IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 18-1134

CITY OF MORGANTOWN
Respondent Below, Petitioner

V.)

CALVARY BAPTIST CHURCH
Petitioner Below, Respondent

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

RESPONDENT'S BRIEF

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Between 2016 and 2018, Calvary Baptist Church twice asked the City of Morgantown to rezone an approximately half-acre parcel from a single-family residential R-1 classification to a commercial B-2 classification. The City twice refused and the Church sued, alleging substantive due process violations and other constitutional claims. After a two day bench trial in August 2018, at which the evidence showed the City had considered and granted similar rezoning applications for abutting or diagonally adjacent properties, the Circuit Court entered an Amended Order on November 26, 2018, concluding the City "looked for reasons" to deny the Church's applications and that those reasons were "obviously arbitrarily and capriciously selected at best, if not utterly misleading and manufactured." The Circuit Court then declared the R-1 classification unconstitutional as applied and directed the City to rezone the Church's property to a B-2 classification.

These conclusions rest on well-established law and are fully supported by the record. The Circuit Court therefore did not abuse its discretion, and the Amended Order should be affirmed.

STATEMENT OF THE CASE

A. The Church partitioned its property in the City's Suncrest district to create a new, approximately half-acre parcel that it asked the City to rezone from a residential to commercial classification.

The Church owns 2.43 acres in the Suncrest district of the City, just east of the intersection of Burroughs Street and Collins Ferry Road. App. 2928, 3173 & 3243. In June 2016, the Church submitted two applications to the City for this property. App. 9 & 20. In its first application, the Church asked the City to subdivide the property into two parcels: one parcel would consist of approximately one-half acre occupied by a stand of trees (the "Partition"), and the other parcel would consist of the remaining acreage improved with a church and parking lot (the "Remainder"). App. 9, 20-21, 2510 & 2454-2458. In its second application, the Church asked the City to rezone the Partition from the existing single-family R-1 classification to a commercial B-1 or B-2 classification. *Id.* Both applications served a larger purpose: to complete the construction of its new sanctuary, the Church had agreed to sell the Partition to Morgantown businessman Bernard Bossio

contingent on a rezoning that would allow for commercial use. App. 2664-2657 & 3454-3456. Bossio agreed to pay the Church's costs for partition and rezoning. App. 3263-3264.

B. After its rezoning application was denied, the Church sued the City in January 2017 to assert an as-applied substantive due process challenge. After a second rezoning application was denied in early 2018, the Church amended its pleading to add as-applied takings and equal protection claims.

The City conditionally approved the Church's 2016 subdivision application but denied the 2016 rezoning application.[1] App. 10 & 21. So the Church sued the City in January 2017 to assert an as-applied substantive due process challenge to the R-1 classification governing the Partition. App. 7-14. Because the City had stated that a B-1 classification would be spot zoning, the Church asked the Circuit Court to direct the City to rezone its property to the commercial B-2 classification governing the abutting and diagonally adjacent properties. App. 11-12 & 2454. The case was then stayed briefly in early 2018 to allow the Church to submit a second set of applications. App. 1570-1573. When the 2018 applications were returned with the same result—approval of the subdivision and denial of the rezoning—the Circuit Court lifted its stay, and the Church amended its pleading to add as-applied takings and equal protection claims to its as-applied substantive due process challenge. App. 1574-1575, 1576-1592, 2394 & 2396. The Circuit Court then held a two day bench trial in August 2018 App. 3182 & 3213.

C. The Circuit Court held a two day bench trial in August 2018 where the Church called four witnesses and the City called none.

The Church called four witnesses at trial: Bossio; its appraiser, Douglas Wise; the City's Planning Director, Christopher Fletcher; and a Church Trustee, David Harkins. App. 3214. The City did not call any witnesses. App. 3186, 3214 & 3459. The parties also collectively introduced 62 exhibits into evidence. App. 3214-3215. What follows is the factual record before the Circuit Court.

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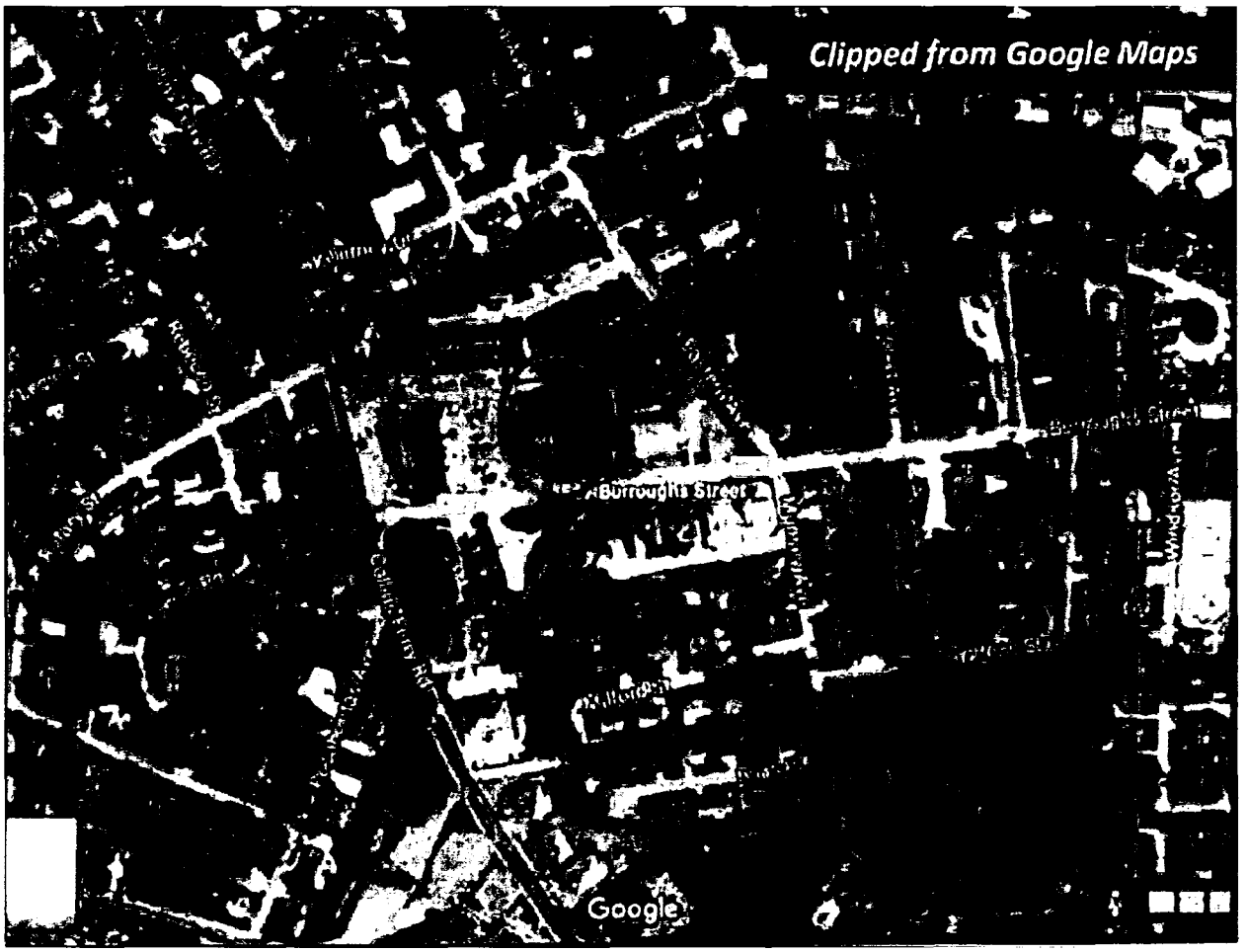
[1] Subdivision and rezoning applications are both submitted to the City's Planning Department, which prepares staff reports for the City's Planning Commission. The Planning Commission then takes the application up at a public meeting where it hears from the applicant and the public. In minor subdivision cases, the Planning Commission may approve or deny the application on its own. In rezoning cases, the Planning Commission may only make a recommendation. Ultimate responsibility for approving or denying a rezoning application lies with City Council. *See, e.g.*, App. 3332-3334.

