

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAR AWAY FARM, LLC,

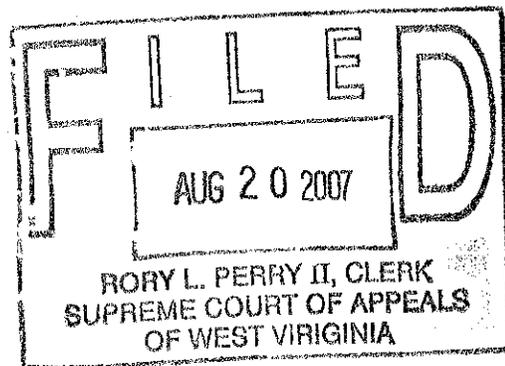
Appellant,

v.

DOCKET NO. 33438

**JEFFERSON COUNTY ZONING
BOARD OF APPEALS, a public body;
THOMAS TRUMBLE, Member,
JEFF BREESE, Member, and
TIFFANY HINE, Chair,**

Appellees.



**RESPONSE OF
EDWARD E. DUNLEAVY AND EDWARD R. MOORE
TO BRIEF ON APPEAL**

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**RESPONSE OF
EDWARD E. DUNLEAVY AND EDWARD R. MOORE
TO BRIEF ON APPEAL**

I. Kind of Proceeding and Nature of Ruling Below

This is an Appeal of an Order of the Circuit Court of Jefferson County, sitting as an appellate court to review, on *certiorari*, a decision of the Jefferson County Zoning Board of Appeals (“the BZA” or “the Board”). The BZA, acting pursuant to the Jefferson County Planning and Zoning Ordinance, denied the application of Far Away Farms, LLC, for a conditional use permit to develop a residential subdivision consisting of 152 single family residential units on 121.8 acres, more or less, situate in the Rural District of Jefferson County. Far Away Farms, LLC, appealed the decision of the BZA to the Circuit Court of Jefferson County. By Order entered on September 18, 2006, the Circuit Court affirmed the decision of the BZA.

II. Statement of Facts

1. These Appellees, Edward E. Dunleavy¹ and Edward R. Moore² (“Dunleavy and Moore”), expressly deny the allegations set forth in Paragraphs No. 14, 15, 17, 18, 20, 23, 27, 28, 30, and 35.

¹ Edward E. Dunleavy is a resident, and president of the homeowners association, of the nearby Trough Bend, a low-density residential development consisting of seven (7) lots of 8+ to 11+ acres in size. *See*, Certified Record of the BZA, File #AP04-05, Item 6 at A.10. The homeowners association is the record owner of a common-interest parcel, reserved for surface water management, which confronts the subject property and which potentially could be compromised by FAF’s proposed development. However, FAF did not list the homeowner’s association as a confronting landowner in the support data submitted with its CUP application, to the end that the homeowners association did not receive the notice to adjacent and confronting landowners required by the Ordinance. *See*, Ordinance, Sec. 7.4(e) (“The developer shall submit a list of all property owners, and their addresses, adjacent to and confronting the property which is to be developed.”).

2. Land use and development in Jefferson County is governed by a comprehensive planning and zoning regulatory scheme which includes the Comprehensive Plan,³ the Zoning and Development Review Ordinance (hereinafter, “the Ordinance”),⁴ and other County ordinances and regulations.

3. The property at issue in this appeal is a parcel containing 121.8 acres, more or less, which parcel is now called “Faraway Farm”⁵ (hereinafter, also referred to as, “the subject parcel”), and which parcel is bounded by Trough Road.

4. According to Jefferson County’s Zoning Map, Faraway Farm is located in the Rural District.⁶

5. The description of the Rural District, and the principal uses permitted therein are found in Section 5.7 of the Ordinance.

6. The Ordinance describes the purpose of the Rural District:

The purpose of this district is to provide a location for low density single family residential development in conjunction with providing continued farming activities. The district is generally not intended to be served with public water or sewer facilities, although in situations

² Edward R. Moore is the owner of an 73.42-acre parcel immediately adjacent to the subject parcel. *See*, Certified Record of the BZA, File #AP04-05, Item 1 at Attachment 1. Within the past year, Mr. Moore donated a conservation easement on his property.

³ Jefferson County first adopted a Comprehensive Plan in 1972. The Comprehensive Plan was revised in 1986, 1994 and 2004.

⁴ The Zoning and Development Review Ordinance, which became effective on October 8, 1988, established county-wide zoning in Jefferson County.

⁵ These Appellees do not know which owner in the chain of title gave the farm this name, however, it does not appear on early maps of the property. Early maps only bear the name of the farm’s owner at the time; e.g., Civil War-era maps show the farm with the name “Osbourne,” who was the owner of the property at that time according to county land records. *See*, Supplemental Certified Record of the BZA, File #Z04-04, Item 1 at Exhibit 3.

⁶ *See*, Supplemental Certified Record of the BZA, File #AP04-05, Item 6 at Attachment 5B.1.

where the Development Review System is utilized, it may be. A primary function of the low density residential development permitted within this section is to preserve the rural character of the County and the agricultural community. All lots subdivided in the rural District are subject to Section 5.7d Maximum number of lots allowed. The Development Review system does allow for a higher density [if] a Conditional use permit is issued.

Ordinance, Sec. 5.7 (capitalization in the original).

7. At the time of the subject application, Section 5.7(d) established the maximum number of lots, and the permitted density of those lots, in the Rural District as one (1) lot for every ten acres in the parcel, with a minimum lot size of three (3) acres, Ordinance Sec. 5.7(d)(1), or, if clustering was used, one (1) lot for every fifteen acres, with a minimum lot size of 40,000 sq. ft. Ordinance Sec. 5.7(d)(2).

8. The principal permitted uses in the Rural District include [s]ingle family dwelling, including mobile homes provided that they are utilized as single family dwelling units on the minimum lot size specified in Section 5.15.

Ordinance, Sec. 5.7(a)3.⁷

9. Although some of the properties surrounding Faraway Farm have been subdivided, all but one such division created large rural lots suitable to continued agricultural use, and in full compliance with the low density residential subdivision allowed as of right in the Rural Zone under Section 5.7(d) of the Ordinance.⁸

⁷ There is, however, no Section 5.15 in the Ordinance, as the last section in Article 5 of the Ordinance is Section 5.10. Section 5.15 was the provision establishing minimum lot sizes in the original, 1988 Ordinance. The minimum lot requirements for the Rural District now are found in Section 5.7(b) and 5.7(d).

⁸ See, fn. 4, *supra*. The subdivision not developed according to these limitations was Cavaland, developed in 1976, prior to the 1988 adoption of the Ordinance, and, therefore not subject to the limitations of Section 5.7(d), but which nonetheless is comprised of lots of greater than one acre in size. See, Certified Record of the BZA, File #AP04-05, Item No 6 at Attachment 5A.2.1. It

10. Of the 176 individual parcels within a one mile radius of the subject property's point of public road ingress/egress,⁹ the average parcel size is over fourteen (14) acres, and 110 of the parcels are greater than three (3) acres in size.¹⁰

11. Trough Road is an old country road which in some areas, including areas abutting Far Away Farm, is too narrow to permit two vehicles to pass one another or to be used by the County's school buses.¹¹

12. High-density residential use, which is not a principal permitted use in the Rural District, may be allowed if a Conditional Use Permit ("CUP") is approved through the Development Review System ("DRS"),¹² which includes the Land Evaluation Site Assessment ("LESA"), found in Article 6 of the Ordinance, and the procedural provisions of Article 7.

also is noteworthy that a prior owner of Far Away Farm had already created a residential subdivision from a portion of the farm, Far View Farms, on December 29, 1987. *See*, Certified Record of the BZA, File No. AP04-05, Item 6 at Attachment 5A.8.3. Even though Far View Farms was created before the effective date of the Ordinance, the number and size of its lots comply with Sec. 5.7(d) of the Ordinance.

⁹ This is the southeast corner of which the FAF complains in its Petition for Appeal.

¹⁰ *See*, Official Record of the BZA Meeting of January 20, 2005. *See, also*, BZA Hearing Tr., July 26, 2005, at pp.174:5 – 178:14 (The transcripts prepared by FAF are not the official records of the proceedings of the BZA, and these Appellees do not concede that they are entirely accurate. The transcripts may be helpful for quick reference where cited herein, however. Whenever the transcripts are cited herein, it is pursuant to this express caveat.) *See, also*, Certified Record of the BZA, File #AP04-05, Item No 6 at Attachments 5A.1 to 5A.10.1.

¹¹ Trough Road in some areas is as narrow as 14 ft. in width. *See*, Official Record of the BZA Meeting of January 20, 2005. *See, also*, BZA Hearing Tr. of January 20, 2005, at pp. 106-112. This is far below the Division of Highways design standards for the service burden on the road. *Id.* at 110. *See*, Certified Record of the BZA, File #AP04-05, Item No 1 at Addendum, 7A.17 and 7A.14.

¹² Ordinance, Sec. 5.7.

13. "The purpose of the Development Review System (also referred to as DRS) is to assess a particular sites (sic) development potential based on criteria which determine the agricultural longevity of the parcel in combination with the presence of and compatibility with public services adjacent and in close proximity to the site."

Ordinance, Section 6.1.

