IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-0369

DOUGLAS S. ROCKWELL and CAROL ROCKWELL,

Plaintiffs Below, Petitioners

v.

JEFFERSON COUNTY BOARD OF ZONING APPEALS
And RIPPON ENERGY FACILITY, LLC,

Defendants Below, Respondents.

On appeal from the
Circuit Court of Jefferson County,
Presiding Judge David M. Hammer
Civil Action No. 22-C-141

PETITIONERS' BRIEF

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

III. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1

The Circuit Court erred by disregarding, and thereby interfering with, the ruling of the Circuit Court of Jefferson County in Civil Action No. 22-C-6 in which the Circuit Court ordered, pursuant to the agreement of the parties (Petitioner here and the Jefferson County Commission and its Planning Commission) that certain standards would be considered in approving or denying a Conditional Use Permit for solar energy facilities.

ASSIGNMENT OF ERROR NO. 2

The Circuit Court misapplied the law as respects alleged "conflicting provisions" of Sections 6 and 8 of the Zoning Ordinance.

ASSIGNMENT OF ERROR NO. 3

The Circuit Court erred in finding that the record before the Circuit Court did not reveal that the Board of Zoning Appeals applied an erroneous principle of law inasmuch as the BZA failed to consider the provisions of Article 6.3A(1) of the Zoning Ordinance.

ASSIGNMENT OF ERROR NO. 4

The Circuit Court erred as a matter of law in holding that no other section or sections of the Zoning Ordinance or Comprehensive Plan may be considered by the Board of Zoning Appeals when applying Sections 6.3A(1) and (2) of the Zoning Ordinance.

ASSIGNMENT OF ERROR NO. 5

The Circuit Court erred as a matter of law in finding that the Board of Zoning Appeals did not apply an erroneous principle of law and was not plainly wrong in its factual findings.

ASSIGNMENT OF ERROR NO. 6

The Circuit Court erred by impliedly finding that Section 8.20 of the Zoning Ordinance was legally adopted by ignoring the fact that the Jefferson County Commission failed to include within Section 8.20 the language agreed to and adopted in the Order of the Circuit Court of Jefferson County in Civil Action No. 22-C-6 that certain standards would be considered in approving or denying a Conditional Use Permit for solar energy facilities.

ASSIGNMENT OF ERROR NO. 7

The failure of the Circuit Court to address all issues raised in the Petition for Certiorari with respect to the misconstruction and misapplication by the Board of Zoning Appeals of Sections 6.3A(1) and (2) of the Zoning Ordinance.

ASSIGNMENT OF ERROR NO. 8

The Circuit Court erred in amending Section 6.3A of the Zoning Ordinance by requiring the Board of Zoning Appeals to apply the provisions of Section 8.20 thereof.

ASSIGNMENT OF ERROR NO. 9

The Circuit Court erred by failing to rule that the Board of Zoning Appeals made insufficient findings of fact for review by the Circuit Court.

ASSIGNMENT OF ERROR NO. 10

The Circuit Court erred by failing to address the issue of the burden of proof at a Conditional Use hearing before the Board of Zoning Appeals.

ASSIGNMENT OF ERROR NO. 11

The Circuit Court erred by disregarding the law of the case inasmuch as Jefferson County Civil Action No. 22-C-6 in which the Circuit Court ordered, pursuant to the agreement of the parties (Petitioner here and the Jefferson County Commission and its Planning Commission) that

certain standards would be considered in approving or denying a Conditional Use Permit for solar energy facilities, was one in a series of cases all relating to the same subject matter.

IV. STATEMENT OF CASE

On November 22, 2022, the Petitioners, Douglas S. Rockwell ("Mr. Rockwell") and Carol Rockwell ("Mrs. Rockwell") (collectively "the Rockwells") instituted the underlying civil action by filing a verified petition for a writ of certiorari pursuant to West Virginia Code § 8A-9-1 challenging the decision of the Jefferson County Board of Zoning Appeals ("BZA") approving a Conditional Use Permit ("CUP") issued to Rippon Energy Facility, LLC ("Rippon") to operate a Solar Energy Facility known as the Rippon Energy Facility ("Rippon Facility"), or, in the alternative, for a declaratory judgment pursuant to West Virginia Code §55-13-1, et seq. Jt. App. at 2-10. The Rockwells reside in the Rural Zoning District of Jefferson County ("County"), outside of the Urban Growth Boundary ("UGB") and the Preferred Growth Area ("PGA") and will be bordered on three sides by the Rippon Facility. Jt. App at 12, 982 (Petition at ¶ 5; Hearing Order at 1).

The Initial Request to Amend the Zoning Ordinance

In the year 2019, the existing Jefferson County Zoning and Land Development and Ordinance ("Zoning Ordinance") contained no express provisions for the development of commercial scale solar energy facilities, or solar farms, in any of its zoning districts. Jt. App. at 1273-1408. A request for an amendment to the Zoning Ordinance to permit large scale solar energy facilities dates back to on or about November 26, 2019 when the Jefferson County Planning Commission ("Planning Commission") received a request from a farmer working with Torch Clean Energy (Rippon's parent company) to amend the Zoning Ordinance to allow for solar farms in the Rural Zoning District as a Conditional Use. Jt. App. at 984 (Hearing Order at ¶ 1). That

request, through actions of the Planning Commission and the Jefferson County Commission ("County Commission"), morphed into the adoption of Text Amendment ZTA19-03 – solar energy facilities (the "First STA") to the Zoning Ordinance—which allowed large-scale solar energy facilities to process as a Principle Permitted Use in eight (8) of the twelve (12) County zoning districts, including the Rural District. *Id.*

The First Suit - County Agrees to Rescind First STA

A procedural and factual history of the various actions of the County entities and the suits which those actions generated is in order to provide necessary context to the instant appeal. On November 2, 2020, Mr. Rockwell and others filed civil actions in the Circuit Court of Jefferson County ("Circuit Court") (Civil Action Nos. CC-19-2020-C-125, 132-137, consolidated under 20-C-125) (the "First Suit") challenging the action of the County Commission in adopting the First STA because the First STA was not consistent with the *Envision Jefferson 2035 Comprehensive Plan* (the "Comprehensive Plan"). The Petitioners in the First Suit and the County reached an agreement embodied in an Agreed Order Resolving Civil Action entered on December 12, 2020, pursuant to which the First STA would be sent back to the Planning Commission, and then to the County Commission for further review and public hearings.

County Fast-Tracks Adoption of Second STA identical to First STA but With Less Stringent Setbacks

After further proceedings before the Planning Commission and the County Commission held between January 12, 2021 and April 12, 2021, the County Commission adopted an STA (the "Second STA") similar to the First STA except as adopted the Second STA required less stringent setbacks and barriers than the First STA. Jt. App. at 984 (Hearing Order at ¶ 2).

