

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COPY

FAR AWAY FARM, LLC,

Appellant,

v.

DOCKET NO. 33438

JEFFERSON COUNTY ZONING BOARD OF APPEALS,

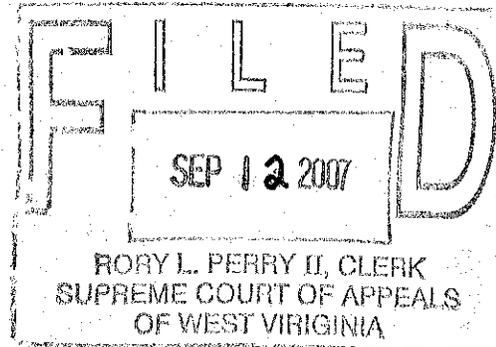
A public body;

THOMAS TRUMBLE, Member,

JEFF BRESEE, Member, and

TIFFANY HINE, Chair

Appellees.



REPLY BRIEF ON APPEAL

Peter L. Chakmakian, Esquire
WV Bar ID No. 687
108 N. George Street, 3rd Floor
P.O. Box 547
Charles Town, WV 25414
(304) 725-9797

Richard G. Gay, Esquire
WV Bar ID No. 1358
Nathan P. Cochran, Esquire
WV Bar ID No. 6142
Law Office of Richard G. Gay
31 Congress Street
Berkeley Springs, WV 25411
(304) 258-1966

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I. ARGUMENT

A. The Court should not apply the Amended Zoning Ordinance¹ to Far Away Farm's case but instead should apply the former Ordinance

Someone said that "Where misunderstanding serves others as an advantage, one is helpless to make oneself understood"²

In this case, Dunleavy and the BZA have misunderstood Far Away Farm's argument in several respects.

First, Dunleavy and the BZA attempt to set up a straw man by re-phrasing Far Away Farm's argument to imply that Far Away Farm is claiming that it did not know of the passage of the Amendments to the Ordinance. Consequently, Dunleavy effectively claims that Far Away Farm is lying about the issue, since Far Away Farm's counsel has submitted other briefs and pleadings utilizing the April 8, 2005 amendments.³

The BZA's response is similar.⁴ The BZA alleges that Peter Chakmakian, who is now one of the Appeal counsel for Far Away Farm,⁵ attended the County Commission meeting when

¹ As set forth in Far Away Farm's brief on Appeal, the Zoning Ordinance was amended on April 8, 2005 and is referred to in this brief as the "Amended Ordinance."

² Lionel Trilling (1905-1975)

³ See generally Dunleavy's Brief pp 16 – 18.

⁴ See generally BZA's Brief pp 13 - 14

⁵ It is worthwhile to note that Peter Chakmakian, who purportedly attended one or more of the County Commission meetings where the Amended Ordinance was discussed, did not become counsel in Far Away Farm's case until the appeal process began. Consequently, even if Mr. Chakmakian had heard statements made by the Commission regarding the application of the former Ordinance, that knowledge can hardly be imputed to Far Away Farm nearly two years prior to Mr. Chakmakian's appearance as counsel. The BZA's companion assertion that "all" of Far Away Farm's counsel were present "throughout the public hearings" on the zoning amendment process, is simply inaccurate. If any of Far

the amendments to the Ordinance were addressed. Now the BZA claims that as a result Far Away Farm cannot now object to the application of the amended Ordinance to this case.⁶

Contrary to the unpleasant inferences by Dunleavy and the BZA, Far Away Farm has never claimed that it did not know about the amendments themselves. Far Away Farm only states that it did not know about the County Commission's promise in its Commission meeting minutes that it would "grandfather" CUP applications submitted before the April 8, 2005 Ordinance amendments were adopted. It follows that, since Far Away Farm had submitted its

Away Farm's counsel appeared at any public meeting regarding these amendments, it would have been Mr. Chakmakian and he was not counsel for Far Away Farm at that time.

⁶ The BZA also claims that the "grandfather" concept only extends to the LESA score provisions, not the entire Ordinance, based mostly on comments made by Paul Raco, former Zoning Administrator, and the phrasing of the subsequent motions at the time the amendments were passed. *See* BZA brief at 12. The Court should reject this argument for the following reasons:

First, the BZA minutes do not make this distinction; instead, the March 23, 2005 minutes say that, for administrative purposes "all applications" that were received in the Planning Commission office before close of business on April 8, 2005, "which address all the necessary 23 questions on the application be grandfathered in, and that applications received after April 8, 2005 comply with the new amendments." Since the minutes are the official record of the County Commission, the public should be able to rely on the minutes, as have Far Away Farm's counsel in making the argument, and the minutes should control. Otherwise, if every comment or phrasing of the motion modified the law, the general public would have a duty to attend every legislative assembly or County Commission meeting to know what comments were made as an addendum on the law. To do otherwise would abandon reason and common sense. The County Commission reads and approves the minutes, they have full authority to make corrections as they see fit. In this case, apparently, the minutes say what the Commission wanted them to say.

Second, even if the Court considers the Raco comments and the phrasing of the motion contained in the recording that could be construed to limit the "grandfathering" concept, (again, not reflected in the minutes) the LESA scoring would be clearly grandfathered, while the issue of procedure (ie, who issues the CUP, the BZA or the Planning Commission) may not be – however, the issue of the three standards that apply to the issuance of the CUP, which is the heart of this appeal, is either silent or is not specifically excluded from the grandfather concept, and, consequently should not be applied to Far Away Farm. If doubts exist as to whether Far Away Farm's application should be grandfathered, they should be resolved in favor of the applicant, Far Away Farm.

Third, even if the LESA score provisions were the only portion of the Ordinance that was grandfathered, the Court should grant the CUP to Far Away Farm because the LESA scores were the only substantive criterion under the former Ordinance and Far Away Farm passed the LESA scoring system with flying colors.

CUP application in 2004, Far Away Farm should be grandfathered into the former ordinance provisions.

The concept that the Commission promised to apply the former ordinance, yet instead applied the new ordinance, is simple, direct, and easily understood. All that Far Away Farm asks of this Court is to apply the former Ordinance in the manner the Commission promised.

Both Dunleavy and the BZA's arguments miss the point entirely. This is the point - it is wholly irrelevant as to when Far Away Farm knew or did not know of the Commission's decision. The fact is, the Commission's minutes indicate it decided to apply the former ordinance to developments like Far Away Farm, and it is incumbent on the zoning officials to follow through with the decision, whether Far Away Farm requested it or not.⁷ One cannot apply an ordinance to a developer before the Commission says it applies any more than one can apply a statute prior to its effective date. In this case, the Commission decided to apply the former Ordinance to pre-April 2005 CUP applications. The Commission's agents, (the Planning Commission, Paul Raco, and the BZA) failed to carry out the Commission's directive. It's that simple.

