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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35129

**JEFFERSON ORCHARDS, INC.,**  
**Petitioner Below, Appellant**

v.

**JEFFERSON COUNTY ZONING BOARD OF APPEALS, a public body;**  
**PAUL RACO, Zoning Administrator; THOMAS TRUMBLE, member; EDWIN**  
**T. KELLY, II, member; TIFFANY HINE, chairperson; CHRISTY HUDDLE,**  
**member; JEFF BRESEE, member; and FRANCES MORGAN, member,**  
**Respondents Below, Appellees**

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Hon. Thomas W. Steptoe, Jr., Judge  
Circuit Court of Jefferson County  
Civil Action No. 06-C-388

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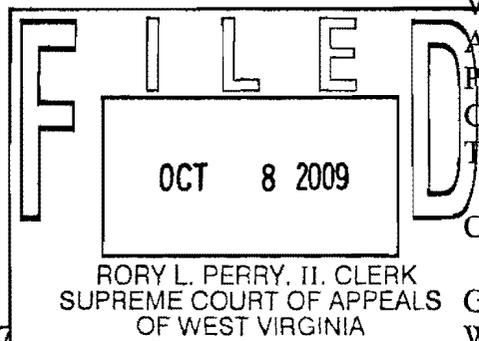
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## I. INTRODUCTION

This is an appeal by Jefferson Orchards, Inc. [Jefferson Orchards or Paynes Ford Station], from an order of the Circuit Court of Jefferson County, entered on December 30, 2008, following this Court's remand directing it to reconsider its previous order "in light of Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals, No. 33438."<sup>1</sup>

In *Far Away Farm*, this Court directed the issuance of a conditional use permit [CUP] by the Jefferson County Planning and Zoning Commission after the Jefferson County Board of Zoning Appeals [BZA] illegally exercised jurisdiction over a developer's application pursuant to an ordinance that was not in effect at the time of the application.<sup>2</sup>

On remand of this case, however, the circuit court disregarded *Far Away Farm*, effectively applied the ordinance adopted after Jefferson Orchards' application, and constructively denied the CUP after Jefferson Orchards spent many years, with the encouragement of local officials, to develop its property for residential use compatible with the neighboring Quail Ridge and Chapel View subdivisions developed while Jefferson Orchards has been denied its fundamental rights to due process of law and equal protection.

Accordingly, having had its subdivision approved by the Berkeley County<sup>3</sup> but rejected by Jefferson County, Jefferson Orchards respectfully requests that this Court reverse the

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<sup>1</sup> *Exhibit A*.

<sup>2</sup> *Far Away Farm, LLC v. Jefferson Co. Bd. of Zoning Appeals*, 222 W. Va. 252, 664 S.E.2d 137 (2008).

<sup>3</sup> The Jefferson Orchards' "Paynes Ford Station" subdivision is located in both Berkeley County and Jefferson County. Not only has Berkeley County approved the subdivision, but pursuant to an agreement between the two counties, water and sewer services are to be provided to the subdivision by Berkeley County, which is already providing water and sewer services to two adjoining subdivisions – Chapel View and Quail Ridge. The only piece of the puzzle remaining in the development of the three subdivisions is approval by Jefferson County.

judgment and remand this case, as it did in *Far Away Farm*, with directions that it be awarded a CUP to proceed with its Paynes Ford Station development as designed and presented.

## II. STATEMENT OF FACTS

On April 3, 2002, Jefferson Orchards submitted an application for a CUP to the Jefferson County Planning Commission. At the time of the application, the ordinance contained a five-step process: (1) a review by planning commission staff; (2) a compatibility assessment meeting; (3) public hearings; (4) issuance or denial of the CUP by the planning commission; and (5) appeal, if desired, to the BZA.

After Jefferson Orchards' application, however, the zoning ordinance was amended and, rather than applying the ordinance in effect at the time of the application, county officials insisted on applying the amended ordinance where the amended ordinance rendered obtaining a CUP both procedurally and substantively more difficult.<sup>4</sup> Eventually, after four years of delay, the BZA was ordered by the Circuit Court of Jefferson County to conduct a hearing on Jefferson Orchards' application, which was held on August 10, 2006. Following this hearing,<sup>5</sup> the BZA created a "density" standard out of whole cloth and constructively denied the application by placing restrictions rendering infeasible any residential development by Jefferson Orchards.

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<sup>4</sup> Curiously, where the provisions of the new ordinance would result in a more favorable LESA score for Jefferson Orchards, the BZA applied a previous ordinance, as did the circuit court, but where less favorable provisions would work against Jefferson Orchards, both the BZA and the circuit court applied the new ordinance. The due process and equal protection implications of this selective application of the provisions of the previous and new zoning ordinances are obvious.

<sup>5</sup> Prior to the BZA hearing, a review by planning commission staff was completed; a neighborhood compatibility meeting was conducted; revisions to the original CUP application were made in order to address issues raised during the compatibility meeting; and two planning commission meetings were held pursuant to the previous ordinance.

Jefferson Orchards then pursued its right to certiorari review of the BZA's decision to the Circuit Court of Jefferson County and, on March 5, 2007, the circuit court granted its petition, stating as follows:

Petitioner argues that the Jefferson County Board of Zoning Appeals (BZA) committed three main errors and some smaller ones. First, it asserts that the BZA effectively amended the Jefferson County Zoning and Land Development Ordinance (Ordinance) by incorrectly applying it to this case. Second, it argues that the BZA did not correctly apply the Ordinance because it denied Petitioner's Conditional Use Permit (CUP) because of increased density, it did not adequately consider Petitioner's Land Evaluation and Site Assessment (LESA) score, and it did not adequately resolve the unresolved issues. Third, Petitioner contends that the BZA denied it due process and equal protection. In addition, it believes that it was error to ignore available public sewer treatment, to not make adequate findings of fact and conclusions of law, and refused to accept certain evidence it supplied.

Respondents argue that the BZA did not error [sic] and that many of the Petitioner's asserted errors are on appeal to the West Virginia Supreme Court of Appeals in the similar case entitled Far Away Farms versus the Jefferson County Board of Zoning Appeals et al. Furthermore, they argue that the April 8, 2005 version of the Ordinance applies, but Petitioner disagrees.

The Court agrees that most if not all of the Petitioner's asserted errors may be resolved by the Far Away Farm case; therefore the Court will not grant certiorari on those errors. However, the Court finds that it must resolve the issue of which Ordinance applies. Thus, the Court **GRANTS** certiorari on that limited issue[ ]: whether the April 8, 2005 version of the Ordinance applies to this case.<sup>6</sup>

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<sup>6</sup> Order, March 5, 2007, at 1-2 (emphasis supplied).

In response to this order, which effectively denied Jefferson Orchards meaningful appellate review from the BZA's constructive denial of its application, Jefferson Orchards filed a motion for immediate certification under R. Civ. P. 54(b).<sup>7</sup>

On April 5, 2007, the circuit court granted Jefferson Orchards' motion. Its order noted that the planned subdivision is located in both Jefferson and Berkeley counties;<sup>8</sup> the Berkeley County Public Service District will provide water and sewer service to the subdivision;<sup>9</sup> and, although the application requested approval of 201 lots in Jefferson County,<sup>10</sup> the BZA approved only 37 lots with a lot size of 3.76 acres,<sup>11</sup> which renders the project completely unfeasible.<sup>12</sup>

The circuit court agreed that "the effect of the Court's [previous] Order . . . was to deny Certiorari for all issues except one,"<sup>13</sup> i.e., "whether the April 8, 2005 version of the Ordinance applies to this case."<sup>14</sup> The circuit court also agreed that this case was "substantially similar"<sup>15</sup> to the *Far Away Farm* case and that the two cases:

have an "interrelationship or overlap among the various legal and factual issues," at least in the following respects:

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<sup>7</sup> Motion Under Rule 54(b) of the West Virginia Rules of Civil Procedure.

<sup>8</sup> Order, April 5, 2007, at 2.

<sup>9</sup> *Id.* at 2 n.2. As previously noted, the Berkeley County Public Service District also provides water and sewer service to the neighboring Quail Ridge and Chapel View residential subdivisions.

<sup>10</sup> *Id.* at 2 n.1.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 5.

<sup>14</sup> *Id.* at 5 n.8.

<sup>15</sup> *Id.* at 5.

Same Ordinance Provisions: Both cases are housing developments that challenge the BZA's interpretation and application of the same sections of the Ordinance, and both claim that the BZA made the same mistakes as to the application of the Ordinance.

