IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-0369

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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

RESPONDENT RIPPON ENERGY FACILITY, LLC'S BRIEF

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STATEMENT OF THE CASE

While this may be the first instance in which this specific action comes before this Court, these Petitioners and the Jefferson County legislative procedures with which they take issue have been before this Court previously in the course of Petitioners' three-year pattern of continued attempts to permanently stall lawful solar development in Jefferson County. As a result, the Jefferson County Circuit Court from which this action was dismissed is intimately familiar with the background of this action and the numerous actions brought previously and collaterally. Nevertheless, because Petitioners wish to focus on the early history of solar development legislation in Jefferson County rather than more recent text amendments which now constitute lawful and binding county procedures on these Respondents and form the primary legal considerations of this action, a full statement of the factual predicates of this appeal is now necessary.

Rippon finds it imperative to set forth from the outset that, despite Petitioners' attempts to propound otherwise, this action relates *exclusively* to a challenge to the Jefferson County Board of Zoning Appeals' (hereinafter, the "Board") approval of Rippon Energy Facility, LLC, a subsidiary of Torch Clean Energy, LLC's (hereinafter "Rippon" or "Respondent") application for a Conditional Use Permit ("CUP") to construct a solar facility in Jefferson County. This action is *purely* a challenge to the Board's actions in reviewing and approving the CUP application procedures, *not* a challenge to the legality of amendment to and implementation of those procedures by Jefferson County governmental entities and officials not made a party to this litigation. More importantly, any "agreement" which Petitioners reference within their brief is of no substance to this appeal, which questions only the legality of CUP issuance to Rippon. As such, that "agreement" is not before this Court, is not incorporated within this appeal, and cannot be considered by this Court in reaching a final decision. It represents yet another attempt by

Petitioners to challenge the legality of ordinance amendment long after the time to do so has ran. This Court, the Circuit Court, and the Board are not lawmaking bodies, and any attempt by Petitioners for this Court to rewrite the laws and ordinances of Jefferson County outside of the clear statutory procedure for doing so is entirely without merit.

Notably, no facts relating to applicable Jefferson County solar implementation (including background of the first four suits outlined herein) are addressed in the Petition because the Petition by its very nature challenged only the Board's issuance of a CUP and alleged illegality relating to the same. No allegations relating to the prior action were even alleged in this action prior to the Petitioners' Response in Opposition to the Motion to Dismiss. As such and as further set forth at length herein, any such arguments—which form the large majority of Petitioners' Assignments of Error—are irrelevant to this appeal. With this in mind and in an attempt to properly set forth the complete background for this most recent litigation, Rippon provides the following statement of the case.

The First Suit

On January 14, 2015, Jefferson County (the "County") adopted a Comprehensive Plan, entitled "Envision Jefferson 2035" ("Comprehensive Plan"), therein contemplating a county which by 2035 would constitute a "vibrant place to live, work, and play." Jt. App. at 1016. Further, the County referenced a "well-diversified economic base of manufacturing, services, government, tourism, and agriculture that is not reliant on any single business type." *Id*. Among Goals 10 and 11 of the Comprehensive Plan, the County expressly set forth a goal to "[e]ncourage public entities to utilize alternative and renewable energy sources for a variety of energy needs" and, of particular pertinence to this appeal, to "**enable the construction of renewable energy generation facilities** by residents and businesses." Jt. App. at 1108 (emphasis added). Thus—despite Petitioners'

attempts to assert otherwise—Jefferson County contemplated and actively desired to incorporate solar development into the County's long-term commercial future nearly a decade ago, long before Rippon or any other solar development facility which Rockwell has persistently obstructed over the previous three years ever became involved in Jefferson County. *See generally*, Jt. App. at 1012-1271.

Following adoption of the Comprehensive Plan, more specific discussions for the implementation of large-scale commercial solar facilities began in November 2019. Jt. App. at 984. Through the recommendation of the Jefferson County Planning Commission ("Planning Commission") and a final decision of the Jefferson County Commission ("County Commission"), Zoning Text Amendment 19-03 ("ZTA 19-03") was passed to allow for large-scale solar energy facilities as a Principal Permitted Use in eight of Jefferson County's twelve zoning districts. *Id*. A "Principal Permitted Use" ("PPU") is defined as "[a]ny use . . . which is or may be lawfully established in a particular district, approved by the Office of Planning and Zoning without requirement of approval by a board or commission, provided the use conforms with all applicable requirements of [the Zoning Ordinance]." Jt. App. at 1305. Contrary to a PPU, a Conditional Use Permit ("CUP") allows a use only "upon approval of the Board of Zoning Appeals which may be subject to conditions or additional requirements that would allow for the proper integration of a compatible use in a community." Jt. App. at 1291; Jt. App. at 984-85, n. 1 (citing W. Va. Code § 8A-1-2(d)).

Shortly after the passage of ZTA 19-03, Douglas and Carol Rockwell ("Petitioners"), along with numerous other Jefferson County landowners, corporate entities, and a legal trust (collectively, the "Jefferson County Litigants"), brought several actions in Jefferson County challenging ZTA 19-03 as nonconforming with the Comprehensive Plan. Jt. App. at 984. These

numerous actions (Jefferson County Civil Actions Nos. CC-19-2020-C-125, 132-137) named the County Commission as the sole defendant and were consolidated under a single lead case, Jefferson County Civil Action No. CC-19-2020-C-125 (collectively referred to as the "First Suit"). *Id*. The First Suit never reached a final adjudication. Rather, the parties reached an agreement by which ZTA 19-03 would be sent back to the Planning Commission for further review and public hearings to ensure compliance with the Comprehensive Plan. Jt. App. at 984-85. Because Rippon nor the Board were parties to the action(s), neither was made party to that settlement agreement.

The Second Suit

Following the agreement in the First Suit, the Planning Commission and County Commission held subsequent discussions at regular public hearings taking place between January 12, 2021 and April 12, 2021 in order to revisit the amendment relating to solar facilities. Jt. App. at 985. A public hearing was held by the Planning Commission on February 9, 2021 and March 9, 2021, at which members of the public were permitted to provide input and feedback. Subsequently, a second solar amendment ("Second ZTA") was proposed and adopted by the County Commission on March 9, 2021. *Id*.

Shortly thereafter, Petitioners, along with several of the remaining Jefferson County Litigants from the First Suit, brought challenges to the Second ZTA in the Jefferson County Circuit Court, first against the Planning Commission on March 30, 2021 (Civil Action No. 19-2021-C-33) and later against the County Commission on April 14, 2021 (Civil Action No. 19-2021-C-46). *See* Jt. App. at 985. The two challenges were consolidated under Civil Action No. 19-2021-C-33 (collectively, the "Second Suit"). Once again, neither Rippon nor the Board were made a party to the action(s). Ultimately, the Court on August 16, 2021 determined that in adopting the Second ZTA, the County Commission had failed to make the findings of fact necessary to enable court

review pursuant to W. Va. Code § 8A-7-8(a). Jt. App. at 985. The Petitioners and the Planning Commission, as well the intervening solar developers all appealed the decision to this Honorable Court.

The Third Suit

On August 31, 2021, the Planning Commission lawfully convened a special meeting to contemplate further revisions to the solar amendment. Jt. App. at 986. Thereafter at its regularly scheduled public hearing on September 2, 2021, the County Commission discussed a proposed solar text amendment. *Id.* As a result, the Planning Commission instructed its staff to draft a possible amendment to facilitate its intentions for large-scale solar facilities in Jefferson County. *See id*. A public hearing was held on December 7, 2021 to address the possibility of large-scale facilities in rural and residential zoning districts. *Id*. At the following Planning Commission meeting on December 14, 2021, the proposed text amendment was approved, clarifying that "solar facilities are [PPUs] in the rural and residential zoning district" and recommended the same to the County Commission. *Id*. The approved text amendment was presented at the January 6, 2022 County Commission meeting. *Id*.