1. The trial evidence showed the Partition is located on Burroughs Street between the Burroughs Place commercial development to the west, the church and its parking lot to the east, and the French Quarter subdivision to the north.

The Partition is located on Burroughs Street in the Suncrest district, near that street's intersection with Collins Ferry Road. App. 2928-2929, 3173 & 3243. The Partition is unimproved; it is not used for church purposes, it has not been assigned a parcel number, and it has not been separately assessed. App. 3365 & 3449-3450; *compare* Pet'r's Br. *6 ¶¶ 10-11. It is zoned under a single-family R-1 classification. App. 2394.



See App. 2497.

Immediately to the west of the Partition is Burroughs Place, a horseshoe-shaped development accessible from Burroughs Street with two, two-story commercial buildings on either side and a five-story mixed-use building in the rear. App. 2394-2396 & 3254. One of the commercial

buildings runs along most of the property line with the Partition; a parking lot for the five-story mixed-use building runs along the remainder. App. 2408-2410, 2509-2510, 3243 & 3336-3339. Car headlights shine onto the Partition from the parking lot, and upper-story residents of the mixed-use building have a view onto the Partition from their apartments. App. 3372. The Suncrest Pub, a bar, and Slight Indulgence, a specialty foods store, lie past Burroughs Place along Collins Ferry Road further to the west. App. 3241-3243. Burroughs Place, the Suncrest Pub, and Slight Indulgence are all zoned under the commercial B-2 classification. App. 2431 & 2394-2395.

Immediately to the east of the Partition is the Remainder, which is improved with a church and parking lot. App. 2510 & 3283-3284. The church faces onto Burroughs Street to the south and is surrounded on three sides, including along the property line with the Partition, by the parking lot. App. 2510, 3283-3284 & 3365. Car headlights from this parking lot also shine onto the Partition. App. 3366. A retaining pond lies below a steep slope to the north. App. 3285. Eastern Avenue lies further to the east and separates the Remainder from older single-family residences. App. 2394 & 2510. The Remainder and the residential properties further to the east are all zoned under the single-family R-1 classification. App. 2394 & 2473. Church uses are conditional uses under an R-1 classification, meaning they require a permit. App. 3438; *compare* Pet'r's Br. *6 ¶ 15.

Immediately to the south of the Partition is Burroughs Street, which (unlike most of the City's residential streets) is a State road. App. 2496-2497, 2510, 3399 & 3419. Across Burroughs Street is the Vintner Reserve subdivision accessible from Munsey Avenue, a side street. App. 3238-3239. Diagonally adjacent to the Partition, just across Burroughs to the southwest, is a restaurant and bar known as The Wine Bar. App. 2394, 3239 & 3247. Vintner Reserve is zoned under the single-family R-1 classification, whereas The Wine Bar is zoned under the commercial B-2 classification. App. 2395-2396 & 2431. Abutting The Wine Bar and extending west to the intersection with Collins Ferry Road is Unity House, a multi-family development. App. 2411, 3243 & 3247.

Immediately to the north is a 20-foot-deep strip of property that, at the City's request, was incorporated into the Remainder to provide a buffer between the Partition and the French Quarter

subdivision. App. 3370-3371. The residences in French Quarter are accessible from Eastern Avenue, a side street off Burroughs Street. App. 2510 & 3285. French Quarter is zoned under the single-family R-1A classification. App. 2473.

2. *The trial evidence showed the Partition is worth $268,000 for commercial use, whereas it has several negative characteristics diminishing its value to $128,000 for single-family residential use.*

Although Wise acknowledged that Suncrest is generally a desirable residential neighborhood, he testified that the residential market is the most sensitive market in real estate. App. 3295 & 3297. A parcel's desirability for single-family residential development can be affected by multiple factors, including non-harmonious uses, view, fumes, and noise. App. 3295. And Wise testified that the Partition has three strikes against it for residential development. App. 3296 & 3299-3301; *compare* Pet'r's Br. *12 ¶ 48. First, the Partition is wedged between non-harmonious development in the form of the Burroughs Place commercial development to the west and the parking lot and church to the east. App. 3296. Second, the Partition is located along Burroughs Street, a heavily-trafficked State road that serves as a linkage route to other parts of the City. App. 3237 & 3299-3300. And third, the Partition has a challenging topography with slopes to the west and to the north. App. 3301, 3366 & 3371-3372.

Wise testified that these limitations are reflected in a 40% penalty reducing the Partition's value for residential use to $128,000. App. 2609 & 3293. No similar limitations apply to the Partition's value for commercial use, which Wise opined is $268,000. App. 3294 & 3304-3305. In fact, Wise testified that the traffic volumes depressing the value for residential development would tend to make the Partition more desirable for commercial development. App. 3305. Wise thus concluded that the highest and best use for the Partition would be some type of commercial development. App. 3306.

3. *The trial evidence showed that Burroughs Street has taken on an increasingly commercial character. The City approved commercial rezoning applications for abutting and diagonally adjacent properties, finding that residential zoning was unsuitable.*

Bossio testified that he grew up near Burroughs Street and has lived in that area for 53 years. App. 3233-3244 & 3242. He has significant experience as a real estate developer along or

near the Burroughs Street corridor, having developed residential and commercial developments in the area. App. 3232-3233, 3235-3242. And from that experience, Bossio testified to a significant change in the character of the Burroughs Street corridor over the past ten to twenty years. App. 3242. He identified the Burroughs Place development abutting the Partition, The Wine Bar diagonally adjacent, and the Unity House multi-family development and the Suncrest Pub slightly further to the east. App. 3243. He also testified that traffic volumes along Burroughs Street have risen significantly, from 3,000 to 7,000 vehicles per day. App. 3280. (The Church and City stipulated that traffic volumes from 2011 to 2017 ranged from a low of 8,734 in 2016 to a high of 10,814 in 2014. App. 2396).

Under a single-family R-1 classification, the Partition can be used be used for almost nothing other than single-family residential development. App. 3262-3263 & 3340. If the zoning for the Partition were changed to share a commercial B-2 classification with the adjacent Burroughs Place development, Bossio testified that a wide array of commercial uses would be permitted. App. 3263. But some of the larger-scale uses permitted under a B-2 classification—like Walmart—would be infeasible given the Partition's small size. *Id.*; *compare* Pet'r's Br. *7 ¶ 21.

Bossio also identified two reports prepared by the City's Planning Department for rezoning applications along Burroughs Street. App. 3248 & 3265. The first report was prepared under Fletcher's supervision as City Planning Director as part of a 2010 rezoning application for the property diagonally adjacent to the Partition (The Wine Bar). App. 2420-2426. The second report was prepared as part of a 2003 rezoning application for the property immediately to the west of the Partition (Burroughs Place). App. 3265. The City stipulated that both applications were approved, with the eventual effect that both The Wine Bar and Burroughs Place were rezoned from a single-family R-1 classification to a commercial B-2 classification.[2] App. 2395-2396.

