

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COPY

FAR AWAY FARM, LLC,

Petitioner,

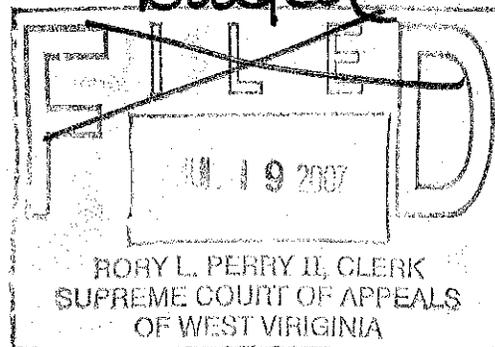
v.

DOCKET NO. 33438

JEFFERSON COUNTY ZONING BOARD OF APPEALS,

A public body;
THOMAS TRUMBLE, Member,
JEFF BRESEE, Member, and
TIFFANY HINE, Chair

Respondents.



BRIEF ON APPEAL

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I. Kind of Proceeding and Nature of the Ruling Below

Far Away Farm is a proposed residential subdivision near Shepherdstown, West Virginia. Far Away Farm is located in an area designated as the Rural district under the Jefferson County Zoning & Review Ordinance (herein "Ordinance").

In the Rural District, a property owner may only subdivide one lot for every ten acres¹ unless the property owner opts to process his or her property in the Development Review System, as stated in the last sentence of Ordinance Section 5.7.² ("The Development Review System does allow for higher density [if] a Conditional [U]se permit is issued"). Because Far Away Farm's proposed subdivision consisted of 152 homes on 122+ acres,³ Far Away Farm applied for a Conditional Use Permit.

The issue here is that the Jefferson County Board of Zoning Appeals⁴ erroneously denied Far Away Farm's⁵ request for the Conditional Use Permit, (and the Circuit Court approved the BZA's erroneous decision),⁶ even though Far Away Farm met or exceeded the Zoning Ordinance's requirements to obtain the CUP.

This appeal arises from the Jefferson County Circuit Court's September 18, 2006 Order to uphold the decision of the BZA and the Court's failure to require the BZA to evaluate Far

¹ Ordinance, Section 5.7(d)(1), Pg. 58. The Ordinance was recently amended to one lot in every 15 acres, but the amendment is not relevant here. Further, the validity of the amendments are being contested in Circuit Court.

² Ordinance, Section 5.7, pg. 55

³ The Ordinance does not define "density."

⁴ The Jefferson County Board of Zoning Appeals is referred to as the "BZA" herein. The BZA's decision denying the CUP is a matter of record and attached as Exhibit A to Far Away Farm's Verified Petition for Writ of Certiorari filed in the Circuit Court.

⁵ Your Appellant, Far Away Farm, LLC, is called "Far Away Farm" herein.

⁶ The term "Conditional Use Permit" is called "CUP" herein.

Away Farm's CUP based only on the three criteria in the Ordinance. The Circuit Court should have overturned the BZA's decision based on the standard this Court re-affirmed in the *Corliss v. Jefferson County Bd. of Zoning Appeals*⁷ case because the BZA acted beyond its jurisdiction, committed an error of law, and was plainly wrong in its factual findings, when it made these errors of law and fact.

The BZA claimed that it denied the CUP primarily because Far Away Farm had a higher density of homes than the surrounding property. The BZA disregarded the fact that Section 5.7 of the Ordinance specifically allows for increased density in the zoning district where Far Away Farm is located.

The BZA had never before held a hearing on a request for a CUP because new procedures in Jefferson County's revised Zoning Ordinance had recently transferred the responsibility for granting a CUP from the Planning Commission to the BZA. Perhaps because of the inexperience of the BZA, or through some other motive, the BZA failed to follow the Ordinance in making its determination about the CUP.

The Ordinance was amended effective April 8, 2005 (herein "Amended Ordinance"). There is an issue as to whether the BZA acted properly by hearing the Far Away Farm CUP application under the new Ordinance procedures, or whether the former ordinance applied, since the Jefferson County Commission limited the applicability of the amended Ordinance to applications filed after April 8, 2005.⁸ Far Away Farm's application for a CUP was filed on June 16, 2004. The BZA was therefore without jurisdiction to apply the Amended Ordinance to Far Away Farm. The BZA claims it based its decision denying Far Away Farm's CUP on the

⁷ *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93, 102 (2003).

⁸ See discussion under Section IV.B.1. of this Appeal, below.

Amended Ordinance. If the former Ordinance applies, the decision to deny Far Away Farm's CUP under the Amended Ordinance is in error.

In the alternative, even if the Amended Ordinance applied, sections 7.6 (f) and (g) of the Amended Ordinance requires that, to issue or deny a CUP, the BZA "shall" consider the three standards of (1) a successful LESA point score, (2) resolution of unresolved issues, and (3) compatibility of the proposed development with the neighborhood.

Section 7.6 (g) of the Ordinance states:

The Board of Zoning Appeals shall issue, issue with conditions, or deny the conditional use permit. The Board of Zoning Appeals shall have the authority over the issuance or denial of all development review applications. 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.

Id.

By using the word "shall," the Ordinance mandates that the BZA consider each of these three standards, and only these three standards, when it issues or denies the CUP.

The BZA failed to apply the three standards in Ordinance section 7.6(g). We will review them in reverse order:

Standard Three -Compatibility: The BZA failed to consider the compatibility of this development with the neighborhood. The BZA confused the term "density" with the term "compatibility."

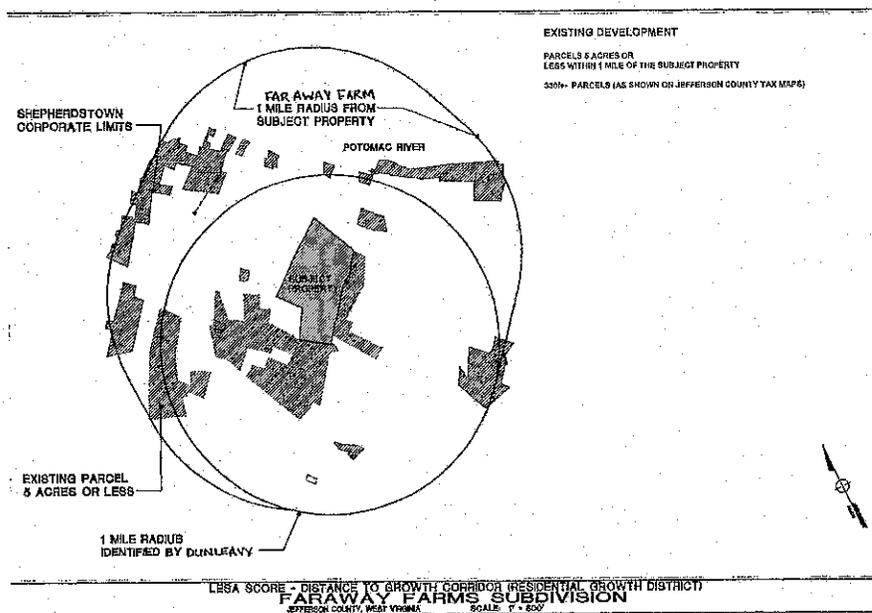
The Ordinance definition of "neighborhood" calls for a measurement of an area of "a one mile radius from the perimeter of the proposed development."⁹

At the July 26, 2005 BZA hearing, the BZA disregarded the Ordinance definition of

⁹ Ordinance Section 2.2.

“neighborhood” and adopted Edward Dunleavy’s definition. Dunleavy, who opposes Far Away Farm, took a map and drew a circle with a one mile radius from the southeast corner of the property, instead of measuring the neighborhood from the perimeter of the development.

The chart below shows the one mile circle measured by Dunleavy from southeast corner of the property, and the one mile radius from the perimeter of the property measured by Far Away Farm.¹⁰



The practical effect of not measuring the “neighborhood” from the perimeter is huge. If the BZA had followed the ordinance and measured the “neighborhood” from the perimeter, the “neighborhood” would have included a residential part of nearby Shepherdstown – thus dramatically affecting the composition of the properties within the “neighborhood.” The proper one mile “neighborhood” would have included more houses, whereas the Dunleavy/BZA “neighborhood” included more farmland. The Dunleavy/BZA measurement skews the

¹⁰ See color chart attached as *Exhibit A* to Far Away Farm’s Petition for Appeal.

characteristics of the "neighborhood."¹¹

The BZA then adopted Dunleavy's method of calculating the density of other development within the wrongly defined one mile "neighborhood." Dunleavy said:

I just drew a line, I went to the tax map, and I gave you every lot with all the data on the lots to come up with the numbers. And as it's been said before, there are 176 lots, and the average is 14.56.

BZA Hearing Tr. (July 26, 2005), 175:12-16

Dunleavy averaged the total acreage of all the lots that touched his wrongly-drawn one mile neighborhood, even if only a portion of the lot intruded into the one mile circle. This is apparent because 176 lots multiplied by Dunleavy's average lot size of 14.56 equals 2562 acres, over 27% more acres than is possible for a one mile circle to contain, which only contains 2010 acres.

Dunleavy then complained that the Far Away Farm property was too dense to be compatible. The BZA agreed with Dunleavy and used the results of this erroneous procedure to deny Far Away Farm's CUP. The BZA's September 15, 2005 decision denying Far Away Farm's CUP cites and relies heavily on Dunleavy's submitted map and calculations.¹²

As a result, the BZA violated the Ordinance definition and was plainly wrong in its

¹¹ In their Opposition to the Petition for Appeal in this case, the BZA claims that Far Away Farm "waived" its right to contest this issue because the location of the "one mile circle," so the BZA claims, was not raised below. This is an incorrect reading of the evidence below. While the specifics of the location of the circle in the "one mile" measurement have not been raised in the Circuit Court brief in the level of detail that was raised here, the issue of the density in the neighborhood as a measurement of compatibility was raised on numerous occasions, and the issue was therefore preserved for this appeal. Also, the entire record was before the Circuit Court, since the matter before the Circuit Court was in the nature of a Petition for Writ of Certiorari, among other causes of action, and the Circuit Court therefore was aware of the matters that had transpired in the BZA below.

