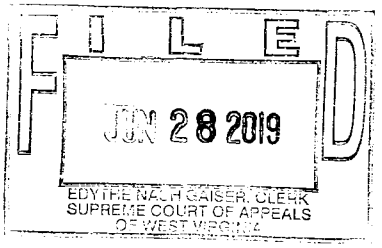
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 REPLY BRIEF

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This case will determine whether properly established community zoning rules can be used when a property has substantial value ($128,000 for half an acre) but may be worth more if zoning did not apply. To address the points raised in the Respondent's Brief, this Reply identifies the sources of the *de novo* standard of review applicable to Respondent's petition in mandamus seeking to invalidate the City's zoning ordinance; references the reasons for Respondent's mid-lawsuit application for a second zoning amendment and the additional factors considered by the planning staff based on Respondent's claims; and restates the various rational bases for residential zoning in the neighborhood, noting where these were disregarded in the Circuit Court opinion. Given the proper zoning purposes, the substantial value of Respondent's property with zoning, and the Circuit Court's disregard of these important factors, the propriety of zoning is at least fairly debatable and the ordinance should be upheld.

Argument

I. Standard of Review

A. The Supreme Court reviews decisions invalidating a legislative enactment *de novo*.

Respondent sought mandamus relief from the Circuit Court to invalidate the City's zoning ordinance. (App. 000007,001576). The standard of appellate review of a circuit court's order granting mandamus relief is *de novo*. *Harrison County Com'n. v. Harrison County Assessor*, 222 W. Va. 25, 27-8, 658 S.E.2d 555, 557-8 (2008). The Circuit Court failed to address the mandamus standard in granting relief to Respondent, but its order acts as a grant of mandamus by directing the City to amend its zoning ordinance. (App. 003200-6). While the Circuit Court erred in finding that relief was appropriate, its failure to articulate the elements necessary for mandamus relief does not establish a separate standard of review on appeal. *See Monongalia County Board of Education*

v. American Federation of Teachers – West Virginia, 238 W. Va. 146, 150, 792 S.E.2d 645, 649 (applying *de novo* review to mandamus and declaratory rulings and stating, " Although the circuit court did not render its final order in the context of the petition for writ of mandamus that was sought by AFT, it implicitly granted the requested writ by granting summary judgment in favor of AFT."). The Circuit Court determination to direct the City to amend its zoning ordinance is subject to the same *de novo* standard of review as is applicable to mandamus relief.

Respondent mistakenly asserts that mandamus is subject to a "clearly wrong" standard by relying on the 1982 opinion in *State ex rel. Morris v. King*. 170 W. Va. 646, 295 S.E.2d 811 (1982); Resp. Br. 13. The 2008 opinion in *Harrison County Commission* clarifies that a *de novo* standard of review always applies to challenges seeking mandamus relief. *Id.* at 222 W. Va. 28, 658 S.E.2d 558. The Court's historical zoning decisions align with the *de novo* standard. The *Trovato v. Town of Star City* decision relied upon by Respondent should not be used to contradict the clearly established 2008 standard and the Court's history of zoning jurisprudence. The *Trovato* opinion did not analyze the standard of review but included a conclusory reference to general trial court decisions: "Where a decision of a trial court is not clearly wrong, it should be affirmed." *Id.* at 166 W. Va. 701, 276 S.E.2d 836. The reference cited several cases unrelated to zoning but none of the Court's prior zoning decisions. That portion of the opinion appears inconsistent with the Court's expressed standard for mandamus claims and with the history of zoning challenges.

Respondent also alleges that *American Tower Corp. v. Common Council of City of Beckley* does not apply to this case, or that it employed a "clearly erroneous" standard of review to the Circuit Court decision. 210 W. Va. 345, 557 S.E.2d 752; Resp. Br. 13. However, *American Tower Corp.* applied a *de novo* standard of review with regard to the claim seeking to invalidate the zoning ordinance. *Id.* at 210 W. Va. 348, 557 S.E.2d 755 ("On appeal, this Court has been asked

