IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-320

SWN PRODUCTION COMPANY, LLC,

Petitioner Below, Petitioner,

v.

**CITY OF WEIRTON and
CITY OF WEIRTON BOARD OF
ZONING APPEALS,**

***Respondents Below, Respondents*.**

OPENING BRIEF OF PETITIONER, SWN PRODUCTION COMPANY, LLC

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ASSIGNMENTS OF ERROR

1. The Brook County Circuit Court ("Circuit Court") abused its discretion by affirming the City of Weirton Board of Zoning Appeals' ("Board") decision ("Board Decision") to deny SWN Production Company, LLC's ("SWN") application for conditional use approval ("Application") to construct a natural gas well pad ("Brownlee Pad"), where the record demonstrates that SWN presented substantial, credible and competent evidence the Application and proposed Brownlee Pad complied with each and every conditional use requirement contained in the City's Unified Development Ordinance ("UDO") in effect at the time of the Application and objectors did not present any credible, non-speculative evidence to the contrary.

2. The Circuit Court abused its discretion by holding that the Board Decision to deny the Application was supported by substantial evidence, where objectors to the Application did not present any credible, non-speculative evidence in opposition to the Application.

3. The Circuit Court erred by determining that SWN was not deprived of its right to procedural due process, where both the Board and Circuit Court refused to accept or consider rebuttal testimony and evidence offered by SWN.

4. The Circuit Court erred by entirely disregarding and refusing to consider relevant testimony presented by SWN at the Circuit Court's hearing to take additional evidence ("Evidentiary Hearing"), where the Court had already determined that the Evidentiary Hearing was necessary because SWN's procedural due process rights were violated at the Board's hearings on the matter.

5. The Circuit Court erred in affirming the Board Decision by applying an unduly deferential standard of the review and failing to make an independent review of both law and fact in order to render judgment as law and justice may require.

6. The Intermediate Court of Appeals ("ICA") erred by dismissing SWN's appeal of the Circuit Court's denial of SWN's appeal of the Board Decision for lack of subject jurisdiction and by failing to grant SWN's Protective Motion for Transfer of Case to the Supreme Court of Appeals after it determined that it lacked subject matter jurisdiction.[1]

STATEMENT OF THE CASE

I. Introduction

This appeal seeks review and reversal of the Circuit Court's August 16, 2023 decision ("Circuit Court Decision"), which affirmed the Board's unlawful decision to deny SWN's Application to construct a natural gas well pad on a large piece of vacant land located in the outskirts of the City of Weirton ("City"). The City has historically maintained a UDO, which purports to regulate where and how and natural gas drilling can occur within the City.

Even though SWN's Application complied with all of the UDO's applicable requirements, the Board denied Application. During the hearings to consider the Application and in its decision,

[1] By Memorandum Decision dated April 22, 2024, after the underlying matter in this appeal had been fully briefed, the ICA dismissed SWN's appeal of the Circuit Court's decision on the grounds that the appeal involved an "extraordinary remedy," over which the ICA does not have jurisdiction pursuant to W. Va. Code § 51-11-4(d)(10). SWN asserts that jurisdiction was indeed proper in the ICA pursuant to W. Va. Code § 51-11-4(b)(1) because this appeal arises from an "order[] of a circuit court" in a consolidated "civil case" "entered after June 30,2022,' over which the ICA already assumed jurisdiction. Specifically, on November 21, 2023, in a matter already consolidated with the instant appeal, the ICA held that the City's ordinances purporting to regulate oil and gas activities were entirely preempted by the West Virginia Oil and Gas Act ("ICA Preemption Decision"). The City appealed the ICA Preemption Decision to this Court, which appeal has now been fully briefed and is docketed at No. 23-753. Notwithstanding SWN's assertion that the ICA had clear jurisdiction to hear this appeal, SWN nevertheless now requests that this Court assume jurisdiction over this appeal on the merits, which appeal arises from the same transaction and occurrence as the ICA Preemption Decision that is currently pending before this Court. To that end, on May 22, 2024, SWN filed a "Motion Requesting that the Supreme Court of Appeals Obtain Jurisdiction Over Appeal," docketed at Case No. 24-288 (a copy of which is attached hereto as **Exhibit A**), which separately requests that this Court obtain jurisdiction over this appeal pursuant W. Va. Code § 51-11-4(b)(1) and Rule 1(b) of the West Virginia Rules of Appellate Procedure. Thus, although SWN asserts herein that the ICA did in fact have jurisdiction to hear this appeal, SWN respectfully requests that this Court now assume jurisdiction over the merits of the instant appeal at this juncture so that the two consolidated matters may be finally disposed of concurrently. Accordingly, SWN submits this Opening Brief, which addresses the merits of the underlying appeal.

the Board improperly found that SWN had failed to present adequate evidence to show compliance with the pertinent ordinance requirements, despite simultaneously violating SWN's due process rights by refusing to allow SWN to enter relevant evidence into the record. For the reasons set forth herein, the City's and Board's blatant and underhanded attempts to prevent SWN from exercising its lawful right to conduct drilling on its property was illegal and the Board Decision should be reversed.

II. Factual and Procedural Background

A. The Subject Property and Surrounding Area

SWN's proposed Brownlee Pad is situated upon a tract of land totaling 301.83 acres in the outskirts of the City, located off of Park Drive on property owned by Brownlee Land Ventures L.P. ("Subject Property"). (Appendix ("A.") 72). SWN is the lessee of record for the Subject Property under an Oil & Gas Lease ("Lease"). (A. 589-595). Pursuant to the Lease, SWN has the right to drill and for and produce oil and natural gas from the Subject Property. *Id*; (A. 1192). The Subject Property consists of wooded and meadowed areas with an open relatively flat grass field at the site entrance. (A. 634). Portions of the Subject Property have been timbered in the recent past. *Id.* There are no streams or wetlands on the Subject Property. (A. 597-626).

The Brownlee Pad site entrance is located off Park Drive approximately 500 feet past the Rue 21 distribution center. (A. 597, 1192). The Brownlee Pad is located approximately 0.5 miles east of the entrance. (A. 17-18, 1192, 1830-31). The Rue 21 distribution center is a large-scale trucking facility with approximately 50 truck docks to accommodate the loading and unloading of tractor-trailers. There are regularly 20-25 tractor-trailers onsite at any given time. (A. 831, 1833-35). Directly across the Brownlee Pad entrance on the other side of Park Drive is a large parking lot owned by Rue 21 where tractor-trailer cargo containers are stored. The lot has the capacity to store more than 70 tractor-trailer cargo containers. (A. 831, 1745, 1834). There are two buildings

past the Brownlee Pad site entrance on Park Drive before it dead ends: Evergreen North America Industrial Services ("Evergreen Industrial") and Pietro Fiorentini. (A. 831, 1836, 1221-34). A majority of Evergreen Industrial's, Pietro Fiorentini's and all of the other traffic on either side of the Brownlee Pad site entrance consists of 18-wheeler tractor-trailer traffic and other large commercial vehicles used to serve the oil and gas industry. *Id.* The Brownlee Pad sits approximately 150 feet lower than the other developments located on Park Drive. (A. 587, 829, 831, 1212-13).

B. The Proposed Brownlee Pad

The Brownlee Pad project will involve the construction and maintenance of an approximately 4.2 acre gravel well pad, a 1.6 acre auxiliary pad, stormwater best controls and an approximately 3,167 foot-long access road ("Access Road"). (A. 587, 628-637, 1208-1211). The disturbed area to construct the Brownlee Pad and Access Road is approximately 26.10 acres. (A. 597, 1611). The Brownlee Pad is designed to drill 14 gas wells. However, at this time, only three gas wells are proposed. (A. 1198-99).

The Brownlee Pad will be constructed with an underdrain system that will divert rainwater into two stormwater ponds. (A. 1556). Additionally, the underdrain system is designed to be fitted with valves to prevent water from leaving the well pad in the event of a spill or release of fluids derived from the drilling or stimulation of the oil/gas wells. *Id.* With the well site being lined, the appropriately designed and operated underdrain system in place and the use of secondary containment for many activities conducted on the Brownlee Pad will minimize any potential off-site soil or groundwater contamination threats. (A. 1556-57). The nearest occupied structure is a single-family residence located approximately 1,273 feet away. (A. 1851). The topography surrounding the Brownlee Pad consists of dense trees, open fields, ridges and valleys. (A. 587, 716).

C. SWN's Conditional Use Application and New Unified Development Ordinance

On June 11, 2021, SWN filed the administratively complete Application for the Brownlee Pad pursuant to the terms of the City's then existing UDO. (A. 585). Pursuant to the UDO, SWN's proposed Brownlee Pad is an "Oil/Gas Extraction" use. *See* UDO § 9.6 (24); (A. 223). At the time the Application was filed, the Brownlee Pad was located within the City's Planned Development District ("PDD"). "Oil/Gas Extraction" uses are permitted conditional uses in the PDD zoning district. *See* UDO § 9.6 (24); Table 1. The UDO contains only two objective standards for oil and gas extraction activities, as follows:

a. No well may be located closer than two hundred (200) feet to any residential use.

b. All oil and gas exploration shall be subject to the Oil and Gas Laws, Chapter Twenty-two, Article Four, of the Code of West Virginia, as amended, and the rules and regulations of the West Virginia Department of Environment Protection.

See UDO § 9.6(24); (A. 223).

On July 7, 2021, the City made effective a new Unified Development Ordinance ("New UDO"), which increased the setback requirements for drilling sites from 200 feet to 2,500 feet from any residential, church or school use, which effectively bans natural gas drilling within City's borders because there is virtually no area in the City where such requirements can be met. (A. 76). In addition, the New UDO removed oil and gas extraction as a permitted conditional use from anywhere except industrial zoning districts, including removal from the PDD zoning district where the Brownlee Pad is located. However, despite the City's best efforts to zone out the Brownlee Pad, SWN submitted its application prior to the UDO's effective date.

D. The Board's Proceedings

1. The August 3, 2023 Hearing

On August 3, 2021, the Board conducted the first hearing on the Application. (A. 1179-1275).[2] SWN presented its case through Shawn Jackson, Operations Manager for SWN, Bob Laine, Land Manager for SWN, Brian Lantz, P.E., Civil & Environmental Consultants, Inc. ("CEC"), Jeff DePaolis, P.E., P.T.O.E., with CEC, and Bradley Webb, Vice President, Absolute Noise Control, LLC ("ANC"). (R. 1191-93, 1219).[3]

Mr. Jackson is an engineer who serves as the Operation Manager for SWN's Southwestern Appalachian Division. He oversees all of the phases in the oil and gas development process. (A. 1828). Mr. Jackson testified as to the nature of the drilling and production process. He explained that the process of developing oil and gas includes four distinct phases: (1) construction; (2) drilling; (3) completions; and (4) production. (A. 1193-1204). Next, Mr. Lantz testified that the Application complies with all the UDO's dimensional requirements, including lot width, lot

[2] Prior to presenting its first witness, SWN's counsel provided the Board with an exhibit book that contained the exhibits that SWN intended to present in support of the Application, which included a traffic impact study ("Traffic Study"). (A. 570-892). At the outset of the hearing, Mr. Vincent Gurrera, attorney for the City, objected to SWN's introduction of the Traffic Study on the grounds that it was not submitted with the Application, despite the fact that there is no application requirement that a traffic study be submitted. (A. 1188-89). Mr. Guerrera also claimed that the Application was incomplete because it did not include an application for timbering activities. (A. 1225-1226). SWN's counsel responded that the submission of a Traffic Study was not an application requirement. (A. 1188-89). SWN's counsel further responded that a separate zoning application for timbering activities was similarly not a zoning application requirement for an "Oil/Gas Extraction" use. (A. 1225-1226). SWN's counsel further explained if the City believed the site clearing activities required separate zoning approval that it would submit a separate application. (A. 1497).

[3] SWN further submitted the following items into evidence: Conditional Use Application (Ex. A); Site Plan (Ex. B); Lease Agreement (Ex. C); Brownlee Pad Permit and Construction Drawings (Ex. D); Geotechnical Report (Ex. E); Rendering to Closet Residence (Ex. F); Photograph of Existing Producing Gas Wells (Ex. G); Post Construction Stormwater Management Report (Ex. H); Erosion and Sediment Control Calculations (Ex. I); Renderings of Proposed Well Pad; (Ex. J); Signage Photographs (Ex. K); Well Site Safety Plan (Ex. L); Site Plan Overhead View (Ex. M); Site Plan Overhead View Expanded (Ex. N); Rendering from Sunset Drive (Ex. O); Renderings from Comfort Inn (Ex. P.); Traffic Study (Ex. Q); Noise Study (Ex. R); and Decibel Scale (Ex. S). (A. 570-892).

coverage, setbacks and height. (A. 1207-08). Mr. Lantz further described the erosion and sediment plan and controls that will be installed on the Subject Property in connection with construction of the Brownlee Pad. (A. 733-765). He testified that a wetland delineation study was performed and that the Brownlee Pad was designed to avoid all streams and wetlands. (A. 1210-11). Mr. Lantz testified that it was his professional opinion that the Subject Property was an appropriate place for the Brownlee Pad. (App 1211).

Mr. Webb, SWN's noise expert, next testified as to the anticipated noise impacts of the proposed Brownlee Pad. He stated that he had evaluated the noise impacts associated with approximately 30 other SWN projects and was very familiar with all of the equipment to be used on site. (A. 1219). He explained that the UDO does not provide for any objective noise standards. (A. 1220). However, he stated that the Brooke County Noise Ordinance considers noise levels in excess of 65 decibels (dBA to be a hazard to public health and safety. (A. 1220-21). He testified that the noise, without any mitigation measures, would be below the ambient background level. (A. 1223-24). Based on all project information provided by SWN and the analysis contained in his expert report, Mr. Webb testified that, within a reasonable degree of engineering certainty, it was his professional opinion that the proposed Brownlee Pad would comply with the noise regulations set forth in the Brooke County Noise Ordinance (A. 897). He further testified that the noise effects would be temporary and will be negligible after drilling and completions. *See* UDO § 3.6.3.1 (D): (A. 894-904).

Next, Mr. Laine testified as to lighting at the site and stated that halo lights would be used at the Brownlee Pad and be pointed downward, which will prevent light from bleeding outside of the Subject Property. (A. 1205). All lighting will be temporary and limited to the Subject Property. *Id.* All lighting will be directed away from adjacent properties and roadways. *Id.* Mr. Laine further

explained that SWN will provide site familiarization training to first responders if requested by the City. (A. 773-827,1206). In addition, a Well Site Safety Plan was submitted and will be applied on site to protect the public health and safety. *Id.*

With respect to the UDO's express "Oil/Gas Extraction" standards, Mr. Layne testified that all of the proposed wells were more than two hundred (200) feet from any residential use. *See* UDO §9.6 (24)(a); (A. 587). The center of the Brownlee Pad sits approximately 1,273 feet away from the nearest residence. (A. 716, 1851). Mr. Layne affirmed that SWN would comply with all applicable state regulations. *Id.* He further testified that SWN was in the process of completing the well permit process with the WVDEP for the three planned wells and would provide the City with copies of the same upon issuance. *Id.*[4]

Next, SWN presented the testimony of Mr. DePaolis, who is a registered professional engineer and a certified professional traffic and transportation operations engineer (P.T.O.E). (A. 1215). He testified as to the conclusions contained in the Traffic Study that he prepared. *Id.* Even though SWN intends to obtain rights-of-way to install a water pipeline to convey water to the site for hydraulic fracturing, Mr. DePaolis testified that the Traffic Study *assumed a worst-case scenario* where all water would need to be hauled to the site by truck, even though such a situation would be highly unlikely. (A. 838, 1217). He testified that trip generation data for a natural gas well pads is not included in the Institute of Transportation Engineers ("ITE") publication. (A. 1216). Therefore, the Traffic Study utilized specific data obtained from SWN's other actual well sites to develop anticipated peak hour site generated trips. (A. 838). Mr. DePaolis testified that he evaluated the three most proximate intersections. *Id.* He testified that, to a reasonable degree of traffic engineering certainty, the additional traffic generated by the Brownlee Pad during the

[4] During the Evidentiary Hearing (discussed below) SWN subsequently submitted a copy of its WVDEP approved Well Work Permit to construct and drill the Brownlee Site. (A. 1606).

completions stage would not result in a degradation of level of surface for the affected intersections and that there would be "no significant traffic impact" associated with the Brownlee Pad. (A. 1218-19).

