

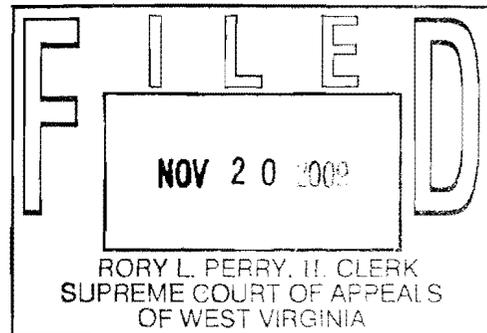
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JEFFERSON ORCHARDS, LLC
Petitioners,

v.

Supreme Court Docket No. 35129
(Jefferson County Circuit Court
Case No. 06-C-388)

JEFFERSON COUNTY
BOARD OF ZONING APPEALS,
PAUL RACO, Zoning Administrator,
THOMAS TRUMBLE, Member,
EDWIN T. KELLT, II, Member,
CHRISTY HUDDLE, Member,
JEFF BRESEE, Member, and
TIFFANY HINE, Chair, and
FRANCES MORGAN, Member,
Respondents.



FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

JEFFERSON COUNTY BOARD OF ZONING APPEALS'
RESPONSE TO BRIEF OF THE APPELLANT

Stephanie F. Grove
Assistant Prosecuting Attorney
Post Office Box 729
Charles Town, West Virginia 25414
West Virginia State Bar No. 9988
304-728-9243 Phone
304-728-3293 Fax

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**JEFFERSON COUNTY BOARD OF ZONING APPEALS’
RESPONSE TO BRIEF OF THE APPELLANT**

Come now your respondents, the Jefferson County Board of Zoning Appeals (hereinafter “BZA”), Paul Raco, Zoning Administrator, Thomas Trumble, Edwin T. Kelly, Christy Huddle, Jeff Bresee, Tiffany Hine, and Frances Morgan and hereby respond to the “Brief of the Appellant” filed with this Court which seeks a reversal of the decision of the Jefferson County Circuit Court entered December 30, 2008, which order approved the BZA’s issuance of the Jefferson Orchard’s conditional use permit. In support of this response the Respondents submit the following:

INDEX

Statement of Facts4

Points and Authorities Relied Upon6

Standard of Review7

Memorandum of Law7

 A. The Supreme Court Did Not Hold that the Jefferson County Zoning Ordinance
 Does Not Contain Any Standards. 7

 B. The Circuit Court Followed This Court’s Directive.

 C. Density and Compatibility Are Relevant. 8

 1) Compatibility Was a Factor under the Pre-Amended Ordinance. 10

 2) Density Is a Factor to Be Considered when Determining Compatibility. 10

 D. The BZA Did Not Violate Jefferson Orchards’ Due Process and Equal Protection
 Rights.13

Request for Relief17

Certificate of Service 18

I. STATEMENT OF THE FACTS

Jefferson Orchards applied for a Conditional Use Permit (hereinafter "CUP") for its Paynes Ford Station subdivision project on April 3, 2002, to place 201 dwelling units on 157 acres in the rural zone of Jefferson County. While most of the proposed project lies within Jefferson County, a small portion of the project is located in Berkley County. The project was assessed a LESA score of 57.58. Because the LESA score was below 60, the project was scheduled for a Compatibility Assessment Meeting. Several appeals were filed with the BZA challenging the LESA score. As a result of these appeals and the inability of the BZA to muster a quorum to hold a Compatibility Assessment Meeting, Jefferson Orchards challenged the failure of the BZA to provide such a meeting. On April 26, 2005, the Circuit Court ordered the BZA to schedule a compatibility hearing. At that hearing, the appellant agreed to resolve eleven of fifty-one unresolved issues. Because forty unresolved issues remained, the BZA scheduled a public hearing to take action on the Paynes Ford Station CUP.