Density Evaluation: Both cases in part turn on the BZA's use of density as the determinative factor in deciding whether developments are compatible with the surrounding neighborhood. Both cases claim that the BZA erred because the BZA applied density as the standard to determine whether a development is "compatible" with the surrounding neighborhood, whereas both developments claims that the Ordinance does not support a density evaluation as the principal test for compatibility.

Method and scope of measuring Neighborhood. Both cases claim that the BZA erred in its application and measurement of the properties in the "neighborhood" surrounding the developments.<sup>16</sup>

Consequently, the circuit court concluded that "there is no just reason for delay since the identical or substantially similar issues in the Jefferson Orchards case can be raised at this time on appeal"<sup>17</sup> and certified its earlier order for interlocutory appeal.

Jefferson Orchards then filed its petition for appeal and, after this Court issued its opinion in *Far Away Farm*, this Court remanded this case to the circuit court on June 11, 2008, directing the circuit court to reconsider its previous order "in light of Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals, No. 33438."<sup>18</sup>

Upon remand, however, the circuit court disregarded this Court's *Far Away Farm* decision and its own previous order limiting the scope of certiorari to the issue of the retroactive application of the amended zoning ordinance:

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<sup>16</sup> *Id.* at 9-10.

<sup>17</sup> *Id.* at 10.

<sup>18</sup> *Exhibit A.*

On the 14<sup>th</sup> day of June, 2008 this matter came on for a status hearing, upon remand from the West Virginia Supreme Court, ordering the Circuit Court to reconsider the matter in light of the recent Far Away Farms decision. . . .

Whereupon, the Court inquired as to the status of the case. The petitioner argued that the Court should direct the appropriate governing body, in this instance the Planning Commission, to issue the CUP. Further, the Petitioner argued that the Supreme Court held that the Jefferson County Zoning Ordinance does not contain any standards, other [than] the requirement of a passing LESA score and participation in a compatibility assessment meeting. Because Jefferson Orchards has complied with both of these requirements, the petitioner's [sic] argued that the Court should direct the Planning Commission to issue the CUP.

The Respondent opposed such directive from the Court, arguing that the Far Away Farms decision was specific to that case only,<sup>19</sup> and the Court should remand the conditional use permit to the Planning Commission for the requisite hearings and decision. . . .

The Intervenor also argued that the Court should remand the CUP back to the Planning Commission for a decision.<sup>20</sup>

Even though no one – not Jefferson Orchards, not the BZA, and not the intervenors – argued that the circuit court should assume jurisdiction, it nevertheless did so:

This Court agrees that the *Far Away Farms* case held that because the old ordinance applied rather than the new one, the BZA did not have jurisdiction to consider Petitioner's CUP application. As a result, the BZA's decision, in this case, regarding Petitioner's application is void as a matter of law.

The West Virginia Supreme Court of Appeals, in the *Far Away Farms* case, then analyzed the record, which included the hearings from the BZA. Although it recognized that "other than the LESA scoring requirements, there was no specific substantive criterion governing the decision to deny or issue the permit," the Court does

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<sup>19</sup> Of course, this argument totally disregards the fact that this Court obviously did not believe its decision in *Far Away Farm* was case-specific because, otherwise, it would not have expressly remanded this case pursuant to such decision.

<sup>20</sup> Order, August 18, 2008, at 1-2.

not agree with Petitioner's interpretation that only a successful LESA score and a compatibility hearing are necessary to mandate the issuance of a CUP.<sup>21</sup>

This ruling by the circuit court was made in the context of repeated and unlawful efforts by local officials to avoid complying with this Court's decision in *Far Away Farm*.

After this Court unanimously denied the BZA's rehearing petition in *Far Away Farm*,<sup>22</sup> a petition for writ of certiorari was filed with the Supreme Court of the United States, which was denied on November 7, 2008.<sup>23</sup> Despite all remedies having been exhausted, the planning commission later requested the Jefferson County prosecuting attorney to sue this Court over the *Far Away Farm* decision and, when he refused, it retaliated against him by filing a complaint with the Office of Lawyer Disciplinary Counsel.<sup>24</sup> Thereafter, the planning commission voted to hire outside counsel for purposes "of taking legal action against the West Virginia Supreme Court of Appeals" as a result of the *Far Away Farm* decision.<sup>25</sup>

Eventually, on April 13, 2009, nearly a year after this Court's opinion in *Far Away Farm*, the planning commission filed an unprecedented motion with this Court to intervene and set

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<sup>21</sup> Order, August 20, 2008, at 1-2.

<sup>22</sup> Order, June 11, 2008.

<sup>23</sup> <http://origin.www.supremecourtus.gov/docket/08-321.htm>.

<sup>24</sup> Smoot, *Jefferson Planning Commission Secures Top Lawyer for Case*, Martinsburg Journal (March 25, 2009), at <http://www.journal-news.net/page/content.detail/id/517376.html>.

<sup>25</sup> *Id.* Later, the county commission questioned whether it should fund outside counsel for the planning commission for purposes of "filing suit against the West Virginia Supreme Court of Appeals." Smoot, *Legal Services Questioned*, Martinsburg Journal (March 27, 2009), at <http://www.journal-news.net/page/content.detail/id/517492.html>. At present, however, such issue remains unresolved and the planning commission is seeking funding to secure counsel to study the possibility of suing this Court claiming that its rights were violated by the *Far Away Farm* decision. See Smoot, *Attorney Funds Debated*, Martinsburg Journal (April 10, 2009), at <http://www.journal-news.net/page/content.detail/id/518104.html>.

aside its mandate.<sup>26</sup> On April 30, 2009, this Court refused the commission's motion.<sup>27</sup> This left the commission, however, undeterred in its obsessive attempts to avoid compliance with this Court's opinion. Even after this Court ordered it to issue a permit to the developer,<sup>28</sup> denied the commission's rehearing petition,<sup>29</sup> and rejected the commission's collateral attack,<sup>30</sup> it has filed suit in the United States District Court for the Northern District of West Virginia making yet another collateral attack on this Court's judgment.<sup>31</sup>

This federal suit claims that this Court lacked personal and subject matter jurisdiction over the commission, and that "the decision of the West Virginia Supreme Court in *Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals*, \_\_\_ W. Va. \_\_\_, 664 S.E.2d 137 (2008), violated plaintiff's right to due process of law . . . ."<sup>32</sup> As a result of this alleged due process violation, the commission seeks a federal court order ruling that this Court's decision is

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<sup>26</sup> Motion of the Jefferson County Planning Commission to Intervene and Motion for Relief from Judgment, *Far Away Farm, supra*.

<sup>27</sup> *Id.*, Order (W. Va. April 30, 2009).

<sup>28</sup> Norris, *Justices Order Jefferson Panel to Issue Permit to Development*, The West Virginia Record (April 24, 2008), at <http://www.wvrecord.com/news/211345-justices-order-jefferson-panel-to-issue-permit-to-development>.

<sup>29</sup> Norris, *Court Won't Rehear Jefferson Co. Zoning Case*, The West Virginia Record (June 13, 2008), at <http://www.wvrecord.com/news/213298-court-wont-rehear-jefferson-co.-zoning-case>.

<sup>30</sup> Smoot, *Jefferson County Planning Commission's Appeal Denied*, Martinsburg Journal (May 2, 2009), at <http://www.journal-news.net/page/content.detail/id/519101.html>.

<sup>31</sup> *Jefferson Co. Planning Comm'n v. Far Away Farms, LLC*, United States District Court for the Northern District of West Virginia Civil Action No. 3:2009-cv-00045, at [http://dockets.justia.com/docket/court-wvndce/case\\_no-3:2009cv00045/case\\_id-24221](http://dockets.justia.com/docket/court-wvndce/case_no-3:2009cv00045/case_id-24221).

<sup>32</sup> Complaint at 5, *Jefferson Co. Planning Comm'n v. Far Away Farms, LLC*, United States District Court for the Northern District of West Virginia Civil Action No. 3:2009-cv-00045.

