. The question is asked merely for staff to determine if the proposed district allows the intended use.</small>			
V. ATTEST			
I hereby certify that I am the owner of record of the named property, or that this application is authorized by the owner of record and that I have been authorized by the owner to make this application as his/her authorized agent and I agree to conform to all applicable laws of this jurisdiction, whether specified herein or not. I certify that I have read and examined this document and know the same to be true and correct. The undersigned has the power to authorize and does hereby authorize City of Morgantown representatives on official business to enter the subject property as necessary to process the application and enforce related approvals and conditions.			
Esmail Monazam			6/13/2012
Type/Print Name of Applicant/Agent	Type/Print Name of Applicant/Agent	Date	

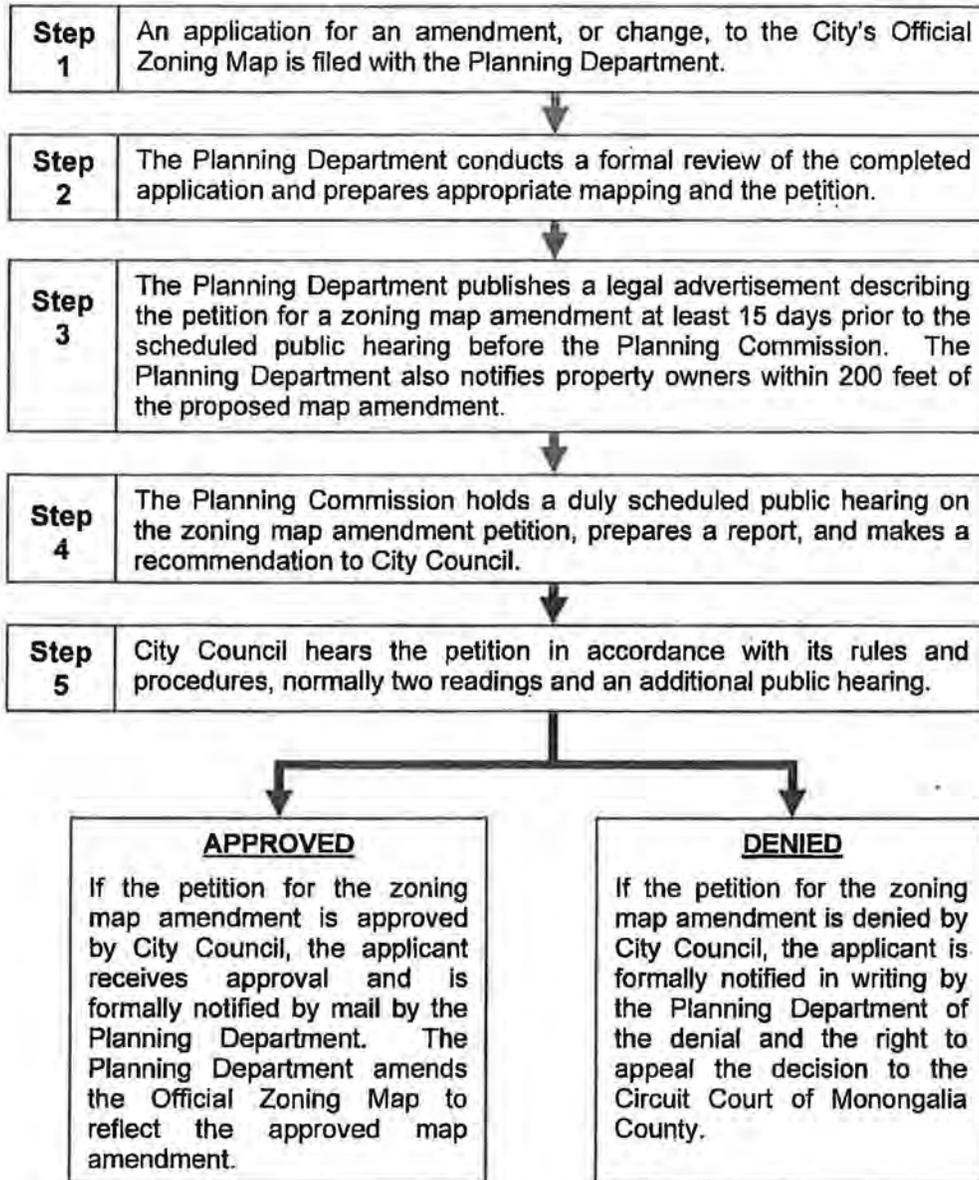
Zoning Map Amendment Fee - \$75



City of Morgantown, West Virginia
APPLICATION FOR
FOR ZONING MAP AMENDMENT

OFFICE USE	
CASE NO.	<i>RZ12-03</i>
RECEIVED:	<i>06/13/12</i>
COMPLETE:	_____

ADDENDUM A - Zoning Map Amendment Process



**IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION NO. 1**

**STATE OF WEST VIRGINIA, EX REL.,
ESMAIL MONAZAM AND SHERRY MONAZAM,**

Petitioners,

vs.