Before the County Commission could adopt the text amendment, Petitioners brought another action in Jefferson County Circuit Court (Civil Action No. 2022-C-6), challenging the legal validity of the proposed amendment and seeking an injunction to enjoin further actions by the County Commission (the "Third Suit"). Jt. App. at 986. Petitioners allege that by order of Judge McLaughlin sometime between January 13, 2022 and March 31, 2022, an injunction was entered. Pets.' Brief, at 6. However, Petitioners subsequently allege that the parties to that suit came to an agreement (the "Agreement") encompassed in a March 31, 2022 Agreed Order which dissolved

the injunction and resolved the Third Suit, as well as the pending appeal of the Second Suit. Jt. App. at 987.

Because neither Rippon nor the Board were parties to the Third Suit, it is unclear what exactly the extent of that injunction may have been. Further, neither that injunction—nor its eventual dissolution—was made part of the Joint Appendix and thus, cannot be considered by this Court on review. Because neither Respondent here was party to the Third Suit, both similarly were not a party to the Agreement. Accordingly, the terms of said Agreement—whatever they may be—have no bearing on these parties and, as will be set forth in detail within Rippon's argument, have no legal consequence on a challenge strictly limited to validity of CUP issuance. By Petitioners' own admission, that agreement was expressly between "the County and Mr. Rockwell" and to Rippon's knowledge neither Respondent herein was ever consulted or provided any input on the contents of the same. Pets.' Brief, at 7.

Passage and Implementation of ZTA 22-01

Following resolution of the Third Suit, Goal Number 8 of the Comprehensive Plan's Infrastructure and Technology Recommendations on was amended on April 12, 2022 to read:

> **Encourage public entities to utilize** alternative and renewable energy sources for a variety of needs, specifically **Solar Energy Facilities** in areas inside of the Urban Growth Boundary and the Preferred Growth Area as a Principle Permitted Use, and **outside the Urban Growth Boundary and the Preferred Growth Area, by the Conditional Use Process.**

Jt. App. at 987-88 (emphasis added). The Planning Commission then held a public hearing regarding the proposed text amendment on May 17, 2022. Jt. App. at 988. The Planning Commission provided sufficient opportunity for public comment and then, determining the amendment to be consistent with the Comprehensive Plan, voted it forward for consideration by the County Commission. *Id*. With the amendment before it, the County Commission first held an open discussion at its regular meeting on May 21, 2022 and then voted to schedule a public hearing

on June 9, 2022 to vote on adoption. Jt. App. at 989. Petitioners at that time were permitted to provide comment for the County Commission's consideration. *Id*. On June 16, 2022 the amendment was adopted **unanimously** over Petitioners' opposition, along with the creation of Section 8.20 of the Jefferson County Zoning and Land Development Ordinance ("Zoning Ordinance"). Jt. App. at 989-990. Accordingly, Zoning Text Amendment 22-01 ("ZTA 22-01") became effective, permitting solar facility development in areas outside the Urban Growth Boundary ("UGB") and Preferred Growth Area ("PGA") through the CUP process. Jt. App. at 990.

The Fourth Suit

Following the passage of ZTA 22-01, Petitioners brought yet another challenge in Jefferson County by means of Civil Action No. 22-C-81 (the "Fourth Suit"). Jt. App. at 990. Therein, Rockwell sought a preliminary injunction, which was subsequently denied by the Circuit Court based upon a determination that Rockwell was "**not likely to prevail upon the merits** of his case." Jt. App. at 192, 990 (emphasis added). The Court went further, noting that when Rockwell was asked by the Court "whether or not there was a legal challenge to the procedure followed by the County when it adopted [ZTA 22-01] at issue in these proceedings," he "**only argued that the County did not comply with the Agreed Order** dated March 21, 2022." Jt. App. at 192 (emphasis added). Thus, Rockwell asserted and the Circuit Court rejected arguments relating to the same Agreement which Petitioners now seek to put forth once again herein. *See id.* Following rejection of his request for a preliminary injunction, Rockwell voluntarily dismissed his suit on August 3, 2022. Jt. App. at 991. Petitioners did not refile the suit or otherwise challenge ZTA 22-01 in any capacity and thereby waived any right to do the same.

Rippon Receives CUP for Solar Development

On or about October 3, 2022, Rippon submitted a completed application to the Jefferson County Office of Planning and Zoning seeking to obtain the necessary CUP in order to commence development of a solar facility within Jefferson County. Jt. App at 28-63. As set forth within the application, Rippon's solar energy facility (the "Rippon Facility") is to be located on approximately 737 acres within the Kabletown District of Jefferson County. Jt. App. 32-35, 43-44, 991. The area surrounding the proposed Rippon Facility is largely non-residential. Jt. App. at 72. The land on which the facility is to be located is currently "generally cleared land but includes some trees along rock outcroppings, field boundaries, and along the Shenandoah River and Bullskin Creek." Jt. App. at 81. Of note, a portion of the land on which the Rippon facility will sit is located within the UGB and is accordingly processed as a PPU. Jt. App. at 991. Only the remaining portion of the property sits outside the UGB and is subject to CUP treatment. *Id*. This appeal concerns the latter property.

The Board provided the public with opportunity to comment and, upon consideration of the completed CUP application, testimony of "two witnesses identified as technical experts," public comment, and the staff report, the Board reviewed each consideration under Section 6.3(a)1-8 of the Zoning Ordinance and on October 27, 2022 determined that the CUP application met all necessary criteria for approval and unanimously voted to approve. Jt. App. at 154, 991.

Namely, two representatives of Rippon were provided with fifteen minutes to present on its behalf. Jt. App. at 79-103. Within that time, both represented manners in which the facility will comply with Zoning Ordinance requirements and Comprehensive Plan guidance. *Id*. Rippon's representatives identified the proposed use as a "very passive open space use of the land" comparable in scale and intensity to the adjacent lands. Jt. App. at 101-102. Further, they

emphasized their deliberate intention to retain the agricultural nature of the property, so that when Rippon does "decommission the [facility], it is really just a matter of pulling these posts out of the ground and recycling that steel and copper and recycling the panels." Jt. App. at 102. Lastly, emphasis was made as to Rippon's voluntary efforts to reach out to adjourning landowners to incorporate their comments and concerns into sixteen conditions for construction and operation of the Rippon Facility. Jt. App. at 103-104. Based upon all of the foregoing, the CUP was issued. Jt. App. at 991.

Dismissal of the Underlying Action (The Fifth Suit)

Almost immediately upon issuance of Rippon's CUP, Rockwell filed the underlying action, Jefferson County Circuit Court Civil Action No. CC-19-2022-C-141 (the "Fifth Suit") on November 22, 2022. *See* Jt. App. at 2, 11-27. Bringing the action pursuant to W. Va. Code §8A-9-1, Petitioners sought review of the legality of issuance of the CUP or, in the alternative, declaratory judgment. Jt. App. at 991-92.[1] While the action was initially brought only against the Board, Rippon subsequently sought and was granted the right to intervene to protect its interests by Order dated January 11, 2023. Jt. App. at 5. Thereafter, Rippon filed a Motion to Dismiss. Jt. App. at 6. The Court thereafter ordered that all "documents and materials submitted to the [Board] by the public" be submitted to the Court by February 24, 2023. Jt. App. at 992. The requested materials were timely delivered, and upon considering the same, the Court issued a twenty-five page order (the "Order") denying the Petition with prejudice and affirming the legality of the CUP granted to Rippon. Jt. App. at 982-1006.

Namely, the Circuit Court determined that "a board of zoning appeals must follow the ordinance, and where required the comprehensive plan, even if it disagrees with the applicable

[1] Of note, two solar developers, Horus West Virginia 1, LLC and Wild Hill Solar, LLC had applied for and previously obtained CUPs in Jefferson County. However, Petitioners sought only to challenge Rippon's CUP.

established provisions." Jt. App. at 996. Noting that the classification of "'Rural District' might be considered as more a title than as a directive for continuing preservation," and that the "BZA, and only the BZA, is authorized to impose any conditions and restrictions directly related to and incidental to the proposed conditional use," the Circuit Court correctly determined that Petitioners had failed to meet the necessary burden of proof and full review of the record revealed that the Board 1) did not apply an erroneous principle of law, 2) was not plainly wrong in its factual findings, and 3) did not act beyond its jurisdiction. Jt. App. at 997-1006. This appeal followed.