Should the matter have been discovered and raised earlier? Perhaps, although one can hardly assign a duty on the part of Far Away Farm or its counsel to attend all County Commission meetings in Jefferson County and parse the meeting minutes just in case the Commission makes a promise that affects land use law. Alternatively, was attorney Peter Chakmakian present at any of the numerous mind-numbing County Commission meetings over

⁷ To do otherwise is akin to the concept of allowing an ex post facto law to be applied, just because the criminal defendant did not know about the law change. In a case such as that, this Court has in the past reversed a criminal conviction. See for example, *State v. Hensler*, 187 W.Va. 81, 415 S.E.2d 885 (1992).

the years that touched on planning and zoning issues? Possibly, although the significance of a few words spoken out of thousands of words at any given County Commission meeting is easily overlooked in the “excitement” of those meetings. But none of those issues matter. It becomes instead a matter of jurisdiction based on the directive contained in the County Commission’s meeting minutes.

Dunleavy misunderstands the concept of jurisdiction and the authority of the Planning Commission and BZA.⁸ The Planning Commission and BZA only have the authority that is given to them under the law and the specifics of the zoning ordinance.⁹ In this case, the underlying enabling law allows the Ordinance to be created, but it is the specific authorization of the Ordinance that controls exactly what the Planning Commission and BZA can do.

Further, in this case, the County Commission stands in a similar position to the legislature, and, like the State legislature, the effective date of a given law is key to its application. No law can be applied before its effective date, and the Ordinance likewise cannot be applied before its effective date.

One cannot agree to confer jurisdiction where none exists. One cannot “waive” the application of an ordinance. It either applies, or it doesn’t. In this case, the County Commission ordered in its meeting minutes that the Amended Ordinance procedure did not apply to a development like Far Away Farm. So it doesn’t.

⁸ In fact, Dunleavy relegates his entire response on this issue to footnote 40 of the brief, claiming that the jurisdictional issue is unworthy of a response.

⁹ See *Weston v. Mineral County*, 219 W.Va. 564, 638 S.E.2d 167 (2006), Syl. Pt 3., holding in part that a County Commission can “only do such things as are authorized by law, and in the mode prescribed.” The Planning Commission and BZA, as administrative subdivisions of the County, have no greater authority than the County Commission.

If this matter were reversed, and Far Away Farm was attempting to get the Court to apply the new Ordinance even though the County Commission had clearly stated the former Ordinance must apply to cases filed before April of 2005, this Court would likely say that the effective date was dispositive. Is not the reverse fair? Is not the effective date dispositive either way?

If there is any doubt, it should be resolved in favor of Far Away Farm, instead of the government.

Far Away Farm did not have a duty to attend the March 23, 2005 County Commission Meeting when the Zoning Ordinance was amended. On the other hand, the BZA had a duty to apply the correct ordinance as directed by the County Commission.

Far Away Farm did not commit any error by not attending the March 23, 2005 County Commission meeting. On the other hand the BZA committed an egregious error by applying the wrong ordinance in hearing Far Away Farm's case.

Because Far Away Farm passed the LESA scoring system, and this being the only significant and concrete criterion under the former Zoning Ordinance for issuance of a CUP, the BZA should have issued a CUP to Far Away Farm.

Dunleavy also misunderstands the effect of the amendments. Dunleavy maintains that the amendments have no substantive effect.¹⁰ Contrary to Dunleavy's assertions, the two Ordinances differ in key provisions relevant to this case, which include, at a minimum, (1) the definition of "neighborhood" in the new Ordinance and (2) the procedure for issuing a CUP.

First, the former ordinance did not contain¹¹ a definition of "neighborhood." The

¹⁰ See generally Dunleavy's Brief pp 18 -19.

¹¹ Far Away Farm, the BZA, and Dunleavy all agree that the definition of the term "neighborhood" was added to the Ordinance through the April 8, 2005 amendment. See Dunleavy's Brief, p. 5, at fn 59. The BZA alleges in its Response Brief that "Mr. Raco cited the new amendments to the BZA as the standard

consequences to Far Away Farm are significant, since the CUP was denied, (so the BZA said), because it was incompatible with the "neighborhood" - based on the new Ordinance's definition of "neighborhood" as a one mile radius from the perimeter of the property. By contrast, the former Ordinance did not even define "neighborhood," so the BZA could not have used the definition of neighborhood to deny Far Away Farm's CUP under the former ordinance in the same way they did under the new Ordinance.

A second significant difference is the requirements of the two Ordinance provisions for issuing a CUP. Under the former Ordinance, the Planning Commission issued the CUP, under the new ordinance, the BZA issues the CUP.¹² 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:

FORMER ORDINANCE	AMENDED ORDINANCE
Section 7.6(f) If all issues raised at the	Section 7.6(f) If all issues raised at the

that body must use in reaching its decisions. 'The one thing that was added into your ordinance in this past change on April 8th, it did not necessarily define the word [word] 'compatible,' but it defined the word 'neighborhood' to a one-mile radius.' See BZA Response to Brief on Appeal, Page 12 Citing Mr. Paul Raco July 26, 2005 Tr. 30:5-9."

Far Away Farm agrees with the BZA, that the amendment defining Neighborhood was added April 8, 2005, and the understanding of Neighborhood is a necessary component in defining compatibility.

¹² Dunleavy seems fixated on Far Away Farm's sentence-long assertion in its brief that the BZA had not issued CUP's prior to the procedures in the amended Ordinance. This is a relatively inconsequential point; however, the Ordinance sections quoted herein demonstrate that the procedure under the former ordinance was that the planning commission issued CUPs, while under the amended Ordinance the BZA issues the CUPs. Far Away Farm was the first development to which the new procedure was applied. Far Away Farm only offered the suggestion that the BZA had made a mistake in denying this CUP either because it was inexperienced, or for some other reason. If the Court at Dunleavy's insistence chooses to believe that the BZA had another reason to not apply the Ordinance (other than inexperience), that is up to the Court. Nonetheless, the practice under the former Ordinance was for the Planning Commission to issue the CUPs - at least within the experience of Far Away Farm. Of course, under the former Ordinance, if a given CUP was appealed, then the BZA would hear the appeal from the Planning Commission's decision.

<p>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>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 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>

The former Ordinance seems to have no specific standards for a developer to meet to obtain a CUP. This is because the developer, under the former ordinance, was processed under the LESA scoring system, attended a compatibility assessment meeting under Ordinance section 7.6(a), and, if needed, a public hearing under section 7.6 (e) and (f) on specific unresolved issues remaining from the Compatibility Assessment meeting. The Planning Commission then issued, issued with conditions, or denied the CUP. There were no specific standards in the Ordinance.

That is in marked contrast to the amended Ordinance provisions, which required Far Away Farm to meet three standards to obtain a CUP, which were (1) a successful LESA point

score, (2) resolution of unresolved issues, and (3) compatibility of the proposed development with the neighborhood.

Had the former Ordinance applied, Far Away Farm would not have been required to meet the three specific standards. Consequently, the entire reason the BZA used to deny the CUP may have been eliminated from the Ordinance, and it follows that the CUP may have issued.

