

No. 31060 – *Michael J. Burkey and Linda Burkey v. The Board of Zoning Appeals of the City of Moundsville by its chairperson, Ruth Lynn Thompson; and Jeannie Church dba Jeannie’s Coffee Shop; Francis Tucker, individually and as an officer of Mound City, Inc., a corporation*

FILED

July 2, 2003

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Albright, Justice, concurring in part, dissenting in part:

I concur in the judgment of the Court that the variance granted by the Board of Zoning Appeals of the City of Moundsville must be set aside. I dissent from the decision of the majority not to remand the matter for further proceedings consistent with the Court’s opinion. That is the course this Court adopted in similar circumstances in *Harding v. Board of Zoning Appeals*, 159 W. Va. 73, 219 S.E.2d 324 (1975). *See also American Tower Corporation v. Common Council of the City of Beckley*, 210 W. Va. 345, 557 S.E.2d 752 (2001), where we required that the Beckley Board of Zoning Appeals, not its common council, ultimately decide such issues.

The Board of Zoning Appeals of the City of Moundsville should be required to fully consider the matter in light of the ruling of this Court and the applicable law. After proper notice and hearing, it should be required to either articulate the required findings of fact and law supporting the granting of the variance or the basis for rejecting the application, as the case may be, after balancing the claims of the persons applying for the variance, the

objections of the appellants, the interests of the City and those of all of its residents under the state and municipal law.

The core problem before us is that the Board of Zoning Appeals did not articulate required findings or any reasons for its decision. It failed to demonstrate a thorough consideration of the competing interests of all interested parties. In particular, it failed to credit the specific objections of the appellants, at least part of which are set forth in the majority opinion, and the Board failed to demonstrate that it weighed those objections against any countervailing considerations the record might disclose.

In my judgment, this Court should encourage thorough, open and articulated consideration by the Board of Zoning Appeals of the kinds of issues giving rise to this case. We should not undertake, in effect, to adjudicate those matters here, particularly on an incomplete record. Such matters should be considered under the clear provisions of West Virginia Code § 8-24-57, *et seq.*, and the applicable provisions of municipal ordinances, in this case, of the City of Moundsville. The relevant decisions should be made in and by the city involved, not by this Court.