to review portions of the Beckley Zoning Ordinance to determine whether it comports with the governing statutory law and to decide whether the Council acted in accordance with these provisions. As these matters involve questions of law, we accord the circuit court's ruling in regard thereto a plenary review."). The clearly erroneous standard was only referenced as to the Board of Zoning Appeals' decision whether to grant a special use permit[1] in *American Tower Corp.*, not to the Circuit Court decision. *Id.* at 210 W. Va. 350-51, 557 S.E.2d 757-8. The Court would have reviewed the Board of Zoning Appeals' findings, had there been any, without according deference to the Circuit Court findings. *Corliss v. Jefferson County Bd. Of Zoning Appeals*, 214 W. Va. 535, 539-40, 591 S.E.2d 93, 97-98 (2003). The Supreme Court uses the same standard of review as the Circuit Court in reviewing an administrative determination. *Id.* As in other zoning decisions, the *American Tower Corp.* Court conducted a *de novo* review regarding the invalidation of the zoning ordinance.

In *Prete v. City of Morgantown*, which articulated the application of the "fairly debatable" standard to zoning challenges in this state, the Court conducted a *de novo* review of the evidence. The *Prete* Court did not specifically state a standard of review, but the opinion indicates it reviewed the Circuit Court decision *de novo*. The *Prete* opinion notes that the Circuit Court concluded that surrounding property was zoned B-3, that the property at issue was being used for more intense uses than those for which it was classified, and that these made refusal to rezone the property arbitrary and capricious. 193 *W. Va.* 417, 419-20, 456 S.E.2d 498, 500-1. The Supreme Court noted, "[w]e believe that there was evidence adduced supporting the circuit court's finding" about the surrounding zoning and that the Circuit Court's finding that "there was evidence that rezoning

[1] In fact, the clearly erroneous standard was not applied because the Board did not make written findings for the Court to evaluate. *Id.* The Court remanded the application to the Board based on its conclusion that the Board was required to make written findings. *Id.*

Mr. Prete's property would not negatively impact on the neighborhood" was supported by the record. *Id.* at 193 W. Va. 420, 498 S.E.2d 501.

The Supreme Court overturned the Circuit Court decision based on its evaluation of other evidence in the record, without finding that the Circuit Court's findings were clearly erroneous. *Id.* The Supreme Court based its decision on its own review of the evidence of record, finding the zoning ordinance must be reinstated because of the following: "There was, however, other evidence suggesting that portions of the immediate area were not used for B–3 purposes[;]" "there was also evidence that the street which Mr. Prete's property abutted was a two-lane way which did not meet the design criteria for an arterial street and which could not be improved due to its narrow, twenty-seven-foot right-of-way[;]""[f]urther evidence showed that changing the property to a B–3 classification could generate more street traffic, impacting upon the traffic situation and impacting upon residential aspects of the area;" and "[o]ther evidence showed that rezoning Mr. Prete's property would eliminate a buffer zone between that property and a county junior high school." *Id.* The opinion indicates that the Supreme Court conducted a *de novo* review of the evidence presented when determining whether to uphold the zoning ordinance.

The Supreme Court indicated this by stating its belief that the ordinance bore a relationship to health, safety, and welfare under the applicable standard. The Court did not couch its findings in terms of a clearly erroneous finding or an abuse of discretion by the Circuit Court. It noted that the Circuit Court's findings were supported by the evidence but found that the legal standard dictated a different result. The Court concisely stated these reasons in its conclusion:

> In this case, this Court believes that, given the evidence before the City Council, whether the City Council's decision was arbitrary and unreasonable was fairly debatable. The evidence was such, both quantitatively and qualitatively, as would lead objective and reasonable persons to reach different conclusions. While there was evidence that the overall neighborhood in which Mr. Prete's property was

> located was B–3 property, there was also evidence that the neighborhood was not consistently B–3 and that property in the immediate neighborhood of Mr. Prete's property carried other classifications. Also, the Court believes that whether the refusal to rezone bore a substantial relationship to the health, safety, morals, or general welfare of the public was fairly debatable. Although there was some evidence supporting the circuit court's conclusion that it was not, there was also evidence that rezoning could generate additional traffic, a factor which would impact on public safety. Additionally, there was evidence that a public school might be impacted by the zoning decision.
>
> After reviewing the documents filed in this case, this Court believes that the propriety of the rezoning of Mr. Prete's case was fairly debatable. Under such circumstances, the cases cited indicate that judicial intervention in the zoning decision is inappropriate.