After SWN completed its case, various residents and politicians spoke both in favor and against the Application. Unlike the witnesses proffered by SWN, none of the objectors were experts in the fields in which they spoke to.[5] SWN repeatedly asserted objections during the public comment period, none of which were acknowledged by the Board. *See* (A. 1244) (hearsay and relevancy objections); ("We're here to make a record right now."); (A. 1245) ("I [assert] the same objection."); (A. 1247) (standing, relevancy and hearsay objections). At the conclusion of the comment period, the City's solicitor requested that the Board continue the hearing. The Board voted to continue the hearing until the Board's next meeting in September. (A. 1272-73).[6]

2. The Board's September 7, 2021 Hearing

At the second hearing on September 7, 2021, several more resident objectors spoke in opposition to the Application. (A. 1307-1326).[7] Eric Frankovitch, on behalf of the Park Drive Development, provided the Board with a single-page letter from a Mr. Jamie Guida that opined

[5] A.D. "Butch" Mastrantoni, Utilities Director of the Weirton Area Water Board and Weirton Sanitary Board ("Water Board"), spoke about his concerns that hydraulic fracturing from the proposed well site would have on the aquifer and watershed. He opined that the aquifer and watershed supplying ground water to the Water Board's Ranney Well is in close proximity to the Brownlee Pad. *See* (A. 1226-28).

[6] After the hearing, SWN filed a conditional use application for "Timbering," which was related to the site clearing activities for the Brownlee Pad ("Timbering Application"). SWN requested that the Timbering Application be placed on the Board's September 7, 2021 agenda with the continued Brownlee Pad Application since they were related. The City advised that it was unable to put the Timbering Application on the September 7, 2021 agenda. The City instead placed the Timbering Application on the Board's October 5, 2021 agenda. (A. 1839-1830).

[7] Messrs. DiBartolomeo, Bowman, Fracasso, Ed Zawatski, Ed W. Zawatski, and Ms. Barkley reiterated the same traffic, environmental, and economic development concerns and opinions as they did at the previous Hearing. *Id.* Other persons who made public comments to the Board included George Hvizdak, Eli Dragisich, Jeanne Czemek and Tom Zielinsky. *Id.*

that Brownlee Pad would negatively impact property values. (A. 1307). [8] SWN objected to the comments and letter. *Id.* Again, the Board did not acknowledge any of SWN's objections. *Id.* ("I recognize this is public comment, but we [object to Mr. Jamie Guida's letter] on hearsay grounds."); (A. 1330-31) ("We're going to be hearing comment and testimony [from] somebody who's not qualified to speak to [such subjects]").

Next, Mark Colantonio, a personal injury attorney, was introduced by Mr. Gurrera as being present on behalf of the City. (A. 1346-48). Mr. Colantonio outlined a litany of issues he believed resulted in the Traffic Study's findings being inaccurate, ultimately concluding that SWN's Traffic Study was "worthless." *Id.* When questioned as to his qualifications, Mr. Colantonio admitted that he was not a licensed engineer. (A. 1349). Nevertheless, SWN requested the opportunity to continue the hearing in order prepare a response to Mr. Colantonio's and others' opinions and statements in opposition to the Application. Again, the Board summarily refused to allow SWN to present a rebuttal case at the Board's next meeting. (A. 1353-54) ("***There were a lot of issues raised today. We would like a rebuttal -- a chance for a rebuttal, to come back next []*** month…") (emphasis added).

Next, the City presented testimony from Mr. Caleb Knowlton, who identified himself as Program Manager, Planning and Development Department, for the City. Mr. Knowlton opined that the Application did not comply with the general conditions for all conditional uses set for in Section 3.6.3.1 of the UDO. (A. 1399-1403). Without offering any evidentiary support, Mr. Knowlton testified that the Application was not complete, that the Brownlee Pad would have detrimental effects on surrounding property values, that the Brownlee Pad would not be consistent

[8] Mr. Jamie Guida is the brother of attorney Dan Guida who represents the Water Board and who entered his appearance in opposition to the Brownlee Pad. (A. 1547).

with the City's 2018 Comprehensive Plan ("Comp Plan"), and that the Brownlee Pad would hinder development on adjacent parcels. *Id.*

Contrary to Mr. Knowlton's testimony, SWN submitted each and every document specified in the UDO's conditional use application requirements. (A. 585). Indeed, SWN went well above and beyond the UDO's requirements to provide more than 240 pages of plans, studies and reports in support of the Application. (A. 570-892). At no point prior to the first hearing did any City representative advise SWN that its Application was in any way "incomplete." When questioned by SWN if he had ever notified SWN that its Application was incomplete in any way prior to the hearings, Mr. Knowlton responded that he had not. (A. 1391-92). Mr. Knowlton further testified that no aquifer or traffic studies are required as part of the conditional use application requirements. *Id.* When questioned about his qualifications, Mr. Knowlton testified that he graduated with a Bachelor's Degree in Political Science in 2019 and that he has been employed by the City for the past one and a half years. *Id.* His previous job was as a security guard. *Id.* He is not certified by the American Institute of Certified Planners. (A. 1388-90). He admitted that he has no formal education or training in the fields of law, land use planning, hydrology, geology, real estate appraisal or real estate development in general. *Id.*

Next, Mr. Mastrantoni stated that the Water Board was in opposition to the Application and provided a resolution which stated that the Water Board "stands opposed to the issuance of a conditional use permit for oil and gas drilling at the Brownlee property until a determination has been made by the Water Board's engineer that such drilling will not adversely affect the Ranney well and its associated aquifer." (A. 1280-82). He further presented a report written by the Water Board's third party engineer, Thrasher Engineering, which stated that "Thrasher cannot complete a review of SWN's conditional use permit application because of the insufficient information

provided in the application. As a result, at this time, Thrasher cannot recommend approval of the conditional use application." (A. 1021-22).

In response, counsel for SWN first requested that SWN be permitted to submit a Hydrogeologic Evaluation Report into evidence in order to rebut the Water Board's report. SWN had prepared the report in anticipation of the Water Board's opposition. Even though SWN's counsel had the report, *in his hand*, the Board summarily denied SWN's request to submit the report into the record, depriving SWN of its rights to due process. (A. 1540-41) ("However, we did anticipate some of those issues, and we do have a report that we'd like to submit into evidence prepared by Moody & Associates."). SWN then requested that the author of the report, Mr. Jeff Walentosky, *who was present with SWN's counsel at the hearing*, be permitted to testify and rebut the concerns regarding the aquifer. Again, the Board summarily denied SWN's request and deprived SWN of its rights to due process. *Id.*

In light of the variety of issues that were raised for the first time at the September 7, 2021 hearing, SWN requested several times to continue the hearing to the following month given that the Timbering Application was already on the Board's October 2021 agenda. (A. 1540) ("As I had mentioned earlier, ***we will be here next month***, and we would like the ***opportunity to present a rebuttal case*** at next month's zoning hearing.") (emphasis added); (A. 1542) ("We're not asking for 40 hearings. ***There's always a right to rebuttal***. It's our application. ***There are a lot of issues that were just raised for the first time today. And how would we – anticipate everything that's going to be raised?***") (emphasis added); (A. 1543) ("[W]e put on our case, you put on your case, ***we have a chance to respond to it. We're going to be here next [] month.***")(emphasis added); (A. 1550) ("We're not asking to continue it indefinitely. These are values that are preempted by state law. And we're still here trying to work with the city.").

At the conclusion of the hearing, the Board voted to deny SWN's request for a continuance. The Board then further voted to summarily deny the Application. (A. 1548-1553).

3. The Board's October 1, 2021 Decision

On October 1, 2021, the Board issued its written decision denying the Application. The Board found that SWN's Traffic Study was flawed for a number of reasons based on Mr. Colantino's testimony, none of which were based upon the opinion of a professional traffic engineer.[9] *See* Findings Nos. 12-30, 34-40 (A. 103-106).

With respect to noise, the Board found that the Brooke County Noise Ordinance did not apply and that Mr. Webb failed to give testimony regarding noise which would be generated from the subject site to Woodlawn Estates and Beacon Drive Ext. notwithstanding the clear testimony and evidence to the contrary. *See* Findings Nos. 31-32; (A. 104). The Board found that the Application failed to address the potential impact of the conditional use on the groundwater aquifer and related matters, notwithstanding SWN's attempts to provide such information at the hearing. *See* Board Decision Findings No. 33; (A. 105). Lastly, the Board made several conclusory findings that SWN failed to meet its burden with the UDO's general criteria for all conditional uses and

[9] Those baseless concerns included: (1) the traffic counts were taken on "February 17, 2021, when it was about 8 degrees" during the COVID-19 epidemic and related restrictions; (2) traffic on Three Springs Drive was not reflective of pre-COVID levels; (3) the baseline traffic count in the Traffic Study did not take into account increased traffic from development of the Three Springs Drive area since 2017 (such as the old Wal-Mart property) and future development (such as Aldi, Big Lots, and Park Drive Development); (4) the traffic count baseline was erroneous; (5) the traffic generation data provided by SWN was not independently verified or analyzed by Mr. DePaolis; (6) the Traffic Study did not state the origins or return destinations of the water, sand and other trucks going to and leaving the subject site; (7) the traffic data from DOH for Three Springs Drive was collected in September and October 2017; (8) the Traffic Study assumed that water, sand and other trucks would be going to and leaving the subject site from different locations instead of the same route; (9) the Traffic Study used a growth rate of 1.082% per year; (10) the traffic count growth rate in the Traffic Study did not take into account increased traffic from the future development of the Three Springs Drive area, such as Aldi, Big Lots and the Park Drive Development; (11) the Traffic Study failed to properly calculate time delays at red lights on Three Springs Drive since it did not use timing cards from the DOH; (12) traffic congestion in the Three Springs area would worsen and additional stress would be placed on other existing infrastructure; and (13) Mr. Colantonio's testimony on the Traffic Study was credible. *See* Findings Nos. 12-30, 34-40 (A. 103-106).

concluded that the Application be denied for the same reasons. *See* Findings Nos. 41-51; Conclusions Nos. 1-9; (A. 106-107).

E. The Circuit Court Proceedings

1. Appeal of the Board Decision and Preemption Complaint

On October 29, 2021, SWN filed a Petition for Writ of Certiorari ("Appeal") seeking an order reversing the Board's Decision. (A. 70). At that time, SWN also filed a Complaint seeking an order enjoining the City from enforcing its regulations because they are preempted by state law ("Complaint"). (A. 71). On March 14, 2022, the Circuit Court entered an Order transferring and consolidating the Complaint and Appeal into one civil action. On August 23, 2022, the Court entered an order denying SWN's preemption claims ("Preemption Order").[10] The Preemption Order lifted a portion of the Circuit Court's prior order, which had stayed the proceedings except with respect to the parties' briefing on state law preemption issues.

On November 23, 2022, SWN filed a Motion to Schedule Hearing to Take Additional Testimony and Evidence. In that motion, SWN requested an evidentiary hearing so that the Circuit Court could take additional evidence to complete the record pursuant to W.Va. Code § 8A-9-6(b). On December 8, 2022, the Circuit Court issued an order granting SWN's Motion and later set a hearing date for April 17, 2023 ("Evidentiary Hearing").

[10] SWN appealed the Preemption Order to the ICA, which was docketed at 22-ICA-83. On November 1, 2023, the ICA entered the ICA Preemption Decision and found that the City's ordinances purporting to regulate oil and gas activities, including the UDO, were entirely preempted by the West Virginia Oil and Gas Act. The City has appealed the Preemption Decision to this Court, which is docketed at No. 23-753. If that appeal is denied, this appeal is rendered moot because the Preemption Decision provides that the City may not regulate SWN's oil and gas activities through a local ordinance, rendering the conditional use denial a nullity.

2. The Evidentiary Hearing to Take Additional Evidence

On April 17, 2023, the Circuit Court held the third and final hearing on the Application. SWN presented its rebuttal case through Mr. Jackson, Mr. DePaolis and Mr. Walentosky, Moody & Associates, Inc.[11] At no point prior to or during the Evidentiary Hearing did the Court indicate it would be limiting SWN's testimony to certain subjects.

In order to rebut the concerns raised for the first time at the second Board hearing, Mr. Jackson first testified that SWN provided Mr. DePaolis with traffic information for the Brownlee Pad, which was based off of the historical data and operations for SWN's 181 well pads in the Southwestern Appalachian Division. (A. 1846). He explained that the numbers were "very conservative" because it assumed that all of the water during the completions phase would be trucked to the Subject Property. (A. 1845). He further explained that SWN typically pipes its water to its sites. When water is piped to the well site it removes approximately 70 percent of the traffic from the completions phase. (A. 1846). He further testified that SWN is removing water from Harmon Creek and has identified a water line for the Brownlee Pad. SWN anticipates that it should be able to pipe all of the water to the Subject Property. (A. 1846).

Mr. Jackson testified that, following the hearings on the Application, WVDEP issued the WVDEP Permit for the Brownlee Pad following a lengthy public comment period. As such, SWN now has all of the required state permits in place to commence activities at the Brownlee Pad. *See* (A. 1606, 1852). With respect to the Comp Plan, Mr. Jackson testified that he had reviewed Objective 2.3, which is in reference to the Three Springs/Park Drive area. (A. 1744) ("Future development should be managed to avoid worsening traffic congestion and additional stress on

[11] SWN further submitted the following items into evidence: Expert Hydrogeologic Evaluation Report (A. 1555); WVDEP Well Permit; DOH Road Permit (A. 1638); pictures of surrounding properties (A. 1657); the Comp Plan (A. 1661); and information for Evergreen Industrial and Pietro Fiorentini (A. 1803).

other existing infrastructure."). He explained that the traffic associated with the Brownlee Pad would comply with this objective because the permanent future traffic volumes once the Brownlee Pad is in production would be "only a few trucks a day." (A. 1851).

Mr. DePaolis then comprehensively addressed and debunked all of the reasons why Mr. Colantino's testimony with respect to the Traffic Study were erroneous. He explained that trip generation data is typically obtained from the ITE Trip Generation Manual, which is a collection of various land use studies that have been submitted to the ITE. (A. 1881). He further explained that the ITE does not have trip generation for oil and gas development, which is not uncommon. (A. 1883-84). In these situations, Mr. DePaolis explained that it is industry standard to obtain data from the operator's historic operations. *Id.* Mr. DePaolis explained that the purpose of studying an intersection is to "assist the overall development impacts on that intersection to determine if traffic generated by the development would necessitate any type of improvements to the intersection to accommodate that traffic." (A. 1884). The existing capacity of an intersection is graded on levels of service A through F. If the proposed traffic from a development changes the level of service at an intersection, the project developer then is typically responsible for improvements to bring that level of service back to the pre-development level of service, but the project can then still proceed. (A. 1884-85).

With respect to the Mr. Colantino's assertion that the Traffic Study was flawed because the temperature was allegedly 8 degrees at some point on February 17, 2021, Mr. DePaolis testified that the temperature does not affect traffic movement counts. (A. 1887-88). He further testified that the ITE and the Transportation Research Board's Highway Capacity Manual do not address the appropriate temperatures that are acceptable to take traffic counts. *Id.* In his professional opinion, the temperature on February 17, 2021 did not make the traffic count baseline erroneous.

