

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**

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

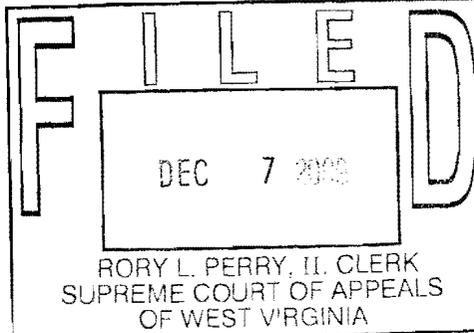
REPLY BRIEF OF THE APPELLANT

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I. INTRODUCTION

This is a reply by Jefferson Orchards, Inc. [Jefferson Orchards or Paynes Ford Station], to the brief of the Jefferson County Board of Zoning Appeals [BZA] in an appeal 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."

II. STATEMENT OF FACTS

This Court held in *Far Away Farm, LLC v. Jefferson Co. Bd. of Zoning Appeals*,¹ "[O]ur review of the former Ordinance reveal[s] that prior to the April 8, 2005 amendments, the BZA was not authorized to make the initial decision to either issue or deny the permit. Rather, Section 7.6(g) of the former Ordinance provided: 'The Planning and Zoning Commission shall issue, issue with conditions, or deny the conditional use permit.'" Consequently, it is somewhat incongruous for the BZA to be opposing Jefferson Orchard's CUP when it had no jurisdiction under the applicable ordinance to determine whether Jefferson Orchard receives a CUP.

Moreover, in *Far Away Farm*, this Court stated:

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. At the meeting, various members of the public appeared and made 106 demands of FAF. FAF agreed to thirty-nine requests but refused to comply with the other demands some of which were clearly unreasonable. . . .

A public hearing was held on July 26, 2005, to deal with the unresolved issues from the compatibility assessment meeting. FAF submitted substantial evidence to support its subdivision development at that time. In particular, FAF presented expert

¹ 222 W. Va. 252, 258, 664 S.E.2d 137, 143 (2008).

reports to show that FAF traffic would not create a significant amount of peak traffic impact on any of the four studied intersections and further, that the level of service for the intersections involved fully complied with the terms of the Subdivision Ordinance. FAF also presented evidence that it was unlikely that its water system would interfere with the local wells and demonstrated that there were no sinkholes on its property. FAF further showed that the property is not historically significant; that there are no previous recorded sites of archaeological significance on the property; and that the Phase 1 environmental report revealed nothing that could not be dealt with as the project progressed.

In contrast, the record shows that no evidence other than anecdotal experiences related by some members of the public was presented at the public hearing to contradict FAF's traffic study. Anecdotal evidence and mere speculation and conjecture about potential traffic problems is simply insufficient to overcome expert testimony.²

Applying this analysis to the instant case, it is clear that Jefferson Orchards is entitled to a CUP under the applicable ordinance because (1) other than the LESA scoring requirements, there were no specific substantive criteria governing the decision to grant or deny the CUP; (2) Jefferson Orchards had a passing LESA score; (3) a compatibility meeting was conducted; and (4) a public meeting was conducted at which Jefferson Orchards' evidence was unrefuted that its development would comply with all objective criteria set forth in the applicable ordinance.

Rather than receiving the CUP to which it was entitled, however, the BZA, which should have played no role in the process, effectively amended the applicable ordinance to substitute "density" for "compatibility" by directing Jefferson Orchards' expert to include "lots over 10 acres in size" that were obviously not part of any residential development; to "remove[] any acreage that was in Berkeley County" even if it adjoined the Jefferson Orchards' development; and to "include[] the new subdivisions and undeveloped lots" in order to achieve an "average lot

² *Id.* at 260, 664 S.E.2d at 145 (footnote omitted).

size surrounding the proposed subdivision [of] 3.76 acres.”³ In other words, the BZA manipulated the data, without any basis in the ordinance, in order to achieve the desired result, i.e., effective denial of the CUP.⁴

³ BZA Brief at 5. It is significant to note that, even using the BZA’s formula, the median lot size in the arbitrarily prescribed area is .81 acres and the median lot size in Jefferson Orchards’ proposed subdivision is .71. Reply Memorandum in Support of Petition for Writ of Certiorari at 5 n.3.