Id. The Supreme Court opinion in *Prete* clearly evaluates the evidence directly under the initial standard of review: whether it is fairly debatable that the zoning ordinance relates to proper purposes. The Court conducted a *de novo* review of the evidence of record and found that the zoning ordinance must be upheld. It did not consider whether the Circuit Court findings were clearly erroneous nor whether its conclusion was arbitrary and capricious. Accordingly, the most recent and applicable Supreme Court precedent indicates that a *de novo* standard of review applies to this appeal.

In *Town of Stonewood v. Bell*, the Court affirmed the Circuit Court decision upholding an ordinance restricting mobile home replacement. 165 W. Va. 653, 270 S.E.2d 787 (1980). The Court did so by conducting its own review as to whether the municipal ordinance was arbitrary or unreasonable. *Id.* at 165 W. Va. 658, 270 S.E.2d 791 ("The second thrust of our inquiry poses the question of whether the ordinances adopted pursuant to W.Va.Code s 8-12-5(30) are a reasonable exercise of the authority granted to municipalities under that code section. We must again be mindful of our touchstone in these cases."). The Court referenced the standards of review applied

in zoning decisions in West Virginia, and it upheld the ordinance without according deference to the Circuit Court findings. *Id.*

In *Carter v. City of Bluefield*, the decision relied upon by Respondents, the Supreme Court considered the validity of a zoning ordinance *de novo* and invalidated it, overturning the Circuit Court judgment. 132 W. Va. 881, 54 S.E.2d 747 (1949). As in the *Prete* decision, the Supreme Court's opinion does not specifically articulate a *de novo* standard of review, but it does not accord any deference to the Circuit Court findings. Neither does it articulate a clearly erroneous or abuse of discretion standard. The opinion itself shows that the Supreme Court evaluated the evidence of record directly, as a matter of first impression, and evaluated the ordinance without deference to the Circuit Court. *Id.* at 132 W. Va. 905-6, 54 S.E.2d 761 (identifying the fairly debatable standard as controlling). The *Carter* opinion reversed the Circuit Court and invalidated a zoning ordinance based upon *de novo* review, and the *Prete* Court reversed the Circuit Court and upheld a zoning ordinance based upon *de novo* review.

This Court has consistently decided zoning challenges based on the evidence of record without according deference to Circuit Court findings. The standard should be maintained in this appeal, and a *de novo* review should be conducted.

The Court's subsequent jurisprudence likewise supports *de novo* review. The *Carter* case sought mandamus relief, as have Respondents here and other zoning challengers in this state. The *Harrison County* opinion established in 2008 that a *de novo* standard applies on all appeals from requests for mandamus relief, whether granted or denied. 222 W. Va. 28, 658 S.E.2d 558 ("[W]e now expressly hold that a de novo standard of review applies to a circuit court's decision to grant or deny a writ of mandamus."). Given this Court's prior review of zoning challenges and its 2008

articulation that *de novo* review applies to all mandamus applications, a *de novo* standard of review applies on this appeal.

B. When conducting its *de novo* review, this Court should determine whether Respondent's evidence of record establishes entitlement to mandamus relief.

Invalidation of zoning ordinances under West Virginia law is predicated upon a showing by challengers that they are entitled to mandamus relief. *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949). The Court described the elements challengers must prove on appeal considering mandamus relief *de novo* in *Harrison County Com'n v. Harrison County Assessor*:

> "[M]andamus lies to require the discharge by a public officer of a nondiscretionary duty.' Point 3 Syllabus, *State ex rel. Greenbrier County Airport Authority v. Hanna*, 151 W.Va. 479 [153 S.E.2d 284 (1967)." Syllabus point 1, *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W.Va. 636, 171 S.E.2d 545 (1969)." Syl. pt. 1, *State ex rel. Williams v. Department of Military Affairs*, 212 W.Va. 407, 573 S.E.2d 1 (2002). Furthermore, "[t]o invoke mandamus the relator must show (1) a clear right to the relief sought; (2) a legal duty on the part of the respondent to do the thing relator seeks; and (3) the absence of another adequate remedy." Syl. pt. 2, *Myers v. Barte*, 167 W.Va. 194, 279 S.E.2d 406 (1981).