The Second Suit – Circuit Court Finds the Second STA Invalid

Some of the Petitioners in the First Suit, including Mr. Rockwell, brought suit in Circuit Court against the Planning Commission on March 30, 2021 and against the County Commission on April 14, 2021. These suits were consolidated under Civil Action No. 21-C-33 (the "Second Suit"). Petitioners in the Second Suit challenged the legality of the Second STA upon substantially the same grounds as the First Suit: the failure of the County to adopt an amendment consistent with the provisions of the Comprehensive Plan as required by W. Va. Code §8A-7-8(a).

In the Second Suit, by Order entered August 16, 2021, Judge Debra McLaughlin presiding, found that the Second STA was invalid and unenforceable because the JC Commission failed to make any factual findings on which the Circuit Court could find that the Second STA was consistent with the Comprehensive Plan or that there "have been major changes of an economic, physical or social nature within the area involved which were not anticipated when the Comprehensive Plan was adopted and those changes have substantially altered the basic characteristics of the area" as required by W. Va. Code §8A-7-8(a). Jt. App. at 985. The County, the Petitioners and Intervenor Wild Hill Solar, LLC each appealed that Order to this Honorable Court filed to Case No. 21-731.[1]

Actions Leading to Third Suit – County Fast Tracks Amendment to Comprehensive Plan in Attempt to Counter Effects of Strike Down of Second STA

After the entry of Judge McLaughlin's Order in the Second Suit, "[t]he Planning Commission convened a special meeting on August 31, 2022, to review the zoning text amendment file for #ZTA 19-03, related to solar energy facilities and [the Second Suit]. The Planning

[1] The Rockwells respectfully ask that this Court take judicial notice of the filing of that appeal and the dismissal of the appeal by Order of this Court entered April 27, 2023, after the Petitioners in the Second Suit moved for dismissal of the appeal as moot.

Commission only discussed the issues in executive session with its legal counsel. At its regular meeting on September 2, 2021, the County Commission discussed the legal issues regarding a proposed solar text amendment. Thereafter the Planning Commission instructed its staff to draft a revision of the [Comprehensive Plan] to permit large scale solar facilities in the rural and residential growth districts. On December 7, 2021, the Planning Commission held a public hearing addressing the text amendment regarding solar facilities in the rural and residential districts. At the December 14, 2021, meeting, the Planning Commission voted to approve the proposed text amendment to the Comprehensive Plan, 'to clarify that solar facilities are principle permitted uses in the rural and residential zoning district,' and to recommend the same to the County Commission…..The Planning Commission presented the proposed text amendment to the County Commission at the County Commission's January 6, 2022, meeting." Jt. App. at 986 (Hearing Order at ¶ 4).

The Third Suit – County Finally Recognizes that Solar Energy Facilities Must Process as a Conditional Use in the Rural District Outside of the UGB and PGA

On January 13, 2022, Mr. Rockwell brought suit against the Planning Commission and the JC Commission in Civil Action No. 22-C-6 (the "Third Suit") challenging the validity of the proposed amendments made by the Planning Commission to the Comprehensive Plan and seeking to enjoin further action thereon by the JC Commission. "On March 31, 2022, a previous injunction entered by Circuit Court Judge McLaughlin [in the Third Suit] was dissolved because the County and Rockwell reach an agreement that, '[a]s adopted, the Comprehensive Plan would allow Sollar Energy Facilities as a Principle Permitted Use in any zoning district within the Urban Growth Boundary and the Preferred Growth Area and would permit such solar energy facilities outside of the Urban Growth Boundary and the Preferred Growth Area by the Conditional Use Permit process

in the Rural District." Jt. App. at 986-87 (Hearing Order at ¶ 5). In addition, as set forth in the Third Suit Order, the County and Mr. Rockwell agreed as follows:

> The parties acknowledge and agree that among the General Standards to be considered in approving or denying a Conditional Use Permit is that "[t]he proposed use is compatible with the goals of the adopted [Comprehensive Plan]." The parties further acknowledge and agree that page 77 of the Comprehensive Plan, Agricultural and Rural Economy Recommendations (Goal 8), paragraph 5. b. provides as follows: "Amend local land use regulations to permit non-agriculturally related commercial uses by the Conditional Use Permit (CUP) process in the Rural zone **if the use is agriculturally and rurally compatible in scale and intensity, poses no threat to public health, safety and welfare, and if the use helps to preserve farmland and open space and continue agricultural opportunities**."

(the "5.b Language"). *Id.* (Emphasis added). As noted in the underlying Order, the County Commission included certain of the language as contained within the Third Suit Order in the Comprehensive Plan, but ignored the 5.b Language despite its declared reason for the amendment: "to conform to the attached agreed Settlement Order" being the Third Suit Order. Jt. App. at 988, 1011 (Hearing Order at ¶ 7 and Exhibit 1 thereto).

Actions Leading to Fourth Suit

On May 17, 2022, the Planning Commission, after a public hearing regarding a Zoning Text Amendment for solar energy facilities ZTA 22-01 (the "Third STA") voted to send the draft of the Third STA to the County Commission for consideration. Jt. App. at 988-89 (Hearing Order at ¶ 8). Although the Planning Commission's proposed draft of the Third STA incorporated the criteria established under Article 6 of the Zoning Ordinance where the solar energy facility was required to process as a conditional use, the Third STA did not require the application for the CUP to contain, nor did it require the BZA to consider the 5.b Language: "if the use is agriculturally and rurally compatible in scale and intensity" and "if the use helps to preserve farmland and open space and continue agricultural opportunities," two of the three conditions previously recognized

by the County in the Third Suit Order and required by the Comprehensive Plan. *Id.* The County Commission voted to adopt the Third STA at its June 16, 2022 meeting without the 5.b Language. Jt. App. at 989-90 (Hearing Order at ¶ 10).