At the public hearing, the BZA heard testimony from the applicant and its witnesses concerning soil contamination and remediation, density, and the agricultural use of the property. The public members who presented unresolved issues presented evidence concerning density through a cartographer, Mr. Gerhart. Mr. Gerhart testified that the average density of the lots within a one mile radius of the proposed Paynes Ford Station Subdivision was 13.3 acres. Jefferson Orchards rebutted this testimony with their own expert, Mr. Mark Dyck, who testified that the average density was actually 1.98 acres, explaining that Mr. Gerhart's calculations were flawed because he used old tax maps that did not include subdivisions and undeveloped lots that were recently approved. Mr. Dyck also explained that Mr. Gerhart's calculations were further flawed because he used Berkley County acreage but did not include the housing units on that

acreage as part of his calculations. After questioning from BZA members, Mr. Dyck admitted that if he had included large parcels which consisted of lots over 10 acres in size and which were located in Jefferson County, removed any acreage that was in Berkeley County, and included the new subdivisions and undeveloped lots, then average lot size surrounding the proposed subdivision is 3.76 acres.

After looking at the unresolved issues and the testimony, the BZA granted Jefferson Orchards a conditional use permit that increased the density from the permitted rural density of one lot per ten acres to one lot per 3.76 acres.

Jefferson Orchards filed a petition for writ of certiorari with the circuit court. Before the circuit court could review the case, the Petitioners filed a motion requesting that the case proceed directly to the Supreme Court of Appeals. The Circuit Court granted this motion. The Petitioners filed a Petition for Appeal with the Supreme Court, alleging that the circuit court had erred on the following points of law: 1) the circuit court used its own order as precedent; 2) the BZA acted beyond its jurisdiction in that it instituted a de facto amendment of the Ordinance without following the requisite procedures; 3) the BZA did not apply the standards in the Ordinance; 4) the BZA wrongly construed the concept of neighborhood; 5) the BZA did not adequately consider the successful LESA score; 6) the BZA did not resolve the unresolved issues; and 7) the BZA violated equal protection and due process principles. The Supreme Court granted the petition for appeal and, the case was remanded back to the Circuit Court under the directive for the Circuit Court to proceed in a manner consistent with the decision in Far Away Farm. The Circuit Court reviewed the evidence in much the same manner as the Supreme Court reviewed the evidence presented in the Far Away Farm Case. After undertaking such a comprehensive review, the Circuit Court issued the CUP as granted by the BZA.

II. POINTS AND AUTHORITIES RELIED UPON

Caselaw

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972)

Far Away Farm v. Jefferson County Board of Zoning Appeals, 222 W.Va. 252, 664 S.E.2d 137 (2008)

Henry v. Jefferson County Planning Commission, 201 W.Va. 289, 496 S.E.2d 239 (1997)

Henry v. Jefferson County Planning Commission, 148 F.Supp.2d 698 (2001)

Jefferson Utilities, Inc. v. Jefferson County Board of Zoning Appeals, 218 W.Va. 436, 624 S.E.2d 873 (2005)

Par Mar v. City of Parkersburg, 183 W.Va. 706, 398 S.E.2d 532 (1990)

State Deputy Sheriff's Association v. County Commission of Lewis County, 180 W.Va. 420, 326 S.E.2d 626 (1988)

Village of Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct. 1073 (2000)

Wolfe v. Forbes, 159 W.Va. 34, 217 S.E.2d 899

Constitution

W.Va. Const. Art. III § 10

Ordinance

Jefferson County Zoning and Land Development Ordinance § 5.7(d)(1)

Jefferson County Zoning and Land Development Ordinance § 7.6(b)

Jefferson County Zoning and Land Development Ordinance § 7.6(e)

III. STANDARD OF REVIEW

While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction.” Syl. Pt. 5, *Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E.2d 899

VI. MEMORANDUM OF LAW

A. **THE SUPREME COURT DID NOT HOLD THAT THE JEFFERSON COUNTY ZONING ORDINANCE DOES NOT CONTAIN ANY STANDARDS**

In *Far Away Farm*, 222 W.Va. 252, 664 S.E.2d 137 (2008) the court stated “[h]aving carefully reviewed the former Ordinance, we agree with FAF that other than the LESA scoring requirements, there was no the specific substantive criterion governing the decision to deny or issue *the* permit.” (emphasis added.) The Petitioner interprets the above-quoted statement to mean the Jefferson County Zoning Ordinance does not contain any standards on which a permit can be either issued or denied. However, after reviewing the Supreme Court’s analysis, this simply is not the ruling of the case. This Court’s statement was in reference to the Far Away Farm’s CUP only, which fact is demonstrated by the Court’s in depth analysis of the proceedings held before the BZA. If the Supreme Court had ruled that the Ordinance did not contain any standards, then the Court’s analysis of the testimony and decision of the BZA proceedings is superfluous.

