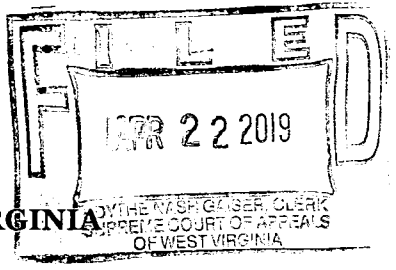

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 18-1134

City of Morgantown

Defendant below, Petitioner,

v.

Appeal from a final order of the Circuit Court of Monongalia County (17-C-41)

Calvary Baptist Church

Plaintiff below, Respondent.

PETITIONER'S BRIEF

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THE CITY OF MORGANTOWN

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Assignments of Error

1. The Circuit Court failed to apply the "fairly debatable" standard of review to this challenge of a zoning ordinance. Review of the ordinance under the appropriate standard dictates upholding the ordinance. Ancillary to the misapplication of the standard of review, the Circuit Court erred by invalidating the zoning ordinance as a violation of substantive due process without considering all appropriate factors and without evaluating the evidence supporting the zoning ordinance under those factors. Full consideration of the legitimate governmental interests supporting the zoning classification demonstrates that it is rationally related to appropriate zoning purposes.

2. The Circuit Court ordered invalidation of the zoning ordinance as a violation of substantive due process without identifying or addressing any other legal theory upon which the ordinance might be challenged. The reliance upon the zoning amendment process in two historical legislative matters is inapposite to the substantive due process analysis, should have been disregarded by the Circuit Court, and contributed to the erroneous finding that the zoning ordinance should be invalidated for lack of a rational relationship to legitimate governmental purposes.

Statement of the Case

I. Procedural History

1. The Plaintiff below, Calvary Baptist Church (the "Church" or "Respondent") filed its "Petition for Writ of Mandamus" on January 24, 2017, seeking to compel the City to amend the zoning classification of its property from the R-1 Single Family Residential District to the B-2 Service Business District (App. 000007-12).[1] The R-1 District is intended to provide attractive single-family neighborhoods, and the B-2 District is intended for large space users such as department stores. (App. 002907).

2. The Defendant below, The City of Morgantown, West Virginia (the "City" or "Petitioner") filed its "Answer" on February 21, 2017. (App. 000018-23).

3. A Scheduling Conference was held on April 13, 2017, and a "Scheduling Order" was entered April 21, 2017, which directed the parties to submit "a joint record for adjudication of this matter no later than May 26, 2017." (App. 000002, Docket Entry No. 12).

4. On May 26, 2017, a "Joint Appendix" was filed in this matter, containing, *inter alia*, the record of the proceedings on the request for a zoning amendment and the documents produced to Petitioner in written discovery. (App. 000031-1362).

5. On June 15, 2017, a Status Conference was conducted in this matter. Following the Status Conference, the Court issued a "Scheduling Order" on June 27, 2017 providing discovery and motions deadlines and a trial date in accordance with the Church's request. (App. 0000002, Docket Entry No. 17).

6. Trial of this matter was initially scheduled for January 24, 2018. On that date, the Court ordered that the trial be continued and all proceedings in this matter be stayed pending a

[1] Citations to the Appendix Record submitted on this appeal are in the format "(App. 000000X)".

renewed application to the City for subdivision of a portion of the Church's property and amendment of the zoning classification applicable to the property. ("Order Continuing Trial and Granting Stay," entered January 26, 2018). (App. 001570).

7. On January 31, 2018, the Respondent submitted its "Application for Zoning Map Amendment" to the City, requesting a change in zoning classification from R-1 to B-2. (App. 002396).

8. The City's professional planning staff prepared a report for the City's Planning Commission analyzing the merits of the application under the Comprehensive Plan and applicable law. The Staff Report addressed Respondent's application and additional issues that Respondent had asserted in litigation that the staff should consider. The report recommended denial of the application because, *inter alia*, the property is located in an area designated by the community – through the Comprehensive Plan process – for limited growth and neighborhood preservation. (App. 002906-2925).

9. On March 8, 2018, the Morgantown Planning Commission voted 8-0 to recommend denial of the Petitioner's application for amendment of the zoning classification of the property from R-1 to B-2. (App. 001741).

10. On May 1, 2018, City Council unanimously voted to deny the application for amendment of the zoning classification filed by the Petitioner. (App. 001853).

11. On May 4, 2018, the Circuit Court entered its "Order Lifting Stay and Notice of Status Conference." (App. 001574).

12. On or about May 17, 2018, Petitioner filed its "First Amended Complaint and Petition for Writ of Mandamus." (App. 001576).

13. On June 28, 2018, the City filed its Answer to the First Amended Complaint and Petition for Writ of Mandamus. (App. 001593).

13. On July 9, 2018, a status conference was conducted, and trial was set for August 16, 2018. (App. 001602).

14. On August 16 and August 17, 2018, a bench trial was conducted in the Circuit Court before Hon. Susan B. Tucker. (App. 003213 *et seq.*).

15. On November 21, 2018, the court entered its "Order" invalidating the City's zoning ordinance as to the Respondent's property. (App. 000005, Docket Entry No. 98).

16. On November 26, 2018, the court entered its "Amended Order" modifying the November 21, 2018 Order. (App. 003200-6).

17. The Amended Order found that the R-1 zoning classification violated the Respondent's substantive due process rights and that the City Council must amend the Respondent's zoning classification to B-2. *Id.*

18. On December 13, 2018, the Respondent filed a motion seeking an award of attorney fees and costs. (App. 000005). The Circuit Court granted Respondent's motion pending submission of detailed fee submissions and objections thereto. At the time of this filing, a final order awarding fees has not been entered by the Circuit Court.

19. The City filed its "Notice of Appeal" with this Court on December 26, 2018, seeking reversal of the Circuit Court's Amended Order and its finding that the City's zoning ordinance does not provide Respondent with substantive due process.

20. The City filed its Motion to Stay Execution of Judgment on January 11, 2019, and the Court entered its Order granting the Motion to Stay Execution of Judgment on March 19, 2019. (App. 000005-6).

21. In accordance with this Court's "Scheduling Order" entered January 31, 2019, this appeal follows.

II. Statement of Facts

1. This case arises out of a request by Respondent to amend the zoning classification for a portion of its property located at 519 Burroughs Street within the City of Morgantown. (App. 000007-12).

2. Respondent owns a parcel comprising approximately 2.5 acres adjoining Burroughs Street and Eastern Avenue in the City's Suncrest neighborhood. (App. 002915; 002926-9).

3. The Respondent joined its request for a zoning amendment with a request to subdivide its property. Respondent sought a zoning amendment only as to the portion of the property it chose to subdivide. (App. 002915; 002926-9).