14. "Upon receipt of an application [for a conditional use permit], the site will be evaluated by the Planning and Zoning Staff using the Development Review System." Ordinance, Section 6.2.

15. The LESA evaluation performed under the DRS, Article 6, has two major components, the Soils Assessment¹³ and the Amenities Assessment,¹⁴ which

... consist of criterion which each possess a numerical value that is weighted relative to its importance as an indicator of a parcel's agricultural significance or its development potential. The total numerical value of the combined criteria is 100 points: the Soil Assessment contributes 25 points and the Amenities Assessment contributes 75 points. The highest numerical value of the combined criteria indicates that a parcel is more suitable for agriculture, whereas, the lowest numerical value indicates that development is more appropriate for the site....

Ordinance, Section 6.2.

¹³ The Soils Assessment evaluates the soil types on the site for agricultural viability, using corn as an indicator crop. Ordinance, Sec. 6.3, and Note thereto. Therefore, the agricultural viability of the soils is limited to its assessment for crop production and does not necessarily reflect viability for other agricultural uses, such as livestock operations.

¹⁴ At the time of the FAF application, the Amenities Assessment examined factors such as the size of the site, adjacent development, distance to growth corridor, comprehensive plan compatibility, proximity to schools, and availability of public water and sewer. Ordinance, Sec. 6.4 (2002 version). The factors assessed were modified pursuant to the County Commission's enactment of amendments to the Ordinance, effective April 8, 2005.

16. At the time of the FAF application, a LESA score of 55 or less allowed an application to advance to the Compatibility Assessment of the proposed project. Ordinance, Section 6.2 (2002 version).

17. The subject property currently is owned by Far Away Farm, LLC, ("FAF") a West Virginia limited liability company, which purchased it from Dwayne and Alice Masemer on or about July 15, 2004.¹⁵

18. On or about June 23, 2004, the Masemers filed an application for a CUP so as to secure the right to develop 152 single-family residential home sites¹⁶ on the subject parcel, which subdivision would exceed the low density residential development that is allowed as of right in the Rural Zone.¹⁷

19. As part of the application process, FAF also submitted support data, as required by Sec. 7.4(d) of the Ordinance, and a list purported to name all adjacent landowners, as required by Sec. 7.4(e).

20. Upon his review of the application and support data, the Zoning Administrator, on September 22, 2004, calculated a LESA score of 46.2 for the site, because of which the development proposal was eligible to proceed for further consideration pursuant to Section 6.5(c) of the Ordinance.¹⁸

¹⁵ See, Certified Record of the BZA, File #Z04-04, Item 1.

¹⁶ This includes one site for the existing home on the property. See, Certified Record of the BZA, File #Z04-04, Item 1.

¹⁷ Ordinance, Sec. 5.7(d), as noted previously herein.

¹⁸ See, Certified Record of the BZA, File #Z04-04, Item 10. As noted previously, at the time of the FAF application, a site had to receive a LESA score of 55 or less to progress for further consideration under the DRS.

21. Pursuant to Sec. 8.1(b) of the Ordinance, neighboring landowners Dunleavy and Moore appealed the Zoning Administrator's LESA point assessment to the BZA.¹⁹

22. On January 20, 2005, the BZA conducted a hearing lasting more than five hours on the Dunleavy and Moore appeal, at which all parties were permitted to present witnesses, cross-examine opposing witnesses, present documentary evidence and make argument to the Board,²⁰ as a result of all of which, the BZA received substantial evidence concerning the design features of the proposed development, the capacity of the roads serving the subject parcel, the developer's traffic study, the size, density and uses of neighboring parcels, and the historic significance of the subject parcel.

23. The persons testifying at the January 20, 2005, hearing included Dunleavy,²¹ Gary Capriotti,²² Charles Printz,²³ Gregory Mason,²⁴ and Dane Knopp²⁵ for

¹⁹ See, Certified Record of the BZA, File #AP04-05, Item 1.

²⁰ Several members of the public also attended the meeting and wished to be heard on the appeal, but the BZA, through Member Rockwell, stated that the procedural rules did not allow for public comments at hearings of this type. See, Official Record of the BZA Meeting of January 20, 2005. See, also, BZA Hearing Tr. (January 20, 2005) at 134:17.

²¹ Mr. Dunleavy presented substantial evidence regarding all of the LESA assessments appealed, particularly the poor physical condition of Trough Road, and the historic significance of the subject parcel as the core of the Battle of Shepherdstown during the American Civil War. See, Official Record of the BZA Meeting of January 20, 2005. See, also, BZA Hearing Tr. (January 20, 2005) beginning at p. 78.

²² A long-time resident of the immediate neighborhood, who testified at length regarding the inadequate physical condition of Trough Road. See, Official Record of the BZA Meeting of January 20, 2005. See, also, BZA Hearing Tr. (January 20, 2005) beginning at p. 144.

²³ A long time resident of the near neighborhood, and an officer in local historical organizations, who testified regarding the historical significance of the subject parcel and of Trough Road itself, and regarding the dangerous condition of Trough Road. See, Official Record of the BZA Meeting of January 20, 2005. See, also, BZA Hearing Tr. (January 20, 2005) beginning at p. 135.

the Dunleavy and Moore appeal, and Mark Dyck, the design coordinator for FAF, and Mr. Keller, the traffic study expert, for FAF.

24. Following the hearing on January 20, 2005, the BZA entered a decision changing the LESA point assessment to 51.2 points.²⁶

25. Dunleavy and Moore appealed the BZA's decision on the LESA score to the Circuit Court, which ultimately affirmed the decision of the BZA in its Order of September 18, 2006.²⁷

26. Because of the passing LESA score, the CUP application was allowed to progress to a Compatibility Assessment Meeting conducted pursuant to Sec. 7.6 the Ordinance, which Compatibility Assessment Meeting occurred on April 13, 2005, and lasted approximately seven (7) hours.

27. The staff recorded all of the comments made by members of the public in attendance at the Compatibility Assessment Meeting, generating a list of one

²⁴ Resident of an adjacent, 13-acre parcel, who testified that his property and an adjacent 10-acre parcel were in actual agricultural use, despite that these parcels were categorized by the Zoning Administrator in the calculation of the LESA score as parcels indicating "intense development pressure" on the subject parcel. *See*, Official Record of the BZA Meeting of January 20, 2005. *See, also*, BZA Hearing Tr. (January 20, 2005) beginning at p. 139.

²⁵ Neighborhood resident who testified regarding the historic significance of the subject parcel and proffered an 1850 census map which included the subject parcel.

²⁶ The BZA, in its February 17, 2005, decision on the appeal of the LESA score, incorrectly calculated the score, following its upward adjustment of five (5) additional points, to be 50.2 points. The Circuit Court corrected the arithmetic error in its Order of September 18, 2006. Order of September 18, 2006, at p. 3, fn. 1.

²⁷ The Circuit Court consolidated the Dunleavy-Moore appeal with FAF's later appeal of the BZA decision denying the CUP, and entered a unitary Order dispensing of both appeals. Order of September 18, 2006.

hundred six (106) issues, of which the developer agreed to address and resolve thirty-nine (39) issues, leaving sixty-seven (67) issues that were deemed unresolved.²⁸

28. The unresolved issues as listed by the zoning staff did not constitute sixty-seven (67) separate and distinct compatibility issues, but were the concerns about and suggestions for abatement of incompatibility, expressed by individuals attending the Compatibility Assessment Meeting, that related to a relatively few issues,²⁹ including road adequacy/safety, proposed density,³⁰ water/sewer (including impact on well water supplies), schools, emergency services, preservation of the neighborhood's rural character, buffers, the historic significance of the site and the impact of construction activities that would be undertaken if the development were permitted.³¹

²⁸ See, Certified Record of the BZA, File #Z04-04, Item 34, April 13, 2005.

²⁹ FAF attempts in this appeal to use the specter of "67 unresolved issues" to bolster its claim that the BZA failed to consider all issues before it. In fact, FAF itself acknowledged below that the numerous concerns listed individually by the staff as separate issues actually constituted a relatively few issues. Prior to the hearing, FAF submitted to the BZA a memorandum categorizing the various concerns and suggestions into those few compatibility issues, and analyzed them by category. See, Supplemental Certified Record of the BZA, File #Z04-04, Item 2.

Moreover, at the July 26, 2005, hearing before the BZA, FAF's counsel argued that the majority of the 67 items listed in the staff report were not compatibility issues or issues over which the BZA had jurisdiction at all. See, Official Record of the BZA Meeting of July 26, 2005 (beginning at Track 28). See, also, BZA Hearing Tr. (July 26, 2005) at pp. 31-37.

³⁰ Twenty-three (23) or more of the sixty-seven (67) unresolved issues listed in the staff report addressed road adequacy/safety and density.

³¹ The numerous concerns expressed by neighboring residents about such construction activities are not the type of issues traditionally included as issues of the proposed development's compatibility with the neighborhood, but were nonetheless allowed and listed by the staff as compatibility issues. These Appellees do not concede, but in fact dispute, that these construction activity concerns, or even some of the other comments listed as "unresolved issues," were proper compatibility considerations for the BZA, and would have so argued but for the fact that the opportunity to dispute the staff's allowance of such remarks as compatibility issues is not afforded parties in these proceedings.