“null and void” and that the commission, despite this Court’s opinion to the contrary, “may rescind its order granting FAF’s permit and may consider it on its merits.”<sup>33</sup>

In other words, the Jefferson County Planning Commission has appealed this Court’s opinion not to the United States Supreme Court, which denied a petition for writ of certiorari on November 10, 2008,<sup>34</sup> but to federal district court. Although Far Away Farms has filed a motion to dismiss this suit, noting that federal district courts do not have appellate jurisdiction from the judgments of this Court, that planning commissions lack standing to sue claiming their constitutional rights have been violated by appellate review of their decisions, that federal courts are required to give full faith and credit to final judgments by state courts of last resort, and that a suit against a private developer under Section 1983 is untenable as it is a citizen, not a state actor,<sup>35</sup> it serves to illustrate the lengths to which the Jefferson County zoning authorities will go to avoid this Court’s ruling in *Far Away Farm*. Moreover, it serves to provide some context for understanding how in this case the circuit court issued an order which exceeded the scope of its own predetermined jurisdiction, assumed the role of the planning commission, selectively and retroactively applied zoning ordinances contrary to this Court’s decision in *Far Away Farm*, and constructively denied Jefferson Orchards’ application.

First, even though the circuit court acknowledged that it “[p]reviously . . . granted a writ of certiorari only on the issue of whether the April 8, 2005 version of the . . . Ordinance applied

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<sup>33</sup> *Id.*

<sup>34</sup> Order, *Dunleavy v. Far Away Farm, LLC*, Supreme Court No. 08-321 (Nov. 10, 2008), at <http://origin.www.supremecourtus.gov/docket/08-321.htm>.

<sup>35</sup> Memorandum of Law in Support of Motion to Dismiss, *Jefferson Co. Planning Comm’n v. Far Away Farms, LLC*, United States District Court for the Northern District of West Virginia Civil Action No. 3:2009-cv-00045.

to Petitioner's conditional use permit (CUP) application"<sup>36</sup> and that "*Far Away Farms* effectively answers that question,"<sup>37</sup> the circuit court "found that it had a record from which it could make a decision" and, sitting as a super planning commission, affirmed the BZA's decision with the exception of "omitting the two requirements that the developer tests all wells adjacent to the property and maintain the vegetation along Opequon Creek."<sup>38</sup>

Second, even though it acknowledged that the actions of the BZA were "void" because it lacked jurisdiction,<sup>39</sup> the circuit court applied a deferential standard of review, holding that any BZA "factual finding supported by substantial evidence is conclusive."<sup>40</sup>

Third, even though it acknowledged that this Court stated in *Far Away Farm* that:

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<sup>36</sup> Order, December 30, 2008, at 1.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 2. Of course, as Jefferson Orchards' property does not border Opequon Creek, it would have been impossible to maintain vegetation on property not owned or controlled by Jefferson Orchards. See *Exhibit B*. These ridiculous conditions having no basis in reality amply demonstrate the lengths to which the Jefferson County zoning authorities will go to prevent development. Jefferson Orchards submits that it is no accident that this Court has issued nine opinions in twelve years involving Jefferson County zoning authorities. See *Far Away Farm, supra*; *State ex rel. Jefferson Bd. of Zoning Appeals v. Wilkes*, 221 W. Va. 432, 655 S.E.2d 178 (2007); *State ex rel. City of Charles Town v. County Comm'n of Jefferson Co.*, 221 W. Va. 317, 655 S.E.2d 63 (2007); *Jefferson Utilities, Inc. v. Jefferson Co. Bd. of Zoning Appeals*, 218 W. Va. 436, 624 S.E.2d 873 (2005); *Corliss v. Jefferson Co. Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003); *Potomac Edison Co. v. Jefferson Co. Planning and Zoning Comm'n*, 204 W. Va. 319, 512 S.E.2d 576 (1998); *Henry v. Jefferson Co. Planning Comm'n*, 201 W. Va. 289, 496 S.E.2d 239 (1997); *Shannondale, Inc. v. Jefferson Co. Planning and Zoning Comm'n*, 199 W. Va. 494, 485 S.E.2d 438 (1997).

<sup>39</sup> *Id.* at 3 ("[T]he BZA's decision in this case regarding Petitioner's application is void as a matter of law."). Or, as this Court succinctly stated, "The BZA simply had no authority to apply the amended Ordinance to FAF's application for a permit." *Far Away Farm, supra* at 257, 664 S.E.2d at 143.

<sup>40</sup> *Id.* at 2.

Pursuant to Section 7.3 of the former Ordinance, a developer seeking a permit was first required to submit an application. Upon receipt of the application, the Planning and Zoning Staff was required to complete the LESA evaluation. If the proposed development received a passing LESA score, a compatibility assessment meeting was scheduled. . . . Thereafter, Section 7.6(d) of the former Ordinance directed the Planning and Zoning Staff to prepare a “report of the developer’s proposal, the agreed upon conditions, and other pertinent data” and then schedule a public hearing. According to Section 7.6(e) of the former Ordinance, the purpose of the public hearing was to “hear the staff’s report of the issues and concerns raised at the Compatibility Meeting.” Following the public hearing, Section 7.6(g) of the former Ordinance stated that the permit shall be issued, issued with conditions, or denied,<sup>41</sup>

it nevertheless held that it “does not agree with the Petitioner’s interpretation that only a successful LESA score and a compatibility hearing is necessary.”<sup>42</sup>

Fourth, the circuit court not only effectively applied the amended ordinance, which this Court held in *Far Away Farm* did not apply, it applied it in an improper manner. As noted by this Court in *Far Away Farm*, the first-step in the process under the previous ordinance was calculation of a LESA score. Of the twenty-three criteria used for calculating the LESA score, none involved density,<sup>43</sup> and it is undisputed that Jefferson Orchards achieved a passing LESA score.<sup>44</sup> As noted by this Court in *Far Away Farm*, the second-step in the process under the previous ordinance was a compatibility assessment meeting. Of the eight criteria used for the

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<sup>41</sup> *Far Away Farm, supra* at 258, 664 S.E.2d at 144.

<sup>42</sup> Order, December 30, 2008, at 4.

<sup>43</sup> Ordinance at § 7.4(d).

<sup>44</sup> Jefferson Orchards’ Memorandum in Support of Petition for Writ of Certiorari, Exhibit D at 6.

compatibility meeting, none involved density,<sup>45</sup> and it is undisputed that any issues concerning the eight criteria – compliance with governmental regulations, similarity of development to existing developments, adequacy of vehicular access, present and future transportation patterns, consistency with land use plans and regulations of adjacent municipalities, any variances, relationship to the comprehensive plan, and all items submitted with the application, were substantially resolved. The circuit court, however, substituted “density,” which is specifically addressed in the new ordinance, but not the previous ordinance,<sup>46</sup> for “compatibility,”<sup>47</sup> and

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<sup>45</sup> *Id.* at § 7.6(b). For purposes of residential development when Jefferson Orchards filed its application, “density” was more a function of available services, primarily water and sewer, rather than “compatibility” as that term was defined in the previous regulations. Prior to the increased availability of public water and sewer services, the “density” of residential development of approximately three acres per lot was dictated by limitations imposed as a result of reliance on wells and septic systems. As public service districts expanded their services, however, “density” became more of an issue. As Jefferson Orchards’ development was premised upon the availability of public water and sewer services, “density” was simply a non-issue under the previous regulations.

<sup>46</sup> Indeed, the stated purposes of the previous ordinance include to “[e]ncourage growth and development in areas,” such as Jefferson Orchards’ proposed development, “where sewer, water, schools, and other public facilities are or will soon be available” and “[p]rovide a guide for private enterprise,” like Jefferson Orchards, “in developing and building a strong economic community.” Ordinance at §§ 1.1(c) and (j). The only reference to “density” in the ordinance relative to rural districts, like the one involved in this case, is contained in Section 5.7, which states as follows:

The purpose of this district is to provide a location for low density single family residential development in conjunction with providing continued farming activities. This district is generally not intended to be served with public water or sewer facilities, although in situations 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. . . . The Development Review System does allow for higher density [where] a Conditional use permit is issued.

(emphasis supplied). Here, there have been no agricultural activity in Jefferson Orchards for nearly a decade; there are three residential developments and two with public water and sewer, in

erroneously held, “the Court cannot find that the BZA was plainly wrong when it limited Petitioner’s project to one lot per 3.76 acres.”<sup>48</sup>

Finally, without any analysis, the circuit court erroneously affirmed the BZA’s decision to impose a 100-foot buffer between the development and an adjacent development as follows:

In paragraph 20, the BZA mandated “a 100 foot buffer along Highland Meadows’ border.”<sup>49</sup> Petitioner argues that this would destroy its ability to create the development as planned and that with the exception of 4 to 12 houses along the border, the houses are not within 100 feet of Petitioner’s development. After review of the record [without explanation], the Court cannot find that this is erroneous.<sup>50</sup>

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the immediate vicinity; West Virginia Route 9, which is undergoing a major upgrade, including two exchanges, is in the immediate vicinity, *see* [en.wikipedia.org/wiki/West\\_Virginia\\_Route\\_9](http://en.wikipedia.org/wiki/West_Virginia_Route_9); and there are a number of employers, including the Veterans’ Administration, the United States Air Force, the Internal Revenue Service, and the United States Coast Guard, are in the immediate vicinity; and the whole purpose of the conditional use permit application process in this case was to allow for a higher density than the three-acre minimum requirement set forth in the ordinance.