In addition, if the Court intended to hold that the Jefferson County Zoning Ordinance does not contain any substantive standards that govern the issuance of CUPs, then the statement by the Court would not have been limited to “the permit,” but rather would have included the

phrase “any permit” or “a permit.” The exclusion of such language coupled with the fact that the Court did not include any such holding in its syllabus confirms that the statement by the Supreme Court that the Ordinance lacked any substantive criterion applies to the Far Away Farm CUP only. The actual ruling of the Court was that the Jefferson County BZA did not have subject matter jurisdiction to hear and decide the Far Away Farm CUP because Far Away Farm applied for the permit under the pre-April 2005 Ordinance, which Ordinance provided that the Planning Commission was the county board responsible for the issuance of CUPs. Therefore, the Court’s statement concerning the standards of the ordinance in the *Far Away Farm* decision are only applicable to the Far Away Farm CUP and the evidence presented at the various hearings on that application. Accordingly, a decision upholding the decrease in density of the Paynes Ford Station application is completely consistent with this Court’s ruling in *Far Away Farm*.

B. THE CIRCUIT COURT FOLLOWED THE SUPREME COURT’S DIRECTIVE

In reviewing the evidence before the BZA the Circuit Court performed a review very similar to that conducted by this Court in the *Far Away Farm* case. Following this Court’s own precedent, the Circuit Court reasoned that that it could review the BZA’s record and make a decision regarding the CUP just as this Court had reviewed the BZA’s record in *Far Away Farm* to render a decision on that CUP.

In *Far Away Farm*, after deciding that the BZA did not have subject matter jurisdiction, this Court then reviewed the proceedings before the BZA to determine if there was any substantive basis to deny the Far Away Farms CUP. The Court then reviewed the testimony presented by Far Away Farm and the public at the various hearings held before the BZA. Of particular interest to the Court was the expert evidence that the addition of homes proposed by

FAF would not result in increased traffic. Further, the Court cited that Far Away Farm presented expert testimony that the site was not historically significant. The Court then contrasted this expert testimony with the “anecdotal evidence” presented by the adjacent landowners, on which the BZA relied to deny the CUP, and concluded that this evidence in contrast to the expert testimony did not provide a legitimate reason to deny the CUP.

The circuit court performed a similar analysis in the case *sub judice*. First, consistent with this Court’s decision in *Far Away Farm*, it found that the BZA did not have jurisdiction to hear and decide the CUP. “As a result, the BZA’s decision in this case regarding the Petitioner’s application is void as a matter of law.” *Order*, December 2008, pg. 3. The Court then reviewed the evidence presented before the BZA regarding the comparison of density of the surrounding neighborhood with that of the proposed subdivision. After reviewing the testimony of both experts that testified before the BZA, the Circuit Court ruled that there was substantial evidence supporting the BZA’s decision to grant the CUP with a density of one unit for every 3.76 acres.

In addition, the Petitioner argued that this Court’s remand to the Circuit Court was limited. However, the Petitioner appealed several aspects of the Circuit Court’s March 5, 2007 appeal. In fact, in the Petition for Appeal, the Petitioner assigned seven errors committed by the Circuit Court. Even more telling, the Petition for Appeal to the West Virginia Supreme Court of Appeals, Docket Number 24161, does not assign any error with regard to which ordinance applies. Further, the Order remanding the case to the Circuit Court states that “the Court is of opinion to and doth hereby grant said petition for appeal and remand it to the Circuit Court of Jefferson County for reconsideration in light of Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals, No. 33438.” As such, the Circuit Court’s determination of which ordinance

applied was never appealed to the Supreme Court. Furthermore, the Supreme Court's Order clearly states that the appeal was granted with the only instructions that the Circuit Court was to reconsider the case under the holdings of *Far Away Farm*. Accordingly, the Circuit Court did not exceed its scope of the remand order because this Court clearly granted the Petitioner's appeal in its remand order and the issue of which ordinance applied was never a subject of that appeal.