¹² See the BZA's "Order Denying Conditional Use Permit Application" dated September 15, 2005, pp. 2 - 3.

factual findings.

The BZA also acted beyond its jurisdiction because there is no authority in the Ordinance for the BZA to use “density” as the standard for “compatibility.” There is no authorization or procedure in the Ordinance that allows the BZA to perform average density calculations or comparisons in this manner. The issue in section 7.6 (f) and (g) is compatibility, not density.

Even if the BZA could consider density as a major factor in its decision, measuring the “neighborhood” like the BZA did in this case skews the density measurement against Far Away Farm because it did not consider the high density area in Shepherdstown in its calculations.

Standard Two – Unresolved Issues: The BZA failed to consider or resolve the sixty-seven unresolved issues¹³ that were raised at the Compatibility Assessment Meeting that was held under Ordinance section 7.6. At the Compatibility Assessment Meeting, (held on July 26, 2005) members of the public are allowed to appear and make requests of the developer, to which the developer agrees (resolving the issue) or disagrees (resulting in an unresolved issue that the BZA has a subsequent duty under the Ordinance to resolve.). The BZA should have resolved each of these issues by making a decision to either require the developer to perform the request, or not require the developer to perform the request. Instead, the BZA disregarded its duty and did not even consider the issues as required by Ordinance 7.6(g). The Circuit Court also erred because it found that the BZA had no legal duty to resolve the unresolved issues, even though the Ordinance states that the BZA “shall” use the resolution of the unresolved issues as one of the

¹³ For example, some of the sixty-seven requests were that the developer eliminate approximately 50 of the proposed total of 152 lots; set aside a \$500,000.00 bond to provide water services to cover possible future well failures; confine the development to the southern 36 acres of the property and donate the balance of the property to the Civil War preservation Trust; and compensate the community in the amount of \$400,000.00 per year for the ecological loss of trees from the creation of impervious services. For a complete list of the 67 unresolved issues, see Staff Report from the Neighborhood Compatibility Assessment meeting attached as *Exhibit C to Petitioner’s Memorandum of Law in Support of Petition for Writ of Certiorari* and attached to the Petition for Appeal as *Exhibit B*.

three standards.¹⁴

Standard One – Consideration of the LESA score: The BZA ignored the fact that the development had a successful LESA score which took into account the density of the project. The LESA score, as more fully explained below, is a procedure under section 6 of the Ordinance to evaluate whether a proposed development is compatible with public services near the site. Far Away Farm passed this evaluation, yet the BZA failed to properly consider the LESA score in its evaluation of the project. The Circuit Court also erred because it held that this part of the test was only a threshold issue, again disregarding the Ordinance requirement that the BZA “shall” consider the LESA score as a standard.¹⁵

To compound its errors, the BZA only allowed Far Away Farm thirty minutes to present its case (disregarding its own attorney’s advice to allow three times that amount). This gave Far Away Farm about twenty-seven seconds to address each unresolved issue. When confronted with the impossibility of this situation, one BZA member commented, “Well, we will have to be speedy.” The lack of time to present its case was a gross violation of Far Away Farm’s due process rights.

The Circuit Court issued its Order upholding the BZA’s denial of the CUP on September 18, 2006. It is from that Order that this appeal arises.

II. Statement of Facts

1. The proposed Far Away Farm development is located in Jefferson County, West Virginia, in an area that has been designated in the Jefferson County Zoning Ordinance as the Rural District.

¹⁴ Order at 32.

¹⁵ Order at 31.

2. A Rural District has at least nineteen permitted uses, including low-density single-family residential development and farming.¹⁶ The Ordinance provides that a piece of property in a Rural District, (where a residential subdivision is not a permitted use) may nonetheless be lawfully used for a residential subdivision if the developer makes application to the Zoning Administrator,¹⁷ meets certain conditions, and obtains a conditional use permit¹⁸ through the use of the Development Review System.¹⁹

3. Far Away Farm filed an application for Conditional Use Permit²⁰ in June, 2004

¹⁶ Ordinance §5.7(a)

¹⁷ Paul Raco is the former Director of Planning and Zoning in Jefferson County and is referred to as “Raco” or the “Zoning Administrator” in this Appeal.

¹⁸ The rural district is addressed in Section 5.7 of the Ordinance. Of particular importance is the last sentence of the first paragraph of Section 5.7, which states:

The Development Review System does allow for higher density [if] *sic.* a Conditional Use Permit is issued.

¹⁹ The Development Review System (DRS) contains a Land Evaluation and Site Assessment component (hereinafter “LESA”), which is a numerical rating system, performed by the Zoning Administrator, comprised of specific criteria detailed in Ordinance Section 6.3 (The Soils Assessment), and Section 6.4 (Amenities Assessment). As part of this system, the developer is required to submit support data to the Zoning Administrator, which is information in 23 categories about the property to be developed and the surrounding area.

Both the soils assessment and the amenities assessment are given a point score based on a numerical system.

The amenities assessment portion of the Development Review System comprises 75% of the overall point score. The amenities assessment portion of the Development Review System is an evaluation of various criteria. The criteria considered under the amenities assessment include the site size, the nature of adjacent development, the distances to the growth corridor and to the public schools, the compatibility with the Comprehensive Plan, the availability of public water and sewer, adequacy of roads, and the availability of emergency services.

The Zoning Administrator assigns a point score to each of the criterion. The evaluation is given a numerical score based on the importance of a parcel’s agricultural significance or its development potential. A higher score on a particular criterion indicates that the property is better suited for agriculture, and a lower score indicates that the property is more suitable for development. At the time of the events in this case, a project seeking a CUP was required to score a maximum of 60 or less in order to proceed to the next stage of development approval.

Far Away Farm had a successful score and therefore passed the development review.

²⁰ As the Court knows, a conditional use permit is a permit to use land in a way that is permitted under the zoning ordinance if certain conditions are met. Conditional uses are defined as “a use of land or activity permitted only after fulfillment of all local regulations.” *Ordinance* at page 6. For example, in this case, the property in which Far Away Farm is located is zoned as a rural district, but residential subdivisions are permitted if certain conditions are met. This Court in *Corliss* recognized that the “ordinance provides

pursuant to Article 6 of the Development Review System of the Jefferson County Zoning and Land Development Ordinance.

4. As a result of the application, a LESA score evaluation was undertaken by Paul Raco. Although Raco gave the development a passing LESA score, Edward E. Dunleavy and Edward R. Moore appealed Raco's LESA score to the BZA.

5. The BZA, upon hearing the Moore/Dunleavy appeal, slightly modified Raco's decision but determined that Far Away Farm, nonetheless, met the required LESA score, thus allowing Far Away Farm to advance to the Compatibility Assessment Meeting provided in Section 7.6 of the Ordinance.²¹

6. A Compatibility Assessment Meeting was held for Far Away Farm in April of 2005 that lasted approximately seven hours. Members of the public raised one hundred six (106) "compatibility issues," more than twice the number of any other applicant seeking a Conditional Use Permit within the past five years.²²

a mechanism whereby a 'conditional use permit' application may be filed to seek the Commission's permission for an already approved use of the land." *Cortiss*, 591 S.E.2d at 95.

"A special exception or conditional use, unlike a variance, does not involve the varying of an ordinance, but rather compliance with it. When it is granted, a special exception or conditional use permits certain uses which the ordinance authorizes under stated conditions."

Harding v. Board of Zoning Appeals, 219 S.E.2d 324 (1975)

²¹ Dunleavy and Moore subsequently appealed the BZA's LESA score evaluation to the Circuit Court. The Circuit Court consolidated its decision in the Dunleavy/Moore appeal (challenging the BZA's upholding Far Away Farm's successful LESA score) with its decision as to Far Away Farm's appeal (of the BZA's subsequent decision to deny Far Away Farm's CUP) in its September 18, 2006 Order.

The second section of the Court's September 18, 2006 Order in this case deals with the LESA score evaluation and the appeal that was filed before the Circuit Court by Dunleavy and Moore, who opposed Far Away Farm's successful LESA evaluation. Far Away Farm does not challenge the Circuit Court's September 18, 2006 Order as to the Circuit Court's denial of the Dunleavy/Moore appeal regarding the LESA score issues.

²²Other subdivisions and issues include: Edgewood at Cress Creek Subdivision (15 issues addressed); Richard Scott Art Gallery (0 unresolved issues); Jefferson Security Bank (0 unresolved issues); Deer Field Village Subdivision (52 issues addressed); Uniwest Waste Water Treatment Plant (8 issues addressed); Thorn Hill Subdivision (30 issues addressed); Forest View Subdivision (24 issues addressed); Chapel View Subdivision (2 issues addressed); Martin's Food Refueling Station (0 unresolved issues);

7. As a result of the Compatibility Assessment Meeting, the Planning Commission staff prepared a Staff Report that listed the compatibility issues. There were thirty-nine issues with which the developer agreed to take certain actions and were therefore considered “resolved” issues. There were sixty-seven issues with which the developer did not agree, and were therefore considered “unresolved” issues.²³

8. The matter was scheduled for a public hearing before the BZA in July of 2005 for the BZA to hear the Staff Report on the sixty-seven unresolved issues and address the concerns raised at the Compatibility Assessment Meeting, pursuant to 7.6(e) of the Ordinance.