<sup>47</sup> The circuit court’s use of “density” was derived from the BZA’s analysis. Incredibly, in order to find that “density” was a component of “compatibility,” the BZA resorted to Webster’s Encyclopedic Unabridged Dictionary of the English Language, which defines “compatibility” as “(1) capable of existing together in harmony, 2) able to exist together with something else, 3) consistent; congruous.” Jefferson Orchards’ Memorandum in Support of Petition for Writ of Certiorari, Exhibit D at 6. Of course, nowhere in this definition is the word “density” or any reasonable synonym for “density.” Nevertheless, based solely upon this dictionary definition, the BZA held, “The Board finds that density of the surrounding neighborhood is a criterion that should be considered when the capability of a project is being determined.” *Id.*

<sup>48</sup> Order, December 30, 2008, at 7.

<sup>49</sup> Ironically, although the BZA imposed a 100-foot buffer along Jefferson Orchards’ border with Highland Meadows, there is no similar restriction imposed upon Highland Meadows and, indeed, some of the homes in Highland Meadows are as close as 40 feet to the border.

<sup>50</sup> *Id.* at 8.

Of course, if Jefferson Orchards' position that the 100-foot buffer would destroy its ability to develop the property is not erroneous, it is unclear from the circuit court's decision why it affirmed the BZA's decision in such regard.

Together with two other neighboring developments – Quail Ridge and Chapel View -- Jefferson Orchards was encouraged by local officials to develop its property for residential use. In fact, the Jefferson County Public Service District and the Berkeley County Public Service District litigated the right to provide public water and sewer service to the Jefferson Orchards subdivision, the Quail Ridge subdivision, and the Chapel View subdivision, resulting in a ruling by the Public Service Commission on May 9, 2003, that “Berkeley County is to provide sewer service to each of the Developments,”<sup>51</sup> including Jefferson Orchards' development. Accordingly, Jefferson Orchards and the Berkeley County Public Service District spent a great deal of funds providing public sewer and public water access, and although the Quail Ridge and Chapel view residential developments have been completed, Jefferson Orchards' property sits undeveloped, like the hole in the proverbial doughnut, because of the BZA and the circuit court.

The alleged “rural” nature of the property as an excuse for denying a CUP is simply wrong. As reflected on a map of the proposed Jefferson Orchards subdivision, where the planned lots appear as unnumbered, it is surrounded by residential developments.<sup>52</sup> Moreover, there are certainly no 100-foot setbacks with respect to these neighboring developments.<sup>53</sup> With

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<sup>51</sup> Jefferson Orchards' Memorandum in Support of Petition for Writ of Certiorari, Exhibit A at 10.

<sup>52</sup> *Exhibit B.*

<sup>53</sup> *Id.*

respect to lot size,<sup>54</sup> Jefferson Orchards' proposal of 201 dwellings on 141.6 acres<sup>55</sup> or an average of .78 acres per dwelling certainly cannot be fairly characterized as "high density" residential development, particularly when some neighboring residential developments have an average of less than .78 acres per dwelling. Moreover, the testimony of the intervenor's expert, a cartographic technician, that the "average density was 13.3 acres per house"<sup>56</sup> was absurd as, even the BZA noted, he "did not present an accurate representation of the number of buildable lots per acre because he did not include undeveloped lots. Further, the calculations were skewed because the cartographic technician included Berkeley County Acreage but did not include lots within the Berkeley County Acreage."<sup>57</sup>

When the BZA was forced to completely reject the testimony of the intervenors' expert offered in support of a red herring "density" standard, it manipulated the data in order to achieve the desired result, i.e., denial of Jefferson Orchards' CUP.

Specifically, Jefferson Orchards' expert testified that the average density of developed lots within a one-mile radius of the proposed subdivision was 1.98 acres, which plainly supported the density of the proposed subdivision.<sup>58</sup> In making his calculations, he properly

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<sup>54</sup> Again, Jefferson Orchards reiterates that density, lot size, or similar criteria are not defined or even referenced with respect to the issuance of conditional use permits under the old ordinance.

<sup>55</sup> Jefferson Orchards' Memorandum in Support of Petition for Writ of Certiorari, Exhibit D at 2. Jefferson Orchards has 154.4 acres of which 15.8 acres lie in Berkeley County and 141.6 acres lie in Jefferson County. Berkeley County has already approved 17 lots on the 15.8 acres which lie in Berkeley County, but of course, the subdivision cannot proceed without the approval of Jefferson County.

<sup>56</sup> *Id.* at 3.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

excluded large lots in excess of ten acres from his calculations because, at that size, those parcels are meaningless for determining residential lot density.<sup>59</sup> Otherwise, there would never be any residential development because the average size of adjacent undivided property will always be in excess of the average size of residential development. This expert testified to his opinions to a reasonable degree of professional certainty.

Faced with no expert to counter this expert's density calculations and without any support in the law or industry practices, the BZA directed Jefferson Orchards' expert to recalculate the average size of parcels within a one-mile radius, including large parcels over ten acres, to arrive at an a meaningless average lot size of 3.76 acres, which the BZA then adopted as the standard even though neither this expert nor anyone else testified that the BZA's methodology was appropriate.<sup>60</sup>

The absolute absurdity of the BZA's decision, affirmed by the circuit court using a wholly-inappropriate deferential standard of review to an administrative agency without jurisdiction, is amply demonstrated by the planning commission's own regulations, effective on September 13, 2006, which provides for an area per dwelling unit [ADU] for single-family detached dwellings in residential growth developments with public water and sewer of 10,000 square feet.<sup>61</sup> Jefferson Orchards' ADU, in contrast, is well in excess of 10,000 square feet. Yet, under the BZA's arbitrary and capricious methodology, Jefferson Orchards is saddled with an

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Ordinance at § 5.4(b)(1). Even for dwellings in rural districts, the old ordinance expressly provides for a minimum lot size of 40,000 square feet, but stated that, "For any residential use that complies with the Development Review System [as has Jefferson Orchards], the setbacks and lot shall be as outlined in Article 5.4(b)." *Id.* at § 5.7(b).

average lot size of 3.76 acres or the equivalent of about 164,000 square feet when its neighboring subdivisions of Quail Ridge and Chapel View have lot sizes that are comparable to those proposed by Jefferson Orchards.

The actions of the BZA and the circuit court have produced an absurd result. Jefferson Orchards' proposed subdivision sits both in Jefferson and Berkeley Counties and, during the pendency of this appeal, the Berkeley County Planning Commission approved the portion of the subdivision which sits in Berkeley County. Now, Jefferson Orchards finds itself with a subdivision plan approved in one county, but rejected in another, which precludes it from development of the property.

Certainly, developers have an obligation to comply with local land use regulations. In this case, however, for almost seven and a half years, Jefferson Orchards has jumped through almost every hoop imaginable to bring its development to fruition. Nevertheless, the circuit court issued an order which exceeded the scope of its own predetermined jurisdiction, assumed the role of the planning commission, retroactively applied zoning ordinances contrary to *Far Away Farm*, and constructively denied Jefferson Orchards' CUP application.

At this juncture, the Jefferson County Planning Commission has made clear that it will not readily comply with this Court's directives in land use cases. It has even gone so far as to collaterally attack this Court's decision in *Far Away Farm* by filing suit in federal court.

Accordingly, Jefferson Orchards respectfully requests that this Court reverse the judgment and remand this case, as it did in *Far Away Farm*, with directions that the circuit court command the Jefferson County Planning Commission to award the CUP as designed and presented.

### III. STANDARD OF REVIEW

With respect to the standard of review, this Court held in *Far Away Farm* as follows:

In this case, we are presented with an appeal of a circuit court order which affirmed the decision of an administrative agency, the BZA. It is well-established that “[o]n appeal, this Court reviews the decisions of the circuit court under the same standard of judicial review that the lower court was required to apply to the decision of the administrative agency.” *Webb v. West Virginia Board of Medicine*, 212 W. Va. 149, 155, 569 S.E.2d 225, 231 (2002). With respect to decisions of a board of zoning appeals, this Court has held that, “While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction.” Syllabus Point 5, *Wolfe v. Forbes*, 159 W. Va. 34, 217 S.E.2d 899 (1975).<sup>62</sup>

Moreover, as this Court held in Syllabus Point 1 of *Corliss*,<sup>63</sup> “In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*.”