29. Because there were unresolved issues of compatibility, the CUP application was required, under Section 7.6(d) of the Ordinance, to proceed to a hearing before the BZA, which hearing occurred on July 26, 2005.³²

30. Prior to the hearing, as permitted by the BZA procedural rules, the parties submitted documentary materials in support of their respective positions, including FAF's submission of a 30-page memorandum and approximately 320 pages of documents, which included the reports of asserted experts hired by FAF.³³

31. Because the BZA's recently-adopted procedural rules did not include specific time allotments for a compatibility hearing on a CUP, the BZA decided to utilize the time guidelines provided in the Ordinance, at Section 7.7(b), which were the time limits that had been consistently used in hearings on CUPs conducted by the Planning Commission and the BZA in prior years.³⁴

32. At the close of evidence and public comment, the BZA continued the hearing to August 9, 2005, for the sole purpose of deliberation on the CUP before it, and at that time announced its decision to deny the CUP for the development as proposed, due to the incompatibility of the project with the surrounding neighborhood, created by

³² Had there been no unresolved issues, there would have been no public hearing required before the BZA. Ordinance, Sec. 7.6(f).

³³ See, Supplemental Certified Record of the BZA, File #Z04-04, Item 2, July 15, 2005.

³⁴ In its Brief, FAF asserts that the BZA lacked experience in hearing and making CUP compatibility assessments. Brief on Appeal, p. 19 at para. 20. This is not true. Prior to April 8, 2005, the Planning Commission conducted compatibility hearings in the first instance, but the BZA routinely conducted full hearings on CUP applications on appeals from the Planning Commission's CUP decisions. Pursuant to the Ordinance provisions then in effect, the BZA hearings were conducted using the same time limits as did the Planning Commission before, which limits still appear in the Ordinance. See, Ordinance, Sec. 7.7(c)(2002 version).

the high density proposed for the development and the inadequacy of Trough Road to serve it.³⁵

33. On September 15, 2005, the BZA issued its decision denying the CUP.³⁶

34. FAF filed a timely appeal of the BZA decision to the Circuit Court.

35. By Order entered September 18, 2006, the Circuit Court affirmed the decision of the BZA, which Order is the subject of FAF's Petition for Appeal herein.

III. Assignments of Error

FAF now assigns the following errors to the Circuit Court, all of which are contested by your Appellees, Dunleavy and Moore:

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 (sic) "density" for the "compatibility" standard.

(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 scores.

³⁵ See, Official Record of the BZA Meeting of August 9, 2005. See, also, BZA Hearing Tr. (August 9, 2005).

³⁶ For reasons unknown to these Appellees, the decision of the BZA does not appear in the Certified Record of the BZA. It is, however, attached to FAF's Petition for Writ of *Certiorari* filed in the Circuit Court.

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

A. Standard of Review

This Court reviews the order of the Circuit Court under the same standard of review that the Circuit Court was required to apply in its review of the decision of the BZA. *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93, 102 (2003), citing *Webb v. West Virginia Board of Medicine*, 212 W. Va. 149, 155, 569 S.E.2d 225, 231 (2002). That standard of review has been succinctly stated and reiterated by this Court in numerous prior decisions. "While on appeal there is a presumption that a board of zoning appeals acted correctly...." Syll. Pt. 3, *Harding v. Board of Zoning Appeals of City of Morgantown*, 159 W. Va. 73, 219 S.E.2d 324 (1975); *Wolfe v. Forbes*, 159 W. Va. 34, 45, 217 S.E.2d 899, 906 (1975). See also, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93, 102 (2003); *Henry v. Jefferson County Planning Com'n*, 201 W. Va. 289, 291, 496 S.E.2d 239, 241 (1997); *Ranson v. City of Charleston*, 201 W. Va. 241, 243, 496 S.E.2d 191, 193 (1997); *Shannondale, Inc. v. Jefferson County Planning and Zoning Com'n*, 199 W. Va. 494, 499, 485 S.E.2d 438, 444 (1997). Following this principle, a reviewing court may disturb the decision of a zoning appeals board only "where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or acted beyond the scope of its jurisdiction." *Wolfe v. Forbes*, 159 W. Va. at 45, 217 S.E.2d at 906.

B. Discussion of Law

FAF works an injustice to the spirit, purpose and procedural requirements of the Ordinance in its characterization of the relevant provisions. FAF mischaracterizes the criteria for the issuance of a CUP, coming finally to the point where it argues that a successful LESA score is the only standard that it must meet to gain approval of its application.³⁷ This argument is denied validity by the express provisions of the Ordinance itself, the requirements and procedures of which have been noted by this Court in prior decisions. *See, e.g., Henry v. Jefferson County Planning Com'n*, 201 W. Va. 289, 496 S.E.2d 239 (1997)(wherein this Court noted that the BZA denied the applicant's CUP because, *inter alia*, its proposed density and its incompatibility with the neighborhood); *see, also, Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 538-539, 591 S.E.2d 93 (2003)(reciting the steps in the DRS process).

All of the Ordinance's criteria apply to FAF's CUP application, just as they apply, and always have applied, to the applications of other would-be developers of rural land. These are the stated "conditions" for the issuance of the CUP. In urging the Court to ignore some of the required conditions, FAF is fundamentally asking the Court

³⁷ Brief on Appeal, at p. 28. Had a passing LESA score been the only criterion under the prior Ordinance, then the outcome in the *Henry* case, where the application earned a LESA score of 39.04, would have had to be granted, but it wasn't. *See, Henry v. Jefferson County Planning Com'n*, 201 W. Va. 289, 496 S.E.2d 239, (1997). This Court would not have had any reason to remand the matter to the BZA for entry of findings of fact and conclusions of law, because only one fact – the LESA score – would have been dispositive, and that fact was already before this Court in that appeal.

It is noteworthy that in the *Henry* case, the applicant argued to the BZA that the passing LESA score alone entitled him to the CUP. BZA Minutes of August 18, 1994. The BZA did not accept that argument, and this Court did not disturb the denial of the CUP on appeal. Consequently, FAF's argument that a passing LESA score is the only criterion for a CUP is an argument that was made to and rejected by the BZA many years ago. It never was the rule under this Ordinance.

to ignore the principle identified in its prior decisions as the foundation for conditional use permits under any zoning scheme.³⁸

“When it is granted, a special exception or conditional use permits certain uses which the ordinance authorizes under stated conditions.” Syll. Pt. 1, *Harding v. Bd. of Zoning Appeals of City of Morgantown*, 159 W.Va. 73, 219 S.E.2d 324 (1975). This Court has explained the principle underlying conditional uses:

The theory is that certain uses, considered by the local legislative body to be essential or desirable for the welfare of the community and its citizenry or substantial segments of it, are entirely appropriate and not essentially incompatible with the basic uses in any zone (or in certain particular zones), but not at every or any location therein or without restrictions or conditions being imposed by reason of special problems the use or its particular location in relation to neighboring properties presents from a zoning standpoint, such as traffic congestion, safety, health, noise, and the like.

Harding, Id. at 78, quoting A. H. Rathkopf, *The Law of Zoning and Planning*, 54-1 (3d ed., 1972). In accord with this underlying theory, the author of another learned treatise notes that

[t]he scheme of any ordinance authorizing exceptions requires two different kinds of findings by the board; first, as to the interest of the general public, and second, as to the interests of a particular neighborhood. Where these two elements are lacking, an exception cannot be properly granted.

E. C. Yokley, *Zoning Law and Practice* § 20-1 (4th ed. 1979). For all of these reasons, a landowner is entitled to a conditional use permit if – but only if – the conditions specified in the Ordinance are met, as it is these conditions that provide the assurance that the interests of both the general public and the particular neighborhood are protected.

³⁸ It also would be asking this Court to rewrite the Ordinance.

FAF's proposed high-density residential subdivision in the Rural District is such a use under the Ordinance. It might be compatible with the district's permitted uses, but only if it met the criteria (i.e., the stated conditions) necessary to the issuance of a CUP, and the special problems at its chosen location could be resolved. FAF's Petition for Appeal asks this Court to set aside these established legal principles and declare that FAF is entitled to a CUP even though the facts and evidence failed to demonstrate that its proposed development was compatible at the intended location, as required by the Ordinance.

1. The BZA did not Act Beyond its Jurisdiction and Apply and Erroneous Principle of Law in Applying the Wrong Version of the Ordinance

FAF urges this Court to permit it to introduce an entirely new Assignment of Error in its Brief on Appeal – an argument that it did not raise in its Petition for Appeal to this Court, an argument that it did not raise in its appeal to the circuit court, and an argument that it did not make to the BZA.

In support of its request to be allowed such a late addition, FAF says that it has only just discovered, since the filing of this appeal, the meeting minutes wherein the Jefferson County Commission adopted amendments to the Ordinance, applicable to CUP applications filed after April 8, 2003.³⁹ Because the BZA herein applied the Ordinance subsequent to the amendments, FAF argues that the BZA not only applied the wrong law, but that it acted beyond its jurisdiction in deciding FAF's CUP application – that is, that it lacked *subject matter jurisdiction!*⁴⁰

³⁹ Brief on Appeal, at p. 26.