9. In order to address the sixty-seven unresolved issues, Far Away Farm filed with the BZA a thirty page memorandum addressing each issue and documents in support of its position totaling approximately three hundred twenty (320) pages, including expert witness opinions and reports²⁴ which included:

- a. *Traffic Study* prepared by Kellerco, which consisted of a study of four (4) intersections rather than the one (1) required by the Subdivision Ordinance (which does not apply at this stage), and the conclusion of the traffic study was that the Far Away Farm traffic would not create a significant amount of peak traffic impact on any of the four (4) studied intersections, that the level of service for the intersections involved fully complied with the terms of the Subdivision Ordinance, which requires only a study of one (1) intersection at the density proposed by Far Away Farm.
- b. *The Preliminary Ground Water Supply Assessment* (Hydrology Report) prepared by Robert K. Denton, Jr. of Specialized Engineering, which concluded that “it is unlikely that a community well” such as the well proposed by Far Away Farm “will interfere with wells on surrounding properties.”

Shenandoah Professional Center & Mini Storage (40 issues addressed); Amber Knolls Subdivision (0 unresolved issues); Town Run Commons Subdivision (21 issues addressed); Harvest Hill Subdivision (24 issues addressed); Quail Run Subdivision (12 issues addressed); Linda Grant Hair and Beauty Salon (0 unresolved issues); Far Away Farm LLC (106 issues addressed).

²³ See copy of Staff Report attached to Appellant, Far Away Farm’s Memorandum of Law in Support of Verified Petition for Writ of Certiorari as *Exhibit C* and attached to its Petition for Appeal as *Exhibit B*.

²⁴ These opinions are presented here in summary form; see detailed statement of facts attached to Appellant, Far Away Farm’s Memorandum of Law in Support of Verified Petition for Writ of Certiorari as *Exhibit B* for further explanation of experts’ positions.

- c. *Preliminary Geological Site Assessment* prepared by Specialized Engineering, which addressed the issue of sink holes and the effect of the proposed development on the geological conditions of the site. The report stated that there were no sink holes on the site and there did not appear to be any adverse impact of the proposed development on the surrounding properties.
- d. *An Architectural Assessment* of the Far Away Farm property provided by the Ottery Group, which concluded that “to date, no significant data has been recovered to support an argument that this property is historically significant. It is likely the property will not be considered eligible for the National Register of Historic Places based on Criterion A, for association with important events in history.”
- e. *Phase I Environmental Report*, revealing evidence of recognized environmental conditions in connection with the subject property including: 1) one gasoline above ground storage tank; and 2) one propane underground storage tank. Supplemental items that were identified at the site include: 1) the potential for the presence of both Asbestos Containing Building Materials and Lead Based Paint; 2) the potential for the presence of radon considering the project site is in a region known to have high levels of radon; 3) old cistern and existing on-site wells and septic systems which should be abandoned or removed; and 4) the potential for sinkholes during site disturbance. These items may be addressed during site planning and development to eliminate any potential hazard, and
- f. *Archeological Report* prepared by Tom Beret, Ph.D. prepared by Greenhorne & O’Mara, Inc., was conducted of the property using a combination of methods including archival research and pedestrian reconnaissance. It was concluded that “archival research identified that 3 prehistoric sites and 1 National Register historic property were located with 1.5 miles of Far Away Farm; however, no previously recorded sites or properties were identified within the boundaries of this parcel.” The results of the pedestrian reconnaissance concluded that no artifacts attributable to the Battle of Shepherdstown were identified.

10. Edward Dunleavy testified at the July 26, 2005 BZA hearing that the Ordinance definition of “neighborhood” was not rational and redefined the term “neighborhood” as an area beginning at the farthest point away from Maryland – which is also the farthest point away from the Town of Shepherdstown instead of the perimeter of the Far Away Farm property, as required by Section 2.2 of the Ordinance.

11. Dunleavy said:²⁵

It has been pointed out that the zoning ordinance says that generally a

²⁵ BZA Hearing Tr. (July 26, 2005) , 174:1-16

neighborhood is one mile from the perimeter. I would say it says generally because if you go one mile from the perimeter north, you are in Maryland. So that to use a precise measurement of one mile from the perimeter seems to me not to be very rational.

And the reason I chose the southeast corner was because it was that piece of the property that was deepest into West Virginia. I just drew a line, I went to the tax map, and I gave you every lot with all the data on the lots to come up with the numbers. And as it's been said before, there are 176 lots, and the average is 14.56.

12. However, the Dunleavy / BZA "neighborhood" apparently included all the area of all the lots that touched on his one mile circle – even if those lots were not completely within the circle. This circle is erroneous because multiplying 176 lots by the average of 14.56 acres yields 2562 acres, over 27% more than the acres contained in a circle with a one mile radius, which is 2010 acres.

13. Based on Dunleavy's presentation, the BZA rejected the Ordinance definition of "neighborhood" as an area with a one mile radius from the perimeter of the property and adopted Dunleavy's definition of "neighborhood," which was a one mile circle from the southeast corner of the Far Away Farm property (the farthest point on the Far Away Farm property from the nearby Town of Shepherdstown) thereby taking Shepherdstown out of the area which should have been Far Away Farm's "neighborhood" and including 27% more property than should have been within the circle, making the area appear less dense.

14. The BZA directly violated its own Ordinance provisions by disregarding the measurement of the neighborhood area from the property's perimeter (as the Ordinance requires) and deliberately selecting the southeast corner of the Far Away Farm property as the center of

the "neighborhood" area (which moves the one mile circle away from Shepherdstown, so that the area surrounding Far Away Farm appeared to be less dense).

15. The BZA then compared the density in the illegally defined "neighborhood" with the density of Far Away Farm, based on (1) Dunleavy's wrongly drawn one mile circle, and (2) the concept of "average density" Dunleavy advocated.

16. The landscape Architect for Far Away Farm, Mark Dyck, also spoke at the July 26, 2005 hearing. Dyck stated that the average lot size was misleading, and that Dunleavy's method included property beyond the one mile circle, as well as failing to include Shepherdstown.

MR. DYCK: I think that one of the important things that I would like to reiterate is exactly what the neighborhood or this subdivision is. The appellant on this, the Citizens to Save Far Away Farms, has put together a document that identifies a one-mile radius from the subdivision, and he's provided extensive data on that. His data is based on this circle right here. He has not taken his data from the perimeter of the property. He has simply taken a point and drawn a one-mile radius circle around the property.

He is also going to discuss the average lot sizes in those areas. The average lot size is extremely misleading just because the information that he is going to be providing you is skewed by, I believe it's nine large lots that are on those acres. A 200-acre lot sitting next to a 1-acre lot will give you an average of 100-acre lots, and that's the data he is going to be providing.

More importantly for the neighborhood that we're talking about is the fact that this property is in proximity to Shepherdstown; it's in proximity to the residential growth area, within one mile of the residential growth area of Jefferson County. It has access to one of the major transportation

corridors in Jefferson County, which is 230. You can go north or south through that area; and, you know, there's just substantial subdivisions that have been done around this property in the past.

This size of those subdivision lots have been driven by the fact that they are in drain field and wells. We felt that this would be -- the development for this subdivision would be more appropriate and more environmentally conscious if we went to a central system and to a central water system, as opposed to that configuration. So...

MS. HINE: Mr. Dyck, if you could explain for me again, you're talking about where your one-mile radius circle starts at one point and then another group starts from down there in the corner.

MR. DYCK: Yes.

MS. HINE: Show me again how you determined your one-mile radius.

MR. DYCK: We took the perimeter of the property and moved it out one mile. So this arch right here is a one-mile arch from that corner. This arch right here is a one-mile arch from there. So this is approximately one mile from the property. The data that was placed on file by the appellant only dealt with this circle right here.

MS. HINE: And you believe they started from that point to determine it?

MR. DYCK: To the best of my knowledge, yes.

MS. HINE: That's what you believe?

MR. DYCK: That's the point that they took their data from.

MS. HINE: Okay.

* * * (Non-relevant portion omitted)

MR. TRUMBLE: The folks from Far Away Farms argue that within their one mile property, the mean size of a lot is approximately about 14.6 acres. Do you know what the mean is within the way you define a

mile?

MR. DYCK: The exhibit that you have before you right now was prepared as part of the LESA point hearing that we previously had before the board.

MS. HINE: Right, right.

MR. DYCK: What we do know is we have approximately 330 acres that --

MR. TRUMBLE: Three hundred and thirty parcels?

MR. DYCK: -- actually, 330 parcels that are less than five acres within one mile of the subdivision. The trouble with just calculating area based on that is the parcels that the Citizens to Save Far Away Farms have identified total -- all right. I'm sorry. A one-mile radius from the property is a total of a little over 2,000 acres. That circle that you draw -- see here --

MR. TRUMBLE: Yours, yeah.

MR. DYCK: -- is approximately 2,000 acres.

MR. TRUMBLE: Okay.

MR. DYCK: That's what a one-mile radius is. Now, when you take the acreage of the parcels that they have identified in their report, there are nine parcels, 50 to 100 acres; there are seven parcels over 100 acres; and the total acreage of those parcels is 1,980 acres. So you can see that, excluding all the other parcels, because of the fact that the acreage that they're including goes far beyond the one-acre circle.

Testimony of Mark Dyck, BZA hearing Tr. (July 26, 2005), 92:19-95:21, 96:10-98:5.

17. Far Away Farm had submitted a traffic study prior to the hearing. The BZA did not allow enough time at the hearing for Far Away Farm's traffic expert to testify, however, there was no sworn testimony or other empirical evidence refuting the specific traffic study other than anecdotal comments and opposition from members of the public who were opposed to any

subdivision.²⁶

18. The BZA allowed Far Away Farm only thirty minutes to present evidence at the July 2005 hearing, and a fifteen minute rebuttal. Far Away Farm was prepared to offer expert testimony supporting the reports that had previously been filed dealing with the compatibility of the roadways and testimony on all of the sixty-seven unresolved issues, including detailed discussion of the traffic impact study. The BZA allowed thirty minutes for the Dunleavy / Moore group to address their issues, which were only to be related to the historical significance of the project. Fourteen members of the public also offered comment, but none of these comments were under oath and no cross examination was allowed by the BZA.