Dunleavy is therefore simply wrong when he asserts that there is no substantive difference between the former Ordinance and the Amended Ordinance.¹³

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. This application of the new Ordinance resulted in the BZA applying a different standard to Far Away Farm than it should have applied, and consequently the BZA and Circuit Court's decision

¹³ Dunleavy also claims that the Compatibility standard in section 7.6(g) of the Amended Ordinance was always operative, because, he claims, the standard was contained in the compatibility assessment meeting procedure in the former Ordinance, and so there is no difference between the old and the new. However, Dunleavy is wrong in this claim. First, the compatibility assessment meeting is a wholly separate event under the Ordinance from the decision to issue the CUP. The addition of the Compatibility standard in section 7.6(g) in the amended Ordinance is evidence that the standard is new, and not merely a clarification, as Dunleavy claims. Since there was a compatibility assessment meeting under the former ordinance, and the procedural part of that section is much the same under the Amended Ordinance, why did there need to be an added criterion in section 7.6(g), if there is no difference?

Also, under the former Ordinance, there were only 8 specific criteria in section 7.6(b) to be considered in the Compatibility assessment meeting. The Amended Ordinance contains 9 criteria – the added criterion is sub paragraph 7.6(b)(3) which is the similarity of the density of a residential project with the density of the surrounding neighborhood. Consequently, even under Dunleavy's theory that the two Ordinances are the same, under the former Ordinance density should not have been considered as a criterion of compatibility. Yet, the BZA used density as a primary reason to deny Far Away Farm's CUP as not compatible with the neighborhood.

Of course, Far Away Farm does not believe that the criteria for the Compatibility Assessment meeting should be the operative standard to issue the CUP under either version of the Ordinance. The Compatibility assessment meeting is a separate event under the Ordinance from the decision to issue the CUP. Far Away Farm merely points out the difference to show that Dunleavy's theory that there is no difference in the standards between the two Ordinances is incorrect.

should be reversed and a CUP issued to Far Away Farm.

B. In the Alternative, the Court should hold that the Circuit Court erred in upholding the BZA's application of the Amended Ordinance

Even if the Court applies the Amended Ordinance, the issue remains that the BZA failed to follow the Amended Ordinance in considering Far Away Farm's CUP application and denying the CUP.

1. The BZA had a duty to resolve the unresolved issues

Dunleavy misunderstands Far Away Farm's argument as to the resolution of unresolved issues.¹⁴ Dunleavy claims that Far Away Farm's position¹⁵ would render the Ordinance meaningless, that is, if the BZA were required to "resolve" all of the "unresolved" issues from the compatibility assessment meeting, that "no application could ever be denied"¹⁶ The BZA advances a similar position.¹⁷

First, the County drafted the Ordinance, not Far Away Farm, and it is the County's responsibility to follow it. Since the Ordinance plainly requires the "Board of Zoning Appeal's resolution of unresolved issues" as a standard in granting the CUP, the BZA should resolve the unresolved issues. It is simply a matter of following the Ordinance – or, in this case, failing to follow the Ordinance.

A second issue is that Dunleavy and the BZA are again making a straw man argument.

¹⁴ See generally Dunleavy's Brief pp 18 -19.

¹⁵ I.e., that the BZA was required to resolve the unresolved issues because Section 7.6 (G) makes the "resolution of unresolved issues" one of the three standards for granting the CUP.

¹⁶ See generally Dunleavy's Brief p 20.

¹⁷ See generally the BZA's Brief p 21 et. seq.

Far Away Farm has never taken the position that all issues must be resolved in favor of Far Away Farm, just that all issues be resolved.

It is important for the Court to understand the process that occurs at the compatibility assessment meeting, under the Amended Ordinance. The developer appears and makes a presentation regarding the proposed development. The public is then invited to speak. The public raises issues and requests of the developer for certain concessions related to the development. For example, a common request is that trees be planted along the edge of the development to create a buffer zone between the development and existing houses nearby. The developer either agrees with the request that is made by the member of the public, (and thus that issue is resolved) or the developer finds the request too burdensome and does not agree (thus leaving the issue unresolved).¹⁸

Far Away Farm has never taken the position that the duty under the ordinance to “resolve” all of the unresolved issues means that every issue must be resolved to the liking of the developer. What Far Away Farm has contended is that it was the duty of the BZA, under the terms of its own ordinance, to address each of the issues and either (a) see to it that the developer agreed to perform the activity requested by the public or staff member at the compatibility assessment meeting; (b) find that the request was unreasonable and burdensome and therefore decide that the developer did not have to fulfill the request; or (c) make the fulfillment of the request a condition of the conditional use permit. That “resolves” each of the unresolved issues.

¹⁸ Various members of the public appeared at the compatibility assessment meeting and made about 106 demands of the developer of Far Away Farm. The developer agreed to 39 requests, but refused to agree to 67 of the requests; because those requests were unreasonable - thus leaving 67 unresolved issues. For example, some of the requests the developer considered “unreasonable” were a request to compensate the community in the amount of \$400,000.00 per year for the ecological loss of trees from the creation of impervious services or; setting aside a \$500,000.00 bond to provide water services to cover well failures for properties within a 1 mile radius of the southeast corner of the Far Away Farms property.

Far Away Farm contends that it was the duty of the BZA, under the amended ordinance, to address each of the 67 unresolved issues in this fashion.

The fact that the BZA did not is a violation of Far Away Farm's due process rights under the Ordinance. The fact that the BZA (in its limited analysis) did not resolve the issues in favor of Far Away Farm is a different issue – although also an error, since the facts support issuing Far Away Farm's CUP. However, the BZA completely failed to address the vast majority of the issues – only considering some traffic and density issues – and thus did not follow the requirements of its own Ordinance. This was an error under the *Corliss / Wolfe* standard.¹⁹

2. The BZA, and subsequently, the Circuit Court, wrongly determined that the development was not compatible with the surrounding neighborhood

a) The BZA wrongly determined that compatibility equals density

The BZA argues that the development was not compatible with the surrounding neighborhood, and the BZA and the Circuit Court were therefore correct to deny the CUP. The primary argument advanced is that the development is more dense than the surrounding neighborhood.²⁰

It is unquestioned that residential development in a rural zone increases density when compared to farmland.

It is also unquestioned that the Ordinance, in section 5.7, allows density to be increased when it states in relevant part that “. . . *The Development Review System does allow for higher density [if] [sic] a Conditional use Permit is issued.*”^{21 22}

¹⁹ *Corliss v. Jefferson County Bd. Of Zoning Appeals*, 214 W. Va. 535 591 S.E.2d 93 (2003)

²⁰ See generally Dunleavy's Brief p 21 et seq. and the BZA's brief p. 23 et seq.

²¹ Ordinance, section 5.7. (portions omitted, emphasis added).