Subsequent attempts at relitigation (The Sixth Suit)

Notably absent from Petitioners' Statement of the Case is any reference to their most recent litigation—which as of this date still remains pending before the same Court from which this appeal originates—Jefferson County Civil Action No. 2023-C-112 (the "Sixth Suit"). While not the subject of this appeal, claims asserted therein directly parallel those Petitioners put forth here. As such, it is necessary to, at minimum, bring the most recent of a repeated assertion of the same claims for the pure purpose of dilatory strategy to this Court's attention.

That action was brought June 15, 2023 by Douglas Rockwell in his individual capacity against the Planning Commission, Board, and County Commission. It was conveniently initiated less than a month following the Circuit Court's dismissal of the Fifth Suit. Rockwell then amended his Complaint on July 11, 2023 to name all three entities who had received a CUP for solar development in Jefferson County—including Rippon—as defendants in the action. Following the filing of Motions to Dismiss by each defendant to the action (four in total), Rockwell on August 22, 2023 filed a Motion to Amend for a second time.

Rippon provides this detail for the Court only to note that the Motion to Amend in the Sixth Suit seeks to amend to bring the same arguments relating to the purported Agreement resolving

Civil Action No. 22-C-6, just as Petitioners now seek to do in this action. As in the Fifth Suit which is now before this Court on appeal, the Petition in the Sixth Suit is entirely devoid of any reference to the Agreement. That Motion to Amend, as well as the four concurrent Motions to Dismiss the action, remain pending at this date and represent only the latest of seemingly endless attempts by the Petitioners to stall solar development in Jefferson County. With these factual predicates established, Rippon turns to the substance of Petitioners' legal arguments.

SUMMARY OF ARGUMENT

This action relates to Petitioner's allegations of error by the Board in granting a CUP to Rippon for the development of a solar energy facility in Jefferson County. The Circuit Court properly determined that Petitioners were entitled to no relief and, on review pursuant to W. Va. Code § 8A-9-6, found no illegality in the Board's decision. Particularly, the Circuit Court correctly concluded that the Board, in approving Rippon's CUP application, did not apply an erroneous principle of law, was not plainly wrong in its factual findings, and did not act beyond its jurisdiction. *See* Jt. App. at 1005; *see also* Syl. Pt. 5, *Wolfe v. Forbes*, 159 W. Va. 34, 217 S.E.2d 899 (1975).

Petitioners' argument is comprised of eleven Assignments of Error, though several relate to matters wholly unpled below and thus not properly before this Court on appeal. Nevertheless, Respondent will address each in turn and establish why each Assignment of Error consequently fails, even those which will be identified as waived for failure to incorporate below, or which are otherwise wholly irrelevant to this action. Particularly, Petitioners posthumously ask that the Circuit Court—and now this Court in review—incorporate the purported Agreement reached between the Planning Commission and County Commission (neither of whom are parties to this action) and plaintiffs to the Third Suit into local statutory requirements for the Board to consider in the process for issuance of a CUP for solar facilities.

To reiterate, that Agreement was between these Petitioners and several other third parties not made party to this litigation. Not only did Petitioners fail to adequately raise any argument relating to the same in this action prior to denial, but no party to that Agreement was made a defendant in this action, and thus Petitioners legally cannot enforce the Agreement against these Respondents. Even further, that Agreement remains entirely unrelated to the substance of this action. Based upon this and well-established principles of jurisprudence set forth herein, that Agreement is not part of the record of this appeal and warrants no consideration by this Court in reaching a final adjudication on the merits. By Petitioners' own admission, any such Agreement bears only on Jefferson County legislative processes, and has no place in this appeal which relates exclusively to the actions of the Board, which has no statutory power to implement or amend those processes. *See* Pets.' Brief, at 14 ("the amended CUP application did not include these standards.").

More importantly, even were the Agreement properly before this Court, it is immaterial to the result. As the Circuit Court properly held, the Board is not a law-making body. Jt. App. at 996; *see also* Syl. Pt. 5, *Wolfe*, 159 W. Va. 34, 217 S.E.2d 899. In essence, Petitioners ask that this Court substitute Petitioners' perceived (or desired) interpretation of what the Zoning Ordinance *should* require for what the Board—the Jefferson County entity vested with authority to interpret it—determined it requires. Petitioners remain unhappy with the prospect of solar development in their general vicinity and, as a result, assert the same arguments which have been rejected on numerous occasions before, and which once again have been brought in yet another action now pending before the same Jefferson County Circuit Court.

To be clear, this action is a challenge to the Board's granting of Rippon's CUP application. Arguments relating to the legality of ZTA 22-01, supposed invalidity of the same for failure to incorporate an agreement from prior litigation, and any other challenge to the Jefferson County

legislative process have no relevance to this action and Petitioners' arguments for the same are of no consequence to this appeal. Neither the Board nor Rippon—the only two defendants in this action—have any control over Jefferson County legislative procedures. The Respondents to this appeal can only follow the procedures as enacted by the Jefferson County governmental entities, and the Circuit Court correctly determined that they did, warranting denial of Petitioner's writ, with prejudice. This Court should not be swayed by Petitioners' attempts to recharacterize this appeal into something which it fundamentally and practically is not.

Respondent's arguments outlined in more detail herein as to each Assignment of Error can be summarized in three categories: (1) the Court correctly addressed and confirmed that the Board followed the proper procedures set forth by local regulation and ordinance in order to determine that Rippon's CUP was warranted; (2) the Court correctly concluded that the Board's factual findings were not "plainly wrong" based upon the record before it and all other evidence presented by Petitioners; and (3) the Court correctly concluded that the record clearly evidenced that Rippon had carried the necessary burden of proof to warrant issuance of a CUP in accordance with applicable Jefferson County regulations and ordinances. Despite Petitioners' attempt to recharacterize this action as a challenge against governmental institution of solar procedures, this action presents only the question of whether Rippon's CUP application and the Board in processing the same complied with those procedures once implemented. The Circuit Court correctly determined that they did.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Rippon requests oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, as this is a simple matter involving assignment of errors in the application of well-settled law. Rippon further states that oral argument is necessary in accordance with the criteria

set forth by Rule 18(a). Finally, Rippon states that this case is appropriate for a memorandum decision.

ARGUMENT

A. Standard of Review

This appeal comes before the Court following the Jefferson County Circuit Court's granting of Rippon's Motion to Dismiss and ultimate denial of Petitioners' Petition for Writ of Certiorari. Dismissal of an action under West Virginia Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. *Edwards v. Stark*, 247 W. Va. 415, 419, 880 S.E.2d 881, 885 (2022). Similarly, review of determinations which are clearly a question of law are reviewed *de novo*. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."). However, a reviewing Court "applies an abuse of discretion standard in reviewing a circuit court's certiorari judgment." Syl. Pt. 1, *Jefferson Orchards, Inc. v. Jefferson Cnty. Bd. of Appeals*, 225 W. Va. 416, 693 S.E.2d 781 (2010).

Generally, a Circuit Court's findings of fact are subject to review under a clearly erroneous standard. Syl. Pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996). More specific to this appeal, however, "there is a presumption that a board of zoning appeals acted correctly." Syl. Pt. 3, *Jefferson Orchards, Inc.*, 225 W. Va. 416, 693 S.E.2d 781. Accordingly, a Court on appeal can reverse a board of zoning appeals' findings *only* where "plainly wrong." Syl. Pt. 5, *Wolfe*, 159 W. Va. 34, 217 S.E.2d 899, 900. This Court has expressly emphasized the importance of "judicial restraint in the review of legislative decisions made by city and county authorities in planning and zoning matters." *Lower Donnally Ass'n v. Charleston Mun. Planning Comm'n*, 212 W. Va. 623, 631, 575 S.E.2d 233, 241 (2022); *see also* Syl. Pt. 1, *Anderson v. City of Wheeling*, 150 W. Va. 689, 149 S.E.2d 243 (1966); Syl. Pt. 7, *Kaufman v. Planning & Zoning Comm'n of*

City of Fairmont, 171 W. Va. 174, 298 S.E.2d 148 (1982). This principle is affirmed by this Court's prior establishment that it "reviews the decisions of the circuit court under the same standard of judicial review that the lower court was required to apply to the decision of the administrative agency." *Corliss v. Jefferson Cnty. Bd. of Zoning Appeals*, 214 W. Va. 535, 539, 591 S.E.2d 93, 97 (2003) (citing *Web v. W. Virginia Bd. of Med.*, 212 W. Va. 149, 155, 569 S.E.2d 225, 231 (2002)).