The Fourth Suit – The County Commission, Planning Commission and the BZA, Acknowledges, and the Circuit Court Stated, that the BZA must Consider Not Only the Goals Contained within the Comprehensive Plan but also the Recommendations

On July 8, 2022, Mr. Rockwell filed suit against the County to Civil Action No. 22-C-81 seeking injunctive and declaratory relief due to the failure of the County to include within the Third STA a requirement that the BZA, when considering an application for a CUP, consider the 5.b Language, being two of the three recommendations contained in the Comprehensive Plan as recognized by the County in the Agreed Order resolving the Third Suit. Jt. App. at 990 (Hearing Order at ¶ 7) (the "Fourth Suit"). At the preliminary injunction hearing held on July 20, 2022, in response to arguments made by counsel for Mr. Rockwell, and based upon the representations of counsel for the County Commission, Planning Commission, BZA and intervenors, Judge McLaughlin entered an Order on July 27, 2022 ("Fourth Suit Order") denying the preliminary injunction "including a finding that the parties agreed that 'when considering an application for a CUP, under [Section 6.3 of the Zoning Ordinance] as to the compatibility with the goals of the Comprehensive Plan, the BZA shall do so in conjunction with the recommendation[s] of the Comprehensive Plan.'" Jt. App. at 990-91 (Hearing Order at ¶ 12). "Goals and objectives are what the community wishes to achieve. Recommendations are implementation strategies of how a community looks to achieve them." Jt. App. at 1029. The issue in the First Suit, the Second Suit, and the Fourth Suit was whether the STA allowed solar facilities in the Rural District outside of the UGBs and the PGAs consistent with the Comprehensive Plan as required by W. Va. Code §

8A-7-8. That issue was not presented to Judge Hammer in the underlying Civil Action because it had been resolved in the First Suit, the Second Suit, and the Fourth Suit.

Rippon's CUP Application and the Underlying Civil Action

On or about October 3, 2022, Rippon submitted an Application with the Jefferson County Office of Planning and Zoning (the "CUP Application") seeking a CUP to construct and operate the portion of its proposed Rippon Facility located in the Rural zoning district but outside of the UGB and PGA. Jt. App. at 28-63. The Rippon Facility is to be located upon seven parcels which are situated in the Rural zoning district outside of the UGB and the PGA and is comprised of the following parcels of real estate in the Kabletown District of the County:

a. Tax Map 11, Parcel 9 containing 133.75 acres of which 106.52 acres (or 79.6%) will be part of the Rippon Facility project, and owned by Bullskin LLC ("Parcel 1");

b. Tax Map 10, Parcel 3.1 containing 108.66 acres of which 99.84 (or 91.9%) will be part of the Rippon Facility project, and owned by Clarence E. Hough, et al. ("Parcel 2");

c. Tax Map 21, Parcel 6, containing 101.6 acres of which 97.01 acres (or 95.5%) will be part of the Rippon Facility project, and owned by View Mountain Farm LLC ("Parcel 3");

d. Tax Map 21, Parcel 5, containing 174.6 acres of which 165.52 acres (or 94.8%) will be part of the Rippon Facility project, and owned by Stanley, Jr. & Katherine Dunn ("Parcel 4");

e. Tax Map 21, Parcel 7, containing 98.39 acres of which 86.07 acres (or 87.5%) will be part of the Rippon Facility project, and owned by Stanley, Jr. & Katherine Dunn

("Parcel 5");

f. Tax Map 22, Parcel 5.1, containing 232 acres of which 169.15 acres (or 72.9%) will be part of the Rippon Facility project, and owned by Stanley, Jr. & Katherine Dunn ("Parcel 6"); and

g. Tax Map 10, Parcel 5, containing 366 acres of which 12.27 acres (or 3.35% - only the substation is located upon this parcel) will be part of the Rippon Facility project, and owned by Stanley, Jr. & Katherine Dunn ("Parcel 7")[2].

Parcels 1 through 7, inclusive, are sometimes referred to herein as the "Rural Parcels." Jt. App. at 32-35, 43-44.

Rippon's Application states that the Rural Parcels "have been used for agricultural purposes, including cropland, hayfields, and pasture. The land is generally cleared land, but includes some trees along rock outcroppings, field boundaries, and along the Shenandoah River and Bullskin Creek." Jt. App. at 43. Parcels 4, 5, and 6, presently owned by Stanley, Jr. and Katherine Dunn, are being sold to Rippon and are not being leased by Rippon. Jt. App. at 123. The aerial views contained in Rippon's Concept Plan reveal that the lands surrounding the Rippon Facility contain very few, if any, non-residential structures thereon. Jt. App. at 72.

During the public comment period on October 27, 2022, Mr. Aitcheson's testimony before the BZA included statements from his "Overview" which was made a part of the record before the BZA, set forth several goals to be considered. Jt. App. at 174-79. In addition thereto, in his presentation to the BZA, Mr. Aitcheson, using Rippon's own information relative to parcel size of each of the six (6) parcels on which a total of 215,000 solar panels and associated infrastructure

[2] Two additional parcels owned by Stiles Family Partnership LLC containing a total of 140.94 acres are a part of the Rippon Facility but are located in the Rural zoning district but within the UGB and therefore a principal permitted use.

comprising the project would be located (excluding the minute percentage of the parcel on which the substation would be located), provided the BZA with percentage occupation of each parcel of land by the solar energy project ranging from 73% to 96% of each parcel's acreage (for an average of 88.17%). *Id.*

After entering into a "deliberative" session for 14 minutes, and returning to an open meeting with limited discussion, the BZA voted to approve the CUP. Jt. App. at 154, 209-17.

Section 6.3 of the Zoning Ordinance sets forth the procedure for processing a CUP by the BZA. Attention is directed to subparagraph A. 1. of Section 6.3 which requires the BZA to consider whether "[t]he proposed use is compatible with the goals of the adopted Comprehensive Plan." Jt. App. at. 1364-65. The Comprehensive Plan, in Appendix D, sets forth 27 "Goals" with subparts (called "Objectives"). Other goals are described in the text of the Comprehensive Plan separate from Appendix D. For instance, "[o]ne goal of this Plan is to maintain productive farmland soils and the rural character and economy of the County by reducing the conversion of farmland to non-agricultural based uses." Jt. App at 1087. The written findings of fact by the BZA consisted of a pro forma statement that the enumerated requirements of Section 6.3 of the Zoning Ordinance had been met without explanation of the reasons for those conclusions. The BZA does not address in those findings of fact what goals the BZA used in evaluating the Rippon Facility's CUP. Therefore, neither this Court nor the lower court can address whether the BZA acted in accordance with law.

The Circuit Court, ignoring many of the facts and arguments of the Rockwells, entered its Order Denying Petition for Writ of Certiorari and Complaint for Declaratory Judgment and Affirming the Decision of the Board of Zoning Appeals on May 19, 2023. Inasmuch as the Order of the Circuit Court denied an extraordinary writ, the Rockwells timely appealed to this Honorable Court on June 16, 2023.

