

R. Gay

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

FAR AWAY FARM, LLC

SEP 13 2006

Petitioner,

JEFFERSON COUNTY
CIRCUIT COURT

v.

CIVIL ACTION NO. 05-C-332
(Consolidated with 05-C-83)
Honorable Thomas W. Steptoe, Jr.

JEFFERSON COUNTY
BOARD OF ZONING APPEALS,
A public body, THOMAS
TRUMBLE, Member, JEFF
BRESEE, Member, and TIFFANY
HINE, Chair

Respondents.

ORDER AFFIRMING BOARD OF ZONING APPEALS DECISIONS

The Court considered this matter on September 18, 2006, upon Petitions for Appeal from the September 22, 2004 decision of the Zoning Administrator assessing a Land Evaluation and Site Assessment (LESA) score of 46.2, and the September 15, 2005 decision of Board of Zoning Appeals (BZA) denying Far Away Farm's Conditional Use Permit (CUP). Richard G. Gay, Esq. and the Law Office of Richard G. Gay, L.C. represents Far Away Farm, Petitioner in Civil Action 05-C-332. Stephanie F. Grove, Esq., Office of the Prosecuting Attorney, represents Respondents BZA, et al. Linda M. Gutsell, Esq. represents Edward E. Dunleavy and Edward R. Moore, who were Petitioners in Civil Action 05-C-83. The Court reviewed the Petitions, all exhibits, and other supporting material submitted therewith. The Court reviewed the findings of fact under the plainly wrong standard, and the application of law under the erroneous principle of law standard while presuming the BZA acted correctly. Syl. pt. 1, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003). The Court AFFIRMS both BZA decisions for the reasons set forth below.

Factual and Procedural Background

On June 23, 2004, Far Away Farms (FAF) applied for a Conditional Use Permit in order to develop approximately 122.88 acres in a designated Rural District in Jefferson County. The application listed the name of the applicant as FAF and the property owner as Alice and Dwayne Masemer. FAF proposed subdividing the land into 152 new home lots, one ten-acre lot with the existing farmhouse, and six acres to provide a trail. The size of each lot would be approximately one-third to one-fifth of an acre.

The Zoning Administrator conducted a Land Evaluation and Site Assessment (LESA). He assigned 12.2 points for the Total Land Evaluation of the site and 34 points for the Total Site Assessment, for a total LESA score of 46.2 points. He scheduled a Compatibility Assessment Meeting for November 3, 2004, sent out notices to adjoining landowners based on the list provided by FAF by domestic certified mail, and placed two notices in the Spirit of Jefferson on October 14 and 21, 2004. Michael and Christine Delia, who are listed as adjoining landowners did not receive their notice because the Zoning Administrator's support staff did not send it international certified mail. The staff did not send notice to Edward E. Dunleavy, as Manager of Trough Bend Owners Association (TBOA), because he was not included on the list of adjoining landowners.

On October 29, 2004, Petitioners Edward E. Dunleavy and Edward R. Moore appealed certain aspects of the LESA score and the lack of notice to Mr. Dunleavy and the Delias to the Board of Zoning Appeals (BZA). Because of this appeal the November 3, 2004 Compatibility Assessment Meeting was cancelled and the BZA scheduled the appeal to be heard on January 20, 2005.

The BZA heard the appeal on January 20, 2005 and entered its decision on February 17,

2005. It reviewed the Zoning Administrator's decision de novo. After granting FAF's Motion to Intervene and denying Mr. Dunleavy and Mr. Moore's preliminary motions, the BZA entertained arguments on the merits of the appeal. The BZA extended the time limits for presentations and witnesses. FAF and Mr. Dunleavy and Mr. Moore each made presentations and questioned many witnesses under oath.

First the BZA found that notice to adjoining property owners was proper according to the Jefferson County Zoning and Land Development Ordinance (Ordinance) because the Zoning Staff provided adequate notice and the notice of the Compatibility Assessment Meeting cured any technical defects in the notice. Second, it denied Mr. Dunleavy and Mr. Moore's Motion to Substitute Citizens United to Save Faraway Farms, LLC (CUSFF) for themselves as Petitioner because Mr. Dunleavy and Mr. Moore are the Appellants and they may call any witness, including any members of CUSFF, and CUSFF was not able to present a definitive list of its members. Third, it denied most of the LESA score appeals but changed the "Distance to the Growth Corridor" score from one to four and the "Comprehensive Capability: Highway score" from two to four, which added five points, changing the final LESA score from 46.2 to 51.2.¹ It denied the appeals of the "Adjacent Development," "Comprehensive Capability: Park/Historical," "Central Water," and "Central Sewer" scores.

The BZA used the Plat marked "Board Exhibit No. 1" to evaluate the measurements of adjacent development. It found that parcels 7.6 and 7.25 were part of the original Gano Subdivision, which was subdivided again to create Cavaland Subdivision. Therefore, the boundary of those parcels was subject to intense development pressure. Thus, the BZA found

¹ All parties have represented that the total LESA score changed from 46.2 to 50.2. This is incorrect. Although the BZA stated in its decision on the appeal that the "Distance to the Growth Corridor" score changed from two points to four points, the Zoning Administrator assessed it a score of one. Therefore, that score changed from one point to four points, making the total LESA score 51.2, not 50.2.

that a score of two was accurate because 5,885 feet (57.5%) of the boundary is subject to intense pressure and 4,348 feet (42.5%) of the boundary is lacking development pressure. The BZA changed the LESA score pertaining to the Distance to Growth Corridor from one to four points by measuring the distance "as the crow flies." However, the BZA concluded that one point was a correct assessment for Comprehensive Capability: Park/Historical because FAF is not designated in the Comprehensive Plan as a historical site. In addition, it is not on the National Historical Register. Mr. Dunleavy and Mr. Moore filed a Petition for a Writ of Certiorari on March 17, 2005.

On November 30, 2004, FAF filed a Motion to Intervene, which eventually the BZA granted at the January 20, 2005 hearing on the LESA score appeal. During this time the BZA adopted rules of procedure on January 4, 2005. Mr. Dunleavy and Mr. Moore submitted their documentary evidence to the Board and copies to FAF according to these new rules before they went into effect. FAF submitted documentary evidence to the BZA along with notice to Mr. Dunleavy and Mr. Moore that the submissions were available for viewing at the BZA. FAF submitted the evidence before the new rules went into effect and before the BZA granted its Motion to Intervene.

On March 21, 2005, because the BZA made its final decision on the LESA score appeal, the Zoning Administrator published notice that the Compatibility Assessment Meeting would go forward on April 13, 2005. FAF provided the Zoning Administrator's support staff with an updated list of adjacent property owners, which included Trough Bend Owners Association. In addition, the staff mailed the Delias' notice by international certified mail and they received it. The seven-hour Compatibility Assessment Meeting took place on April 13, 2005.