Dismissal for failure to state a claim is mandated "where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 52, 717 S.E.2d 235, 239 (2011). However, while the ultimate disposition below effectively stemmed from a traditional Motion to Dismiss, West Virginia Code § 8A-9-6 sets forth that a court "may consider and determine the sufficiency of the allegations of illegality contained in the petition without further pleadings…" Accordingly, the Circuit Court here upheld the Board's decision upon full consideration of the record as contemplated by West Virginia Code § 8A-9-6.

"Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." *Far Away Farm, LLC v. Jefferson Cnty. Bd. of Zoning Appeals*, 222 W. Va. 252, 256, 664 S.E.2d 137, 141 (2008) (citing Syl. Pt. 4, *Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp*., 166 W. Va. 775, 277 S.E.2d 613 (1981)). Particularly in consideration of decisions rendered by a county administrative body, the standard is a "deferential one, which presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." *Maplewood Estates Homeowner's Ass'n v. Putnam Cnty. Planning Comm'n*, 218 W. Va. 719, 723, 629 S.E.2d 778, 782 (2006) (citing *Conley v. Worker's Compensation Division*, 199 W. Va. 196, 199, 483 S.E.2d 542, 545 (1997)).

B. The Circuit Court could not consider an agreement or ruling from a different civil action purportedly relating to the same because Petitioners' Petition did not put either before this Court for consideration, and even if it had, both are entirely irrelevant to an analysis of the legality of the Board and Rippon's actions.

Petitioners initiate their assignments of error with an argument relating to the Agreement reached in the Third Suit. Therein, Petitioners engage in analysis outlining fundamental principles of contractual formation and enforceability. *See* Pets.' Brief, at 15-17. Unfortunately, that analysis is of no consequence to this appeal, as questions of the Agreement—and all parties who may be bound by that Agreement—are not the subject of this action. Further, arguments relating to the same were not sufficiently presented for consideration to the Circuit Court below. To be clear, the Agreement is not mentioned once within the Petitioner's *Verified Petition*. *See* Jt. App. at 11-27. As will be reiterated numerous times herein in response to Petitioners' attempt to expand the scope of this appeal and the Petition on which it is based, the Agreement is immaterial to approval of Rippon's CUP application. *See* Sections F, G, and L, infra. To the extent that Petitioners assert otherwise, they should have fully pursued the necessary avenues to challenge the same, rather than attempting to bring such arguments in this action posthumously. Accordingly, this argument fails.

As a general principal of appellate procedure, "the Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review." *Keeney v. Shamblin*, 186 W. Va. 536, 537, 413 S.E.2d 357, 358 (1991); Syl. Pt. 1, *O'Neal v. Peake Operating Co*., 185 W. Va. 28, 404 S.E.2d 420 (1991). "Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal." Syl. Pt. 1, *State Road Comm'n v. Ferguson*, 148 W. Va. 742, 137 S.E.2d 206 (1964). Beyond this first assignment of error, a great portion of Petitioners' brief is directly concerned with an Agreement between parties not involved

in this litigation, and requests enforcement of that same Agreement to preliminarily bar the necessary analysis by the Board which Petitioner challenged below. Because these arguments were not properly put before the Court, they are not subject to this appeal and should be disregarded in their entirety. To be clear, this is an action challenging the legality of the Board's issuance of a CUP pursuant to the Zoning Ordinance, not a challenge to the implementation of the Zoning Ordinance. As such, extraneous arguments relating to Zoning Ordinance amendment are not properly before this Court for consideration. Nevertheless, Rippon will address the arguments as if validly put before this Court out of caution.

Citing federal caselaw, Petitioners outline for this Court that "[a] settlement agreement made in open court . . . is a valid, enforceable agreement…" *Petty v. The Timken Corp*., 849 F.2d 130, 133 (4th Cir. 1988). Such a general statement of the law may be true, but is of no consequence to this appeal. Further caselaw Petitioners cite relating to parties opposing enforcement of a settlement agreement to which the parties (or their attorney on their behalf) were a signatory serve only to distract this Court from the factual and legal basis for this appeal. The simple reality is that a contract cannot be enforced against a non-signatory, except in very limited circumstances which do not here apply. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631, 129 S.Ct. 1896, 1902 (2009) ("'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel…'") (citing 21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed. 2001)). Petitioners fail to cite any legal theory not readily distinguishable by which the Agreement could be lawfully enforced against these Respondents.

As another matter, the Circuit Court correctly noted in its Order 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. Such a requirement is put forth in plain language providing that "[a]fter the adoption of a comprehensive plan by the governing body, **all amendments to the comprehensive plan shall be made by the planning commission** and recommended to the governing body for adoption in accordance with the procedures set forth in sections six, seven, eight and nine of this article." W. Va. Code § 8A-3-11 (emphasis added). Petitioners' contention that "[w]hile this may be a correct statement of the law generally, it is clearly wrong …" (Pets.' Brief, at 16) seeks to read exceptions into the statute which are simply not there. Rather, the statutory language is quite clear that the power of amendment to a zoning ordinance rests exclusively with the planning commission and, absent procedural safeguards not met here, a Court may not intervene in such a legislative process. *See Prete v. City of Morgantown*, 193 W. Va. 417, 419, 456 S.E.2d 498, 500 (1995). Nor can governmental entities bind the local legislative processes by agreement with a private individual, as the Circuit Court so aptly noted. *See* Jt. App. at 1005.

Only addressed in passing within Petitioners' analysis is the simple fact that neither Rippon nor the Board was a party to the Third Suit and, accordingly, was not a party to the Agreement originating from settlement of the same. While attempting to downplay this realty which proves fatal to the argument as a whole, Petitioners seek to somehow insinuate that the Board's inclusion in a subsequent suit which referenced language from the Agreement thereby renders the Board bound by the Agreement to which it was not a signatory. West Virginia caselaw referenced in Petitioners' arguments relating to the enforceability of court settlements fail entirely to address

enforceability against third parties and are entirely distinguishable as a result.[2] Such a position finds no support in law, and Petitioners fail to reference any caselaw which may hold otherwise. Rather, Petitioners seek only to incorporate language from the Circuit Court's Order in the Third Suit, rather than the suit below which is now the subject of this appeal. To the extent that the Agreement is not included within the Joint Appendix of this appeal, it is only further indication that such matters are not properly before this Court for consideration.

In sum, the Board, nor Rippon, were parties to the settlement, nor have any statutory authority to amend the Zoning Ordinance themselves. Even were the Agreement enforceable against them, their duties are merely to comply with the Zoning Ordinance once implemented—Rippon to file an application which contains all necessary information and for the Board to render a decision based on consideration of all factors contained therein—and those duties are the only being challenged within this action. Because the Agreement bears no weight on either party or the legality of the actions which this appeal seeks to question, any argument relating to the Agreement is merely a distraction and is entirely irrelevant to the substance of this action. As such, the Circuit Court properly upheld Rippon's CUP.

[2] *See Martin v. Ewing*, 112 W. Va. 332, 164 S.E. 859 (1932) (challenge among parties as to enforceability of deed and bill of sale based on dispute of fact as to mental capacity of signatory); *United States ex rel. McDermott, Inc. v. Centex-Simpson Constr. Co*., 34 F. Supp.2d 397 (N.D.W. Va. 1999) (following verbal settlement agreement and release on record, party to settlement moved to enforce agreement when other party failed to sign agreement as reduced to writing); *Riner v. Newbraugh*, 211 W. Va. 137, 563 S.E.2d 802 (2002) (Court rejected argument that parties to settlement were required to sign agreement that contained terms not part of the original agreement prepared at mediation).

C. The Circuit Court did not err in applying Jefferson County regulations and administrative guidance regarding Sections 6.3A and 8.20 of the Zoning Ordinance. Irrespective of the Circuit Court's determination, the record supports the conclusion that the Board fully considered scale and intensity of the project, rendering this argument irrelevant to the ultimate disposition of Petitioners' claims.