Since section 5.7 specifically allows density to be increased, it is an error of law for the BZA to deny Far Away Farm's CUP because it increases density – when an increase in density is the ultimate purpose of a CUP under section 5.7. It was further error for the Circuit Court to uphold the BZA's determination.

Further, it is not density that the BZA should be evaluating at the section 7.6 CUP hearing, instead, it is compatibility.²³ 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 dwellings²⁴ and subdivisions of greater density are allowed if the development review system is utilized.²⁵

Compatibility is not defined in the Ordinance as the BZA has attempted to use it here. 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.

It is a fundamental rule of construction that, in accordance with the maxim *Noscitur a sociis*, the meaning of a word or phrase may be ascertained by

²² The *Jefferson Utilities* case upheld the reasoning of the BZA in that case that the CUP process allowed higher density development to occur under section 5.7 of the Ordinance when it said that:

[W]e conclude that the Board's interpretation of section 5.7 as allowing the conditional use permit application process as the specified procedural mechanism for seeking approval for development of property that was not a parcel in existence on October 5, 1988, is a valid interpretation of the Ordinance

Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals, 624 S.E.2d 873, 886 (W.Va.,2005)

²³ The BZA indicates in its brief that Far Away Farm has conceded that the new ordinance applies to these proceedings, however, Far Away Farm maintains that this issue is an open question and requests that the Court construe this question in the confines of this case.

²⁴ See Ordinance 5.7 (a)(3)

²⁵ See Ordinance 5.7

reference to the meaning of other words or phrases with which it is associated. Language, although apparently general, may be limited in its operation or effect where it may be gathered from the intent and purpose of the statute that it was designed to apply only to certain persons or things, or was to operate only under certain conditions.

Wolfe v. Forbes, 159 W.Va. 34, 34-35, 217 S.E.2d 899, 900 (W.Va. 1975)

Here, since the ordinance specifically allows an increase in density under section 5.7, it cannot be logically maintained that an increase in density makes a development incompatible without destroying the purpose of the Ordinance. Under this logic, no development could ever be approved in a rural district. The BZA's decision is therefore *ultra vires* because it goes beyond the permitted limits of the Ordinance. The BZA's application of compatibility as equivalent to density is adverse to the plain meaning of section 5.7, and is consequently an error under the *Corliss* standard of review.

This is in marked contrast to a later decision²⁶ by the BZA, in a case called *Conditional Use Permit Application for Town Run Commons*, where the BZA clearly decided 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.

²⁶ 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.

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.”²⁷

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. The BZA’s argument²⁸ that each subdivision be judged on its own merits ignores the underlying concept that the standards applied to the two subdivisions were different – the essence of a denial of due process – and resulting in an arbitrary and capricious decision.

The Far Away Farm development is easily compatible even under the dictionary definition of compatibility, since the residential use of Far Away Farm is “capable of existing together in harmony” and “consistent” with the other residential uses surrounding the property.²⁹

Even if the proposed development is found to have a higher density of homes than some other developments, the BZA was wrong when it ignored the design of the Far Away Farm Development – (which was designed to maximize open space around the development by concentrating the homes nearer to each other on the internal subdivision roads, thereby leaving more open space instead of the more traditional design of making lots of equal size with the houses evenly distributed throughout the development). Far Away Farm has also determined to provide a buffer around the perimeter of the subdivision, minimizing the visual impact of density

²⁷ Dunleavy also spoke against the Town Run Commons subdivision and complained about the “density” there.

²⁸ See BZA Brief on Appeal pp 30-31.

²⁹ The LESA score revealed that there were residential uses near this property, including a townhouse development. While some farmland does exist near the development, there are also a variety of subdivisions, town homes, and other residences – the BZA’s fact finding ignores these facts and instead incorporates its new “one mile radius” standard as the definitive new standard for density in the ordinance.

to the current community residents.³⁰ The density concerns are therefore alleviated.

As a result, the BZA violated the *Corliss / Wolfe* test in its decision to deny the CUP.

b) Far Away Farm did not waive the argument regarding neighborhood or the one mile circle

The Ordinance definition of “neighborhood” calls for a measurement of an area of “a one mile radius from the perimeter of the proposed development.”³¹

At the July 26, 2005 BZA hearing, the BZA disregarded the Ordinance definition of “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 BZA relied on this erroneous “neighborhood” definition to determine that the Far Away Farm development was too dense and thus deny the CUP.

³⁰ Mark Dyck offered expert testimony at July 26, 2005 BZA Hearing:

“I think it’s also important to note that what we are proposing on this property is single family homes. The adjoining properties are single family homes. The use that we’re proposing for the property is single family homes and is, therefore, compatible.”

“For those lots that have some agricultural use adjacent to the property, we have provided a minimum 50-foot buffer all the way around the perimeter of the property. For compatibility, it’s important to note that we are not proposing any single family home lots on this project that are adjacent to any existing single family homes. There is a landscaped buffer around the entire perimeter of the property.” July 26, 2005 BZA Hrg. Tr., 76:2-17

“The second area that was specifically identified by the public was the area along existing Trough Road, along which the majority of the existing residences are located. What we propose to do along there is to put in a minimum of 50 feet in some areas that precedes it, as well as a buffer along those areas. Much of the area along existing Trough Road, especially to the south, has a hedge row, I guess, for lack of a better term. In all these instances, we are proposing or keeping the existing vegetation. There’s no use taking material out that doesn’t need to be taken out, but what we want to do is provide that visual screen from the lots that are closest to us.” July 26, 2005 BZA Hrg. Tr., 79:5-20

“We have specifically chosen to try to address the density issues by the fact that we do not have any proposed residential lots against any existing residential lots. The entire property is surrounded by a landscaped buffer. In many instances, that buffer already contains mature vegetation. In those cases where we are close to adjacent properties and it doesn’t contain mature vegetation, we are proposing not only to put vegetation in but to berm it.” July 26, 2005 BZA Hrg. Tr., 100:8-18

³¹ Ordinance Section 2.2.

The BZA claims this issue was not raised below. Dunleavy makes a similar claim.³²

Both consequently take the position that Far Away Farm waived its argument regarding Dunleavy's erroneous definition of "Neighborhood" and the one mile circle that Dunleavy drew from the southeast corner of the property, instead of the "one mile radius from the perimeter" of the property that the Ordinance requires.

First, the BZA had no jurisdiction to disregard its Ordinance requirements and make up a new method to determine the surrounding "neighborhood." Since this is a jurisdictional point, it can be raised at any time.

Second, an obvious point that both Dunleavy and the BZA overlook is the fact that the proceeding below sounded, at least in part, as *Certiorari*, which, as this Court knows, includes a review of the entire record in the BZA – thus the arguments raised before the BZA are part of the Circuit Court review.