CIVIL ACTION NO. 02-C-375

THE CITY OF MORGANTOWN, WEST VIRGINIA,

Respondent.

**ORDER DENYING THE PETITIONER'S REQUEST TO
VACATE THE RESPONDENTS' ZONING DECISION**

This matter is before the Court upon the record, including the briefs of the petitioner and the respondent. The Court has studied the entire record and carefully considered the arguments raised in the parties' briefs and by oral argument. As a result of these deliberations, the Court has concluded that the decision of the City of Morgantown should not be vacated.

Opinion

On May 30, 2002, the Petitioners' filed a Writ of Mandamus seeking an order of this Court directing the City of Morgantown to rezone a parcel of real estate involved herein and located in Morgantown, Monongalia County, WV, from an R-1, single family residence, zoning classification to a PRO, professional office, zoning classification per Petitioners' request. The Petition filed by the petitioner seeks this Court to declare that the action taken by the Respondent,

the City of Morgantown, in denying the Petitioners' request for rezoning, was unlawful, arbitrary, capricious, unreasonable and discriminatory. On December 1, 2003, Petitioner Esmail Monazam appeared with counsel, Edmund J. Rollo, and the Respondent appeared by and through its counsel, Stephen R. Fanok, at which time oral arguments were presented to the Court.

Pursuant to Rule 52 of the West Virginia Rules of Civil Procedure, the Court hereby sets forth with specificity its findings of facts and conclusions of law:

FINDINGS OF FACT

1. Petitioners own property located at 3566 Collins Ferry Road, Morgantown, West Virginia, which is shown on Monongalia County Tax Map 51 as Parcel 6.
2. Petitioners' realty is zoned R-1, single family residential, with B-1, neighborhood business, zoned realty abutting to the North, and R-1, single family residential, zoned realty abutting it to the South and East. The area to the West and directly across Collins Ferry Road from Petitioners' realty is outside of the Morgantown city limits, is not regulated by zoning use requirements of any governmental entity, and contains a variety of business and residential uses.
3. On November 8, 2001, Petitioners filed an application with the City of Morgantown requesting that their realty be rezoned from an R-1 classification to a PRO, professional office, classification.
4. Section 14.1 of the City of Morgantown's Zoning Ordinance states:

The PRO District is intended to provide a suitable environment for certain types of uses, primarily professional and office in character, that can be located adjacent to residential uses without undue harmful effects to such residential uses. The

(PRO) District will be applied where a transition use buffer is appropriate between residential and incompatible uses.

5. On December 13, 2001, the Morgantown Planning Commission held a public hearing regarding Petitioners' request of the City of Morgantown that it rezone the above described parcel from an R-1, single family residential, zoning classification to a PRO. professional office, zoning classification.

6. In his December 13, 2001, Staff Report to the City's Planning Commission, the City Planner reminded the Commission that in considering the Monazam rezoning request it should determine if PRO is the appropriate zoning district for the site; that the analysis involved in that determination should properly weigh all possible future development scenarios for the site under PRO regulations; that there is no surrounding or adjacent PRO zoning in the immediate area; that one can fairly debate which option (either R-1 or PRO) provides the better buffer for the R-1 area; and that it is left to the Planning Commission and City Council to decide if there is a compelling reason to either grant the PRO designation or to keep the property residential.

7. The minutes of the December 13, 2001, Planning Commission meeting, indicate that the Planning Commission held a very thorough hearing on the Monazam rezoning request and that Mr. Monazam was there to speak in favor of his request and that several local residents spoke both for and against the rezoning. Those speaking for the rezoning offered that Mr. Monazam's proposed use of the property for an engineering office would be a "plus" for the neighborhood. Those speaking in opposition to the rezoning emphasized their concerns that the various permitted uses allowed by a rezoning to PRO would, or at least could, negatively impact their R-1 neighboring properties and their quality of life. At that meeting Mr. Monazam stated to

the Planning Commission that he purchased the residence at 3566 Collins Ferry Road [the realty at issue] in January of 2001 with the intention of remodeling it into an office for the engineering business that he owns and operates. After much discussion as to the pros and cons of any such rezoning, the Planning Commission voted to forward a recommendation to Morgantown City Council that it deny Petitioners' rezoning request. Mr. Pat Esposito, a member of the Planning Commission who owns the property north of petitioner's property, recused himself from the consideration of Mr. Monazam's petition.