Id. With respect to the Mr. Colantino's assertion that the Traffic Study was flawed because of the COVID-19 pandemic, Mr. DePaolis testified that there was no stay-at-home order in effect on February 17, 2021. (A. 1888-89). He further explained, in general, that he performed several other traffic studies during the COVID pandemic. *Id.* In his professional opinion, the COVID-19 pandemic did not make the traffic count baseline erroneous. *Id.*

Mr. DePaolis testified that the Traffic Study did not only rely on the traffic counts taken on February 17, 2021 to determine the capacity calculations at the study intersections. (A. 1890-91). He testified that he also used historical WVDOT data from 2017, which was the last time data for the studied intersections was available. *Id.* The DOH also provided CEC with a background traffic growth rate of 1.082 percent per year. *Id.* He testified that the 2017 traffic volumes, when applied to the 1.082 growth rate, was consistent with the actual traffic counts taken on February 17, 2021. *Id.* Mr. DePaolis testified that he also reviewed the City's Comp Plan, which provided for an annual traffic growth rate for the Three Springs/Park Drive area of 1.25 percent per year. *Id;* (A. 1746). He testified that for all intents and purposes, that is consistent with the DOH's growth rate for the same area. (A. 1890) ("You're talking about 1.082 percent per year versus 1.25 percent per year, that's a difference of .17 percent per year or one car or one-and-a-half, two cars, for every thousand cars that goes through the intersection."). In Mr. DePaolis's expert opinion, not only were the actual traffic counts consistent with the DOH's traffic counts and annual growth rate, but also the City's own projected growth rate for the very same area. *Id.*

With respect to the Mr. Colantino's assertion that the Traffic Study was flawed because Three Springs Crossing, Aldi's and Big Lots developments occurred after the WVDOT studied the area in 2017, Mr. DePaolis explained that these are the types of developments that are contemplated in the annual growth rates used by both the DOH and the City. In his professional

opinion, the traffic associated with the Three Springs Crossing, Aldi's and Big Lots developments did not render his baseline traffic counts erroneous. (A. 1891-92). With respect to the Mr. Colantino's assertion that the Traffic Study was flawed because the DOH's timing cards were not reviewed, Mr. DePaolis explained that timing cards are summaries provided by the DOH that indicate the programming inside the cabinet of the traffic signal that controls the operation of the traffic signal. *Id.* In his professional opinion, the Traffic Study was not flawed because they "used actual observed traffic signal timings at the intersection, which means [CEC] saw the phasing, the green times, the yellow and all red times that were present during the counts" and "not theoretical timings that are shown on the timing card." As he explained, actual field measurements are more reliable information than the timing cards. *Id.*

Mr. DePaolis further reiterated that the Traffic Study assumed that all of the water would be trucked in during the completions phase, which was the most intensive part of the process and that all of the traffic would not change the level of service at any of the three study intersections in the Traffic Study. (A. 1893-94). In his professional opinion, the results of the Traffic Study do not change if all of the water and traffic is only utilizing two of the three studied intersections because all the vehicles were assumed to go through the intersection, regardless of direction. (A. 1893). In support of his expert opinion, Mr. DePaolis cited to the issuance of the DOH Road Permit. He explained that if the DOH believed the traffic associated with the Brownlee Pad would have a significant impact the DOH would have required a traffic impact study to confirm that no improvements would be required to accommodate the development traffic prior to issuing the permit. (A. 1638, 1894-95).

Mr. DePaolis testified that he also does work as a transportation planner for municipalities. (A. 1913). He testified that he reviewed Objective 2.3 of the Comp Plan and that in his professional

opinion, the traffic associated with the production phase of operations will not worsen traffic congestion nor will it add additional stress on the existing infrastructure. (A. 1894-96). He further testified that the traffic would not negatively affect future development of this area as a mixed-use commercial hub. *Id.* On cross-examination, Mr. DePaolis was asked if he had reason to doubt the comments of the Fairfield Inn Suites ownership that the Brownlee Pad development would harm their business and the Park Drive development owners' opinions that they would either not be able to develop or would have difficulty in developing their adjacent developments because of the proposed development. (A. 1913-15). Mr. DePaolis answered as follows:

> THE WITNESS: Yes, I do have reason to doubt that.
>
> BY MR. SIMONTON:
>
> Q. What reason is that?
>
> A. Because, again, we analyze the actual operation. We analyzed the impacts to the roadways in front which showed that there are negligible impacts on the roadway for, again, a small three-to-four week period. ***I just do not think that a three-to-four week period is going to negatively impact somebody's overall business, especially when we're showing no impact during that three-to-four week period***.

(A. 1914) (emphasis added). Mr. DePaolis further explained that the increased traffic was only for the completions phase. When the permanent long-term traffic volumes for production is going to be a few trucks a day the aforementioned concerns were unfounded. (A. 1915-16).

SWN next presented the testimony of Mr. Walentosky, who is a professional geologist. (A. 1917). His primary focus for the past 32 years has been hydrogeology and the movement of groundwater through soils and bedrock. (A. 1917-1919). He is one of the preeminent experts in this field. In 2019, he was appointed to the Oil and Gas Technical Advisory Board for the Pennsylvania Department of Environmental Protection ("PADEP"). (A. 1574). His role in this capacity is to assist and offer advice to the PADEP on regulations, proposed regulations, proposed

technical guidance and policy matters. (A. 1917-1919). Mr. Walentosky presented the expert report that he intended to present to the Board at the September 7, 2021 hearing. (A. 1255). As he explained, in preparing the report, he reviewed the City's water supplies, the location of the Brownlee Pad, drilling plans, the local geology, hydrogeology, the West Virginia Department of Health and Human Resources Bureau for Public Health documentation on the City's water supplies and the City's source water assessment reports. (A. 1921). He explained that the Brownlee Pad is hydraulically isolated from the City's public water supply system because water discharging from the Brownlee Pad drains into the watershed located downstream of the water supply system. (A. 1925-26). In addition, there are multiple hydrogeologic divides that prevent any potential contaminant migration to the City water supply system from the proposed Brownlee Pad. *Id*; (A. 1555).

In addition to drawing water from the Ohio River, the City's public water supply draws groundwater from the unconsolidated sediments at the bottom of the Ohio River. (A. 1555, 1926-28). The Brownlee Pad does not intercept this alluvial aquifer system, which is confined to the Ohio River floodplain. *Id.* Additionally, the fractured rock aquifer system that underlies the Brownlee Pad is hydraulically downgradient of the City's public water supply, which eliminates the possibility of groundwater communication between the two sites. *Id.* The Marcellus Shale is separated by approximately 4,990 feet of bedrock at the proposed Brownlee Pad. This serves as a nearly one-mile thick aquiclude, which prevents upward migration of gas well related fluids (primarily brines and hydrocarbons) into the relatively shallow river aquifer system. (A. 1927).

Multiple "Source Water Protection Areas" have been delineated for the protection of the City's public water supply. (A. 1555, 1930-31). These include a "Wellhead Protection Area" for the Ranney collector well in addition to a "Zone of Critical Concern," a "Zone of Peripheral

Concern," and Watershed area for the surface water intake. The proposed Brownlee Pad is outside of all four of these protection areas. *Id.* Further, the center of the proposed pad is located greater than 3.3 miles east of the City's public water supply sources. Mr. Walentosky also explained that site controls, such as a liner over the entire well pad and the construction of an underdrain system that will divert rainwater into two stormwater ponds, will be utilized to ensure that spills or releases from the gas well activities can be contained from leaving the well pad. *Id.* he testified that he had reviewed Mr. Mastrantoni's comments, as provided for in the Decision, and explained why his concerns were unsubstantiated. (A. 1931-32). In Mr. Walentosky's expert opinion, there will be no impacts to the City's public water supply sources resulting from the proposed natural gas development activities at the Brownlee Pad. (A. 1562).

Despite ample opportunity to do so, the City did not present *any* witnesses or testimony whatsoever to rebut the testimony provided by SWN's witnesses at the Evidentiary Hearing. At the conclusion of the hearing, the Circuit Court directed the parties to submit proposed findings of fact and conclusions of law, which after an agreed upon extension, were finally due on July 28, 2023.

3. The Circuit Court Decision and Appeal to the ICA

Less than three weeks later, on August 16, 2023, the Circuit Court issued the 57-page Circuit Court Decision, which affirmed the Board's denial of the Application. The Court copied nearly verbatim the proposed findings submitted by the City.[12] Despite ostensibly agreeing to hold the Evidentiary Hearing because SWN's due process rights were violated, the Court devoted a majority of its discussion to a lengthy survey of extra-jurisdictional and federal case law regarding

[12] Given the short time in which it considered the voluminous record in this case, the length of the decision, and the verbatim recitation of the City's proposed findings, the Circuit Court's predisposition in this matter could not be clearer.

due process principles, ultimately concluding that SWN's due process rights were not in fact violated. The Circuit Court Decision further erroneously refused to consider most of the additional evidence presented by SWN at the Evidentiary Hearing because such testimony was "was not a subject on which SWN requested rebuttal or additional evidence before the BZA," which is an assertion completely belied by the record. (A. 35). Finally, despite the compelling expert testimony and substantial evidence presented by SWN demonstrating compliance with all the UDO's conditional use standards, the Circuit Court erroneously found SWN had not met its burden. Rather, the Court somehow concluded that the Board's Decision denying the Application, which relied entirely on wildly unqualified non-expert and speculative lay testimony, was supported by "substantial evidence."

On September 6, 2023, SWN timely appealed the Circuit Court Decision to the ICA. By Memorandum Decision dated April 22, 2024, after the matter had been fully briefed, the ICA dismissed SWN's appeal of the Circuit Court's decision on the grounds that the appeal involved an "extraordinary remedy," over which the ICA does not have jurisdiction pursuant to W. Va. Code § 51-11-4(d)(10). On May 24, SWN timely appealed the ICA's Memorandum Decision to this Court. SWN now asks that this Court to reverse the ICA' Memorandum Decision, but nevertheless exercise its powers pursuant W. Va. Code § 51-11-4(b)(1) and Rule 1(b) to assume jurisdiction over the merits of this appeal and enter an order reversing the Circuit Court Decision.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure, SWN respectfully submits that oral argument is appropriate in this case under Rule 20. The issue of whether a zoning board can blatantly ignore substantial evidence presented by an applicant to improperly deny a conditional use application is one of fundamental public importance. *See* W.Va. R. A. P. 20(a)(2).

SUMMARY OF ARGUMENT

Uses permitted by conditional use approval are permitted as of right, provided that an applicant demonstrates compliance with all of an ordinance's applicable conditional use criteria. Through compelling and competent expert testimony, SWN demonstrated in exacting detail compliance with all of the applicable requirements. The City and objectors provided precisely zero expert or non-speculative testimony in opposition the Application. Therefore, SWN is entitled to approval of the Application and the Board's Decision to deny the Application was not supported by substantial evidence. Additionally, the Circuit Court erred by finding that the Board had not deprived SWN of its due process rights and by failing to consider most of SWN's evidence introduced at the Evidentiary Hearing, despite the fact the Circuit Court had already agreed that SWN's due process rights had been violated by agreeing to hold the Evidentiary Hearing in the first place. Accordingly, the Circuit Court abused its discretion by affirming the Board Decision and the Circuit Court Decision should be reversed.

ARGUMENT

I. Standard of Review

West Virigina appellate courts apply an abuse of discretion standard in reviewing a circuit court's judgment on certiorari upon its review of a lower tribunal's order." *Bd. of Zoning Appeals of Town of Shepherdstown v. Tkacz*, 234 W.Va. 201, 203, 764 S.E.2d 532, 534 (2014). In addition, as the West Virginia Supreme Court of Appeals explained in *Webb v. West Virginia Board of Medicine,* 212 W.Va. 149, 569 S.E.2d 225 (2002), "[o]n appeal, [an appellate court] 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." The standard that applied to the Circuit Court's review of the Board's decision in this matter is set is set forth in *Corliss v. Jefferson Cnty. Bd. of Zoning Appeals*, 214 W.Va. 535, 539–40, 591 S.E.2d 93, 97–98 (2003), which held

that, "[w]hile 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."

The West Virginia Supreme Court has explained that "the plainly wrong standard of review is a deferential one, which presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." *Tkacz*, 234 W. Va. 201, 764 S.E.2d 532, 538 (2014). "Substantial evidence…is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Maplewood Estates Homeowners Ass'n v. Putnam Cnty. Planning Comm'n*, 218 W. Va. 719, 723, 629 S.E.2d 778, 782 (2006). Thus, in the instant case, the Court must determine whether the Circuit Court abused its discretion by: (1) finding that the Board Decision was not supported by substantial evidence; and/or (2) by applying an erroneous principle of law.

II. Legal Framework for Conditional Use Proceedings

A conditional use does not represent a deviation from the terms of the zoning ordinance. Rather, it is a use that is permitted, subject to compliance with the specific objective requirements of the zoning ordinance and any reasonable conditions imposed by the board. *See In re Skeen*, 190 W. Va. 649, 441 S.E.2d 370 (1994) ("A…conditional use, unlike a variance, does not involve the varying of an ordinance, but rather compliance with it. When it is granted, [ ] a conditional use permits certain uses which the ordinance authorizes under stated conditions…In other words, whereas a variance relates primarily to the allowance of a use of a particular property prohibited in the particular zone, ***the right to a special exception or conditional use automatically exists if the Board finds compliance with the standards or requisites set forth in the ordinance***.**"**) (emphasis added); *Harding v. Bd. of Zoning Appeals*, 159 W. Va. 73, 219 S.E.2d 324 (1975) ("If

the board finds compliance with the standards or requisites set forth in the ordinance, ***the right to the exception exists***, subject to such specific safeguarding conditions as the agency may impose by reason of the nature, location and incidents of the particular use.") (emphasis added).

Thus, where an applicant provides substantial evidence to demonstrate compliance with the objective terms of the zoning ordinance, it is entitled to approval of a conditional use application, unless objectors demonstrate that the proposed use will cause detrimental effects on the community beyond those normally associated with that type of use. Accordingly, a board of zoning appeals' decision denying a conditional use application must be overturned where the applicant has provided substantial evidence to address each of the conditional use criteria in the zoning ordinance, and no objector has offered credible non-speculative evidence rebutting the same. *See Far Away Farm, LLC v. Jefferson Cnty. Bd. of Zoning Appeals*, 222 W.Va. 252, 259, 664 S.E.2d 137, 144 (2008) (holding that a board of zoning appeals erred in denying a conditional use application where the applicant provided evidence addressing each of the conditional use criteria and the record showed that "no evidence other than anecdotal experiences related by some members of the public was presented at the public hearing to contradict [applicant's] traffic study"); *Corliss*, 591 S.E.2d at 99 (upholding a board of zoning appeals approval of a conditional use application, where the applicant "did in fact address each of the twenty-three areas of required support data"); *In re Skeen*, 441 S.E.2d at 372 (overturning the denial of a conditional use application where, despite the applicant's satisfaction of all the criteria for "home occupation" uses, the board denied the application).

Furthermore, it is improper for a board of zoning appeals to deny a conditional use application based upon speculative concerns raised by the public. *See Id.* (reversing the board of zoning appeals denial of a conditional use application where "the Board based its denial on a

ground wholly separate from the requirements set out in [the zoning ordinance], namely the virtual unanimous opposition of the neighboring landowner"); *Far Away Farm*, 664 S.E.2d at 145 ("[T]he record shows that no evidence other than anecdotal experiences related by some members of the public was presented at the public hearing to contradict [applicant's] traffic study. ***Anecdotal evidence and mere speculation and conjecture about potential traffic problems is simply insufficient to overcome expert testimony***.") (emphasis added).

Of particular relevance to the instant case is the West Virginia Supreme Court of Appeal's seminal decision in *Far Away Farm*, *supra.* In that case, a developer sought to obtain conditional use approval for a 122.88 acre, 152 home housing development, with a ten-acre lot for an existing farmhouse and six acres for a trail and park. After public hearings before the zoning board of appeals ("BZA") where the applicant presented expert testimony with respect to traffic and other requirements, the BZA denied the application, concluding that the development as proposed was too dense to be compatible with surrounding neighborhoods and that the roads were inadequate for the increased traffic that would result from the development. *Id.* [13]

In reversing the denial of the conditional use application, the Supreme Court explained:

> [T]he record shows that no evidence other than anecdotal experiences related by some members of the public was presented at the public hearing to contradict [Applicant's] traffic study. ***Anecdotal evidence and mere speculation and conjecture about potential traffic problems is simply insufficient to overcome expert testimony.*** Also, with respect to the other unresolved issues which primarily concerned the construction and design of the development and the history of the property, the record shows that no evidence was presented refuting or contradicting that presented by [Applicant]. ***In sum, [Applicant] addressed all the unresolved issues at the public hearing and its evidence was unrefuted. Accordingly, based upon all the***

[13] As here, at the public hearing on the conditional use application, the applicant "presented expert reports to show that [Applicant's] traffic would not create a significant amount of peak traffic impact on any of the four studied intersections and further, that the level of service for the intersections involved fully complied with the terms of the Subdivision Ordinance. [Applicant] also presented evidence that it was unlikely that its water system would interfere with the local wells and demonstrated that there were no sinkholes on its property. [Applicant] further showed that the property is not historically significant; that there are no previous recorded sites of archaeological significance on the property; and that the Phase 1 environmental report revealed nothing that could not be dealt with as the project progressed." *Id.*

> ***above, we find that [Applicant] complied with every requirement of the former Ordinance and therefore, is entitled to the permit.***
>
> In reaching our decision in this case, we were certainly mindful that many members of the public are concerned about the dangers of over development and the strain placed on local resources by an expanding population. ***However, zoning ordinances must be interpreted to balance the rights of individual property owners with the needs of the community. Such ordinances can only be effective if they are applied in an even-handed manner with the utmost adherence to the procedural rights of all parties…***[T]he evidence in the record shows that Applicant satisfied all of the requirements necessary to obtain the permit.

Id. at 145 (emphasis added). Thus, the Supreme Court's decision makes clear that a conditional use application must be approved if the objective requirements of the ordinance are met and there is no credible non-speculative rebuttal evidence proffered by objectors or the municipality.