222 W. Va. at 28, 658 S.E.2d at 558. When evaluating the evidence of record on this appeal, the Court should uphold the ordinance unless Respondent's evidence establishes by clear and convincing evidence the three required elements for mandamus relief, including the proof that the zoning ordinance is arbitrary and capricious beyond fair debate.

C. The decision below should be reviewed either as a grant of mandamus relief or as a declaratory judgment.

Petitioner's First Amended Complaint and Petition for Writ of Mandamus seeks only declaratory judgment and mandamus relief. (App. 001576). The Circuit Court's "Amended Order" did not make findings indicating mandamus was warranted and did not reference the

declaratory judgments act. (App.003200-6). As these are Respondent's only two claims for relief, and relief was granted, one theory must have been employed by the Circuit Court. Review of actions seeking mandamus is *de novo*. *Harrison County Comm'n, supra.* This Court also reviews orders granting declaratory relief *de novo*. Syl. Pt. 3, *Cox v. Amick*, 195 W. Va. 608, 610, 466 S.E.2d 459, 461 (1995); *see also City of Martinsburg v. Berkeley County Council*, 241 W. Va. 385, 825 S.E.2d 332 (2019). Accordingly, the decision below is subject to a *de novo* standard of review regardless of which theory was utilized in the Amended Order.

D. The *Par Mar* decision does not limit West Virginia courts to consideration of a subset of the *LaSalle* factors in zoning challenges.

The *LaSalle* factors are a common set of factors used to evaluate whether a zoning ordinance is reasonable. The Supreme Court referenced some of those factors in its 1990 decision to dismiss a zoning challenge for failure to state a claim upon which relief could be granted. *Par Mar v. City of Parkersburg*, 183 W. Va. 706, 398 S.E.2d 532 (1990). The *Par Mar* opinion referenced the initial decision upon which those factors were developed. *Id.* at 183 W. Va. 710, 398 S.E.2d 536 (*citing La Salle National Bank v. County of Cook,* 60 Ill.App.2d 39, 51, 208 N.E.2d 430, 436 (1965)). The opinion noted that the factors which might be evaluated "include" six listed factors. *Id.* The opinion does not state or suggest that those are the exclusive factors which may be considered.

The *Par Mar* decision is based on the deficiency of the pleading, which only asserted that the zoning ordinance was invalid because nearby property had a different zoning classification. *Id.* The Court's full discussion of the specific claims was as follows:

> In the present case the complaint alleges that the zoning ordinance is arbitrary and unreasonable as applied to the appellant's property, without factual allegations in

> support of that conclusion. The only reasonable inference which can be drawn from the language of the complaint is that the zoning ordinance is allegedly arbitrary and unreasonable as applied to the appellant's property because, under the ordinance, properties abutting on the south side of State Route No. 47 may be used for nonresidential purposes, while those abutting on the north side of that highway may be used only for residential purposes.
> 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.

Id. at 183 W. Va. 711, 398 S.E.2d 537. The Court dismissed the challenge without evaluating the *LaSalle* factors. To the extent evaluation of those factors is required based on Respondent's challenge here, West Virginia law does not preclude use of all the relevant factors. Accordingly, any evaluation of the *LaSalle* factors should consider the following commonly accepted factors: (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.).

II. The Second Zoning Amendment Application was directed by the Circuit Court.

Respondent asserts that its submission of two applications for zoning amendments shows its diligent attempts to seek relief outside of litigation. Resp. Br. 2. However, Respondent submitted a second zoning amendment only because the Circuit Court ordered it to do so. (App. 001570). Respondent failed to complete subdivision of its property and delayed the initial trial of the case. (App. 001570). The Circuit Court ordered Respondent to complete subdivision of its property and apply for a zoning amendment. *Id.*