C. DENSITY AND COMPATIBILITY ARE RELEVANT.

1) Compatibility was a factor under the pre-amended ordinance.

The Petitioner argues that density was not an appropriate consideration to deny the conditional use permit, under the former, pre-April 2005 ordinance. However, compatibility and consequently density have always been requirements under the Jefferson County Zoning Ordinance, even before the April 8, 2005 amendments were enacted. Section 7.6 of the Jefferson County Zoning and Development Review Ordinance indicates that the purpose of the Compatibility Assessment Meeting is to hear issues related to compatibility and in fact limits testimony to those issues alone. "During the Compatibility Assessment Meeting, those who participate should address, but are not limited to, the following criteria *to determine compatibility* of the proposed project..." § 7.6(b) *Jefferson County Zoning and Development Review Ordinance*. Further, the Ordinance indicates that if issues of compatibility are not resolved at the Compatibility Assessment Meeting, then a public hearing should be held to address those issues. "The purpose of the meeting is to hear staff's report of the issues and concerns raised at the Compatibility Assessment Meeting." § 7.6(e) *Jefferson County Zoning and Development Review Ordinance*. After the public hearing on compatibility issues is held, then the Planning Commission can issue, issue with conditions, or deny the conditional use permit. Only after several hearing and meetings on compatibility have been conducted may the Planning

Commission render a decision on the CUP. Thus, it is clear from the provisions of the pre-amended ordinance that compatibility has always been the driving force behind either the issuance or denial of a conditional use permit.

In fact, a review case law indicates that conditional use permits have been denied on the basis of compatibility prior to the enactment of the 2005 amendments. On May 24, 1994, the Planning Commission denied a conditional use permit for townhomes located in the rural zone based on compatibility. A review of the federal court case filed in 2001, well before the April 8, 2005 amendments, as a result of this denial reveals that the entire reason the CUP was not issued centered around the incompatibility of the project. “At the conclusion of the May 24, 1994 Public Hearing, the Commission, by unanimous vote, denied Henry’s application for a conditional use permit. In page two of the Commission’s minutes, the Commission stated the following as grounds for its decision to deny Henry’s application: “*density*, the projects danger to the Town Run and Morgan Grove Park and the *incompatibility of the project* with the neighborhood.” *Henry v. Jefferson County Planning Commission*, 148 F. Supp.2d 698, 702 (2001). Further, a case was also filed in the West Virginia Supreme Court, wherein the Court also quoted the reason for the denial as incompatibility. *Henry v. Jefferson County Planning Commission*, 201 W.Va. 289, 496 S.E.2d 239 (1997) (emphasis added). Therefore, it is clear, through the history of cases, that compatibility and density have always been the cornerstones of consideration in the conditional use permit process in Jefferson County.

Because compatibility has always been a consideration in the issuance or denial of conditional use permits, the BZA’s decision in the case *sub judice* to reduce the amount of density based upon compatibility is still valid under the pre-amended ordinance. Further, it is significant to note that the Supreme Court never addressed the issue of compatibility in the *Far*

Away Farm case, but rather decided the case on the jurisdiction of the BZA to issue the conditional use permit. As such, a denial based on density is not inconsistent with the Supreme Court's ruling in the *Far Away Farm* decision.

2) Density is a factor to be considered when determining compatibility

The Petitioner also argued that the Circuit Court erred in considering density and upholding the BZA's decision based upon the calculations presented to the BZA. However, density is a factor to be considered in compatibility, which as discussed above was relevant under the pre-amended ordinance. 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 Board of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d 873 (2005). However, currently in a rural zone, a subdivider may only subdivide one lot per ten acres. *Ordinance* § 5.7(d)(1). Thus, an increase in density could possibly be defined as one lot per nine acres. Any grant of a CUP for more subdivision of land than is permitted in the Ordinance is an increase in density. The BZA has within its discretion to decide when such an increase is incompatible with the surrounding neighborhood, whether it be one lot per ten acres or one lot per every one acre. In addition, in this case, in granting the CUP to Paynes Ford Station, the BZA placed a condition on the CUP that limited the density. However, this condition is still an increase from the one lot per ten acres permitted under the Zoning Ordinance.