III. SWN Demonstrated Compliance with all of the UDO's Conditional Use Criteria And Is Thus Entitled to Approval of the Application

The uncontroverted evidence introduced by SWN at the hearings demonstrates that it satisfied all of the UDO's specific requirements for Oil/Gas Extraction Uses, as well as the general welfare requirements for all conditional uses. The Board's factual findings supporting its determination that the Application did not comply with the UDO's requirements for "Oil/Gas Extraction" uses were "plainly wrong" because they were not supported by substantial evidence *See Corliss*, 591 S.E.2d at 97-98. Consequently, SWN is entitled to reversal of the Board's decision and approval of the Application.

A. The Application's Compliance With The UDO's Express Standards for "Oil/Gas Extraction" Uses

In designating "Oil/Gas Extraction" uses as conditional uses, the City Council determined that the Brownlee Pad is an appropriate use in the PDD District subject to the express standards set forth in the UDO. *See In re Skeen*, 190 W. Va. 649, 651, 441 S.E.2d 370, 372 (1994). There is no question that the Application complied with the only two express requirements for "Oil/Gas Extraction" set forth in the UDO. First, the proposed use is more than two hundred (200) feet from

any residential use. UDO § 9.6(24)(a). Second, the UDO also requires that all oil and gas exploration comply with state issued regulations. UDO § 9.6(24)(b). SWN's WVDEP Well Permit conclusively demonstrates that all of its activities shall comply with all applicable oil and gas laws and WVDEP rules and regulations. (A. 1606).

B. The Application's Compliance With The UDO's General Conditional Use Criteria

Despite the Board's and Circuit Court's assertions to the contrary, it is beyond dispute that the Application complies with all of the objective conditional use requirements in the UDO. As such, it should be presumed that all of the general criteria have been satisfied. For this reason alone, the Board's decision should be reversed. [14] However, as set forth below, even if the subjective general criteria were considered under the same burden as the express criteria, SWN nevertheless met its burden to show compliance with the UDO's general requirements.[15]

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[14] West Virginia does not have very extensive or well-developed case law with respect to the burdens required of an applicant and objectors during a conditional use proceeding. However, the general rule followed in most jurisdictions is that the applicant has the initial burden of demonstrating compliance with the specific objective terms of the zoning ordinance, at which time it is presumed to have satisfied the conditional use criteria related to the general welfare. If the applicant meets that burden, then the burden shifts to the objectors to demonstrate with a high degree of probability that the use will cause detrimental effects on the community beyond those normally associated with the use. *See, e.g., Northampton Area Sch. Dist. v. E. Allen Twp. Bd. of Sup'rs*, 824 A.2d 372, 377 (Pa.Cmwlth. 2003) ("In addressing an application for a conditional use, a zoning board must employ a shifting burden of persuasion. First, the applicant must persuade the board its proposed use satisfies the ordinance's objective criteria. Once it does so, a presumption arises that the proposed use is consistent with the general welfare. The burden then shifts to objectors to rebut the presumption by proving, to a high degree of probability, the proposed use will adversely affect the public welfare in a way not normally expected from the type of use. Mere speculation as to possible harm is insufficient."); *Habitat for Humanity of Moore County, Inc. v. Board of Com'rs of the Town of Pinebluff*, 187 N.C. A. 764, 653 S.E.2d 886 (2007) ("After Habitat made its prima facie showing of harmony by demonstrating the proposed development's conformity with the R-30 zoning…the burden was on the opponents of the permit to show that the proposed development was not in harmony with the area.").

[15] Thus, the Court's rejection of SWN contention "that [SWN] was entitled to a conditional use permit application because its Application asserted that it complied with technical standards for Oil/ Gas extraction uses such as setbacks" is of no consequence because, as set forth at length below, SWN nevertheless also showed compliance with all of the UDO's general conditional use criteria.

1. Compliance with Section 3.6.3.1.A – Compatibility with the City Comp Plan

First, SWN demonstrated that the Brownlee Pad is "compatible with the goals of the Comprehensive Plan." *See* UDO § 3.6.3.1.A. The only relevant objective, Objective 2.3 of the Comp Plan, provides that future development in the Three Springs/Park Drive area should be managed to avoid worsening traffic congestion and additional stress on other existing infrastructure. (A. 1746). Mr. DePaolis – who practices in the area of municipal transportation planning - testified that he reviewed Objective 2.3 of the Comp Plan and that in his professional opinion, the traffic will not worsen nor will it add additional stress on the existing infrastructure. He further testified that the traffic would not negatively affect future development of this area as a mixed-use commercial hub. (A. 1894-96). He further addressed each and every reason that the Board found that his Traffic Study was "flawed."[16]

2. Compliance with Section 3.6.3.1.B – Compatibility With Appropriate And Orderly Development Of The District

Next, SWN demonstrated that development of the Brownlee Pad would "be compatible with the appropriate and orderly development of the district, taking into consideration the location and size of the use, the nature and intensity of the operations involved...." *See* UDO § 3.6.3.1.B. SWN provided expert testimony from Mr. DePaolis that the intensity of the traffic for the

[16] *See* (A. 1887-88) (the temperature on February 17, 2021 did not make the traffic count baseline erroneous); (A. 1887-88) (the COVID-19 pandemic did not make the traffic count baseline on Three Springs drive erroneous); (A. 1889) (not only were the actual traffic counts consistent with the DOH's traffic counts and annual growth rate, but also the City's own projected growth rate for the very same area); (A. 1891-92) (the traffic associated with the Three Springs Crossing, Aldi's and Big Lots developments did not render his baseline traffic counts erroneous); (A. 1892) (the Traffic Study assumed that that all of the water would be trucked in during the completions phase, which was the most intensive part of the process and that all of the traffic would not change the level of service at any of the three study intersections in the Traffic Study); (A. 1891-92) (the Traffic Study was not flawed due to lack of review of DOH timing cards because actual field measurements are more reliable information than the timing cards); and (A. 1893) (the results of the Traffic Study do not change if all of the water and traffic is only utilizing two of the three studied intersections).

Brownlee Pad was compatible with and similar to the truck traffic generated nearby by the Rue 21 distribution center, Evergreen North America Industrial Services, Pietro Fiorentini and Wal-Mart. (A. 1805, 1834-36). Furthermore, the Subject Property consists of vast wooded and meadow areas with an open relatively flat grass field at the site entrance. (A. 634). Portions of the Subject Property have been timbered in the recent past. There are no streams or wetlands on the Subject Property. Of the total site comprised of 301.83 acres, the total disturbed area to construct the Brownlee Pad, Access Road and topsoil stockpiles is only approximately 26.10 acres. (App. 597, 634, 1611). Thus, SWN has demonstrated, through expert testimony and the other evidence it submitted at hearings, that the Brownlee Pad is compatible with orderly development in the surrounding district consistent with Section 3.6.3.1.B of the UDO.

3. Compliance with Section 3.6.3.1.C – Hinderance of Appropriate Development on Adjacent Lands

SWN also demonstrated at that development of the Brownlee Pad would "not hinder nor discourage the appropriate development and use of adjacent land and buildings…" *See* UDO § 3.6.3.1.C. SWN presented evidence that the Brownlee Pad will be located near the center of the large 301.81-acre tract of land that comprises the Subject Property and that the nearest occupied structure is located approximately 1,273 feet away. (A. 1851). SWN further demonstrated that the topography surrounding the Brownlee Pad consists of dense trees, open fields, ridges and valleys. (A. 587, 716). With respect to visual impacts on adjacent properties, the Subject Property is not at the same elevation with the other developments along Three Springs and Park Drives. The Pad sits approximately 150' lower than the other developments located on Park Drive and will not be visible from adjacent properties. (A. 1212-13). And, as set forth at length above in the discussion regarding compliance with the Comp Plan, SWN's traffic expert demonstrated conclusively that the Brownlee Pad will not have detrimental traffic impacts for adjacent properties.

4. Compliance with Section 3.6.3.1.D – Neighborhood Character and Surrounding Property Values

Next, SWN demonstrated at the hearings that development of the Brownlee Pad would safeguard neighborhood character and surrounding property values. *See* UDO § 3.6.3.1.D. Again, the nearest occupied structure is a single-family residence located approximately 1,273 feet away. (A. 1851). SWN further demonstrated that the topography surrounding the Brownlee Pad consists of dense trees, open fields, ridges and valleys. (A. 587, 716). Therefore, the evidence submitted by SWN sufficiently demonstrates that the Brownlee Pad will not be visible from surrounding commercial and residential properties, and will consequently safeguard the neighborhood character and surrounding property values. This is especially so after drilling and completions activities are concluded, at which time there will be no active use of the property, other than periodic maintenance trucks.

5. Compliance with Section 3.6.3.1.E – Environmental Impacts

SWN demonstrated with extensive testimony at the hearings that development of the Brownlee Pad would "not be offensive, dangerous, destructive of property values and basic environmental characteristics, or detrimental to the public interest of the community [and shall] not be more objectionable to nearby properties by reason of fumes, noise, vibration, flashing of or glare from lights, and similar nuisance conditions than the operations of any Permitted Use not requiring a Conditional Use permit in the district." *See* UDO § 3.6.3.1.E. With respect to environmental impacts of the Brownlee Pad, SWN presented expert witnesses to opine on noise, traffic and water impacts.

Mr. Webb testified as to the anticipated noise impacts of the proposed Brownlee Pad. Based on all project information provided by SWN and the analysis contained in his expert report, he testified that, within a reasonable degree of engineering certainty, it was his professional

opinion that the proposed Pad would comply with the noise regulations. (A. 897). He further testified that the noise effects would be temporary and will be negligible after construction operations, drilling and completions. *See* UDO § 3.6.3.1 (D); (A. 894-904).[17]

With respect to water impacts, SWN presented testimony and reports from Mr. Walentosky. (A. 1555). He explained that the Brownlee Pad is hydraulically isolated from the City's public water supply system because water discharging from the Brownlee Pad drains into the watershed located downstream of the water supply system. (A. 1925-26). Further, the center of the proposed Brownlee Pad is located more than 3.3 miles east of the public water supply sources. (A. 1922). The aquifer supplying the Ranney collector well is laterally and topographically separate from the bedrock aquifers through which the Pad gas wells would be installed. *Id.* As such, in Mr. Walentosky's expert opinion, there will be no impacts to water supply sources resulting from the proposed natural gas development activities. (A. 1555).

With respect to lighting, Mr. Laine testified that halo lights would be used at the Brownlee Pad and be pointed downward, which will prevent light from bleeding outside of the Subject Property. Furthermore, all lighting associated with the Brownlee Pad will be temporary and limited to the Subject Property. (A. 1205). All lighting will be directed away from adjacent properties and roadways. *Id.* Finally, once the wells are in production the Brownlee Pad will be less intense than most, if not all, Permitted Uses in the PDD District. (A. 1851).

[17] The Board's finding that Mr. Webb failed to give testimony regarding noise which would be generated from the subject site to Woodlawn Estates and Beacon Drive Ext. is plainly wrong. *See* Findings at 31-32. (A. 104-105). Mr. Webb testified as to noise impacts for all areas surrounding the Brownlee Pad, including the Woodlawn Estates and Beacon Drive areas. In addition, Mr. Webb's expert report, at Figures 5-7, clearly shows predicted decibel levels for all areas surrounding the Brownlee Pad. (A. 902-903). Furthermore, the Board's finding that the Brooke County Noise Ordinance did not apply is meaningless. Mr. Webb's testimony that the Brownlee Pad would comply with terms of the Brooke County Noise Ordinance merely demonstrates that the noise generated would be reasonable, regardless of whether the ordinance is enforceable in the City of Weirton.

6. Compliance with Section 3.6.3.1.F – Character of Use and Structures

Finally, SWN demonstrated at the hearings that "[t]he character and appearance of the [the Brownlee Pad], buildings, structures, and/or outdoor signs [will] be in general harmony or better, with the character and appearance of the surrounding neighborhood." *See* UDO § 3.6.3.1.F. SWN testified that there are no permanent buildings proposed for the site and outdoor signage will be limited to 911 Emergency Response Information and related informational signs at the site entrance. (A. 1211). The Brownlee Pad will not be visible from surrounding properties because of the recessed topography and large area of the site. (A. 832-36). Because the pad will not be visible unless accessing the site, it is in general harmony with the character and appearance of the surrounding area. Furthermore, SWN testified that, after the gas wells are completed, only the well heads and production equipment will remain on the Subject Property. (A. 596-627, 1200). Thus, after completion, the Brownlee Pad will be a passive use that creates no impact on the surrounding neighborhood in compliance with Section 3.6.3.1.F.

C. SWN is Entitled to Approval of the Application

Because SWN has demonstrated compliance with all of the UDO's express requirements for "Oil/Gas Extraction" uses and the general criteria for all conditional uses, the Application must be approved. *See In re Skeen*, 441 S.E.2d at 370 ("[T]he right to a special exception or conditional use automatically exists if the Board finds compliance with the standards or requisites set forth in the ordinance"); *Corliss*, 591 S.E.2d at 99 (upholding a board of zoning appeals approval of a conditional use application, where the applicant "did in fact address each of the twenty-three areas of required support data").

After SWN demonstrated compliance with the UDO's express and general conditional use criteria, the "burden then shift[ed] to any objectors to prove that the proposed use fails to meet the [conditional] use criteria or that the approval was otherwise not supported by substantial

evidence." *See American Law of Zoning*, 2 Am. Law. Zoning § 14:6 (5th ed.); *Northampton Area Sch. Dist. v. E. Allen Twp. Bd. of Sup'rs, supra.* The City and objectors in this case failed to present *any* non-speculative evidence or expert testimony to meet their burden to show that SWN failed to meet the conditional use criteria. Accordingly, the Board was plainly wrong when it made findings concluding that SWN has failed to meet its burden to demonstrate compliance with the UDO's conditional use standards.

Undeniably, this case is almost identical to the fact pattern in *Far Away Farm*, *supra*, where the Supreme Court upheld the reversal of a zoning board decision that was based upon anecdotal and non-expert testimony regarding traffic and water concerns.[18] There, as here, "the record shows that no evidence other than anecdotal experiences related by some members of the public was presented at the public hearing to contradict [Applicant's] traffic study. ***Anecdotal evidence and mere speculation and conjecture about potential traffic problems is simply insufficient to overcome expert testimony***." *Far Away Farm*, 664 S.E.2d at 145 (emphasis added). Also similar to this case, *Far Away Farm* dealt with water impact analyses, where the "[Applicant] also presented evidence that it was unlikely that its water system would interfere with the local wells and demonstrated that there were no sinkholes on its property." *Id*. In the absence of any non-speculative testimony to the contrary, the court in *Far Away Farm* found the applicant's testimony sufficient to demonstrate that there would not be detrimental impacts on the water supply. *Id*.

The Court in *Far Away Farm* sympathized with the concerns of the public, but ultimately concluded that:

> In reaching our decision in this case, we were certainly mindful that many members of the public are concerned about the dangers of over development and the strain placed on local resources by an expanding population. ***However, zoning ordinances must be interpreted to balance the rights of individual property owners with the needs of the community. Such***

[18] The Circuit Court failed to distinguish, or even mention, the *Far Away Farm* case.

> ***ordinances can only be effective if they are applied in an even-handed manner with the utmost adherence to the procedural rights of all parties…***[T]he evidence in the record shows that Applicant satisfied all of the requirements necessary to obtain the permit. Consequently, we must reverse the decision of the circuit court which affirmed the BZA's decision and direct the Jefferson County Planning and Zoning Commission to issue the permit to [Applicant].

664 S.E.2d at 145 (emphasis added). Therefore, as in *Far Away Farm*, because SWN demonstrated compliance with all of the conditional use criteria and objectors failed to meet their burden to demonstrate otherwise, the Court must reverse the Circuit Court Decision.

IV. The Board's Decision Is Not Supported By Substantial Evidence

Despite SWN's extensive testimony in support of its Application, and the utter dearth of credible non-speculative testimony set forth in opposition thereto, the Circuit Court erroneously found that Board Decision as to each of the pertinent conditional use criterion was supported by substantial evidence. (A. 55-57). The Circuit Court is correct that substantial evidence is "such relevant evidence that a ***reasonable mind*** might accept as adequate to support a conclusion." *Maplewood Estates Homeowners Ass'n v. Putnam Cnty. Planning Comm'n*, 218 W. Va. 719, 723, 629 S.E.2d 778, 782 (2006) (emphasis added). However, simply put, no *reasonable* mind could genuinely come to the conclusion that the Board's findings were supported by competent relevant evidence in this case. Indeed, each of the citations to the record made by the Circuit Court to "substantial evidence" consists of speculative opinions of lay property owners, or to a person completely unqualified to testify to a given area of expertise.