Here, it is clear that the circuit court erred (1) by applying a deferential standard of review to an administrative agency without jurisdiction; (2) by exceeding the scope of its own pre-determined jurisdiction upon a petition for writ of certiorari; (3) by retroactively applying zoning ordinances contrary to *Far Away Farm*; and (4) by constructively denying Jefferson Orchards’ application. Accordingly, Jefferson Orchards respectfully requests that this Court reverse the judgment and remand this case with clear directions that the circuit court command the Jefferson County Planning Commission to award the CUP as designed and presented.

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<sup>62</sup> *Far Away Farm*, *supra* at 256, 664 S.E.2d at 141.

<sup>63</sup> *Supra* quoting Syl. pt. 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

#### IV. ASSIGNMENTS OF ERROR

##### A. THE CIRCUIT COURT ERRED IN APPLYING A DEFERENTIAL STANDARD OF REVIEW TO THE VOID DECISION OF AN ADMINISTRATIVE AGENCY.

In *Far Away Farm*, this Court succinctly stated:

We reject the BZA's assertion that applications pending when the amended Ordinance took effect were only 'grandfathered' with respect to the LESA score requirements. This argument is not supported by the meeting minutes of the Jefferson County Commission or any provision in either the former or amended Ordinance. In sum, we find that the Ordinance as amended on April 8, 2005, should not have been applied to the request for a permit submitted by FAF on June 23, 2004. Because the former Ordinance was applicable, the BZA did not have the authority to decide whether to issue or deny the permit. Consequently, its decision to deny FAF the permit is void as a matter of law and the decision of the circuit court must be reversed.<sup>64</sup>

Of course, in the instant case, Jefferson Orchards' application was submitted on April 3, 2002, which was before the April 8, 2005, application of Far Away Farm. Accordingly, the BZA did not have the authority to rule on Jefferson Orchards' permit and its decision to deny the application is void as a matter of law. For this reason, on June 11, 2008, this Court remanded the case to the circuit court in light of *Far Away Farm*.

Rather than conduct a *de novo* review of the application, however, the circuit court incorrectly applied a deferential standard of review:

The plainly wrong standard presumes an administrative tribunal's actions are valid as long as the factual findings are supported by substantial evidence. *Maplewood Estates Homeowners Ass'n v. Putnam County Planning Com'n*, 2006 WL 842878, 629 S.E.2d 778, 782 (W. Va. 2006). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a

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<sup>64</sup> *Id.* at 259, 664 S.E.2d at 144 (emphasis supplied).

conclusion. *Id.* And a factual finding supported by substantial evidence is conclusive. *Id.*<sup>65</sup>

Not only is the wrong standard of review from a void decision by an administrative agency without jurisdiction,<sup>66</sup> it clearly contaminated the circuit court's analysis.

First, the circuit court erred in conducting a "density" analysis as there is nothing in the applicable ordinance to support such analysis. The specific holding of the opinion in *Far Away Farm* is that a new zoning ordinance cannot serve as the basis for denying a pending application for a condition use permit, but this is precisely what the circuit court did in its zeal to defer to the BZA and affirm its constructive denial of Jefferson Orchards' CUP application.

Second, the circuit court erred when it expressly deferred to the BZA's factual findings regarding the "density" of residential development in the area surrounding the proposed subdivision. As previously noted, the BZA was forced to completely reject the testimony of the intervenors' expert, a cartographic technician, after he conceded that his methodology was flawed. Alternatively, as noted in the circuit court's order, Jefferson Orchards' "expert testified that average density in the surrounding neighborhood was one lot per 1.98 acres,"<sup>67</sup> which supports the award of the CUP. The BZA, however, without any legal support,<sup>68</sup> directed Jefferson Orchards' expert to perform a mathematical calculation of density based not upon the expert's opinions concerning the correct methodology, but based upon the BZA's own arbitrary

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<sup>65</sup> Order, December 30, 2008, at 2.

<sup>66</sup> See *Turner v. Perales*, 869 F.2d 140 (2<sup>nd</sup> Cir. 1989)(*de novo* standard of review applied where state court rules were deemed void under supremacy and equal protection clauses).

<sup>67</sup> *Id.* at 7.

<sup>68</sup> Indeed, at no time did the planning commission staff review or present any documentation on density because there is no basis in the ordinance for the consideration or calculation of density.

and capricious methodology. Thereafter, incorrectly utilizing a deferential standard of review, the circuit court then affirmed the BZA's findings:

The BZA heard both experts and the Petitioner was given the opportunity to rebut. The BZA relied on Petitioner's expert for the average lot size – 3.76 acres. This is substantial evidence from an expert. Therefore, the Court cannot find that the BZA was plainly wrong when it limited Petitioner's project to one lot per 3.76 acres.<sup>69</sup>

Obviously, not only was there no “substantial evidence from an expert” supporting the BZA's findings, there was no evidence as the BZA rejected the intervenors' expert's testimony. The BZA did not “rel[y] on Jefferson Orchards' expert for average lot size – 3.76 acres,” as that was not his testimony. Rather, his testimony was that the average lot size was 1.98 acres. The fact that the BZA used Jefferson Orchards' expert as a calculator did not convert him to its witness.<sup>70</sup>

Finally, the circuit court blindly deferred, without explanation, to the BZA's findings regarding the need for a 100-foot buffer along the border of an adjoining residential subdivision:

In paragraph 20, the BZA mandated “a 100 foot buffer along Highland Meadows' border.” Petitioner argues that this would destroy its ability to create the development as planned and that with the exception of 4 of 12 houses along the border, the houses are not within 100 feet of Petitioner's development. After review of the record, the Court cannot find that this erroneous. Furthermore, many applicants' projects do not receive approval for the same as originally planned – this is not a valid argument against the BZA conditions.<sup>71</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> Indeed, one of the fundamental errors in the circuit court's order is its statement, “Unlike in *Far Away Farms*, here Petitioner's evidence concerning density was refuted by an expert.” *Id.* at 5 (emphasis supplied). This is plainly wrong. As noted, both the BZA and circuit court completely disregarding the testimony of the intervenors' expert after he conceded his methodology was flawed. Moreover, Jefferson Orchards' expert certainly did not “refute” himself.

<sup>71</sup> *Id.* at 8 (emphasis supplied).

Again, the circuit court undertook no independent review of any evidence supporting this finding nor did it discuss any evidence. Rather, it erroneously concluded that, based upon a deferential standard of review, the BZA's finding should be affirmed.<sup>72</sup>

Clearly, in *Far Away Farm*, this Court applied a *de novo* standard of review to the evidence and the law governing an application for a conditional use permit where the BZA, as in this case, had rendered a void decision under an inapplicable ordinance resulting in a complete absence of jurisdiction. Because the circuit court in this case, however, applied the wrong standard of review, this Court should reverse the judgment and, as it did in *Far Away Farm*, remand with directions that the circuit court direct the planning commission to award the CUP as designed and presented.

**B. THE CIRCUIT COURT ERRED BY SUBSTITUTING A DENSITY ANALYSIS NOT CONTAINED NOR DEFINED IN THE PREVIOUS ORDINANCE FOR THE SPECIFIC CRITERIA SET FORTH IN THE PREVIOUS ORDINANCE.**

As previously noted, when the circuit court initially certified the case to this Court under Rule 54(b) for consideration in conjunction with the *Far Away Farm* appeal, it held, "Both cases in part turn on the BZA's use of density as the determinative factor in deciding whether developments are compatible with the surrounding neighborhood. Both cases claim that the BZA erred because the BZA applied density as the standard to determine whether a development

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<sup>72</sup> Not only did the circuit court err in deferring to the BZA's finding regarding the need for a 100-foot buffer, there was no evidentiary basis for the buffer. Under the circuit court's analysis, there is nothing that would have prevented the BZA from imposing a 150, 200, or 300 foot buffer even though the ordinance provides for only a 25 foot front, 12 foot side, and 20 foot rear setback for single family attached dwellings in residential growth districts and a 40 foot front, 15 foot side, and 50 foot rear setback for dwellings in rural districts. Plainly, the imposition of a 100 foot buffer was arbitrary, capricious, and designed to render the development infeasible.

is 'compatible' with the surrounding neighborhood, whereas both developments claims that the Ordinance does not support a density evaluation as the principal test for compatibility.”<sup>73</sup> Thus, the circuit court agreed that the BZA’s density analysis was predicated not upon the previous ordinance, but upon the new ordinance. This is because, unlike the new ordinance, the previous ordinance used criteria other than density to determine the nature and scope of conditional uses.