19. Although Far Away Farm had experts present to offer their opinion, the limited amount of time allotted to Far Away Farm precluded any effective testimony by the various experts who attended the meeting.

20. This July 26, 2006 hearing was the first time in its existence, that the BZA held a hearing to determine whether to issue a CUP.²⁷

21. When the BZA was informed that thirty minutes would be an unreasonable amount of time for Far Away Farm to address sixty-seven unresolved issues, amounting to approximately twenty-seven seconds per issue, the BZA responded "Well, we will have to be speedy."²⁸

22. The BZA's own legal counsel, Greg Jones, Esquire, stated, "I can't see how a developer can properly present to you this development in thirty minutes."²⁹

23. Although the BZA's legal counsel recommended that the BZA triple the amount

²⁶ Dunleavy and Moore offered non-sworn comments that were limited to historical issues.

²⁷ BZA Hearing Tr. (July 26, 2005), 18:15-18

²⁸ BZA Hearing Tr. (July 26, 2005), 56:11-19

²⁹ BZA Hearing Tr. (July 26, 2005), 66:19-21

of times listed,³⁰ and the BZA's secretary, Becky Burns, confirmed that the Ordinance allows the BZA to change the amount of time allowed the speakers,³¹ the BZA determined not to allow Far Away Farm one additional minute to present its case.³²

24. On August 9, 2005, the BZA called a special meeting for the purpose of considering the action they would take on the conditional use application for Far Away Farm. The meeting commenced at approximately 9:17 a.m. and concluded at 10:18 a.m.

25. In summary, the transcript³³ of the August 9, 2005 BZA meeting shows that:

- Mr. Bresee moved that the "Board of Zoning Appeals deny the conditional use permit for the proposed Far Away Farm development as it is currently proposed" because it is "not compatible with the neighborhood where it is proposed to be located".
- Bresee based his motion to deny the CUP on two, or perhaps three, issues:
 - First, Bresee mentioned an aerial photograph, stating that ". . . It shows pictorially that the density of proposed development is far in excess with anything around it."³⁴
 - Second, Bresee mentioned an exhibit showing "the characteristics of the neighborhood within a one mile radius of the southeast corner Far Away Farm" submitted by Linda Gutsell, that contained a list of adjacent property owners. Bresee claimed that the adjacent lot sizes were larger than those proposed by Far Away Farm, later stating that ". . . These differences in intensity of land use that proposed would thin [sic] the development as opposed to that which exists around the development we simply cannot call them compatible. That's why the land is on a rural. And, to allow such a high density would not be consistent with this zoning or the comprehensive plan."
 - A potential third issue Bresee raised is the condition of the road surrounding the development, stating that "17 unresolved issues relating to the adequate and physical condition of the roads. The developer may not be able to address all of these, but a development of much lower density may address some of them or may render some

³⁰ BZA Hearing Tr. (July 26, 2005), 67:11-12

³¹ BZA Hearing Tr. (July 26, 2005), 67:1-10

³² BZA Hearing Tr. (July 26, 2005), 70:1-18

³³ The entirety of the transcript of the BZA ruling is set out in the detailed statement of facts that was attached to Appellant, Far Away Farm's Memorandum of Law in Support of Verified Petition for Writ of Certiorari as *Exhibit B*.

³⁴ The development does concentrate housing near the developments roads, but does so in order that open space is maximized. Consequently, unlike many developments in Jefferson County, much of the Far Away Farm development is open space, making the BZA's supposed concern about density unrealistic. The BZA also ignored the findings in the LESA scoring that there is a nearby approved townhouse development.

of them moot.”

- Bresee stated that the LESA system had failed, saying “this is an example of the failure of the LEESA (*sic*) point system, both to the citizens surrounding this area and to the developer.”
- Bresee acknowledged that the BZA had a duty to resolve the unresolved issues, stating “On the matter of the conditional use permit this board is required to find that there be a resolution of the unresolved issues and we are required to evaluate by testimony and written materials and make findings that the proposed development is compatible with the neighborhood where it is proposed. We cannot resolve these issues having to do with density and the adequate condition of the roads. They simply are not resolvable given the present proposal and we cannot find that this development, as proposed, is compatible with the neighborhood in which it’s proposed to be located.”

26. The BZA then voted to deny Far Away Farm its Conditional Use Permit, concluding that: “Far Away Farm LLC is not compatible with the surrounding neighborhood.”³⁵

27. The BZA’s Findings of Fact, which, under the Ordinance, should have dealt with the sixty-seven unresolved issues, consisted of a total of six double-spaced transcript pages. Contrary to the Ordinance, the sixty-seven unresolved issues were not addressed by the BZA.

28. As a result of the August 9, 2005 BZA special meeting, the BZA issued an Order on September 15, 2005, denying Far Away Farm its Conditional Use Permit, even though Far Away Farm met all administrative requirements for the issuance of the CUP.³⁶

29. The BZA admitted that its decision was based on defining neighborhood “within a one mile radius of the southeast corner of Far Away Farms.”³⁷ This definition of neighborhood is identical to the one submitted by Dunleavy at the July hearing,³⁸ and the BZA adopted Dunleavy’s density calculations as well. The BZA relied heavily on Dunleavy’s exhibit showing the one mile circle.

³⁵ BZA Deliberation Tr. (August 9, 2005), 14:10-11

³⁶ See Board’s Order Denying Conditional Use Permit Application, dated 9/15/05.

³⁷ BZA Deliberation Tr. (August 9, 2005), 15:2-3

³⁸ BZA Deliberation Tr. (August 9, 2005), 173:20-21

30. The BZA based its denial on an aerial photograph which it claims “on its face shows incompatibility.”³⁹ This “evidence” however is primarily based on Dunleavy’s misconceived definition of neighborhood and Dunleavy’s faulty suggestion that the perimeter measurement be from the southeast corner of the proposed subdivision.

31. The BZA also claimed evidence of inadequate road conditions as a determining factor in its denial of the CUP.⁴⁰ The BZA claims seventeen of the unresolved issues “related to the adequate and physical conditions of the roads.”⁴¹ The BZA further held that these issues could be resolved by lower density.⁴²

32. On August 9, 2005, the BZA, just minutes before deliberating the CUP request of Far Away Farm, was informed by its legal counsel, Greg Jones,

“I think Mr. Trumble asked me last time about what is compatibility. I’ve not really been able to find any answer on that and I would ask you further to kind of give some guidance as to look at 7.6B for some guidance.”⁴³

33. One of the last statements made by the BZA legal counsel before the BZA went into deliberations to determine the fate of Far Away Farm was, “there’s no guidance for you, so this is totally up to you.”⁴⁴

34. This is in marked contrast to a later decision⁴⁵ by the BZA, in a case called *Conditional Use Permit Application for Town Run Commons*, where the BZA clearly decided

³⁹ BZA Deliberation Tr. (August 9, 2005), 15:18-19

⁴⁰ BZA Deliberation Tr. (August 9, 2005), 17:1-4

⁴¹ BZA Deliberation Tr. (August 9, 2005), 17:7-9

⁴² BZA Deliberation Tr. (August 9, 2005), 17:10-13

⁴³ BZA Deliberation Tr. (August 9, 2005), 4:5-10

⁴⁴ BZA Deliberation Tr. (August 9, 2005), 8:14-15

⁴⁵ This Court previously allowed the record to be supplemented with the Town Run Commons decision. In a different case, called *Paynes Ford Station*, (currently in this Court under a Petition for Appeal styled, *Jefferson Orchards v. Jefferson County BZA*) the BZA measured the one mile radius even though the radius extended beyond Jefferson County into Berkeley County. This is different than Far Away Farm, where the BZA agreed with Dunleavy to measure the one mile radius from the southeast corner of the property so the circle would not extend beyond Jefferson County into Maryland.

that the definition of compatibility should be drawn from the dictionary, stating:

“The Board finds that Compatibility should be defined using the plain meaning found in the Dictionary. For the purposes of defining compatibility, the board will use the Webster’s definition, which is as follows: 1) capable of existing together in harmony, 2) able to exist together with something else, 3) consistent; congruous. Webster’s Encyclopedic Unabridged Dictionary of the English Language, © 1989.

35. Also, the BZA in Town Run Commons used the median lot size, instead of the average lot size, when it calculated the density of the “neighborhood.”

36. The Circuit Court issued an Order upholding the BZA’s decision on September 18, 2006.

37. The Court’s September 18, 2006 Order contains three major sections.

38. The first section of the Court’s September 18, 2006 Order involves mostly procedural issues. Far Away Farm raised due process issues before the Circuit Court, since, under the circumstances of this case, the BZA did not allow enough time for Far Away Farm to present its expert witnesses in support of its CUP request or to adequately address the unresolved issues that had been raised. Far Away Farm was unable to present any expert testimony (outside of the summary statements of Mark Dyck, the landscape architect that coordinated the project) due to the time restrictions. The time allotted to Far Away Farm was approximately 27 seconds per issue.

39. The second section of the Court’s September 18, 2006 Order involves the Court’s review of the LESA score from the Moore/Dunleavy appeal. As stated above, Far Away Farm does not challenge the Circuit Court’s decision to uphold the LESA score and deny the

Moore/Dunleavy appeal.⁴⁶

40. The third major section of the Court's September 18, 2006 Order deals with the BZA's denial of Far Away Farm's CUP. Far Away Farm's appeal is primarily concerned with this section of the Order and is discussed more fully below.

III. Assignments of Error

1. The BZA acted beyond its jurisdiction and applied an erroneous principle of law because it applied the wrong version of the Ordinance.

2. The Circuit Court erred when it approved the BZA's failure to apply the three standards in the Ordinance when making the decision regarding the CUP.

a. The Circuit Court should have ruled that the BZA wrongfully subtitled "density" for the "compatibility standard."