By way of example, the Circuit Court specifically found that the Brownlee Pad was not compatible with and would negatively affect surrounding property values based upon the testimony of Mr. Knowlton. (A. 28-29, 54-55). Mr. Knowlton admitted that he had no formal education or training in the fields of law, land use planning, hydrology, geology, real estate appraisal or real estate development in general. Indeed, he testified that he graduated with a political science degree the year before and that he previously worked as a security guard.

Similarly, the Circuit Court *specifically* found that Mr. Colantonio, a personal injury attorney with no training in traffic engineering, provided substantial evidence to support the Board's determination that the use would have detrimental impacts on traffic. (A. 25-28, 56). Despite Mr. Knowlton's, Mr. Colantonio's and other lay objectors' lack of experience and knowledge in the areas in which they testified, the Circuit Court found that their testimony constituted "substantial evidence" sufficient to support the Board's decision to deny the Application because "[t]he Courts give great deference to the interpretation of planning and zoning codes by the bodies charged with enforcement of those codes… Any interpretation… should be considered appropriate unless it can be shown to be clearly erroneous." (A. 56).

While the Circuit Court is correct that the Board is afforded a certain level of deference in its interpretation of the UDO, the court failed recognize the bedrock principle that "when that interpretation is unduly restrictive and in conflict with the legislative intent, the agency's interpretation is inapplicable." *Far Away Farm*, 222 W.Va. at 256; 664 S.E.2d at 141 (citing Syl. Pt. 5, *Hodge v. Ginsberg*, 172 W.Va. 17, 303 S.E.2d 245 (1983)). Furthermore, the Circuit Court failed to recognize that, "[o]n certiorari, the circuit court is required to make an independent review of both law and fact in order to render judgment as law and justice may require." *Sams v. City of White Sulphur Springs*, 226 W.Va. 723, 725, 704 S.E.2d 723, 725 (2010). In this case, SWN did in fact demonstrate that the Board's interpretation was "erroneous" and "unduly restrictive" through the presentation of expert testimony that directly contradicted that of the lay objectors. In finding that the Board's decision was supported by substantial evidence, the Circuit Court gave undue deference to the Board and capriciously disregarded SWN's mountain of substantial evidence. Indeed, if the Circuit Court's decision is allowed to stand in this case, it would render the purpose of appellate review of conditional use decisions entirely pointless in West Virginia,

essentially providing a "rubber stamp" to any conditional use denial where there is *any* opposing testimony to an application.[19]

Accordingly, because objectors in this case did not provide a scintilla of non-speculative or competent testimony, this Court should determine that the Board Decision is not supported by substantial evidence and reverse the Circuit Court Decision.

V. SWN's Due Process Rights Were Violated and the Circuit Court Erred by Not Considering Relevant Testimony from the Evidentiary Hearing

Finally, with respect to the level of due process that is required to be afforded to an applicant during a conditional use proceeding, when considering a conditional use application, a board of zoning appeals is "an administrative agency, acting in a quasi-judicial capacity." *Wolfe v. Forbes*, 159 W. Va. 34, 45, 217 S.E.2d 899, 906 (1975). In the context of a conditional use application, "due process requires a hearing before an impartial and neutral tribunal, over which a disinterested adjudicator presides." *Rissler v. Jefferson Cnty. Bd. of Zoning Appeals*, 225 W. Va. 346, 352-53, 693 S.E.2d 321, 327-28 (2010). It is an essential component of procedural fairness that the defendant have an opportunity to be heard and to present evidence. *See Clay v. City of Huntington,* 184 W. Va. 708, 711, 403 S.E.2d 725, 728 (1991); *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). In *North v. West Virginia Board of Regents* the West Virginia Supreme Court of Appeals set forth the standard of procedural due process required in administrative proceedings. In that case, the Court held that, "due process is met when an aggrieved party is afforded: a formal written notice of charges; ***sufficient opportunity to prepare to rebut the***

[19] If this case does not involve a set of facts where a zoning board's denial is not supported by substantial evidence, it is difficult to imagine a scenario where a denial could *ever* be overturned based on a substantial evidence analysis. Here, the Circuit Court relied entirely on lay testimony, and gave the *most weight* to: (1) a personal injury attorney who opined on traffic issues and; (2) a former security guard that opined on land use, property value, and compatibility issues. This, despite the various expert reports and testimony offered by SWN to the contrary.

charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence on his own behalf, an unbiased hearing tribunal; and an adequate record of the proceedings." *North v. W. Virginia Bd. of Regents*, 160 W.Va. 248, 256, 233 S.E.2d 411, 417 (1977) (emphasis added).

During the second and final hearing before the Board, objectors presented a litany of unsupported speculations, letters and "reports" with respect to alleged detrimental impacts of the Brownlee Site. At the conclusion of the second and final hearing, SWN's counsel requested the opportunity to provide rebuttal evidence with respect to concerns raised by objectors at the second hearing. Despite the fact that SWN's expert geologist *was present and willing to testify* with respect to hydrogeological issues, the Board refused to allow his testimony. The Board further repeatedly refused to grant a continuance to allow SWN to respond to objectors' other concerns.

Ostensibly because SWN's due process rights were violated at the conclusion of the second hearing, the Circuit Court granted SWN's Motion to hold the Evidentiary Hearing to hear SWN's rebuttal evidence. But, even though it granted SWN's motion, the Circuit Court Decision confusingly found that "SWN has failed to establish that the BZA's administrative hearings denied it sufficient due process rights." (A. 52).

However, despite the Circuit Court's verbatim copying of the City's treatise on extra-jurisdictional and federal case law regarding the general principles of due process, SWN's procedural due process rights were plainly violated here under West Virginia law, where SWN was denied "sufficient opportunity to prepare to rebut" the objectors' unsubstantiated testimony. *See North v. W. Virginia Bd. of Regents, supra; Jordan v. Roberts, supra.* The Circuit Court plainly erred by finding that SWN's fundamental due process right to present rebuttal evidence was not

violated, especially where it has already agreed that SWN's due process claim had merit by granting SWN's motion to hold the Evidentiary Hearing.[20]

At the Evidentiary Hearing, SWN presented rebuttal testimony from Mr. Jackson, Mr. DePaolis and Mr. Walentosky and submitted 6 additional items, all of which were accepted into evidence. (A. 1638). Prior to and during the Evidentiary Hearing, the Circuit Court never limited the scope of rebuttal testimony offered by SWN.[21] That notwithstanding, in the Circuit Court Decision, the Court refused to consider testimony from Mr. DePaolis and Mr. Jackson as the Evidentiary Hearing, or the additional exhibits, because the Circuit Court held that such testimony and evidence "was not a subject on which SWN requested rebuttal or additional evidence before the BZA at its September 7, 2021 hearing." (A. 35). This finding was plainly wrong and is completely belied by the record. SWN's request to present rebuttal evidence was never limited to a single subject or subjects. SWN's counsel could not have been clearer in his request at the conclusion of the hearing. *See* (App. 1540) ("As I had mentioned earlier, ***we will be here next month***, and we would like the ***opportunity to present a rebuttal case*** at next month's zoning hearing.") (emphasis added); (App. 1542) ("We're not asking for 40 hearings. ***There's always a right to rebuttal***. It's our application. ***There are a lot of issues that were just raised for the first time today. And how would we*** – ***anticipate everything that's going to be raised?***") (App.

[20] The Circuit Court's Decision is all the more puzzling, given that, as discussed below, it did choose to consider the rebuttal testimony of Mr. Walentosky related to water impacts. Therefore, it must have determined there was at least *some* deprivation of SWN's due process rights, or it would not have considered *any* of the testimony presented at the Evidentiary Hearing.

[21] After some discussion, the Court and parties appeared to entirely agree on the scope and purpose of the Evidentiary Hearing. (A. 1825) ("MR. SIMONTON: The standard on review is that the findings of fact have to be plainly wrong, or the legal principals applied have to be clearly erroneous. So I suppose to the extent that the evidence presented here could establish that, then it would be possible to rule on it…THE COURT: So [the witnesses will] just be responding to something specific that was maybe brought up that you didn't get a chance to rebut [at hearing]? MR. GALLAGHER: Yes…").

1543) ("[W]e put on our case, you put on your case, ***we have a chance to respond to it. We're going to be here next [] month.***") (emphasis added); (App. 1550).

Therefore, the record is clear that: (1) SWN's procedural due process right to present rebuttal evidence was blatantly violated at the conclusion of the Board's hearing; (2) SWN's counsel did not limit his request to present rebuttal testimony to any single subject; (3) the Circuit Court agreed SWN's due process rights were violated when it granted SWN's request for the Evidentiary Hearing and considered *some* of the rebuttal evidence; and (4) the Circuit Court never limited the scope of the Evidentiary Hearing. Accordingly, the Circuit Court abused its discretion by finding that SWN's due process rights were not violated and by failing to consider in its decision all of the rebuttal testimony presented by SWN at the Evidentiary Hearing.[22]

CONCLUSION

The ICA had clear jurisdiction to hear this appeal, which arises from the same transaction and occurrence over which it has already asserted jurisdiction. The record in this case indisputably shows that SWN demonstrated compliance with all of the UDO's express and general conditional use criteria, and that each and every person who testified in opposition was either unqualified to do so or voiced merely speculative opinions. Accordingly, SWN respectfully requests that this honorable Court reverse the ICA' Memorandum Decision, but nevertheless assume jurisdiction over the merits of this appeal and enter an order reversing the Circuit Court Decision.

[22] That notwithstanding, given the entirely speculative nature of the issues raised by objectors during the Board hearings, the Circuit Court should have reversed the Board Decision even absent SWN's rebuttal testimony at the Evidentiary Hearing.

Respectfully submitted,

Dated: June 28, 2024

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Exhibit A

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SWN PRODUCTION COMPANY, LLC, *Petitioner Below, Petitioner*, v. CITY OF WEIRTON BOARD OF ZONING APPEALS AND CITY OF WEIRTON *Respondents Below, Respondents*.	:	Case No. 24-

[PROPOSED] ORDER

On May 22, 2024, SWN Production Company, LLC, by counsel Shawn N. Gallagher and Kathleen Jones Goldman, Buchanan Ingersoll & Rooney LLP, filed a Motion Requesting that the Supreme Court of Appeals Obtain Jurisdiction Over Appeal Filed in the Intermediate Court of Appeals.

Upon consideration and review of said motion and any response thereto, the Court is of the opinion to and does hereby grant the motion. Pursuant to W. Va. Code § 51-11-4(b)(1) and Rule 1(b) of the West Virginia Rules of Appellate Procedure, the West Virginia Supreme Court of Appeals hereby obtains jurisdiction over the appeal docketed with the Intermediate Court of Appeals at Docket No. 23-ICA-405.

This Court shall review the briefs already filed with the Intermediate Court of Appeals at Docket No. 23-ICA-405 and render a decision thereon.

Attest: _____
Clerk of Court

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SWN PRODUCTION COMPANY, LLC, *Petitioner Below, Petitioner,* v. CITY OF WEIRTON BOARD OF ZONING APPEALS AND CITY OF WEIRTON *Respondents Below, Respondents.*	:	Case No. 24-

MOTION REQUESTING THAT THE SUPREME COURT OF APPEALS OBTAIN JURISDICTION OVER APPEAL FILED IN THE INTERMEDIATE COURT OF APPEALS

Pursuant to W. Va. Code § 51-11-4(b)(1) and Rule 1(b) of the West Virginia Rules of Appellate Procedure, Petitioner, SWN Production Company, LLC ("SWN"), by and through its undersigned counsel, hereby files the within Motion Requesting that the Supreme Court of Appeals Obtain Jurisdiction Over Appeal Filed in the Intermediate Court of Appeals ("Motion"). In support thereof, SWN states as follows:

I. Introduction

With this Motion, SWN requests that the Court exercise its Rule 1(b) powers to obtain jurisdiction over SWN"s appeal ("ICA Appeal") to the Intermediate Court of Appeals ("ICA"). The ICA Appeal arises from a Brooke County Circuit Court order affirming the denial of SWN"s conditional use application ("Application") to construct a natural gas well pad in the City of Weirton ("City"). On April 22, 2024, after the appeal was timely docketed at Docket No. 23-ICA-405 and fully briefed, the ICA entered an order dismissing the ICA Appeal ("Dismissal Order"), determining that the ICA appeal had been "improvidently docketed" because the ICA

lacked subject matter jurisdiction under the newly adopted West Virginia Appellate Reorganization Act, Va. Code §§ 51-11-1 *et seq*. ("Reorganization Act").[1]

On May 17, SWN filed a Notice of Appeal of the Dismissal Order to this Court, which has not yet been assigned a docket number. And, in addition to the SWN's Notice of Appeal of the Dismissal Order, the City's appeal of a related issue in this consolidated matter is currently before this Court at Docket No. 23-753 ("Preemption Appeal").

As asserted in SWN's Notice of Appeal to this Court, and as set forth below, the ICA does in fact have jurisdiction to hear its appeal in this consolidated civil action. But, whether or not this Court determines that the ICA has jurisdiction over the ICA Appeal, it should utilize its Rule 1(b) powers to assume jurisdiction over this case.[2] This Court's assumption of jurisdiction over the ICA Appeal would obviate the need for this Court's consideration of SWN's Notice of Appeal of the Dismissal Order and would permit this Court to concurrently dispose of both this matter and the Preemption Appeal on the merits. Thus, SWN respectfully requests that this Court obtain jurisdiction over the ICA Appeal and render a decision based on the parties' briefs already filed with the ICA.

[1] A copy of the Dismissal Order is attached hereto as **Exhibit A**.

[2] As set forth at length below, at the very least, the Reorganization Act has created legitimate ambiguity as to appellate jurisdiction over land use appeals in West Virginia, especially those that have been consolidated with other civil cases. Accordingly, dismissal of this case outright would result in serious injustice to SWN, where it timely filed and fully briefed the ICA Appeal.

II. Factual and Procedural Background

On October 29, 2021, SWN filed a statutory land use appeal styled as a Petition for Writ of Certiorari[3] ("Conditional Use Appeal") appealing the City of Weirton Board of Zoning Appeals' ("BZA") unlawful decision ("BZA Decision") to deny SWN's Application for conditional use approval to construct a natural gas well pad in the outskirts of the City ("Brownlee Site"). On the same date, SWN also filed a Verified Complaint ("Preemption Action") seeking an order enjoining the City from enforcing its zoning regulations because they are preempted by state law with respect to the regulation of oil and gas activities. On March 14, 2022, upon a motion by the City, the Circuit Court entered an order consolidating the Complaint action with the Appeal because the court found that "[t]he two cases are based upon and arise out of the same transaction or occurrence and consolidation will promote a more efficient process and ensure consistent outcomes in both cases." *See* Circuit Court Order (Mar. 14, 2022).[4]

On August 23, 2022, the Circuit Court entered an order denying SWN's preemption claims in its Complaint ("Preemption Order"). SWN appealed the Preemption Order to ICA, which was docketed at 22-ICA-83.[5] On November 1, 2023, the ICA held that the City's ordinances purporting to regulate oil and gas activities were entirely preempted by the West Virginia Oil and Gas Act ("ICA Preemption Decision"). The City has appealed the ICA

[3] As discussed at length below, although the statutory process to appeal a zoning board's decision is entitled a "writ of certiorari" under Section 8A-9-1 of the Land Use Planning Act, W. Va. Code § 8A-1-1, SWN asserts that it is not an "extraordinary remedy" "provided for" in the West Virgina Code, 53-1-1 *et seq*.

[4] A copy of the Circuit Court's March 14, 2022 Order is attached hereto as **Exhibit B**.

[5] After filing its appeal of the Preemption Order with the ICA, SWN also filed a Motion for Direct Review of the Preemption Order with this Court pursuant to W. Va. R. App. P. 29(f), which docked at 22-684 and was summarily refused on October 25, 2022.

Preemption Decision to this Court, the West Virginia Supreme Court of Appeals ("SCA") by filing the Preemption Appeal, which is docketed at 23-753.