4. Respondent chose to subdivide a small portion of its property with access only onto Burroughs Street. *Id*; App. 003414-15. Respondent could subdivide a portion of its property with access onto Eastern Avenue but did not do so. *Id.*

5. Respondent sought to amend the zoning classification from the existing R-1 Single Family Residential District classification to the B-2 Service Business District Classification. *Id.*

6. The subdivision and request for zoning amendment were made as part of an effort to sell the property to Bernard Bossio for commercial development. (App. 003259-60).

7. Mr. Bossio has agreed to purchase the property from the Respondent for $250,000.00, but only if the zoning is changed to permit commercial uses. (App. 002657, 003260).

8. Mr. Bossio is paying the legal fees incurred by the Respondent in its attempts to invalidate the City's zoning ordinance. (App. 003263-4).

9. Respondent offered an appraisal valuing the same portion of its property at $128,476.00 under the R-1 zoning classification. (App. 003303).

10. The estimated appraised value for Respondent's entire property, according to public records of the Monongalia County Assessor's office, is $885,300.00. (App. 003425).

11. The Respondent conducts church services on its property and is not in the business of commercial development. (App. 003454, 003457-8).

12. Respondent will continue to operate a church on its property regardless of whether the zoning classification is changed. *Id.*

13. Respondent's property is classified as "R-1 Single Family Residential District" by the City's Zoning Ordinance. (App. 002906; 002914).

14. The property and neighborhood have had residential zoning since the City's first zoning ordinance in 1959. (App. 003435). The Church established its use of the property after that zoning ordinance and has never attempted to change the zoning until entering a contract to sell its property for commercial development. (App. 003435).

15. Church uses are common and permitted in residential districts. These uses are understood to contribute to the neighborhood uses. (App. 003437).

16. The property is surrounded on three sides by property zoned for residential use. (App. 002906; 002914).

17. The property is adjoined on its other side by the end of a node of property zoned for commercial use centered on Collins Ferry Road. (App. 002906; 002914).

18. The R-1 zoning classification covering the property and the neighborhood serves the following purposes:

(A) Provide for attractive single family neighborhoods for residents who prefer larger lot sizes, and do not generally desire to live in close proximity to other types of uses, and
(B) Preserve the desirable character of existing single family neighborhoods, and
(C) Protect the single family residential areas from change and intrusion that may cause deterioration, and provide for adequate light, ventilation, quiet, and privacy for neighborhood residents.

(App. 002907).

19. The B-2 zoning classification sought by Respondent is intended to provide areas that are appropriate for most kinds of businesses and service, particularly large space users such as department stores. (App. 002907).

20. Mr. Bossio testified regarding the B-2 district, "If the parcel will allow it to be in a particular area, and the topography would be right, you could build a Walmart." (App. 003263).

21. The City's planner testified that the B-2 district is the City's "second-most intense commercial district" and is used for "larger big-box development." (App. 003376).

22. The following uses are permitted in the B-2 District classification:

- Amphitheater
- Automotive repair
- Automotive paint shop
- Building materials supplier
- Car wash
- Conference Center
- Department store
- Dormitory
- Drive-in theater
- Fraternity or sorority house
- Gas station
- Hospital
- Hotel
- Commercial Kennel
- Large Movie Theater
- Outdoor storage, seasonal
- Parking Lot, Principal Use
- Parking Structure, Principal Use
- Small scale shopping center

(App. 002444); *City Code* § 1331.05.01 – Table of Permitted Land Uses.

23. The City's current zoning ordinance is guided by a Comprehensive Plan adopted in 2013 and codified at *City Code* § 1301.01-1301.09.[2]

24. The Comprehensive Plan involved an eighteen-month project that included four rounds of public workshops and forums. (App. 003430). Through these public workshops and forums, City staff and consultants conducted interviews with allied stakeholder interests and other members of the public to identify ideas to improve the built environment, make the community more attractive, and promote continued economic development and growth. (App. 003430-31).

25. In conjunction with three consulting firms, and using data from Mylan Pharmaceuticals, West Virginia University, area hospitals, and other businesses, the City determined that it should plan for a 40,000-person population increase by 2040, essentially doubling the population of the City. (App. 003431).

26. Based on those growth projections, the Comprehensive Plan process reviewed existing and available space to identify where the new residents may live and where their services could be provided:

> [We] reported back to the community, listen, the consulting team thinks we're going to grow by 40,000 people by 2040. What does that physically mean? Okay. So, that particular exercise we have maps of the urban area. We broke the attendees up in groups. We gave them stickers. The stickers represented I think 40 acres. So, to grow by 40,000 people during that time frame, it's anticipated that 8,800 acres would be consumed to support the new bodies, the new jobs, the new retail, to live, work, play and use, that we all have. The different groups work together, use the stickers, placed the stickers on the map, identifying where they thought that growth could go, should go, would go, if you will. After that exercise was done, they came back. They reported, if you will, what they were concerned with, what opportunities they saw. And from there that really solidified what areas within Morgantown were acceptable for more intense development and what areas were very clear

[2] Cited provisions of the *City Code* of The City of Morgantown can be viewed at the following links:

(1) http://whdrane.conwaygreene.com/NXT/gateway.dll?f=templates&fn=default.htm&vid=whdrane:WV Morgantown
(2) https://bit.ly/2dVTwyZ

> that that participatory process was to leave alone. And the leave alone areas for the single-family was the "Neighborhood Conservation" identification on the Land Management Map.

(App. 003430-32).

27. The Comprehensive Plan process occurred after the development of commercial uses – in 2003 and 2011 – relied upon by Respondent as support for invalidating the City's zoning ordinance. (App. 002414, 002439, 003434).

28. Respondent's property is within one of only two areas in the City designated for Neighborhood Conservation during the comprehensive planning process that accounted for a doubling of population. (App. 003430-34). Other neighborhoods such as [Wiles] Hill, Jerome Park, and South Park are existing single-family neighborhoods that the Comprehensive Plan identified as appropriate for additional infill development, as long as it was compatible with the existing built environment. (App. 003435).

29. The Comprehensive Plan identified areas for future study where existing zoning was inconsistent with current or expected uses. (App. 003427-28). Respondent's property is not within a future study area. *Id.* (App. 002905-2925).

30. West Virginia Code Chapter 8A, Article 7, Section 8 prohibits a City Council from making zoning amendments inconsistent with the Comprehensive Plan unless it finds that major changes not anticipated by the Comprehensive Plan have occurred, and that those changes have substantially altered the basic characteristics of the area. (App. 003440-41). No such inconsistency was found as to Respondent's property. (App. 003441).