Upon remand from this Court, however, rather than applying the previous ordinance, under which density is not a factor, the circuit court used “a density evaluation as the principal test for compatibility,” which even it had formerly recognized was inappropriate:

In a rural district, density is the type of use rather than the amount of use. Density determines what a rural district is. As the Ordinance explicitly states, “[t]he purpose of the district is to provide a location for low density single family residential development . . . .” The Ordinance only allows a density of one lot per ten acres.<sup>74</sup> It defines a rural district based on density for the purpose of preserving the rural character of the County. The Ordinance mandates that the BZA evaluate the density of a proposed development and compare it to its surrounding neighborhood.<sup>75</sup>

This is simply incorrect and the Court will notice that the circuit court makes no reference to the previous ordinance because nowhere in the previous ordinance does it mandate that the BZA, which had no authority under the previous ordinance, evaluate the density of a proposed

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<sup>73</sup> *Id.* at 9-10.

<sup>74</sup>With respect to this issue, the circuit court’s order is self-contradictory. On the one hand, the order correctly notes that property in rural districts can be subdivided into ten-acre parcels without approval, but on the other hand acknowledges that the ordinance “allows a higher density if an applicant,” such as Jefferson Orchards, “uses the Development Review System (DRS) and the BZA issues a CUP.” *Id.* at 5. In fact, as the circuit court acknowledges, “The CUP process is intended to provide a developer an opportunity to seek permission to increase the density beyond that which is normally allowed in the rural zone. *Jefferson Utilities, Inc. v. Jefferson County Bd. Of Zoning Appeals*, 218 W. Va. 436, 624 S.E.2d 873 (2005).” *Id.*

<sup>75</sup> *Id.* at 6 (emphasis supplied).

development and compare it to its surrounding neighborhood. Rather, the circuit court was erroneously applying the new ordinance which this Court held in *Far Away Farm* does not apply.

Recently, in *Largent v. Zoning Bd. of Appeals*,<sup>76</sup> this Court carefully traced the history of the municipal zoning statute. Initially, when adopted in 1931, the scope of municipal zoning was quite limited.<sup>77</sup> Eventually, in 1959, 1969, 1973, and 2004, the scope of municipal zoning was legislatively broadened, including adoption of a comprehensive plan as a precondition to exercise of zoning powers.<sup>78</sup> Because zoning statutes and ordinances are strictly construed in favor of the property owner,<sup>79</sup> this Court held that our statute “required a municipality to adopt a comprehensive plan either as part of, prior to, or simultaneously with, the adoption of a zoning ordinance in order for the municipality to exercise the zoning powers therein provided.”<sup>80</sup>

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<sup>76</sup> 222 W. Va. 789, 671 S.E.2d 794 (2008).

<sup>77</sup> *Id.* at 792, 671 S.E.2d at 797.

<sup>78</sup> *Id.* at 793-93, 671 S.E.2d at 797-98.

<sup>79</sup> See, e.g., *Pro-Eco, Inc. v. Bd. of Commissioners*, 956 F.2d 635, 637 (7<sup>th</sup> Cir. 1992)(“Indiana courts have strictly construed the powers conferred by the zoning statute.”)(citation omitted); *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 223 (8<sup>th</sup> Cir. 1990)(“The Minnesota Supreme Court has strictly construed zoning ordinances against the municipality and in favor of the property owner.”)(citation omitted); *Wedgewood Ltd. Partnership I v. Town of Liberty*, 578 F. Supp. 2d 941, 950 (S.D. Ohio 2008)(“Ohio law is clear that in interpreting a zoning ordinance courts must strictly construe restrictions on the use of real property in favor of the property owner.”)(citation omitted); *Florida RSA #8, LLC v. City of Chesterfield*, 416 F. Supp. 2d 725, 732 (E.D. Mo. 2006)(“Missouri law provides that zoning ordinances are strictly construed against the zoning authority and in favor of the property owner.”)(citation omitted); *Norton v. Town of Islip*, 239 F. Supp. 2d 264, 270 (E.D. N.Y. 2003)(“Moreover, even if the ordinance were somewhat ambiguous in this regard, the court would be loath to interpret the Town Code as providing such an ephemeral property right, both because zoning restrictions affecting nonconforming uses are to be strictly construed in favor of the property owner.”)(citations omitted).

<sup>80</sup> *Largent, supra* at 796, 671 S.E.2d at 801.

“Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land, and as such, must be strictly construed. . . . Any restrictions contained in zoning resolutions may not be extended by the courts to include limitations not clearly prescribed.”<sup>81</sup> Thus, “Zoning regulations that constrain the free use of real property should be construed strictly” and a “court cannot extend zoning restrictions by implications.”<sup>82</sup>

In this case, however, none of the BZA’s density methodology, which was approved by the circuit court, had any basis in the previous ordinance. There was nothing in the previous ordinance about drawing a circle of one mile in radius around a proposed development, taking the number of lots within that one mile radius, calculating the average acres per existing lot, and restricting lots in a proposed residential subdivision to the average. Moreover, the absurdity of

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<sup>81</sup> *Hamner v. Best*, 656 S.W.2d 253, 255 (Ky. Ct. App. 1983)(citations omitted); *see also Ware v. Fairfax Bd. of Zoning Appeals*, 164 Ohio App. 3d 772, 774, 844 N.E.2d 357, 359 (2005)(“Zoning regulations are in derogation of the common law and deprive a land owner of certain uses of his land to which he would otherwise be entitled. . . . Therefore, zoning regulations must be strictly construed in favor of the property owner, and their scope cannot be enlarged to include limitations not clearly set forth.”)(citation omitted); *Lakewood v. Calanni*, 154 Ohio App. 3d 703, 706, 798 N.E.2d 701, 704 (2003)(“To the extent that there is doubt as to its application, the ordinance must be strictly construed against the city and liberally construed in favor of the defendant.”)(citation omitted); *Hess v. Warwick Tp. Zoning Hearing Bd.*, 2009 WL 2031303 at \*4 (Pa. Cmwlth.)(“[A] zoning ordinance should be construed in a manner that does not, by mere implication, fetter a landowner's reasonable use of his land. Thus, the permissive nature of an ordinance provision should be taken in its broadest sense and restrictive provisions should be construed in the strictest sense.”)(citation omitted); *Ruley v. West Nantmeal Tp. Zoning Hearing Bd.*, 948 A.2d 265, 270 (Pa. Cmwlth. 2008)(“[W]hen construing zoning ordinances, courts must afford permitted uses the broadest interpretation so that a landowner may have the benefit of the least restrictive use of his or her land.”)(citation omitted); *Albert v. Zoning Hearing Bd. of North Abington Tp.*, 578 Pa. 439, 447, 854 A.2d 401, 406 (2004)(“Moreover, in conducting our review, we must keep in mind that zoning ordinances are to be liberally construed and interpreted broadly to permit a landowner the broadest possible use of her land.”)(citations omitted); *Harford County People's Counsel v. Bel Air Realty Associates Ltd. Partnership*, 148 Md. App. 244, 266, 811 A.2d 828, 841 (2002)(“We are mindful that ‘zoning ordinances are in derogation of the common law and should be strictly construed.’”).

<sup>82</sup> *City of Hammond v. Indiana's Last Real Estate Development Corp.*, 923 F. Supp. 1097, 1099 (N.D. Ind. 1996)(citations omitted).

this methodology is amply demonstrated by the following example: (1) an owner proposes a residential development of ten lots on a 100-acre tract; (2) within one-mile of that 100-acre tract is only one other undivided parcel, which is 500 acres; (3) the existing average acres per lot is  $500 \div 10 = 50$  acres; and (4) using the BZA and the circuit court's methodology, the owner can only subdivide the property into 50-acre lots, which is the existing average acres per lot. Unless this Court overturns the use of this methodology, residential development in rural districts in Jefferson County, which is expressly permitted by the ordinance, cannot occur.