A Compatibility Assessment Meeting includes only the Zoning Administrator, the

developer and its agents, and any interested public citizen or citizen group, but not the BZA. The developer's agent presented its proposal and some citizen groups and many public citizens expressed their concerns and requests. Of the 106 issues that the public raised, the developer agreed to modify its plan or actions and resolved 39 of the issues. According to Ordinance § 7.6(d), the Zoning Administrator prepared a report listing the 39 resolved issues and the 67 unresolved issues and scheduled a public hearing of the BZA on July 26, 2005.

The July 26, 2005 meeting was the first time the BZA decided a Conditional Use Permit (CUP) issue.² The Zoning Administrator argued to the BZA that its new Procedural Rules did not provide time guidelines for considering a CUP, but that the BZA could use the guidelines in Ordinance § 7.7(b) as long as it established them at the beginning. The BZA voted in favor of providing the following time limits for presentations: 30 minutes for FAF, 30 minutes for CUSFF, 15 minutes for individuals, 5 minutes for groups, and 15 minutes for FAF's rebuttal. The BZA did not take any testimony; therefore, no cross-examination took place. However, the BZA allowed FAF to submit unlimited memoranda and documents in support of its CUP application. FAF submitted a 30-page memorandum addressing each of the 67 unresolved issues and expert witness reports totaling 320 pages.

FAF presented to the BZA that its development was compatible with the character of the land, nature of the land, and its relationship to the community as a whole because it consists of single-family homes, there is a 50-foot buffer around the whole property, the development will not create a significant amount of peak traffic impact, and it will include the old farm house and a park. Members of the public spoke about their experience with the neighborhood roads, the rural and agricultural nature of the surrounding properties, and the historical significance of the

² In the past, the Ordinance provided that the Planning Commission would decide on CUPs. However, the April 8, 2005 amendment gave that decision-making power to the BZA

FAF property. In particular, adjoining property owners expressed concerns that the roads were too narrow for a school bus to travel on and increased traffic in general. They reiterated that the evidence presented at the LESA score appeal demonstrated that FAF was a historically significant area. One of the biggest issues that the adjoining property owners spoke to was density and the agricultural nature of the area.

The BZA concluded the meeting and set a special meeting on August 9, 2005 to take action on FAF's CUP application. At that meeting, the BZA's attorney advised them to look at the overall compatibility and at the unresolved issues. In addition, the attorney suggested that the BZA could resolve some of the unresolved issues in order to make it compatible, but he stated there was no guidance on this so it was in the BZA's discretion. The BZA denied the CUP based on two pieces of evidence, an aerial photo labeled "Unresolved Issues-Neighborhood Compatibility" dated July 15, 2005, and an item date-stamped July 7, 2005 labeled "Exhibit 1 Characteristics of the Neighborhood Within One Mile Radius of the Southeast Corner of Faraway Farms." This item included a list of the 176 lots in that area showing an average acreage size of 14.56.

The BZA found that the aerial photograph demonstrated that the density of the proposed development is far in excess of anything around it, and that the actual lot size will be 1/5th to 1/3rd of an acre. It concluded that the development is incompatible with the surrounding neighborhood. Exhibit 1 reinforced the incompatibility by demonstrating that the average lot size of the surrounding neighborhood is 14.56, and that 28 of its 176 lots are over 20 acres. Furthermore, the BZA heard much testimony on the density problems with the FAF development: there were approximately 10 unresolved density issues, and the number of homes was not compatible with the roads that would serve the development. There were approximately

17 unresolved issues related to the adequate physical condition of the roads. The BZA found that a development with much lower density could render these issues moot. In the end, the BZA could not resolve issues regarding density and the physical condition of the roads in order to provide the developer with a permit that resembled what it proposed; therefore, it denied the CUP.

Standard of Review

“While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction.” Syl. pt. 1, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, S.E.2d 93 (2003). The plainly wrong standard presumes an administrative tribunal’s actions are valid as long as the factual findings are supported by substantial evidence. *Maplewood Estates Homeowners Ass’n v. Putnam County Planning Com’n*, 2006 WL 842878, 629 S.E.2d 778, 782 (W. Va. 2006). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* And a factual finding supported by substantial evidence is conclusive. *Id.*

Law and Reasoning

I. Preliminary Procedural Matters

A. FAF’s Motions to Exceed Page Limits and Supplement Record

FAF requests the Court to allow it to submit a 28-page memorandum in opposition to Mr. Dunleavy and Mr. Moore’s Writ of Certiorari and supplement the record by adding the following: a December 16, 2004 letter to Ms. Linda Gutsell, a list of properties on the National Register Sites and Districts in Jefferson County, a January 19, 2005 letter to Senator Byrd from

the National Park Service, and a West Virginia Department of Transportation Intent-To-Apply form from Mr. Dunleavy.

The Court **ORDERS** FAF's Motion to Exceed Page Limits **GRANTED** because the issues before the Court are complex and warrant additional discussion. The Court **ORDERS** FAF's Motion to Supplement the Record **GRANTED** because the above documents may assist the Court and Mr. Dunleavy and Mr. Moore did not object.

B. Mootness

FAF argues³ that because the BZA has already denied its CUP application, Mr. Dunleavy and Mr. Moore's appeal of the BZA's decision on the LESA score is moot. Mr. Dunleavy and Mr. Moore argue that their appeal is not moot because FAF is also appealing the BZA's denial of its CUP and if this Court or the West Virginia Supreme Court of Appeals reversed the BZA's denial then a non-passing LESA score could be dispositive of the CUP application.

The Court agrees with Mr. Dunleavy and Mr. Moore. The Jefferson County Zoning and Development Review Ordinance (Ordinance) § 6.2 allowed a LESA score of 55 or less to advance a CUP application to the Compatibility Assessment stage. Ordinance § 6.2 (Amended August 8, 2002). However, the BZA could have evaluated a score of more than 55 for advancement. If Dunleavy and Moore were to convince this Court that the BZA erroneously found the LESA score to be 55 or under, that finding could defeat a successful appeal by FAF of the BZA's denial of its CUP. Therefore, the Court **FINDS** that Mr. Dunleavy and Mr. Moore's appeal of the BZA's decision on the LESA score is not moot.

C. Interlocutory

³ Whenever the Court states "FAF argues" or "Dunleavy and Moore argue," the Court also includes the BZA's arguments because the BZA argued with FAF on the LESA score appeal and with Dunleavy and Moore on the CUP appeal

FAF argues that a LESA score is not a final decision that a party can appeal by a writ of certiorari because the final decision did not occur until the BZA denied its CUP. Mr. Dunleavy and Mr. Moore argue that their appeal is not interlocutory because it is unclear whether they could have delayed filing their appeal until the BZA decided on the FAF's CUP.