31. The Comprehensive Plan includes a map of all zoning areas and identifies additional concept areas for the City. *Id.*

32. The property involved in this case is within the Neighborhood 1 Pattern and Character Area, the Neighborhood Conservation and Corridor Enhancement Concept Areas of the Land Management Map, and the Limited Growth Concept Area of the Conceptual Growth Framework Map. (App. 002906-2925).

33. The "Neighborhood 1" Pattern and Character area includes the oldest residential areas in the city surrounding Downtown and WVU's campus. (App. 002921).

34. The "Neighborhood Conservation" area is intended for preservation of existing neighborhood character and continued maintenance of buildings and infrastructure. (App. 002922). This area is intended to maintain and protect existing neighborhoods. (App. 002923).

35. The "Corridor Enhancement" concept area is intended for improving development along corridors with a mix of uses, increased intensity at major nodes or intersections, and roadway improvements to improve traffic flow and pedestrian and biking experience. (App. 002922). Corridor Enhancement areas are "not just specifically desiring more intense development or redevelopment, it also discusses the improvement of the public [] rights-of-way, whether it's improvement to vehicular traffic, pedestrian traffic, the interaction between pedestrians, bicycles, and vehicular traffic." (App. 003423)(Tr. p. 211 ln 14-21).

36. The Corridor Enhancement concept area is a type of overlay upon roadways within other concept areas. (App. 003421-22). It does not supersede the Neighborhood Conservation concept area in the Comprehensive Plan. *Id.*

37. Only two areas of Morgantown were designated for Neighborhood Conservation in the 2013 Comprehensive Plan: the Suncrest neighborhood where Respondent's property is located and the Evansdale neighborhood. (App. 003423).

38. The "Limited Growth" concept area is intended for areas that are subject to development, but where increased intensity is generally not desired. These areas include both existing open space and existing development and all developable areas. (App. 002920).

39. The City's professional planning staff prepared a Staff Report for consideration by the Planning Commission on review of the Respondent's application to amend the zoning classification for its property. (App. 2905). The report addressed both the application content and issues Respondent had indicated through litigation required additional staff review. (App. 003415; 003421-22).

40. The Staff Report noted that "[t]he predominant development activity within the immediate area since 1998 has reflected the neighborhood's single-family residential zoning classifications. Specifically, 33 new residential dwelling units have been constructed within the surrounding two- to three-block area during that time." (App. 002908; App. 002665-2904 (Building permits for residential dwellings)).

41. Of those thirty-three newly-constructed residential units in a two- to three-block area, six were constructed in the past 5 years and at least one had the exact same alignment and access to Burroughs Street as the part of the Respondent's property at issue in this case. (App. 003389).

42. There are twelve other homes in the area directly accessing Burroughs Street. (App. 003390). Those twelve existing homes, and the thirty-three newly-constructed, establish "an existing built environment, an existing land use pattern, and an expectation by those who own the property and reside there that there not be a significant impact with a compatible development or in compatible uses." (App. 003418) (Trial Transcript, hereinafter "Tr." P. 206, ln 8-11).

43. The Staff Report similarly noted that "[t]he area along Burroughs Street has seen substantial new residential construction, including development of new subdivisions at French Quarter Drive, Vintner Place, Vintner Square, Suncrest Place, and at least one single dwelling construction accessing Burroughs Street." *Id.*

44. The Respondent's application for a zoning amendment did not identify how the change to a B-2 classification would be consistent with the Comprehensive Plan or was merited based on changed circumstances since the 2013 adoption of the Comprehensive Plan. (App. 003441).

45. The Respondent's application for zoning amendment did not identify any manner in which the change to a B-2 classification would provide corridor enhancement by reducing traffic volume or improving pedestrian facilities. (App. 003441). No right-of-way improvements have been made in the area to accommodate increased traffic. (App. 003444-45).

46. The Respondent's application for zoning amendment did not identify any manner in which the change to a B-2 classification was required to provide economic use of the property due to topography or drainage issues. (App. 003442).

47. Respondent's appraiser testified that the site's topography is equally challenging for residential or commercial uses. (App. 003310).

48. Respondent's appraiser testified that the neighborhood supports a realistic use of the land for residential development. (App. 003312). The appraiser testified that this area has the strongest demand in the City for residential uses. (App. 003311-12).

49. The Staff Report noted that changing the zoning classification for the property to B-2 would be inconsistent with the area's development patterns and the Limited Growth and

Neighborhood Conservation concept areas established by the Comprehensive Plan. (App. 002905-25).

50. The change in zoning classification would inhibit the Neighborhood Conservation goals in the Comprehensive Plan – in one of only two areas of the City identified for that purpose. (App. 003444).

51. The change in zoning classification would increase intensity of uses in a Limited Growth area, which is inconsistent with the Comprehensive Plan. (App. 003444).

52. The change in zoning classification would result in an unplanned expansion of the commercial node surrounding Collins Ferry Road and could jeopardize the integrity of the surrounding single-family residential area and compromise the quality of life of the existing residents. (App. 003445).

53. The City's Planning Commission and City Council unanimously opposed the change in zoning classification. (App. 003449).

54. The Circuit Court's Amended Order invalidating the zoning ordinance was based on the following findings: (1) the property is "unattractive and unsuitable for residential development[;]" (2) "given the neighbors, residential development would be difficult and not a harmonious use of the land[;]" (3) "there are privacy issues because of car headlights shining into the property[;]" and (4) "the typography (*sic*) makes residential development challenging and expensive." (App. 003186). The Amended Order did not reference the Respondent's appraiser's opinion that the site topography was equally challenging for residential and commercial use. *Id.*

55. The Amended Order supported invalidating the City's zoning ordinance because "properties nearby and adjacent to Calvary are already being used for commercial, multi-family, or other non-single family residential purposes" and "the current contract in place regarding the

[property] will fail because the property is not suitable for R-1 zoning." (App. 003187). The Amended Order also stated, "It is of note that the re-zoned Biafora parcel is contiguous to Calvary's Subdivided Parcel, yet the City declines to grant Calvary the same consideration it previously granted to the 60-foot Biafora parcel and to the Wine Bar parcel." (App. 003188). The Amended Order cites this Court's decision in *Par Mar* but fails to address the Court's direction that an adjacent commercial use does not justify judicial zoning amendments. (App. 003182 *et seq.*).

56. The Amended Order disregards use of the Comprehensive Plan as a guide for zoning amendments based upon a finding that it "is not law, nor is it binding." (App. 003188). The Amended Order does not reference testimony regarding the community input process resulting in the Comprehensive Plan, nor does it reference testimony or exhibits demonstrating residential uses and development in the area. (App. 003182 *et seq.*). The Amended Order does not reference *W. Va. Code* §§ 8A-7-2(c)(2) or 8A-7-8, which make the Comprehensive Plan binding, nor does it reference *City Code* §§1301.01-1301.09, which adopt the Comprehensive Plan into law.