V. SUMMARY OF ARGUMENT

While the Argument is comprised of eleven (11) Assignments of Error, there are three (3) central issues in the appeal: (1) The Agreement- during the Third Case an agreement was reached to settlement, resolve and compromise all issues in that case was reached between the plaintiffs (including Petitioners herein) and the Planning Commission and the County Commission that any solar energy facility amendment would be protective of rural districts, particularly outside Urban Growth Boundaries and Urban Growth Areas (See Jt. App. 299-300); and (2) in the Fourth Case, after passage of a solar energy facility amendment that didn't on its face comply with the above agreement, representations were made by Mr. Rohrbaugh, on behalf of the County Commission, the Planning Commission and the BZA to the Court and Mr. Rockwell that despite the complained of deficiencies in the solar energy facility amendment the amendment still required any CUP Application to be processed and analyzed in accordance with Section 6.3 of the Zoning Ordinance, including the Comprehensive Plan and the Goals and Recommendations thereto; and (3) after the BZA failed to process and analyze the Rippon CUP Application in accordance with the applicable provisions of the Zoning Ordinance, the Comprehensive Plan, the Goals and Recommendations thereto, and the agreement and representations of Mr. Rohrbaugh on behalf of BZA embodied in the Orders entered in the Third and Fourth Cases, Petitioners filed their Petition for Writ of Certiorari in the Circuit Court. In the Order entered therein by the Circuit Court and appealed from herein, the Circuit Court failed to apply the agreement and the representations of the County Commission, the Planning Commission and the BZA as contained in the Orders entered in the Third and Fourth Cases, determined that the solar energy facility amendment was proper in all respects and that said amendment, by its terms, removed CUP Applications filed under it from the application of most of the Zoning Ordinance, the Comprehensive Plan and the Recommendations

and Goals therein by virtue of the primacy provision of Article 8. All of this is contrary to Petitioners' rights under the agreement, the Orders entered in the Third and Fourth Cases and the plain language of Article 8, Section 8.20 which does not conflict with the Zoning Ordinance or the Comprehensive Plan, or the Goals and Recommendations therein, and in fact incorporates by reference most of the provisions thereof.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. W. Va. R. App. P. 20(2) and (4). The Circuit Court of Jefferson County erred when it granted Rippon Energy Facility, LLC's Motion to Dismiss, upholding the Solar Text Amendment considered and purportedly approved in violation of the parties' settlement agreement reached in a previously Civil Action in the Circuit Court, and in contradiction of Orders entered therein and in other Civil Actions by the Circuit Court. Furthermore, this matter impacts the general public because it involves the application of land use law impacting members of the general public and their property interests.

VII. ARGUMENT

A. Standard of Review

This is an appeal from an Order entered in the Circuit Court granting a Motion to Dismiss a Petition for Certiorari from a BZA determination. In this appeal, Appellants challenge the circuit court order that granted a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. "'Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.'* Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). Syl. Pt. 1, *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 854 S.E.2d 870 (2020)" *Potter v. Bailey & Slotnick,*

PLLC, No. 21-0009, 2022 W. Va. LEXIS 446 (May 27, 2022). The same standard of review is applicable when reviewing an appeal from the circuit court which is clearly a question of law or involving an interpretation of statute. Syl. Pt. 1, *Lower Donnally Ass'n v. Charleston Mun. Planning Comm'n*, 212 W. Va. 623, 575 S.E.2d 233 (2002) (quoting Syl. Pt. 1 *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)).

B. Assignment of Error 1: The Circuit Court erred by disregarding, and thereby interfering with, the ruling of the Circuit Court the Third Suit in which the Circuit Court ordered, pursuant to the agreement of the parties (Petitioner here and the Jefferson County Commission and its Planning Commission) that certain standards would be considered in approving or denying a Conditional Use Permit for solar energy facilities.

In *Petitioners' Response in Opposition to Rippon Energy Facility, LLC's Motion to Dismiss*, Petitioner demonstrated in the Third Suit, to which the County Commission and Planning Commission were a party that, the parties agreed on applicable standards that must be considered in approving and denying a CUP for solar energy facilities. Jt. App. at 299-300. Among those standards was the language of Goal 8 of the Comprehensive Plan which required the BZA to consider "if the use is agriculturally and rurally compatible in scale and intensity" and "if the use helps to preserve farmland and open space and continue agricultural standards." However, the amended CUP application did not include these standards. Jt. App. at 300. Therefore, Mr. Rockwell argued below that such standards should have been considered as agreed upon by the parties in the previous case. Jt. App. at 306-309. The Circuit Court erred by completely disregarding the Order filed in the Third Suit, where the parties agreed that these standards should be considered in approving or denying a CUP.

In applying West Virginia law, the United States District Court of the Northern District of West Virginia has stated:

> A settlement agreement is a contract governed by fundamental principles of contract law. As such, the settlement agreement comes into being as soon as offer, acceptance, and consideration are exchanged, regardless of whether the agreement is subsequently formalized in writing. See *Lucas v. United States*, 25 Cl. Ct. 298 (1992) (contract is a written or oral exchange containing agreement, mutual assent); *Martin v. Ewing*, 112 W. Va. 332, 164 S.E. 859 (W.Va. 1932).
>
> A settlement agreement made in open court . . . is a valid, enforceable agreement and need not be reduced to writing. See *Petty v. The Timken Corp.*, 849 F.2d 130, 133 (4th Cir. 1988); *Wilson v. Wilson*, 46 F.3d 660, 660 (7th Cir. 1995). Failure to complete formal settlement papers does not indicate that a settlement agreement was not in fact reached. *Vari-O-Matic Mach. Corp.*, 629 F.Supp. 257, 259 (S.D.N.Y. 1986); *Autera v. Robinson*, 419 F.2d 1197, 1198 n. 1 (D.C. Cir. 1969) (lawsuits may be compromised by oral contract).[3]

In coming to this conclusion, the Northern District relied on *Wilson*, a case in which an oral settlement agreement was enforced by the appellate court after "the parties reached a settlement figure at a pre-trial conference before the district court judge but were subsequently unable to reduce other terms of the agreement to writing."[4] This Honorable Court then relied on *McDermitt* in reaching its decision in *Riner*, determining that a settlement agreement is enforceable, even if not signed and executed.[5]

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[3] *United States ex rel. McDermitt, Inc. v. Centex-Simpson Constr. Co.*, 34 F. Supp. 2d 397 (N.D. W. Va. 1999) (short-form citations expanded and emphasis added).

[4] *Id.* at 400.

[5] *See Riner v. Newbraugh*, 211 W. Va. 137, 563 S.E.2d 802 (2002), (quoting the language in *McDermitt* in *supra* n.36 and accompanying text stating that a "settlement agreement made in open court . . . is a valid enforceable agreement and need not be reduced to writing."). *See id*. The Court, furthermore, is enabled: i) to determine that the parties reached the agreement "free of coercion, mistake, or other unlawful conduct," and ii) make "findings of fact and conclusions of law sufficient to enable appellate review of an order enforcing the agreement." *See Riner* at Syl. Pt. 3. However, in this case, the Order in the Third Suit finding an agreement among the parties is now final and no longer appealable.