[2] The Wine Bar was first rezoned to a PRO (professional, residential, office) classification before it was rezoned to a commercial B-2 classification in 2011. App. 2395-2396. Burroughs Place was first rezoned to a commercial B-1 classification before it was rezoned to a commercial B-2 classification in 2006. App. 2395.

When the City rezoned The Wine Bar property to allow for commercial use in 2010 (and again in 2011), it gave several justifications. First, the multi-family Unity House development had been built next door. App. 2421. Second, The Wine Bar Property was the remainder of a larger parcel sold after the church that had owned it closed. *Id.* Third, the construction of Burroughs Place across the street had significantly increased development intensity in the area. *Id.* Fourth, The Wine Bar Property had become orphaned due to neighboring development. *Id.* Fifth, installation of a three-way stop at the nearby intersection of Burroughs Street and Collins Ferry Road suggested increasing traffic volumes. *Id.* Sixth, the surrounding developments reduced privacy, brought cars with shining headlights, and increased noise. App. 2422. And seventh, steep slopes left limited area for development and increased stormwater management costs beyond what could be realistically borne by a single-family development. *Id.* The City thus concluded that commercial use was a higher and better use for The Wine Bar property than residential use. *Id.*

The City's justification for rezoning a 60-foot-wide strip of the Burroughs Place property in 2003 was even more striking. Although the City found the existing single-family R-1 classification was likely a map error, it further found that "nor is this strip of land likely to ever be used for single-family residential purposes, especially the portion fronting Burroughs Street." App. 2414-2415. When the City reached this conclusion, the property was improved by a barber shop and trailer park. App. 3344. Neither the Burroughs Place nor The Wine Bar commercial developments had been built. App. 3344-3345.

4. The trial evidence showed that, when the Church submitted a second rezoning application after litigation had commenced, the City's Planning Department changed a neutral recommendation to a negative one and omitted favorable evidence to the Church.

The City's treatment of the Burroughs Place and The Wine Bar rezoning applications stood in marked contrast to its treatment of the Church's rezoning applications. For Burroughs Place and The Wine Bar, the Planning Department staff reports had recommended the zoning change. App. 2414-2415, 2420-2425 & 2428-2436. Not so for the Church. For the Church's 2016 rezoning application, the City's Planning Department issued a three page staff report (exclusive of exhibits) making no recommendation on approval or denial. App. 2454-2456. But for the Church's 2018

rezoning application—submitted after a year of litigation—the Planning Department's staff report ballooned to 8 pages (exclusive of exhibits) and contained a negative recommendation. App. 2489-2496.

In addition to changing its recommendation, the Planning Department made other, more subtle changes and editorial decisions in its 2018 staff report. The 2018 staff report referred to 33 building permits issued for the Burroughs Street area without indicating that only six had been built in the last ten years and only one had direct access onto Burroughs Street (and then only at a 100-200 foot distance from the house). *Compare* App. 2491 *with* App. 3388-3391. It selectively quoted Wise as stating that Suncrest is a desirable residential neighborhood without also including his specific (and negative) findings for the Partition that caused him to value it substantially less as a residential parcel than as a commercial parcel. App. 3384-3384 & 3394-3396. It included traffic volumes for Burroughs Street (a State road) without providing any comparisons to other City streets (typically non-State roads) for context. App. 3397-3401. And it made several changes to the "concurrence evaluation" reviewing the Church's rezoning applications against 11 principles from the City's comprehensive plan. App. 2459-2466 & 2499-24508. For several of the principles, the 2018 staff report changed its evaluation from "concurrence" (favoring rezoning) to "other" (neutral) or from "other" to "inconsistent" (opposing rezoning). App. 2459-2466, 2499-24508 & 3404-3411. The 2018 concurrence evaluation also simply omitted favorable facts for the Church, such as the existence of non-residential uses to the west; the existence of an adjoining parcel zoned under the commercial B-2 classification; the rezoning application's promotion of the City's vision for corridor development under its comprehensive plan; and the Church's creation of a buffer zone to address neighbors' concerns. App. 3405-3407, 3409 & 3411.

At trial, Fletcher attempted to explain the differences between the 2016 and 2018 staff reports as the City's response to new information presented by the Church in litigation. App. 3415-3416. But Fletcher admitted that there were **no** changes to the area around the Partition in the intervening 16 to 17 months separating the two staff reports. App. 3380. There were **no** new developments, **no** conversions of existing developments from commercial to residential use, and **no**

changes to traffic patterns. App. 3380-3381. And Fletcher admitted that the City's Planning Department has no responsibility for litigation matters. App. 3382.

5. The trial evidence showed that, for at least the past twenty years, only one person has built a single-family residence with direct access onto Burroughs Street—and then only at considerable distance from the road.

To support the enforcement of its single-family R-1 classification against the Partition, the City relied on its comprehensive plan and existing residential development in the area.

Fletcher testified that the comprehensive plan was developed as part a multi-month community-oriented process and that Suncrest was one of only two districts marked for "neighborhood conservation." App. 3326-3328 & 3423. But Fletcher admitted that the City's comprehensive plan provides a 30,000 foot view and does not individually evaluate each of the thousands of distinct parcels in City limits. App. 3451-3452. Fletcher also admitted that the City's comprehensive plan is not binding law. *Id.*

Fletcher further testified that there are twelve single-family residences with direct access onto Burroughs Street. App. 3390. And he identified 33 building permits that had been issued in the past twenty years for residences in the Burroughs Street area. App. 3326-3328. Of those 33 residential building permits, however, only one had been issued in the past five years and only six had been issued in the past ten years. App. 3388-3389. None of the properties is wedged between a commercial development and a five-story apartment building, on the one side, and church and its parking lot, on the other side. App. 3391-3392. And only one of those properties—also the only property built in the last five years—has direct access onto Burroughs Street. App. 3391. Even then, Fletcher conceded this lone development has been set far back from Burroughs Street. App. 3391-3392; *compare* Pet'r's Br. *11 ¶ 41.

Bossio, who sold this lone property with direct access onto Burroughs Street, estimated the distance at 100 to 200 feet. App. 3238. In fact, Bossio testified that he had reviewed the City's 33 residential building permits and had developed several of the properties. App. 3271-3272 & 3274-3275. In each case, Bossio testified to making a conscious decision—even at substantial additional cost—to locate his developments on side streets and separate them from Burroughs Street with

fencing. App. 3238-3239 & 3275. Like Fletcher, Bossio testified that none of the 33 properties identified by the City has the same challenges as the Partition: (1) the direct access onto Burroughs Street; (2) the location between the Burroughs Place commercial development and church; and (3) the difficult topography. App. 3276-3277.

Despite the 30,000 foot view taken by the City's comprehensive plan, the fact on the ground was that, for at least twenty years, only one person has built a single-family residence with direct access onto Burroughs Street—and then only at considerable distance from the road.

D. On November 26, 2018, the Circuit Court entered an Amended Order declaring the residential zoning classification unconstitutional as applied and directing the City to change it to a commercial classification.