⁴ As noted in Jefferson Orchards’ initial brief, the Jefferson County Planning Commissioner filed a suit in the United States District Court for the Northern District of West Virginia making a collateral attack on this Court’s decision in *Far Away Farm. 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. Since the filing of Jefferson Orchards’ initial brief, the district court has entered an order dismissing the Commission’s suit, stating as follows:

This Court finds that when plaintiff filed the Motion to Intervene contesting the jurisdiction of the West Virginia Supreme Court, it submitted to the jurisdiction of the West Virginia Supreme Court, and thereby became a party bound by the court’s judgment on that issue. Since the purpose of plaintiff’s Motion to Intervene was to allow it to enter into the action as a party—and the motion was denied—it would appear that of necessity, plaintiff was not a party to the action. This is not the law. When plaintiff, in filing its Motion to Intervene, entered an appearance before the court to contest jurisdiction, it submitted itself to be bound by the West Virginia Supreme Court’s decision as to jurisdiction. . . .

The West Virginia Supreme Court actually considered the jurisdictional issue several times, and each time rejected the arguments that it lacked jurisdiction. . . .

Based on the reasoning stated above, this Court finds that the issue of a lack of personal jurisdiction over the Commission was fully and fairly litigated before the West Virginia Supreme Court, and that the court found in a final judgment that it had sufficient jurisdiction to order the Commission to issue FAF a permit. As such, this Court finds that plaintiff would be bound in the West Virginia courts by the judgment issued in the State Court Case. This Court is, therefore, bound by the Full Faith and Credit Clause of the Constitution of the United States to accord that judgment the same preclusive effect as it would be granted in the courts of West Virginia. . . .

When the West Virginia Supreme Court’s decision as to jurisdiction is accorded the preclusive effect, plaintiff’s action must fail. This is because a collateral attack

A zoning authority cannot effectively deny a CUP based upon an applicant's failing a test not provided in the applicable zoning regulations, but this is exactly what has occurred in this case. Even though the CUP application in this case requested no information concerning either density or average lot size,⁵ the BZA concocted a formula for calculating average lot size⁶ in order to award a CUP to Jefferson Orchards that it knew would be entirely infeasible. Then, it

of a state court judgment cannot be mounted in federal court where the state court had jurisdiction. After finding that the West Virginia Supreme Court fully and fairly considered its jurisdiction this Court's enquiry ends. Any argument that the court acted in error is to be disregarded by this Court.

<https://ecf.wvnd.uscourts.gov/doc1/1991833695> at 11-17. Undaunted, however, by clear authority preventing a collateral attack on this Court's decision in federal district court, the Jefferson County Planning Commission has filed a motion for reconsideration of the dismissal of its federal suit, arguing that this "Court's decision in FAF on the conditional use permit was a nullity because the Court lacked subject matter jurisdiction to decide that issue on the merits." <https://ecf.wvnd.uscourts.gov/doc1/1991836770> at 6. Specifically, the Commission is now arguing that, "Without even addressing the issue of its own jurisdiction over the subject matter of the conditional use permit – let alone personal jurisdiction over the Planning Commission – the Court proceeded to the merits and to ordering the Planning Commission to issue the permit." *Id.* at 7. As noted in Jefferson Orchards' initial brief, the Jefferson County zoning authorities will go to extraordinary lengths to avoid issuing conditional use permits for residential development in Jefferson County.

⁵ Consequently, density or average lot size played no role in either calculation of the LESA score or review by the planning commission staff. Indeed, the planning commission staff determined that Jefferson Orchards' application complied with the requirements of the ordinance. It was as if an applicant scored high enough on a bar examination to comply with the written requirements for admission to the practice of law, but admission is denied, despite the recommendation of staff, because the State Bar, which has no role in the process, determined that the applicant is older than the average age applicants who had been admitted over the previous ten-year period. Certainly, the Rules of Admission to the Practice of Law have general "character and fitness" requirements, but the data provided in an application cannot be manipulated, without notice, in order to deny admission using such generalities.

⁶ The conduct of the BZA was arbitrary. The decision as to the land area to be used to calculate average lot size was arbitrary. The decision to use mean lot size instead of median lot size was arbitrary. The decision to exclude land outside Jefferson County was arbitrary. The decision as to what properties would be included was arbitrary. Finally, the decision to issue a CUP to Jefferson Orchards with an average lot size equal to its concocted formula was arbitrary.

used this single calculation of “density” as a substitute for “compatibility” even though none of the written criteria for determining compatibility references density or any formula for the calculation of density.

Administrative agencies, including zoning authorities, cannot amend statutes, ordinances, rules, or regulations through the adjudicatory process by creating tests that have no basis on those statutes, ordinances, rules, or regulations. The public is entitled to fair notice of what is required for obtaining agency approval and to the receipt of a license, certificate, or permit if they comply with the criteria set forth in the applicable statutes, ordinances, rules, or regulations.