Later, this Court decided *Sanson v. Brandywine Homes, Inc.*, 215 W.Va. 307, 599 S.E.2d 730 (2004), which involved, in part, a contention by those opposing enforcement of a settlement agreement that they did not authorize their attorney to settle their claim. This Court upheld the enforcement of the settlement on the basis set forth in Syllabus Point 5: "When an attorney appears in court representing clients there is a strong presumption of his authority to represent such clients, and the burden is upon the party denying the authority to clearly show the want of authority."[6] The decision in *Sanson* also reiterated the doctrine set forth in Syllabus Point 5 of *Riner*, which states that "the law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy."[7]

The Circuit Court, in the Order appealed from herein, determined that "[s]tatutorily, an amendment to the Comprehensive Plan can only be prepared by the planning commission, and not by a court or the parties to a settlement in a civil action." Jt. App. at 1005. While this may be a correct statement of the law generally, it is clearly wrong where, as here, the Planning Commission and County Commission were parties in the Third Suit. During the course of the Third Suit is when the settlement was reached and adjudicated., the Planning Commission and County Commission are bound by the Order in the Third Suit as any other party would be bound, and the Order appealed from herein is in error to the extent it conflicts with that previous Order. To hold otherwise would be to find that a legislative body (such as the Planning Commission or County Commission here), having reached an agreement settling, resolving and compromising bona fide claims against it in

[6] *Sanson*, 215 W.Va. at Syl. Pt. 5 (citing Syl. Pt. 1, *Miranosky v. Parson*, 152 W.Va. 241, 161 S.E.2d 665 (1968)).

[7] *See id*. at Syl. Pt. 3 (citing Syl. Pt. 1, *Moreland v. Suttmiller*, 183 W.Va. 621, 397 S.E.2d 622 (1999)).

a civil action in which it was a proper party, may simply legislate away its responsibilities and obligations pursuant to the agreement it reached and pursuant to which it obtained, and retains, certain benefits, i.e. dismissal of the Third Suit.

While it might be argued that the BZA was not a party to the civil action in which that agreement was reached and adjudicated, and therefore it is not bound by that agreement or that Order, the BZA was a party to the Fourth Suit, and, in the Fourth Suit, the Planning Commission, County Commission and BZA obtained voluntary dismissal of that civil action based on their representation to the Circuit Court and the party plaintiff therein (Mr. Rockwell) that, after the passage of the Zoning Ordinance amendment adding Section 8.20 the proper analysis of a Conditional Use under Section 8.20 did as a matter of law require consideration of all the provisions of Article 6, including Section 6.3, the Zoning Ordinance as a whole, the Comprehensive Plan, and the various Goals and Recommendations contained therein. That Order found as follows:

> Whereupon the Court proceeded to hear the arguments of counsel for each of the parties, which centered around the language contained within the New STA which requires that "[p]rojects which will occur on properties located outside of the UGB/PGA areas as delineated on the Future Land Use Guide shall process a Conditional Use in accordance with Article 6 [of the Zoning Ordinance.]" Section 6.3 A. of the Zoning Ordinance requires, *inter alia*, that in considering each Conditional Use Permit ("CUP") request, "[t]he following General Standards shall be considered in approving or denying the CUP: 1. The proposed use is compatible with the goals of the adopted Comprehensive Plan." After hearing concerns raised by Mr. Rockwell that the recommendations as contained within the Comprehensive Plan, in particular the Agricultural and Rural Economy Recommendations on page 77 *et seq.* thereof, were differentiated from the "goals" of the Comprehensive Plan, the Court inquired of counsel for the County as to his position as respects these concerns and was advised by Attorney Rohrbaugh that "…. the Board of Zoning Appeals must look at the recommendations. They go hand in hand with the goals….The recommendations are the strategy for implementing the goals." The Court further inquired of Attorney Rohrbaugh as to whether "the way you implement the goals must be consistent with the recommendations" to which Attorney Rohrbaugh responded that he "agreed" with that statement. All parties

> agreed and **the Court does find the "definition of a recommendation is that it is the strategy for implementing goals, and therefore, when a Board of Zoning Appeals looks at goals they have to do so in conjunction with these recommendations."** Accordingly, all parties agreed that **when considering an application for a CUP, under Section 6.3 as to the compatibility with the goals of the Comprehensive Plan, the BZA shall do so in conjunction with the recommendations of the Comprehensive Plan.**

Jt. App. at 191-92 (Emphasis Added). The representations set forth in that portion of the Order set forth hereinabove were made by Mr. Rohrbaugh, counsel for the county, who was representing the defendants, County Commission of Jefferson County, WV, the Jefferson County Planning Commission, and the Jefferson County Board of Zoning Appeals. Clearly, at that time, these three Jefferson County entities understood that any consideration of a Conditional Use Permit under Section 8.20 would have to be conducted as Mr. Rohrbaugh represented to the Circuit Court, i.e. in conformance with Article 6.3 as well as the Comprehensive Plan as a whole, including its stated

Goals and Recommendations. In reliance on those representations, Mr. Rockwell agreed to voluntary dismissal of the Fourth Suit.

It was clear error for the BZA not to process the CUP in accordance with the agreement reached, and the Order entered with respect thereto, in settlement and compromise of the Third Suit, and which said agreement is exactly what the BZA represented to the Circuit Court and Mr. Rockwell in seeking his voluntary dismissal of the Fourth Suit. And it was reversible error for the Circuit Court not to so hold.

C. Assignment of Error 2: The Circuit Court misapplied the law as respects alleged "conflicting provisions" of Sections 6 and 8 of the Zoning Ordinance.

In his *Response in Opposition to Rippon Energy Facility, LLC's Motion to Dismiss*, Petitioner contends that both Section 8.20, regarding Supplemental Use Regulations for solar

energy facilities, and Section 6.3(a), setting out general standards, must be considered by the BZA when deciding whether to deny or approve a CUP application. Jt. App. at 305. Thus, the Circuit Court erred and misapplied the law by finding that these provisions are "conflicting" and therefor inapplicable.