At the end of the August 2018 bench trial, the Circuit Court took the matter under advisement. It then entered judgment in a November 21, 2018, Order which the Circuit Court superseded with a November 26, 2018, Amended Order correcting minor typographical errors. App. 3175-3181 (Order) & App. 3182-3189 (Am. Order). The Amended Order held that the single-family R-1 classification violates substantive due process as applied to the Partition and directed the City to change the zoning to a commercial B-2 classification.[3] App. 3188. It did not decide the Church's takings or equal protection claims. App. 3182-3189.

In reaching its conclusion, the Circuit Court properly applied the six-factor substantive due process test this Court adopted in *Par Mar v. City of Parkersburg*, 183 W. Va. 706, 710, 398 S.E.2d 532, 536 (1990). App. 3187. The Circuit Court found that (1) properties near or adjacent to the Church are already being used for commercial, multi-family or other non-single family residential purposes; (2) residential use would not be harmonious with neighboring properties; (3) neighboring parking lots created privacy issues discouraging residential development; (4) site topography

[3] The Amended Order states that "the City's enforcement of its R-1 single-family zoning class is unconstitutional." It neither identifies the specific constitutional theory nor qualifies its holding to apply only to the Partition. But there are three reasons why the Amended Order must be read as an as-applied judgment under a substantive due process theory. First, the Circuit Court cited to *Carter* and *Village of Euclid*, which are the seminal substantive due process decisions on zoning under West Virginia and Federal law. App. 3186-3187. Second, both the Church and the City argued the case under as-applied constitutional theories. *See, e.g.*, Pet'r's Br. *22 (The only challenge to the zoning law is whether those proper zoning purposes may be appropriate to the Church's property). And third, the Amended Order directed the City to cure the constitutional violation by rezoning the Partition, thus indicating the Circuit Court itself understood the as-applied nature of the case.

made residential development challenging and expensive; and (5) the current residential zoning would deprive the Church of an economically beneficial use. App. 3186-3187. The Circuit Court also found that the City had contributed to the Church's predicament when it had rezoned an adjacent 60-foot-wide strip allowing Burroughs Place to be developed and then rezoned a diagonally adjacent property allowing for The Wine Bar only a few years later. App. 3187-3188.

For those reasons, the Circuit Court was "at a loss as to why the City would go to such lengths to deny the Church's two re-zoning requests." App. 3188. But whatever the City's reasons, the Circuit Court found that they were "not only disingenuous" but also "obviously arbitrarily and capriciously selected at best, if not utterly misleading and manufactured." *Id.*

The City appealed the Amended Order on December 26, 2018.[4] App. 3190-3208.

SUMMARY OF THE ARGUMENT

After a two day bench trial, the Circuit Court entered an Amended Order finding that the City's reasons for rezoning the Partition were disingenuous, if not utterly misleading and manufactured. The Circuit Court then declared that the City's single-family R-1 classification is unconstitutional as applied to the Partition and directed the City to change it to a commercial B-2 classification. The City assigns two errors to this Amended Order: (1) that the Circuit Court misapplied the substantive due process standard and incorrectly evaluated the evidence, and (2) that the Circuit Court should have disregarded the City's past approvals of rezoning applications for two adjacent properties. The City is mistaken.

First, the Circuit Court properly weighed the evidence under the correct substantive due process standard. The City argues that the Circuit Court did not apply the fairly debatable standard, but the Amended Order cites to this Court's substantive due process decisions on zoning in which the fairly debatable standard was articulated and applied. The City also argues that the Circuit Court failed to apply all nine *LaSalle* factors, but the Circuit Court applied the six *LaSalle* factors

[4] After entry of the Amended Order, the Church moved for its fees and costs. The Circuit Court granted the Church's motion but has not completed the lodestar analysis.

this Court adopted in *Par Mar*, 183 W. Va. at 706 398 S.E.2d at 536, and appropriately disregarded the remaining three factors it did not.

Second, the Circuit Court properly considered the City's rezoning approvals for two adjacent properties, as well as the circumstances under which the City granted them. The crux of the substantive due process analysis is whether the zoning classification is arbitrary or unreasonable, and whether the City reached different conclusions for the Partition than the City reached for the Church's immediate neighbors bears on that analysis.

Where the Circuit Court applied the correct law, its factual findings and judgment must be given substantial deference under the clear error and abuse of discretion standards applied by this Court. This Court should therefore affirm the Amended Order.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate under Rule 20 of the West Virginia Rules of Appellate Procedure because this case involves an as-applied substantive due process challenge to enforcement of a municipal zoning ordinance. W. Va. R. App. P. 20(a)(3). Because it has not decided such a challenge since *Prete v. City of Morgantown*, 193 W. Va. 417, 456 S.E.2d 498 (1995) (*per curiam*), this Court should issue a signed opinion in order to provide guidance to the bench and bar. W. Va. R. App. P. 20(g).

STANDARD OF REVIEW

This appeal is from the Circuit Court's November 26, 2018, Amended Order granting judgment for the Church after a two day bench trial in August 2018.

In appeals from a bench trial, this Court applies a "two-pronged deferential standard of review." Syl. Pt. 1, in part, *Pub. Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (1996). "The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review." *Id.*

This Court's standard of review in an appeal from a bench trial is generally the same standard applied to appeals from judgment orders entered on petitions for mandamus. In those cases, "the judgment ... based upon a finding of fact upon conflicting testimony will not be reversed unless it appears to be clearly wrong." Syl. Pt. 1, *State ex rel. Morris v. King*, 170 W. Va. 646, 295 S.E.2d 811 (1982) (citing Syl. Pt. 1, *Point Pleasant Register Publ'g Co. v. Cty. Ct. of Mason Cty.*, 115 W. Va. 708, 177 S.E. 873 (1934)). This is the same standard applied in *Trovato v. Town of Star City*, where, relying on the same substantive due process standard applicable here, this Court affirmed a writ of mandamus directing a municipality to rezone property because the classification-in-place was "clearly arbitrary, capricious, and unreasonable." 166 W. Va. 699, 700, 276 S.E.2d 834, 835 (1981) (*per curiam*).

The City is therefore mistaken when it argues that a *de novo* standard applies to all issues in this appeal. *See* Pet'r's Br. *17. The case the City cites for that principle, *Am. Tower Corp. v. Common Council of City of Beckley*, only applied the *de novo* standard to a pure question of law: whether a municipal ordinance vesting final authority over conditional use permits in Beckley's Common Council impermissibly conflicted with a State statute reserving that authority to boards of zoning appeals. 210 W. Va. 345, 348-49, 557 S.E.2d 752, 755-56 (2001). The *American Tower* court then applied a clearly erroneous standard to the decision itself. *Id.* at 349, 557 S.E.2d at 756.

Applying the correct standard of review from *Public Citizen*, the *de novo* standard applies only to the Circuit Court's interpretation of the substantive due process standard this Court first articulated in *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949) and most recently refined in *Prete*, 193 W. Va. at 417, 456 S.E.2d at 498. The Circuit Court's factual findings under that standard—whether it can be fairly debated that the zoning classification is arbitrary or unreasonable or bears a substantial relation to the public health, safety, morals, and general welfare—are reviewed under a clearly erroneous standard. *Pub. Citizen*, 198 W. Va. at 328, 480 S.E.2d at 538. And the Circuit Court's judgment as a whole is reviewed for abuse of discretion. *Id.; see also Trovato*, 166 W. Va. at 699, 276 S.E.2d at 834 (applying a clearly erroneous standard to a writ of mandamus directing a municipality to rezone property).