⁴⁰ Brief on Appeal at p. 29. By arguing that the issue is one raising a question of the BZA's subject matter jurisdiction, FAF apparently intends to bolster its request to assert this new

It strains credulity that FAF would have only just learned of the passage of the 2005 amendments to the Ordinance, and the effective date of those amendments.

FAF's counsel are seasoned attorneys in the Jefferson County land-use arena. *See, e.g., Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d 873 (2005), *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93, (2003), *Singer v. Davenport*, 164 W. Va. 665, 264 S.E.2d 637 (1980), all being Jefferson County land use cases where at least one of FAF's counsel herein appeared.

Mark Dyck, the project designer who appeared on FAF's behalf at the administrative proceedings, and FAF's counsel must have known that the three amendments were pending, because both Mr. Dyck and Mr. Chakmakian appeared at and/or made written submissions to the County Commission for its two public meetings to discuss the proposed amendments held on February 23 and March 3, 2005. Minutes of those Special Sessions show that Mr. Dyck was present for the discussion on February 23, and that Mr. Chakmakian made a presentation and submitted written correspondence for the meeting of March 3.⁴¹ The minutes of the County Commission's meeting of

assignment of error, insofar as subject matter jurisdiction can be asserted at any time, even for the first time on appeal. *Id.* at n. 52. *See, e.g., Snider v. Snider*, 209 W. Va. 771, 777, 551 S.E.2d 693, 699 (2001).

The subject matter jurisdiction argument is so devoid of merit that this response limits its remarks on the point to this footnote. The BZA has subject matter jurisdiction over conditional use permits under state law. W. Va. Code § 8A-8-9(3). Even if it has applied an erroneous principle of law, it is not divested of that jurisdiction.

⁴¹ The Appellees herein will be submitting a Motion to Supplement the Record with these records shortly after the submission of this responsive brief. Due to problems encountered in the Office of the Clerk of the County Commission, attested copies of the records could not be secured so as to submit the motion simultaneously, but undersigned counsel has been advised that the problem has now been solved.

March 23, 2005,⁴² show that Mr. Chakmakian made a presentation to the Commission at the very meeting where the amendments were adopted.

The participation of FAF's representative and counsel in the public hearings on the amendments proposed in 2005 show that they were aware that the amendments were under consideration. It seems highly unlikely that parties who demonstrated enough interest in proposed zoning amendments to participate actively in the public hearings would not be interested enough to find out about the vote on those amendments until after the filing of the Petition for Appeal herein.

Even if this natural sequence of events did not happen, could attorneys as familiar with the Ordinance as these not recognize that they were hearing new or unfamiliar language when the BZA read the standards and definitions that it would be applying at the hearings on the CUP?⁴³ If not, wouldn't the fact that then-Zoning Administrator Paul Raco, during this discussion by the BZA, twice referred to the new amendments of April 8 serve as an adequate alert?⁴⁴ And yet, even though Mr. Gay spoke to preliminary matters, immediately on the heels of these comments, he made no objection to the BZA's stated intention to apply the Ordinance provisions that were expressly identified as 2005 amendments.⁴⁵

⁴² These minutes were attached to FAF's Motion to Supplement the Record, filed in this appeal on or about August 1, 2007.

⁴³ See, Official Record of the BZA Meeting of July 26, 2005 (at Track 24) and Official Record of the BZA Meeting of August 9, 2005. See, also, BZA Hearing Tr. (July 26, 2005) at 26:21 – 28:3; BZA Hearing Tr. (August 9, 2005) at 6:12-18.

⁴⁴ See, Official Record of the BZA Meeting of July 26, 2005 (at Tracks 26 and 27). See, also, BZA Hearing Tr. (July 26, 2005) at 30:7 and 30:15.

⁴⁵ See, Official Record of the BZA Meeting of July 26, 2005 (beginning at Track 28). See, also, BZA Hearing Tr. (July 26, 2005) at 31:18 – 36:8.

Furthermore, while FAF's counsel herein represent that they did not learn of the passage and effective date until after this appeal was filed, these same attorneys represent the Petitioner in a case now pending in Jefferson County, found at *Jefferson County Citizens for Economic Preservation v. Jefferson County Comm'n, et al.*, Civil Action No. 05-C-143, filed in the Office of the Circuit Clerk on May 9, 2005 ("JCEP case"). This civil action is a direct challenge, by *certiorari*, to the 2005 amendments to the Ordinance. Paragraph No. 6 of the Petition filed therein states: "On March 23rd, 2005, the County Commission voted to adopt the new Amendments to the zoning ordinance, effective April 8, 2005."⁴⁶ If counsel herein were unaware of the passage and effective date until after the filing of the instant appeal, then how could they have drafted Paragraph No. 6 of the petition for the JCEP case some *two months* before the BZA's hearing on FAF's CUP application, and some *seventeen months before* Judge Steptoe entered the order from which appeal is taken herein.

The assertion of recent discovery is simply unsustainable. Counsel knew, and yet stood mute while the BZA discussed its intention to rely on the updated provisions. When FAF's counsel failed to object to the BZA's reference to the 2005 amendatory language at either the July 26, 2005, or the August 9, 2005, hearing, they waived the issue.

Even if they had not waived the issue, the assignment of error would be without merit. The 2005 amendments to Sec. 7.6(f) and (g) did not introduce substantive changes into the Ordinance, or change the way the CUP applications had always been

⁴⁶ These Appellees will be filing a motion to supplement the record with an attested copy of this petition. *See*, n. 41, *supra*.

decided. These amendments merely collected (reiterated in two places⁴⁷) and clarified the criteria that were scattered across provisions of Sec. 7.6, and which the Planning Commission and BZA had been applying to CUP applications for many years. The criteria for approval of a CUP application have always been a successful LESA score, the resolution of compatibility issues left unresolved at the Neighborhood Compatibility Meeting, and the hearing board's conclusion that the development is compatible with the neighborhood.⁴⁸

The 2005 amendments exposed FAF to no new or different criteria that they would not have had to meet under the prior version of the Ordinance. The BZA's reference to the amended Ordinance made no difference to the consideration of FAF's application. In fact, nowhere in its Brief does FAF even suggest to this Court that the outcome would have been different under the prior version of the Ordinance.

If it was error for the BZA to refer to the updated Ordinance, the error was harmless, as the analysis and outcome would have been no different under the former version.

⁴⁷ The amendatory language is repeated in Sec. 7.6(f) and (g) (2005 version).

⁴⁸ See, Sec. 7.6 (2002 version), especially Sec. 7.6(a), 7.6(b), (e), (f) and (g). That the third prong existed prior to the 2005 amendments is demonstrated by the fact that even where all issues raised at the Neighborhood Compatibility Meeting were resolved at that meeting, and no public hearing before the Planning Commission or BZA was required, those bodies still had the power to issue the CUP *with conditions*. Sec. 7.6(f) (2002 version). Because the only issue under consideration was compatibility, this language in former Sec. 7.6(f) makes clear that the hearing board could address, through the imposition of conditions, issues of compatibility that may not have been raised by members of the public at the Neighborhood Compatibility Meeting. This step in the process merely was clarified by the 2005 amendments.

2. The Court did not Err in Concluding that the BZA Correctly Applied the Three CUP Standards

The current version of the Ordinance sets out the criteria that an applicant must meet to secure the issuance of a CUP, providing that the

... standards governing the issuance of Conditional Use Permits shall be: successful LESA point application; Board of Zoning Appeals 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 at Sec. 7.6(g)(2005 version). As discussed in the preceding section, even before the 2005 amendments to the Ordinance, these were the criteria applied in the determination of CUP applications. While assigning error to the BZA's reference to the updated version of the Ordinance, FAF alternatively assigns error to the BZA's application of those criteria.

Throughout its discussion of the BZA's application of the Ordinance's criteria to FAF's development proposal, there is an overriding mischaracterization of the criteria that an applicant is required to meet and of the BZA's duty when determining if those criteria have been met. While the Ordinance states that the "standards governing the issuance of Conditional Use Permits shall be ..., " see above, Ordinance at Sec. 7.6(g)(2005 version), FAF persistently argues that the word "shall" creates an affirmative duty to resolve all unresolved compatibility issues – even to the point of arguing that the Ordinance says that the BZA *must* resolve all unresolved issues.⁴⁹ If this were the proper reading, then no application could ever be denied, as the BZA would have to "resolve" all

⁴⁹ See, e.g., Brief on Appeal, at pp. 29, 37.

compatibility issues,⁵⁰ and declare that all impediments to compatibility had been abated by the resolution.⁵¹ This could not be the proper reading of the Ordinance, because it would render every application's determination a foregone conclusion of success. It is from this improper mooring that FAF embarks upon its assignments of error to the BZA in its application of the CUP standards.

As demonstrated by the following discussion, the BZA properly considered FAF's CUP application pursuant to the standards and found it to be lacking in essential areas of compatibility.

- a. The Circuit Court did not Err when it Concluded that the BZA's Finding of Incompatibility was Based upon Proper Considerations of Density and Adequacy of the Road

FAF's argument stands logic on its head. FAF admits that the development it proposes had to apply for a CUP only because the planned density is higher than that permitted in the rural zone. Yet, FAF argues that the density of the proposal cannot be a consideration in the CUP process,⁵² only the type of the proposed use. FAF asserts that because residential uses are permitted in the rural zone, its

⁵⁰ How the BZA could resolve unresolvable issues, FAF does not venture to say.