On August 16, 2023, the Circuit Court issued an order denying SWN's Conditional Use Appeal and affirming the BZA's denial of SWN's Application to develop the Brownlee Site ("Circuit Court Conditional Use Decision").[6] On September 6, 2023, SWN timely appealed the Circuit Court Decision by filing the ICA Appeal pursuant to the ICA's jurisdiction to hear "[f]inal judgments or orders of a circuit court in civil cases, entered after June 30, 2022." *See* W. Va. Code § 51-11-4(b)(1).)(1). On December 18, 2023, the ICA entered an Amended Scheduling Order, which directed the parties to address in their briefs the additional issue of whether West Virginia Code § 51-11-4(d)(10) prevented the ICA from exercising jurisdiction over the appeal of the Circuit Court Conditional Use Decision. On April 22, 2024, the ICA entered the Dismissal Order, which found the appeal of the Circuit Court Conditional Use Decision was "improvidently docketed" and dismissed the appeal for lack of subject matter jurisdiction. On May 17, SWN filed a Notice of Appeal of the Dismissal Order to this Court, which has not yet been assigned a docket number.

III. Relevant Legal Framework

A. Appellate Jurisdiction of the ICA and SCA

Pursuant to the Reorganization Act, which became effective on June 30, 2022, the ICA has jurisdiction to hear, *inter alia*, appeals from "[f]inal judgments or orders of a circuit court ***in civil cases***, entered after June 30, 2022: Provided, That ***the Supreme Court of Appeals may,*** *on* its own accord, ***obtain jurisdiction over any civil case filed in the Intermediate Court of Appeals.***" *See* W. Va. Code § 51-11-4(b)(1) (emphasis added). Rule 1(b) of the West Virginia

[6] A copy of the Circuit Court Conditional Use Decision is attached hereto as **Exhibit C**.

Rules of Appellate Procedure similarly provides that "[t]he Supreme Court may, on its own motion or by motion of a party, obtain jurisdiction over any civil case filed in the Intermediate Court. W. Va. R. App. P. 1(b). Under West Virginia Code § 51-11-4(d)(10), "[t]he Intermediate Court of Appeals does not have appellate jurisdiction over . . . [e]xtraordinary remedies, ***as provided in § 53-1-1 et seq. of this code***, and any appeal of a decision or order of another court regarding an extraordinary remedy." *See* W. Va. Code § 51-11-4(d)(10) (emphasis added). With respect to the administration of dockets, W.Va. Code § 51-11-3(f) provides that "[t]he Clerk of the Supreme Court shall act as Clerk of the Intermediate Court of Appeals."

Rule 2 of the West Virginia Rules of Appellate Procedure provides that "[i]n the interest of expediting a ruling, or for other good cause shown, the Intermediate Court or the Supreme Court may suspend the requirements or provisions of any of these Rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. These Rules shall be construed to allow the Intermediate Court or the Supreme Court to do substantial justice." W. Va. R. App. P. 2.

B. The Extraordinary Remedies Act

West Virgina Code §§ 53-1-1 *et seq.* ("Extraordinary Remedies Act") codified the common law writs of prohibition, mandamus, quo warranto, certiorari and habeas corpus. Section 53-3-2 of the Extraordinary Remedies Act, entitled "When certiorari lies," sets forth the criteria and exclusions for applicability of the Extraordinary Remedies Act with respect to the remedy of certiorari, as follows:

> In every case, matter or proceeding, in which a certiorari might be issued as the law heretofore has been, and in every case, matter or proceeding before a county court, council of a city, town or village, justice or other inferior tribunal, the record or proceeding may, after a judgment or final order therein, or after any judgment or order therein abridging the freedom of a person, be removed by a writ of certiorari to the circuit court of the county in which such judgment was

> rendered, or order made; ***except in cases where authority is or may be given by law to the circuit court, or the judge thereof in vacation, to review such judgment or order on motion, or on appeal,*** writ of error or supersedeas, or in some manner other than upon certiorari…

W. Va. Code § 53-3-2.

Thus, the remedy of a writ of certiorari under the Extraordinary Remedies Act applies only where there has been no statutory appeal process enacted by the Legislature. As explained by this Court in *Foster Found. v. Gainer*:

> [T]he writ of certiorari is proper only ***when there exist no other means of reviewing the lower tribunal's decision.*** This is so because "[c]ertiorari is an extraordinary remedy resorted to for the purpose of supply[ing] a defect of justice in cases obviously entitled to redress and yet unprovided for by the ordinary forms of proceeding." Syl. pt. 1, *Poe v. Machine Works*, 24 W.Va. 517 (1884). *Accord Poe*, 24 W.Va. at 520 (observing that certiorari "is generally used in such cases as might otherwise, without its intervention, leave the party remediless"). Therefore, "[w]here it is proper to review the proceedings of inferior jurisdictions, where neither appeal, writ or error or supersedeas are allowed to lie, resort may be had to certiorari." Syl. pt. 1, *Meeks v. Windon*, 10 W.Va. 180 (1877). ***Likewise "[i]t is well established as a general rule that when the party aggrieved can obtain redress [by appeal] or writ of error, he will not be allowed this unusual remedy.***..." Syl. pt. 3, in part, *Poe*, 24 W.Va. 517. *Accord Welch*, 29 W.Va. at 73, 1 S.E. at 344 ("[I]t is clear ... the writ of certiorari ought not to issue but should be denied, where there is other [a]dequate remedy[.]" (citation omitted)). ***In short, "certiorari is not a substitute for an appeal or writ of error.***" *North*, 160 W.Va. at 259, 233 S.E.2d at 418 (citation omitted).

228 W.Va. 99, 104, 717 S.E.2d 883, 888 (2011) (emphasis added).

C. The Land Use Planning Act's Statutory Appeal Process

W. Va. Code §§ 8A-1-1 *et seq*. ("Land Use Planning Act") sets forth the statutory procedure for conditional use approvals and appeals of the same. Article 9 of the Land Use Planning Act, entitled "Appeal Process," provides that "[e]very decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals is subject to review by certiorari." *See* W. Va. Code § 8A-9-1. Section 8A-9-3 further provides that "[i]f the planning commission, board of subdivision and land development appeals, or board of

zoning appeals fails to show the court or judge that a writ should not be issued, then the court or judge may allow a writ of certiorari directed to the planning commission, board of subdivision and land development appeals, or board of zoning appeals…The writ shall prescribe the time in which a return shall be made to it. This time shall be not less than ten days from the date of issuance of the writ and may be extended by the court or judge." *See* W. Va. Code § 8A-9-3

After granting the writ of certiorari and receiving the return containing the lower tribunal's record, the Land Use Planning Act then provides that the Circuit Court shall review the zoning board of appeals' decision and "[i]n passing upon the legality of the decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals, the court or judge may reverse, affirm or modify, in whole or in part, the decision or order." *See* W. Va. Code § 8A-9-6. The Land Use Planning Act further provides that "[a]n appeal ***may*** be taken to the West Virginia Supreme Court of Appeals from the final judgment of the court or judge reversing, affirming or modifying the decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals within the same time, ***in the same manner, and upon the same terms, conditions and limitations as appeals in other civil cases***." *See* W. Va. Code § 8A-9-7 (emphasis added).

IV. Argument

A. Jurisdiction with the ICA is Proper

First and foremost, SWN submits that jurisdiction with the ICA of this appeal is appropriate because it is involves an issue arising from the identical consolidated case upon which the ICA already entered the Preemption Order. Here, the Circuit Court consolidated the the Conditional Use Appeal with the Preemption Action into one civil action because "[t]he two cases are based upon and arise out of the same transaction or occurrence and consolidation will

promote a more efficient process and ensure consistent outcomes in both cases." *See* Circuit Court Order (Mar. 14, 2022). Because the cases were consolidated into a single civil action involving the same factual transaction and occurrence, over which the ICA has already exercised jurisdiction by entering the Preemption Order, the ICA also has jurisdiction to consider SWN's appeal of the Circuit Court Conditional Use Decision.

This is especially so, given the ICA's broad jurisdiction to hear "[f]inal judgments or orders of a circuit court ***in civil cases***" and that Land Use Planning Act's directive that zoning appeals be heard "***in the same manner, and upon the same terms, conditions and limitations as appeals in other civil cases***." *See* W. Va. Code § 8A-9-7 (emphasis added). Here, even absent the consolidation element, SWN's Conditional Use Appeal was filed with the Circuit Court under the Land Use Planning Act and should therefore be appealed "in the same manner, and upon the same terms" as other civil cases, over which the ICA has general jurisdiction.

Furthermore, even discounting the consolidation issue here, while the ICA is correct that "[t]he Intermediate Court of Appeals does not have appellate jurisdiction over…[e]xtraordinary remedies, as provided in § 53-1-1 *et seq*. of this code, and any appeal of a decision or order of another court regarding an extraordinary remedy[,]" the statutory process for zoning appeals, though styled as a "writ of certiorari" is not "provided in § 53-1-1 *et seq*." (i.e., the Extraordinary Remedies Act). *See* W. Va. Code § 51-11-4(d)(10). Rather, in the Land Use Planning Act, the Legislature plainly provides a separate statutory appeal procedure for zoning proceedings that is not "provided in" the Extraordinary Remedies Act. Indeed, the Extraordinary Remedies Act specifically provides that the remedy of certiorari contained therein is not available "where authority is or may be given by law to the circuit court, or the judge thereof in vacation, to review such judgment or order on motion, ***or on appeal***…" *See* W. Va. Code § 53-3-2 (emphasis

added). Here, in the Land Use Planning Act, the legislature plainly provided a separate statutory appeal procedure for zoning proceedings that gives "authority…to the circuit court…to review such judgment…on appeal." *Id.*[7]

Thus, although the statutory appeal procedure under the Land Use Planning Act involves a review process styled as "certiorari," that procedure is separate and distinct from the procedure for obtaining a writ of certiorari under the Extraordinary Remedies Act, which is only available where there is no statutory appeal process. Accordingly, even if the cases were not consolidated, W. Va. Code § 51-11-4(d)(10) would not divest the ICA of jurisdiction in this case, because an appeal of a zoning board decision is statutorily provided for under the Land Use Planning Act and thus cannot also be "provided in § 53-1-1 *et seq*." (*i.e.,* the Extraordinary Remedies Act).[8] This conclusion is entirely consistent with the purpose of the Reorganization Act, which was intended, *inter alia*, to reduce the caseload of the SCA. If this were the case, then the Legislature

[7] Article 9 of the Land Use Planning Act is specifically entitled "Appeal Process."

[8] Furthermore, even if the writ of certiorari sought in this case were "provided for" in the Extraordinary Remedies Act, which it plainly is not, the writ of certiorari issued by the Circuit Court is not the subject of this appeal. On December 8, 2022, the Circuit Court granted SWN's Petition for a Writ Of Certiorari under the Land Use Planning Act, by entering an order ("Certiorari Order") stating that "[t]he writ of certiorari ***is granted pursuant to W. Va. Code § 8A-9-3*** and Respondent shall file its return in accordance with W. Va. Code § 8A-9-5 on or before December 22, 2022" (emphasis added). A copy of the Certiorari Order is attached hereto as **Exhibit D**. No party appealed the Circuit Court's entry of the Certiorari Order. In the Circuit Court Conditional Use Decision, the Circuit Court explained that "this Court entered its Order Issuing a Writ of Certiorari, directed the Board to file its Return, and granted Petitioner's Motion to Schedule Hearing to Take Additional Testimony and Evidence." Thus, even assuming the writ of certiorari sought in this case were covered by the Extraordinary Remedies Act, which it is not, the issuance of the writ of certiorari is no longer at issue. Such was expressly granted by the Circuit Court and no party appealed its issuance. The issue in the ICA Appeal is not whether the writ of certiorari should have issued, but rather whether the Circuit Court abused its discretion after issuing the writ and receiving additional evidence, by incorrectly determining that the BZA Decision was supported by substantial evidence. Such is clearly an issue reviewable by the ICA as a "final judgment…of a circuit court in [a] civil case" and is not "the appeal of a decision or order of another court regarding an extraordinary remedy." *See* W. Va. Code §§ 51-11-4(b)(1); 51-11-4(d)(10).

could not have intended the SCA to act as the direct court of appeal for every municipal zoning decision. [9]

B. Whether Not this Court Determines that the ICA has Jurisdiction, It Should Obtain Jurisdiction over the ICA Appeal Pursuant to Rule 1(b) and Rule 2

The ICA has jurisdiction to hear the ICA Appeal, both because this is a consolidated case that has already been before the ICA and because the statutory procedure for appealing a zoning decision in this case is "provided for" in the Land Use Planning Act and *not* in the Extraordinary Remedies Act. However, whether or not this Court determines that the ICA has jurisdiction, SWN respectfully requests that, in the interests of substantial justice, it exercise its power under Rule 1(b) and W. Va. Code § 51-11-4(b)(1) to "obtain jurisdiction over any civil case filed in the Intermediate Court of Appeals."

As set forth above, SWN had a strong legal position and good faith belief that the ICA had jurisdiction over the ICA Appeal. And, although SWN disagrees with the ICA's conclusion, there is a legitimate question of statutory interpretation raised by the ICA in the April 22, 2024 Memorandum Decision as to the ICA's jurisdiction to hear statutory land use appeals under the Reorganization Act, which has created a lack of clarity for appellants in land use matters.

[9] This is true even if the Land Use Planning Act is construed to be in conflict with the Reorganization Act because the Land Use Planning Act provides that "[a]n appeal ***may*** be taken to the West Virginia Supreme Court of Appeals from the final judgment of the court or judge reversing, affirming or modifying the decision…" *See* W. Va. Code § 8A-9-7 (emphasis added). SWN submits there is no conflict because the use of "may" is permissive in this instance, and the Reorganization Act separately provides the ICA with jurisdiction over a final judgment in any "civil case." However, even if there were a conflict, "[w]hen faced with two conflicting enactments…courts generally follow the black-letter principle that effect should always be given to the latest expression of the legislative will." *Wiley v. Toppings*, 210 W.Va. 173, 175, 556 S.E.2d 818, 820 (2001) (internal citations omitted). Thus, because the Reorganization Act was passed after the Land Use Planning Act, its provisions would prevail in the instance of a conflict.

Indeed, based on SWN's review of this ICA's and this Court's electronic dockets, only three appeals from Circuit Court decisions involving municipal land use appeals have been filed since the Reorganization Act became effective: (1) the instant case, *SWN Production Company, LLC v. City of Weirton Board of Zoning Appeals et al.* (ICA Docket No. 23-ICA-405); (2) *Huntington Realty Corporation v. The City of Huntington Board of Zoning Appeals et al.* (ICA Docket No. 22-ICA-239); and (3) *Rockwell v. Jefferson County Board of Zoning Appeals et al.* (Supreme Court of Appeals Docket No. 23-369). Two of those three cases, *SWN Production Company* and *Huntington Realty Corporation* were initially filed with the ICA. This demonstrates that Reorganization Act lacked sufficient clarity regarding jurisdiction over appeals involving municipal land use decisions.

The Legislature itself has recognized that W. Va. Code § 51-11-4(d)(10) lacked sufficient clarity necessary to clearly direct appellants to the correct court. As pointed out by the ICA in its Memorandum Decision, in legislation enacted earlier this year, which goes into effect on June 6, 2024, the Legislature amended W. Va. Code § 51-11-4(d)(10) as follows:

> The Intermediate Court of Appeals does not have appellate jurisdiction over…
> ~~Extraordinary remedies, as provided in §53-1-1 et seq. of this code, and any appeal of a decision or order of another court regarding an extraordinary remedy~~
> **Judgments or final orders issued in proceedings where the relief sought is one or more of the following extraordinary remedies: writ of prohibition, writ of mandamus, writ of quo warranto, writ of certiorari, writ of habeas corpus, special receivers, arrests in civil cases, and personal safety orders…**

See Enrl. Com. Sub. For S.B. 548 (2024 Regular Session, effective June 6, 2024). Thus, the Legislature amended W. Va. Code § 51-11-4(d)(10) to clarify that the West Virginia Appellate Reorganization Act precludes ICA jurisdiction over appeals involving "writs of certiorari" generally and not specifically to the "extraordinary" writs "provided for" in the Extraordinary

Remedies Act, W Va. Code §§ 53-1-1 *et seq.*[10] Thus, the Legislature itself recognized that the original language of W. Va. Code § 51-11-4(d)(10) lacked sufficient clarity because it amended it less than two years after the Reorganization Act became effective.

Accordingly, it would be manifestly unjust for the ICA Appeal to be dismissed without consideration on the merits, either by the ICA or this Court, where the Legislature has admitted that the ICA's jurisdiction was not clear with respect to land use appeals, and where SWN timely filed the ICA Appeal, which has been fully briefed by the parties. Thus, whether or not this Court determines that the ICA does not have jurisdiction over the ICA Appeal, it should utilize its power under Rule 1(b) to obtain jurisdiction over the ICA Appeal, which permits this Court to obtain jurisdiction over any case filed in the ICA.