⁴⁶ One issue that has been touted by opponents of the subdivision is their claimed belief that the subdivision is on the site of a battlefield. While the opponents of Far Away Farm have made numerous unsubstantiated allegations that the development is located in a Civil War battlefield, there is no proof of this claim, in fact, the evidence is that the Battle of Shepherdstown occurred near the river, which is about one mile away. Undoubtedly, soldiers have walked on the Far Away Farm property, but the same is true for practically every square foot of Berkeley, Jefferson and Morgan Counties. If that were the standard for historic property, no development could ever occur in the Eastern Panhandle.

Most important is the legal issue concerning the property as "historic." Far Away Farm is exempt from the Ordinance definition as a historic site. As the Circuit Court correctly ruled, (*Order* at 23-25) the Far Away Farm site is not designated as a "Historic Site" within the meaning of the Ordinance, section 2.2, which requires that a given property must be listed on the "West Virginia or the National Register of Historic Places" if it is to be considered as a historic site. Far Away Farm has never been registered on a "Register of Historic Places" and cannot be, because the law states that the owner must consent and Far Away Farm does not consent. (*See* Historic Preservation Act, 16 U.S.C. 470, Sec. 101, a, (a)(6))

Further, there has been precious little activity to preserve the "battlefield" in past years – until the opponents of development seized on the concept to utilize to oppose the development. For example, the Jefferson County Historic Landmarks Commission has not, in its thirty-year history, nominated this area for eligibility to the National Register, even though the Landmarks Commission currently recognizes sixty-two Historic Sites in Jefferson County. Also the West Virginia Coalition for Historic Preservation, which holds itself out as the primary protector of West Virginia Civil War battlefields, has not taken any action previously to have the battlefield listed on the National Register of Historic Places. Thirdly, there is no evidence that any employee of the National Park Service, either at the Harpers Ferry National Historic Park or the Antietam National Battlefield Park, has taken any prior action to have the Shepherdstown Battlefield listed on the National Register of Historic Places.

The lack of attention to this area by the above named historical organizations reveals that no party has been able to determine the exact location of the Shepherdstown Battlefield, and that the opponents of development are seizing at this issue to further their purpose.

b. The Circuit Court erred when it held that the BZA did not have to resolve the unresolved issues.

c. The Circuit Court should have ruled that the BZA did not adequately consider the successful LESA score.

3. The Circuit Court erred when it upheld the BZA's denial of the CUP, even though the BZA ignored the empirical evidence presented at the public hearing when the BZA made its August 9, 2005 decision regarding the CUP.

4. Far Away Farm's due process rights were violated.

IV. Points and Authorities Relied On

A. Standard of review

The appropriate standard of review for appeal of decisions of the BZA to the Circuit Court is as follows:

[3][4] As we explained in *Webb v. West Virginia Board of Medicine*, 212 W.Va. 149, 569 S.E.2d 225 (2002), "[o]n appeal, this Court reviews the decisions of the circuit court under the same standard of judicial review that the lower court was required to apply to the decision of the administrative agency." *Id.* at 155, 569 S.E.2d at 231; accord *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995). The standard that applied to the circuit court's review of the consolidated appeals from the Zoning Board was announced in syllabus point five of *Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E.2d 899 (1975): "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."

Corliss v. Jefferson County Bd. of Zoning Appeals, 214 W.Va. 535, 591 S.E.2d 93, 102 (2003), citing *Syl. Pt. 3, Harding v. Board of Zoning Appeals of the City of Morgantown*, 159 W. Va. 73; 219 S.E.2d 324 (1975) (citing Syllabus point 5, *Wolfe v. Forbes*, W. Va., 217 S.E.2d 899 (1975)).

W.Va.Code § 8A-9-6(c) (2004) provides that, "In passing upon the legality of the decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals, the court or judge may reverse, affirm or modify, in whole or in part, the decision or order."

Maplewood Estates Homeowners Ass'n v. Putnam County Planning Com'n, 218 W.Va. 719, 722-723, 629 S.E.2d 778,781 - 782 (W.Va.,2006)

B. Discussion of Law

1. The BZA Acted beyond its Jurisdiction and Applied an Erroneous Principle of Law because it applied the wrong version of the Ordinance

The Ordinance was amended by the Jefferson County Commission effective April 8, 2005.

The BZA erred because it should have applied the Jefferson County Zoning Ordinance as it existed before it was amended effective April 8, 2005.

Since this appeal was filed, Far Away Farm has discovered a meeting minute of the Jefferson County Commission wherein the County Commission approved the April 8, 2005 amendments to the Ordinance. In that meeting minute, the County Commission also clearly states that applications for CUP that were filed before the April 8, 2005 amendments were “grandfathered” and the former version of the Ordinance should apply.⁴⁷ The Jefferson County Commission meeting minute states in relevant part:

Motion by Tabb, second by Manuel, for administrative purposes to recognize that all applications in the Office of Planning Zoning and Engineering received on and before the closing business of April 8, 2005 which address all the necessary 23 questions on the application to be grandfathered in, and that applications received after April 8, 2005 comply with the new amendments. Motion carried.

Far Away Farm’s CUP application was filed on June 16, 2004.⁴⁸ Consequently, Far Away Farm’s CUP application was “grandfathered,” based on the specific language of the

⁴⁷ See relevant portion of County Commission’s March 23, 2005 meeting minutes record attached as *Exhibit A*, which was obtained from www.jeffersoncountywv.org.

⁴⁸ See the first page of the CUP application, dated June 16, 2004, attached as *Exhibit B*. Also see the first docket page of the BZA’s certified record, attached as *Exhibit C*, which notes as docket item number 1 that the CUP application was received by the Planning Commission on June 23, 2004. These items are in the record below.

County Commission's meeting minute, and therefore should have been heard under the former zoning ordinance.

The County Commission's decision as to which version of the Ordinance applied removed the BZA's jurisdiction to apply the April 8, 2005 Ordinance provisions. The BZA therefore acted beyond the scope of its jurisdiction under the *Corliss* standard when it applied the April 8, 2005 Ordinance standards to Far Away Farm. Also, using the wrong Ordinance provision means the BZA applied an erroneous principle of law under the *Corliss* standard.

The requirements of the two Ordinance provisions are different, especially regarding the issuance of a CUP. Note the key provisions governing issuing the CUP which are contained in sections 7.6(f) and 7.6(g) of the two versions of the Ordinance:⁴⁹

FORMER ORDINANCE	AMENDED ORDINANCE
<p>Section 7.6(f) If all issues raised at the Compatibility Assessment Meeting with the staff were resolved at that meeting, there will be no Public Hearing required. At the next Planning and Zoning Commission meeting thereafter, the Planning and Zoning Commission shall issue, issue with conditions, or deny the conditional use permit.</p>	<p>Section 7.6(f) If all issues raised at the Compatibility Assessment Meeting with the staff were resolved at that meeting, there will be no Public Hearing required. At the next Board of Zoning Appeals meeting thereafter, the Board of Zoning Appeals shall issue, issue with conditions, or deny the conditional use permit. 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.</p>
<p>Section 7.6(g) The Planning and Zoning Commission shall issue, issue with conditions, or deny the conditional use permit. The Planning and Zoning Commission shall have the authority over the issuance or denial of all development review applications.</p>	<p>Section 7.6(g) The Board of Zoning Appeals shall issue, issue with conditions, or deny the conditional use permit. The Board of Zoning Appeals shall have the authority over the issuance or denial of all development review applications. The standards governing the</p>

⁴⁹ Far Away Farm is filing a Motion to Supplement the Record with the former Ordinance provisions.

	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.
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The BZA applied the Amended Ordinance provisions to Far Away Farm even though Far Away Farm had filed its CUP application before the Amended Ordinance became effective, which violated the County Commission's own Ordinance and directive in its meeting minute. The Amended Ordinance provisions required Far Away Farm to meet three standards⁵⁰ to obtain a CUP, while Far Away Farm was not required to meet the three standards under the former Ordinance. If the BZA had applied the former Ordinance provisions, the CUP should have been issued to Far Away Farm, since Far Away Farm passed the LESA scoring system,⁵¹ and the LESA score seemed to be the only criterion under the former Ordinance.

The BZA's entire hearing process and ruling is therefore error under the *Corliss* standard, because the BZA applied the wrong Ordinance. The entire process before the Circuit Court is error for the same reason. Since it is now impossible to re-write history, there is no viable alternative but for this Court to Order the CUP to be issued.

Applying the Amended Ordinance to Far Away Farm means that the BZA failed to follow its own Ordinance as to Far Away Farm. The BZA had a duty to apply the correct ordinance as directed by the County Commission and failed to follow that duty. The BZA, in

⁵⁰ As discussed below, the three standards in the amended Ordinance are (1) a successful LESA point score, (2) resolution of unresolved issues, and (3) compatibility of the proposed development with the neighborhood.

⁵¹ See Far Away Farm's successful LESA score sheet that was scored by Paul Raco, the former Director of the Planning Commission staff, attached as *Exhibit D*. The LESA score was appealed by Mr. Dunleavy to the BZA and upheld by the BZA (with minor modification), and further upheld by the Circuit Court as a passing score after Mr. Dunleavy's appeal to the Circuit Court. See Circuit Court's Order dated September 18, 2006.

effect, amended the former Ordinance to apply to Far Away Farm when the County Commission explicitly directed that a developer like Far Away Farm was under the prior Ordinance. The BZA does not have the power to amend an Ordinance since “. . . the Board of Zoning Appeals is an administrative agency acting in a quasi-judicial capacity, and has no power to amend the zoning ordinance under which it functions since it is not a lawmaking body.” *Dewey v. Board of Zoning Appeals of Greenbrier County*, 185 W.Va. 578, 582, 408 S.E.2d 330, 334 (W.Va.,1991), citing *Wolfe v. Forbes*, 159 W.Va. at 45, 217 S.E.2d at 906.