Petitioners next argue that the Circuit Court erred in applying the Zoning Ordinance as it reads and accordingly determining that the Board correctly applied the necessary standards as proscribed by the Planning Commission and County Commission. Specifically, Petitioners wish for both Section 6.3A—which they admit serves the purpose of "setting out general standards" (Pets.' Brief, at 19)—and the more specific Section 8.20—"regarding Supplemental Use Regulations for solar energy facilities" (Pets.' Brief at 18-19)—to be considered in reviewing CUP applications. However, as the Circuit Court determined and as Petitioners correctly point out, the language of Article 8 of the Zoning Ordinance expressly provides that "[s]hould 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 1005-06, 1367. While Rippon asserts that the correct interpretation was made and applied by the Circuit Court, it is also worth noting that the resolution of this Assignment is irrelevant. Although disregarded by Petitioners, the record clearly supports that considerations of scale and intensity were made by the Board, and this argument accordingly has no bearing on the outcome of this appeal.

The general principles of statutory interpretation "require[] that a specific statute be given precedence over a general statute relating to the same subject matter." Syl. Pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984); *see also Daily Gazette Co., Inc. v. Caryl*, 181 W. Va. 42, 45, 380 S.E.2d 209, 212 (1989) ("The rules of statutory construction require that a specific statute will control over a general statute[.]"). The Circuit Court referenced this established

guideline in addressing the clear conflict between Section 6.3A and Section 8.20. Jt. App. at 1001-03, 1005-06. Specifically, the "intensity and scale" consideration provides no specific metric for evaluation as it relates to solar energy facilities, despite providing specific metrics for evaluation for other conditional uses. Jt. App. at 1002, 1378-1382.

To counter this point, Petitioners acknowledge the primacy clause outlined within Article 8, but assert that Sections 6.3A(2) and 8.20 are not in conflict. To be clear, Section 6.3A(2) requires consideration as to whether 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 (emphasis added). Conversely, Section 8.20, which specifically addresses requirements for solar energy facilities, includes no such language. Jt. App. at 1378-1382.

Petitioners similarly put forth arguments incorporating goals and recommendations of the Comprehensive Plan to undermine the explicit language contained within the Zoning Ordinance. However, such an attempt directly contradicts the individual and particularized purposes of the two. As the Circuit Court correctly articulated, "[c]omprehensive plans and zoning ordinances are two separate tools to be used in the scheme of [county] land utilization… Although a planning commission may recommend all kinds of desirable approaches to land utilization and development, not all of these may become eventually enforceable in a zoning ordinance." *Largent v. Zoning Bd. of Appeals for the Town of Paw*, 222 W. Va. 789, 671 S.E.2d 794, 800 (2008) (citations omitted). Put more succinctly, a county's "zoning ordinance is the law, and its comprehensive development plan is not." *Id*; *see also Singer v. Davenport*, 164 W. Va. 665, 668, 264 S.E.2d 637, 640 (1980) ("[t]he comprehensive plan was never intended to replace definite, specific guidelines; instead it was to lay the groundwork for the future enactment of zoning laws.").

In totality, Petitioners' argument in this regard is a complete non-starter. In arguing technicalities of the application of scale and intensity standards, Petitioners entirely neglect to mention that the record clearly supports that the Board did in fact take into account such considerations and based upon the same, approved Rippon's CUP application. Specifically, the record supports the conclusion that the Board did in fact consider scale and intensity. *See* Jt. App. at 146 ("it is my opinion that the proposed use is **compatible to scale and intensity** of the rural environment") (emphasis added); Jt. App. at 148-49 ("I think it's **well and compatible with the scale and intensity** of the rural environment") (emphasis added); Jt. App. at 150 ("I think on pondering **this it is compatible in scale and intensity** with the rural environment") (emphasis added). The Circuit Court made note of the same. Jt. App. at 991 ("the [Board] reviewed each of the General Standards listed in Section 6.3(A)1-8 of the Zoning Ordinance…"). Thus, whether consideration of the same is required or not, the Board did consider scale and intensity of the project and thus, Petitioners' arguments in this regard are entirely irrelevant to the ultimate adjudication of this matter.

For these reasons, the Circuit Court did not err in determining that the Board correctly applied the law in rendering its decision.

D. The Circuit Court did not err in finding that the Board of Zoning Appeals correctly applied the necessary sections of the Zoning Ordinance in granting Rippon a Conditional Use Permit.

Irrespective of the prior assignment of error addressed above, Petitioners argue that the Circuit Court erred in finding that the Board applied the correct standards of the Zoning Ordinance and properly made necessary considerations in reaching its conclusion. For the same reasons set forth in Section C, supra, and as further explained herein, this argument fails.

Petitioners once again qualify their argument with acknowledgement that the argument was not set forth within the Petition, but only in Response to Rippon's Motion to Dismiss. Pets.' Brief, at 21. In support of their position, Petitioners allege that the Circuit Court was in error in finding that Section 6.3A and Section 8.20 are in conflict and, as a result, Section 8.20 controls as a result of the primacy clause. *Id*.; *see* Jt. App. at 1005-06. They rest their argument on the fact that Section 8.20 generally states that the "[p]rocess for a Solar Energy Facility as a Conditional Use . . . shall process as a Conditional Use in accordance with Article 6." Jt. App. at 1379. However, a citation to Article 6 generally does not in any way undermine the fact that express language requires standards found in Article 8 to control when in conflict with any other standard found in the Zoning Ordinance, or elsewhere. *See* Jt. App. at 1367; Syl. Pt. 1, *Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 ("The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled."). Petitioners further support their position with another reference to the Court's Order in the Fourth Suit, which is not the subject of this appeal from the Fifth Suit. *See* Pets.' Brief, at 21-22.

Irrespective of the arguments put forth above, the Petitioners simply fail to meet the standard necessary for reversal of the Board's actions. As a matter of law, the standard of review of the Board's opinion is a "deferential one, which presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." *Maplewood Estates Homeowner's Ass'n*, 218 W. Va. at 723, 629 S.E.2d at 782 (citing *Conley*, 199 W. Va. at 199, 483 S.E.2d at 545). As this Court has elaborated on numerous occasions, the "'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume the agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." *Frymier-Halloran v. Paige*, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995).

Regardless of whether a complete analysis of Section 6.3A(1) is required, the record clearly reflects that the Board considered all evidence before it and engaged in meaningful and complete deliberations prior to rendering a decision. *See* Jt. App. at 29-188. More importantly (and seemingly disregarded entirely by Petitioners) the record reflects that the Board "reviewed each of the General Standards outlined in Section 6.3A.1-8 of the Ordinance." Jt. App. at 186. As a result, Petitioners' statement that there exists "no evidence in the record that the BZA conducted any such analysis as required" (Pets.' Brief at 22) is plainly wrong and entirely contradicted by the record. *See* Jt. App. at 186. Rather, the record clearly reflects that the Board did in fact conduct an analysis and approved Rippon's CUP based upon consideration of the same. *Id*. Thus, irrespective of whether consideration of provisions of 6.3A(1) of the Zoning Ordinance is required, any argument relating to the same is immaterial, as the record reflects that the Board did so, and the Circuit Court did not err in finding that consideration to have been supported by substantial evidence.

E. The Circuit Court did not err in its findings regarding the application of Sections 6.3A(1) and (2) of the Zoning Ordinance as they relate to Conditional Use Permit Issuance for Solar

Petitioners' fourth Assignment of Error once again takes issue with the result of the Board's decision as it relates to considerations set forth generally within Section 6.3A of the Zoning Ordinance. This time, however, Petitioners appear to plainly mischaracterizes the Circuit Court's findings as they relate to the application of Section 6.3A(1) and (2). Specifically, Petitioners assert that the Circuit Court held that "no other sections of the Zoning Ordinance or Comprehensive Plan may be considered when applying Sections 6.3A (1) and (2)." Pets.' Brief, at 22. Despite such a consequential characterization of the Circuit Court's Order, Petitioners by their brief fail to cite to any language within the Order which lends to such a conclusion. Rather, Petitioners cite only to

their own arguments asserted in their *Response in Opposition to Rippon's Motion to Dismiss* which the Circuit Court rejected below.