⁵¹ By the express terms of the Ordinance, compatibility issues that are resolved are those that no longer present an impediment or create an incompatibility. This is why, under both the current and past versions of the Ordinance, no public hearing was required if all compatibility issues were resolved at the Neighborhood Compatibility Meeting. Ord., Sec. 7.6(f) (2002 and 2005 versions).

⁵² FAF's argument on this point is inconsistent with its argument that the BZA has to specifically address each and every unresolved issue from the Neighborhood Compatibility Meeting. The density of the proposed development was one of the unresolved issues that appeared with the highest frequency in the list of issues in the Staff Report. How could the BZA address all of the unresolved issues and not address density? Presumably, FAF's answer would be that the BZA could address it, but its options in resolving it were limited to only one: the BZA would have to conclude that the density did not matter.

proposed residential subdivision is “compatible as a matter of law”⁵³ in the rural zone, irrespective of the proposed density.

What FAF never explains is why – if density is not an issue under consideration, and residential development is compatible as a matter of law – its proposed development was required to go through the DRS process at all. What would be the purpose? The obvious answer is that, if FAF is correct, there would be no reason to subject the proposed development to the DRS, because its approval would be a foregone conclusion. The DRS would have no function to perform, and it would be absurd to force applicants to endure the process. Therefore, the conclusion urged by FAF must be, and is, wrong.

Because it is presumed that a legislative body intends every word in a statute to have purpose and meaning, *State ex rel Johnson v. Robinson*, 162 W.Va. 579, 582, 251 S.E.2d 505, 508 (1979), “an interpretation of a statute which gives a word, phrase or clause thereof no function to perform ... must be rejected as unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective.” Syl. Pt. 2, in part, *Ex parte Watson*, 201 W.Va. 201, 95 S.E. 648 (1918). *In accord*, *Verizon West Virginia, Inc. v. W. Va. Bureau of Employment Programs*, 214 W.Va. 95, 108, 586 S.E.2d 170, 183 (2003)(citing *Ex parte Watson*). Furthermore, because a legislative body is not presumed to have intended an absurdity, it has long been the rule in West Virginia that, “[w]here a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made.” Syl Pt. 2, *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E.

⁵³ Brief on Appeal at p. 32.

350 (1938). Because it would rob the DRS provisions of all meaning and function, and because it would result in an absurd outcome, the conclusion urged by FAF must be, and is, wrong.

While it is true that the outcome of the DRS process may be to allow greater density than would otherwise be allowed in the Rural District,⁵⁴ it is not true, as FAF repeatedly implies in its Brief, that the function of the DRS is to *allow* increased density.⁵⁵ The function of the DRS process is to *determine if* a higher density development should be permitted, not to guarantee a permit for any degree of density desired by the developer for a given parcel of land. Where, as here, the proposed density is the only reason that the residential development is subject to the DRS in the first instance, it is folly to suggest that the proposed density has no bearing on the ultimate determination of compatibility necessary for the issuance of a CUP. In essence, it is the proposed density that is being tested against the compatibility standard.

FAF also argues that density is unrelated to type of residential use. Not only is this not true in Jefferson County's Ordinance, it is not true in zoning ordinances in general. Zoning ordinances routinely define residential uses according to the density of the residential use, restricting some districts to single-family residential use while allowing two-family or multi-family residential uses only in other zones.⁵⁶ Minimum lot

⁵⁴ Ordinance, Sec. 5.7.

⁵⁵ See, e.g., Brief on Appeal at p. 32.

⁵⁶ See, e.g., "Zoning Ordinance for the City of Charleston, West Virginia," at Sec. 3-010.A. and Sec. 3-050 (Permitted Land Use Table). See, also, *Harding v. Bd. of Zoning Appeals of the City of Morgantown*, 159 W.Va. 73, 80-81, 219 S.E.2d 324 (1975), in which the proposed conditional use was for multi-family residential in the R-2 District, which allowed only single-family and two-family residences as primary uses. Nowhere in *Harding* did this Court suggest that the

sizes per residential unit typically vary depending upon the type of residential use permitted.⁵⁷ Contrary to the argument of FAF, all residential uses are not equal, and density is typically the defining characteristic for differing residential use classifications in any zoning ordinance.

More to the point, FAF's argument, put into practice, would produce a result that clearly is offensive to the intent of the Ordinance. Taken to its logical conclusion, FAF's theory would allow the entire Rural District to be blanketed in high density, urban-type residential development -- in which case it would no longer be the Rural District, distinct from, say, the Residential Growth District. The Rural District's defining characteristic is low density uses. This is why developments such as those proposed by FAF are permitted only as conditional uses, and only after proving their compatibility with the neighborhood surrounding the intended location. FAF failed to make this showing, as determined by the Board and affirmed by the Circuit Court.

FAF attempts to discredit the BZA's decision by wrongly attributing to the BZA a ruling that it did not make. Nowhere in its decision of September 15, 2005, did the BZA suggest that the proposed development was incompatible simply because it featured a higher density than that permitted of right in the rural zone, nor that density alone was the primary factor in its finding of incompatibility, as FAF repeatedly asserts. The document speaks for itself. The BZA concluded that the planned development was incompatible because the proposed density was significantly higher than the surrounding neighborhood, and that the road serving the parcel was inadequate for the number of

proposed multi-family use was compatible as a matter of law in the R-2 District, just because it was a residential use.

⁵⁷ See, e.g., Ordinance at Sec. 5.4(b).

homes that the development would add. *See*, Order Denying Conditional Use Permit Application, at p. 3-4. The BZA did not suggest that a development of some lesser density, while still exceeding the density permitted of right in the rural zone, could not be found to be compatible. In fact, the Board expressly suggested otherwise. *See*, Order Denying Conditional Use Permit Application, at p. 4.

FAF has cited no Ordinance provision or other authority that would make the density proposed an improper factor in the compatibility determination for the subject CUP. Nonetheless, FAF forcefully contends that the BZA cannot consider density as a compatibility factor.

Even early cases applying Sec. 7.6(b)'s nonexclusive list of compatibility factors relied on the density of the proposed development as a factor in denying the CUP sought. *See, e.g., Henry v. Jefferson County Planning Com'n*, 201 W. Va. 289, 496 S.E.2d 239 (1997). Moreover, because the Ordinance requires the BZA to address the unresolved issues generated during the Compatibility Assessment Meeting,⁵⁸ and those issues can include concerns about proposed density, there is no theory that would support FAF's argument that the Board cannot consider density as part of the compatibility determination.

FAF next contends that in examining the density factor, the BZA applied an improper definition of "neighborhood," which, in turn, resulted in an unfairly skewed portrayal of the existing density in the relevant area.⁵⁹ The circuit court did not address

⁵⁸ Ordinance, Sec. 7.6(g). That the BZA must address the unresolved issues is not to be confused with FAF's contention that the BZA must *resolve* each of the unresolved issues.

⁵⁹ Brief on Appeal at pp. 33-35. It should be noted that the definition of "neighborhood" on which FAF relies was one of the April 8, 2005, amendments to the Ordinance. Under the version of the Ordinance to which FAF asserts it was entitled to have its application decided, the BZA

this question, because FAF did not raise this argument below. FAF's failure to present this argument to the circuit court makes it improper for consideration in this appeal. Syll. Pt. 3, *Wells v. Roberts*, 167 W.Va. 580, 280 S.E.2d 266 (1981), *citing*, Syll. Pt. 1, *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721 (W. Va. 1980). This Court has previously explained this rule:

It is essential that there has been a decision of an inferior court, since an appellate court is, on appeal, a court of review and not a court of first instance, exercising jurisdiction only in reviewing the rulings of the trial court, and being limited to review of the judgment, order, or decree of the court from which the appeal is taken.

City of Huntington v. Chesapeake & Potomac Telephone Co., 154 W.Va. 634, 639, 177 S.E.2d 591, 595 (1971), *quoting*, 4 C.J.S. *Appeal and Error*, Section 39 at page 152. *See, also*, Syll. Pt. 1, *Western Auto Supply Co. v. Dillard*, 153 W.Va. 678, 172 S.E.2d 388 (1970). The circuit court made no ruling on the neighborhood measurement issue because the issue was not before it. Consequently, there is no ruling for this Court to review on *certiorari*.

Even assuming, *arguendo*, that FAF did not waive this issue, the BZA did not err in applying the Ordinance as it did. The Ordinance, in Section 2.2 (2005 version), defines "neighborhood" as, "[a]n area *generally* confined to a one-mile radius from the perimeter of a proposed development." Emphasis added. The word "generally" does not create an immutable rule to be strictly applied even in the face of specific circumstances which make its application unsuitable.⁶⁰ Here, there were special circumstances that

had even greater discretion to determine the scope of the site's neighborhood on a case-by-case basis.