Third, even disregarding that crucial point, the issue was raised below. Both Dunleavy and the BZA are mistaken to claim otherwise. Far Away Farm made the following argument (which strikes directly at the heart of the issue) in Far Away Farm's *Reply Memorandum In Support of Writ of Certiorari*, which was submitted to the Circuit Court on June 26, 2006. (note that the footnotes within this quote were also part of the *Reply Memorandum In Support of Writ of Certiorari*):

The BZA also erred in its invention of a new "one mile radius" averaging standard³³ in determining the density that would be acceptable. This "one mile

³² See generally Dunleavy's Brief pp 25 - 26.

³³ See Order Denying CUP, page 2. Even in using this "one mile radius" averaging standard, the BZA measured from the "Southeast corner" of the development as advocated by the development's opponents—which is the farthest corner away from Shepherdstown, thereby artificially decreasing the average density of nearby land, since a measurement from the center of the property or the Northeast corner would have included property located in or near the Town of Shepherdstown, and would have increased the density

radius" averaging standard is nowhere to be found in the ordinance,³⁴ and is in itself an arbitrary and capricious method of artificially skewing this issue against the developer. The BZA simply made up a definition of density and compatibility that allowed them to reach the goal they wanted.

By ignoring the true meaning of compatibility and substituting density and the "one mile radius" averaging standard as their standard the BZA also violated the principle in *Kaufman* that:

A subdivision regulation enacted by a planning commission must be reasonable and the regulation must sufficiently restrain the discretion of the commission to insure fair administration and must sufficiently inform the property owner to insure adequate guidance in the preparation of plans.

Kaufman v. Planning & Zoning Com'n of City of Fairmont, 171 W.Va. 174, 181, 298 S.E.2d 148, 155 (W.Va.,1982)

While the *Kaufman* court was dealing with a subdivision regulation, the underlying principle is valid – the Ordinance, to be valid, must provide boundaries for the application of law. The Supreme Court illustrated their position in *Kaufman* by quoting the following discussion in *Kaufman* that was held before the planning commission in that case:

MR. PETTY: There is still no way for me as a developer or land owner to figure out what a proper plat would be to conform with the harmonious development other than to present it to you and let you all tell me?

MR. PYLES: I would say that would be very difficult.

In this case, like the practice condemned regarding the subdivision regulation in *Kaufman*, there is no way for Far Away Farm to know how to meet the compatibility standard, if it is based on density, other than to "present it to you and let you all tell me" - exactly what *Kaufman* condemns as an improper unbridled use of discretion.

Reply Memorandum In Support of Writ of Certiorari that was submitted to the Circuit Court at

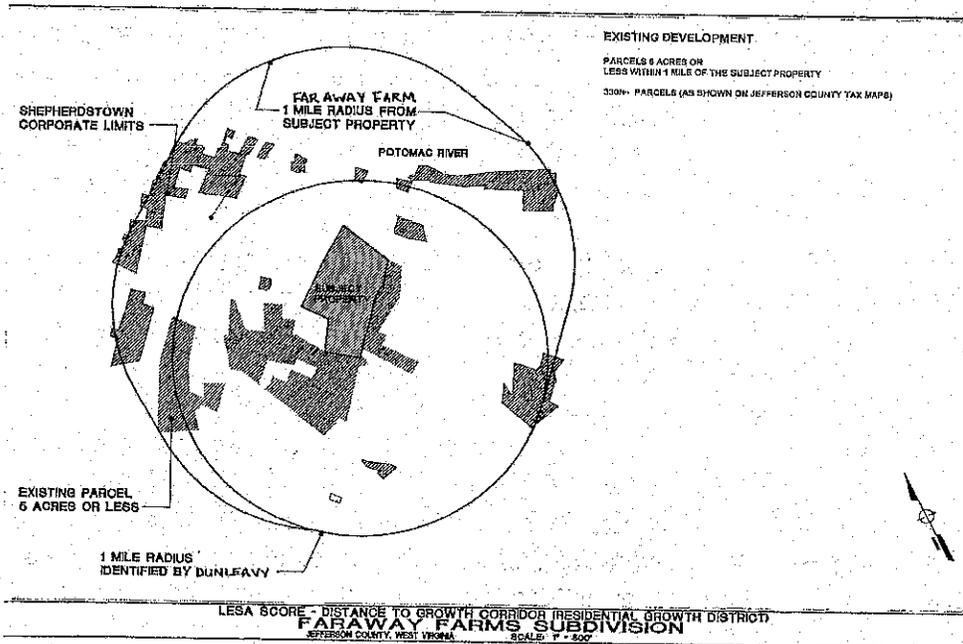
average. (note that this footnote was part of the *Reply Memorandum In Support of Writ of Certiorari* that was submitted to the Circuit Court)

³⁴ The BZA likely has confused the definition of "neighborhood" (which does contain a one mile radius component) with the concept of "compatibility" or "density" - thereby applying an erroneous principle of law under *Corliss*. (note that this footnote was part of the *Reply Memorandum In Support of Writ of Certiorari* that was submitted to the Circuit Court)

Far Away Farm therefore did raise the “one mile” issue below, and the BZA and Dunleavy are mistaken to say that it did not,³⁵ especially since the *Reply Memorandum In Support of Writ of Certiorari* that was submitted to the Circuit Court clearly states that:

Even in using this “one mile radius” averaging standard, the BZA measured from the “Southeast corner” of the development

³⁵ Perhaps the BZA and Dunleavy are mistaken because the Brief on Appeal in this Court contains the demonstrative drawing showing the circle drawn by Dunleavy with a radius from the southeast Corner of the property superimposed on the circle drawn by Mark Dyck that comports with the Ordinance’s directive to draw the circle from the perimeter of the property, which looks like this:



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” and made the neighborhood more dense. The proper one mile “neighborhood” would have included more houses, whereas the Dunleavy/BZA “neighborhood” included more farmland. The Dunleavy/BZA measurement therefore skews the characteristics of the “neighborhood” and violates the Ordinance.

as advocated by the development's opponents -- which is the farthest corner away from Shepherdstown, thereby artificially decreasing the average density of nearby land, since a measurement from the center of the property or the Northeast corner would have included property located in or near the Town of Shepherdstown, and would have increased the density average.

Reply Memorandum In Support of Writ of Certiorari, fn 19, p. 9

Far Away Farm properly assigned this as error, the Circuit Court erred in ignoring it, and this Court should review the actions of the BZA and the Circuit Court in disregarding the Ordinance requirements that the "one mile" "neighborhood" be measured from the perimeter of the property, instead of the corner farthest away from the higher density Town of Shepherdstown.

c) The definition of Neighborhood was improperly applied

For the BZA to have applied the Ordinance correctly in the present case, it must have first determined the correct definition of neighborhood, which is a necessary competent of determining density and compatibility.

Similarly, for the BZA to properly determine the third standard for issuing a CUP, which is whether or not the "proposed development is compatible with the neighborhood," as the BZA's legal counsel has previously specified, the BZA must properly define "Neighborhood."