ARGUMENT

A. Response to Assignment of Error No. 1: The Circuit Court applied the correct substantive due process standard and did not commit clear error when it made findings of fact under the only six *LaSalle* factors adopted by this Court in *Par Mar*. The Circuit Court thus did not abuse its discretion when it granted judgment for the Church.

Although the City splits its first assignment of error into two subparts—the first discussing the fairly debatable standard, and the second discussing the so-called *LaSalle* factors—they are not separable. The trial court must consider the *LaSalle* factors (of which this Court has adopted only six) to determine whether it is fairly debatable that a zoning classification violates substantive due process. *See, e.g.,* Syl. Pt. 9, *Carter,* 132 W. Va. at 881, 54 S.E.2d at 747; *Par Mar*, 183 W. Va. at 710, 398 S.E.2d at 536; *Prete*, 193 W. Va. at 419, 456 S.E.2d at 500. Because the Circuit Court applied the correct substantive due process standard, and because its findings of facts are not clearly erroneous, the Amended Order should be affirmed.

1. Under the substantive due process standard, the trial court weighs evidence under the six Par Mar factors to determine whether objective and reasonable persons would fairly debate that the challenged zoning classification is arbitrary or unreasonable or fails to bear a substantial relation to the public health, safety, morals, or general welfare.

A zoning classification satisfies substantive due process under the West Virginia and United States Constitutions if it is neither arbitrary nor unreasonable, and it bears a substantial relation to the public health, safety, morals, or general welfare. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); Syl. Pt. 7, *Carter*, 132 W. Va. at 881, 54 S.E.2d at 747. The fairly debatable standard was incorporated from the start in *Carter*. 132 W. Va. at 908, 54 S.E.2d at 761. This Court then elevated the fairly debatable standard to a Syllabus Point in *Anderson v. City of Wheeling*, where it held that, "if most of the factors necessary to the decision of a zoning case have both positive and negative aspects it would appear that these matters are fairly debatable, and in such case the court will not overrule the city authorities in the exercise of their legislative function." Syl. Pt. 4, 150 W. Va. 689, 149 S.E.2d 243 (1966). In *Par Mar*, this Court identified six factors (the "*Par Mar* factors") a trial court may consider as part of that analysis:

> (1) existing uses and zoning of nearby property;
>
> (2) the extent to which property values are diminished by the particular zoning restrictions;

> (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public;
>
> (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner;
>
> (5) the suitability of the subject property for the zoned purposes; and
>
> (6) the length of time the property has been vacant as zoned, considered in the context of land development in the area in the vicinity of the property.

183 W. Va. at 710, 398 S.E.2d at 536. And in *Prete*, this Court explained that a matter is fairly debatable if, "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." 193 W. Va. at 419, 456 S.E.2d at 500. Proof is made under a clear and convincing standard. *Par Mar*, 183 W. Va. at 710, 398 S.E.2d at 536.

Applying these cases together, this Court's substantive due process standard in zoning cases is straightforward. A trial court must (1) receive evidence on the six *Par Mar* factors, (2) weigh the evidence under quantitative and qualitative tests, and (3) determine whether objective and reasonable persons would reach different conclusions about whether the zoning classification is arbitrary or unreasonable and bears a substantial relation to the public health, safety, morals, and general welfare. *See Carter,* 132 W. Va. at 881, 54 S.E.2d at 747; *Par Mar*, 183 W. Va. at 710, 398 S.E.2d at 536; *Prete*, 193 W. Va. at 419, 456 S.E.2d at 500.

2. The Circuit Court applied the correct substantive due process standard in the Amended Order.

In its Amended Order, the Circuit Court cited the seminal substantive due process decisions under West Virginia and Federal law: *Carter* and *Village of Euclid*. App. 3186-3187. The Circuit Court then identified the six *Par Mar* factors in its substantive due process analysis. App. 3187. The City nonetheless argues the Circuit Court erred by failing to apply the fairly debatable standard and failing to assess the *LaSalle* factors. *See, e.g.,* Pet'r's Br. *16. Not so.

To start with the *LaSalle* factors, the nine factors advanced by the City come from two Supreme Court of Illinois cases that bind neither the Circuit Court nor this Court. The first six

factors come from *La Salle Nat. Bank v. Cook Cty.*, 12 Ill. 2d 40, 46-47, 145 N.E.2d 65, 69 (1957). The remaining three factors come from *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 378, 167 N.E.2d 406, 411 (1960). In its *Par Mar* decision, this Court adopted the first six *LaSalle* factors.[5] 183 W. Va. at 710, 398 S.E.2d at 536. But this Court has never adopted the remaining three *LaSalle* factors from *Sinclair Pipe Line*, all of which expressly or impliedly concern comprehensive planning.[6] And there is no reason to do so here: the three comprehensive planning factors are already subsumed in the six *Par Mar* factors and lack the same relevance in West Virginia, which imposes a comprehensive planning requirement for zoning, as in Illinois, which does not. *Compare* 9 Ill. Real Prop. § 46:4 *with Largent v. Zoning Bd. of Appeals*, 222 W. Va. 789, 671 S.E.2d 794 (2008). The Circuit Court therefore did not err in applying the six *Par Mar* factors adopted into West Virginia law rather than the nine factors advanced by the City under Illinois law.

Returning to the fairly debatable standard, the City's premise appears to be that, since the Amended Order does not use the phrase, it was not applied. But to accept that argument, this Court would need to conclude that the Circuit Court cited *Village of Euclid*, *Carter*, and *Par Mar* while remaining ignorant of the fairly debatable standard incorporated in those decisions. App. 3186-3187; *Village of Euclid*, 272 U.S. at 387; *Carter*, 132 W. Va. at 905, 54 S.E.2d at 761; *Par Mar*, 183 W. Va. at 709, 398 S.E.2d at 535. This already-difficult conclusion is made impossible when this Court considers that the parties briefed the fairly debatable standard in the weeks before trial as part of the City's summary judgment motion. App. 1656-1660 & 2111-2113. Moreover, this Court has held that it "may affirm the judgment of the trial court where it is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the trial court for its judgment." *Barnett v. Wolfolk*, 149 W. Va. 246, 253-254, 140 S.E.2d 466, 471 (1965)

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[5] In *Par Mar*, this Court cited to the Appellate Court of Illinois' decision in *La Salle Nat. Bank v. Cook Cty.*, 60 Ill. App. 2d 39, 208 N.E.2d 430 (1965). The Appellate Court's decision cited to the Supreme Court of Illinois' 1957 *La Salle* decision, and both discuss the same six factors. *See id.* at 51, 208 N.E.2d at 436.

[6] By stating that *Par Mar* "noted the utility of the factors" without also acknowledging that *Par Mar* adopted only six of the nine *LaSalle* factors it advances, the City is attempting to disguise its argument for an extension of the law. Pet'r's Br. *25-26.

(collecting cases). Because the Circuit Court relied on the seminal substantive due process decisions under West Virginia and Federal law, this Court should presume that the Circuit Court correctly applied the fairly debatable standard and reject the City's technical argument to the contrary.