Summary of Argument

This case is about community values. It will decide whether the Morgantown community can plan its future development in a way that is consistent with quality of life for its residents, or whether land use is chosen by the highest bidder.

The Respondent owns about 2.5 acres of real estate adjoining Burroughs Street and Eastern Avenue in the Suncrest neighborhood. It has a contract to sell a certain half-acre piece of its property for $250,000.00, but only if it can invalidate the City's zoning ordinance and allow commercial development there. The buyer is paying its legal fees for the lawsuit. The

Respondent's appraiser says the same piece of property would sell for $128,000.00 without invalidating the zoning ordinance. So this case is about the value of $132,000.00 in relation to community values. Can the City's legislation be invalidated so the Respondent makes an extra $132,000.00 by selling some property? Is that true even when it could sell the same half-acre of property for $128,000.00 and leave the neighbors with the benefits of residential zoning?

Zoning legislation protects some important community values that are hard to define in dollars, and separating residential areas from some commercial uses is one of them. Living in a residential area can provide an opportunity to enjoy your home without the intrusion of late night noise and light that commercial uses bring, opportunity to enjoy the outdoors without the noise and traffic of parking lots, and a sense of community from being surrounded by neighbors. Legislatures and the courts have found these values are worthy of protection. The values are so important that, when they are enacted into zoning ordinances, they cannot be invalidated unless they are undoubtedly irrational.

A zoning ordinance is judged by the "fairly debatable" standard – if there can be fair debate about whether the ordinance relates to some legitimate purpose, it is upheld. Providing adequate air and light, protection against noise and traffic, and compatible surrounding uses are all legitimate zoning purposes. *W. Va. Code* § 8A-1-1(a). The question before the Court is whether those purposes are valuable for the property in Respondent's neighborhood when they are applied to Respondent's property.

While there is no determinative test for the fairly debatable standard, the evidence of record here indicates a thorough community planning process identified the area as residential, that community members supported preserving residential uses here, that existing residential uses remain in the area and new residential structures are being constructed, and that residential zoning

does not destroy the value of the property. The Respondent argues that the property can be sold for a higher value with commercial zoning, but it admits that the property has substantial market value with residential zoning. The Respondent argues that the property's topography is difficult for residential development, but it admits that the difficulty is the same for commercial development. The Respondent argues that traffic on the roadway makes residential use unlikely, but it ignores numerous new and established surrounding residential uses. This is sufficient evidence to determine that the zoning ordinance must be upheld.

When a formulaic approach to zoning challenges is preferred, a multifactor analysis referred to as the *LaSalle* factors is often employed. Analysis of these factors – such as whether a comprehensive plan exists, the community benefit of the zoning classification, and whether there is a community need for the proposed change – also supports upholding the City's ordinance.

In its Amended Order, the Circuit Court did not apply the fairly debatable standard, nor did it assess the *LaSalle* factors. The Amended Order substitutes the judgment of the Court for the legislative zoning decision, in contravention of this Court's opinion in *Par Mar v. City of Parkersburg*. Analysis of the ordinance under the appropriate standard requires that the Circuit Court order be reversed and that the zoning ordinance be upheld.

Statement Regarding Oral Argument and Decision

This case presents an issue proper for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure as it involves constitutional questions regarding the validity of a municipal ordinance. *W. Va. R. App.* 20(a)(3). The decision below invalidates an ordinance duly enacted by the City Council of The City of Morgantown, West Virginia on the ground that

the ordinance, as applied to Respondent's property, violates the substantive due process rights of Respondent under the federal or state Constitutions.

Argument

I. Standard of Review

Review of a Circuit Court's decision invalidating a zoning ordinance considers a question of law or interpretation of a statute, and accordingly a *de novo* standard of review applies. *American Tower Corp. v. Common Council of City of Beckley*, 210 W. Va. 345, 557 S.E.2d 752 (2001), *citing* Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995); Syl. pt. 2, *Coordinating Council for Indep. Living, Inc. v. Palmer*, 209 W.Va. 274, 546 S.E.2d 454 (2001); Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review."); Syl. pt. 1, *Burks v. McNeel*, 164 W.Va. 654, 264 S.E.2d 651 (1980) ("In reviewing the judgment of a lower court this Court does not accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law.").

Zoning ordinances are presumed to be constitutional. *Par Mar v. City of Parkersburg*, 183 W. Va. 706, 709, 398 S.E.2d 532, 535 (1990) ("A zoning ordinance, as an exercise of the broad police power of the local governing body, is rebuttably presumed to be valid."); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) ("[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and ... the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.") Courts utilize a deferential standard of review when considering challenges

to zoning ordinances: "Judicial power to inquire into, review and set aside municipal zoning laws is subject to definite limitations arising from the governmental and legislative nature of zoning as well as from the separation of the judiciary from the legislative branch of government. This limited scope of judicial review must be kept in mind with respect to contentions that an ordinance adopted pursuant to a zoning statute is arbitrary, unreasonable and unconstitutional." 8A *McQuillin Mun. Corp.* § 25:301 (3d ed.). "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 municipality is arbitrary or unreasonable." Syllabus, *Prete v. City of Morgantown*, 193 W. Va. 417, 456 S.E.2d 498 (1995) (*quoting* Syllabus point 4, *DeCoals, Inc. v. Board of Zoning Appeals, etc.*, 168 W.Va. 339, 284 S.E.2d 856 (1981)).

In West Virginia, a zoning ordinance must be upheld unless it is beyond fair debate that the ordinance is arbitrary and unreasonable. *Prete v. City of Morgantown*, 193 W. Va. 417, 456 S.E2d 498 (1995). *Prete v. City of Morgantown* holds that "it is inappropriate to intervene when it is 'fairly debatable' whether the decision is arbitrary or unreasonable or whether it bears a substantial relation to the appropriate public concerns." 193 W. Va. 417, 456 S.E.2d 498. The *Prete* decision also set the standard for courts to determine when an issue is fairly debatable: "[A]n issue is 'fairly debatable' when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." *Id.* West Virginia courts have also referenced the *LaSalle* factors as helpful determinants of whether to uphold a zoning ordinance. *Par Mar*, 183 W. Va. at 710, 398 S.E.2d at 536; *see* 2 *Am. Law. Zoning* § 15:11 (5th ed.). ("The La Salle factors have developed primarily in the context of as-applied challenges, although they may also be relevant to facial claims. Other states, including, Georgia, Kansas and West Virginia have used the La Salle test on occasion or

developed a similar factor test to be applied in substantive due process zoning cases."). The common *LaSalle* factors are as follows: (1) the character of the area where the restricted property is located, including existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the challenged regulation; (3) the purpose of the regulation, and the extent to which the destruction of private property values promotes the public health, safety and general welfare; (4) the balancing of public and private interests (i.e. the relative gain to the public as compared to the hardship imposed upon the upon the individual property owner); (5) the suitability of the property for the permitted purposes; (6) the length of time that the property has been vacant as zoned considered in the context of land development in the vicinity of the subject property; (7) whether there exists a comprehensive plan; (8) whether the challenged regulation is in harmony with the comprehensive plan; and (9) whether the community needs the proposed use. 2 *Am. Law. Zoning* § 15:11 (5th ed.).