In this case, however, the BZA, which was without any authority under the applicable zoning ordinance, did not follow the ordinance and regulatory process, but created obstacles for issuance of the CUP sought by Jefferson Orchards in the form of a “density” test. The circuit court then compounded this error by deferring to an agency without authority; by applying standards not in effect at the time of Jefferson Orchards’ application; and by likewise using a “density” test as a substitute for “compatibility” even though Jefferson Orchards complied with the published standards for determining “compatibility.”

Consequently, this Court should 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.

III. STANDARD OF REVIEW

The BZA agrees⁷ that 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.”⁸

Where the parties disagree, however, is that Jefferson Orchards maintains 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.

In this case, it is clear that Jefferson Orchards is entitled to a CUP because (1) it had a passing LESA score; (2) a compatibility meeting was conducted; and (3) a public meeting was held at which the evidence was unrefuted that Jefferson Orchards’ development would comply with all objective criteria set forth in the zoning ordinance. Only by manipulating the data and creating a new density criterion not referenced in the applicable ordinance or the application was the CUP denied by the BZA, which was without jurisdiction under the applicable ordinance.

Accordingly, Jefferson Orchards requests that this Court reverse the judgment of the Circuit Court of Jefferson County 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.

⁷ BZA Brief at 7.

⁸ Syl. pt. 5, *Wolfe v. Forbes*, 159 W. Va. 34, 217 S.E.2d 899 (1975); *Far Away Farm*, *supra* at 256, 664 S.E.2d at 141.

IV. ASSIGNMENTS OF ERROR

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

For whatever reason, this assignment of error by Jefferson Orchards is not directly addressed in the BZA's brief. Instead, it makes a straw-man argument that this Court did not rule in *Far Away Farm* that the old ordinance contained no standards.⁹

Of course, Jefferson Orchards does not argue and has never argued that no standards apply to its CUP application. Rather, Jefferson Orchards argues that the record evidence clearly establishes that its application complied fully with the standards in the applicable ordinance; that the "density" test was created out of whole cloth to justify denying the CUP; and that the circuit court incorrectly applied a deferential review to the BZA's decision even though the BZA lacked jurisdiction and there was no evidentiary basis for denying the CUP applying the correct criteria.

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.¹⁰

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

⁹ BZA Brief at 7.

¹⁰ *Id.* at 259, 664 S.E.2d at 144 (emphasis supplied).

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 conclusion. *Id.* And a factual finding supported by substantial evidence is conclusive. *Id.*¹¹

Not only is the wrong standard of review from a void decision by an administrative agency without jurisdiction,¹² it clearly contaminated the circuit court's analysis.

First, the circuit court erred in conducting a "density" analysis even though there is nothing in the applicable ordinance or the application to support such analysis. 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. 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.

The record simply does not support the BZA's contention that the circuit court "performed a review very similar to that conducted by this Court in the *Far Away Farm* case."¹³

¹¹ Order, December 30, 2008, at 2.

¹² See *Turner v. Perales*, 869 F.2d 140 (2nd Cir. 1989)(*de novo* standard of review applied where state court rules were deemed void under supremacy and equal protection clauses).

¹³ BZA Brief at 8.

As the record reflects, the circuit court undertook no independent review of the evidence, but based upon a deferential standard of review, erroneously concluded that the BZA's findings should be affirmed. Indeed, as the BZA's own brief describes it: "[T]he 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."¹⁴

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.

Having lost the *Far Away Farm* case, the Jefferson County zoning authorities persist in attempting to apply a criterion, i.e., density, found in the new ordinance, but not found in the ordinance applicable to this case. As noted, they have filed a suit in federal court challenging this Court's jurisdiction in *Far Away Farm* to mandate compliance with the applicable ordinance. Moreover, in this case, they persist in their efforts to substitute "density," which was not in the applicable ordinance, for "compatibility," which is in the applicable ordinance.

The reason for this is simple. There is no question that the Jefferson Orchards' subdivision will be "compatible" with surrounding property as it was initiated as part of a three subdivision plan together with the adjoining Quail Ridge and Chapel View developments both of which have been constructed. Indeed, approval of a sewer line across Jefferson Orchards' property was needed to develop the Chapel View property and Jefferson Orchards shared in the cost of installing that line so that it could be used by the purchasers of lots in its subdivision.¹⁵

¹⁴ *Id.* at 9.