Characterization of the Circuit Court's findings are plainly contradicted by the Circuit Court's review of the General Standards contained within Article 6. Jt. App. at 1000-01. Only after addressing the General Standards did the Circuit Court address the considerations within Section 8.20 relating specifically to solar energy facilities. Jt. App. at 1001-03. Nowhere within the Opinion, however, is language reflecting the Petitioners' conclusion that the Circuit Court held that no other sections of the Zoning Ordinance may be considered in conjunction with Sections 6.3A(1) and (2). Rather, the Court determined, as addressed and disposed of in totality above (*see* Sections C and D), the conflict between Section 8.20 of the Zoning Ordinance and Section 6.3A(2) requires the application of Section 8.20, the more specific governance. Repeated reference to a Court Order from previous litigation does not otherwise justify Petitioners' position, as neither the Circuit Court nor Rippon contend that the Comprehensive Plan is to be thrown to the side in consideration of CUP applications. Rather, Rippon asserts merely what the law says, that the Comprehensive Plan is intended to "lay the groundwork for the future enactment of zoning laws." *Singer*, 164 W. Va. at 668, 264 S.E.2d at 640.

A comprehensive plan is by no means intended to be controlling law for all county land use considerations and, in applying the express language of the applicable Zoning Ordinance in regard to the general goals of the Comprehensive Plan, the Board did not err, nor did the Circuit Court err in confirming the same. Petitioners' mischaracterization of the breadth of the Circuit Court's Order does not negate the substance contained therein. As a result, Petitioners' argument in this regard fails.

F. The Circuit Court did not err in finding that the Board of Zoning Appeals correctly applied the law and was not plainly wrong in its findings of fact.

Petitioners' asserted Assignment of Error No. 5 is twofold, but both grounds fail. First, Petitioners assert that the Circuit Court erred as a matter of law in finding that the Board did not apply an erroneous principle of law. Second and separately, Petitioners allege that the Circuit Court erred as a matter of law in finding that the Board was not plainly wrong in its factual findings. Respondents address each in turn.

i. The Circuit Court did not err in finding that the Board of Zoning Appeals correctly applied the law.

The Circuit Court correctly determined that the Board correctly applied the law in approving Rippon's CUP application. To support their arguments opposing this determination, the Petitioners assert that the Board misapplied the law by failing to address in detail each of the factors listed in Article 6, Section 6.3(A) of the Zoning Ordinance. Pets.' Brief, at 23. Further, Petitioners allege that the failure of the Board to consider the Agreement from the Third Suit amounted to an erroneous application of law. *Id.* Lastly, Petitioners assert that the Board did not adequately consider certain provisions of Goal 8 of the Comprehensive Plan. *Id*. Namely, Petitioners, without any basis, assert that the Board failed 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." *Id*.

In essence, Petitioners ask that the Board legislate, rather than adjudicate. That is not the Board's duty. "A board of zoning appeals is not a law-making body," and "has no power to amend the zoning ordinance under which it functions." *Wolfe*, 159 W. Va. at 45, 217 S.E.2d at 906. For the Board to consider the Agreement, it would be required to act unilaterally and usurp the legislative authority of the Planning Commission and County Commission. To be clear, the Board is vested with no authority to do so, and as the Circuit Court correctly determined, Petitioners'

perceived argument that the Board must "forever refer to the [Agreement] when considering an application for a solar facility is in error." Jt. App. at 995.

Petitioners' arguments relating to misapplication of applicable Zoning Ordinance sections additionally fail. As addressed in more detail herein, Section 8.20 was expressly enacted to govern solar facilities and, as a result, controls over the more general provisions contained within Section 6.3(A). *See* Section C, supra. The Board has the power only to interpret and apply the law as available to it. It did so in approving the CUP. Petitioners' assertions of a misapplication of the law do not relate to this Board, but rather are subliminal issues which Petitioners take with the County's enactment of the Zoning Ordinance the Board was tasked to apply in evaluating the CUP application. As already stated, the implementation of the Zoning Ordinance is not the subject of this action, and the Board's choice not to incorporate an Agreement which is not law (nor is binding on the Board as a non-party) does not constitute a misapplication of the law. As such, the Circuit Court properly determined that the Board correctly applied the law.

ii. The Circuit Court did not err in finding that the Board of Zoning Appeals was not plainly wrong in its finding of fact.

For similar reasons, Petitioners' arguments that the Board was plainly wrong in its findings of fact are unsupported. Petitioners' arguments when brought to their logical conclusion are purely that because the Zoning Ordinance does not wholly incorporate what the Petitioners would prefer that it does, factual findings rendered upon consideration of the same cannot be adequately supported. Such a conclusion contravenes common sense and fundamental principles of adjudication. To reiterate, it is not the Board's duty or obligation to enact the Comprehensive Plan, Zoning Ordinance, or any other county governmental guidance which clearly and explicitly contemplates solar development facilities in Jefferson County. That duty is expressly upon Jefferson County's law-making bodies. W. Va. Code § 8A-3-11. A "zoning appeals board is

simply 'an administrative agency, acting in a quasi-judicial capacity.'" *Far Away Farm, LLC*, 222 W. Va. at 258, 664 S.E.2d at 143. Further, the legality of the Zoning Ordinance or the Comprehensive Plan is not before this Court. This appeal concerns only the legality of CUP issuance pursuant to that local governance, and Petitioners have failed to point to any justification for overturning the findings of fact of the Board. In consideration of the strong presumption that the Board's findings of fact are not erroneous, the Circuit Court made no error in affirming those findings. *See* Syl. Pt. 3, *Jefferson Orchards, Inc.*, 225 W. Va. 416, 693 S.E.2d 781.

G. The Circuit Court did not err in applying Section 8.20 of the Zoning Ordinance to the challenge before it, as no argument regarding legality of the inclusion of Section 8.20, Civil Action No. 22-C-6, or a settlement stemming from that action were put forth by the Petitioner.

As set forth elsewhere herein, Petitioners untimely assert in this appeal that a portion of the Zoning Ordinance—namely Section 8.20—was illegally adopted. To once again reiterate, this challenge relates *exclusively* to the legality of the Board's approval of Rippon's CUP application. *See* Jt. App. at 27 (Petitioners' requested relief asks only that "the actions of the [Board] in approving the Rippon Facility [CUP] as more fully set forth herein should be declared unlawful and the [CUP] set aside…"). Petitioners unsuccessfully challenged the institution of the Zoning Ordinance in the Fourth Suit and, after rejection of a requested injunction, voluntarily dismissed the same. Jt. App. at 192, 991. Nevertheless, the Petitioners now on appeal seek to relitigate the legality of the Zoning Ordinance despite failing to do so below. The intent of this course of action is evident on its face, as all arguments Petitioners set forth within Assignment of Error 6 are directed at the County Commission and the Planning Commission, who are not parties to this action. *See* Pets.' Brief, at 24. Specifically, the basis for this allegation is that the "Jefferson Count [sic] Commission failed to include the language that was agreed upon by the parties in its amended

CUP application." *Id*. (citing to Jt. App. at 299-300). Petitioners then address the substance of the Agreement, to which neither Respondent in this action was a party. *Id*.

Petitioners' characterization of the Court's findings is itself errant. The Circuit Court's Order from which Petitioners appeal addresses only the legality of the Board's review and determination in relation to Rippon's CUP application. Jt. App. at 1005-06. The Circuit Court concluded that the "Zoning Ordinance was amended with the addition of Section 8.20 effective on June 22, 2022" and further elaborated that, "[i]ndeed, if statutory procedures are followed, the Zoning Ordinance could be amended again by the Jefferson County Commission." Jt. App. at 995. Nowhere therein did the Circuit Court opine as to the legality of that amendment, because such a question was not before it. In fact, acknowledging that the question was not before it, the Circuit Court expressly qualified its comments regarding the Zoning Ordinance as "the Jefferson County Commission has, as is its sole right, and **assuming it complied with Chapter 8A of the West Virginia Code**, greatly expanded land uses in the Rural District beyond any traditional notions of the word 'rural.'" Jt. App. at 999 (emphasis added).