The Circuit Court noted that, when considering a Conditional Use Permit Application, the BZA must consider eight General Standards in approving or denying the CUP that are laid out in Section 6.3(A) of the Zoning Ordinance, as well as the specific standards given in Section 8 of the Zoning Ordinance regarding Supplemental Use Regulations. One General Use Standard that must be considered under Section 6.3(A)(2) is, "The proposed use is compatible in intensity and scale with the existing and potential land uses on the adjoining and confronting properties, and poses no threat to public health, safety and welfare." Jt. App. at 1364. Section 8.20 of the Zoning Ordinance sets forth specific Supplemental Use Regulations for solar energy facilities, but, as the Circuit Court noted, Section 8.20 does not contain a metric for density or "intensity and scale" for solar energy facilities. The Circuit Court points out that the "density of lots is only an issue in the Rural District when considering the permissible density of residential development" under Section 5.7(1)(a) of the Zoning Ordinance.

Article 8 of the Zoning Ordinance provides, "Should the standards found in this Article conflict with those found in this Ordinance or the Jefferson County Subdivision and Land Development Regulations, the standards of this Article shall apply." Jt. App. at 1367. Thus, the Circuit Court found that Section 8.20 has priority over any conflicting sections of the Zoning Ordinance. So, in its conclusions of law, the Circuit Court found that Petitioner's argument below that Section 6.3's requirement to consider "intensity and scale" is synonymous with the term "density," as "applied to residential subdivision development in the Rural District" creates a

conflict with Section 8.20. Therefore, the Circuit Court found that, because Section 8.20 has no metric for scale and intensity, no density metric from Section 6.3 or any other section of the Zoning Ordinance could be imputed to a solar energy facility's CUP application.

In a footnote, the Circuit Court reasons that the primacy of Article 8 of the Zoning Ordinance "is consistent with general principles of statutory construction" because the Supreme Court of Appeals has long held that "specific statutes control over general statutes that relate to the same subject." citing Syl. Pt. 1, in part, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984) ("The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter [.]") Jt. App. at 1002.

However, the Circuit Court misapplied the primacy clause of Article 8 because Sections 6.3(A)(2) and 8.20 are not in conflict. Section 8.20 simply does not contain an "intensity and scale" or "density" metric. There is a distinction between the absence of and conflicting "intensity and scale" or "density" metrics which would be in direct conflict with Section 6.3(A)(2). Thus, the Circuit Court should have imputed the "intensity and scale" consideration onto CUP applications. Furthermore, nothing in Article 6 could be in conflict with the provisions of Article 8, Section 8.20 where, as here, Article 8, Section 8.20 incorporates by reference Article 6 as the proper process for a CUP Application, and further, Article 6 expressly makes the Zoning Ordinance, its goals and recommendations, a part of the Article 6 CUP Application process.

This understanding of the proper interpretation and application of the Zoning Ordinance by the BZA and others was confirmed by Mr. Rohrbaugh in representations he made to the Circuit Court in the Fourth Suit and which said representations were incorporated by the Circuit Court in the Fourth Suit in the Order it entered therein. *See* Section VII. B above.

The Circuit Court committed reversible error when it found that Article 8, Section 8.20 is in conflict with provisions of the Zoning Ordinance which Section 8.20 makes specific reference to as the guide to proper processing of a CUP Application by the BZA.

D. Assignment of Error 3: The Circuit Court erred in finding that the record before the Circuit Court did not reveal that the Board of Zoning Appeals applied an erroneous principle of law inasmuch as the BZA failed to consider the provisions of Article 6.3A(1) of the Zoning Ordinance.

Below, when responding to Rippon's Motion to Dismiss, Petitioner asserted that the BZA failed to consider the provisions of Article 6.3A(1) of the Zoning Ordinance by failing to consider whether the proposed use met the goals of the Comprehensive Plan. Jt. App. at 304-312.

The BZA clearly applied an erroneous principle of law in failing to properly apply the provisions of Article 6.3A(1) of the Zoning Ordinance to the CUP Application and the goals of the Comprehensive Plan. While the Circuit Court considered that Article 8's primacy provision governed to eliminate consideration of other "conflicting" portions of the Zoning Ordinance and Comprehensive Plan, the Circuit Court was in error to do that. Article 8, Section 8.20 does not conflict with Article 6, because Article 6 is specifically referenced in Article 8.20 as the proper procedure for the BZA to analyze and act on a CUP Application for a solar energy facility. Article 8, Section 8.20A.(1) provides that the "[p]rocess for a Solar Energy Facility as a Conditional Use (such as the facility at issue in this appeal) . . .shall process as a Conditional Use in accordance with Article 6." Article 6, Section 6.3 then requires the proposed use be compatible with the goals of the adopted Comprehensive Plan, incorporating by reference the overarching goals of the Comprehensive Plan as part and parcel of the Article 6 analysis. In fact, in the Fourth Suit, the Planning Commission, the BZA and the County Commission all agreed, and the Circuit Court

found, "that the definition of a recommendation is that it is the strategy for implementing goals, and therefore when [the BZA] looks at goals they have to do so in conjunction with these recommendations." Jt. App. at 191-92.

There is no evidence in the record that the BZA conducted any such analysis as required, and the Circuit Court erred in finding that no such analysis was required due to the Article 8 primacy provision, because the express provisions of Article 8, Section 8.20, expressly require the Article 6 analysis for a CUP Application.

E. Assignment of Error 4: The Circuit Court erred as a matter of law in holding that no other section or sections of the Zoning Ordinance or Comprehensive Plan may be considered by the Board of Zoning Appeals when applying Sections 6.3A(1) and (2) of the Zoning Ordinance.

Petitioner asserted in his *Response in Opposition to Rippon's Motion to Dismiss* that the Circuit Court mandated in the Fourth Suit Order that the BZA consider the goals of the Comprehensive Plan in conjunction with the recommendations of the Comprehensive Plan. Jt. App. at 305-306. Further, Petitioner noted that Section 6.3A requires that BZA to consider each of the general standards laid out in Section 6.3A. Jt. App. at 305. The Circuit Court erred in holding that no other sections of the Zoning Ordinance or Comprehensive Plan may be considered when applying Sections 6.3A (1) and (2).

This determination by the Circuit Court is clearly wrong, and reversible error. Section 8.20 clearly makes Article 6 the proper processing guide for CUP Applications for solar energy facilities. Sections 6.3A(1) and (2) then make reference to other provisions of the Zoning Ordinance and Comprehensive Plan which must be considered by the BZA to complete the CUP Application analysis, including, but not limited to the goals and recommendation of the Comprehensive Plan, including the Agricultural and Rural Economy Recommendations. See

discussion Sections VII B, C and D. above. In fact the BZA admitted this to the Circuit Court during a hearing in the Fourth Suit and made such representations in court to Mr. Rockwell as an inducement for him to agree to voluntary dismissal of the Fourth Suit. In reliance on that representation, Mr. Rockwell did agree to the voluntary dismissal of the Fourth Suit.