¹⁵ Determining the economic feasibility of providing public water and sewer service to these three developments was based upon comparable lot sizes. Obviously, it is not feasible to extent public water and sewer service, as in this case, to only a few lots when the development was planned for lot sizes comparable to Quail Ridge and Chapel View.

The BZA's argument that the Jefferson Orchards' development is incompatible with the rural nature of the area is simply wrong. As noted, it is adjacent to the Quail Ridge and Chapel View developments and its compatibility with those developments can be readily observed.¹⁶ All three are near the newly-constructed U.S. Route 9; the Veteran's Affairs Medical Center; the City of Kearneysville; and other commercial and industrial development.¹⁷ There are 423 total parcels within 1 mile of Jefferson Orchards.¹⁸ The median parcel size within Jefferson Orchards' neighborhood is .81 acres¹⁹ and the median lot size proposed by Jefferson Orchards is .71 acres.²⁰ Finally, the Jefferson Orchards' subdivision is bounded on three sides by developments which are classified under the zoning ordinance as "high development pressure."²¹

Because of its location sitting just above the neighboring Quail Ridge and Chapel View developments, the Jefferson Orchards' property is supremely suited for similar residential

¹⁶ Jefferson Orchards' development is the rectangular shaped property located immediately south of the Quail Ridge and Chapel View developments, which are located just south of US Route 9, that has been cleared for years pending approval of its CUP. *See Exhibit A* (http://maps.google.com/maps?f=q&source=s_q&hl=en&geocode=&q=25430&sl=37.0625,-95.677068&sspn=45.197878,81.738281&ie=UTF8&hq=&hnear=Kearneysville,+Jefferson,+West+Virginia+25430&ll=39.386325,-77.908902&spn=0.030648,0.055575&t=h&z=15) (four views of 2007 satellite image).

¹⁷ *Id.*

¹⁸ Reply Memorandum in Support of Petition for Writ of Certiorari at 5 n.3.

¹⁹ *Id.*

²⁰ Median lot size better demonstrates the incremental impact of a development on surrounding properties as it minimizes the impact that a few large parcels can have on calculation of average lot size.

²¹ This illustrates another problem with the BZA's analysis, i.e., it fails to differentiate between a .25 acre lot immediately adjacent to a proposed development from a 400 acre parcel .99 miles from the development.

development and unsuited for any other productive use.²² So, without any evidence of incompatibility, the BZA substituted “density” and then manipulated the data to approve the subdivision with an average lot size that is many multiples of the lot sizes in the adjoining Quail Ridge and Chapel View subdivisions.

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 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.”²³ Thus, the circuit court

²² The Fourth Circuit described the process under the old ordinance as follows:

The Development Review System consists of two to four stages: (1) application for a conditional use permit by the property owner to the Commission; (2) evaluation by the Commission's staff of the application, under the point system contained in Article 6 of the Zoning Ordinance, to determine whether the property at issue is better used for agricultural purposes as opposed to residential, commercial, or industrial development; (3) if the application receives a numerical score indicating that the property qualifies for possible residential, commercial, or industrial development, the Commission's staff holds a compatibility assessment meeting (at which the public is allowed to comment) to determine the compatibility of the proposed development to the “existing areas adjacent to the site” and to the nature of the zoned district involved; and (4) if any compatibility issues remain unresolved after the compatibility assessment meeting, the Commission holds public hearings to discuss the unresolved issues. *See id.* art. 7, §§ 7.3-7.7. After completion of the requisite stages, the Commission formally votes to grant or deny the application for the permit. *See id.* § 7.6(g).

Henry v. Jefferson Co. Planning Comm’n, 215 F.3d 1318, at *1 (4th Cir. 2000). Here, Jefferson Orchards completed all of these stages and but for the BZA’s intervention, it should have been issued its conditional use permit.

²³ Order at 9-10.

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.²⁴

²⁴ It is ironic that the BZA cites this Court's decision in *Henry v. Jefferson County Planning Commission*, 201 W. Va. 289, 496 S.E.2d 239 (1997), in support of its application of a density test under the old ordinance. BZA Brief at 11. In *Henry*, a developer applied for a CUP for construction of a townhouse development. *Henry, supra* at 241, 496 S.E.2d at 241. The BZA's decision to deny the CUP was "based on the density, the projects danger to the Town Run and Morgan Grove Park and the incompatibility of the project with the neighborhood." *Id.* This Court did not conclude that these findings were supported by the ordinance then in effect, but rather held, "the BZA's decision is not supported by adequate findings of fact. The BZA's one sentence explanation for its action, which merely repeated the Commission's minutes, does not allow for meaningful review. Therefore, we reverse and remand this case to the circuit court with directions to remand the case to the BZA and direct it to make the requisite findings of fact." *Id.* at 292, 496 S.E.2d at 242.