This Court has previously determined that "[t]he enactment of a zoning ordinance of a municipality being a legislative function, all reasonable presumptions should be indulged in favor of its validity." Syl. Pt. 1, *Sampson v. Karnes*, 187 W. Va. 64, 415 S.E.2d 610 (1992) (citing Syl. Pt. 3, *G-M Realty v. City of Wheeling*, 146 W. Va. 360, 120 S.E.2d 249 (1961)). Because the validity of the Zoning Ordinance was not properly put at issue and in compliance with the foregoing presumption of validity, the Circuit Court merely performed its analysis based upon the presumption that the Zoning Ordinance was lawfully enacted. Put simply, the Circuit Court considered and correctly adjudicated the matter within the limited scope of the legality of the Board's actions. The legality of the County Commission or Planning Commission's actions in

enacting and/or amending the Comprehensive Plan and the Zoning Ordinance are immaterial to this appeal, as indicated by the non-inclusion of those parties in the matter below. Should Petitioners have wished to challenge the Zoning Ordinance, rather than its application, Petitioners should have pursued the necessary avenues to do so.

Accordingly, any arguments which Petitioners now assert relating to the same are entirely without merit and should not be considered by this Court. Even were they to be, the Circuit Court did not err in determining it to be of no consequence in an action challenging the validity of the Board's issuance of a CUP.

H. The Circuit Court correctly and fully addressed and dismissed all issues raised in the Petition relating to Sections 6.3A(1) and (2) of the Zoning Ordinance.

Petitioners by Assignment of Error No. 7 allege once again that the Board—and subsequently the Circuit Court on appeal—errantly misconstrued and misapplied certain standards set forth by the Zoning Ordinance. From the outset, Rippon notes that this argument is functionally (if not entirely) superfluous, as it asserts the same arguments and relates to the same substantive law as Assignment of Error 2, 3, and 4. *See* Sections B, C, and D, supra. Nevertheless, Rippon will address the argument once more for the sake of comprehensive rebuttal.

As already addressed ad nauseam throughout this Brief, Section 6.3A of the Zoning Ordinance relates to general requirements of the Board in consideration of applications for a CUP. Jt. App. at 1364-65. Section 8.20, on the other hand, addresses specific requirements for solar energy facilities. Jt. App. at 1378. Article 8 as a whole provides that where any term contained therein conflicts with another term of the Ordinance, or any other term contained within the Jefferson County Subdivision and Land Development Regulations, the more specific terms contained with Article 8 are to apply. Jt. App. at 1367. This language, as incorporated by the Planning Commission and County Commission, clearly evidences the intent of the two and,

further, codifies common principles of jurisprudence in that a specific statute must always control over a general statute. *Daily Gazette Co., Inc.*, 181 W. Va. at 45, 380 S.E.2d at 212.

Despite these clear understandings, Petitioners continue to argue that requirements for consideration of "whether the proposed use is compatible with the goals of the adopted Comprehensive Plan" and whether 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" are applicable and were not complied with below. Such assertions are errant. *See* Sections B, C, and D, supra. As defined within the Comprehensive Plan, "intensity" is contemplated as "[t]he permitted ratio of building size to land area." *See* Jt. App. at 1259. Petitioners assert without factual or legal basis that the Board failed to address compatibility of the facility, in blatant disregard of several statements on the record that the Board clearly determined the facility to be compliant. *See* Jt. App. at 146 ("it is my opinion that the proposed use is compatible to scale and intensity of the rural environment"); Jt. App. at 148-49 ("I think it's well and compatible with the scale and intensity of the rural environment"); Jt. App. at 150 ("I think on pondering this it is compatible in scale and intensity with the rural environment"). The totality of this evidence as presented is summed up in the Board Chairman's statement that there had been no "convincing remarks or evidence or anything I've seen that really makes me believe that it's not compatible." Jt. App. at 151.

Further, Petitioners reference testimony from the public hearing to support their contention that "members of the Board misstated the requirements of Paragraph 5.b." Pets.' Brief at 26. To be clear, Petitioners in referencing "Paragraph 5.b," allude to *guidance* of the Comprehensive Plan, rather than the *requirements* of the Zoning Ordinance. *See Largent*, 222 W. Va. 789, 671 S.E.2d 794 (a county's "zoning ordinance is the law, and its comprehensive development plan is not.").

Along these lines, Paragraph 5.b *guides* the Board and the County in implementing its goals, but does not *require* anything. *See* Jt. App. at 1092. In fact, the Comprehensive Plan itself makes explicitly clear that it is intended to be only a "statement of realistic **Goals and Objectives** which **lay the groundwork** for the recommendations and implementation strategies of the vision." Jt. App. at 1027 (emphasis added). Beyond that, Petitioners' objection that the proposed use is non-compliant with Paragraph 5.b of Goal 8 of the Comprehensive Plan finds no support, as the Board clearly found that once decommissioned, the land will be wholly available for agricultural use. Jt. App. at 147. Guidelines contained therein contain no prohibition as to a temporary use of the land which in no way permanently impedes preservation, despite Petitioners' attempts to read one in.

Even absent these clear principles of law, Petitioners' position that scale and intensity and considerations of public health, safety, or welfare were not involved in the Board's decision are nevertheless errant. *See* Sections C and D, supra. Board member McKinney expressly stated his opinion on the record 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." Jt. App. at 146 (emphasis added). McKinney went on to state that he had heard "no evidence that this facility would pose any threat to public health, safety or welfare" and concluded by noting that the parcels will still be maintained as farmland once the facility is decommissioned in thirty years. Jt. App. at 146-47. It's unclear how Petitioners can continue to assert such factors were not considered despite the plethora of clear and convincing evidence in the record to the contrary. Petitioners' only attempt to do so is to allege that Rippon's application "failed to address each of the general standards," yet Petitioners fail entirely to provide any evidentiary basis for an allegation which is so clearly unsupported by the record. *See* Pets.' Brief, at 26.

Baseless allegations resulting purely from Petitioners' unhappiness with the result do not render the Board's actions arbitrary or capricious. Rather, the West Virginia Code makes clear that a comprehensive plan is intended to "enhance the unique quality of life and culture in that community and [adapt] to future changes of use of an economic, physical, or social nature." W. Va. Code § 8A-3-1(b). With these mandated objectives in mind, it appears that Petitioners, rather than either Respondent, through their reluctance to adapt to contemplated economic changes in Jefferson County incorporating the utilization of solar energy, seek to act contrary to the purpose of the Comprehensive Plan.

With these considerations in mind, the Circuit Court properly determined that the Board complied with both the requirements of the Zoning Ordinance, as well as the recommendations of the Comprehensive Plan. The Board's compliance is well-documented by the record before this Court and, as a result, is not subject to reversal.

I. The Circuit Court did not "amend" Section 6.3A of the Zoning Ordinance, but correctly interpreted based upon the record before it and the plain language as enacted.

The Circuit Court correctly determined that, based upon the plain language of the Zoning Ordinance and pursuant to fundamental principles of statutory construction, Section 8.20 controls when reviewing a CUP application. Petitioners allege that the Board is "required to apply each of the general standards given in 6.3A of the Zoning Ordinance…" Pets.' Brief, at 27. Specifically, Petitioners oppose the conclusion that because Section 8.20 relates specifically to solar development facilities, these specific requirements apply rather than those more generalized. However, such a result is expressly set forth within the Zoning Ordinance itself. Article 8 requires that "[s]hould the standards found in this Article conflict with those found in this Ordinance or in

the Jefferson County Subdivision and Land Development Regulations, **the standards of this Article shall apply**." Jt. App. at 1367. The language could not be more clear.

Further, West Virginia Courts have strictly held that "'shall' in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation." Syl. Pt. 5, *Rogers v. Hechler*, 176 W. Va. 713, 348 S.E.2d 299 (1986) (citing Syl. Pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 171 S.E.2d 480 (1969)). As a more general matter, principles of statutory interpretation "require[] that a specific statute be given precedence over a general statute relating to the same subject matter." Syl. Pt. 1, *Kingdon*, 174 W. Va. 330, 325 S.E.2d 120; *see also Daily Gazette Co., Inc.*, 181 W. Va. at 45, 380 S.E.2d at 212 ("[t]he rules of statutory construction require that a specific statute will control over a general statute[.]"). Thus, the Zoning Ordinance includes an obligatory preclusion of sections which may conflict with Section 8.20. As a result, the assertion that the Circuit Court "improperly alter[ed] or amend[ed] the Zoning Ordinance and Comprehensive Plan" are entirely baseless. *See* Pets.' Brief, at 27. Rather, the Circuit Court merely acknowledged and correctly applied the deliberate legislative intent of the County Commission and Planning Commission in affirming the Board's decision to do the same.