The burden is on the party challenging the ordinance to show it is invalid: "In short, "[w]here the complaining party has failed to show that a municipal [zoning] ordinance, properly adopted, is arbitrary or unreasonable, this Court will not overrule city authorities in the exercise of their legislative function." *Par Mar*, 183 W. Va. At 709-10, 398 S.E.2d at 535-6 (*quoting* Syl. pt. 4, *Town of Stonewood v. Bell,* 165 W.Va. 653, 270 S.E.2d 787 (1980)). The challenger must prove by clear and convincing evidence that the ordinance is arbitrary or unreasonable. *Id.* ("Moreover, the person challenging the validity of a zoning ordinance, as applied to the property in question, must show by clear and convincing evidence that the ordinance is arbitrary or unreasonable or does not bear a substantial relation to the public health, safety, morals or general welfare of the community.").

Zoning boundary decisions are a "critical function" of the zoning process that courts consistently affirm is a matter of legislative discretion:

> As zoning regulations are imposed by districts, the drawing of district boundary lines is a critical function in the zoning process. It may determine whether a parcel of land is available for highly lucrative use as the site of a shopping center, or for less profitable use as a site for single-family homes.
>
> The courts recognize the importance, as well as the delicacy, of the decision-making function which results in the final fixing of a boundary between one zoning district and the next. They have consistently said that the fixing of such boundary lines is a matter of legislative discretion.

1 Am. Law. Zoning § 9:4 (5th ed.). In *Par Mar*, the Supreme Court of Appeals of West Virginia established a clear precedent that commits the drawing of boundaries to elected officials:

> However, a zoning ordinance must draw lines for boundaries between zoning districts, and such line drawing, such as utilizing a highway or a street as a boundary, is not *ipso facto* "arbitrary and unreasonable" so as to invalidate the application of a zoning ordinance. As stated in the opinion in *Board of Supervisors v. Pyles,* 224 Va. 629, 300 S.E.2d 79 (1983), "[f]ixing the specific location of boundaries between zoning districts is a legislative function that 'is, by nature, more or less arbitrary[,]' " *id.* at 638, 300 S.E.2d at 84 (internal citation omitted), but not so "arbitrary" by itself as to invalidate the application of a zoning ordinance as a matter of law. *See also Wilkins v. City of San Bernardino,* 29 Cal.2d 332, 339-40, 175 P.2d 542, 548 (1946) (en banc); *Lapkus Builders, Inc. v. City of Chicago,* 30 Ill.2d 304, 310, 196 N.E.2d 682, 686 (1964) (presence of less restricted areas across the street does not make restrictions in question unreasonable); *Dodge Mill Land Corp. v. Town of Amherst,* 61 A.D.2d 216, 220, 402 N.Y.S.2d 670, 672 (1978) (highway may separate business and residential zones); *Carlson v. City of Bellevue,* 73 Wash.2d, 41, 48-49, 435 P.2d 957, 961-62 (1968) (en banc) (not arbitrary and unreasonable to use highway as boundary between industrial zone and multiple housing/nonretail business zone, even though there are two gasoline service stations across highway from proposed gasoline service station)[.]

Par Mar, 183 W. Va. at 711, 398 S.E.2d at 537. The *Par Mar* decision establishes that the mere existence of a commercial use adjacent to a residential district is not sufficient reason to invalidate residential zoning. *Id.* at 183 W. Va. 711-12, 398 S.E.2d 537-38 ("It is trite to observe that in zoning a city into various use districts there must be a dividing line somewhere. The selection of

such a line involves the exercise of the legislative power and is a problem peculiarly within the power of the legislative body of a municipality. It involves a high degree of legislative discretion and an acute knowledge of existing conditions and circumstances. If the fairly debatable rule is a sound one, and we have so held, there is no situation in the field of zoning in which it is more applicable than that involving the decision of where the dividing line between use districts should be placed. Recognizing the fundamental premise that there must be a line somewhere, the courts should be highly respectful of the decision of the legislative body which, under the law, is vested with the power and charged with the duty of zoning. The courts should tread lightly in this field and then only where the actions of the City Council are so unreasonable and unjustified as to amount to confiscation of property.") (*quoting City of Miami Beach v. Wiesen*, 86 So.2d 442 (Fla.1956) (en banc)).

The Respondent proceeded below upon, and the Circuit Court appeared to grant relief upon, a petition for writ of mandamus. .A writ of mandamus will only issue when "three elements coexist - (1) a clear right in the petitioner to the relief sought; (2) a clear legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." *Fisher v. City of Charleston*, 425 S.E.2d 194, 188 W.Va. 518 (W.Va., 1992) (*quoting* Syllabus point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969)).

The plaintiff below, Respondent herein, must prove by clear and convincing evidence that the ordinance is arbitrary and unreasonable beyond fair debate, or the ordinance must be upheld. *Prete* 193 W. Va. 417, 456 S.E.2d 498; *Par Mar*, 183 W. Va. at 711-12, 398 S.E.2d at 537-38.

II. Residential zoning provides substantive due process under the "fairly debatable" standard.

Zoning ordinances may not be invalidated when it is fairly debatable whether the law has a legitimate purpose. *Prete v. City of Morgantown*, 193 W. Va. 417, 456 S.E.2d 498 (1995); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Where it is arguable that a zoning classification relates to a proper government purpose, it must be upheld. *Id*; *See W. Va. Code* § 8A-7-2(a)(2)-(4), (b)(11); 1 Am. Law. Zoning § 7:1 (5th ed). The parties agree that the residential zoning classification at issue generally serves proper zoning purposes. (App. 001517). The only challenge to the zoning law is whether those purposes may be appropriate to Respondent's property.

The record shows that the residential classification applicable to Respondent's property is based upon a thorough community planning process that identified the area as residential (App. 003430-34), that community members supported preserving residential uses here (App. 003430-34), that existing residential uses remain in the area and new residential structures are being constructed (App. 002908; App. 002665-2904), and that residential zoning does not destroy the value of the property. (App. 003303).