The Circuit Court committed reversible error in determining that no other section or sections of the Zoning Ordinance or Comprehensive Plan may be considered by the Board of Zoning Appeals when applying Sections 6.3A(1) and (2) of the Zoning Ordinance.

F. Assignment of Error 5: The Circuit Court erred as a matter of law in finding that the Board of Zoning Appeals did not apply an erroneous principle of law and was not plainly wrong in its factual findings.

In his Response in Opposition to Rippon's Motion to Dismiss, Petitioner provides evidence of several instances in which the BZA applied an erroneous principle of law and provides plainly wrong factual findings. Jt. App. at 304-12.

The BZA clearly applied an erroneous principle of law in analyzing the subject CUP Application in that it failed to analyze the CUP Application under all the factors listed Article 6, Sections 6.3A(1) and (2), including conformance with the provisions of the agreement reached in the Third Suit and which said requirements were reiterated as making up part of the required analysis by Mr. Rohrbaugh on behalf of the County Commission, the Planning Commission and the BZA on the record in the Fourth Suit, namely compatibility with the Comprehensive Plan, the Recommendations and Goals of the Comprehensive Plan, including Goal 8 of the Comprehensive Plan which required the BZA to consider "if the use is agriculturally and rurally compatible in scale and intensity" and "if the use helps to preserve farmland and open space and continue agricultural standards.". See Sections VII B, C and D. above.

Furthermore, not having completed that required analysis, the BZA couldn't possibly have made the required findings of fact to support its decision and allow for meaningful appellate review by the Circuit Court or the West Virginia Supreme Court of Appeals.

The Circuit Court erred as a matter of law in finding that the Board of Zoning Appeals did not apply an erroneous principle of law and was not plainly wrong in its factual findings.

G. Assignment of Error 6: The Circuit Court erred by impliedly finding that Section 8.20 of the Zoning Ordinance was legally adopted by ignoring the fact that the Jefferson County Commission failed to include within Section 8.20 the language agreed to and adopted by the Circuit Court in the Third Suit that certain standards would be required to be considered in approving or denying a Conditional Use Permit for solar energy facilities.

Petitioner demonstrated below that, in the Third Suit, the parties agreed on applicable standards that must be considered in approving and denying a CUP for solar energy facilities, but the Jefferson Count Commission failed to include the language that was agreed upon by the parties in its amended CUP application. Jt. App. at 299-300.

The Circuit Court erred by finding that Section 8.20 was legally adopted by the Planning Commission and County Commission because it did not contain the language agreed upon by the Planning Commission and County Commission in the settlement they reached with plaintiffs in the Third Suit and the Order entered therein, accordingly, the Planning Commission and County Commission exceeded there proper powers and authority in drafting, deliberating on and purportedly passing an amendment to the Zoning Ordinance contrary to the provisions they had agreed to include in said amendment. Furthermore, the County Commission, the Planning Commission and the BZA all agreed and represented to the Circuit Court and Mr. Rockwell in the Fourth Suit there was such an agreement reached in the Third Suit and that the provisions of that

agreement were required for the for the proper consideration of a CUP Application pursuant to the newly adopted amendment, despite the lack of the agreed upon language due the incorporation of other provisions in the Comprehensive Plan and Zoning Ordinance.

Accordingly, it was reversible error for the Circuit Court to have concluded that Section 8.20 was legally adopted by the Planning Commission and County Commission because it did not contain the language agreed upon by the Planning Commission and County Commission in the settlement they reached with plaintiffs in the Third Suit and the Order entered therein.

H. Assignment of Error 7: The failure of the Circuit Court to address all issues raised in the Petition for Certiorari with respect to the misconstruction and misapplication by the Board of Zoning Appeals of Sections 6.3A (1) and (2) of the Zoning Ordinance.

In his verified *Petition for Writ of Certiorari*, Petitioner identified several instances where the BZA misconstrued and misapplied Sections 6.3A(1) and (2). Jt. App. at 20-26. Petitioner identified several of these same issues again in his *Response in Opposition to Rippon's Motion to Dismiss*. Jt. App. at 304-312.

Section 6.3(A)(1) requires the BZA, when approving or denying the CUP, to consider whether "[t]he proposed use is compatible with the goals of the adopted Comprehensive Plan." Section 6.3(A)(2) requires the BZA to consider whether "[t]he proposed use is compatible in intensity and scale with the existing and potential land uses on the adjoining and confronting properties, and poses no threat to public health, safety and welfare."

Goal 8 of the Comprehensive Plan, at Paragraph 5.(b). states, "Amend local land use regulations to permit non-agriculturally related commercial uses by the Conditional Use Permit (CUP) process in the Rural zone if the use is agriculturally and rurally compatible in scale and intensity, poses no threat to public health, safety, and welfare, and if the use helps to preserve

farmland and open space and continue agricultural operations." Intensity is defined in the Comprehensive Plan as, "[t]he permitted ratio of building size to land area. Intensity is often associated with the amount of non-residential structures on a site." The BZA had to determine whether Rippon's proposed commercial use covering over 736 acres of land in the Rural District for a solar energy facility was compatible in scale and intensity with the rural environment, and this it failed to do. Rippon did not address the scale or number of nonresidential structures, and the Concept Plan sheets show that the layout of the solar panels and arrays are not compatible with the scale of the nonresidential structures on the confronting and adjoining parcels. Jt. App. at 306. Further, the BZA did not consider how Rippon, through its proposed land use, was helping "continue agricultural operations" nor did it require Rippon to describe what agricultural operations would be implemented at the project. Finally, the Zoning Ordinance required Rippon to make application for the CUP addressing each of the general standards which the BZA was required to review pursuant to Article 6, Section 6.3A. The BZA ignored the fact that Rippon failed to address each of the general standards of Section 6.3A in its application, and given Rippon's failure, the BZA could not analyze those issues in consideration of the CUP Application.

At the BZA's hearing relating to Rippon's proposed use, members of the Board misstated the requirements of Paragraph 5.b. Jt. App. at 310. "[I]t is my opinion that the proposed use is compatible to scale and intensity of the rural environment especially with the use of the adjoining land that's already been developed to the extent that it's going to be developed." Mr. McKinney further stated that the "life span of this project is 30 years" and "[a]fter that 30 years, they be decommissioned and go back to farmland. There's open space as the solar panels are there." Paragraph 5.b. requires the proposed use help continue agricultural operations in the present, not 30 years from now.

The Circuit Court failed to address the arguments that the BZA did not adhere to Section 6.3A of the Zoning Ordinance by misinterpreting or failing to consider these requirements of the Comprehensive Plan and that constitutes reversible error.

I. Assignment of Error 8: The Circuit Court erred in amending Section 6.3A of the Zoning Ordinance by requiring the Board of Zoning Appeals to apply the provisions of Section 8.20 thereof.