Likewise, the BZA's reliance on *Henry v. Jefferson County Planning Commission*, 148 F. Supp. 2d 698 (N.D. W. Va. 2001), is misplaced for several reasons. First, that ruling was reversed, in part, by the Fourth Circuit in *Henry v. Jefferson County Planning Commission*, 34 Fed. Appx. 92 (4th Cir. 2002), where the Fourth Circuit remanded to allow the developer to pursue a suit for damages against the Jefferson County zoning authorities. Second, the developer's application was not denied based solely on density, but based upon "sixteen compatibility issues" that "remained unresolved." 148 F. Supp. 2d at 701. These included problems with erecting a fence along a property line adjoining a park, erecting a fence along a property line adjoining a marsh, environmental impacts on an adjoining marsh, storm water management, inadequate disclosures to potential buyers, sewer treatment, traffic, potential buyers' pets, impacts on local schools, and density. *Id.* Because "the public continued to address their concerns regarding the incompatibility of these townhouses to their surroundings" and the developer "did not offer any response" to these concerns, the BZA denied the CUP. *Id.* Finally, the BZA did not deny the CUP on density grounds, as it did in this case, but rather denied the CUP on compatibility grounds, including "density, the projects[sic] danger to the Town Run and Morgan Grove Park and the incompatibility of the project with the neighborhood." *Id.* at 702. Moreover, as noted by the federal district court, it was this very decision that was reversed by this Court in *Henry, supra*, finding it to be inadequate. *Id.* Plainly, density can be a legitimate factor in determining whether a proposed develop is "compatible" with surrounding property, but it cannot be used as the sole or predominate factor to deny a CUP when the proposed development is completely compatible, as to size, with neighboring properties.

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 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.²⁵ 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.²⁶

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,²⁷ evaluate the density of a proposed 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.

²⁵With 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.*

²⁶ *Id.* at 6 (emphasis supplied).

²⁷ Indeed, even in its brief, the BZA resorts to arguing that “currently in a rural zone, a subdivider may only subdivide one lot per ten acres.” BZA Brief at 12. Noticeably absent from the BZA’s brief, however, is any recitation to the ordinance that applies to this case which is completely silent on the issue of density.

This case is similar to *Condor Corp. v. City of St. Paul*²⁸ in which property owners were required by the applicable zoning ordinance to satisfy certain “compatibility” criteria in order to qualify for a conditional use permit. Specifically, the property owner involved applied for a conditional use permit for purposes of operating a heliport.²⁹ Although the applicable zoning ordinance did not specifically address heliport permits.³⁰ As in this case, despite complying with the existing criteria, the zoning authorities denied the conditional use permit application using criteria not specifically provided in the applicable zoning ordinance. Overturning the denial of the conditional use permit, the Eighth Circuit held:

Condor's proposed heliport had already been found compatible with the surrounding uses, including the residential areas. No conditions (other than those in the proposed operations agreement) relevant to public health, safety, or welfare were proposed or considered. Although the City could not regulate certain matters that it felt were important, its review of Condor's application ensured that the concerns of its zoning code were met. That review established that Condor's proposed heliport did not infringe on public health, safety, or welfare to the extent that denial of the permit was required.

The Minnesota Supreme Court has strictly construed zoning ordinances against the municipality and in favor of the property owner. See *Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984). This rule of construction assists us in reaching our decision. Although this case involves a moratorium enacted to allow for study of zoning issues, it also involves a resolution limiting that moratorium. The resolution provided for the consideration of permits based on regular city regulations and procedures. The City was therefore obligated to consider the merits of the application under its then existing zoning code. The City could not deny the permit based on its inability to regulate heliport operations, since even without

²⁸ 912 F.2d 215 (8th Cir. 1990).

²⁹ *Id.* at 216.

³⁰ *Id.*

those conditions, the proposed heliport operation was not shown to interfere with the concerns the zoning code seeks to protect. Therefore, we hold the City's denial of the permit because of its inability to control certain heliport operations was an arbitrary action under state law.³¹

Likewise, in the instant case, the BZA has never identified any infringement on public safety, health, and welfare that would result from Jefferson Orchards' proposed subdivision. Moreover, it has never identified any provision of the existing zoning ordinance that would be violated by issuance of the conditional use permit. Instead, it has acted arbitrarily in denying Jefferson Orchards' application and, therefore, as in *Condor Corp.*, this Court should order the Jefferson County zoning authorities to issue a conditional use permit to Jefferson Orchards.