The definition of compatibility is also instructive as to whether density is a factor to be considered when determining if a project is compatible. Webster's dictionary defines compatible as "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. Under the plain meaning of compatible, comparing density to density is a reasonable interpretation to determine if the proposed subdivision is “consistent” with the surrounding neighborhood. Here, the BZA concluded that because the proposed development was more dense than the surrounding neighborhood, it would not be compatible with the existing rural nature of the community and thus limited the density by placing a condition on the CUP.

The Petitioner also argued that Jefferson Orchard’s expert was correct in his calculation of density, which calculations excluded large parcels and the Circuit Court erred in deferring to the BZA’s finding on this issue. Under the Petitioner’s calculations, all parcels over ten acres were eliminated. This resulted in twenty two parcels being excluded from the calculations. However, the BZA and the Circuit Court found that it was not reasonable to eliminate large parcels which in fact create the rural character of the rural zone. However, it is clear from the record that the BZA used Mr. Dyck’s calculations of total land in the area, and excluded the Berkeley County property and roads. They simply added in the large parcels that are the hallmark of any rural zone. Without such a density calculation that considered large undeveloped parcels in the area, any proposed residential subdivision would *always* be compatible in the rural zone because only developed, smaller parcels would be considered. It is clear that large parcels that surround the subject property must be considered, and it was not an error for the circuit court to defer to the BZA’s findings on this issue.

D. THE BZA DID NOT VIOLATE JEFFERSON ORCHARDS DUE PROCESS AND EQUAL PROTECTION RIGHTS

The Petitioner alleges that the BZA violated Jefferson Orchards’ equal protection and due process rights because the adjacent developments of Quail Ridge and Chapel

View have a much higher density than was granted to Paynes Ford Station. However, each subdivision is judged on its own merits and neither the Ordinance nor other land use law requires the BZA to grant a CUP because other applicants in the same area received a CUP for an increase in density. All land is unique, and must be judged upon the criteria comprising the CUP Application Process and all the factors which constitute those component parts. Accordingly, a CUP application is not evaluated based upon the merits of other property. The CUP application is just that: an application for permission, not a vested property right.

Further, the applicant's assertion that because other subdivisions received CUPs, Jefferson Orchards is also entitled to a CUP, highlights the fallacy of the Petitioner's arguments concerning density and compatibility. Under the Petitioner's rationale, if one high density subdivision exists in the rural zone, then other high density subdivision can "piggyback" on to that subdivision, creating a sprawl of development in the rural zone. Such a rationale annihilates the rural zone, for if one high density subdivision is approved in an area than other applicants can simply use that approval as justification that their CUP must also be approved, thereby destroying the low density character of the rural zone. The Ordinance explicitly states that "[t]he purpose of this district is to provide a location for low density single family residential development. . ." *Jefferson County Zoning Ordinance* §5.7. If the BZA is compelled to approve every CUP where another CUP has also been approved in the same area, then the rural district would cease to exist.

In addition, the BZA cannot be compelled to approve a subdivision because the portion that lies within Berkeley County was also approved. Berkeley County does not have zoning, and as such, is mandated to approve every subdivision as long as it meets the planning requirements. As such, it is unreasonable to require Jefferson County, which adopted county-

wide zoning in 1988, to base its decisions on those of Berkeley County, which has never adopted county-wide zoning. Thus, the BZA is permitted to deny or limit the density of CUPs to maintain the rural zone. In this instance, the BZA granted to Paynes Ford Station a CUP that increased the permitted density from 1 lot per 10 acres to 1 lot per 3.76 acres. This is an increase in density that also maintains the low-density character of the rural zone.

Furthermore, the Supreme Court has ruled that “a zoning ordinance is not invalid as to a particular property owner where such property owner is not treated differently from other property owners [in the same zoning district] and the ordinance bears a substantial relation to the health, safety, morals, and general welfare of the people. And the courts are not disposed to declare an ordinance invalid in whole or in part where it is fairly debatable as to whether the action of the zoning commission or the city council is arbitrary and unreasonable.” Syl. Pt. 1 *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 398 S.E.2d 532 (1990). Every landowner in the rural district must comply with the same standards: one lot per ten acres. If a landowner wishes to apply for more density, then he must apply for a conditional use permit. Both the subdivisions of Chapel Hill and Quail Ridge had to complete the same process as Jefferson Orchards, and like Chapel Hill and Quail Ridge, Jefferson Orchards was eventually granted a CUP to increase the density beyond that which is permitted in the rural zone. All subdivisions that apply must also meet compatibility requirements under the ordinance, including those issues that are raised at the compatibility assessment meeting. Finally, the BZA has discretion to preserve the rural zone, and look at compatibility issues. If the BZA is not granted this discretion and is mandated to approve a CUP because other landowners also received CUPs, then rural zone ceases to exist.