The BZA’s error should not be held against Far Away Farm, since the BZA should have followed its own Ordinance in hearing Far Away Farm’s case, and is charged with knowledge of its own Ordinances.

Also, this is a jurisdictional question which, as the Court knows, can be raised at time.⁵² It is impossible to agree to confer jurisdiction where there is none, or to waive the application of a law that clearly applies.

The BZA therefore erred and this Court should Order the CUP be issued.

2. In the Alternative, the Circuit Court Erred when it approved the BZA’s failure to Apply the Three Standards in the Ordinance When Making the Decision Regarding the CUP

In the alternative, if this Court were to apply the Amended Ordinance to this case, the Amended Ordinance requires that the BZA “shall”⁵³ apply three standards to make its decision,

⁵² “Whether a court or county commission has subject-matter jurisdiction is a question that can be raised and debated at any time. As this Court has said many times, ‘Lack of jurisdiction of the subject matter may be raised in any appropriate manner . . . and at any time during the pendency of the suit or action.’ (citations omitted). Lack of subject matter jurisdiction can even be raised for the first time in this Court, or the Court on its own motion may take notice that it or a lower court did not have jurisdiction. *Shrewsberry v. HRKO*, 206 W.Va. 646, 527 S.E.2d 508, 514 (1999) (citations omitted)”

⁵³ See Ordinance section 7.6(f) and 7.6(g) which state that “. . . standards governing the issuance of conditional use permits shall be . . .”

which are (1) a successful LESA point score, (2) resolution of unresolved issues, and (3) compatibility of the proposed development with the neighborhood.

The use of the word “shall” removes the discretion of the BZA in applying the three standards. As this Court has said:

“This Court has long recognized that ‘[i]t is well established that the word ‘shall,’ in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.’ . . . ‘Generally, shall commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary.’ (citations omitted)

Ryan v. Clonch Industries, Inc., 219 W.Va. 664, 639 S.E.2d 756, 764 (2006)

It is therefore mandatory that the BZA’s decision be based on its consideration of the three standards enumerated in the Ordinance, and only those three standards.

In this case, the BZA summarily denied the CUP without proper consideration of the three standards in the Ordinance, thereby committing an error of law that violates the *Corliss* standard.

The Circuit Court should have enforced the Ordinance and required the BZA to apply the three standards in reaching its decision regarding the CUP. Instead, the Court ruled against Far Away Farm on these issues.

We will examine the Circuit Court’s review of the BZA’s application of the three standards in reverse order:

a) The Circuit Court should have ruled that the BZA wrongfully subtitled “density” for the “compatibility standard.”

The BZA acted beyond its jurisdiction, applied an erroneous principle of law, and was plainly wrong when it failed to properly apply the third standard under the Ordinance and decided that the density of the subdivision made Far Away Farm incompatible with the surrounding neighborhood. The BZA confused the term “density” with “compatibility.” The

BZA was required by Section 7.6(g) to evaluate compatibility but instead erroneously evaluated “density” as the standard for “compatibility.”

This Court has held that:

“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 v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 536, 591 S.E.2d 93, 94 (W.Va.,2003) (citation omitted)

In this case, the BZA’s decision –which is, in essence, that a subdivision should not be permitted in a rural district because it increases density- is in stark conflict with the legislative intent discussed in the Ordinance – which is, to allow the density in a rural district to be increased if a given property successfully completes the Development Review System, which Far Away Farm has done. The BZA’s interpretation is therefore “unduly restrictive and in conflict with the legislative intent,” consequently, “the agency's interpretation is inapplicable.” *Id.*

The Circuit Court erroneously upheld the BZA’s decision, and further compounded the BZA’s error, when it held that “. . . density is the type of use, not the amount of use. Density defines a rural district.” *Order* at 29. The Court goes on to find that the BZA was not clearly wrong in its determination, and upholds the BZA. *Order* at 29.

The problem with this interpretation is that Sections 7.6(f) and 7.6(g) of the Ordinance require the BZA to evaluate compatibility, not density. Compatibility speaks to the type of use, not the amount of use. Far Away Farm is located in a rural district, in which one of the principal

permitted uses is single family dwellings⁵⁴ and subdivisions of greater density are allowed if the Development Review System is utilized.⁵⁵

Residential subdivisions are compatible as a matter of law in a rural district, since homes are a permitted use, as opposed to, for example, factories. The BZA should have realized that use compared to use is the basis for compatibility, not density compared to density. The Circuit Court should have held that the BZA erred in its interpretation of this issue.

The Court's decision ignores the entire purpose of the Development Review System, which functions (or, at least, should function) to allow an increase in density in a rural district property, as stated in Section 5.7 of the Ordinance. Of particular importance is the last sentence of the first paragraph of Section 5.7, which states that, in a rural district:

“The Development Review System does allow for higher density [if] [*sic*] .
a Conditional Use Permit is issued.”

The Circuit Court wholly ignores the function of the Development Review System in favor of an erroneous fixation on the purpose of the rural district, to the exclusion of the application of the Development Review System. For example, the Court repeatedly emphasizes that the “purpose of the rural district is to provide a location for low density single family residential development.” *Order* at 29, *Order* at 27.

The Circuit Court's decision ignores the concept that the Development Review System specifically allows an increase in the density of the housing placed on the land. It is an incorrect application of law for the BZA to rule that an increase in density alone makes a residential development incompatible, because it stands to reason that all development and use of the Development Review System will result in an increase in density from the use of the property as

⁵⁴ See Ordinance 5.7 (a)(3)

⁵⁵ See Ordinance 5.7

agricultural. Any other interpretation would be inconsistent with the Ordinance.⁵⁶

Nonetheless, the BZA, and subsequently, the Circuit Court, interpreted the Ordinance wrongly, stating that the development's increase in the density of houses on the land makes the development incompatible.⁵⁷

By its use of the "density" concept as a substitute for "compatibility," the BZA has disregarded the intent of the Ordinance that allows an increase in density through the use of the Development Review System. The BZA has further disregarded the approved principles in *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*⁵⁸ that the "Conditional Use Permit process allows a prospective subdivider to subdivide the property into greater number of lots with a greater density than may be allowed in the rural district pursuant to Section 5.7, Zoning Ordinance."

The first step in determining whether the proposed subdivision would be compatible with the surrounding neighborhood should have been to first, define neighborhood. The County Zoning Ordinance defines neighborhood "as an area generally confined to a one-mile radius from the perimeter of a proposed development."⁵⁹ Far Away Farm therefore defines

⁵⁶ See *Charter Communications VI, PLLC v. Community Antenna Service, Inc.*, 211 W.Va. 71, 77, 561 S.E.2d 793, 799 (2002) (citations omitted), which states in part "a well established canon of statutory construction counsels against ... an irrational result [for] '[i]t is the "duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results." *Mullen v. State, Div. of Motor Vehicles*, 216 W.Va. 731, 613 S.E.2d 98 (W.Va., 2005).

⁵⁷ The BZA also skewed the density findings by measuring the "neighborhood" as a one mile circle with its center at the farthest corner of the property from the town of Shepherdstown. Had the BZA measured the one mile circle from the perimeter of the property (as was advocated by Far Away Farm and as the BZA has done in other cases) then the one mile "neighborhood" would have included part of Shepherdstown, which would have markedly increased the density in the one mile "neighborhood."

⁵⁸ *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 624 S.E.2d 873, 886 (W.Va., 2005) (citing with approval the decision of the BZA in that case. "Accordingly, we conclude that the Board's interpretation of section 5.7 . . . is a valid interpretation of the Ordinance" with relationship to the CUP process)(*id.* portions omitted).

⁵⁹ BZA Hearing Tr. (July 26, 2005), 74:16-18

neighborhood as all property within a one mile radius from the perimeter of the proposed development at any point. This definition of neighborhood has never been disputed in the past.

Mr. Dunleavy, however, in his presentation to the BZA, redefined neighborhood by maintaining that the one mile radius should be drawn from the corner of the property farthest from the town of Shepherdstown, asserting that "if you go one mile from the perimeter north, you are in Maryland. So that to use a precise measurement of one mile from the perimeter seems to me not to be very rational."⁶⁰ Dunleavy therefore recalculated the radius of measurement so it would not encompass property outside of the State of West Virginia. In so doing, he moved the portion of the one mile circle so that Shepherdstown was not included, thereby greatly decreasing the density of the properties in the one mile circle in the calculation that the BZA ultimately adopted.⁶¹

This led to the argument that the surrounding property was less dense than Far Away Farm.

The BZA admitted that its decision denying the CUP was based on defining neighborhood "within a one mile radius of the southeast corner of Far Away Farm."⁶² This definition of neighborhood disregards the Ordinance definition and is identical to the one submitted by Dunleavy at the July hearing.⁶³

The BZA also based its denial on an aerial photograph which it claims "on its face shows

⁶⁰ BZA Hearing Tr. (July 26, 2005), 174:1-8

⁶¹ In other words, by this definition, "neighborhood" must only include property in the State of West Virginia. So, if one has property in Jefferson County bordering either Virginia or Maryland, then the Ordinance's definition of neighborhood cannot apply to those properties. There is no justification or exception in the Ordinance that allows this sort of definition change.

⁶² BZA Deliberation Tr. (August 9, 2005), 15:2-3

⁶³ BZA Hearing Tr. (July 26, 2005), 173:20-21

incompatibility.”⁶⁴ This “evidence” however is primarily based on Dunleavy’s misconceived definition of neighborhood and faulty suggestion that the perimeter measurement be from the Southeast corner of the proposed subdivision.

There is no clear definition of “compatibility” in the Ordinance. In marked contrast of the BZA’s creation of the new ordinance standard on this case, the BZA adopted the dictionary definition of compatibility in a different case (*see* Town Run Commons Order Granting Conditional Use Permit Application of November 9, 2006) which was decided after the Far Away Farm case. There the BZA held:

“The Board finds that Compatibility should be defined using the plain meaning found in the Dictionary. For the purposes of defining compatibility, the board will use the Webster’s definition, which is as follows: 1)capable of existing together in harmony, 2) able to exist together with something else, 3) consistent; congruous. Webster’s Encyclopedic Unabridged Dictionary of the English Language, © 1989.