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

As noted in Jefferson Orchards' initial brief, 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.

Jefferson Orchards reiterates its argument that this was contrary to *State ex rel. Frazier & Oxley, L.C. v. Cummings*,³² and the BZA's argument that that the circuit court applied the

³¹ *Id.* at 223 (emphasis supplied).

³² 214 W. Va. 802, 591 S.E.2d 728 (2003).

appropriate standard of review is contradicted by the language of the circuit court's own order, which sites a deferential standard of review concerning the BZA's factual findings.

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.

The BZA admits that "the adjacent developments of Quail Ridge and Chapel View have a much higher density than was granted to Paynes Ford Station."³³ Although it attempts to explain this inconsistency by summarily stating "each subdivision is judged on its own merits,"³⁴ it offers absolutely no explanation as to why Jefferson Orchards' development, under the terms of the applicable ordinance, should receive a different treatment. Moreover, its response to Jefferson Orchards' due process and equal protection arguments is another straw man, mischaracterizing Jefferson Orchards' argument as "because other [neighboring] subdivisions received CUPs, Jefferson Orchards is also entitled to a CUP."³⁵

Jefferson Orchards has never argued that merely because the neighboring subdivisions of Quail Ridge and Chapel View, which have greater densities than Jefferson Orchards' proposed subdivision, were awarded CUPs, Jefferson Orchards must have been awarded its CUP. Moreover, Jefferson Orchards has never argued that because Berkeley County approved its subdivision, Jefferson County was required to issue a CUP.

³³ BZA Brief at 13-14 (emphasis supplied).

³⁴ *Id.* at 14.

³⁵ *Id.*

Rather, Jefferson Orchards has argued that 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 . . . were ‘compatible’ with the neighboring properties, but inconsistently rule that the Jefferson Orchards’ development was not ‘compatible’ with the [same] neighboring properties, based solely upon ‘density.’”³⁶ Yet, nowhere does the BZA address this argument.

Where this BZA has consistently erred and necessitated this Court’s repeated intervention on other cases is its belief that it has unfettered “discretion” to do whatever it pleases irrespective of the evidence and the terms of the applicable zoning ordinance.

Its own brief illustrates this point: “the BZA is permitted to deny or limit the density of CUPs to maintain the rural zone;”³⁷ “the BZA has discretion to preserve the rural zone;”³⁸ “If the BZA is not granted this discretion . . . then the rural zone ceases to exist;”³⁹ “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;”⁴⁰ and “not every conditional use permit will be granted just because others have been approved.”⁴¹

³⁶ Jefferson Orchards’ Brief at 30.

³⁷ BZA’s Brief at 15.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 16.

⁴¹ *Id.*

In other words, irrespective of the terms of the applicable ordinance; of the evidence presented concerning a proposed development's compatibility with neighboring properties; and of how similarly situated applications have been approved, the BZA has the "discretion" to "deny or limit" a CUP "to preserve the rural zone."⁴²

Of course, no administrative body has such discretion because fundamental to due process and equal protection is the prevention of arbitrary and capricious enforcement,⁴³ which applies to zoning ordinances, and requires that they provide fair notice of their scope, including any density requirements or restrictions.⁴⁴

Consequently, this Court has held, "A subdivision regulation enacted by a planning commission must be reasonable and the regulation must sufficiently restrain the discretion of the commission to insure fair administration and must sufficiently inform the property owner to

⁴² The BZA's "piggyback" argument also illustrates its disregard for the zoning ordinance and the evidence. There are three residential developments bordering the Jefferson Orchards property. As the BZA concedes, two of the developments have similar densities to the Jefferson Orchards proposed development. Moreover, there was no "piggybacking" here because the Jefferson Orchards subdivision, along with the Quail Ridge and Chapel View subdivisions, were initiated at the same time; were litigated before the Public Service Commission at the same time; worked with local authorities to develop the necessary water and sewer service at the same time; and were contemplated to be approved and constructed at the same time. The three subdivisions have similar lot sizes and will be served by the same water and sewer system. Determining "compatibility" means comparing the proposed development with the surrounding properties and there is no legitimate question that the Jefferson Orchards development is very compatible with the surrounding properties. Indeed, noticeably absent from this appeal are any objections by the neighboring property owners, who have filed no brief, to the relief requested by Jefferson Orchards. Rather, this case persists because of the political objective of the BZA and other Jefferson County zoning entities to halt residential development even in the face of applications that comply with the applicable zoning ordinance.