At that first trial date, Respondent had only filed a complaint for writ of mandamus asserting a substantive due process violation. (App. 000002). Respondent asserted in its Motion for Summary Judgment and its "Petitioner's Brief" to the Circuit Court that the zoning ordinance should be invalidated because the staff report reviewing the application failed to account for factors evaluated in other applications, such as new residential construction, traffic, property value, and topography. (App. 002246-54). Respondent's argument was incorrect – a substantive due process challenge only evaluates the merits of the zoning ordinance as applied to the property, not the process for reviewing a zoning amendment application. Nonetheless, the staff report on the second zoning amendment application ordered by the Circuit Court attempted to address the factors Respondent asserted were important. (App. 002246-54; 2906-2925). It found traffic volume was flat or reduced during the relevant time period, the property had substantial value for residential use, and the topography factors that merited zoning amendment for other properties did not apply. (App. 002906-2925). It found that the proposed change from a residential zoning classification to a commercial zoning classification did not support the community's goals for the area designated for "Neighborhood Preservation" and "Limited Growth." *Id.* Respondent subsequently amended its pleading to add takings and equal protection claims. (App. 001576). The Circuit Court did not

grant relief on either claim, and Respondent has not filed any cross-assignments of error seeking relief on those grounds. (App. 003200-6); Resp. Br. The staff report was required by the Circuit Court, and it attempted to address Respondent's concerns that other factors should be evaluated.

Respondent's – and the Circuit Court's – reliance on the staff report to show a substantive due process violation are misplaced. Courts evaluate whether a zoning ordinance accords substantive due process to a property owner by considering whether the ordinance may be rationally related to a legitimate zoning purpose. This is not a claim for violation of procedural due process or equal protection of the laws, in which Respondent can assert that it is entitled to a particular process accorded to others. Only the application of the zoning ordinance to the Respondent's property is at issue. The staff report is relevant for those purposes only, and it showed that the property was identified by a thorough comprehensive planning process as an area for promotion and preservation of residential uses, that those purposes relate to legitimate zoning objectives in the comprehensive plan, that residential uses are the predominant use in the area, and that new residential uses are being created in the area. (App. 002906-25).

III. The Record Demonstrates Legitimate Purposes for Residential Zoning that were disregarded by the Circuit Court.

The deference in zoning challenges is accorded to elected representatives setting community boundaries, not to a Circuit Court invalidating the legislation. *Par Mar*, 183 W. Va. at 711-12, 398 S.E.2d at 537-38. That policy demonstrates the propriety of *de novo* review of the Circuit Court decision on Respondent's request for mandamus or declaratory judgment. The Amended Order would be invalidated even if reviewed under Respondent's preferred standard, however, as the findings disregard important factors that must be evaluated and rely on items irrelevant to substantive due process challenges.

A. Prior zoning amendments were improperly considered.

The Amended Order's reliance on prior zoning amendments was in error, because those zoning amendments dealt with factual scenarios different than those presented in this case and because the considerations applicable to other properties are irrelevant to a substantive due process challenge to a zoning ordinance. Respondent repeatedly characterizes the 2003 zoning amendment for the adjoining Biafora parcel as a rezoning of a 60-foot strip of property. (Resp. Br. 24, 25). The record shows that the zoning amendment merely corrected a situation where the zoning lines did not match the parcel lines. (App. 002414). The adjoining property has been commercially zoned for as long as Morgantown has had zoning laws. *Id.* The use of the proceedings on the 2003 zoning amendment in the proceedings below was improper because it addressed different circumstances and did not consider the application of the zoning ordinance to Respondent's property.

The Circuit Court based a part of its decision on the presumed intent of the City in its 2003 amendment, finding: "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 is incorrect on two grounds: no 60-foot Biafora parcel existed, and a zoning amendment of a nearby property does not entitle a later applicant to a zoning amendment. The record shows that the "60-foot Biafora parcel" was just the width of parcels 32, 33.01, 33.2, and 33.4 of Map 31 which was not accounted for by the zoning map. (App. 002414). In fact, the report on the zoning amendment stated that the "official Zoning Map for the city has, since at least 1993, shown the subject property as being already zoned B-1." *Id.* Were the City to grant Respondent the same consideration, it would determine that no mapping error exists and zoning should not be changed.

Nonetheless, the City is not supposed to grant Respondent "the same consideration" when zoning; it is supposed to evaluate the land use classification based on the community values identified in its Comprehensive Plan. *W. Va. Code* § 8A-7-8. On a substantive due process challenge, only the application of the zoning to the property may be used to consider whether zoning is invalidated. *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 correction of a map error on the adjacent Biafora parcel has no bearing on Respondent's claim.