⁶⁰ "Generally" is commonly defined as, "... in disregard of specific instances and with regard to an overall picture" Miriam Webster's Collegiate Dictionary (10th Ed., 1993).

made the general rule unsuitable, because the boundary of the neighborhood that would result from application of the general rule would be bisected by the Potomac River and would include territory in Maryland on the other side of the River.⁶¹

Moreover, FAF had every opportunity to rebut the demonstrative evidence proffered by Mr. Dunleavy.⁶² It could have identified the parcels within the area that it believed constituted the neighborhood, and demonstrated that the parcels were, overall, more similar in density than Mr. Dunleavy's calculations suggested,⁶³ but FAF did not do so at any point in the proceedings below.⁶⁴ FAF's representative argued to the BZA that the perimeter drawn by Mr. Dunleavy was incorrect, that parcels not fully within the circle should be deleted and that parcels over 50 acres in size should be ignored because they distort the density picture.⁶⁵ But, FAF never, not once at any time, calculated

⁶¹ It seems imminently reasonable to recognize that the concept of "neighborhood" does not typically include territories separated by a body of water or other large geographical feature. If, however, as FAF insists, the neighborhood *must* be measured as the entire area within a one-mile of the perimeter of the subject property, then is the acreage underlying the waters of the Potomac to be counted as a single parcel? Is FAF prepared to include this area in a density comparison?

⁶² Unlike FAF, Dunleavy and Moore served all of their intended documentary submissions on counsel for FAF in advance of the January 20, 2005, hearing. Consequently, FAF had ample notice – literally months -- and an opportunity to rebut Dunleavy and Moore's calculations, if it could, at that hearing, or at the later hearing in July.

⁶³ Contrary to FAF's assertion, Mr. Dunleavy's calculations were not limited to mean lot size, but also included a count showing that, of the 176 parcels within the one-mile radius, 110 were more than (3) acres in size.

⁶⁴ See, Official Record of the BZA Meeting of July 26, 2005. See, also, BZA Hearing Tr. (July 26, 2005) at pp. 92-99. And, if FAF believed that mean, median, mode, standard deviation or normal distribution provided the most appropriate statistical model to demonstrate the existing density in the neighborhood as it identified it, FAF could have attempted to show that, too.

⁶⁵ FAF did not appear similarly concerned that the atypically small lots on the edge of Shepherdstown might falsely distort the representation of the area surrounding the subject parcel, even though this is the greater threat of distortion, as the Shepherdstown lots are the greatest distance from the site. See, Official Record of the BZA Meeting of July 26, 2005. See, also, BZA Hearing Tr. (July 26, 2005) at pp. 99-100.

relative densities or provided any other concrete example so as to show the BZA what the density composition of the neighborhood would be using its suggested protocols.⁶⁶ In short, FAF's claim that the proposed density of its development was similar to the existing neighborhood density was one of bald, unsubstantiated assertions.

Finally, FAF attempts to inflate the importance of Mr. Dunleavy's demonstrative exhibit to the BZA's ultimate conclusion that the proposed density was not compatible with the neighboring area. The BZA's decision reveals that the first piece of evidence upon which it relied was an aerial photograph showing the parcel and the surrounding area, which was an exhibit that FAF put into evidence.⁶⁷ The aerial photograph so clearly shows the relatively undeveloped state of the area that it would have constituted the substantial evidence necessary to support the BZA's conclusion⁶⁸

⁶⁶ For the Court's edification, and in direct response to FAF's unsubstantiated argument, these Appellees calculated the density distribution of the parcels within a one-mile radius of the perimeter of the subject parcel. The table of all of the lots occurring within the line urged by FAF were set out in a table attached to these Appellees' Response to the Petition for Appeal. Because FAF did not raise its argument to the Circuit Court, these calculations were not prepared for and entered upon the record below.

As an initial matter, the circle drawn by FAF in its Brief on Appeal is not the line that would occur measuring one mile from the perimeter of the subject parcel. The boundaries of the subject parcel are primarily straight lines, so that a line drawn one-mile therefrom also would result in boundaries of straight lines.

Four hundred three (403) parcels fall within this one-mile radius, with an average lot size of ten (10) acres if the Potomac River is counted, or an average lot size of 8.6 acres if it is not. The land located in Maryland is not counted, but would not result in a downward adjustment to the average calculated, as that land is a section of the C&O Canal National Park and is a single, large, undeveloped parcel.

⁶⁷ See, BZA Decision of September 15, 2005, at p. 2.

⁶⁸ Substantial evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *In re Queen*, 196 W. Va. 442, 446, 473 S.E.2d 483, 487 (1996).

even in the absence of Mr. Dunleavy's exhibit. In this case, a picture really was worth a thousand words.

The BZA did not substitute density for compatibility, but properly considered density as a compatibility factor, as had been done historically in the consideration of CUP applications. The BZA properly weighed the evidence presented to it by both parties to compare the proposed density to the existing density in the surrounding neighborhood. It is not grounds for reversal that the Court might have weighed the evidence differently, so long as substantial evidence exists to support the BZA's findings. "Neither this Court nor the circuit court may supplant a factual finding ... merely by identifying an alternative conclusion that could be supported by substantial evidence." *In re Queen*, 196 W. Va. 442, 446, 473 S.E.2d 483 (1996). Therefore, it was not error for the circuit court to uphold the BZA on this issue; it would have been error had the circuit court done otherwise.

b. The Circuit Court did not Err in
Affirming the BZA's
Resolution of Unresolved Issues

FAF's argument asserting that the BZA has a duty to resolve each of the compatibility issues raised by members of the public, but left unresolved at the end of the Compatibility Assessment Meeting, does not survive close scrutiny.⁶⁹ It is undeniable that the Ordinance's second standard for the issuance of a CUP is the Board's resolution

⁶⁹ It should be noted that in the *Henry* case, the applicant unsuccessfully argued to the BZA that Planning Commission should have addressed each and every unresolved issue in its hearing on the CUP application. BZA Minutes of August 18, 1994. Once again, FAF is making an argument that has already been resolved by years of administrative practice in the Planning Commission and the BZA.

of the unresolved issues. It is incorrect to suggest, as FAF does, that the BZA failed to fulfill its duty under this standard.

As an initial matter, it must be observed that it was FAF that proposed that the numerous itemized public comments could be grouped by general issue for consideration, effectively reducing the number of issues for consideration to twelve (12) instead of sixty-seven (67).⁷⁰ It was FAF that then argued to the BZA that the majority of the issues itemized in the staff report were not proper compatibility issues within the jurisdiction of the BZA to consider.⁷¹ The BZA apparently agreed, and did not address any of the numerous issues addressing, for example, concerns about the noise, dust and other disruptions anticipated to be caused by construction activities should the CUP be granted.

Nonetheless, FAF argued to the Circuit Court, and now argues to this Court, that the BZA had a duty to address *and resolve* each and every one of the sixty-seven (67) unresolved issues listed in the staff report. FAF then contradicts its own argument and assigns error based upon the fact that the BZA did consider two issues to which approximately one-third of the itemized unresolved issues pertained: proposed density and road adequacy.⁷² FAF cannot have it both ways.

FAF asserts that the BZA refused to resolve the unresolved issues. On the contrary, it is FAF that refuses to acknowledge the possibility that some compatibility

⁷⁰ See, Supplemental Certified Record of the BZA, File #Z04-04, Item 2, July 15, 2005.

⁷¹ See, Official Record of the BZA Meeting of July 26, 2005 (Track 28). See, also, BZA Hearing Tr. (July 26, 2005) 32:9-34:15.

⁷² FAF's Assignment of Error 2.a., *supra*. Apparently, in FAF's view, the BZA would have been wrong if it had attempted to resolve every single item, and also wrong if it did not.

issues cannot be resolved to achieve compatibility. In the instant case, the BZA reasonably found that an adequate road and a lower density of development⁷³ were indispensable to the compatibility of the proposed development on the subject parcel. The BZA could not resolve either issue so as to achieve compatibility of the proposed project,⁷⁴ a fact which FAF's counsel argued in his preliminary remarks to the BZA.⁷⁵ Consequently, FAF's application could not meet the second standard necessary for the issuance of a CUP.⁷⁶

Having found these two issues to be dispositive – that is, necessary to compatibility, but incapable of being resolved so as to make the proposed development compatible – the BZA did not address the remaining issues.⁷⁷ The BZA's limitation of its inquiry was consistent with common adjudicative practice, including that of this Court, which frequently declines to reach remaining issues after having decided an issue that disposes of the case. *See, e.g., Holloman v. Nationwide Ins. Co.*, 217 W.Va. 269, 617 S.E.2d 816 (2005); *State ex rel. Lemaster v. Oakley*, 157 W.Va. 590, 599, 203 S.E.2d 140

⁷³ Road adequacy and density were the subject of at least twenty-three (23) of the sixty-seven (67) unresolved issues appearing in the staff report.

⁷⁴ The power to resolve the density issue rested wholly with the developer, which could have offered to reduce the proposed density at either the Compatibility Assessment Meeting or at the BZA hearing, but refused to do so, leaving that issue unresolved and unresolvable. The power to resolve the issue of road adequacy rests with a third party, the Division of Highways, and also could not be resolved in favor of compatibility by the BZA or by the developer.

⁷⁵ *See*, Official Record of the BZA Meeting of July 26, 2005 (Track 28). *See, also*, BZA Hearing Tr. (July 26, 2005) 32:9-34:15.