⁴³ *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

⁴⁴ 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).

insure adequate guidance in the preparation of plans.”⁴⁵ Moreover, “Planning commissions may consider only evidence presented for the record which bears on the grounds authorized by statute for plat approval or disapproval. W. Va. Code § 8-24-30.”⁴⁶ Finally, “When an applicant meets all requirements, plat approval is a ministerial act and a planning commission has no discretion in approving the submitted application.”⁴⁷

Where, as noted in Jefferson Orchards’ initial brief, the terms of a zoning ordinance are either undefined or are interpreted in a manner inconsistent with its plain language, a violation of due process arises from the denial of an application.⁴⁸ In another straw man argument, the BZA acts as if Jefferson Orchards is attempting to invalidate the applicable zoning ordinance when, in fact, Jefferson Orchards embraces the ordinance. It is not the ordinance itself which is the problem in this case. Rather, it is the BZA’s ignoring the ordinance and engrafting a density requirement found nowhere in the ordinance or the LESA criteria.

Other than the United States Supreme Court’s decision in *Village of Willowbrook v. Olech*,⁴⁹ the BZA does not even attempt to distinguish the numerous cases, relied upon by Jefferson Orchards, that hold that zoning authorities cannot extend zoning regulations beyond

⁴⁵ Syl., *Singer v. Davenport*, 164 W. Va. 665, 264 S.E.2d 637 (1980).

⁴⁶ Syl. pt. 5, *Kaufman v. Planning & Zoning Commission*, 171 W. Va. 174, 298 S.E.2d 148 (1982).

⁴⁷ Syl. pt. 8, *id* (emphasis supplied).

⁴⁸ See, e.g., *Wedgewood Limited Partnership I v. Township of Liberty, Ohio*, 578 F. Supp. 2d 941 (S.D. Ohio 2008); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Continental Coal, Inc. v. Cunningham*, 511 F. Supp. 2d 1065 (D. Kan. 2007); *Trovato v. Town of Star City*, 166 W. Va. 699, 276 S.E.2d 834 (1981).

⁴⁹ 528 U.S. 562 (2000).

their plain language to deny zoning applications and that zoning regulations cannot be applied differently to similarly-situated applicants.⁵⁰

As to *Willowbrook*, a homeowner asked a municipality for permission to connect to its water supply.⁵¹ Although the municipality had only required a 15-foot easement from other similarly-situated homeowners in exchange for such connection, it conditioned granting this homeowner's connection on granting the municipality a 33-foot easement.⁵² Like the BZA in this case, the municipality articulated no rational basis for approving connections for other homeowners in exchange for a 15-foot easement while demanding that this homeowner grant a 33-foot easement.⁵³ Consequently, the United States Supreme Court held:

Olech's complaint can fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners. . . . The complaint also alleged that the Village's demand was "irrational and wholly arbitrary" and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement. These allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis.⁵⁴

Likewise, in the present case, the BZA offers no rational basis to distinguish much smaller lot sizes for the Quail Ridge and Chapel View developments. Indeed, at the time those subdivisions were approved, the "average lot size" applying the BZA's newly-created formula

⁵⁰ BZA Brief at 13-17.

⁵¹ 528 U.S. at 563.

⁵² *Id.*

⁵³ *Id.* at 564.

⁵⁴ *Id.* at 564-65.

would have been many multiples of the 3.76 acres calculated for purposes of effectively denying Jefferson Orchards' application for a conditional use permit.⁵⁵ Certainly, if the BZA's objective concern is "preservation of the rural zone"⁵⁶ then the Quail Ridge, Chapel View, and other residential developments in the area never would have been approved. Instead, as in *Willowbrook*, the BZA's "subjective motivation" to punish Jefferson Orchards for filing suit to compel action on its CUP application and to prevent any further residential development whether by Jefferson Orchards, Far Away Farm, or any other entity, resulted in an "irrational and wholly arbitrary" ruling based upon a "density" formula created out of whole cloth.

Finally, perhaps the most revealing aspect of the BZA's brief is its argument that "Jefferson Orchards is not entitled to due process protections in the CUP process."⁵⁷ This attitude speaks volumes about the role the BZA perceives for itself in considering and deciding applications for conditional use permits.