"Every decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals is subject to review by certiorari." W. Va. Code § 8A-9-1 (2003), emphasis added. This Court noted, "statutorily-provided certiorari is only available to review final decisions of a planning commission," which means, "interlocutory' decisions of a planning commission are not subject to review on certiorari." *BC Partners Inc. v. Jefferson Planning and Zoning Commission*, 03-C-323 (W. Va. Cir. Ct. October 27, 2004); citing *Lower Donnally Ass'n v. Charleston Mun. Planning Com'n*, 212 W.Va. 623, 575 S.E.2d (2002). In discerning that a decision by the Planning Commission (Commission) to reject a Community Impact Statement (CIS) was not a final decision, this Court explained that "the Commission's decision to reject a CIS has no bearing whatsoever on the ability of the developers to proceed through the plat approval process, or even to gain final plat approval." *BC Partners Inc.*, 03-C-323 at p. 4.

The West Virginia Supreme Court of Appeals decided *Lower Donnally* before the Legislature repealed W. Va. Code § 8-24-38. Although the Legislature did not specifically replace this section, it dealt with the issue for writ of certiorari for a planning commission as well as a board of zoning appeals in W. Va. Code § 8A-9-1. Where 8A-9-1 refers to *every* decision of a commission and board, 8-24-38 refers to *a decision* of a commission. Therefore, the Court **FINDS** that the BZA's decision concerning the LESA appeal is not interlocutory because the statutorily-provided certiorari specifically states it is available to *every* decision by the BZA.

Even if *Lower Donnally* somehow applied to 8A-9-1, the BZA's decision is not interlocutory under *BC Partners Inc.* because a passing LESA score has direct bearing on the ability of the developers to go forward.

D. Motion to Continue and Notice and Service

Mr. Dunleavy and Mr. Moore argue that the BZA should have granted their Motion to Continue because Mr. Dunleavy and other adjacent landowners did not receive proper notice. Mr. Dunleavy did not receive notice as the president of Trough Bend Homeowners Association, Trough Bend being the official owner of an adjacent storm water management parcel. Mr. and Mrs. Delia did not receive notice in England, and the other adjacent landowners did not receive notice until 22 days after the Zoning Administrator decided the LESA score. They argue that service was defective because FAF and the Zoning Administrator did not serve their evidentiary submissions on them or any other adjoining landowners. And because of this defective notice, they did not have enough time to secure counsel and file an effective appeal. Furthermore, they point out that the BZA did not rule on their Motion to Strike for lack of proper service.

FAF argues that notice was proper because it gave a list of the names and addresses of all adjacent landowners to the BZA as required by the Ordinance. In addition, it was not required to provide the information for Trough Bend because it is only a storm water management parcel, which will not be harmed by a new subdivision. Because the purpose behind notice is to allow landowners to voice their opinion about potential harm to their land, FAF argues that it was unnecessary to provide Trough Bend's information to the BZA. Moreover, Trough Bend Homeowners Association does not appear on the tax maps. Additionally, FAF maintains that service was proper because FAF was not required to serve its evidentiary submissions according to the BZA's Procedural Rules. This, it contends, is because it did not have intervenor status at

the time it served and the new procedural rules were not in effect at the time it served.

Furthermore, the Zoning Administrator's decisions did not have discretion, therefore he did not need to be at the appeal and his written submission was considered along with all the other evidence without any deference.

1. Service

The West Virginia Rules of Civil Procedure only apply to an administrative proceeding in which the administrative body's rules of procedure provide for them to apply or reference them. *State v. West Virginia Judicial Review Board*, 164 W. Va. 363, 365, 264 S.E.2d 168, 170 (1980); *State ex rel. v. Smith*, 198 W. Va. 507, 513, 482 S.E.2d 124, 130 (1997). The BZA's procedural rules that were in effect for the January 20, 2005 meeting allowed the BZA to "continue, reschedule or re-open proceedings for any good cause deemed reasonable and appropriate." Jefferson County BZA Rules of Procedure, § 6(c). Prior to January 4, 2005, no procedural rules for submissions existed. Procedural Rule § 4 provides the time frames and format for service of documents to the BZA and others. Neither this section nor any other provides rules for service upon non-parties or Zoning Administrators. Although West Virginia has not dealt with submissions to a BZA by a Zoning Administrator in its case law, other states in the Fourth Circuit have. Virginia courts have allowed a Zoning Administrator to submit memos to the BZA in circumstances such as to detail staff opposition to an application, to recommend against approval, and to ask it to instigate action to revoke special use permits. *Amoco Oil Co v. Board of Zoning Appeals for the City of Fairfax*, 30 Va. Cir. 159, WL 945947 (Va. Cir. Ct. 1993); *Board of Zoning Appeals of Fairfax County v Cedar Knoll, Inc., et al*, 217 Va. 740, 232 S.E.2d 767 (1977). West Virginia recognizes that in Jefferson County, the Planning Commission hires the Zoning Administrator and the Planning Commission or the

Ordinance defines his or her job duties. *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d 873, 880 (2005).

Because FAF submitted its evidence to the BZA before the procedural rules went into effect, it was not under any obligation to follow the rules for service in the procedural rules. But FAF still provided to Dunleavy and Moore notice it had submitted its evidence to the BZA. Even had the rules of procedure been in effect when submissions were made, the rules do not obligate or direct non-parties as to service. Therefore, because the Civil Rules of Procedure would not automatically apply to BZA proceedings, the BZA did not erroneously find that service was proper as to FAF.

Furthermore, the BZA did not erroneously find that service was proper as to the Zoning Administrator's memo because he simply was acting as a county employee when he submitted a memo outlining the process that led him to his LESA score. Consistent with the BZA's de novo review of his determination, there is no evidence in the record that the BZA gave any deference to his memo. Thus, the Court **FINDS** that the BZA did not erroneously find service was proper. Lastly, the Court **FINDS** that Mr. Dunleavy and Mr. Moore's counsel's statement, "if they weren't served they should be stricken for not given our continuance," is not a Motion to Strike that the BZA needed to rule upon. Transcript, January 20, 2005, p. 57.

2. Notice

When a developer files an application for a CUP, it must "submit a list of all property owners, and their addresses, adjacent to and confronting the property which is to be developed." Ordinance § 7.4(e) (as adopted on July 7, 1988). Once the BZA staff has reviewed the application and collected fees, the "staff will notify the adjacent and confronting property owners of the date, time and place of the Compatibility Assessment Meeting by registered mail . . ."