Petitioner asserted in his Response in Opposition to Rippon's Motion to Dismiss, that the BZA is required to apply each of the general standards given in 6.3A of the Zoning Ordinance, as well as the specific provisions of Section 8.20. Jt. App. at 305. The Circuit Court erred in failing to so hold.

Throughout its Order, the Circuit Court committed numerous errors in the interpretation of the Zoning Ordinance provisions, including finding that the primacy provision of Article 8 precluded consideration of other aspects of the Zoning Ordinance and Comprehensive Plan beyond Section 6.3. These errors had the cumulative effect of the Circuit Judge improperly altering or amending the Zoning Ordinance and Comprehensive Plan rather than interpreting or construing it. See discussion Sections VII. C, D, E, F, and H above.

J. Assignment of Error 9: The Circuit Court erred by failing to rule that the Board of Zoning Appeals made insufficient findings of fact for review by the Circuit Court.

In his Response in Opposition to Rippon's Motion to Dismiss, Petitioner noted several findings of fact made by the BZA that were not supported by the record. Jt. App. at 311, as well as identifying required analysis that was never conducted, see Section VII C, D, E, and H. above.

The record before the BZA clearly fails to establish sufficient findings of fact with respect to the matters raised in the CUP Application or required by Article 8, Section 8.20, Article 6, the

Zoning Ordinance and Comprehensive Plan to permit meaningful review by the Circuit Court or this Court.

In *Lower Donnally Ass'n v. Charleston Mun. Planning Comm'n*, 212 W. Va. 623, 575 S.E.2d 233 (2002), our Supreme Court opined that in deciding to "make certiorari available for persons challenging decisions by the board of zoning appeals …. the Legislature sought to assert these powers in order **to afford a remedy for the review of the record developed by these bodies as a convenient means of assuring adherence to the requirements of the law** without necessarily providing a means of attacking their proper exercise of discretion." Id., 212 W. Va. at 630, 575 S.E.2d at 240. (Emphasis Added).

"While on appeal there is a presumption that a board of zoning appeals acted correctly, **a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings**, or has acted beyond its jurisdiction. *Syl. Pt. 5, Wolfe v. Forbes, 159 W.Va. 34, 217 S.E.2d 899 (1975).*" Syl. Pt. 3, (citing *Jefferson Orchards Inc. v. Jefferson Cty. Zoning Bd. of Appeals*, 225 W. Va. 416, 693 S.E.2d 781 (2010)) (Emphasis Added).

The record of the BZA in support of its granting of the subject CUP Application does not have the findings of fact necessary to establish that the BZA conducted the required analyses pursuant to the required provisions of the Zoning Ordinance and Comprehensive Plan, including the Goals and Recommendations as the BZA represented to the Circuit Court in the Fourth Case they were required to apply to properly process the subject CUP Application.

Accordingly, it was reversible error for the Circuit Court to uphold the BZA action in approving the CUP in the deficient factual record before the BZA.

K. Assignment of Error 10: The Circuit Court erred by failing to address the issue of the burden of proof at a Conditional Use hearing before the Board of Zoning Appeals.

Petitioner asserted in his *Response in Opposition to Rippon's Motion to Dismiss*, that Rippon had the burden of proving its entitlement to the issuance of a CUP by addressing each of the general standards which the BZA was required to review under Section 6.3A of the Zoning Ordinance. Jt. App. at 311. See discussion of Section 6.3A requirements set forth in Section VII H above.

Rippon failed to provide sufficient evidence to the BZA during the application and hearing process to enable the BZA to find that based on all the criteria required to be considered on a CUP Application should as that filed herein by Rippon. Accordingly, the BZA could not possibly have considered all the required criteria, and thus the CUP Application shouldn't have been granted. The Circuit Court erred in applying the primacy provision of Section 8 to dramatically reduce the criteria required to be considered by the BZA. See Sections VII. B, C, D, E, F, and H above.

The Circuit Court committed reversible error when it failing to address the issue of the burden of proof at a Conditional Use hearing before the Board of Zoning Appeals.

L. Assignment of Error 11: The Circuit Court erred by disregarding the law of the case inasmuch as the Third Suit in which the Circuit Court ordered, pursuant to the agreement of the parties (Petitioner here and the Jefferson County Commission and its Planning Commission) that certain standards would be considered in approving or denying a Conditional Use Permit for solar energy facilities, was one in a series of cases all relating to the same subject matter.

As asserted by the Petitioner below, a series of lawsuits involving solar energy facilities have led to and are directly related to the case at hand. Jt. App. at 295-302. Thus, by disregarding the agreement and previous Order entered by the Circuit Court in the Third Suit, the Circuit Court

here committed reversible error. This was reiterated by Mr. Rohrbaugh, counsel for the county, on behalf of the Planning Commission, the County Commission and the BZA in the Fourth Suit, which said representations were incorporated into a finding by the Circuit Court in its Order entered therein. Jt. App. at 301 and 315-318.

See Sections VII.B, C, E, F, G above, for discussion regarding the agreement, Mr. Rohrbaugh's representations regarding the Planning Commission's, the County Commission's and the BZA's interpretation and understanding of the applicability of the agreement, the Zoning Ordinance as a whole, the Comprehensive Plan and the Goals and Recommendations thereof to the proper analysis of a CUIP Application pursuant to the amendments contained in Section 8.20 and the applicability thereto of the Third Case Order and the Fourth Case Order to the analysis of a CUP Application for solar energy facility.

The Circuit Court committed reversible error by disregarding the law of the case inasmuch as the Third Suit in which the Circuit Court ordered, pursuant to the agreement of the parties (Petitioner here and the Jefferson County Commission and its Planning Commission) that certain standards would be considered in approving or denying a Conditional Use Permit for solar energy facilities, and the Fourth Suit in which Mr. Rohrbaugh, on behalf of the County Commission, the Planning Commission and the BZA agreed and reiterated that the agreement in the Third Case applied to the proper consideration of a CUP Application pursuant to the amendments contained in Section 8.20 and those are two in a series of cases all relating to the same subject matter.

VIII. CONCLUSION

Accordingly, and for all the reasons set forth hereinabove, Petitioners respectfully request the entry herein of an Order or Decision, setting aside the Order entered in the Circuit Court below and appealed from herein, finding and determining that the amendment Section 8.20 was not

properly enacted and striking it down, finding and determining that the CUP issued to Rippon was improvidently granted and rescinding it, awarding Petitioners their costs incurred herein, including attorney fees, and providing for such other and further relief as this Court deem just and proper.

Respectfully submitted, this Nineteenth day of September, 2023.

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