It reasons that "due process protections" are "only triggered by the existence of a property interest"⁵⁸ and because "Jefferson Orchards does not have a legitimate claim of entitlement to a CUP,"⁵⁹ it lacks the "property interest" the BZA mistakenly believes is required before Jefferson Orchards is entitled to any due process.

⁵⁵ Consequently, the BZA is forced to argue in the alternative: "[I]f the Court were to find that the Plaintiff was treated differently than any other plaintiff similarly situated" BZA Brief at 16.

⁵⁶ *Id.*

⁵⁷ *Id.* at 17; *see also id.* at 16 ("the Petitioner . . . is not entitled to any due process protections . . .").

⁵⁸ *Id.* at 17.

⁵⁹ *Id.* at 16.

But, as this Court has held, “[For due process purposes,] ‘[a] “property interest” includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings.’”⁶⁰ Plainly, a property owner’s application to a zoning or building authority for government approval of a proposed use of its land triggers due process protections.

In *Hutchison v. City of Huntington*,⁶¹ for example, a property owner applied for a building permit to construct mini-storage units on his property.⁶² Rejecting the municipalities’ argument, similar to the BZA’s in this case, that the property owner had no right to due process because he had only an expectation of approval of his application, this Court held:

In this case, our law of real property confers on the plaintiff a right, subject to reasonable regulation, to use his property as he sees fit and to build on it what he wants. The City's regulatory powers include its ability to impose reasonable conditions on plaintiff's right through, for example, zoning and permitting laws. Requiring the plaintiff to obtain a building permit before he can build on his own property is a restraint on his property rights. Therefore, the permit cannot be denied except upon the provision of an adequate procedure, i.e., a process that is due. In other words, the "entitlement" created by state law in this case is not that the plaintiff is automatically entitled to a building permit. Rather, the entitlement is found in the bundle of rights that attaches to the plaintiff's fee simple ownership in his land. The City's permitting process may qualify plaintiff's use of his bundle, but it cannot do so without giving him the process that the Fourteenth Amendment says is his due.⁶³

⁶⁰ Syl. pt. 4, *Zalenski v. W. Va. Physicians' Mut. Ins. Co.*, 220 W. Va. 311, 647 S.E.2d 747 (2007), quoting Syl. Pt. 3, *Waite v. Civil Service Commission*, 161 W. Va. 154, 241 S.E.2d 164 (1977)

⁶¹ 198 W. Va. 139, 479 S.E.2d 649 (1996).

⁶² *Id.* at 145, 479 S.E.2d at 655.

⁶³ *Id.* at 154, 479 S.E.2d at 664 (emphasis supplied and footnote omitted).

Unfortunately, in Jefferson County, the zoning authorities, including the BZA, have it backwards. As articulated in the BZA's brief, they believe that property owners have no right to due process in the administration of the zoning ordinance because there is a presumption that any use of land requiring approval is automatically inconsistent with the zoning ordinance and, therefore, will not be approved. Therefore, as in the instant case, they can deny an application for a conditional use permit by merely finding that the requested use is contrary to "preservation of the rural zone" even though the basis for that finding, in this case the "density" of surrounding development, can be found nowhere in the applicable zoning ordinance.

Respectfully, it needs to be made clear to the BZA and other Jefferson County zoning authorities that they are required to comply with the applicable zoning ordinance; that they are to afford applicants a full and fair opportunity to present their evidence of compliance with the applicable zoning ordinance; that if applicants present sufficient evidence of compliance with the applicable zoning ordinance, they are entitled to issuance of the approval necessary to effectuate use of applicants' property in a manner consistent with the applicable zoning ordinance; and that artificial obstacles to approval with no basis in the applicable zoning ordinance will not be tolerated.

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, this is wholly inconsistent with the applicable zoning ordinance, which permits development in rural districts when certain criteria are met.

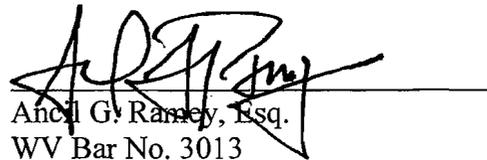
Third, the circuit court exceeded the scope of this Court’s remand order. Specifically, rather than limiting its review to whether the BZA had authority and which ordinance applied, the circuit court undertook a deferential review of the BZA’s findings and conclusion.

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. 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.

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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on December 7, 2009, I served the foregoing Reply Brief of the Appellant upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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EXHIBITS

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