Ordinance § 7.5(b) (as amended on May 4, 1989). However, a Compatibility Assessment Meeting cannot take place unless the Zoning Administrator has determined that the application has a passing LESA score through the Development Review System (DRS). The purpose of the DRS "is to assess a particular sites (sic) development potential . . ." Ordinance § 6.1 (as adopted on July 7, 1988). It is a numerical rating system that produces a LESA score. *Id.* An application will advance to a Compatibility Assessment Meeting if the Zoning Administrator has assessed it a LESA score of 55 or less.⁴ Ordinance § 6.2 (as amended on August 8, 2002).

In addition, the "Zoning Administrator shall determine if the sketch plan and support data are adequate. Once the Zoning Administrator places the advertisement in the paper, any interested party has thirty days to appeal the inadequacies of the sketch plan and/or support data to the Zoning Board of Appeals." Ordinance § 7.4(g) (as amended May 18, 1996). The Ordinance does not provide a similar section directing the Zoning Administrator as to the LESA score. However, Section 8.1(a) and (b) provide that an aggrieved person may appeal any administrative decision based or claimed to be based upon the Ordinance within 30 days of the decision appealed. Ordinance § 8.1 (a) and (b) (as adopted July 7, 1988).

The Court recognizes that it may be difficult for one to discern when the limitation period starts and ends for a LESA score appeal. However, it was not erroneous for the BZA to find that the BZA staff's notice was adequate and notice of the Compatibility Assessment Meeting according to Section 7.6 would cure any technical defect in notice. Because when the staff provided notice of the Compatibility Assessment Meeting that actually took place on April 13, 2005, TBHA was on the list of adjacent property owners, and both TBHA and the Delias

⁴ The Ordinance in effect at the time that the Zoning Administrator calculated the LESA score did not explicitly state that he was to determine the LESA score, only that the staff would evaluate it. The April 8, 2005 amendment specifically added this duty to reflect reality.

received that notice. Moreover, the purpose of the notice according to Section 7.5(b) is to alert adjacent and confronting property owners of the "date, time, and place of the Compatibility Assessment Meeting," not that the Zoning Administrator decided a LESA score. Ordinance § 7.5(b). Therefore, the Court **FINDS** it was not erroneous for the BZA to find that notice was adequate. Thus, the Court **FINDS** that it was not erroneous for the BZA to deny Mr. Dunleavy and Mr. Moore's Motion to Continue.

E. Motion to Substitute CUSFF As Party Appellant

Mr. Dunleavy and Mr. Moore argue that the BZA erroneously denied their Motion to Substitute because it focused on the fact that Dunleavy and Moore were the only parties that were also members of CUSFF and that if it allowed the motion it would be tantamount to allowing a late appeal. Dunleavy and Moore argue, however, that a limitations argument is not available to FAF because it is not a jurisdictional issue; rather it is a mere substitution. They maintain that the BZA has discretion to substitute as long as there is no prejudice and that there is not prejudice here because a group can have standing if one member has standing. Also, they argue the BZA cannot substitute FAF and not CUSFF.

FAF argues that this is not a mere replacement because CUSFF could contain countless members. FAF contends that CUSFF will not suffer any harm because Mr. Dunleavy and Mr. Moore can call unlimited witnesses from the CUSFF membership. Moreover, they argue that the BZA did not erroneously deny Dunleavy and Moore's motion because the Ordinance does not allow the BZA to substitute parties in an appeal process; it only allows verified appeals filed within 30 days of an administrative decision. CUSFF was not formed within 30 days of the Zoning Administrator's LESA score decision.

Dunleavy and Moore cite to some secondary sources and a Nebraska case for the

proposition that a tribunal has discretion to substitute parties, that it cannot arbitrarily refuse to substitute it if there is no prejudice, and that limitations arguments are not effective against substitution. 59 Am. Jur.2d Parties § 328; Change in Party After Statute of Limitations Has Run, 8 A.L.R.2d 6, at §35; *New Light Co., Inc. v. Wells Fargo Alarm Services*, 252 Neb. 958, 567 N.W.2d 777 (1997). After a review of above authorities, the Court finds that their conclusions are based on individual states' rules of civil procedure or, in the Nebraska case, a specific state statute.

However, as stated above, West Virginia case law only allows the application of the West Virginia Rules of Civil Procedure to an administrative proceeding when the administrative body's rules of procedure provide for it. *West Virginia Judicial Review Bd.*, 164 W. Va. at 365. The BZA Rules of Procedure do not provide that the Rules of Civil Procedure apply to its proceedings. Additionally, the BZA's Rules of Procedure do not mention a procedure for substitution much less any standard for not arbitrarily refusing it without a showing of prejudice. Actually, there is a good argument that the BZA has complete discretion over substitution because neither the Ordinance nor the BZA's Rules of Procedure mention it.

The Court finds Dunleavy and Moore's citations unavailing because they only address situations in which a state's Rules of Civil Procedure or a specific statute applies to an administrative body. Here, the BZA Rules of Procedure do not allow for the application of the Rules of Civil Procedure and the BZA Rules themselves do not explicitly provide for substitution. The BZA did not act erroneously by denying Dunleavy and Moore's Motion to Substitute because it is in the BZA's discretion to grant or refuse substitution and the BZA Rules do not provide for any standard regarding when or if substitution is appropriate. The Ordinance clearly requires that appellants must verify an appeal of an administrative decision before 30

days expires; CUSFF was not formed before that time. Insofar as Dunleavy and Moore challenge FAF's "substitution," the record shows that the BZA did not substitute FAF for the owners of the property; it found them as a successor-in-interest because FAF purchased the property from the Masemers. Also, FAF appears as the applicant on the CUP application. Thus, the Court FINDS the BZA did not erroneously deny their Motion to Substitute.

F. Due Process and Mr. Doug Rockwell

In their Petition for Writ of Certiorari, Dunleavy and Moore argue that Mr. Rockwell, a BZA member, should have disclosed that he was a lawyer in the firm of Crawford and Keller, PLLC because that firm assisted in creating FAF, LLC. They contend that because he did not disclose this fact, they suffered a denial of due process because they did not have chance to move for his recusal. FAF argues that due process only would be triggered if a property interest exists and that Dunleavy and Moore they do not have a property interest in FAF's LESA score or CUP application.

After examining the record, the Court did not find any facts that support the conclusion that Mr. Rockwell was an interested party. The law provides no duty to disclose unless an individual is an interested party. Therefore, the Court FINDS that Mr. Rockwell was not an interested party; thus, the BZA did not deny Mr. Dunleavy and Mr. Moore due process by failing to disclose his employment in the firm that assisted in FAF's creation.

G. Due Process and the July 26, 2005 BZA Meeting

FAF argues that the BZA did not provide it with due process because the July 26, 2005 hearing did not include testimony, it did not have an opportunity to conduct cross-examination, and it did not have sufficient time to present its expert witnesses.