⁷⁶ FAF twists the reading of the second standard to mean that the BZA must resolve each of the unresolved issues. The Ordinance doesn't actually say that. It says that one of the standards for the issuance of a CUP is the BZA's resolution of unresolved issues. Ordinance, Sec. 7.6(g). If the BZA cannot resolve any of the unresolved issues, then obviously the second standard cannot be achieved and the application cannot earn a CUP. *See*, discussion at p. 29 herein.

⁷⁷ BZA Decision of September 15, 2005, at p. 4.

(1974). For the BZA, nonetheless, to address each of the other unresolved issues, a majority of which FAF argued were not compatibility issues in any event, and state whether or not FAF had to comply with each item, would have accomplished nothing more than a colossal waste of time.

The most telling indication that no purpose would have been served by the BZA's addressing each remaining issue is provided by FAF itself. Nowhere in its Petition for Appeal does FAF allege that the outcome would have been different had the BZA addressed each of the remaining unresolved issues. FAF demonstrates no harm arising from this asserted error, because there is none. Even if the BZA had addressed and been able to resolve every one of the remaining unresolved issues, it would not have overcome the fact that there were two dispositive issues that were unresolvable.

The BZA, having found that two dispositive issues could not be resolved in favor of compatibility, committed no error when it did not attempt to resolve every remaining unresolved issue. The Circuit Court did not err when it upheld the BZA.

c. The Circuit Court did not Err in
Affirming the BZA's
Due Consideration of the LESA Score

FAF's argument in support of its contention that the BZA failed to give due consideration to the LESA score is flawed in several respects.

First, FAF claims that its development proposal achieved a passing LESA score.⁷⁸ This claim belies a fundamental misconception of the LESA scoring protocol. LESA does not score the development proposal. LESA does not even purport to score the development proposal. LESA scores *the site*, by calculating the values of the soil

⁷⁸ See, e.g., Brief on Appeal at p. 10.

types on the parcel, and the amenities available to the parcel, which together, according to the express terms of the Ordinance, assesses the *site's* development potential.

Ordinance, Sec. 6.2.

Because LESA evaluates the potential of the site, and not the propriety of a particular proposed development on the site, a successful LESA score means only that the developer's proposal is entitled to progress to further consideration under the DRS. This Court acknowledged that this was the function of LESA in *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 538, 591 S.E.2d 93 (2003). The Ordinance, in Section 6.2, expressly states that this is the effect of a successful LESA score: "A score of 55 points or less advances the application to the Compatibility Assessment as provided in Section 7.6."⁷⁹ Accordingly, even after a successful LESA score is calculated, further evaluation of the development proposal is necessary to determine if a CUP should be issued. This further evaluation is provided under the second and third standards for a CUP. Ordinance, Sec. 7.6(g).

Secondly, FAF's argument suggests that any site receiving a passing LESA score is suitable to any level of residential density. This, too, is at odds with the Ordinance's express description of LESA. Ordinance, Sec. 6.2.⁸⁰ The Ordinance describes a numerical continuum, where the highest possible score would indicate that the site has maximum agricultural significance and the lowest possible score would

⁷⁹ 2002 version of the Ordinance. Nowhere in Article 6 or Article 7 of the Ordinance is there a suggestion that a successful LESA score means that the proposed project is compatible with the neighborhood, or is entitled to a CUP.

⁸⁰ "The combined maximum total for both Assessments is 100 points. The most agriculturally significant parcel would rate 100; the most developable parcel would rate 0. A total of 55 points or less advances the application to the Compatibility Assessment Meeting." Ordinance, Sec. 6.5(c). *See, also*, Ordinance, Sec. 6.2 (2002 version).

reflect maximum developmental viability. On this continuum, a site scoring in excess of 55 points is deemed unsuitable for development in excess of the Rural District's permitted density limits found in Section 5.7(d) of the Ordinance. However, the Ordinance does not conversely suggest that every LESA score lower than 55 reflects the same potential for high density development. On the numerical continuum, a score of 30 would indicate much greater potential for high density of development than would a score of 54.

The subject parcel earned a marginally-passing score of 51.2 points on the LESA. This does not indicate that the site is suitable for development at the highest levels of residential density. Instead, the score is reflective of significant agricultural viability and of a significant lack of the services and amenities necessary to support urban-type development.

Even if the LESA score for the subject parcel had suggested a better potential for high density development, the Ordinance does not permit the inquiry to stop there. By requiring the subsequent compatibility inquiry and determination, the Ordinance indicates that there are factors, not measured by LESA, which can make the proposed development incompatible with the neighborhood in which it would be built. At its core, FAF's argument denies the possibility of this outcome, even though the Ordinance expressly provides for it.

Thirdly, FAF's assertion that the the BZA "shall" consider the LESA score⁸¹ is wholly baseless. Not only does Section 7.6(g) not say that, the Ordinance *nowhere* says that the BZA "shall" consider the LESA score when making its

⁸¹ Brief on Appeal at 38.

compatibility determination. The Ordinance says that the purpose of the hearing before the BZA, "is to hear the staff report of the issues and concerns raised at the Compatibility Meeting[,]" and that, "speakers shall be limited to the resolution of issues which could not be resolved at the Compatibility Assessment Meeting and the compatibility of the project within the neighborhood."⁸² Ordinance, Section 7.6(e).

In fact, by the express terms of Section 7.6(e) and (g), the BZA's role is limited to the determination of the second and third standards, and does not involve further consideration of the LESA score. Section 7.6(g) lists the three things that must occur for an applicant to secure a CUP, one of which is a successful LESA score. Having earned a successful LESA score for the subject parcel, the first standard was concluded, the application moved on, and the LESA score's contribution to the total determinative process was done.⁸³

Finally, even if the BZA were required to give some greater consideration to the LESA score than the Ordinance provides, FAF could not seriously suggest that it had not done so. Because Dunleavy and Moore appealed the LESA calculations, the BZA conducted a lengthy hearing dedicated exclusively to the LESA score.⁸⁴ It

⁸² Section 7.6(e) provides additional confirmation that the third prong of the CUP standards, compatibility within the neighborhood, is something more than merely the fulfillment of the first two standards.

⁸³ The BZA members were, of course, aware that they would not be deciding the CUP application but for a successful LESA score. In reviewing the three standards governing the issuance of a CUP, BZA Member Trumble expressly acknowledged the passing score, noting, "... successful LESA plan application, which they have." *See*, Official Record of the BZA Meeting of August 9, 2005. *See, also*, BZA Hearing Tr. (August 9, 2005) at 6:12. No further consideration of the LESA score is required of the Board.

⁸⁴ *See*, Official Record of the BZA Meeting of January 20, 2005.

examined the underlying data, and even altered the values assigned to some factors.⁸⁵

Having thoroughly considered the LESA score at the January 20, 2005, hearing, the BZA had no duty to repeat the exercise at the final hearing on the CUP application.

The contention that the BZA had a duty to give additional consideration to the LESA score is without basis in the Ordinance. The Court did not err in finding no fault with the BZA on the issue.

3. The Circuit Court did not Err in Affirming
The BZA's Resolution of Unresolved Issues

FAF offers no proof whatsoever that the BZA ignored any of the evidence when making its decision to deny the CUP, the "empirical" evidence or otherwise. Instead, FAF's argument is premised upon the questionable leap of logic that because the CUP was denied, the only possible explanation is that the BZA did not consider the evidence (*post hoc ergo proctor hoc*). This is a leap of logic that the Court, acting within the applicable standard of review, cannot take.

In support of its contention, FAF attempts to unfavorably compare the testimony of lay persons with the opinions of the expert witnesses that it had hired. Presumably, FAF's repeated use of the word "empirical" is intended to apply only to the opinions of its expert witnesses, and to elevate that evidence to a stature of greater dignity than the testimony of those lay persons. "Empirical" does not provide such a distinction, as the word merely means "originating in or based on observation and experience."⁸⁶

All of the lay testimony was "based on observation and experience."
Furthermore, the lay witnesses' opportunities for observation and experience with the

⁸⁵ BZA decision of February 17, 2005.

⁸⁶ Miriam-Webster's Collegiate Dictionary (10th ed., 1993).

issues on which they gave testimony far exceeded those of FAF's expert witnesses. The established principles of this Court recognize no inherent difference between the weight or credibility of the testimony of expert witnesses and that of lay witnesses, and the testimony of an expert is neither exclusive on an issue nor superior to the credibility of lay witnesses on the same issue. Syl. Pt. 6, *Frye v. Kanawha Stone Co., Inc.*, 202 W.Va. 467, 505 S.E.2d 206 (1998).

Examining the competing evidence offered on the adequacy and safety of the road, which was one of the issues that the BZA found to be a dispositive factor requiring a finding of incompatibility, the record shows that the evidence overwhelmingly supported the BZA's conclusion. The opinions rendered by FAF's traffic expert witness, Mr. Keller,⁸⁷ focused exclusively on the impact that would occur during peak hours at four intersections, located some distance from the subject parcel, because of the increased traffic generated by the proposed development. FAF's traffic expert did not examine or render an opinion about the adequacy and safety of Trough Road, on which residents would have to travel to get to any of the four intersections that the traffic expert studied.⁸⁸

⁸⁷ Contrary to the assertion that none of FAF's expert witnesses was heard, the traffic expert hired by FAF did testify at the hearing on January 20, 2005. See, Official Record of the BZA Meeting of January 20, 2005. See, also, BZA Hearing Tr. (January 20, 2005) at 224:8 – 244:15. Also, his final report was entered in the record. Supplemental Certified Record of the BZA, File #Z04-04, Item 2.