Further, the Petitioner’s reliance on *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000) is misplaced. In that case the Court ruled that in order to prevail on

an equal protection claim brought by a class of one the plaintiff must allege both that “she has been intentionally treated differently from others similarly situated and ***that there is no rational basis for the difference in treatment.***” *Id.* at 564 (emphasis added). Here, the Petitioner was not treated differently than any other plaintiff similarly situated, and Jefferson Orchards was ultimately granted a conditional use permit for increased density. In addition, if the Court were to find that the Plaintiff was treated differently than those who are similarly situated, there is a rational basis for such a difference: the preservation of the rural zone. The Ordinance itself states that the rural zone is intended to provide low density development. As such, not every conditional use permit will be granted just because others have been approved.

Finally, although the Petitioner received adequate due process, it is not entitled to any due process protections because Far Away Farm does not have a vested or legitimate property interest in the CUP process. Article III, Section 10 of the West Virginia Constitution provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law...” Therefore, the procedural due process is only triggered by the existence of a liberty or property interest. *State Deputy Sheriff’s Association v. County Commission of Lewis County*, 180 W.Va. 420, 422, 376 S.E.2d 626, 628 (1988). “No property interest exists where an individual does not have a legitimate claim of entitlement to the object sought.” Syl. Pt. 3, *State Deputy Sheriff’s Association*, 180 W.Va. 420, 376 S.E.2d 626.

Jefferson Orchards does not have a legitimate claim of entitlement to a CUP. “A person has a legitimate claim of entitlement to a development plan if the individuals reviewing the plan lack all discretion to deny the issuance of the permit or withhold its approval. Any significant discretion conferred upon the individuals reviewing the plan defeats the claim of a property interest.” *Henry v. Jefferson County Planning Commission*, 148 F. Supp.2d 698, 711 *aff’d in*

part, vacated in part 34 Fed. Appx. 92 (4th Cir. W.Va.2002), *cert. denied*, (U.S. Mar. 31, 2003), *quoting*, 408 U.S. 564, 577, 92 S.Ct. 2701. The issuance of a CUP to increase density in the rural zone is not a right to which Far Away Farm is entitled but rather the issuance of the CUP is contingent upon the discretion of the BZA, which body is guided by the factors delineated in the Zoning Ordinance. An applicant's interest in obtaining a conditional use permit under the Jefferson County CUP Process is "at best, a unilateral expectation, and not a protected property interest." Henry, *supra*. at 714. Therefore, Jefferson Orchards is not entitled to due process protections in the CUP process, which is only triggered by the existence of a property interest which would vest upon the issuance of a CUP.

V. RELIEF REQUESTED

The Respondent respectfully requests that the Court: (1) affirm the Board of Zoning Appeal's and the Circuit Court's decision to issue the conditional use permit with conditions; and (2) award any other relief the court may deem appropriate.

Respectfully Submitted,

Jefferson County
Board of Zoning Appeals,

By Counsel:



Stephanie F. Grove
Assistant Prosecuting Attorney
Post Office Box 729
Charles Town, West Virginia 25414
WV Bar No. 9988
304-728-9243 Phone
304-728-3293 Fax

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CERTIFICATE OF SERVICE

I, Stephanie F. Grove, do hereby certify that on this 18th day of November, 2009, I served a true copy of the foregoing "Jefferson County Board of Zoning Appeals' Response to Brief of the Appellant" upon the following counsel via facsimile and U.S: Ancil G. Ramey, Steptoe & Johnson, PLLC, E..P.O. Box 1588, Charleston, WV 25326-1588, (304) 353-8180.



Stephanie F. Grove
Assistant Prosecuting Attorney
Post Office Box 729
Charles Town, West Virginia 25414
West Virginia State Bar Number 9988
304-728-3243 Phone
304-728-3293 Fax