The Ordinance defines Neighborhood as:

"An area generally confined to a one-mile radius from the perimeter of a proposed development."³⁶

³⁶ Jefferson County Zoning Board of Appeals Special Meeting and Public Hearing, July 26, 2005 Tr., Page 74:16-18; Page 105:14-18

However, the BZA, permitted Dunleavy to apply an erroneous definition to the term "neighborhood."³⁷

Dunleavy: "Let me point out on this map, what I did was I took a measurement from the southeast corner of Far Away Farm, which in the middle of the map is the white area. And from that southeast corner, I measured approximately one mile as being essentially the neighborhood."

July 26, 2005, Special Meeting and Public Hearing Tr., Page 19, Line 1-7

Dunleavy redefined the term "neighborhood" in his argument to the BZA:

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

July 26, 2005, Special Meeting and Public Hearing Transcript, Page 175, Line 1-8

The primary reason the BZA denied Far Away Farm the CUP is based on its acceptance of Dunleavy's flawed interpretation of Neighborhood, allowing for a measurement of the proposed development to be made from the Southeast corner of the property, rather than the perimeter of the property as defined in the Ordinance.

In the Order denying Far Away Farm's CUP, the BZA found that the proposed property:

"is not compatible with the surrounding neighborhood," based primarily on an exhibit which "shows the characteristics of the neighborhood within a one mile radius of the Southeast corner Far Away Farm."

³⁷ It is worthwhile to note that Faraway Farm's engineering expert, Mark Dyck, disagreed with Dunleavy's interpretation of the term "neighborhood" – here in the context of being asked about promising to bring high speed internet into the "neighborhood":

"Mr. Dyck: We would love to have it available in the subdivision, it's one of the things that, you know, a design like this will bring to the community. You need to be careful with the one-mile radius because unlike Mr. Dunleavy's calculation, we take it from the perimeter of the property which puts you into Maryland. So I would hate to be promising to provide high-speed service into Maryland."

Compatibility assessment meeting transcript, April 13, 2005; Page 92, Line 2-11.

In contrast the Dunleavy's and the BZA's interpretation, the term "neighborhood" and its definition clearly require a measurement of one mile from the perimeter of the development, not from the southeast corner.³⁸

This Court in *West Virginia University Bd. of Governors v. West Virginia Higher Educ.*, 2007 WL 1526999 (W.Va. 2007) held that:

"This Court has invariably explained that 'courts may not find ambiguity in statutory language which laymen are readily able to comprehend ... Plain language should be afforded its plain meaning.' *Crockett v. Andrews*, 153 W.Va. 714, 718-19, 172 S.E.2d 384, 387 (1970). This Court held as follows in syllabus point two of *Crockett*, 'Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.' In syllabus point four of *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959), this Court also expressed: 'Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.'"

This standard applies equally to the interpretation of local ordinances.³⁹ "The rules for construing statutes also apply to the interpretation of municipal ordinances." *Town of Burnsville*

³⁸ If this Court believes the definition of Neighborhood as found in the Ordinance is unclear or ambiguous, as Dunleavy asserts, (*see* Dunleavy Brief at 25) then Dunleavy interprets the word "generally" within the definition without citing any reliable sources in support of his interpretation. The word "generally" is defined as "1. usually, commonly, ordinarily. 2. with respect to the larger part; for the most part: a generally accurate interpretation of the facts. 3. without reference to or disregarding particular persons, things, situations, etc. that may be an exception." *Webster's New Universal Unabridged Dictionary* 795 (Second ed. 2003).

There is nothing in the definition of the word "generally" that Dunleavy can point that alters the clear definition of Neighborhood as found in the Ordinance. The wording in the Ordinance defining "Neighborhood" states "An area generally confined to a one-mile radius from the perimeter of a proposed development." There is no language in the Ordinance to allow a measurement from the Southeast Corner of the development.

For Dunleavy to maintain that the definition of Neighborhood allows for the one-mile radius to be measured from any point other than the perimeter of the property, the definition must read "An area confined to a one-mile radius generally measured from the perimeter of a proposed development." This is not a true reading of the Ordinance.

v. Kwik-Pik, Inc., 185 W.Va. 696, 408 S.E.2d 646 (1991) However, "when the language of a statute is clear and unambiguous, the courts will apply, not construe such language." *Rite Aid v. City of Charleston*, 189 W.Va. 707, 709, 434 S.E.2d 379, 381 (1993).

If courts are prohibited from construing clear and unambiguous language, then the BZA should have prohibited Dunleavy from misconstruing the definition of neighborhood. The correct interpretation of the definition should have been applied to Far Away Farm.

In the present case, the Ordinance contains a specific definition of Neighborhood, which Dunleavy skews and the BZA openly endorses. This alone is enough to overturn the decision of the BZA.

3. The BZA is incorrect in its understanding of discretion

The BZA argues that it has discretion to determine and weigh the evidence presented to it regarding the CUP.⁴⁰ The BZA has a fundamental misunderstanding as to the meaning of discretion in this case and the reach of *Kaufman* principles.⁴¹

The BZA does not have unbridled discretion to make up law or to either modify or disregard the requirements of the zoning ordinance.

The *Jefferson Utilities* case discusses the obligations of "quasi-judicial" bodies in making decisions:

³⁹ See *City of Princeton v. Stamper*, 195 W.Va. 685, 689, 466 S.E.2d 536, 540 (1995) ("if the plain language of the Ordinance did vest the City of Princeton with the exclusive power to collect and dispose of residential refuse, absent any other challenge, we would be likely to uphold that exclusivity. However, we need not be concerned about upholding the City of Princeton's exclusivity in residential refuse collection, since the plain language of the Ordinance only gives the City a limited exclusivity. 'The rules for construing statutes also apply to the interpretation of municipal ordinances.'")

⁴⁰ See BZA brief at 18 - 21

⁴¹ *Kaufman v. Planning & Zoning Com'n of City of Fairmont*, 171 W.Va. 174, 298 S.E.2d 148 (W.Va., 1982)

“In making quasi-judicial decisions, the decision makers must ‘investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.’ In the zoning context, these quasi-judicial decisions involve the application of zoning policies to individual situations, such as variances, special and conditional use permits, and appeals of administrative determinations. These decisions involve two key elements: the finding of facts regarding the specific proposal and the exercise of some discretion in applying the standards of the ordinance.” *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 4 S.E.2d 873, 882-83 (2005)

Under *Jefferson Utilities*, in rendering a decision, the BZA must engage in two key inquiries: 1) the finding of facts and 2) the exercise of *some* discretion in applying the standards of the ordinance. *Id.*

a) The BZA ignored the substantial evidence presented by Far Away Farm in finding facts in this case and was thus wrong in its factual findings

As to the first *Jefferson Utilities* element, the finding of facts, Far Away Farm presented empirical evidence⁴² to the BZA in favor of its subdivision at the July 2005 public hearing, as to the “unresolved issues” pursuant to Ordinance section 7.6(e). At the same time, fourteen members of the public were allowed to speak, but were not under oath and no cross examination was permitted. There was no sworn testimony or other expert empirical evidence presented to the BZA at the July 2005 public hearing refuting the specific traffic study other than anecdotal

⁴² 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. 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, and whom Far Away Farm was prepared to offer as witnesses. While Far Away Farm objected to the time allotment, the BZA nonetheless failed to allow additional time for the hearing.

comments and opposition from members of the public who were opposed to any subdivision.