8. On February 5, 2002, Petitioners' rezoning request and the Morgantown Planning Commission's recommendation that City Council deny the request were presented to Morgantown City Council. At the February 5, 2002, meeting of City Council, Mr. Monazam and his attorney were given the opportunity to speak to Council. Both argued that a PRO rezoning of Mr. Monazam's realty would be an appropriate transition use buffer between the R-1 property to the South of Mr. Monazam's realty and the B-1 property to the North of it. Both men also emphasized that several non-residential uses already existed to the West of Mr. Monazam's property, across Collins Ferry Road in unincorporated territory. Mr. Monazam's attorney stated that since City Council had approved the rezoning of the property abutting Mr. Monazam to the North from R-1 to B-1, City Council had paved the way for the rezoning of Mr. Monazam's property from R-1 to PRO. At that same February 5, 2002, City Council meeting, many residents of the area in question again spoke in opposition to the rezoning stating that it would negatively impact their residential properties. Other individuals spoke in favor of it. Following the public's comments, City Council discussed the matter. Council member Bane expressed concern that a rezoning of Mr. Monazam's property to PRO might result in other neighboring properties

wanting rezoned from R-1 to a more intense zoning usage district. Council member Merow stated that the residents of that neighborhood want to live in a residential neighborhood, that the City's Comprehensive Plan indicates that the area should remain single family residential, and that the Planning Commission had reviewed the matter and recommended to City Council that the rezoning request be denied. At the conclusion of City Council's discussion of the matter, the seven City Council members voted unanimously to deny the Monazam's request to rezone the property from R-1 to PRO.

9. On or about May 30, 2002, Petitioners filed their Petition for Writ of Mandamus with the Court seeking an order which would require Morgantown City Council to rezone the realty at issue from R-1 to PRO.

10. Petitioners' primary arguments in support of their petition are: (1) that property on the other side of Collins Ferry Road from Petitioners' realty is not single family residential in nature and has set a precedent for the City of Morgantown to rezone Petitioners' realty to a more intense use than R-1 single family residential and (2) that by previously rezoning the realty which abutts Petitioners' realty to the North from R-1 to B-1 (neighborhood business), the City has obligated itself to rezone Petitioners' realty to PRO so that it can be a buffer between the B-1 realty and neighboring R-1 properties. Additionally, petitioner argues that there will be no increase in traffic and no significant disruption to the character of the neighborhood.

11. Section 13 of the City of Morgantown's Zoning Ordinance defines a B-1 zoning district as follows:

This [B-1] District is designed and *located in neighborhoods* to accommodate the shopping and service needs of the locality.

Although limited in area occupied, these districts are important to the economic welfare of the community in placing "convenience" and "impulse" goods shops close to the consumer.

CONCLUSIONS OF LAW

Petitioners have sought judicial relief via the filing of a Petition for Writ of Mandamus. In that regard, mandamus is a proper remedy to require the performance of nondiscretionary legal duties by various governmental agencies or bodies. State ex rel. Allstate Ins. Co. v. Union Serv. Dist., 151 W.Va. 207, 151 S.E.2d 102 (1966); State ex rel. Anderson v. Board of Educ., 160 W.Va. 208, 233 S.E.2d 703 (1977). Furthermore, if the respondent, (governmental body), has discretion, in the manner it acts, it may be required by mandamus to act, but a court is without authority to command in what manner it shall act unless the action of the governmental body is so arbitrary and capricious as to create a question for judicial determination. State ex rel. Canterbury v. County Court, 151 W.Va. 1013, 158 S.E.2d 151 (1967); State ex rel. Lambert v. Cortellessi, 182 W.Va. 142, 386 S.E.2d 640 (1989). Caselaw nationwide and within this State has thoroughly addressed the authority of local governmental bodies on making zoning decisions in light of the foregoing arbitrary and capricious test.

The authority of local governments to enact zoning regulations is an exercise of police power. The only limitations on that power is that restrictions imposed must be reasonable and not arbitrary and that they bear substantial relation to public health, safety, morals, or general welfare. Carter v. City of Bluefield, 54 S.E.2d 747, 750 (W.Va. 1949). The United States Supreme Court in Ferguson v. Skrupa, 372 U.S. 726, 730, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93.