Although West Virginia has not adopted any specific rules with respect to transfer of cases between appellate courts (ostensibly because, until 2022, there was only one appellate court), the transfer of cases between appellate courts in other jurisdictions is a common occurrence where an appeal is timely docketed with the incorrect court. The following are only a few examples of such transfer rules:

- The Rules for Jurisdiction and Venue for the Federal court system provide that, "[w]henever…an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court (or, for cases within the jurisdiction of the United States Tax Court, to that court) in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred." 28 U.S.C. § 1631.

[10] Though this is contrary to SWN's position that the Legislature did not intend local land use appeals to be heard directly by this Court, it nevertheless demonstrates the Legislature's recognition of the statute's ambiguous language.

- Pennsylvania Appellate Rules of Procedure, Rule 751 provides that "[i]f an appeal or other matter is taken to or brought in a court or magisterial district which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper court of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee court on the date first filed in a court or magisterial district." 210 Pa. Code § 751.

- Rule 1902 of the Rules of Courts and Judicial Procedure of Delaware provide that "[n]o civil action, suit or other proceeding brought in any court of this State shall be dismissed solely on the ground that such court is without jurisdiction of the subject matter, either in the original proceeding or on appeal. Such proceeding may be transferred to an appropriate court for hearing and determination." 10 Del. C. § 1902.

- Florida Rules of Appellate Procedure, Rule 9.040(b)(1) provides that "[i]f a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate court." Fla. R. App. P. 9.040(b)(1).

- Kentucky Rule of Appellate Procedure, Rule 17(G) provides that "[i]f the Supreme Court Clerk or Court of Appeals Clerk receives a notice of appeal within the exclusive appellate jurisdiction of the other appellate court, the clerks may consult and transfer the appeal to the appropriate court. Upon docketing of the appeal in the appropriate court, the appeal shall proceed as if it had been originally filed in the court with jurisdiction." Ky. R. App. P. 17(G).

- South Carolina Rules of Appellate Procedure, Rule 204(a) provides that "[i]n the event that the notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed shall issue an order transferring the case to the appropriate appellate court." SCACR 204(1).

- The Alabama Code provides that "[w]hen any case is submitted to the Supreme Court which should have gone to one of the courts of appeals or is submitted to one court of appeals when it should have gone to the other, it must not be dismissed but shall be transferred to the proper court; and, when any case is submitted to a court of appeals which should have gone to the Supreme Court, it shall be transferred to the Supreme Court." Ala. Code § 12-1-4

These jurisdictions recognize, that, to avoid a miscarriage of justice, a timely filed appeal should not be dismissed merely because there is a question as to the appellate venue within which it should have been filed.[11] Although West Virginia has not adopted any such rule at this point in

[11] This is especially true where, as here, the appeal is required to be filed with the same clerk, whether or not such filing is directed to the ICA or SCA. *See* W.Va. Code § 51-11-3(f).

time, Rule 1(b) specifically empowers this Court to effectuate the same purpose by obtaining jurisdiction over the ICA Appeal. And, in addition to Rule 1(b), Rule 2 has also been utilized by the courts to cure jurisdictional defects for "good cause shown." *See First Nat. Bank of Bluefield v. Clark*, 181 W.Va. 494, 498, 383 S.E.2d 298, 302 (1989), overruled on other grounds by *Coonrod v. Clark*, 189 W.Va. 669, 434 S.E.2d 29 (1993); *Ransom v. Guardian Rehab. Servs., Inc*., 248 W. Va. 390, 888 S.E.2d 890 (2023). Here, there is undoubtedly "good cause," where: (1) SWN timely filed its appeal with the ICA; (2) the appeal was fully briefed; (3) transfer to the Supreme Court of Appeals to consider the appeal on the merits would result in absolutely no prejudice to the City[12]; and (4) there exists a legitimate question of law as to the ICA's jurisdiction to hear land use appeals under the newly enacted Reorganization Act.

Thus, whether or not this Court determines that the ICA has jurisdiction, this Court should nevertheless obtain jurisdiction over the ICA Appeal pursuant to Rule 1(b). This Court's assumption of jurisdiction over the ICA Appeal would obviate the need for this Court's consideration of the SWN's Notice of Appeal of the Dismissal Order and would permit this Court to concurrently dispose of both this matter and the Preemption Appeal on the merits.

V. Conclusion and Relief Requested

SWN respectfully requests that this Court exercise its power under W. Va. Code § 51-11-4(b)(1) and Rule 1(b) of the West Virginia Rules of Appellate Procedure to obtain jurisdiction over the ICA Appeal and consider the matter on the parties' briefs and appendix that have already been filed with the ICA. A proposed order is attached hereto.

[12] SWN is the applicant for zoning approval to develop the Brownlee Site. Thus, any delay caused by this Court obtaining jurisdiction over the ICA Appeal would only be prejudicial to SWN.

Respectfully submitted,

Dated: May 22, 2024

/s/ Shawn N. Gallagher

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Exhibit A

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

SWN PRODUCTION COMPANY, LLC,
Petitioner Below, Petitioner

v.) No. 23-ICA-405 (Cir. Ct. Brooke Cnty. Case No. CC-05-2021-P-35)

CITY OF WEIRTON BOARD OF ZONING APPEALS
and CITY OF WEIRTON,
Respondents Below, Respondents

MEMORANDUM DECISION

Petitioner SWN Production Company, LLC, ("SWN") appeals the Circuit Court of Brooke County's August 16, 2023, "Order Affirming the Decision of the Weirton Board of Zoning Appeals." In that order, the circuit court affirmed the decision of the Weirton Board of Zoning Appeals, which had been presented to the circuit court through the filing of a petition for a writ of certiorari. Respondent City of Weirton Board of Zoning Appeals ("the Board") filed a response in support of the circuit court's order.[1] SWN filed a reply. After considering the parties' briefing on the issue, the record, and the applicable law, we find the appeal was improvidently docketed and this appeal must be dismissed.[2]

SWN initiated these proceedings in the Circuit Court of Brooke County on October 29, 2021, by filing a petition for writ of certiorari seeking review of the decision of the Board, which was docketed as CC-05-2021-P-35, and a civil complaint asserting that the City of Weirton's zoning ordinances related to oil and gas were preempted as a matter of law, which was docketed as CC-05-2021-C-71. On March 15, 2022, the Circuit Court entered an order consolidating these cases.

Although the circuit court consolidated the cases for certain purposes, it addressed the matters through separate orders. On August 23, 2022, the circuit court issued its "Order on Preemption," which resolved SWN's civil complaint concerning pre-emption. SWN then appealed the "Order on Preemption" to this Court.

[1] SWN is represented by Shawn N. Gallagher, Esq., and Kathleen Jones Goldman, Esq. The Board is represented by Ryan P. Simonton, Esq., and Margaret E. Lewis, Esq.

[2] The Court acknowledges that the briefing of the parties was helpful in rendering this decision.

On August 16, 2023, the circuit court issued its "Order Affirming the Decision of the Weirton Board of Zoning Appeals" regarding the petition for writ of certiorari seeking review of the decision of the Board, which is currently on appeal to this Court. In that order, the circuit court affirmed the Board and then ordered the writ of certiorari matter dismissed with prejudice from the circuit court's docket while the pre-emption matter would remain docketed pending appeal to this Court. On November 1, 2023, this Court issued a signed opinion resolving the pre-emption matter in *SWN Prod. Co. v. City of Weirton*, 249 W. Va. 372, __, 895 S.E.2d 227, 229 (Ct. App. 2023), wherein we reversed the circuit court and found that the West Virginia Horizontal Well Act pre-empts Weirton's ordinance regulating the location of oil and gas drilling sites.

On December 18, 2023, this Court issued an Amended Scheduling Order wherein, on its own motion, the Court directed the parties to brief the issue of "whether West Virginia Code § 51-11-4(d)(10) . . . prevents the Court from deciding the merits of this appeal of a Circuit Court order regarding a petition for a writ of certiorari."

"It is, of course, axiomatic that a court of limited appellate jurisdiction is obliged to examine its own power to hear a particular case." *James M.B. v. Carolyn M.*, 193 W. Va. 289, 292, 456 S.E.2d 16, 19 (1995). In its current form, West Virginia Code § 51-11-4(d)(10) (2022) provides that this Court does not have appellate jurisdiction over "[e]xtraordinary remedies, as provided in §53-1-1 *et seq.* of this code, and any appeal of a decision or order of another court regarding an extraordinary remedy." In amending the Rules of Appellate Procedure to implement this Court, the Supreme Court of Appeals clarified that this Court has no jurisdiction over "[e]xtraordinary remedies and the appeal of any extraordinary remedy, including in *habeas corpus*." W. Va. R. App. P. 1(b). The Supreme Court of Appeals of this State has stated that "[*c]ertiorari* is an extraordinary remedy[.]" Syl. Pt. 1, in part, *Poe v. Mach. Works,* 24 W. Va. 517 (1884).

In arguing that this Court has jurisdiction to hear its appeal of a writ of certiorari from circuit court, SWN relies on the language of West Virginia Code § 53-3-2 (1889), which provides:

> In every case, matter or proceeding, in which a certiorari might be issued as the law heretofore has been, and in every case, matter or proceeding before a county court, council of a city, town or village, justice or other inferior tribunal, the record or proceeding may, after a judgment or final order therein, or after any judgment or order therein abridging the freedom of a person, be removed by a writ of certiorari to the circuit court of the county in which such judgment was rendered, or order made; except in cases where authority is or may be given by law to the circuit court, or the judge thereof in vacation, to review such judgment or order on motion, or on appeal, writ of error or supersedeas, or in some manner other than upon certiorari; but no

> certiorari shall be issued in civil cases before justices where the amount in controversy, exclusive of interest and costs, does not exceed $15.

SWN points specifically to the language that provides that certiorari may not be sought "in cases where authority is or may be given by law to the circuit court, or the judge thereof in vacation, to review such judgment or order on motion, or on appeal, writ of error or supersedeas, or in some manner other than upon certiorari." SWN argues that, in the Land Use Planning Act, West Virginia Code § 8A–1–1 to § 8A–12–21, the legislature provided a statutory avenue for appeal of a board of zoning appeals, governed by Article 9 of Chapter 8A, thereby removing such review from West Virginia Code § 53-3-2. SWN acknowledges that this appeal process must be initiated by filing a petition for a writ of certiorari under West Virginia Code § 8A-9-1 but argues that "such procedure is separate and distinct from the procedure for obtaining a writ of certiorari under the Extraordinary Remedies Act, which (by its own terms) is only available where there is no separate statutory remedy." Functionally, SWN argues that the petition for a writ of certiorari used to initiate an appeal under West Virginia Code § 8A-9-1 is distinct from the extraordinary remedy of a petition for a writ of certiorari described in West Virginia Code § 53-3-2.

However, SWN's argument is inconsistent with the text of West Virginia Code § 53-3-2, which provides that certiorari review is available "except in cases where authority is or may be given by law to the circuit court, or the judge thereof in vacation, to review such judgment or order on motion, or on appeal, writ of error or supersedeas, *or in some manner other than upon certiorari*." (Emphasis added). Therefore, SWN's argument that a statutory appeal process that is initiated by filing a petition for a writ of certiorari is distinct from the petition for a writ of certiorari available under West Virginia Code § 53-3-2 is inconsistent with the text of that section.[3]

SWN also argues that, because the Circuit Court of Brooke County consolidated the certiorari proceeding (CC-05-2021-P-35) with the civil preemption proceeding (CC-05-2021-C-71), and this Court has already exercised jurisdiction over an order in the preemption proceeding (22-ICA-83), the two cases are a single civil case over which the ICA has jurisdiction. SWN asserts that "it would be a peculiar waste of judicial economy for this Court to find no jurisdiction in this case, given the ICA's prior decision to hear an issue in the same case involving the same facts and underlying administrative appeal process," and argues that the Board should be estopped from arguing that this Court lacks

[3] Moreover, the Supreme Court of Appeals has not treated the certiorari review available under West Virginia Code § 8A-9-1 as distinct from the extraordinary remedy of certiorari available under West Virginia Code § 53-3-2. *See Jefferson Orchards, Inc. v. Jefferson Cnty. Zoning Bd. of Appeals*, 225 W. Va. 416, 420-21, 693 S.E.2d 781, 785-86 (2010). Our Supreme Court also characterized the writ of certiorari in that case as an extraordinary remedy. *See id.* 225 W. Va. at 421 n.4, 693 S.E.2d at 786 n.4.

jurisdiction in this appeal after it did not object to jurisdiction in 22-ICA-83. However, SWN offers no authority for the proposition that the circuit court, by consolidating an extraordinary remedy proceeding with a standard civil proceeding, can impart appellate jurisdiction over both proceedings to this Court. Accordingly, this Court finds that the circuit court did not extend the civil character of the declaratory judgment action of CC-05-2021-C-71—and therefore this Court's appellate jurisdiction—to the petition for certiorari matter simply because the two cases were consolidated for certain purposes.[4] Moreover, with respect to SWN's argument that the Board should be estopped from arguing that this Court lacks subject matter jurisdiction because they did not object to this Court deciding 22-ICA-83, the Supreme Court of Appeals has recognized that "[s]ubject matter jurisdiction cannot be conferred by consent or waiver[.]" *Hansbarger v. Cook*, 177 W. Va. 152, 157, 351 S.E.2d 65, 70 (1986) (citation omitted).[5] Therefore, this Court does not have subject matter jurisdiction over this matter because it is an appeal of an order of another court regarding an extraordinary remedy.

Accordingly, based on the foregoing, this appeal was improvidently docketed and this appeal is dismissed.

Dismissed.

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[4] The Court notes that courts across the country have rejected the principle that subject matter jurisdiction may be implied through judicial economy concerns. *See, e.g.*, *Miller v. Est. of Self*, 113 S.W.3d 554, 558 (Tex. App. 2003); *Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp.*, 484 F. Supp. 814, 817 (E.D. Pa. 1980); *Smith v. St. Luke's Hosp.*, 480 F. Supp. 58, 61 (D.S.D. 1979).

[5] Additionally, while being mindful of the Supreme Court of Appeals' statement that "[w]e do not believe that post-enactment legislative history is entitled to substantial consideration in construing a statute," *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 587 n.16, 466 S.E.2d 424, 438 n.16 (1995), our view that this Court lacks jurisdiction over an appeal from an order stemming from a petition for a writ of certiorari conforms to recent legislation amending West Virginia Code §51-11-4(d)(10) to expressly exclude from this Court's jurisdiction review of "[j]udgments or final orders issued in proceedings where the relief sought is one or more of the following extraordinary remedies: writ of prohibition, writ of mandamus, writ of quo warranto, writ of certiorari, writ of habeas corpus, special receivers, arrests in civil cases, and personal safety orders." Enrl. Com. Sub. For S.B. 548 (2024 Regular Session, effective June 6, 2024). The bill's title states that the purpose of the bill is "clarifying the appellate jurisdiction of the Intermediate Court of Appeals." To the extent this legislation is viewed as a legislative clarification of West Virginia Code § 51-11-4, it supports our conclusion that this Court lacks jurisdiction in this case.

ISSUED: April 22, 2024

CONCURRED IN BY:

Chief Judge Thomas E. Scarr
Judge Charles O. Lorensen
Judge Daniel W. Greear

Exhibit B

West Virginia E-Filing Notice

CC-05-2021-P-35

Judge: Jason A. Cuomo

To: Shawn Norman Gallagher
shawn.gallagher@bipc.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA
SWN Production Company, LLC v. City of Weirton Board of Zoning Appeals
CC-05-2021-P-35

The following order - case was FILED on 3/14/2022 1:24:36 PM

Notice Date: 3/14/2022 1:24:36 PM

Glenda Brooks
CLERK OF THE CIRCUIT COURT
Brooke County
P.O. Box 474
WELLSBURG, WV 26070

(304) 737-3662
Glenda.Brooks@courtswv.gov

In the Circuit Court of Brooke County, West Virginia

SWN Production Company, LLC, Plaintiff,	)	
vs.)	)	Case No. CC-05-2021-P-35
City of Weirton Board of Zoning Appeals, Defendant	)	

ORDER GRANTING RESPONDENT'S MOTION TO TRANSFER AND CONSOLIDATE CASES

On a prior day came the Respondent by counsel, pursuant to Rule 42 of the West Virginia Rules of Civil Procedure and moved this Court for entry of an order transferring Civil Action No. CC-05-2021-C-71 currently pending before Judge Michael J. Olejasz to this Court. Respondent further requested that these two cases be consolidated on the grounds that the two matters arise out of the same transaction or occurrence. Upon consideration of the Motion, Response, and Reply thereto and for reasons otherwise appearing in the record, the Court is of the opinion to and hereby GRANTS Respondent's Motion.