Jefferson Orchards was encouraged by local governmental entities to pursue this development. Two local public service districts, Jefferson and Berkeley, fought over providing water and sewer service to the development. Jefferson Orchards met all of the procedural requirements and satisfied all of the substantive criteria for approval of the development, including a passing LESA score and a neighborhood compatibility assessment meeting. What has happened to Jefferson Orchards, however, is precisely what happened to the developer of Far Away Farm, i.e., after satisfying all of the specific procedural and substantive requirements for issuance of a conditional use permit, the BZA and the circuit court created additional substantive requirements, average density within a one-mile radius and 100-foot buffer zone, not provided in the applicable ordinance despite the fact that zoning ordinances are in derogation of the common law, must be given the broadest possible interpretation so that landowners have the benefit of the least restrictive use of their land, and may not be extended by zoning authorities or courts to include limitations not clearly prescribed.

As this Court observed in *Far Away Farm*, "Having carefully reviewed the former Ordinance, we agree with FAF that other than the LESA scoring requirements, there was no specific substantive criterion governing the decision to deny or issue the permit. As discussed

above, FAF received a successful LESA score, and the compatibility assessment meeting was conducted.”<sup>83</sup> Just as this Court prohibited the imposition of additional specific criteria in *Far Away Farm* not provided in the applicable zoning ordinance, it should respectfully reverse the judgment and likewise prohibit the imposition of additional specific criteria in this case.

Rather, the following are the terms of the CUP that should have been issued to Jefferson Orchards [Paynes Ford Station], which are consistent with the ordinance, consistent with the two adjoining Quail Ridge and Chapel View subdivisions, consistent with the terms of the planning commission staff report dated May 24, 2006, which was issued following the neighborhood compatibility meeting; and consistent with the terms of the *Far Away Farm* CUP:

- Permission to use the property for 201 single family homes on the 141+ acres of Paynes Ford Station;
- Limit the lots bordering Chapel View lots 18, 19, 21, and 22 to a minimum of .50 acres;
- Provide an inter-connector walking path between the Chapel View and Paynes Ford Station subdivision for pedestrian traffic;
- Provide an estimation of the amount of land within the site to be covered with impervious surface and within 2 weeks provide a letter to the DPZE office and Barbara Hartman to that effect;
- Provide developer’s report summary on the impact of this subdivision on the aquifers (groundwater recharge) to be maintained in the DPZE office and a copy to be mailed to Patrick McNamara;
- Send a letter to the WV DOH requesting a study on the adequacy of the roads impacted by this development now and during the subdivision process;
- Provide a flashing red/yellow light at the intersection of Paynes Ford and Bowers Road if allowed by the WV DOH;

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<sup>83</sup> *Far Away Farm*, *supra* at 259, 664 S.E.2d at 144.

- Improve sight distance by reducing vegetation or provide 4-way stop signs at the Paynes Ford and Bowers Road intersection at the developer's expense if allowed by the WV DOH;
- Preserve the natural vegetation within the State right-of-way unless otherwise directed by the local or state government approval process. If the natural buffer is to be reduced within the State right-of-way, the buffer will be increased inwards from the property line;
- Provide a 50' landscape buffer along Mt. Zion Road (Route 9/19);
- Provide a copy of the proposed covenants to the president of the Highland Meadows HOA at the Community Impact Statement stage; and,
- Upgrade all adjacent State Roads to meet the Subdivision Ordinance Standards.

Accordingly, Jefferson Orchards requests that this Court reverse the judgment of the Circuit Court of Jefferson County and remand with directions to issue a CUP with these terms and conditions.

**C. THE CIRCUIT COURT ERRED BY EXCEEDING THE SCOPE OF THIS COURT'S LIMITED REMAND ORDER.**

On June 11, 2008, this Court entered an order in which it stated as follows:

On a former day, to-wit, July 10, 2007, came the petitioner, Jefferson Orchards, Inc., by Richard G. Gay and Nathan P. Cochran, Law Office or Richard G. Gay, L.C.; and Peter L. Chakmakian and Alice Chakmakian, its attorneys, and presented to the Court its petition for appeal from a judgment of the Circuit Court of Jefferson County . . . .

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition for appeal and remand it to the Circuit for reconsideration in light of Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals, No. 33438.<sup>84</sup>

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<sup>84</sup> *Exhibit A.*

As previously noted, however, rather than limiting its review to whether the BZA had authority and which ordinance applied, the circuit court undertook a deferential review of the BZA's findings and conclusion.

In Syllabus Point 2, 3, and 4 of *State ex rel. Frazier & Oxley, L.C. v. Cummings*,<sup>85</sup> this Court held:

2. When this Court remands a case to the circuit court, the remand can be either general or limited in scope. Limited remands explicitly outline the issues to be addressed by the circuit court and create a narrow framework within which the circuit court must operate. General remands, in contrast, give circuit courts authority to address all matters as long as remaining consistent with the remand.

3. Upon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.

4. A circuit court's interpretation of a mandate of this Court and whether the circuit court complied with such mandate are questions of law that are reviewed *de novo*.

Here, this Court's remand was not general, but was specific, i.e., for reconsideration under *Far Away Farm*, of the circuit court's ruling that the new statute applied to Jefferson Orchards' application. On remand, Jefferson Orchards forcefully argued that the circuit court should not exceed the scope of this limited remand, but should simply apply the previous statute to its application. Instead, as previously discussed, the circuit court proceeded to apply a deferential standard of review to an administrative agency that acted without jurisdiction, violating both the letter and spirit of this Court's remand order.

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<sup>85</sup> 214 W. Va. 802, 591 S.E.2d 728 (2003).

**D. THE INCONSISTENT, ARBITRARY, AND CAPRICIOUS APPLICATION OF THE JEFFERSON COUNTY ZONING ORDINANCE, WHICH NEITHER USES NOR DEFINES “DENSITY” FOR PURPOSES OF DETERMINING AN APPLICANT’S QUALIFICATION FOR ISSUANCE OF A CONDITIONAL USE PERMIT, VIOLATED JEFFERSON ORCHARDS’ RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FEDERAL AND STATE CONSTITUTIONS.**

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”<sup>86</sup> The vagueness doctrine prevents arbitrary and capricious enforcement,<sup>87</sup> applies to zoning ordinances, and requires that they provide fair notice of their scope, including any density requirements or restrictions.<sup>88</sup>

Here, the Jefferson County authorities have issued conditional use permits to the adjoining and neighboring residential developments at Quail Ridge and Chapel View with comparable densities, but have denied a conditional use permit to Jefferson Orchards. The BZA was able to make these inconsistent decisions because the previous ordinance had no specific provisions regarding density with respect to the issuance of conditional use permits. Thus, the Jefferson County authorities could rule that the Quail Ridge and Chapel View densities, even though comparable to the Jefferson Orchards’ densities, were “compatible” with the neighboring properties, but inconsistently rule that the Jefferson Orchards’ development was not “compatible” with the neighboring properties, based solely upon “density.”

Subsequently, the circuit court, applying an inappropriately deferential standard of review, also equated “density,” which is neither referenced nor defined with respect to

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<sup>86</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

<sup>87</sup> *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

<sup>88</sup> *See, e.g., Magnolia Garden Condomiums, LLC v. City of Waveland*, 2009 WL 367378 (S.D. Miss.) (genuine issues regarding vagueness of zoning ordinance provisions, including those involving density limitations, precluded award of summary judgment to municipality).

conditional use permits in the previous ordinance, with “compatibility,” which is referenced and defined by the LESA criteria.

Where, as in the instant case, the terms of a zoning ordinance are either undefined or are defined by the responsible administrative agency or court in a manner inconsistent with their definition, a violation of due process arises from the denial of an application.

