

35129

Chakmakian

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

JEFFERSON ORCHARDS, INC,

Petitioner,

v.

CIVIL ACTION No. 06-C-388
Honorable Thomas W. Steptoe, Jr.

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.

ORDER DIRECTING ISSUANCE OF CONDITIONAL USE PERMIT

On June 19, 2008, the West Virginia Supreme Court of Appeals granted Petitioner's appeal and remanded this case to this Court for reconsideration in light of its decision in *Far Away Farm, LLC v. Jefferson Bd. of Zoning Appeals*, 222 W.Va 252, 664 S.E.2d 137 (2008). Previously, this Court granted a writ of certiorari only on the issue of whether the April 8, 2005 version of the Jefferson County Zoning and Land Development Ordinance applied to Petitioner's conditional use permit (CUP) application. *Far Away Farm* effectively answers that question—the ordinance as it existed prior to April 8, 2005 applies to this case. This Court then ordered the parties to submit in writing their positions on whether or not this Court should remand this case to the Jefferson County Planning Commission, and, if so, what direction, if any, it should give the Commission.

Ultimately, this Court found that it had a record from which it could make a decision on the merits on the Petition for Certiorari and ordered briefing on the merits. After review of the certified record, parties' briefs, all attachments, and applicable law, the Court **ORDERS** the Jefferson County Planning Commission to issue Petitioner's CUP as the Jefferson County Board of Zoning Appeals previously ordered except omitting the two requirements that the developer test all wells adjacent to the property and maintain the native vegetation along Opequon Creek.

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

Law and Reasoning

In regards to its CUP, Petitioner contends that consideration of density is irrelevant under the old ordinance, and the Jefferson County government does not have jurisdiction to require Petitioner to do the things it ordered in paragraphs 18 through 21

under "Conclusions of Law." It disputes the correctness of the conditions that the BZA mandated under paragraphs 19 through 22 under "Conclusions of Law." Finally, Petitioner argues that the *Far Away Farm* decision stands for the proposition that an applicant is entitled to a CUP if it has a passing Land Evaluation and Site Assessment (LESA) score and participated in a Neighborhood Compatibility Assessment meeting and a public hearing, if required.

First, the Court notes that *Far Away Farm* held that because the old ordinance applied rather than the new one, the BZA did not have jurisdiction to consider Petitioner's CUP application. The same analysis applies to this case, which is why this case was remanded for reconsideration in view of *Far Away Farm*. As a result, the BZA's decision in this case regarding Petitioner's application is void as a matter of law. Even so, the Court may review the BZA's record and make a decision regarding Petitioner's CUP because of the Supreme Court of Appeals' precedent in *Far Away Farm* – it made a decision regarding the CUP in that case based upon the BZA's record.¹ In fact, in that case as in this, the Planning Commission was not involved in Petitioner's CUP application in any way. Consequently, the Court may make a decision regarding the CUP. Furthermore, under the precedent of *Far Away Farm*, if this Court determines that a CUP should issue, then this Court must direct the Planning Commission, and not the BZA, to issue it, because, under the applicable law, the Planning Commission is the appropriate

¹ In addition, if the Supreme Court of Appeals thought that only the Planning Commission could make a decision regarding the CUP in this case, logically it would have remanded to the Planning Commission rather than the Circuit Court.

agency to issue CUPs.

In *Far Away Farm*, the Supreme Court 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 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. *Far Away Farm, LLC*, 664 S.E.2d at 144. In fact, the Supreme Court spent approximately three pages of its opinion reviewing the record and found that no one submitted any evidence to overcome Far Away Farm’s evidence to support the issuance of its CUP.

Petitioner states numerous times in its briefs that the Supreme Court of Appeals found that a LESA score is the only ‘*substantive criterion*’ in the Ordinance. To the contrary, the Supreme Court found that it was the only ‘specific substantive criterion,’ governing the BZA’s decision to deny or issue the permit. A cursory look at the Ordinance demonstrates that there is another substantive criterion – compatibility of the applicant’s project to the existing areas adjacent to the site. This criterion is general, not specific, because no compatibility assessment will consist of the same exact standards as a LESA score has. Each project will have different issues to be resolved as each application is unique.

Though the Supreme Court of Appeals may not have contemplated a ‘general substantive criterion,’ it is not stating that an applicant only need to submit a complete application and have a passing LESA score to be entitled to its CUP, as Petitioner seems

to insinuate. A passing LESA score does not make a project compatible with the area as Petitioner asserts, or the Compatibility Assessment Meeting and the public hearing would not be necessary. The reason the Supreme Court of Appeals ordered the Planning Commission in *Far Away Farm* to grant the CUP is that “[a]necdotal evidence and mere speculation and conjecture about potential traffic problems is simply insufficient to overcome expert testimony. Also, . . . the record shows that no evidence was presented refuting or contradicting that presented by FAF . . .” on the other unresolved issues. *Id.* at 145. That Court emphasized that FAF’s evidence was not refuted. Unlike in *Far Away Farm*, here Petitioner’s evidence concerning density was refuted by an expert.