Even if a vested property right of FAF existed in the CUP such that Due Process rights

existed, which is contested, Dunleavy and Moore argue the BZA did give FAF due process because it adhered to procedural time frames, and because it allowed FAF to submit unlimited written evidence, which FAF did. Moreover, they argue, Due Process was not denied because at the April 13, 2005 Compatibility Assessment Meeting, the BZA took testimony of FAF's witnesses, and FAF had an opportunity to cross examine the opponents and their witnesses.

Jefferson County Rules of Procedure (Rules) provide every party of record "the rights of due process, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing." Jefferson County R. Pro. 6(j) (as amended June 1, 2005). "Any claim of entitlement to a constitutionally protected interest is determined by state law." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). The West Virginia Supreme Court of Appeals has recognized that due process extends to administrative tribunals. *State ex rel. Hoover* at Syl. pt. 1. Administrative agencies must follow their own rules so as not to violate the due process clause. *Tasker v. Mohn*, 165 W. Va. 55, 56, 267 S.E.2d 183, 189 (1980). Therefore, due process applies to BZA meetings because Rule 6(j) provides for it.

"When due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by government action." *State ex rel. Hoover* at Syl. pt. 2. The United States Supreme Court has outlined the factors that must be considered when determining the procedural protections that due process affords. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The factors are: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, (3) the probable value, if any, of additional or substitute procedural safeguards, and (4) the government's interest,

including the functional, fiscal, and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

The Rules provide that “[e]ach party of record shall have thirty (30) minutes for presentation and where appropriate each party has 15 minutes for rebuttal.” Jefferson County R. Pro. 6(f) (as amended on June 1, 2005). However, the Chair may grant extensions of these time limits. *Id.* In addition, “[a]ny relevant evidence shall be admitted if it is the type which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. The Board shall retain discretion to admit or exclude any evidence.” *Id.* at 6(g)(2). The BZA may limit the number, nature, and length of testimony if it finds the “testimony will be repetitious, cumulative or irrelevant.” *Id.* at 6(j). Although cross-examination is permitted, the BZA has discretion to limit it. *Id.*

In cases like the one before the Court, the BZA conducts the DRS in order to determine if it can issue a CUP to developers who wish to create subdivisions of higher densities than the Rural District allows. FAF’s due process interest in the CUP process is that the BZA follows its procedural rules in issuing or denying a CUP. At the July 26, 2005 meeting, the BZA provided FAF with 30 minutes to present and 15 minutes for rebuttal. This allotment did not include, and was increased by, questions that BZA members asked FAF and when FAF answered thereto. The BZA did not deny FAF the opportunity to present testimony through witnesses, FAF chose not to present witnesses, complaining the BZA time frame were insufficient within which to present its witnesses. Additionally, after review of the transcript, the Court found that no individual gave testimony; therefore, the issue of cross-examination is moot.

The procedural protections that the BZA provided to FAF comport with due process. Here, FAF’s private interest is a CUP so it can have a higher density subdivision than the Rural

District automatically allows. However, the risk of deprivation of this interest is low because the DRS provides numerous hearings, some of which include testimony and cross-examination, and the opportunity to submit an unlimited amount of written evidence. The probable value of expanding the BZA's time frame and guaranteeing testimony and cross-examination would be that a party would present the fullest case possible. But, this probably would create a multi-day or weeklong hearing and bog down the DRS process, and it would cost more. Therefore, the Court FINDS that the BZA provided FAF with due process.

II. LESA Score Appeal⁵

"While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction." Syl. pt. 1, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003). "While the interpretation of a statute by the agency charged with its administration should ordinarily be afforded deference, when that interpretation is unduly restrictive and in conflict with the legislative intent, the agency's interpretation is inapplicable." Syl. pt. 4, *Corliss*, 214 W. Va.

A. Calculation of Adjacent Development Pressure

Dunleavy and Moore argue that the BZA erroneously interpreted the Ordinance when it classified parcel 7.25 and 7.6 as part of the "intense development boundary." They argue that Ordinance § 6.4(b) required the BZA to first categorize each parcel as "agricultural" or "not indicating intense development pressure" and that no parcel can be included in both categories.

⁵ The Court notes that only if Mr. Dunleavy and Mr. Moore were successful in convincing the Court that the BZA erroneously found the three LESA scores appealed, would the LESA score be significantly above 55. If one starts with the BZA score of 51.2, it would go up only two points for adjacent development pressure to 53.2, two points for distance to growth corridor to 55.2, and only one point for Park/Historical, culminating in a score of 56.2

They argue that a tax map is inadequate to determine whether land is agricultural or not, and that the BZA incorrectly used the tax map to evaluate this part of the LESA score, rather than using the un rebutted evidence that both parcels were in agricultural use. Lastly, they argue that it was plainly wrong for the BZA to find that parcel 7.6 and 7.25 were part of the Gano subdivision and later the Cavaland subdivision.

FAF argues the BZA did not erroneously interpret the Ordinance because it is reasonable for it to conclude that "intense development pressures" has started when any division of five lots happens, and size does not matter. Furthermore, they argue that the BZA had substantial evidence to find that parcels 7.6 and 7.25 were part of the "intense development boundary" because the plats in evidence show they were part of five-plus parcel subdivisions.

Ordinance § 6.4(b) provides for the calculation of "adjacent development pressure."

This criterion assesses a combination of the percentage of land in actual agricultural use (including timber or pasture land) and percentage of adjacent land that does not indicate that there is development pressure. Intense development pressure includes more than a 5 lot (sic) subdivision and commercial or industrial uses. An average of the two will yield a percentage of land adjacent to the property that is either farmed or not intensely developed.

Ordinance § 6.4(b) (as adopted in July 7, 1988).

The intent is that a Rural District "is to provide a location for low density single family residential development in conjunction with providing continued farming activities." Ordinance § 5.7 (as amended on May 18, 1996). The purpose of the Rural District designation is to "preserve the rural character of the County and the agricultural community." *Id.* Even so, this section allows for higher density development if an applicant uses the DRS. *Id.*

The record shows that parcels 7.6 and 7.25 were originally part of the Gano land.⁶ In

⁶ The Court looked to a plat of the Gano property dated 1977 and date stamped December 2, 2004, and attachment 5

1977 Mr. W. E. Gano, Jr. subdivided a parcel of his land into tracts A through E with a reserve tract. In 1986, he further divided tract A into a residue parcel of 13.25 acres and a 10.00-acre exemption parcel, which are parcels 7.6 and 7.25 respectively. Even though the BZA may have incorrectly labeled tract A as part of the Cavaland subdivision, there is substantial evidence for the BZA to find that parcels 7.6 and 7.25 were part of a 5-lot-plus subdivision because Gano divided the original parcel into 6 lots in 1977. Therefore, the Court **FINDS** that the BZA was not clearly wrong in finding that parcels 7.6 and 7.25 were part of the Gano 5-lot-plus subdivision.