⁸⁸ In short, FAF's argument compares apples to oranges. The traffic expert's report was not even addressing the same thing as were the neighborhood witnesses, or the materials submitted by these Appellees.

The traffic expert's report, therefore, did not rebut the eyewitness testimony of the residents who use Trough Road,⁸⁹ the substantial photographic evidence, the official accident data relative to Trough Road and its connecting roads, the written statement of the School Board's Director of Transportation regarding the inability of school buses to use Trough Road, or the design standards of the Division of Highways which revealed the substandard physical condition of Trough Road.⁹⁰

The BZA did not ignore the traffic expert's intersection impact report. The expert's report simply did not relate to the same issue as that of other witnesses. The report did not address and was not relevant to the issue that the BZA found compelling: the inadequate and unsafe condition of Trough Road. The BZA never suggested that it rejected the expert's report as valid on the issue for which it was offered (the anticipated impact of traffic at the intersections).⁹¹

FAF's argument sets up a false dichotomy. The evidence before the BZA did not require an either-or conclusion on the two different roadway issues. It is entirely possible that the intersections may be adequate to the increased traffic the development would produce (as FAF's expert reported), *and* that the road traveled to reach those intersections is inadequate.

⁸⁹ At both the LESA hearing and the final CUP hearing, numerous persons testified about the poor condition and inadequate capacity of the road from their own observations as frequent users of it: Charles Printz, BZA Hearing Tr. (January 20, 2005) at 136:10 - 137:9; Gary Capriotti, BZA Hearing Tr. (January 20, 2005) at 145:10 - 150:16; Fred Wells, BZA Hearing Tr. (July 26, 2005) at 200:7 - 201:13; Gary Capriotti, BZA Hearing Tr. (July 26, 2005) at 204:15 - 207:7; Cal Bechert, BZA Hearing Tr. (July 26, 2005) at 211:15 - 212:9.

⁹⁰ All of this documentary evidence was submitted by Dunleavy and Moore as part of their appeal. *See*, Certified Record of the BZA, File #AP04-05, Item 6. This refutes FAF's argument that the only evidence offered was that of lay persons.

⁹¹ Which is why FAF's argument that the BZA accepted lay testimony over that of an expert is without merit.

For all of the reasons discussed previously herein,⁹² FAF also cannot support an assertion that the BZA ignored its evidence on the density of the proposed project. The record is clear that the BZA devoted a great deal of attention to FAF's evidence on this issue, and even used one of FAF's own exhibits as a basis for its decision. Clearly, the BZA simply did not agree with the assertions of FAF that the density of its proposed development would be compatible with that of the surrounding area, and its decision regarding density was supported by substantial evidence in the record.

As noted previously herein, substantial evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *In re Queen*, 196 W. Va. 442, 446, 473 S.E.2d 483, 487 (1996). The substantial evidence rule does not depend upon the record being devoid of conflicting evidence. The Board's findings of fact, and reasonable inferences drawn therefrom, so long as they are based upon substantial evidence, must be upheld under the applicable standard of review, even if the Court might have weighed the competing evidence differently. *Id.*

The BZA's decision was based upon substantial evidence in the record. The Circuit Court committed no error in concluding that the BZA had not ignored the evidence in rendering its decision.

4. Far Away Farm's Due Process Rights were not Violated

FAF attempts to suggest that this assigned "error" might be due to the fact that the hearing in this matter "was the first time in its existence that the BZA held a

⁹² The evidence presented to the BZA regarding similarity of density was discussed at great length earlier in this Response, and is equally applicable to this discussion. *See*, pp. 19-21, *supra*.

hearing to determine whether to issue a CUP.”⁹³ This is simply not true. Under the original version of the Ordinance, the BZA participated jointly with the Planning Commission in the hearings, but then the BZA made the decision.⁹⁴ Furthermore, even after the Ordinance was amended to allow the Planning Commission to conduct the hearings and make the decision in the first instance, the BZA routinely conducted full hearings if the Planning Commission’s decision was appealed. In these hearings, the proponents and opponents again made their presentations, using the same time limits that used for the Planning Commission hearings, and the BZA rendered the decision of whether or not the CUP should issue.⁹⁵

FAF argues that it was denied due process because the time limits on its presentation to the BZA at the July 26, 2005, hearing were inadequate to enable it to present all of the witnesses that it wished to present, that members of the public were permitted to speak without being placed under oath, and that it was denied the opportunity to cross-examine all of the persons who spoke against its CUP application.

What FAF fails to tell this Court is that the time limits to which it was subject were the same time limits to which final hearings on CUP applications have always been subject, *see*, Ordinance, Sec. 7.7(b), and that, until recently, no right of cross-examination was ever recognized in Jefferson County’s zoning proceedings. In a prior case arising under the Ordinance, the Circuit Court of Jefferson County concluded

⁹³ Brief on Appeal, p. 19 at No. 20.

⁹⁴ *See*, Ordinance (1988 version), Sec. 7.6(e). This version of the Ordinance was attached to the Appellant’s Motion to Supplement the Record.

⁹⁵ A partial, but varied sampling is the CUP matters of Town Run Village (i.e., the *Henry* case)(August 18, 1994); Shannondale Mini Storage (January 21, 1999); Uniwest Sanitary Systems (March 18, 2004 and July 15, 2004).

that the abbreviated time limits and the lack of such procedural protections as the opportunity for cross examination resulted in a procedure that denied minimum due process to parties in zoning proceedings. *Kletter v. Jefferson County Board of Zoning Appeal*, Circuit Court of Jefferson County, Civil Action No. 02-C-217. On appeal, this Court reversed the Circuit Court's order in its entirety, and remanded for the issuance of a CUP based upon the administrative hearing that the lower court found to have been procedurally defective.⁹⁶ See, *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d 873 (2005).⁹⁷

The only difference between that case and the instant appeal is that in the *Jefferson Utilities* case, it was the neighboring landowners who claimed the denial of due process, while in the instant case it is the developer.⁹⁸ If there was no due process deprivation for the neighbors in *Jefferson Utilities*, then there was no due process deprivation for FAF in this instance. To have concluded differently in the case below, the Circuit Court would have had to either ignore *Jefferson Utilities*, or conclude that this Court intended one rule for affected landowners and another for developers.⁹⁹ The Circuit Court acted correctly when it followed the holding of this Court.

⁹⁶ Presumably, if this Court had agreed that the Kletter hearing had lacked minimum due process standards, it would never have validated the product of that hearing, the CUP.

⁹⁷ The lower court's *Kletter* decision was consolidated with its decision in *Jefferson Utilities, Inc.*, for the appeal in this Court.

⁹⁸ And that the attorneys who argued against the Circuit Court's decision in the earlier case, and secured its reversal, are now making the claim of due process denial on behalf of the developer.

⁹⁹ Were such a disparate rule to be established, the law would favor the neighboring landowners for the greater protection. The right to due process is dependent upon the existence of a property interest. *State Deputy Sheriff's Assoc. v. County Comm'n of Lewis County*, 180 W.Va. 420, 422, 376 S.E.2d 626, 628 (1988). A developer has, at best, a "unilateral expectation" of gaining a CUP, but not the vested property interest in the permit which is the necessary predicate for a claim to due process. *Henry v. Jefferson County Planning Comm'n*, 148 F.Supp.2d 698, 711,

V. Conclusion

In order to sustain FAF's appeal, this Court would have to ignore the express terms of the Ordinance, the established interpretations and practices of the zoning administrative bodies, and the prior decision of this Court. The CUP application of FAF was correctly denied by the BZA. The decision of the circuit court should be sustained.

VI. Prayer for Relief

FAF has presented no assignments of error that survive scrutiny. These Respondent respectfully request that the relief sought in its appeal be denied, and that the Order of the Circuit Court be upheld by this Honorable Court.

Respectfully submitted this 16th day of August, 2007.

EDWARD E. DUNLEAVY, et al.,
The Appellees
By counsel.


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aff'd in part, vacated in part, 34 Fed. Appx. 92 (4th Cir. W.Va. 2002), *cert. denied* (U.S. Sup. Ct., March 31, 2003). Under these same principles, neighboring landowners, who have a vested property right in the established, lawful uses on their lands, which uses could be damaged or destroyed by the proposed development, should be entitled to due process in the proceedings which provide their sole procedural opportunity for protecting their vested property interests.

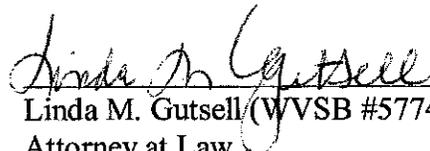
CERTIFICATE OF SERVICE

I, Linda M. Gutsell, counsel for Edward E. Dunleavy and Edward R. Moore, certify that I have served the foregoing RESPONSE OF EDWARD E. DUNLEAVY AND EDWARD R. MOORE TO BRIEF ON APPEAL upon the Petitioner and Respondent by mailing a true and accurate copy thereof by the US mail, first-class postage prepaid, to counsel for said parties, at the addresses shown below, this 16th day of August, 2007

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