J. The Circuit Court did not err by upholding the findings of fact rendered by the Board of Zoning Appeals in granting Rippon's Conditional Use Permit.

Petitioners assert that the Circuit Court, in coming to its ultimate conclusion upholding Rippon's CUP issuance, erred in affirming the Board's findings of fact. In support of this argument, Petitioners now assert that "several findings of fact" were not supported by the record. *See Pet.'s Brief*, at 27. They further allege that required analysis was never conducted. *Pet.'s Brief*, at 27. Both arguments fail.

As a baseline, a board of zoning appeals is required to make "written findings of fact. Such facts determine whether the particular conditional use applied for is consistent with the spirit, purpose and intent of the ordinance." *In re Skeen*, 190 W. Va. 649, 651, 441 S.E.2d 370, 372 (1994). Petitioners correctly acknowledge that "[w]hile on appeal there is a presumption that a board of zoning appeals acted correctly…" *Lower Donnally Ass'n*, 212 W. Va. at 630, 575 S.E.2d at 240. So long as written findings of fact are issued, those factual findings should be disturbed only if "plainly wrong." *See* Syl. Pt. 5, *Wolfe*, 159 W. Va. 34, 217 S.E.2d 899.

Petitioners allege that they sufficiently outlined "several findings of fact made by the [Board] that are not supported by the record." Pets.' Brief at 27. However, to support this contention, they merely cite to a bulleted list of findings of fact with which they take issue. *See* Jt. App. at 311. Petitioners therein seek to nitpick factual technicalities in the record with which they take issue, though fail to provide any evidence of their own which grants credence to their arguments. Overcoming the factual findings of the Board requires meeting a high burden and Petitioners' mere disdain for the result of those findings is not sufficient. Rather, the complete record indicates that the Board adequately considered all evidence before it and rendered a decision based upon the same. The Circuit Court, in review of that record, affirmed the decision, determining that Petitioners failed to prove any grounds for overcoming the presumption of correctness. Jt. App. at 1004-05.

As the factual circumstances remain the same and based upon the considerations of law as outlined herein, nothing in the record indicates that the Board's findings of fact were plainly wrong. Accordingly, it cannot be said that the Circuit Court erred in holding the same.

K. The Board of Zoning Appeals and Circuit Court both correctly determined that Rippon carried the necessary burden of proof for issuance of a Conditional Use Permit.

Petitioners by their tenth Assignment of Error contend that the Court failed to address the burden of proof at a Conditional Use hearing before the Board and, accordingly, the CUP must be revoked. *See* Pets.' Brief at 29. Rippon does not contest that the burden of proof was placed upon it in order to receive a CUP. However, as indicated by the Board's decision and the subsequent record before the Circuit Court, that burden was unquestionably met, thereby justifying issuance of the CUP. Jt. App. at 1004. It is also facially evident that Petitioners fail to provide any basis of law upon which they allege the burden of proof was not met (nor even seek to establish what the burden of proof is), but merely make the same allegations which are clearly contradicted by the breadth of the record.

Of further importance, any allegation that the Circuit Court failed to address the burden of proof is entirely misplaced. Considering the challenge itself relates exclusively to the issuance of the CUP and that issuance requires consideration of a variety of factors based upon information provided by the applicant to the Board, the burden of proof which was on Rippon is inextricably intertwined with the result. Despite this, Petitioners once again now seek to challenge for the first time a question of law which was not directly put before the Circuit Court below. Regardless of deficiencies in Petitioners' pleadings and subsequent arguments relating to the Motion to Dismiss, the Circuit Court's determination that the Board was "not plainly wrong in its factual findings" (Jt. App. at 1006) affirms that Rippon necessarily carried the burden of proof for issuance of a Conditional Use Permit. As a result, Petitioners' arguments in this regard fail both practically, and as a matter of law.

L. The Circuit Court did not err in any regard with consideration to Jefferson County Civil Action No. 22-C-6, as no argument relating to the same was put before the Court. Even had Petitioners not waived such an argument, the law of the case doctrine is wholly inapplicable to the case at hand.

As with several arguments above, Petitioners now posthumously attempt to add claims to this action which at no point were put before the Court at the lower level. *See* Sections B, F, and G, supra. Particularly, the Petitioners argue that the Circuit Court, despite not being presented with the same, failed to consider an agreement rendered in the Third Suit between the Petitioners and Jefferson County entities not made a party to this action.

Importantly, the "law of the case" doctrine applies to "prohibit[] reconsideration of issues which have been decided in a prior appeal in **the same case**, provided that there has been no material changes in the facts since the prior appeal, such issues may not be relitigated in the trial court or re-examined in a second appeal." *Hatfield v. Painter*, 222 W. Va. 622, 632, 671 S.E.2d 453, 463 (2008) (citing 5 Am.Jur.2d *Appellate Review* § 605 at 300 (1995)) (emphasis added). "The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." Syl. Pt. 3, *State ex rel. Frazier & Oxley v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003). "The general rule is that when a question has been definitely determined by this Court its decision is conclusive on parties, privies and courts, including this Court, upon a second appeal or writ of error and it is regarded as the law of the case." Syl. Pt. 1, *Mullins v. Green*, 145 W. Va. 469, 115 S.E.2d 320 (1960); *see also Graves v. Lioi*, 930 F.3d 307, 318 (4th Cir. 2019). Put simply, the doctrine does not apply "unless an appellate decision was issued on the merits of the claim sought to be precluded." *Hatfield*, 222 W. Va. at 632, 671 S.E.2d at 463 (citing *Shore v. Warden, Stateville Prison*, 942 F.2d 1117, 1123 (7th Cir. 1991), *cert. denied*, 504 U.S. 922, 112 S.Ct. 1973 (1992)). It applies only to "govern the **same**

issues in subsequent stages in the **same case**." *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391 (1983) (emphasis added).

Petitioners correctly state by their Brief that they have brought "a series of lawsuits involving solar energy facilities." *See Pet.'s Brief*, at 29. Rippon does not dispute that Petitioners have demonstrated a clear intent to bring repeated challenges to solar development in Jefferson County. However, the numerous challenges previously brought have no bearing on the Circuit Court's dismissal of the matter at hand and—more specifically—an agreement purportedly entered in the Third Suit cannot be enforced against Rippon, who was not a party to the alleged agreement. *See* Section B, supra. As caselaw clearly demonstrates, the law of the case applies only where the trial court receives a matter on remand with clear directive from the appellate court. *See, e.g.,* Syl. Pt. 3, Cummings, 214 W. Va. 802, 591 S.E.2d 728 ("**[u]pon remand of a case** for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case *as established on appeal*.") (emphasis added). The Circuit Court dismissed this action and upheld the Board's decision in the preliminary stages and—at least in this action—had no orders from an appellate court by which the law of the case doctrine could even apply.

Petitioners' argument in this regard appears to be that the Third and Fourth Suits bind this Court (or the Circuit Court) in some manner, despite entirely different questions of law, distinct defendants, and the simple reality that this action constitutes an entirely separate action. In support, Petitioners once again cite to a purported agreement entered in the Third Suit. As set forth on numerous occasions herein, that agreement is of no consequence to this analysis and the mere fact that Petitioners have repeatedly brought challenges to solar development in Jefferson County over the previous four years in no way binds the Circuit Court in its consideration of the validity of the

Board's CUP issuance. *See* Section B, supra. That consideration is an entirely separate issue in an entirely different suit.

As succinctly established by the Circuit Court's Order, the Board has no authority to legislate or amend the zoning ordinance by which it operates, but must "apply the Zoning Ordinance as written…" *See* Jt. App. at 995. Because no arguments regarding the agreement and an associated law of the case doctrine application were before the Circuit Court below and, even if they were, are entirely irrelevant to this action, the Circuit Court correctly upheld the Board's decision.

CONCLUSION

For the reasons set forth herein, Respondent Rippon Energy Facility, LLC respectfully requests that the Court affirm the Order of the Circuit Court of Jefferson County and grant such other relief as the Court deems just and proper.

Respectfully submitted, this Second day of November, 2023.

RIPPON ENERGY FACILITY, LLC

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