The Court agrees with Mr. Dunleavy and Mr. Moore's interpretation of Section 6.4(b) requiring a classification of agriculture or low intensity development pressure versus high intensity development pressure. However, the record shows that the BZA interpreted that section similarly to Dunleavy and Moore by taking testimony regarding agricultural use of land, but eventually finding that land as high intensity use. That is, the BZA focused on classifying the parcels as high intensity, which is a 5-lot subdivision or more, rather than accepting that the parcels were agricultural. But it did not disregard the possibility that the parcels were agricultural because Mr. Gregory L. Mason, who owns parcel 7.6, testified as to his and Mr. Dennis Jackson's, who owns parcel 7.25, possible agriculture use, and the BZA noted this in its discussion on this factor. Mr. Rockwell noted "that there was testimony that Lot 10 was presently used by the owner to board her (sic) race horses along with other livestock." (January 20, 2005, Transcript, p. 270). However, the BZA apparently found there was not sufficient evidence to conclude that the land was agricultural, despite the testimony that in some cases it was being used for agriculture. *Id.* Therefore, the Court **FINDS** that the BZA's interpretation of the Ordinance was not unduly restrictive or in conflict with the legislative intent; thus, it did not

and 6 from Mr. Dunleavy and Mr. Moore's appeal packet to the BZA.

erroneously apply the Ordinance.

B. Calculation of Distance to Growth Corridor

Mr. Dunleavy and Mr. Moore argue that the BZA's interpretation of the distance to a growth corridor being "as the crow flies," is at odds with other manners of measuring "proximity" criteria. They argue that the use of the identical term by the legislative body would indicate that the manner of measurement is meant to be the same in each instance, and, thus, that the measurement should have been taken from the nearest exit from the parcel and along the traveled road ending at the Residential Growth Corridor.

FAF argues the BZA was correct in using the measurement "as the crow flies" for the distance to growth corridor because a 500-home subdivision could abut the development, but it might take one a mile to drive there. That would not accurately measure how close the development is to the growth corridor. FAF argues that using driving distance for assessing proximity to schools is logical because the concern is how far school buses must drive from the development to school, but that the same rationale does not apply for the growth corridor.

Under the title of Distance to Growth Corridor, "[t]he distance to the growth corridor relates to the distance of the subject parcel to the boundaries of the Residential-Growth District adopted within this ordinance." Ordinance § 6.4(c). Under the title of Proximity to Schools, "[t]he purpose of assessing the proximity of schools to new development is to avoid excessive busing of students." Ordinance § 6.4(e). For example, the Ordinance assesses zero points if the development is located less than two miles from schools.

Neither section of the ordinance indicates a method of measuring distance or proximity. The BZA has used driving distance for issues with bussing and "as the crow flies" with issues of distance to a residential-growth district. This interpretation is not unduly restrictive or in conflict

with the intent of the Ordinance because the concern is with how far busses must travel versus how near the development is to an area that is denser and expanding. Section 6.4(c) addresses where the area is, not how one would travel there. Therefore, the Court FINDS it was not erroneous for the BZA to measure the distance "as the crow flies" even though it uses driving distance for measuring proximity to schools.

C. Comprehensive Compatibility: Park/Historical

Dunleavy and Moore argue that the property is historically significant and so it should be entitled to a higher LESA score. They argue that points were omitted for historicity first because FAF's experts did not consult with any official that determines historicity in creating their reports and secondly, because the BZA erroneously assumed that listing on the Comprehensive Plan or a historic registry was a prerequisite for such points being awarded. They point out that the BZA cannot require a site to be designated in the Comprehensive Plan as a historic site because the Ordinance does not provide for that. Also, owners must consent before a property can be listed on the National Registry and it is not on that registry, but the site is listed on the American Battlefield Protection Program Registry as a Class C battlefield.

FAF responds by noting that if the BZA did not have a listing criterion of whether or not the property is a designated historical area, all of Jefferson County could be considered historically significant because it was a contested region during the Civil War. They argue that the BZA was correct in assessing its score because the land is not listed on the national or state register of historic places.

When the BZA evaluates the compatibility of the development to the Comprehensive Plan, it "shall determine whether the site development is supportive or has a negative impact on the following elements of the Comprehensive Plan: Highway Problems Areas (4 points),

Compatibility of site development with designated parks, historical and recreational areas (2 points), and land use policies and recommendations (2 points).” Ordinance § 6.4(d) (as adopted on July 7, 1988). The points are assigned as follows:

	<u>“POINTS</u>
Site development has a negative Impact on element	2+
Site development is no supported or against element of the Plan	1+
Site development has a supportive Effect on element	0+”

Id.

The Ordinance does not define “designated historical areas.” However, according to state statute, a historic site is defined as one that had a “significant event, a prehistoric or historic occupation or activity, or a building or structure whether standing, ruined or vanished, where the location itself possesses historical, cultural or archaeological value regardless of the value of any existing structure *and designated as historic on a national, state or local register.*” W. Va. Code § 8A-1-2(n) (emphasis added). The Ordinance defines a historic site as “[a]ny lot, parcel, historic structure, or designated area which has been listed on the West Virginia or the National Register of Historic Places.” Ordinance § 2.2 (as adopted on July 7, 1988).

After reviewing the list of battlefields on The American Battlefield Protection Program’s website, the Court found Boteler’s Ford (also known as Pack Horse Ford) listed as a Class C battlefield in the Battle of Shepherdstown with no mention of Far Away Farm. Neither the website nor the record offers definitive evidence that Far Away Farm is officially considered part of the Battle of Shepherdstown. Even though the Ordinance does not expressly state that the BZA must look to the Comprehensive Plan to determine if a site is a designated historical area, it is not erroneous for the BZA to conclude that it may look to the Comprehensive Plan as part of

the Comprehensive Compatibility factor. Because the 2004 version of the Comprehensive Plan included a list of places listed on the National Historical Register, it was reasonable for the BZA to look to the list as providing the designated historical areas under the Ordinance.

The West Virginia Code does provide a broader definition of "historic site" than the Ordinance because it allows designation as such on even a local registry. However, the BZA was determining what a "designated historic area" was, as used in Ordinance 6.4(d), and not the definition of "historic site" in general. It concluded that a "designated historic area" was one that was designated in the Comprehensive Plan as a "historic site", which is based on being listed on the West Virginia or National Historical Register according to Section 2.2. Therefore, the Court **FINDS** that it was not unduly restrictive or against the intent of the Ordinance for the BZA to conclude the site was not a designated historic area. Furthermore, the Court **FINDS** it was not erroneous for the BZA to uphold the Zoning Administrator's assessment of one point for this category because Far Away Farms is not listed on the state or national registries, although it may have some historical significance because of the Battle of Shepherdstown. Thus, it is neither supportive of nor against this criterion.