97. 95 A.L.R. 2d 1347, 1352 (1963) addressed the issue of judicial intrusion:

We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Cited in Hartsock-Flesher Candy v. Wheeling Wholesale, 328 S.E.2d 144 (W.Va. 1984); see also DeCoals, Inc. v. Bd. of Zoning Appeals, 284 S.E.2d 856 (W.Va. 1981) (“It is not ours to judge the wisdom or efficacy of those chosen means.”) Furthermore, “If most of the factors necessary to the decision of a zoning case have both positive and negative aspects, it would appear that these matters are “fairly debatable”, and in such cases, the court will not overrule the city authorities in the exercise of their legislative function.” Town of Stonewood v. Bell and Town of Barrackville v. Griffin, 270 S.E.2d 787, 791 (W.Va. 1980).

It must be understood that a municipality is not required to enact the best ordinance under the circumstances, but rather must only enact a reasonable ordinance. Choices among alternative reasonable choices of action are to be determined by the legislature, not the courts; and so long as there is a reasonable or rational basis for a particular course of conduct, there is not a constitutional violation. DeCoals, at 856, 859. Therefore, the judicial role in reviewing a zoning ordinance is rigidly circumscribed: “If the end is legitimate, [the court’s] inquiry is limited to whether the means are substantially related to that end”. DeCoals, at 858. See also Barley v. Truby, 321 S.E.2d 302 (W.Va. 1984). In other words, the court merely determines whether the zoning regulation, as applied to the particular property promotes public health, safety, or general welfare. The concept of public welfare is broad and inclusive. It includes the orderliness of community growth, land, value, and aesthetic objectives. 5 ROHAN, ZONING AND LAND

USE CONTROLS Section 36.02 (2). In addition, general welfare means stabilization of property values, promotion of desirable home surrounds, and happiness and comfort of the citizens. Id at Section 36.02 (2).

The fact that a owner may otherwise make more profitable use of the property does not render a zoning ordinance unreasonable; it is the very nature of zoning regulations that "rights and privileges of some individuals are to some extent limited or controlled by every such zoning ordinance." G.M. Realty, Inc. v. City of Wheeling, 120 S.E.2d 252 (W.Va. 1961); 5 ROHAN Section 36.02 (5) (C).

Petitioners' argue that the City of Morgantown was obligated to rezone their realty from R-1 to PRO because of the non residential uses existing nearby, across Collins Ferry Road. As Respondent has pointed out, the area across Collins Ferry Road is outside of the City limits and the City has no legal authority to regulate or control its land use. It would be unreasonable to believe that the City should forsake its residents who live in long established R-1 residential neighborhoods, or its Comprehensive Plan which recommends those residential neighborhoods simply because of uncontrolled growth outside the City limits in territory over which the City has absolutely no control. The basis for the City's Comprehensive Plan and Zoning Ordinance is to promote the health, safety, and general welfare of the inhabitants of the City. For the City to begin rezoning properties within the City limits merely because they are near totally different types of uses which lie outside the City limits would be irresponsible. Even if the properties across Collins Ferry Road were within the City limits and zoned nonresidential, it would not be unreasonable for the City to maintain the R-1 area and neighborhood in which Petitioners' realty lies. In 1990, the West Virginia Supreme Court ruled that a zoning ordinance was not arbitrary

and unreasonable as applied to the property where, under the ordinance, properties abutting on one side of a highway could be used for nonresidential purposes, while those abutting on the other side of the highway could be used only for residential purposes. Par Mar v. City of Parkersburg, 183 W.Va. 706, 398 S.E.2d 532 (1990). This Court finds that petitioners' allegation regarding land use across Collins Ferry Road is without merit and does not form a basis for an arbitrary and capricious argument.

Petitioners' also argue that the City has a duty to rezone its property to PRO so that it can be a transition buffer between the B-1 realty to the North and neighboring R-1 properties to the South. Section 14.1(A) of the City's Zoning Ordinance addresses PRO zoning districts and states "that a PRO District will be applied where a transition use buffer is appropriate between residential and *incompatible* uses." Petitioners assert that that is the case with the B-1 zone being the incompatible use that justifies their PRO rezoning as a buffer between the B-1 and neighboring R-1 lots. This Court does not accept Petitioners' argument. Section 13 of the City's Zoning Ordinance defines a B-1 zoning district as follows:

This [B-1] District is designed and located in neighborhoods to accommodate the shopping and service needs of the locality. Although limited in area occupied, these districts are important to the economic welfare of the community in placing "convenience" and "impulse" goods shops close to the consumer.