Similarly, the process for considering zoning amendments to the Wine Bar does not apply to this case. Only the existence of the restaurant use across the street is relevant to determining whether residential zoning has a rational purpose at Respondent's property, and it is established that dividing a commercial from residential use by a street is insufficient to invalidate zoning. *Par Mar*, 183 W. Va. at 711, 398 S.E.2d at 537. The evidence of these two zoning amendments only demonstrates the existence of a longstanding commercial use nearby a residential area and a restaurant across the street from this residential area and directly adjacent another area. Considered with the other evidence of record, these nearby uses do not support invalidating the zoning ordinance.

B. Factors supporting residential zoning were disregarded by the Circuit Court.

The zoning ordinance must be upheld unless it is beyond fair debate that it has no legitimate purpose. All of the following facts of record demonstrate appropriate purposes for residential zoning of the property:

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). Church uses are common and permitted in residential districts. These uses are understood to contribute to the neighborhood uses. (App. 003437). These facts show that the church use of the property and residential use of the property are ongoing and compatible with surrounding uses.

The property is surrounded on three sides by property zoned for residential use. (App. 002906; 002914). 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). The 2003 zoning amendment relied upon by Respondent only aligned the zoning map with the existing parcel boundary. (App. 002414). The parcels involved were already zone and used for commercial purposes. *Id.* These facts show that the adjoining commercial property does not create a "trend" toward commercial development in the area. To the contrary, the six new homes built on a single section of street within the past five years, the thirty-three new homes built in the area within the last twenty years, and the Respondent's appraisal all show that the trend in the area is toward residential development.

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). 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)). 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). 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 incompatible uses." (App. 003418) (Trial Transcript, hereinafter "Tr." P. 206, ln 8-11). 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.* 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). Respondent's Brief, and the Amended Order, assert that the City's Comprehensive Plan is neither a law nor binding. The cited provisions of West Virginia Code and the City Code contradict those claims, and the West Virginia Code requires adherence to the plan or demonstration of changed circumstances. The evidence shows that the Comprehensive Plan correctly planned for residential use in the area. The Circuit Court should have considered the Comprehensive Plan due to its thorough expression of community values, but the Amended Order dismissed that process with a couple of sentences. The City is required by law to consider the Comprehensive Plan when adopting zoning ordinances. It did so, and the evidence shows that choice accords with common uses of the area.

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). Respondent's appraiser testified that the site's topography is equally challenging for residential or commercial uses. The appraiser testified that this area has the strongest demand in the City for residential uses. (App. 003311-12).

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). Respondent's theory that a nearby commercial area dictates invalidation of residential zoning has insidious effects for zoning law. Once Respondent's theory is accepted, sprawl cannot be avoided. Each adjacent property would be entitled to commercial zoning, and no community could plan for residential areas near the commercial centers that serve them.

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). Respondent relies on the property purchaser, Bernard Bossio, opining that nobody would buy the property for residential use. (Resp. Br. 21). The Circuit Court did not assert this basis for relief in its Amended Order, and that was proper. Mr. Bossio did not qualify as an expert and cannot offer opinion testimony. His opinion also contradicts the opinion of Respondent's appraiser, who testified that the land has

substantial value for residential use and could be sold for $128,000.00 as undeveloped land. (App. 003303). The same appraiser testified that the area has the strongest demand in the city for residential development. *Id.* Thus, Respondent's evidence shows the property has substantial economic value with the preexisting residential zoning. The Amended Order erroneously concluded, on this evidence, that the zoning classification "deprives Calvary of economically beneficial use of its property." (App. 3187). The Amended Order misstates both the appraised value as residential property – substituting $120,000 for $128,000 – and the value of a commercial sale – using the $268,000 appraisal figure while finding that the $250,000 sale contract must not be allowed to fail. (App. 003183).