The preceding BZA applications of law and findings of fact were reasonable and supported by substantial evidence. Its interpretations and findings may not be the best ones, but the Court's function is not to substitute its opinion unless the BZA was clearly erroneous in its application of the law or clearly wrong in its findings of facts. Consequently, since the Court did not find any of the BZA's applications of law or findings of fact to be erroneous or clearly wrong, the Court **ORDERS** the BZA's January 20, 2005 Decision **UPHELD**, and the appeal of Mr. Dunleavy and Mr. Moore is **ORDERED** dismissed.

III. Conditional Use Permit (CUP)

“While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction.” Syl. pt. 1, *Corliss v. Jefferson County Bd of Zoning Appeals*, 214 W. Va. 535, S.E.2d 93 (2003). The plainly wrong standard presumes an administrative tribunal’s actions are valid as long as the decision is supported by substantial evidence. *Maplewood Estates Homeowners Ass’n v. Putnam County Planning Com’n*, 2006 WL 842878, 629 S.E.2d 778, 782 (W. Va. 2006). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* And a factual finding supported by substantial evidence is conclusive. *Id.*

A. Factual Findings

FAF contends that because the Ordinance permits an increase of density in a Rural District, density is factually irrelevant. Therefore, it argues that the BZA wrongly determined that compatibility is equivalent to density because it should have evaluated type of use not amount of use. Moreover, it argues that the BZA used anecdotal traffic evidence from the public instead of empirical evidence from its traffic experts, which is not substantial evidence to support a conclusion that the traffic impact would be significant (road was inadequate to service the subdivision as proposed).

Dunleavy and Moore argue density is relevant because a developer must seek a CUP in order to increase density from what a Rural District normally allows, and the BZA must decide if a CUP is compatible with the Rural District. In this case, they argue that the BZA had substantial evidence that the density of the surrounding neighborhoods was much lower than what FAF proposed. They also point out that traffic experts may study traffic patterns for only a

short time, whereas residents have the opportunity to observe the patterns every day over a longer period of time. Likewise, the BZA does not have to ignore lay people's observations over a traffic expert's, and FAF did not present proof that the BZA ignored its expert evidence.

Ordinance § 5.7 provided that property owners may only subdivide one lot per every ten acres and the minimum lot size must be three acres. Ordinance § 5.7(d) (as amended on May 18, 1996). However, it allows a higher density if an applicant uses the DRS and the BZA issues a CUP. Ordinance § 5.7. Still, the "purpose of this [rural] district is to provide a location for low density single family residential development in conjunction with providing continued farming activities." *Id.* This functions "to preserve the rural character of the County and the agricultural community." *Id.*

In *Kaufman v. The Planning and Zoning Comm. of the City of Fairmont*, that Court held that Commission members could not consider their past experiences or their own observations in reaching a decision; they could only consider material presented to them for the record that bears on their decision. 171 W. Va. 174, 182, 298 S.E.2d 148, 155 (1982). In that case, Petitioners submitted a preliminary plat approval for a subdivision to the Planning and Zoning Commission of the City of Fairmont along with expert testimony on traffic problems at a public hearing. However, opponents did not present empirical evidence or expert testimony to substantiate their claims that property values would decrease because of the intrinsic nature of renters and increased highway traffic and overcrowding of schools. The Commission found no technical flaws in the proposal, but found that the development would not be in harmony with other subdivisions in the area, the construction would depreciate local property values, and new residents would burden the highways.

That Court found that it was improper for the Commission to consider factors of property

depreciation, the development's rental nature, and the economic class of the proposed occupants under the statutory term "harmonious development" because that term lacks the specificity to notify persons seeking plat approval and the city did not specify what considerations may be considered under "harmonious development." *Id.* at 181. Therefore, adverse traffic impact was the only proper consideration for the Commission's decision.

However, after examining the testimony of the Commission's chairman, that Court found that the Commission members used their own observations of the traffic issue to deny the plat. *Id.* at 182. That Court pointed out that the statute does not authorize Commission members to consider matters not presented to them. Therefore, that Court concluded, that the Commission members' own experiences were not sufficient to overcome the evidence of the Petitioner's traffic experts that refuted the Commission's traffic findings. *Id.* at 183. Additionally, that Court noted, "perhaps the real reason was the fact that low-income persons were going to live in the publicly-funded development," and the Commission attempted to rezone the area to prevent multi-family development in an area zoned for multi-family development. *Id.* at 184.

In the context of juries, the West Virginia Supreme Court has ruled that "[t]he testimony of expert witnesses on an issue is not exclusive and does not necessarily destroy the force or credibility of other testimony. The jury has the right to weight the testimony of all witnesses, experts and otherwise; and the same rule applies as to weight and credibility of such testimony." Syl. pt. 6, *Frye v Kanawha Stone Company, Inc.*, 202 W. Va. 467, 505 S.E.2d 206 (1998).

As in the context of juries, the BZA should not have to believe and agree with one opinion over another opinion because an expert espouses it. The BZA may consider testimony and evidence from lay-people without violating the principles in *Kaufman*, which do not allow the BZA members to use their own observations to deny a CUP. In fact, this case is not like

Kaufman. Here, the record shows that, although no one presented expert testimony to rebut FAF's traffic expert, the BZA did not use its own experiences to make conclusions on traffic issues. The BZA did not focus on traffic impact on peak hours, as the traffic expert's report did, but focused on the adequacy of the physical condition of the roads. The record contains testimony, comments, pictures and official letters concerning the physical condition of the roads. Also, the record is void of any evidence that the BZA ignored FAF's traffic expert's report.

The Court cannot agree with FAF that density is not relevant or that the BZA cannot compare the proposed developments density to its neighborhood's density when determining compatibility. In a Rural District, density is the type of use rather than the amount of use. Density defines a Rural District. As the Ordinance explicitly states, "[t]he purpose of this district is to provide a location for low density single family residential development . . ." The Ordinance only allowed a density of one lot per ten acres. The Ordinance defines the Rural District based on density for the purpose of preserving the rural character of the County. The Ordinance mandates that the BZA evaluate the density of a proposed development and compare it to its surrounding neighborhood. Therefore, the Court **FINDS** that the BZA was not clearly wrong when it found density to be relevant and compared FAF's density to the surrounding neighborhoods' density. Furthermore, after examining the two pieces of evidence that the BZA used to support its conclusion that the density of the surrounding neighborhoods was much lower than FAF's proposal, the Court concludes that a reasonable mind would accept them as adequate. The aerial photograph demonstrates that FAF is obviously the densest development in its neighborhood. And "Exhibit 1" shows the average lot size in the neighborhood being 14.56 acres as opposed to FAF's proposed 1/5th to 1/3rd acre lots. Thus, the Court **FINDS** that the BZA was not clearly wrong when it concluded the neighborhood density was much lower than

FAF's density.