3. The Circuit Court did not commit clear error when it made factual findings under the Par Mar factors.

Most of the City's argument challenges the Circuit Court's factual findings in separate discussions of the fairly debatable standard and *La Salle* factors. Pet'r's Br. *21-33. But these are not distinct standards. The fairly debatable standard takes the evidence adduced under the six *Par Mar* factors, evaluates it under quantitative and qualitative tests, and determines whether it would lead objective and reasonable persons to reach different conclusions. *Par Mar*, 183 W. Va. at 710, 398 S.E.2d at 536; *Prete*, 193 W. Va. at 419, 456 S.E.2d at 500. This is a fact-finding exercise, and so the Circuit Court's evaluation of the *Par Mar* factors is reviewed for clear error and its ultimate judgment is reviewed for abuse of discretion. *Pub. Citizen*, 198 W. Va. at 328, 480 S.E.2d at 538.

***Par Mar* Factor No. 1**. The first *Par Mar* factor considers the existing uses and zoning of nearby property. 183 W. Va. at 710, 398 S.E.2d at 536. The evidence at trial showed that the Partition was near several commercial or multi-family developments at the intersection of Burroughs Street and Collins Ferry Road; that the Partition abuts the Burroughs Place commercial development on one side; that the Partition abuts the church and its parking lot on the other side; and that the Partition is diagonally adjacent to The Wine Bar commercial development.[7] App. 2394-2396 & 3242-3243. The evidence also showed that the Suncrest district where the partition is located is a desirable residential neighborhood, and that the French Quarter subdivision is located to the north and the Vintner Reserve subdivision is located across Burroughs Street to the south. App. 2394, 3285 & 3297. But the Circuit Court heard testimony that the Partition's prospects for residential development are limited by factors not affecting other properties in Suncrest; that only six developments have been built along Burroughs Street in the last five years; that five of those develop-

[7] The City's statement that the property is bordered on three sides by residential uses is misleading. Pet'r's Br. *26. This statement is true for the Remainder, but not for the Partition.

ments lack direct access to Burroughs Street; and that the one recent development with direct access onto Burroughs Street has been built 100-200 feet back from the road. App. 3238 & 3388-3392. The evidence also showed that the City had thrice rezoned properties adjacent (or diagonally adjacent) to the Partition, in one case finding it was unlikely the property would ever be used for single-family residential purposes. App. 2395-2396 & 2414-2415. The Circuit Court therefore did not clearly err when it found that the Partition was part of a commercial neighborhood scheme. App. 3188.

Par Mar Factor No. 2. The second *Par Mar* factor considers the extent to which property values are diminished by a particular zoning restriction. 183 W. Va. at 710, 398 S.E.2d at 536. The City contends this factor is no longer relevant following the Supreme Court's decision in *Lingle v. Chevron*, 544 U.S. 528 (2005). Pet'r's Br. *28. But the effect of *Lingle* was to clarify that whether a zoning classification "substantially advances legitimate state interests" is a substantive due process test rather than a takings test. 544 U.S. at 540. *Lingle*—itself a takings decision—made no changes to the Supreme Court's substantive due process jurisprudence. 544 U.S. at 542 (although dismissing the "substantially advances" test as a takings test, recognizing it "has some logic in the context of a due process challenge"). And even the secondary source cited by the City acknowledges that property value has relevance in a substantive due process inquiry. Pet'r's Br. *28 (citing 2 Am. Law of Zoning § 15:11 (5th ed.)). At trial, the unrebutted evidence from the Church's appraiser was that the Partition has substantial limitations on its desirability for residential use that, together, depress its value to $128,000. App. 3293, 3296 & 3299-3301. The appraiser testified that no similar limitation applies to the Partition's desirability for commercial use, where its value is $268,000. App. 3294 & 3304-3305. The Circuit Court therefore did not clearly err when it found that the single-family R-1 classification diminishes the Partition's value. App. 3187.

Par Mar Factor No. 3. The third *Par Mar* factor balances the diminution in property value against the promotion of the public health, safety, morals, and general welfare. 183 W. Va. at 710, 398 S.E.2d at 536. The City's reference to the "purpose of zoning" appears neither in *Par Mar*, 183 W. Va. at 710, 398 S.E.2d at 536, nor *La Salle Nat. Bank*, 12 Ill. 2d at 46-47, 145 N.E.2d at

69. At trial, the City presented evidence that Suncrest is one of two districts selected for "neighborhood conservation" under its comprehensive plan. App. 3423. City Planning Director Fletcher also testified to residential construction near Burroughs Street and those residents' interest in preserving residential zoning. App. 3417-3418. But the City conceded that only six residences have been built near Burroughs Street in the past ten years and that, in the past twenty years, only one residence has been built with direct access onto Burroughs Street—and then at considerable distance from the road. App. 3238 & 3388-3392. The Circuit Court additionally heard evidence that the City had previously considered the directly and diagonally adjacent properties to be unsuitable for residential development and therefore rezoned them for commercial use. App. 2395-2396, 2414-2415 & 2420-2426. And the Circuit Court heard evidence that Burroughs Street, unlike most of the City's residential streets, is a State road where traffic volumes have increased from 3,000 vehicles per day to at least 8,700 vehicles per day in each year from 2011 to 2017. App. 2396 & 3280. The Circuit Court therefore did not clearly err when it found that the single-family R-1 classification diminishes the Partition's value while also interfering with a neighborhood scheme the City's past rezoning approvals helped to create. App. 3188.

Par Mar Factor No. 4. The fourth *Par Mar* factor balances the public gain from the zoning classification against the private harm. 183 W. Va. at 710, 398 S.E.2d at 536. The City minimizes the more than 50% loss in value the Church will experience under the single-family R-1 classification while emphasizing the possibility that a change to a commercial B-2 classification will expose neighbors to "big-box development" impacting "'adequate light, ventilation, quiet, and privacy.'" Pet'r's Br. *29-30. But the Church's harm is real whereas the public gain is hypothetical. As Bossio testified, the Partition is not big enough to support the larger-scale developments identified by the City, and the most likely outcome for the Partition is that it would be developed into a commercial building with an outwardly-residential appearance App. 3263 & 3271. The City's concern for adequate light, ventilation, quiet, and privacy is also ironic when the Circuit Court found the City contributed to the Church's predicament by issuing rezoning approvals allowing

the Burroughs Place and The Wine Bar commercial developments to be built adjacent to the Partition. App. 3187. The Circuit Court therefore did not clearly err when it found that the private harm outweighed the public gain. App. 3188.

Par Mar Factor No. 5. The fifth *Par Mar* factor evaluates the suitability of the parcel for the zoned purposes. 183 W. Va. at 710, 398 S.E.2d at 536. The City argues that the Church's 2.5 acre property has been suitable for church purposes for decades. Pet'r's Br. *30. While true, this argument is deceiving because the City imputes the uses for the Remainder to the Partition. The Partition is unimproved, and the unrebutted testimony at trial was that it has three strikes against it for residential development: (1) its location between the Burroughs Place commercial development, on the one side, and the church and its parking lot, on the other side; (2) its direct access onto the busy Burroughs Street corridor; and (3) its challenging topography. App. 3276-3277, 3299-3301, 3366 & 3371-3372. The City argues that the topography would be equally challenging for residential or commercial use and that 33 new residences have been built in the area. Pet'r's Br. *31. But the evidence showed that most of the 33 residences aren't particularly new—all but six had been built more than ten years earlier—and only one had been built with direct access onto Burroughs, and even then at great distance from the road. App. 3238 & 3388-3392. Fletcher also admitted that, in contrast to the Partition, none of the 33 residences have the same limitations for residential development. App. 3391-3392. The Circuit Court therefore did not clearly err when it found that the Partition is not suitable for the purposes authorized under the single-family R-1 classification. App. 3186.