In light of the foregoing definition, it does not appear that a B-1 (neighborhood business) zoning district is necessarily or always an *incompatible* use needing buffered from abutting R-1 neighborhoods. The Morgantown Zoning Ordinance's definition of B-1 makes it clear that B-1 zoning and its permitted uses are not only compatible with R-1 single family residential districts.

but also, are intended to be located in neighborhoods to accommodate the shopping and service needs of its residents. Based upon the foregoing, this Court does not believe that Morgantown City Council had any legal duty to rezone Petitioners' property to PRO as a result of City Council's prior rezoning of abutting property to B-1.

The Court agrees with Respondent that in determining whether City Council acted arbitrarily and unreasonably in not rezoning Petitioners' realty to PRO the Court should take into consideration whether the existing R-1 zoning classification of Petitioners' realty is no longer reasonable or appropriate. In that regard, Petitioners have not demonstrated that such a condition exists. To the contrary, the record indicates that the residential R-1 area in question is a thriving single family neighborhood and that for Petitioners' realty to remain R-1 is reasonable. This Court agrees with the approach taken by the Virginia Court in such matters. The Virginia Court, which also follows the Fairly Debatable Doctrine, has offered:

Where two uses of the land were presented, both reasonable, the legislative body did not err in choosing to retain the use permitted under present zoning, even though the proposed zoning might have been the most appropriate use for the land; the presumption of reasonableness of the legislative body's action stood un rebutted and therefore was sufficient alone to sustain the denial of the rezoning request.

Board of Supervisors v. International Funeral Service, Inc. 221 Va. 840, 275 S.E.2d 586 (1981).

The Virginia Court has also held:

A refusal to rezone will be upheld where no compelling need for the rezoning is shown, and it is not clearly demonstrated that the existing zoning classification is no longer reasonable or appropriate. The burden is on the one who seeks rezoning to show the need therefore, and in Virginia, the courts apply the fairly

debatable rule in the case of denial of a rezoning application.

Town of Vienna Council v. Kohler, 218 Va. 966, 244 S.E.2d 542 (1978). Inasmuch as the West Virginia Supreme Court has historically adopted the principles of Virginia caselaw addressing zoning and the fairly debatable doctrine, when there is no West Virginia law on point, this Court believes that the principles set forth in both Virginia cases apply to the issue at hand. It clearly supports the action taken by City Council in denying Petitioners' rezoning request.

This Court believes it is important to note that Petitioners bought the R-1 realty in question in January of 2001 with the express intention of having it rezoned to PRO so that they could operate an engineering business at the site. Petitioners' purchase and intended office use, in light of the property's R-1 zoning, was a speculative business venture and investment risk. There was no guarantee that the property would be rezoned by the City of Morgantown to something other than R-1 residential use. This Court will not rule that such a speculative purchase, in light of the facts at hand, is reason to hold that the City should have rezoned the property for professional office usage. The caselaw simply does not support a rezoning under such circumstances.

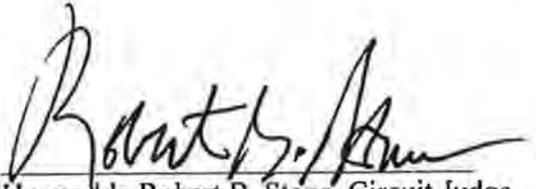
Whether or not Petitioners' realty should have been rezoned to PRO by Morgantown City Council is a matter of debate as evidenced by the Morgantown Planning Commission and Morgantown City Council public hearings on the matter. Petitioner argues that there will be no additional traffic nor will there be a disruption to the character of the neighborhood. Additionally, petitioner presented evidence that his rezoning efforts had the support of some his neighbors. These factors were weighed by the Planning Commission and City Council. This

Court finds that there is no evidence that R-1 zoning for the realty is no longer reasonable or appropriate. Reasonable minds might disagree as to the appropriate zoning of Petitioners' realty. Based upon the foregoing, the matter clearly falls within the Fairly Debatable Doctrine and the Court is precluded from substituting its opinion on the matter for that of Morgantown City Council.

Wherefore, given the foregoing, the Court **ORDERS** that Petitioners' petition for a writ mandamus be **DENIED** and that this matter be dismissed from the docket.

The Circuit Clerk shall provide copies of this order, findings of fact, and conclusions of law to counsel of record.

Entered this 13th day of January, 2004.


Honorable Robert B. Stone, Circuit Judge