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 Amended Order misconstrues these land use trends by its finding that the City's Development Services Director testified that the new construction constituted a change in surrounding development. (App. 003185). The Director testified, and the Staff Report showed, that these homes were a continued residential use, not a change in circumstances. (App. 3418). In fact, the evidence showed that people building those homes "establishes 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 incompatible uses" *Id.* The Amended Order erroneously concludes that "the Planning Commission was not advised of the appraisal Mr. Wise submitted" when the

appraisal was included in the Staff Report. (App. 003185, 002939). Respondent, and the Circuit Court in its Amended Order, ignore entirely the homes in the French Quarter subdivision immediately adjoining Burroughs Place, the 12 existing single-family homes accessing Burroughs Street, and the surrounding residences. The Amended Order fails to give any weight to the substantial value the property has for residential purposes. Respondent minimizes the construction of six new homes in five years, but that construction occurred in a three-block section of one street. *Id.* The predominant and trending use in this neighborhood is family homes. That development is consistent with existing conditions and with the Comprehensive Plan. It contradicts the finding that residential zoning deprives the property of beneficial economic use as occurred in *Carter v. City of Bluefield*, where only commercial and industrial uses had been recently constructed. The *Carter* Court found "the entire absence of any new or recently constructed residence and the existence of only two or three old residence buildings upon land abutting on either side of Bluefield Avenue throughout its entire length within the city." 132 W. Va. at 906, 54 S.E.2d at 761. Those conditions are not present here. Invalidating a residential zoning ordinance when several new homes have been constructed on a small stretch of road is not supported by the holding in *Carter*.

All of these factors were disregarded by the Circuit Court in its Amended Order. The Amended Order fails to reference any of the surrounding homes. (App. 003187). In fact, the Amended Order concluded, "It is clear and undisputed from the evidence that properties nearby and adjacent to Calvary are already being used for commercial, multi-family, or other non-single family residential purposes." *Id.* Page 3 of the Respondent's Brief – plus multiple exhibits and staff reports – shows it plainly: the property is surrounded by people's homes. The Amended Order does not mention those homes. That aerial image alone shows hundreds of residents who are entitled to zoning protections enacted by their local government. Those zoning protections are

hard to calculate as dollars, but they are more valuable to the residents collectively than an extra $130,000 is to Respondent. That is especially true when Respondent can already sell a half-acre piece of its property for $128,000 without impacting those homes at all.

The bases for invalidating the zoning ordinance, as stated in the Amended Order, ignore the basic principle that factors supporting the zoning ordinance must be evaluated, and the court must consider whether those factors create fair debate about whether zoning advances a legitimate purpose. The Amended Order errs by disregarding the factors supporting the ordinance, then compounds the error by considering factors outside the analysis – such as whether a sale contract will be completed, or whether the City granted zoning amendments at other properties.

Respondent asserts that the Amended Order must have conducted a "fairly debatable" analysis and evaluated the *LaSalle* factors because it referenced the *Village of Euclid*, *Carter*, and *Par Mar* decisions. Resp. Br. 16. Yet the Amended Order contains no indication that it evaluated these standards. It does not weigh evidence and address whether any fact debatably supports residential zoning. That analysis would have found substantial evidence for the ordinance – surrounding residential uses on three sides, continuing new residential construction in the area, high demand for residential uses in the area, substantial property value for residential use. It would have found a fair debate, at least. That analysis would have considered whether there is a comprehensive plan, what that plan identified as important to the community, whether the community identified a need for new commercial uses here, and whether residential development and use consistent with the plan is occurring. Considering those factors would have demonstrated that the community extensively planned for population growth and the attendant commercial development, that it identified areas to develop new commercial growth, and that this area was one where preserving residential uses is important. Those factors would have shown that the

community preferences expressed in the comprehensive plan were prescient: demand for residential use here is the highest in the city, a half-acre piece of open property is worth $128,000, homes built in the area sell for several hundred thousand dollars, and new homes are being built in the area. Findings that disregard this evidence are clearly wrong. Conclusions that residential zoning is arbitrary beyond fair debate, under these circumstances, constitute an abuse of discretion. A finding that a half-acre property in West Virginia that can be sold for $128,000 has had its economic value destroyed is plainly wrong. The failure to consider the legitimate government purpose of protecting hundreds of area homes in their residential uses ignores the "fairly debatable" standard and supplants the role of elected representatives in planning community growth with the Circuit Court's preference. Under any standard, the Amended Order should be reversed and the zoning ordinance 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
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