The Respondent counters that its zoning must be changed to the B-2 district because it could sell part of its property for about $130,000 more ($250,000.00 vs. $128,000.00) (App. 003303), because there are commercial uses nearby (App. 003188), and because of automobile traffic on the adjacent road (App. 003186). The relative merits of these claims are discussed below. However, the factors supporting the zoning ordinance show the ordinance should be upheld under the fairly debatable standard. 193 W. Va. 417, 456 S.E.2d 498.

A. Application of the "fairly debatable" standard.

The *Prete* decision holds, "[A]n issue is 'fairly debatable' when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." *Id.* This case presents substantial quantitative evidence that residential zoning is appropriate in the area. At least twelve single-family homes in the immediate area have access directly onto Burroughs Street. (App. 003418). At least thirty-three new single-family homes have been constructed in the immediate area over the past two decades. (App. 002908; 002665-2904). This area has the strongest demand in Morgantown for residential development, according to the Respondent's appraiser. (App. 003311-12). The proposed half-acre site on Respondent's property is likely to sell for $128,000.00 – as vacant land – for development of a residential use. (App. 003303). This, again, is testimony from Respondent's own appraiser. *Id.* Houses constructed on similar property are valued at several hundred thousand to over one million dollars. (App. 002665-2904).

The qualitative factors provide more support for residential zoning. The neighborhood is one of only two in Morgantown designated for Neighborhood Conservation – a concept designed to protect existing residential neighborhoods. (App. 003444). The area is one of Morgantown's oldest residential neighborhoods (zoned R-1 since 1959) and those existing and newly-constructed residential uses rely upon the continuance of residential zoning. (App. 002921). Changing the zoning to B-2 would contribute to the uncontrolled sprawl of a commercial node centered around Collins Ferry Road. (App. 003445). The City took great care in planning for growth areas based on an expected doubling in population, and it specifically sought to avoid that type of expansion with its Comprehensive Plan. (App. 003445). The R-1 zoning classification supports a community need for single-family housing areas in a rapidly developing community. The data show that residential use in the area is traditional and continues to expand.

Against this, Respondent claims that the property is worth more for commercial use, that neighboring commercial uses dictate a change in zoning, and that automobile traffic precludes residential use. Mere decrease in value will not support a judicial zoning change; rather, the zoning classification must destroy the property's value. *See Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949) ("the residential use of the Section 207 and contiguous area had practically ceased except for a few old houses, and the petitioners' land was practically valueless for residential use but valuable for industrial use") ; 2 *Am. Law of Zoning* § 15:11 (5th ed.) ("[I]in most states, if an ordinance is found to substantially advance a public interest, it will be upheld even if it imposes a severe and expensive limitation upon the use of land."). Similarly, adjacent commercial properties do not furnish a reason to invalidate residential zoning. *Par Mar*, 183 W. Va. at 711, 398 S.E.2d at 537 ("a zoning ordinance must draw lines for boundaries between zoning districts, and such line drawing, such as utilizing a highway or a street as a boundary, is not *ipso facto* "arbitrary and unreasonable" so as to invalidate the application of a zoning ordinance. As stated in the opinion in *Board of Supervisors v. Pyles,* 224 Va. 629, 300 S.E.2d 79 (1983), "[f]ixing the specific location of boundaries between zoning districts is a legislative function that 'is, by nature, more or less arbitrary[,]' " *id.* at 638, 300 S.E.2d at 84 (internal citation omitted), but not so "arbitrary" by itself as to invalidate the application of a zoning ordinance as a matter of law. *See also Wilkins v. City of San Bernardino,* 29 Cal.2d 332, 339-40, 175 P.2d 542, 548 (1946) (en banc); *Lapkus Builders, Inc. v. City of Chicago,* 30 Ill.2d 304, 310, 196 N.E.2d 682, 686 (1964) (presence of less restricted areas across the street does not make restrictions in question unreasonable); *Dodge Mill Land Corp. v. Town of Amherst,* 61 A.D.2d 216, 220, 402 N.Y.S.2d 670, 672 (1978) (highway may separate business and residential zones); *Carlson v. City of Bellevue,* 73 Wash.2d, 41, 48-49, 435 P.2d 957, 961-62 (1968) (en banc) (not arbitrary and

unreasonable to use highway as boundary between industrial zone and multiple housing/nonretail business zone, even though there are two gasoline service stations across highway from proposed gasoline service station)"). Finally, while Respondent offers evidence that traffic counts on Burroughs Street are higher than some other residential streets in the City, it offers no evidence that the traffic discourages residential uses. The new million-dollar house directly accessing Burroughs, the six new residential dwellings constructed in the last five years, and the thirty-three new residential dwellings constructed in the last twenty years suggest the traffic is compatible with residential uses. Those existing residential uses also do not support adding a commercial property likely to generate additional traffic. Nor do they explain why Respondent chose to subdivide its property with access onto Burroughs Street rather than to Eastern Avenue, a less frequently traveled street. While Respondent identifies actual concerns with respect to its use of the property, none is sufficient to foreclose debate about whether residential zoning is a legitimate purpose for the area. Instead, the thoughtful and comprehensive community planning process seems to have correctly identified an area where residential uses are valued and should be preserved. For these reasons, it is not beyond fair debate whether the ordinance is reasonable, and the City's zoning ordinance should be upheld.

B. Use of the *LaSalle* factors.

While the *Prete* decision established a standard to determine when a zoning issue is fairly debatable and should be upheld, many courts analyze the *LaSalle* factors to consider the types of evidence relevant to a substantive due process challenge. 2 *Am. Law. Zoning* § 15:11 (5th ed.). The *LaSalle* factors originate from the *LaSalle National Bank v. Cook County* decision in 1957 and an ensuing line of Illinois cases. *See La Salle Nat. Bank of Chicago v. Cook County*, 12 Ill. 2d 40, 145 N.E.2d 65 (1957); 2 *Am. Law. Zoning* § 15:11 (5th ed.). The *Par Mar* opinion issued

by this Court noted the utility of the factors, though it found no need to apply them in dismissing the challenge by a residentially-zoned property adjacent to commercial uses. 183 W. Va. at 710, 398 S.E.2d at 536. The commonly-used *LaSalle* factors are (1) the character of the area where the restricted property is located, including existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the challenged regulation; (3) the purpose of the regulation, and the extent to which the destruction of private property values promotes the public health, safety and general welfare; (4) the balancing of public and private interests (i.e. the relative gain to the public as compared to the hardship imposed upon the upon the individual property owner); (5) the suitability of the property for the permitted purposes; (6) the length of time that the property has been vacant as zoned considered in the context of land development in the vicinity of the subject property; (7) whether there exists a comprehensive plan; (8) whether the challenged regulation is in harmony with the comprehensive plan; and (9) whether the community needs the proposed use. 2 *Am. Law. Zoning* § 15:11 (5th ed.) Evaluation of the factors supports upholding the City's zoning ordinance as to Respondent's property.