Par Mar Factor No. 6. The sixth (and last) *Par Mar* factor considers how long the parcel has been vacant in the context of surrounding land development. 183 W. Va. at 710, 398 S.E.2d at 536. The City again deceptively relies on pre-subdivision boundaries to argue that the property has been continuously occupied for decades when, in fact, the Partition is vacant and unimproved. Pet'r's Br. *31; App. 3294. The City also relies on average marketing times for residential and commercial properties to suggest the Partition would sell quickly if placed on the residential market. Pet'r's Br. *31. Wise's trial testimony, however, was that the residential market is the most

sensitive market in real estate and the Partition has three strikes limiting its desirability. App. 3295-3296 & 3299-3301. And Bossio, who has substantial residential development experience, questioned whether anyone would build a home on the Partition. App. 3233 & 3264. The Circuit Court therefore did not clearly err when it found that the Partition will remain vacant if the single-family R-1 classification is maintained. App. 3187.

The Comprehensive Plan. The City argues for three additional *LaSalle* factors that either expressly or impliedly consider its comprehensive plan. Pet'r's Br. 31-33. As City Planning Director Fletcher acknowledged, however, the comprehensive plan is not binding and does not have the force of law. App. 3451-3452; *see also Largent*, 222 W. Va. at 795, 671 S.E.2d at 801 (citing 101A C.J.S. Zoning & Land Planning § 4 (2008) ("A city's zoning ordinance is the law, and its comprehensive development plan is not")). Instead of evaluating the suitability of each zoning classification for each of the thousands of parcels in City limits, the comprehensive plan takes a 30,000 foot view. App. 3451. The City's suggestion that the Circuit Court must overlook the facts on the ground in favor of a broad policy statement is thus simply absurd. The City's *ipse dixit* cannot bless an arbitrary or unreasonable ordinance, and the Circuit Court did not err when it declined the City's invitation to the contrary. App. 3188.

4. The Circuit Court did not abuse its discretion when it declared the single-family R-1 classification unconstitutional as applied to the Partition and directed the City to change it to a commercial B-2 classification.

In its Amended Order, the Circuit Court declared the single-family R-1 classification unconstitutional as applied to the Partition and directed the City to change it to a commercial B-2 classification. App. 3188-3189. The Circuit Court arrived at its judgment by evaluating the evidence adduced under the *Par Mar* factors and concluding that, under qualitative and quantitative measures, reasonable and objective persons would conclude that the zoning classification applied to the Partition is arbitrary, unreasonable, and fails to bear a substantial relation to the public health, safety, morals, and general welfare. App. 3187-3188; *see Carter*, 132 W. Va. at 881, 54 S.E.2d at 747; *Par Mar*, 183 W. Va. at 710, 398 S.E.2d at 536; *Prete*, 193 W. Va. at 419, 456 S.E.2d at 500.

This Court reviews that judgment for abuse of discretion. *Public Citizen*, 198 W. Va. at 328, 480 S.E.2d at 538.

The City invites this Court to substitute its judgment for that of the Circuit Court—to give greater significance to surrounding residential developments and less significance to the adjacent commercial developments. It relies primarily on its discretion to set zoning boundaries and on this Court's precedent.

Line-Drawing. The City argues that this Court must preserve the City's discretion to draw the line between zoning districts. *See, e.g.,* Pet'r's Br. *19-20 & 24-25. It is true that courts (including this Court) have recognized municipalities' discretion in this area. *Par Mar*, 183 W. Va. at 711, 398 S.E.2d at 537 (collecting cases). But that discretion is not absolute; in *Par Mar*, this Court held only that line-drawing is not "*ipso facto* 'arbitrary or unreasonable.'" *Id.* Moreover, like several of the other cases the City cites, the border in *Par Mar* lay along a street. *Par Mar*, 183 W. Va. at 711, 398 S.E.2d at 537; *see also* Pet'r's Br. 24-25. Here, the property line is the only separation between the single-family R-1 classification governing the Partition and the commercial B-2 classification governing Burroughs Place next door. *See, e.g.,* App. 2394-2395 & 2497. And the Circuit Court recognized that this situation was possible only because the City had previously rezoned the abutting 60-foot-wide strip, thus contributing to the "current zoning predicament." App. 3188. The Circuit Court therefore did not abuse its discretion when concluded that the zoning boundaries drawn by the City are arbitrary and unreasonable. *Id.*

Precedent. The City also relies on this Court's decisions in *Anderson*, 150 W. Va. at 689, 149 S.E.2d at 243, and *Prete*, 193 W. Va. at 417, 456 S.E.2d at 498. Pet'r's Br. *27.

Anderson involved a commercial rezoning claim that was dismissed on demurrer when the alleged facts showed the property would be bordered on three sides by residential uses and on one side by commercial uses. 150 W. Va. at 696, 149 S.E.2d at 248. The Circuit Court in this case, by contrast, considered a record developed after a two-day bench trial in which the evidence showed that (1) the Partition is wedged between the large Burroughs Place commercial development, on the one side, and the church and its parking lot, on the other side; (2) The Wine Bar commercial

development is diagonally adjacent; (3) traffic volumes along Burroughs Street have reduced its desirability for residential development; and (4) only one home has been built with direct access onto Burroughs Street in at least twenty years, and then only at great distance from the road. App. 2394-2396, 2510, 3254, 3280, 3283-3284, 3299-3300, 3388-3391, 3399 & 3419.

Prete reversed a trial court decision ordering the municipality to rezone property from a mixed-use PRO or commercial B-1 classification to a commercial B-3 classification. 193 W. Va. at 419-420, 456 S.E.2d at 500-501. This Court held that the constitutionality of the existing classification was fairly debatable because (1) although there were other properties classified B-3 in the area, most were located further away along a four-lane highway; (2) the property at issue was wedged between B-1 properties in a predominately residential section along a two-lane road; (3) the two-lane road could not be improved to meet the increased traffic from the zoning change; and (4) rezoning would eliminate a buffer with a junior high school. *Id.* at 420, 456 S.E.2d at 501. Here, the trial evidence showed (1) properties classified B-2 abut the Partition to the west and are diagonally adjacent to the southeast; (2) the Partition is wedged between two non-residential uses in the large Burroughs Place commercial development, on the one side, and the church and its parking lot, on the other side; (3) Burroughs Street already supports significant traffic volumes; and (4) the Partition does not function as a buffer. App. 2394-2396, 2510, 3254, 3280, 3283-3284.

Although *Prete* is distinguishable, this Court should also give its decision little weight.

First, *Prete* reviewed the municipal governing body's denial of a rezoning application whereas, starting with its seminal decision in *Carter*, every other decision from this Court has reviewed the constitutionality of the zoning classification itself. *Carter*, 132 W. Va. at 881, 892 & 901, 54 S.E.2d at 749, 754 & 759 (reviewing the constitutionality of the zoning classification); *G-M Realty, Inc. v. City of Wheeling*, 146 W. Va. 360, 364, 120 S.E.2d 249, 251 (1961) (same); *Anderson*, 150 W. Va. at 700, 149 S.E.2d at 250 (same); *State ex rel. Cobun v. Town of Star City*, 157 W. Va. 86, 90, 197 S.E.2d 102, 104-05 (1973) (same); *Trovato*, 166 W. Va. at 700, 276 S.E.2d at 835 (same); *Prete*, 193 W. Va. at 420, 456 S.E.2d at 501 (reviewing the constitutionality of the City Council decision). *Prete* is therefore an outlier in this Court's jurisprudence.