In *Petition of G. Skeen*, 190 W.Va. 649, 441 S.E.2d 370 (1994), the Supreme Court of Appeals of West Virginia 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 held 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, has disregarded expert testimony, and has instead relied upon non-substantial testimony of mostly non-adjacent landowners with no substantive evidence to influence its decision.

The BZA wholly ignored the substantial evidence placed before it by Far Away Farm in violation of The West Virginia Supreme Court's decision in *Maplewood Estates Homeowners Ass'n v. Putnam County Planning Com'n*, 2006 WL 842878 (W.Va. 2006), which states:

. . . "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." . . . Substantial evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." . . .

Id. (citations omitted).

Far Away Farm presented expert testimony revealing that the traffic generated by the

proposed subdivision would not create significant impact on the four intersections included in the study presented.^{43 44} This expert testimony was never rebutted by the opponents to the development.

To counter this substantial evidence, the BZA misstates public testimony regarding traffic concerns and asks this Court to rely on unsubstantiated public testimony. The BZA stated in its Memorandum of Law in Opposition that “members of the public testified that narrow roads and numerous roads and numerous hills create blind spots along the adjacent roads.”⁴⁵ Review of the hearing transcripts, however, refutes the BZA’s claims.

Only three witnesses made reference to “hill” or “narrow” roads.⁴⁶ Only one of these witnesses testified that “there is one particular blind hill.”⁴⁷ Only one of these witnesses is an adjacent property owner to the proposed subdivision.⁴⁸

The BZA also claims that “members of the public commented about their personal observations of accidents.”⁴⁹ Again the BZA has misconstrued the public testimony. The only reference that may be defined as a “personal observation of an accident” was given by Gary

⁴³ Kellercó’s June 29, 2005 traffic study, consisting of about 108 pages, which was presented to the BZA below as part of Far Away Farm’s documentary evidence. An executive summary of the Traffic report was also presented below.

⁴⁴ It is important for this Court to realize that the Subdivision Ordinance requires additional traffic work to be performed. The BZA’s actions here have, in effect, required Far Away Farm to submit traffic data and reports, and attempt to defend issues, that are appropriate for subdivision review, and are premature at this stage of the proceeding. This is an error of law on the part of the BZA.

⁴⁵ These issues were argued below. See Respondent’s Memorandum of Law in Opposition to Petition for Writ of Certiorari, Civil Action No. 05-C-332. The Court should note that the case below arose from a consolidation of Dunleavy’s Petition for Writ of Certiorari for review of LESA scores, (Case No. 05-C-83) and Far Away Farm’s Petition for Writ of Certiorari for denial of Far Away Farm’s CUP (Case No. 05-C-332).

⁴⁶ Note the following transcript pages from the July 26, 2005 hearing: Fred Wells (200:10-20); Mimi Rogers (202:13); Gary Capriotti (206:18-19).

⁴⁷ Fred Wells (200:19)

⁴⁸ Gary Capriotti (Far Away Farm – Adjacent property owner list)

⁴⁹ Respondent’s Memorandum of Law in Opposition to Petition for Writ of Certiorari, Civil Action No. 05-C-332

Capriotti, who stated:

“I’ve even heard them where I live a half a mile away. Because screeching brakes, as you go over a hill or make a turn.”⁵⁰

None of these anecdotal comments outweigh the traffic studies presented to the BZA. For the BZA to have this Court believe that hearing screeching brakes a half a mile away constitutes personal observation of an accident is absurd.

Disregarding the expert reports and testimony, the BZA, in its August 9, 2005 meeting and subsequent decision denying the CUP, largely ignored the substantial evidence presented by Far Away Farm in favor of this anecdotal evidence presented by the members of the public. In so doing, the BZA violated the principles in *Maplewood* and *Kaufman v. Planning & Zoning Com’n of City of Fairmont*⁵¹ 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 and the unsupported opinion testimony of individuals.

In so doing, the BZA violated the *Corliss* test in that it was plainly wrong in its factual findings and applied an erroneous principle of law.

b) The BZA’s argument regarding discretion is wrong as a matter of law

As to the second element in *Jefferson Utilities*, the use of the term “some” discretion means that the BZA’s discretion is not unlimited here. If Far Away Farm meets the Ordinance requirements, then discretion is severely limited (or vanishes altogether under *Kaufman*), even on

⁵⁰ July 26, 2005 Hrg. Transcript 205:11-13

⁵¹ *Kaufman v. Planning & Zoning Com’n of City of Fairmont*, 171 W.Va. 174, 298 S.E.2d 148 (W.Va., 1982)

matters before the BZA. The BZA applied an erroneous principle of law and was plainly wrong in its factual findings to say that Far Away Farm did not meet the Ordinance requirements to obtain the CUP; therefore the BZA is subject to being overturned under the *Corliss* doctrine.

It may be true that the BZA possesses some “quasi judicial” authority;⁵² however, that authority is limited by the bounds of the law. Just as the Circuit Court possesses discretion, but does not possess an unlimited ability to make up applications of law without constraint of the law it purports to enforce, the BZA cannot ignore the fundamental concept that when an applicant for a CUP meets the requirements under the ordinance, the BZA’s discretion is limited by the law (in this case the Ordinance). This is the essence of due process.

The BZA’s use of discretion here, in abrogation of the Ordinance, is an error of law under the *Corliss* case and should be reversed.

4. The BZA’s use of its “Discretion” has amounted to a rezoning in this case

The Supreme Court framed a primary issue in *Kaufman* as “whether a planning commission may “rezone” property by denying plat approval for uses permitted by the zoning ordinance. . .” *Kaufman v. Planning & Zoning Com’n of City of Fairmont*, 171 W.Va. 174, 180, 298 S.E.2d 148, 153 (1982)

The same scenario exists here. Far Away Farm is situated in a district that permits the establishment of higher density development through use of the Development Review System. The BZA here is doing exactly the same thing as the *Kaufman* planning commission –

⁵² Those proceedings, which entail the presentation of evidence and the making of findings, are clearly quasi-judicial in nature. *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 624 S.E.2d 873, 884 (W.Va., 2005)

effectively rezoning by fiat to eliminate, in this case, higher density development.

This amounts to an amendment of the Ordinance⁵³ to eliminate higher density development in a rural district in violation of the procedures in W.Va. Code § 8A-4-1, et. seq. As the West Virginia Supreme Court has said “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.” *Wolfe v. Forbes*, 159 W.Va. at 45, 217 S.E.2d at 906, *Dewey v. Board of Zoning Appeals of Greenbrier County*, 185 W.Va. 578, 582, 408 S.E.2d 330, 334 (W.Va.,1991).