In the Town Run Commons decision, the BZA also adopted the median lot density as the standard for measuring density. This makes a dramatic difference in the density calculations.⁶⁵

For example, if one were to take a hypothetical average of 85 parcels in a given one mile radius, and assume:

50 parcels are 1 acre

20 parcels are 5 acres

10 parcels are 20 acres

3 parcels are 50 acres

1 parcels is 600 acres

1 parcels is 810 acres

Resulting in a total of 2010 acres in the one mile radius;

Then the average lot density is 23.64 acres

But, the Median lot density is 1 acre

⁶⁴ BZA Deliberation Tr. (August 9, 2005),15:18-19

⁶⁵ Dunleavy also spoke against the Town Run Commons subdivision and complained about the “density” there.

So, at best, the BZA is inconsistent and standardless in applying the average lot size to Far Away Farm, while applying the median lot size to Town Run Commons.

Further, the BZA's interpretation in adopting the average lot size as a density standard thwarts the purpose of the Development Review System and makes it impossible to realistically develop any property in the rural zone. This is clearly not the intent of Section 5.7 of the ordinance. For example, using Far Away Farm's average lot size of 1.2 units per acre times 2010 (the number of acres in a one mile radius circle) results in 2412 homes in the one mile circle – which is likely more dense than anyplace in Jefferson County, save perhaps downtown Charles Town itself. It is therefore impossible for a development like Far Away Farms, (which Mark Dyck testified was about half as dense as the majority of the Conditional Use Permits prepared as of the date of the BZA hearing)⁶⁶ to be located within a one mile radius of any other piece of property in Jefferson County that has 2142 homes per within the one mile radius, since no such development area exists. Using the average density calculation as the standard for “compatibility” therefore precludes all development within the rural zone. This is why utilizing an average measurement of acreage completely thwarts the purpose of the Development Review System, and must be an incorrect method of calculation, and clearly wrong.

The BZA's interpretation is both an error of law and a decision that *de facto* creates a new Ordinance standard, resulting in the BZA acting beyond its jurisdiction because it has considered other issues beyond the three standards that it should consider in granting the CUP.

Increased density is not a basis for the BZA to deny the CUP or call the development incompatible. An increase in density is allowed under the Development Review System, and the increase in density does not make a development incompatible. It is an erroneous application of

⁶⁶ BZA Hearing Tr. (July 26, 2005), 80.

law for the BZA to hold otherwise, and subsequently, an erroneous decision for the Circuit Court to uphold the BZA's decision.

b) The Circuit Court erred when it held that the BZA Did Not have to Resolve the Unresolved Issues.

The BZA wholly ignored the second standard in the Ordinance that requires the BZA to resolve the unresolved issues from the compatibility meeting. Consequently, under the *Corliss / Wolfe* test, the BZA "applied an erroneous principle of law" to reach its decision to deny the CUP.

The Ordinance states in sections 7.6(f) and 7.6(g) that the BZA has the duty to resolve all unresolved issues from the compatibility meeting, because one of the three standards "shall" be the "BZA's resolution of unresolved issues . . ." Mr. Bresee was aware of this duty when he admitted in the August 9, 2005 meeting that the BZA had a duty to resolve the unresolved issues, stating in part that ". . . this board is required to find that there be a resolution of the unresolved issues . . . We cannot resolve these issues having to do with density and the adequate condition of the roads. They simply are not resolvable . . ."

Although Mr. Bresee admitted that the BZA had the duty to resolve the unresolved issues, the BZA refused to resolve them. The Circuit Court erred when it agreed with the BZA and apparently held that the Ordinance did not require their resolution. The Circuit Court said that it "cannot agree with FAF that the BZA has a legal duty to resolve all unresolved issues." *See Order* at 32.

Contrary to Bresee's statement that the issues were "not resolvable," the BZA could have easily resolved every one of the sixty-seven unresolved issues. The BZA merely had to consider each issue individually, and either decide that the developer was required by the Ordinance to perform the request or not. The BZA's decision to either make the developer perform an act to

obtain a CUP, or, alternatively, decide that the act is not required by the Ordinance for the developer to obtain a CUP, resolves the “unresolved issue.”

Instead of fulfilling their duty to resolve all unresolved issues from the compatibility meeting, the BZA did not even try to address the sixty-seven “unresolved issues” that were raised at the compatibility meeting. The BZA’s Findings of Fact, which, under the Ordinance, should have dealt with the sixty-seven unresolved issues, consisted of a total of six double-spaced transcript pages, most of which discussed the density of the development.

Based on the above, the BZA failed in its legal duty in Sections 7.6(f) and 7.6(g) to resolve the unresolved issues and thereby “applied an erroneous principle of law” and was “plainly wrong in its factual findings” in violation of the *Corliss / Wolfe* standard.

The Circuit Court erred when it refused to make the BZA comply with this duty under the Ordinance.

c) The Circuit Court should have ruled that the BZA Did Not Adequately Consider the Successful LESA Scores

The Circuit Court erred when it failed to recognize that the LESA scores took into account the density concerns expressed by the BZA and, consequently, held that “the LESA score is simply a threshold to advance to the compatibility meeting” and that the “Ordinance does not provide for the BZA to give additional weight to a passing LESA score.” *Order* at 31.

Contrary to the Circuit Court’s position, the successful LESA score is the first of the three standards in section 7.6(f) and 7.6(g) of the Ordinance that the BZA “shall” consider in determining whether to issue the CUP. The BZA did not correctly apply the first standard in the Ordinance because it did not take into account that Far Away Farm successfully passed the LESA scoring system, even after the score was appealed to the BZA and the BZA approved the LESA score with minor adjustments. The BZA should have considered that the LESA score

takes at least twenty-three issues⁶⁷ into account before a development is even considered eligible to seek full approval for a Conditional Use Permit – including information on issues such as traffic, extent of conversion of farm land to residential use, and the general effect of the development on the area’s schools, roads, etc. The fact that Far Away Farm passed the LESA score should have had a significant impact on the BZA’s decision regarding the CUP.

Instead, the BZA blatantly refused to apply or seriously consider the LESA score, with Bresee stating “This is an example of the failure of the LEESA (*sic*) point system, both to the citizens surrounding this area and to the developer.”

The BZA’s statement is an outright refusal to apply the Ordinance as written. The BZA’s failure to consider the successful LESA score in its decision to deny the CUP is an erroneous application of law under the *Corliss/Wolfe* standard.

The Circuit Court erred in failing to require the BZA to consider the LESA scores.

3. In the Alternative, the Circuit Court Erred when it Upheld the BZA’s Denial of the CUP, Even Though the BZA Ignored the Empirical Evidence Presented at the Public Hearing When the BZA Made its August 9, 2005 Decision Regarding the CUP

If this Court applies the former Ordinance, the entire issue of density is irrelevant, since the LESA score was the overriding criterion in the decision to grant a CUP, and Far Away Farm passed the LESA score. Density was not even a specific issue in the LESA score (although the LESA score did take matters like adjacent development into account). Nonetheless, Far Away Farm passed LESA, and should have been granted a CUP.

In the alternative, if this Court applies the Amended Ordinance, the BZA was plainly wrong in its factual findings as to the evidence presented about traffic, density, and related

⁶⁷ Ordinance Section 7.4(d)

issues. The Circuit Court should have overturned the BZA on this point alone.

As more fully stated above, Section 7.6 of the Jefferson County Zoning Ordinance requires that the planning commission staff hold a Compatibility Assessment Meeting to allow the adjacent property owners and others to hear about the development and make their concerns known.

Various members of the public appeared at the compatibility meeting and made about one hundred six demands of the developer of Far Away Farm. The developer agreed to thirty-nine requests, but refused to agree to sixty-seven of the requests, because those requests were unreasonable. Had the developer agreed to these requests, it would have likely destroyed the economic viability of the project.

The requests to which the developer did not agree were presented to the BZA as "unresolved issues" at the July 2005 public hearing, pursuant to Ordinance section 7.6(e). Far Away Farm presented empirical evidence⁶⁸ to the BZA in favor of its subdivision at that time. At the same time, fourteen members of the public were allowed to speak, but were not under oath and no cross examination was permitted.

In its August 9, 2005 meeting denying the CUP, the BZA largely ignored the empirical evidence presented by Far Away Farm in favor of anecdotal evidence presented by the members of the public. It is true that "the plainly wrong standard of review is a deferential one, which 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*, 218 W.Va. 719, 723, 629 S.E.2d 778, 782 (W.Va.,2006). Substantial evidence is "such

⁶⁸ Prior to the July 2005 hearing Far Away Farm had filed a thirty page memorandum addressing each issue, along with documents and expert reports in support of its position totaling approximately 320 pages. The BZA ignored the information Far Away Farm had filed and did not provide adequate time for Far Away Farm to present testimony from the experts that were present to testify.

relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.*

In this case, however, the BZA’s decision was not supported by “substantial evidence,” but was instead against the great weight of the evidence, and should be reversed as “clearly erroneous” under the *Corliss* standard. (“Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” *Corliss*, Syl. Pt. 3)

There was unrefuted evidence and expert reports submitted to the BZA that:

- that the Far Away Farm traffic would not create a significant amount of peak traffic impact on any of the four (4) studied intersections, and that the level of service for the intersections involved fully complied with the terms of the Subdivision Ordinance,
- it was unlikely that Far Away Farm’s water system would interfere with the local wells, and there were no sinkholes located on the property,
- that the property is not historically significant,
- that the Phase 1 environmental report revealed nothing that could not be dealt with later in the project, and
- that there were no previously recorded sites of archeological significance on the property.