B. Principles of Law

FAF argues that the BZA erroneously applied the standards governing the issuance of a CUP because it did not resolve unresolved issues, used density in its evaluation of compatibility, made up a method of measuring density, and did not adequately consider FAF's LESA score. It points out that the BZA should have considered each unresolved issue individually and decided if the Ordinance required FAF to perform the request. Further, FAF argues that the BZA's discretion is limited when an applicant meets the Ordinance's requirements, which it did by proposing a single-family residential dwellings. It contends that single-family residential dwellings are compatible as a matter of law in a rural district because the Ordinance provides for their use, and if an increase in density is incompatible the purpose of the Ordinance is destroyed.

Dunleavy and Moore argue that the BZA correctly applied the standards because the Ordinance does not require the BZA to weigh one standard over another and a LESA score is only a threshold for an applicant's move to the Compatibility Assessment Meeting. They point out that the BZA considered the 26 unresolved issues that related to density or road issues and found that it could not resolve these issues in a manner that would allow it to issue the permit that FAF wanted. Moreover, they argue that any CUP grant would include an increase in density, but the issue is whether the increase proposed is compatible with the surrounding neighborhood; therefore, comparing FAF's density to its neighborhood's density was not erroneous.

In order for an applicant to advance to the Compatibility Assessment Meeting as provided in Ordinance §7.6, the Zoning Administrator must have given a LESA score of 55 points or less to the applicant. Once at the Compatibility Assessment Meeting, the Ordinance

provides that the "standards governing the issuance of Conditional Use Permits shall be: successful LESA Point application; Board of Zoning Appeal's resolution of unresolved issues; and evidence offered by testimony and findings by the Board of Zoning Appeals that the proposed development is compatible with the neighborhood where it is proposed." Ordinance § 7.6(g) (as amended on April 8, 2005). Neighborhood is defined as "an area generally confined to a one-mile radius from the perimeter of a proposed development." Ordinance 2.2 (as amended December 10, 1998). The Board of Zoning Appeals has authority over the issuance and denial of a CUP. *Id.* The idea behind allowing a CUP is that certain uses are beneficial and are not essentially incompatible with allowed uses, but not at every location or without conditions to address special problems the use would create. *In re Petition of Skeens*, 190 W. Va. 649, 441 S.E.2d 370, FN 2 (1994).

The right to a conditional use automatically exists if the BZA finds compliance with the standards set forth in the ordinance. *In re Petition of Skeens*, 190 W. Va. at 651. The BZA's findings of fact determine whether a conditional use is consistent with the spirit, purpose, and intent of the ordinance. *Id.* The BZA must base a denial on the standards set out in the Ordinance, not on opposition of the neighboring landowners. *Id.* In that case, the Supreme Court reversed the BZA's denial because no evidence was introduced at the hearing that the requirements for the CUP were not met. No one presented evidence that Petitioner's business would substantially enhance traffic, parking, or noise.

After review of the Ordinance, the Court agrees with Dunleavy and Moore that the LESA score is simply a threshold to advance to the Compatibility Meeting. The Ordinance does not provide for the BZA to give additional weight to a passing LESA score in whole or in part. Therefore, the Court FINDS that it was not erroneous for the BZA to refuse to consider the LESA

score any further in its decision to deny the CUP.

The Court cannot agree with FAF that the BZA has a legal duty to resolve all unresolved issues. Even so, FAF admits that most of the unresolved issues concern matters that are dealt with in the subdivision process. Transcript, July 26, 2005, p. 57. Furthermore, it is the public, at the Compatibility Assessment Meeting, that creates the issues, and certain issues only stay unresolved if the applicant will not comply with the public's requests. Then it becomes an issue between the applicant and the BZA.

The Ordinance does not define what "Board of Zoning Appeal's resolution of unresolved issues" means. But, the BZA apparently interpreted this to mean that if it could not resolve the unresolved issues in a manner that would give FAF a permit that resembled what it proposed then it could not grant the CUP. The BZA concluded that it could not resolve the unresolved issues regarding density and inadequate roads, so it concluded that it could not issue the permit as proposed. Although FAF's suggestion that the BZA evaluate each unresolved issue one at a time and determine if the Ordinance requires it to comply, may be reasonable, the BZA's interpretation is also reasonable. Therefore, the Court FINDS the BZA did not erroneously interpret this standard.

It is reasonable for the BZA to consider density when evaluating compatibility because a Rural District is defined by density. The DRS and CUP exist to allow an applicant to develop a subdivision with a density that exceeds the maximum density allowed in a Rural District. Although single-family homes are permitted, this does not mean that if an applicant proposes the same use, the development is automatically compatible. In fact, if the Court were to follow this rationale, and not consider density, then the BZA would have to approve all increases in density in single-family home developments even if it consisted of 100 .01-acre lots. That would destroy

the intent of a Rural District, which is low-density single-family residential development.

Because density is part of the definition of a Rural District, density in this case is about type of use and not amount of use. Therefore, comparing the density of FAF to its surrounding neighbors is comparing use to use. Although averaging lot size in a neighborhood may not be the best method to compare density, it is reasonable for the BZA to use it, without the Ordinance providing for a method. Additionally, it is reasonable for the BZA to use a one-mile radius around the southeast corner to determine the boundaries of the neighborhood rather than from the perimeter, otherwise the neighborhood would extend into Maryland. The definition of "Neighborhood" uses the word "generally" to describe the boundaries. It is reasonable for the BZA to interpret this as giving it discretion to move the boundary from the perimeter when it would extend the neighborhood into another state. Therefore, the Court **FINDS** that the BZA did not erroneously find that FAF's proposed subdivision was incompatible with the surrounding neighborhood.

Conclusion

Thus, the Court **CONCLUDES AND ADJUDGES** that the BZA neither erroneously applied any principles of law nor was plainly wrong in its factual findings when it determined the EAF's LESA score and denied FAF's CUP.

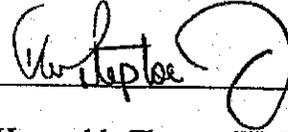
ACCORDINGLY, the BZA's decisions on FAF's LESA score and CUP application are **ORDERED AFFIRMED**.

The Court notes all parties' exceptions and objections to all adverse rulings.

The Clerk shall **ENTER** this **ORDER**, and shall forward an attested copy to counsel and pro se parties of record.

ENTERED this 18th day of September, 2006.

3cc
R. Bay
S. Grove
L. Sutzell
9/19/06
DRP

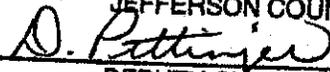


Honorable Thomas W. Steptoe, Jr.
Judge, 23rd Circuit

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

A TRUE COPY
ATTEST:

PATRICIA A. NOLAND
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY 
DEPUTY CLERK