1. The character of the area.

The area is one of the oldest residential neighborhoods in Morgantown and one of only two areas in the city designated for Neighborhood Conservation. (App. 002906-2925). Respondent's property is occupied by a church use permitted in residential districts and which is considered beneficial to residential areas. (App. 003437). The property is surrounded on three sides by residential uses. (App. 002906; 2914). The area has been adjacent to a commercial node zoned B-2 and centered on Collins Ferry Road since 2003. (App. 003445).

This area currently has the strongest demand for residential development within the city. (App. 003311-12). In the immediate two- to three-block area, thirty-three new residential

dwellings have been constructed within the last two decades, six in the last five years, and one directly accessing Burroughs Street. (App. 003389). These are in addition to twelve pre-existing single-family residential homes directly accessing Burroughs Street in the immediate area. (App. 003390).

The character of the area supports residential zoning. In *Prete*, where the property was mostly surrounded by the higher-intensity use requested by the petitioner, the Court found the existence of nearby residential uses sufficient to defeat the zoning challenge on these grounds. *Prete,* 193 W. Va. at 420, 456 S.E.2d at 501. In *Par Mar*, where commercial uses were permitted on one side of a street and residential uses on another, the zoning ordinance was upheld. *Id.* at 183 W. Va. 711, 398 S.E.2d 537. In *Anderson v. City of Wheeling*, the petitioner's property – which petitioners sought to change to commercial zoning – was surrounded by commercial development on one side across the street, a school and private residences on one side, private residences on a third side, and a planned apartment building on the remaining side, the existing residential zoning classification was upheld. 150 W. Va. 689, 149 S.E.2d 243 (1966). Also in *Anderson*, had the petitioners succeeded, "about one-fourth of the perimeter of petitioners' property would adjoin commercially-zoned property and three-fourths would be bounded by Park Road and residentially-zoned property." *Id.* at 150 W. Va. 696, 149 S.E.2d 248. The Court upheld residential zoning. *Id.* at 150 W. Va. 702, 149 S.E.2d 251. As in these decisions, the property here is surrounded by residential uses and shows a consistent demand for additional residential uses. This factor supports the zoning ordinance.

2. Diminution in property value.

Respondent alleges that the portion of its property which it chose to subdivide is worth $128,000.00 with residential zoning (App. 003303), and it has a contract to sell the property to Bernard Bossio for $250,000.00 if it can invalidate the residential zoning and obtain a B-2 zoning classification. (App. 002657, 003260). However, diminution in value has minimal relevance to a substantive due process claim. 2 *Am. Law of Zoning* § 15:11 (5th ed.) ("...the diminution in value of a piece of property may, in limited circumstances, reflect upon the arbitrary or irrational nature of a land use regulation, the courts do not give great weight to the loss in value when assessing substantive due process —a test primarily concerned with the substance of the ordinance and not with its economic effects on particular property owners."). Under current precedent of the Supreme Court of the United States, consideration of economic impact should likely be considered only in takings claims, with substantive due process challenges focusing on the purpose of the zoning regulation. *Id.* ("Following the Supreme Court's decision in *Lingle v. Chevron* in 2005, it seems clear that the economic impacts of a land use regulation are properly evaluated under takings analysis, not substantive due process."); *see also Lingle v. Chevron*, 544 U.S. 528 (2005), *abrogating Agins v. City of Tiburon*, 447 U.S. 255. To the extent this factor is relevant, the facts show that the property has substantial value for residential use. Respondent's appraiser assigns a half-acre undeveloped portion of the property a value of $128,000.00. (App. 003303). Newly-constructed homes in the area are valued at several hundred thousand dollars to over a million dollars. (App. 002665-2904). Residential zoning in the area of Morgantown with the strongest demand for residential development should not support invalidation of the zoning ordinance when it undoubtedly leaves the property with substantial economic value.

3. Purpose of zoning

The R-1 zoning classification covering the property and the neighborhood serves the following purposes:

> (D) Provide for attractive single family neighborhoods for residents who prefer larger lot sizes, and do not generally desire to live in close proximity to other types of uses, and
> (E) Preserve the desirable character of existing single family neighborhoods, and
> (F) Protect the single family residential areas from change and intrusion that may cause deterioration, and provide for adequate light, ventilation, quiet, and privacy for neighborhood residents.

(App. 002907). The property is within one of only two areas in the City designated for Neighborhood Conservation during the comprehensive planning process that accounted for a doubling of population. (App. 003430-34). Other neighborhoods such as [Wiles] Hill, Jerome Park, and South Park are existing single-family neighborhoods that the Comprehensive Plan identified as appropriate for additional infill development, as long as it was compatible with the existing built environment. (App. 003435). The "Neighborhood Conservation" area is intended for preservation of existing neighborhood character and continued maintenance of buildings and infrastructure. (App. 002922). This area is intended to maintain and protect existing neighborhoods. (App. 002923). The property is also within the "Limited Growth" concept area, which is intended for areas that are subject to development, but where increased intensity is generally not desired. These areas include both existing open space and existing development and all developable areas. (App. 002920).

4. Balancing public and private interests

This factor considers the public benefit of zoning relative to its impact on the property owner. The relinquishing of some property development rights by property owners in favor of a the community benefit of zoning is central to zoning law. The inhibition on the property owner

here is quantifiable: $132,000.00, according to its own allegations. (App. 002657; 003260; 003303). That inhibition can be questioned – we might ask whether the property owner could have used or subdivided its 2.5-acre property in some better way to maximize its value for residential use. Surely it could have. Yet the important consideration for the community is whether the property owner's chance to make an extra $132,000.00 supplants the community desire to maintain select areas for residential use. Morgantown has thoughtfully selected residential areas to preserve while planning for rapid growth: an 18-month community input process resulted in a Comprehensive Plan that identified only two neighborhoods in the City for conservation from development. (App. 003430-35). The zoning in those areas benefits residents by separating them from areas designed for "larger big-box development" or "a Walmart." (App. 003376; 003263). It also provides stability to guard against change and intrusion that might impact the "adequate light, ventilation, quiet, and privacy" which are purposes of the district. (App. 002907). These neighborhood features are important considerations for families choosing a home they expect to occupy for a generation. Where the zoning regulation preserves uses benefiting from the regulation, and evidence shows new residents seeking out the location, this factor supports upholding the residential zoning classification.