In *Wedgewood Limited Partnership I v. Township of Liberty, Ohio*,<sup>89</sup> a developer sought zoning approval for a plan to develop a retail store. As in the instant case, the applicable zoning ordinance was admitted during the pendency of the developer’s application and, subsequent to the amendment, the zoning authorities denied approval based upon limitations contained in the new ordinance. Rejecting the zoning authorities’ argument that the previous ordinance permitted denial of approval based upon the square-footage of the proposed development, the court held that such application violated the developer’s due process rights as follows:

“The ‘void-for-vagueness doctrine’ is embodied in the due process clauses of the fifth and fourteenth amendments.” *D.C. and M.S. v. City of St. Louis, Mo.*, 795 F.2d 652, 653 (8th Cir. 1986). A vague regulation is constitutionally infirm in two significant respects. First, the doctrine of vagueness “incorporates notions of fair notice or warning,” and a regulation “violates the first essential of due process of law” by failing to provide adequate notice of prohibited conduct. *See Smith v. Goguen*, 415 U.S. 566, 572, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974); *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)(citations omitted). In short, a regulation is void-for-vagueness if it “forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application . . . .” *Id.* Second, the void for vagueness doctrine prevents arbitrary and discriminatory enforcement. *Goguen*, 415 U.S. at 573, 94 S. Ct. 1242. “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis,

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<sup>89</sup> 578 F. Supp. 2d 941 (S.D. Ohio 2008).

with the attendant dangers of arbitrary and discriminatory application” *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

Generally, courts have found that “[v]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand.” *Nat’l Rifle Ass’n of Am. v. Magaw*, 132 F.3d 272, 292 (6th Cir. 1997)(citing *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988)). In other words, the statute must be judged on an as-applied basis, and a facial challenge before the statute has been applied is premature. *United States v. Mazurie*, 419 U.S. 544, 550, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975); *United States v. Hofstatter*, 8 F.3d 316, 321 (6th Cir. 1993).

Plaintiff brings an as-applied challenge, arguing that if the January 19 Instructions solely clarify the PUD Plan’s requirements, and do not represent an amendment to the PUD Plan, then the PUD Plan is unconstitutionally vague. Plaintiff rests its claim on the assertion that the PUD Plan provides no notice of the obligations and restrictions that are spelled out by the January 19 Instructions.

Defendants focus their argument on the notion that it is reasonable to conclude that the 500,000 square-foot limitation and the two-step major modification were a part of the PUD Plan and Liberty Township Zoning Regulation before the creation of the January 19 Instructions. Defendants rely on the Supreme Court’s instructions regarding statutory interpretation as set forth in *INS v. St. Cyr*, 533 U.S. 289, 299-300, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001): “if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems.” Defendants also assert that for Plaintiff to succeed on its vagueness claim, it “must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.” *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 n. 7, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)(internal citations omitted). Defendants argue that Plaintiff falls well short of demonstrating that it is impossible to interpret the PUD Plan as containing the requirements that were allegedly clarified in the January 19 Instructions.

The Court finds that the PUD Plan is unconstitutionally vague as applied to Plaintiff. Defendants' analysis of the vagueness doctrine is flawed insofar as it attempts to demonstrate the facial validity of the PUD Plan. Plaintiff has brought an as-applied challenge, which does not require analysis of whether the PUD Plan could have any possible valid interpretations. *See Mazurie*, 419 U.S. at 550, 95 S.Ct. 710. Instead, Plaintiff's claim requires the Court to determine whether Defendants' actual application of the PUD Plan put Plaintiff on adequate notice of prohibited conduct. *See Goguen*, 415 U.S. at 572, 94 S. Ct. 1242. Thus, the *St. Cyr* and *Hoffman* cases cited by Defendants are inapposite. Both of those cases address facial validity of legislation, not challenges to the application of legislation. As discussed in *supra* section IV(A)(1), there is nothing in the PUD Plan that would put Plaintiff on notice that commercial development outside of subareas 3, 8, and 9 would cause a corresponding decrease in the commercial development permitted within those three subareas--nor did Defendants' actions during the thirteen years following the passage of the PUD Plan give Plaintiff such notice. Further, there is nothing in the Liberty Township Zoning Regulation that would give a person of common intelligence notice that a two-step major procedure for major deviations from the PUD Plan would actually be applicable for any commercial development application, even those that did not propose a major deviation. Thus, the fact that the January 19 Instructions introduced these requirements and were relied upon by the Zoning Inspector for her denial of Plaintiff's application demonstrate that the PUD Plan is unconstitutionally vague as applied to Plaintiff, and as a result, Plaintiff suffered injury.<sup>90</sup>

Likewise, in the instant case, the efforts by the BZA and the circuit court to shoehorn the new ordinance into the previous ordinance in order to equate "density" with "compatibility" is violative of Jefferson Orchards' due process rights under the federal and state constitutions. Accordingly, Jefferson Orchards submits that this Court should reverse the judgment of the circuit court.

In addition to a developer's due process rights, the unequal application of zoning ordinances can also violate a developer's equal protection rights.

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<sup>90</sup> *Id.* at 952-53.

For example, in *City of Cleburne v. Cleburne Living Center*,<sup>91</sup> the United States Supreme Court held that requiring a special use permit for a proposed group home for the mentally retarded violated equal protection where there was no rational basis that home would pose any special threat to city's legitimate interests.

Likewise, in *Village of Willowbrook v. Olech*,<sup>92</sup> the United States Supreme Court held a homeowner could assert an equal protection claim against a municipality based on allegations that it intentionally demanded a 33-foot easement as a condition to connecting her property to its water supply even though it had required only a 15-foot easement from similarly-situated property owners.

Finally, in *Continental Coal, Inc. v. Cunningham*,<sup>93</sup> the court held that a mining company stated an equal protection claim against county zoning authorities based on allegations that they had treated similarly-situated bed-and-breakfast operators differently by not requiring those operators to obtain conditional use permits for non-conforming uses.

In *Trovato v. Town of Star City*,<sup>94</sup> this Court affirmed the reversal of a decision of by zoning authority as arbitrary and capricious where the applicants, surrounded on three sides by mobile homes, sought permission to place twelve mobile homes on their property. Likewise, in the instant case, the Jefferson County zoning authorities have imposed upon Jefferson Orchards untenable conditions that they did not impose upon the similarly-situated Quail Ridge and Chapel View developments. They accomplished this by imposing lot-size and set-back

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<sup>91</sup> 473 U.S. 432 (1985).

<sup>92</sup> 528 U.S. 562 (2000).

<sup>93</sup> 511 F. Supp. 2d 1065 (D. Kan. 2007).

<sup>94</sup> 166 W. Va. 699, 276 S.E.2d 834 (1981).

restrictions they did not impose upon Quail Ridge or Chapel View. By treating Jefferson Orchards differently than similarly-situated applicants, the Jefferson County zoning authorities and the circuit court have violated Jefferson Orchards' rights to equal protection.

## V. CONCLUSION

In *Far Away Farm*, this Court's message to the Jefferson County zoning authorities was clear – the zoning ordinance in effect at the time of an application must be applied, as written, and the denial of any conditional use must be supported by adequate findings and conclusions grounded in the terms of the ordinance. Likewise, in its remand order, this Court's directive to the circuit court was clear – it was to review its previous decision in accordance with the opinion in *Far Away Farm*. On remand, however, the circuit court committed four separate errors.

First, it expressly and incorrectly applied a deferential standard of review to an administrative agency that this Court ruled in *Far Away Farm* was without jurisdiction. Plainly, the circuit court should have applied a *de novo* standard of review to the void decision of an administrative agency without jurisdiction.

Second, it erred in superimposing a density analysis not contained in the applicable ordinance. Ignoring the twenty-three LESA criteria, the circuit court employed a methodology not defined in any statute, ordinance, regulation, or court decision. Moreover, the circuit court equated “density,” i.e., average lot size, with “compatibility” in a manner that would effectively prohibit any residential development into traditionally rural districts. Of course, as discussed in this petition, this is wholly inconsistent with the applicable zoning ordinance, which permits development in rural districts when certain criteria are met.

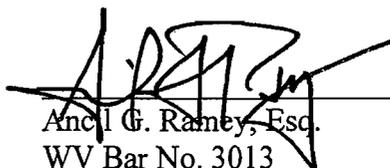
Third, the circuit court exceeded the scope of this Court's remand order. Specifically, rather than limiting its review to whether the BZA had authority and which ordinance applied, the circuit court undertook a deferential review of the BZA's findings and conclusion.

Finally, the inconsistent, arbitrary, and capricious application of the applicable Jefferson County zoning ordinance, which neither uses nor defines "density" for purposes of determining an applicant's qualification for issuance of a conditional use permit, violated Jefferson Orchards' rights to due process and equal protection under the federal and state constitutions. As discussed in this petition, even though the Jefferson County zoning authorities encouraged and approved adjoining and neighboring developments with similar lot sizes, the inherent vagueness of the zoning ordinance regarding "density" allowed first the BZA and then the circuit court to arbitrarily and capriciously deny Jefferson Orchards' application for a conditional use permit.

WHEREFORE, Jefferson Orchards respectfully requests that this reverse the judgment of the Circuit Court of Jefferson County and remand the matter with directions that it require the Jefferson County Planning Commission to forthwith issue the conditional use permit as designed and presented.

**JEFFERSON ORCHARDS, INC.**

By Counsel



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**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**