Changing the meaning and operation of the Ordinance is an improper use of the BZA’s “discretion.” The Ordinance requires that the BZA take action to either issue, issue with conditions, or deny a CUP that is properly before it for decision.⁵⁴ In so doing, the same ordinance section states that the BZA must apply three standards to make its decision, which are: (1) a successful LESA point score, (2) resolution of unresolved issues, and (3) compatibility of the proposed development with the neighborhood.

It is therefore mandatory that, first, the BZA take action with regard to the CUP before it, and second, that the BZA’s decision be based on its consideration of the three standards enumerated in the Ordinance.

⁵³ In the alternative, this decision (and the BZA’s complaint that the LESA system was broken) could be viewed as a moratorium on section 5.7 of the Ordinance, which is likewise unlawful under *State ex rel. Brown v. Corporation of Bolivar*, 209 W. Va. 138, 544 S.E.2d 65 (2000) (“this Court held in Syllabus Point 3 of *Bittinger* that “in order to suspend the operation of an ordinance, the ordinance must be repealed or succeeded by another ordinance or an instrument of equal dignity.”) The Supreme Court has reasoned that a moratorium was, in effect, a zoning ordinance, no matter how temporary, but it was enacted “without compliance with the statutory requirements for the enactment of either zoning ordinances or subdivision ordinances. See *Bittinger v. The Corporation of Bolivar*, 183 W.Va. 310, 395 S.E.2d 554 (1990) citing *Bd. of Sup’rs of Fairfax County v. Horne*, 216 Va. 113, 2115 S.E.2d 453 (1975) and *Matthews v. Board of Zoning Appeals of Green County*, 218 Va. 270, 237 S.E.2d 128 (1977).

⁵⁴ See Ordinance section 7.6(f) and 7.6(g) which require that “. . . the Board of Zoning Appeals shall issue, issue with conditions, or deny the conditional use permit . . .”

In this case, the BZA summarily denied the CUP without consideration of the three standards in the Ordinance, thereby committing an error of law that violates the *Corliss/Wolfe* standard. The BZA ignored the LESA determinations that had already been made. The BZA should have considered that the LESA score takes at least 23 issues⁵⁵ 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, for a number of reasons, including the fact that the area surrounding Far Away Farm is not exclusively farmland but instead contains residential growth. This growth includes subdivision property and also includes town homes that are more dense than Far Away Farm. Instead, the BZA ignores the successful LESA score and laments the failure of the LESA system.

The BZA also failed in its duty under Ordinance sections 7.6(f) and 7.6(g) which states that the BZA has the duty to resolve all unresolved issues from the compatibility meeting, because the decision on the CUP is partly dependant on 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 . . .” See August 9, 2005 BZA Hearing Tr., 17:19-20, 18: 4-7.

Now, after the CUP was denied, the BZA claims in its brief that it did not need to

⁵⁵ Ordinance Section 7.4(d)

consider these issues because the so-called failure of the Far Away Farm evaluation as to density and traffic make everything else moot.⁵⁶ This approach violates the Ordinance on at least two levels. First, the Ordinance requires the BZA to resolve the unresolved issues, (which the BZA failed to do). Second, the BZA did not express in its order the concept that its counsel is now advancing – i.e., that the inability of the BZA to resolve density and traffic issues makes the other points moot. This amounts to a post-hoc rationalization of the BZA’s decision, and, at a minimum, the failure of the BZA to clearly set forth the basis for its decision in its findings of fact.

Where the power to pass upon special exceptions or conditional uses allowable by a zoning ordinance has been delegated to an administrative body, the body must set forth the factual basis of its determination so that a reviewing court may ascertain whether the administrative decision conforms to the standards in the ordinance for the particular action taken.

Burkey v. Board of Zoning Appeals of City of Moundsville ex rel. Thompson, 210 W.Va. 345, 351, 557 S.E.2d 752, 758 (W.Va.,2003) citing *Harding v. Bd. of Zoning Appeals of the City of Morgantown*, 159 W.Va. 73, 219 S.E.2d 324 (1975)

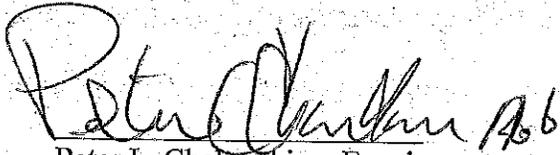
The failure of the BZA to deal with these issues, coupled with its incorrect decisions regarding the compatibility issues, should result in reversal by this Court under the *Corliss* standard of review.

II. Relief Prayed For

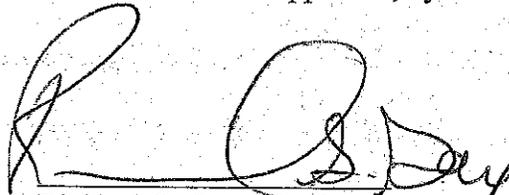
The Appellant, Far Away Farm, respectfully requests that this Court reverse the decision of the Jefferson County Circuit Court upholding the decision of the Jefferson County Board of Zoning Appeals and remand the case to the Circuit Court with directions to issue Far Away Farm its Conditional Use Permit.

⁵⁶ See BZA Brief p 22.

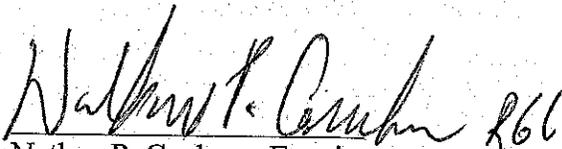
Respectfully submitted,
Far Away Farm
Appellant, by counsel.



Peter L. Chakmakian, Esquire
WV State Bar ID No. 687
108 N. George Street, 3rd Floor
P.O. Box 547
Charles Town, WV 25414
(304) 725-9797



Richard G. Gay, Esquire
WV Bar ID No. 1358
Law Office of Richard G. Gay, L.C.
31 Congress Street
Berkeley Springs, WV 25411
(304) 258-1966



Nathan P. Cochran, Esquire
WV Bar ID No. 6142
Law Office of Richard G. Gay, L.C.
31 Congress Street
Berkeley Springs, WV 25411
(304) 258-1966

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAR AWAY FARM, LLC,

Appellant,

v.

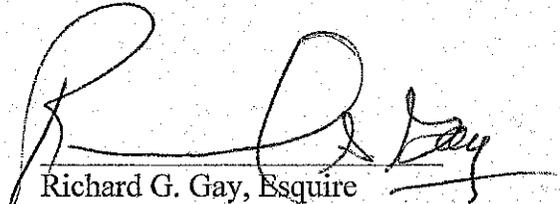
DOCKET NO. 33438

JEFFERSON COUNTY ZONING BOARD OF APPEALS,
A public body;
THOMAS TRUMBLE, Member,
JEFF 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 **REPLY 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 116 W. Washington Street, Suite 2A, Charles Town, West Virginia 25414 by United States first class mail, postage prepaid, this 20 day of September, 2007.


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