Second, *Prete* identified the "fairly debatable" standard of review to be applied by the trial court but never identified its own appellate standard of review. *See* 193 W. Va. at 418-419, 456 S.E.2d at 499-500. The result was that *Prete* reweighed the evidence to reach its own conclusion superseding the trial court's judgment. 193 W. Va. at 420, 456 S.E.2d at 501. *Prete* should have instead applied the deferential, abuse of discretion standard of appellate review. *See* Syl. Pt. 1, *Pub. Citizen, Inc*, 198 W. Va. at 329, 480 S.E.2d at 538.

Rather than *Anderson* or *Prete*, this Court should follow its decision in *Trovato*. In that case, the property owner challenged a residential zoning classification prohibiting the placement of mobile homes. *Trovato*, 166 W. Va. at 700, 276 S.E.2d at 835. The trial court received evidence that the property was surrounded on three sides by other mobile homes; that development had changed the neighborhood character from residential to commercial; that there were not any newly-constructed residences in the area; and that the property was unsuitable for residential construction. *Id.* On appeal, this Court affirmed after applying its traditional deferential standard of review and finding that the trial court's judgment was not clearly wrong. *Id.*

Here, the Circuit Court heard from four witnesses and received 62 exhibits over two days of trial. App. 3213-3215. It evaluated their credibility in a context not replicable on appeal. And having done so, the Circuit Court concluded that the City's reasons for enforcing its single-family R-1 classification were "obviously arbitrarily and capriciously selected at best, if not utterly misleading and manufactured." App. 3188. As in *Trovato*, this Court should apply its traditional, deferential standard of review and hold that the Circuit Court did not abuse its discretion when it entered judgment under the Amended Order.

B. Response to Assignment of Error No. 2: Because they were probative of neighborhood trends and the general arbitrariness and unreasonableness of the City's zoning classification, the Circuit Court did not abuse its discretion when it considered the City's prior rezoning approvals for adjacent properties.

At trial, the Circuit Court received evidence that the City had previously approved rezoning applications for properties near the Partition. One application was for the Burroughs Place development, and two applications were for The Wine Bar development. App. 2395-2396, 2412-2413,

2414-2415, 2416, 2418-2149, 2420-2425, 2426-2427 & 2428-2442. For both properties, the City's approvals allowed commercial development on formerly residentially-zoned properties abutting or diagonally adjacent to the Partition. App. 2395-2396. On appeal, the City argues that this evidence should have been excluded for two reasons: (1) the trial court may consider only the current use of other properties and neighborhood trends, and (2) the rezoning applications were submitted under the City's previous comprehensive plan. The City is mistaken.

First, the Burroughs Place and The Wine Bar rezoning approvals reflect the development trends for the area around the Partition. Even the City acknowledges that the "trend of use in the neighborhood is relevant." Pet'r's Br. *33. This Court has also considered prior rezoning approvals, specifically, in *Anderson*, 150 W. Va. at 692, 149 S.E.2d at 246, and development trends, generally, in *Carter*, 132 W. Va. at 906, 54 S.E.2d at 761, and in *Trovato*, 166 W. Va. at 700, 276 S.E.2d at 835.

Second, the City's adoption of a new comprehensive plan since the rezoning approvals for Burroughs Place and The Wine Bar does not diminish its factual findings and conclusions. The City found in 2003 that it was unlikely anyone would build single-family residences on the 60-foot-wide strip of property abutting the Partition, particularly if those residences had direct access onto Burroughs Street. App. 2415. The City also found in 2010 and 2011 that nearby commercial development and increased traffic reduced privacy and made the property diagonally adjacent to the Partition unsuitable for residential development. App. 2421-2422 & 2429. Whatever view the City took for Suncrest in its new comprehensive plan, generally, the Circuit Court properly considered whether the City's past concerns remained for the Partition, specifically—and they did.

And fundamentally, this Court indicated in *Anderson* that a zoning classification can be invalid if a property owner is arbitrarily or unreasonably treated differently from his neighbor. *See* Syl. Pt. 1, 150 W. Va. at 689, 149 S.E.2d at 243. The trial evidence showed that the City had rezoned part of the Burroughs Place property abutting the Partition in 2003, finding it was unlikely a single-family residence would ever be built there with direct access onto Burroughs Street. App.

2395 & 2414-2415. The trial evidence also showed that the City had rezoned the diagonally-adjacent The Wine Bar property because of privacy concerns for a single-family residence, such as shining headlights from Burroughs Place and sightlines from a neighboring multi-story apartment building. App. 2395-2396 & 2421-2422. Fletcher acknowledged those same privacy concerns for the Partition. App. 3366 & 3372. But the City treated the similarly-sized Partition far differently than the Burroughs Place and The Wine Bar properties. After initially making a neutral recommendation, the City Planning Department made a post-litigation recommendation against rezoning the Partition in which it omitted favorable facts to the Church. *Compare* App. 2454-2456 *with* App. 2489-2496; *see also* App. 3388-3391, 3397-3401 & 3404-3411. Fletcher did not identify any changes to land uses in the area that would have explained the City's change in position. App. 3380-3381. Instead, the City maintained a stubborn adherence to a comprehensive plan reflecting the facts as the City wished them to be, rather than how they actually were.

The Circuit Court was justifiably offended by the City's position and its disparate treatment of the Church for reasons it described as "not only disingenuous" but "obviously arbitrarily and capriciously selected at best, if not utterly misleading and manufactured." App. 3188. This Court should be offended, too, and it should affirm the Amended Order concluding the City acted arbitrarily and unreasonably.

C. Response to Public Policy Arguments: The Circuit Court's decision protects important property interests, and the City overstates the impact of the Circuit Court's decision on its zoning authority.

In its summary of the argument, the City frames this case as a conflict between private profits and community values. Pet'r's Br. *15. This could be said of any zoning case, and it takes an unfairly dismissive approach to the harm the Church will experience without the zoning classification change. But it also approaches this case from the wrong side.

The Church is not challenging the City's broader zoning scheme; it is not arguing the City is wholly without discretion; and it is not dismissing community values. The Church's position is simply that, for this one small piece of property, the City had it wrong.

Zoning is based on the average reciprocity of advantage—the idea that the burden placed on an individual property owner from any one aspect of zoning will be outweighed by the benefits he receives from the others. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 147 (1978).[8] And here, after reflecting on the record developed over two days of trial, the Circuit Court found that burden on the Church was significant whereas the harm to a neighborhood with an already commercial character was minimal. App. 3187. The Circuit Court thus held that the single-family R-1 classification was unconstitutional as applied to the Partition. App. 3188.

The protection of substantive due process rights conferred by the Amended Order is itself an important community value. All community members suffer when a municipality is allowed to enforce ordinances that are arbitrary or unreasonable. And unless the City believes that its zoning classifications are broadly subject to attack (in which case the City should change them), it likely will remain the rare case where substantive due process challenges are made.

This Court should therefore affirm the Amended Order and reject the City's invitation to allow general zoning principles to outweigh the specific constitutional implications of the single-family R-1 classification for the Partition.

CONCLUSION

For these reasons, the Church requests that this Court affirm the Circuit Court's November 26, 2018, Amended Order and grant such other relief as it deems just and proper.

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[8] Although *Penn Central* is a regulatory takings case, its explanation of the theory of zoning is informative in this context, as well.