5. Suitability for permitted purposes

57. The Respondent's 2.5-acre property has been suitable for Respondent's church purposes under residential zoning for decades, and since the Church's inception. (App. 003454, 003457-8). Based on a contract with a commercial developer, the Respondent has subdivided a portion of that property and asserted it is not suitable for the permitted purposes any longer. (App. 002657, 003260). However, the Respondent's own appraiser testified that the topography of the site has equal utility for residential or commercial development. (App. 003310). The same

appraiser testified that the area has the strongest demand in the city for residential development and that the half-acre site has at least $128,000 market value as undeveloped land. (App. 003303). While the site subdivided by Respondent is adjacent to a mixed-use development, it is also adjacent to a newly-constructed residential subdivision that adjoins the same mixed-use development. (App. 2908; 002914-15; 003418). There are thirty-three newly-constructed residential units in a two- to three-block area, six were constructed in the past 5 years, and at least one had the exact same alignment and access to Burroughs Street as the part of the Respondent's property at issue in this case. (App. 003389). The record does not indicate that Respondent's property – either its 2.5-acre parcel or the portion it chose to subdivide – is unsuitable for residential uses.

6. Length of time the property has remained vacant

The Respondent's property continues to operate as a church. (App. 003435). It has been continuously occupied under residential zoning for decades. The portion of the property for which Respondent seeks a change in zoning classification was subdivided for purposes of sale in a contract contingent upon commercial zoning. (App. 003259-60). There is no indication that Respondent has attempted to market the property for residential development since its subdivision during the underlying litigation. However, its appraiser found that marketing time in the neighborhood for residential properties is "3 to 6 months" while marketing time for commercial properties is "300 days." (App. 002583). The record shows that residential zoning has not caused a vacancy at Respondent's property.

7. Whether a comprehensive plan exists

The City adopted its Comprehensive Plan in 2013. *City Code* §§ 1301.01 to 1301.09. The Comprehensive Plan was the outcome of a thorough, 18-month process that obtained input from numerous residents and stakeholders. (App. 003430-35). The planning process anticipated rapid

population growth, and the attendant need for new development, and established land management concepts to direct that growth in a manner that preserved important community uses such as residential neighborhoods while promoting infill development. *Id.*

8. Whether the regulation is in harmony with the comprehensive plan

The Comprehensive Plan designates the area in question as one of only two within the City for Neighborhood Conservation. (App. 003430-34). The area is also identified for Limited Growth and is a Neighborhood 1 area containing the community's oldest residential neighborhoods. (App. 002906-25). The R-1 zoning classification is harmonious with, and promotes, these Comprehensive Plan concepts.

9. Whether the community needs the proposed use

Respondent does not identify a proposed use that the community may need in this challenge. However, the community has identified a strong need in this area for preservation of residential uses against the economic pressures to expand commercial use. These community needs are identified in the land management concepts of the Comprehensive Plan: Neighborhood Conservation, Limited Growth, a Neighborhood 1 area. (App. 003430-34). The Corridor Enhancement overly concept area supports a need for infrastructure rather than a particular type of use. The community identified needs for infill development, but it identified other areas where that development is most appropriate. (App. 003435). The overwhelming community preference for this area, established by the Comprehensive Plan, is a residential neighborhood.

Consideration of all relevant factors shows that residential zoning for the area is supported – by quantitative data about existing homes, newly-constructed homes, and residential development values, and by qualitative data about the community's preference for preservation of a longstanding residential area as a place with limited intrusion from the activity attendant to

commercial uses. As in *Par Mar* and *Prete*, this case demonstrates that zoning requires a line be drawn somewhere between commercial and residential areas, and that the choice where to draw that line is committed to the sound discretion of elected representatives. "It is trite to observe that in zoning a city into various use districts there must be a dividing line somewhere. The selection of such a line involves the exercise of the legislative power and is a problem peculiarly within the power of the legislative body of a municipality. It involves a high degree of legislative discretion and an acute knowledge of existing conditions and circumstances." *Par Mar*, 183 W. Va. at 711-12, 398 S.E.2d at 537-38. Important community issues such as land use can be – and surely will be – fairly debated, and that is itself good reason to permit elected officials to represent the citizens by making these decisions. In keeping with this principle, and supporting the community needs established by Morgantown's Comprehensive Plan, the zoning ordinance should be upheld.

III. The City zoning ordinance cannot be invalidated based on factors outside the substantive due process analysis.

The Amended Order of the Circuit Court relies upon *Euclid* and *Par Mar* to hold that the City zoning ordinance violates Respondent's substantive due process rights and must be amended. (App. 003200). However, the Amended Order improperly includes proceedings on prior zoning amendments as part of it substantive due process analysis. (App. 003202). Substantive due process challenges consider only the application of a zoning ordinance to the property at issue. *See, e.g., Par Mar*, 183 W. Va. at 712, 398 S.E.2d at 538; 2 *Am. Law. Zoning* § 15:11 (5th ed.). The apparent theory underlying the Amended Order's finding that zoning must be changed for Respondent's parcel because it was changed for other parcels fails to respect that the inherent line-drawing involved in zoning decisions is committed to the legislature. *Par Mar*, 183 W. Va. at 711-12, 398

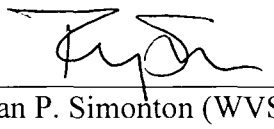
S.E.2d at 537-38. As part of a substantive due process analysis, only the current use of other properties and the trend of use in the neighborhood is relevant. 2 *Am. Law. Zoning* § 15:11 (5th ed.). The considerations addressed in zoning amendments for other properties prior to the adoption of the current Comprehensive Plan are irrelevant to the property under consideration here and should have been excluded from the Court's substantive due process analysis. The Amended Order's reliance on prior zoning amendment proceedings demonstrates its failure to apply the "fairly debatable" standard of review or accord the appropriate deference to the zoning ordinance.

As detailed in Section II., *supra*, the residential zoning classification rests upon carefully considered principles informed by community input, projected growth, historical uses, and recent development trends. When these appropriate factors are considered in accordance with applicable law, the zoning ordinance must be upheld.

Conclusion

For the foregoing reasons, the City respectfully requests that the Court uphold the duly enacted zoning ordinance of The City of Morgantown as it applies to Respondent's property, overturn the Circuit Court's Amended Order, invalidate the award of attorney costs and fees to Respondent based on the Circuit Court's Amended order, and grant the City such additional relief as is appropriate.

Respectfully submitted
City of Morgantown
Petitioner
By counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CITY OF MORGANTOWN,

Defendant below, Petitioner,

v.

CALVARY BAPTIST CHURCH,

Plaintiff below, Respondent.

Appeal No. 18-1134

(Circuit Court of Monongalia County

Civil Action No. 17-C-41)

CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that the foregoing ***Petitioner's Brief*** was served on the parties this 22nd day of April, 2019, by delivering a copy in the U.S. mail, postage prepaid, to Plaintiff's counsel as follows:

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