Petitioner’s assertion that density is irrelevant under the applicable Ordinance is misplaced. Ordinance § 5.7 provides that property owners may only subdivide one lot per every ten acres and that the minimum lot size is three acres. Ordinance § 5.7(d) (as amended on May 18, 1996). However, it allows a higher density if an applicant uses the Development Review System (DRS) and the BZA issues a CUP. Ordinance § 5.7. Still, the “purpose of this [rural] district is to provide a location for low density single family residential development in conjunction with providing continued farming activities.” *Id.* This functions “to preserve the rural character of the County and the agricultural community.” *Id.* 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).

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 this 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. 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. Thus, the Court cannot agree with Petitioner that density is irrelevant or that the applicable zoning agency cannot compare the proposed development's density to its neighborhood's density when determining compatibility.

This Court does not agree with Petitioner's argument that Jefferson County government does not have jurisdictional authority to require Petitioner to comply with the conditions it set forth in paragraphs 18-21 in the 'Conclusions of Law' section of the BZA's Order. This Court finds that the Ordinance allows the Jefferson County government to require Petitioner to comply. Ordinance § 7.6(g) states that the "Planning and Zoning Commission shall issue, issue with conditions, or deny the conditional use permit." Ordinance § 7.6 (as originally adopted). This provides the legal authority to the Jefferson County government to set conditions as it did in paragraphs 18-21.

Lastly, Petitioner believes that the BZA erroneously ordered the conditions in paragraphs 19 through 22. In Paragraph 22, the BZA limited the density to one lot per 3.76 acres. The Court in *Far Away Farm* stated that anecdotal evidence is insufficient to overcome expert testimony. It pointed out that unless there is better evidence presented to refute or contradict petitioner's expert testimony, the expert testimony will prevail. In

this case, both Petitioner and the opposition to the CUP presented expert testimony about how many lots per acre were appropriate.

Petitioner's expert testified that average density in the surrounding neighborhood was one lot per 1.98 acres. In contrast, the opposition's expert testified that the average density was 13.3 acres per house. After being called to rebut that number, Petitioner's expert stated that the calculation of 13.3 acres per house was flawed because it did not include lots and subdivisions recently approved and included acreage in Berkeley County. However, he did admit that if he included the large parcels in the surrounding neighborhood, which he had excluded, the average lot size in the area would be 3.76 acres.

This case is different in some respects from *Far Away Farm*. In that case, the BZA outright denied the CUP; in this case, the BZA granted a CUP with conditions. Also, importantly, in this case the opposition presented more than anecdotal evidence – it challenged Petitioner's evidence with its own expert. The BZA heard both experts and 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. Thus, the Court **AFFIRMS** paragraph 22 under "Conclusions of Law" in the BZA's Order that granted Petitioner's CUP.

In paragraph 21, the BZA mandated that the "developer maintain the native vegetation along Opequon Creek. After reviewing the map in the record, the Court **FINDS** this requirement to be erroneous because it appears that the creek does not border

Petitioner's proposed 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 is 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. Therefore, the Court **AFFIRMS** paragraph 20 under "Conclusions of Law" in the BZA's Order that granted Petitioner's CUP.

In paragraph 19, the BZA required "the developer to test all wells adjacent to the property before and after construction." Petitioner argues this is erroneous because the property will have public water and sewer. The Court agrees with Petitioner. In addition, the Court **FINDS** this requirement erroneous because one of Petitioner's experts testified that there was no evidence of groundwater contamination. No rebuttal testimony was presented. Thus, Court **FINDS** this requirement to be erroneous because it is unnecessary based upon the evidence.

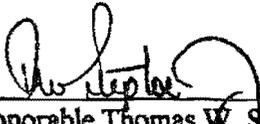
ACCORDINGLY, all is so ORDERED.

The Court notes all parties' exceptions and objections to all adverse rulings.

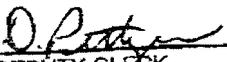
The Clerk shall **ENTER** this **ORDER**, and shall forward an attested copy to counsel and pro se parties of record.

ENTERED this 30th day of December, 2008.

3 cc
P. Chakmakian
N. Cochran / R. Say
B. Groves, Asst P/A (Court)
12/31/08
PP


Honorable Thomas W. Steptoe, Jr.
Judge, 23rd Circuit

A TRUE COPY
ATTEST:
LAURA E. RATTENNI
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY 
DEPUTY CLERK

The Clerk is directed to retire this
action from the active docket and
place it among causes ended.