The BZA disregarded this empirical evidence as a basis for its ultimate decision on the CUP in the August 9, 2005 meeting, stating that there were “17 unresolved issues relating to the adequate and physical condition of the roads. . .” but refusing to resolve the issues. Consequently, like in *Kaufman*, the BZA ignored the unrefuted expert testimony presented during the CUP process that the Far Away Farm traffic would not create a significant amount of peak traffic impact, and then used the BZA’s belief that that traffic or roads could potentially be impacted as a reason to turn down the CUP.

The BZA further ignored the other empirical evidence that Far Away Farm presented, choosing instead to focus on the issue of density as the underlying basis for rejecting the CUP. Since increased density is permitted under the Ordinance, the fact that a residential subdivision increases the density of a given area is irrelevant. The BZA did not give a fair analysis of the

material presented to it.

The Court states that the “record is void of any evidence that the BZA ignored FAF’s traffic expert report.” *Order* at 29. However, the most significant evidence that the BZA ignored the traffic expert’s report is that the BZA denied the CUP. Considering the fact that no evidence regarding traffic (other than perhaps some anecdotal experience) was presented to the BZA that contradicted Far Away Farm’s traffic study, yet the BZA denied the CUP partly because of traffic concerns, is dramatic evidence that the BZA ignored the substantial evidence presented in writing by Far Away Farm, and also limited the presentation of further expert testimony by its time limitations.

In the present case, the BZA has denied Far Away Farm a Conditional Use Permit based on public opposition without substantial supporting evidence, while turning a blind eye to the expert testimony and substantive documentation presented by Far Away Farm.

In *Oates v. Continental Ins. Co.*, 137 W.Va. 501, 72 S.E.2d 886 (1952), the Supreme Court of Appeals of West Virginia held that:

“A prima facie case is not overcome by evidence which merely affords a bare conjecture to the contrary. And in *Turk v. McKinney*, 132 W.Va. 460, 52 S.E.2d 388, this Court held that a jury will not be permitted to base findings of damages upon conjecture or speculations.”

Id. at 511

In this case, the opponent’s concern related to traffic was not supported by substantial evidence, but amounted to nothing more than conjecture or speculation by a handful of opponents.

In *Petition of G. Skeen*, 190 W.Va. 649, 441 S.E.2d 370 (1994), this Court reversed a decision of a local Zoning Board of Adjustment that had denied homeowners’ application for special use exception to operate babysitting service in their home.

The Court noted that:

“No evidence was introduced at the hearing that the requirements for a home occupation special exception set forth in City Code section 23-3 were not met. Indeed, the Board based its denial on a ground wholly separate from the requirements set out in section 23-3, namely the virtual unanimous opposition of the neighboring landowners.”

In like manner, the BZA has determined to overlook the fact that Far Away Farm has complied with every requirement of the County Zoning Ordinance in its attempt to gain issuance of a Conditional Use Permit and has instead allowed opposition of mostly non-adjacent landowners with no substantive evidence to influence its decision.

By ignoring the evidence presented to it, the BZA also violated the principle in *Kaufman v. Planning & Zoning Com'n of City of Fairmont*⁶⁹ where the developer in that case presented a variety of expert testimony showing that his development would not have an adverse traffic impact on the community, and the Planning Commission chose to ignore the empirical data in favor of their own anecdotal experience. The Supreme Court said that, “The commission members' own experiences are not sufficient to overcome the evidence presented by the developer.”⁷⁰

The Court also failed to address the fact that is right on point with the present case - that although various individuals vehemently opposed the proposed subdivision at a public hearing, the *Kaufman* Court ruled in favor of substantial evidence presented by the developer. *Id.* at 177, 151. The Circuit Court therefore erred in limiting its view of *Kaufman* to only prohibiting a Planning Commission from using their own experiences to deny the CUP in that case. It seems that the *Kaufman* case also stands for a broader principle - i.e., that substantiated evidence

⁶⁹ *Kaufman v. Planning & Zoning Com'n of City of Fairmont*, 171 W.Va. 174, 298 S.E.2d 148 (W.Va., 1982)

⁷⁰ *Id.* at 171 W.Va. 174, 183, 298 S.E.2d 148, 157

outweighs unsubstantiated evidence.

The Court erred when it failed to rule that the BZA was plainly wrong in its factual findings in violation of the *Corliss* standard.

4. Far Away Farm's due process rights were violated

Far Away Farm's due process rights were violated because the BZA failed to follow its own Ordinance when it applied the Amended Ordinance to this case. The BZA had a duty to apply the correct ordinance and failed to follow that duty. Under the former Ordinance, since Far Away Farm passed the LESA score, Far Away Farm met the standards to obtain a CUP and should have been issued the CUP.

Even if the Amended Ordinance applied, the West Virginia Code requires certain procedures be followed to amend a land use ordinance, which are contained in W.Va. Code §8A-7-8. The BZA violated Far Away Farm's right to due process of law under the United States and West Virginia Constitution because its application of the Ordinance (to make density the primary criteria of CUP approval and disregard the Development Review process) is an illegal *de facto* amendment of the Ordinance. The BZA has defined "neighborhood" and "compatibility" in conjunction with "density" in a manner that creates a new standard under the Ordinance. The BZA therefore erred in that it effectively instituted a *de facto* amendment of the Ordinance without following the requisite procedures contained in W.Va. Code §8A-7-8.

Far Away Farm's due process rights were also violated by the BZA because the time allotted for the hearing was insufficient by any measure to allow Far Away Farm to fairly present its case, due to the number of issues that the BZA had to consider.⁷¹ In fact, the BZA allowed

⁷¹ In the July, 26, 2005 hearing before the BZA, Mr. Gay objected:
... So I have four

only 27 seconds per issue. When Far Away Farm raised this issue, the BZA replied, "Well, we will have to be speedy." The BZA also disregarded its own attorney's advice to allow three times the normal allotted time. All decisions made by the BZA subsequent to the July, 2005 public hearing were tainted by this lack of due process.

The Jefferson County BZA's own Rules of Procedure allows the Applicant to present relevant evidence to prove his case by a preponderance of the evidence, including documentary evidence and witness testimony.⁷²

The BZA's unfair discretion in setting unreasonable time restraints on the parties representing Far Away Farm was a blatant violation of their right of due process under *State ex rel. Hoover v. Smith*, 198 W.Va. 507, 511, 482 S.E.2d 124, 128 (1997).

V. Relief Prayed For

The Appellant, Far Away Farm, respectfully requests that this Court reverse the decision

or five witnesses to present. There's no way I can present this case in 30 and 15 minutes. There is 67 unresolved issues. We have five reports we filed with our filings with the court, with this body, addressing those issues; and it is impossible under due process for me to make any kind of a record in that amount of time, and I just want to go on record as objecting.

BZA hearing Tr. (July 26, 2005), 71:11-20.

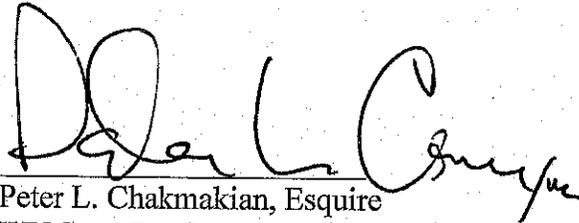
⁷² *Rules of Procedure*, 6. Meetings, (g)(1)(2)(3)(h). The Rules of Procedure were based on the Circuit Court's decision in *Jefferson Utilities*, 218 W. Va. 436, 624 S.E.2d 873 which was later vacated by the Supreme Court. The Rules of Procedure further state:

"Each Applicant shall have the rights of due process, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing. Where the Board finds that testimony will be repetitious, cumulative or irrelevant to the matters before it, then the Board through the presiding Chair may impose reasonable limitations on the number of witnesses heard and nature and length of their testimony. Cross-examination by a party is permitted as necessary for a full disclosure of the facts. The Board has discretion to limit cross-examination."

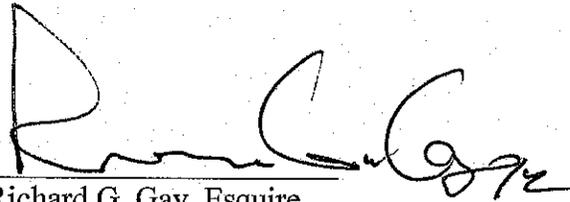
Rules of Procedure, 6. Meetings, (j)

of the Jefferson County Circuit Court upholding the decision of the Jefferson County Board of Zoning Appeals and remand the case to the BZA with directions to issue Far Away Farm its Conditional Use Permit.

Respectfully submitted,
Far Away Farm
Appellant, by counsel.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAR AWAY FARM, LLC,

Appellant,

v.

DOCKET NO. 070472

JEFFERSON COUNTY ZONING BOARD OF APPEALS,

A public body;

THOMAS TRUMBLE, Member,

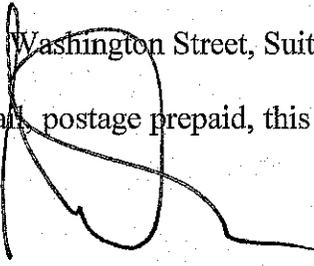
JEFF BRESEE, Member, and

TIFFANY HINE, Chair

Appellees.

CERTIFICATE OF SERVICE

I, Richard G. Gay, Esquire and/or Nathan P. Cochran, Esquire, counsel for appellant, Far Away Farm, do hereby certify that a true copy of the foregoing **BRIEF ON APPEAL** and **CERTIFICATE OF SERVICE** has been served on Stephanie Grove, Esquire at the Jefferson County Prosecuting Attorney's Office, P.O. Box 729, Charles Town, West Virginia 25414, and Linda Gutsell, Esquire at Linda Gutsell, Esquire, at 116 W. Washington Street, Suite 2A, Charles Town, West Virginia 25414 by United States first class mail postage prepaid, this 16 day of July, 2007.


Richard G. Gay, Esquire
Nathan P. Cochran, Esquire