FINDINGS OF FACT

1. On October 29, 2021, SWN Production Company ("SWN") filed its *Verified Petition for Writ of Certiorari* against Respondent City of Weirton Board of Zoning Appeals appealing the Board's denial of SWN's application for a conditional use permit to engage in natural gas drilling within Weirton City Limits, which is currently pending before this Court. SWN asserts more than 15 grounds of error in its Appeal, including that the West Virginia Oil and Gas Act, W.Va. Code §§ 22-6-1, *et. seq*., preempts the Unified Development Ordinance. *Verified Complaint for Writ of Certiorari* at ¶ 69(m).

2. On the same day and shortly after filing its *Verified Petition for Writ of Certiorari,* SWN also filed its *"Verified Complaint",* bearing Civil Action No. CC-05-2021-C-71, currently pending in the Circuit Court of Brooke County before Judge Michael Olejasz. In the Complaint, SWN asserts that the City of Weirton's zoning ordinances relating to oil and gas development are preempted as a matter of law. With its Preemption Complaint, SWN seeks an order enjoining the City from enforcing its original Unified Development Ordinance and new Unified Development Ordinance, a declaration that the original and new Unified Development Ordinances are preempted by state law and violate SWN's constitutional rights, and SWN requests damages for the unlawful taking of its property rights.

3. The Court finds that both the *Verified Petition for Writ of Certiorari* and the *Verified Complaint* arise out of the same transaction or occurrence, the City's Unified Development Ordinance and denial of SWN's application for a conditional use permit.

CONCLUSIONS OF LAW

4. Rule 42(b) of the West Virginia Rules of Civil Procedure governs the transfer and consolidation of civil actions pending in different courts and provides in pertinent part:

> When two or more actions arising out of the same transaction or occurrence are pending before different courts or before a court and a magistrate, the court in which the first such action was commenced shall order all the actions transferred to it or any other court in which any such action is pending**.**The Court to which the actions are transferred may order a joint hearing or trial of any or all of the matters in issue in any of the actions, it may order all the actions consolidated; and it may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

5. The Supreme Court of Appeals of West Virginia further explained that "[u]nder the provisions of Rule 42(b) R.C.P., when two actions arise out of the same transaction or occurrence and both actions are pending in two different circuit courts, it is mandatory that the court in which the first action was commenced either transfer the other action to the court where the first action was commenced or transfer its pending action to the court where the other action is still pending." *Hanlon v. Joy Mfg. Co*., 187 W. Va. 280, 283, 418 S.E.2d 594, 597 (1992)

citing *Bank of Ripley v. Thompson,* 149 W.Va. 183, 139 S.E.2d 267 (1964).

6. The West Virginia Rules of Civil Procedure are to "be construed and administered to secure the just, speedy, and inexpensive determination of every action." W.Va. R. Civ. Proc. 1.

7. Because Civil Action No. CC-05-2021-C-71 currently pending before Judge Michael Olejasz arises out of the same transaction or occurrence as this case, Rule 42(b) mandates that Civil Action No. CC-05-2021-C-71 be transferred to this Court.

8. Following transfer of the *Verified Complaint*, this Court has discretion to "order a joint hearing or a trial of any or all of the matters in issues in any of the actions, it may order all of the actions consolidated; and it may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." W.Va. R. Civ. P. 42(b). The *Verified Petition for Writ of Certiorari* do not necessarily have to be consolidated for all purposes but can be consolidated to resolve any common questions of law or fact.

9. When exercising its discretion to consolidate cases under Rule 42, the Court should consider the following factors:

> (1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy;
>
> (2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits;
>
> (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and,
>
> (4) the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Syl. Pt. 2, *State ex rel. Appalachian Power Co. v. Ranson*, 190 W. Va. 429, 430, 438 S.E.2d 609, 610 (1993).

10. In addition, "[w]hen the trial court concludes in the exercise of its discretion whether to grant or deny consolidation, it should set forth in its order granting or denying consolidation sufficient grounds to establish for review why consolidation would or would not promote judicial economy and convenience of the parties and avoid prejudice and confusion." *Id.*

DISCUSSION & ORDER

Both the *Writ of Certiorari* and *Complaint* involve the resolution of whether state law preempts the Unified Development Plan and Weirton's Board of Zoning's Denial of SWN's application for a conditional use permit. Consolidating the two matters for purposes of resolving common questions of law promotes judicial economy by providing the efficiencies of a single forum for all parties to brief and for this Court to consider the legal issues. *Pickett v. Taylor,* 178 W.Va. 805, 807, 364 S.E.2d 818, 821 (1987)(the purpose of consolidation is "to promote judicial dispatch and economy, and to guarantee substantial justice to the parties.")

Likewise, consolidation promotes judicial economy and avoids the parties and Court from having twice the normal burden of holding two separate hearings and trials involving similar evidence, witnesses, facts and questions of law. Consolidation would also reduce the amount of time to resolve the proceedings as the Court can determine and rule upon the common issues of law that impact both cases, which is anticipated to promote resolution of both cases.

Further, consolidation of these matters will not cause any confusion or prejudice to the parties. The two cases are based upon and arise out of the same transaction or occurrence and consolidation will promote a more efficient process and ensure consistent outcomes in both cases.

ACCORDINGLY, the Court **ORDERS**:

A. Respondent's *Motion to Transfer* and *Consolidate* is hereby **GRANTED**;

B. Brooke Civil Action No. CC-05-2021-C-71, styled *SWN Production Company, LLC v. City of Weirton* shall be transferred to this Court and consolidated with Brooke Civil Action No. CC-05-2021-P-35, styled *SWN Production Company, LLC v. City of Weirton Board of Zoning Appeals*.

C. The issues originally presented in 05-2021-P-35 are hereby **STAYED** until such time as this Court makes a final determination on the State pre-emption issues originally presented in 05-2021-C-71.

D. A briefing schedule is hereby established as follows: any *Responses* to the verified *Complaint* shall be filed with the Circuit Clerk and a copy, in Word format, along with a proposed order with referenced findings of facts and conclusions of law by email, in Word format, forwarded to the Judge's Clerk (samuel.stillwell@courtswv.gov) on or before **April 8, 2022**. It is further **ORDERED** that any *Replies* shall be filed with the Circuit Clerk and a copy, in Word Format, along with a proposed order with referenced findings of fact and conclusions of law, in Word format, by email, forwarded to the Judge's Clerk on or before **April 27, 2022**.

E. The objections and exceptions of Plaintiff are noted.

/s/ Jason A. Cuomo
Circuit Court Judge
1st Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.

Exhibit C

West Virginia E-Filing Notice

CC-05-2021-P-35

Judge: Jason A. Cuomo

To: Shawn Norman Gallagher
shawn.gallagher@bipc.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA
SWN Production Company, LLC v. City of Weirton Board of Zoning Appeals
CC-05-2021-P-35

The following order - case was FILED on 8/16/2023 12:05:57 PM

Notice Date: 8/16/2023 12:05:57 PM

Glenda Brooks
CLERK OF THE CIRCUIT COURT
Brooke County
P.O. Box 474
WELLSBURG, WV 26070

(304) 737-3662
Glenda.Brooks@courtswv.gov

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

SWN PRODUCTION COMPANY, LLC,

Plaintiff,

v. Civil Action: CC-05-2021-C-71
Jason A. Cuomo, Judge

CITY OF WEIRTON,

Defendant.

Consolidated with

SWN PRODUCTION COMPANY, LLC,

Petitioner,

v. Civil Action: CC-05-2021-P-35
Jason A. Cuomo, Judge

CITY OF WEIRTON BOARD OF ZONING APPEALS,

Respondent.

ORDER AFFIRMING THE DECISION OF THE WEIRTON BOARD OF ZONING APPEALS

This matter comes before this Court by and through the following procedural history:

PROCEDURAL HISTORY

1. **October 29, 2021** -- Petitioner SWN Production Company, LLC (hereinafter referred to as "Petitioner" or "SWN") initiated this action by filing its *Petition for Writ of Certiorari* (hereinafter referred to as "Petition"), asking the Court to overturn the decision of the Weirton Board of Zoning Appeals which denied Petitioner's *Application for Conditional Use Permit* (hereinafter referred to

as "Application") to construct and operate a horizontal gas drilling and production operation in the Planned Development District established by the City of Weirton Uniform Development Ordinance (hereinafter referred to as the "UDO").

2. **December 3, 2021** -- Respondent Weirton Board of Zoning Appeals (hereinafter referred to as "Respondent," "BZA," or the "Board") filed its *Response to Petition for Writ of Certiorari* (hereinafter referred to as the "Response"), asking the Court to decline to issue the requested *Writ*, in accordance with W. Va. Code §§ 8A-9-1, *et seq.* because Petitioner failed to neither identify an illegal decision of the Board nor to establish that the Board's decision to deny the conditional use permit (due to the harmful impacts of the proposed horizontal gas drilling and production operation on surrounding developments, neighborhood character, and infrastructure and traffic) was based upon the application an erroneous principle of law, was plainly wrong in its factual findings, or was beyond the Board's jurisdiction.

3. **November 23, 2022** -- Petitioner filed its *Motion to Schedule Hearing to Take Additional Testimony and Evidence* pursuant to *W. Va. Code* § 8A-9-6(b). Petitioner asserted in its *Motion* that "the Board improperly deprived SWN of its rights to due process by preventing SWN from presenting evidence to rebut testimony presented by the City's witnesses during the hearing on its" Application for conditional use permit. (Petitioner's *Motion* at 2, ¶ 2).

4. **December 5, 2022** -- Respondent filed its Response of City of Weirton Board of Zoning Appeals to Petitioner's Motion to Schedule Hearing to Take Additional Testimony and Evidence, asserting that no Writ of Certiorari had issued and the verified record of proceedings before the Board was not before the Court for the Court to consider.

5. **December 8, 2022** -- this Court entered its *Order Issuing a Writ of Certiorari*, directed the Board to file its *Return*, and granted Petitioner's *Motion to Schedule Hearing to Take Additional Testimony and Evidence.*

6. **December 22, 2022** -- Respondent filed its *Return to Writ of Certiorari* (hereinafter referred to as "Return"), along with the record of proceedings before the Board on Petitioner's Application for Conditional Use Permit.

7. **April 11, 2023** -- Respondent filed its *Supplement to Return to Writ of Certiorari* (hereinafter referred to as the "Supplement to Return"), along with transcripts prepared by a certified court reporter from audio recordings of hearings held before the Board on August 3, 2021, and September 7, 2021.

8. **April 17, 2023** -- this Court held a hearing to take additional evidence in its certiorari review of the *Petition*, in accordance with W. Va. Code § 8A-9-6(b).

9. **June 1, 2023** -- Respondent filed its *Second Supplement to Return to Writ of Certiorari* (hereinafter referred to as the "Second Supplement"), along with a transcript of the Court's April 17, 2023, hearing and the additional documentary evidence considered by the Court at that hearing.

When considering the legality of a decision or order of a municipal board of zoning appeals, a Circuit Court must be mindful of the following:

STANDARDS OF REVIEW

1. "Certiorari 'is an extraordinary remedy, used in cases where there has been an error in justice, which cannot be reviewed and corrected by the ordinary forms of procedure.'" *Foster Found. v. Gainer*, 228 W. Va. 99, 104, 717 S.E.2d 883, 888 (2011) (*quoting Ashworth v. Hatcher,* 98 W. Va. 323, 325, 128 S.E. 93, 94 (1924)). "Thus, '[a] writ of certiorari will lie from an inferior tribunal, acting in a judicial or quasi-judicial capacity, where substantial rights are alleged to have been violated and where there is no other statutory right of review given.'" *Id.* (*quoting* Syl. pt. 4, in part, *North v. Board of Regents,* 160 W. Va. 248, 233 S.E.2d 411 (1977).

2. "The extraordinary remedy of certiorari is not granted as a matter of right, but rather is relief that rests within the sound discretion of the Court: 'The remedy by writ of *certiorari* ... to review the judgment of a[n inferior tribunal], is not given as a matter of right, but is awarded by the court ... for cause on proper case shown.'" *Id.* (*quoting* Syl. pt. 1, in part, *Harrow v. Ohio River R.R. Co.,* 38 W. Va. 711, 18 S.E. 926 (1894)); *see also* Syl. pt. 2, in part, *Welch v. County Court of Wetzel Cnty.,* 29 W. Va. 63, 1 S.E. 337 (1886) ("A writ *of certiorari* is not a writ of right, but the issuing of it is dependent on a sound judicial discretion[.]").

3. "When determining whether to award a writ of certiorari in a particular case, the standard for the issuance of the writ is quite limited. In this regard we have observed and now hold that 'the scope of review under the

common law writ of certiorari is very narrow. It does not involve an inquiry into the intrinsic correctness of the decision of the tribunal below, but only into the manner in which the decision was reached.'" *Id.* (*quoting State ex rel. Prosecuting Attorney of Kanawha Cnty. v. Bayer Corp.*, 223 W. Va. 146, 150, 672 S.E.2d 282, 286 (2008) (*quoting Hall v. McLesky*, 83 S.W. 3d 752, 757 (Tenn. Ct. App. 2001)). Review of planning decisions is afforded by *W. Va. Code* § 8A-9-1 *et seq.* "Every decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals is subject to review by certiorari." *W. Va. Code* § 8A-9-1. An aggrieved person may file a petition setting forth: "(1) That the decision or order by the planning commission, board of subdivision and land development appeals, or board of zoning appeals is illegal in whole or in part; and (2) Specify the grounds of the alleged illegality." *Id.* The Board is entitled to respond to the *Petition* to demonstrate to the Court why a *Writ* should not issue and the planning decision at issue should be left undisturbed.

4. The Court conducts a limited review of the decisions of bodies charged with planning and zoning administration. *Corliss v. Jefferson Cnty. Bd. of Zoning Appeals*, 214 W. Va. 535, 537, 591 S.E.2d 93, 95 (2003) ("Having carefully reviewed this matter, we find that the lower court erred in overturning the Zoning Board's decision by not adhering to the limited scope of review applicable to this type of administrative proceeding and by altering the established manner in which adjacent property measurements are determined for purposes of evaluating a conditional use permit application. Accordingly, we

reverse."). Decisions contravening the limited scope of review and substituting judgment for the administrative bodies' will be reversed. *Id.*

5. In order to overturn the decision below, a court must identify an illegal decision by the Board and determine that the Board applied an erroneous principle of law, was plainly wrong in its factual findings, or acted beyond its jurisdiction. *See Kaufman v. Planning & Zoning Comm'n of City of Fairmont,* 171 W. Va. 174, 298 S.E.2d 148 (1982); *Casto v. Kanawha Cnty. Comm'n,* No. 14-0683, 2015 WL 1839320, at *3 (W. Va. Apr. 17, 2015) ("When reviewing a planning decision, a court may disturb the decision only where the relevant body 'has applied an erroneous principle of law, was plainly wrong in its factual findings, or acted beyond its jurisdiction.'") (*citing Kaufman, supra*).

6. The decision of the Board administering the zoning ordinance is entitled to deference by the reviewing Court, and it is presumed that the Board acted correctly. Syl. Pt. 5, *Wolfe v. Forbes,* 159 W. Va. 34,217 S.E.2d 899 (1975); Syl. Pt. 1, *Corliss v. Jefferson County Bd. o/Zoning Appeals,* 214 W. Va. 535, 591 S.E.2d 93 (2003); Syl. Pt. 1, *Rissler v. Jefferson County Bd. Of Zoning Appeals,* 225 W. Va. 346,693 S.E.2d 321 (2010); Syl. Pt. 2, *Bd. of Zoning Appeals of the Town of Shepherdstown v. Tkacz,* 234 W. Va. 201, 764 S.E.2d 532 (2014). However, this presumption notwithstanding, "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. 1, *Corliss v. Jefferson County Bd. o/Zoning Appeals,* 214 W. Va. 535, 591

S.E.2d 93 (2003); Syl. Pt. 1, *Rissler v. Jefferson County Bd. Of Zoning Appeals*, 225 W. Va. 346,693 S.E.2d 321 (2010); Syl. Pt. 2, *Bd. of Zoning Appeals of the Town of Shepherdstown v. Tkacz*, 234 W. Va. 201, 764 S.E.2d 532 (2014).

7. Specifically, with respect to the Petitioner's contention that the Board's decision was "plainly wrong," the Supreme Court has explained that "the plainly wrong standard of review is a deferential one, which presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." *Tkacz*, 234 W. Va. 201, 764 S.E.2d 532,538 (2014) (*citing Conley v. Workers' Comp. Div.*, 199 W. Va. 196, 199,483 S.E.2d 542,545 (1997)). "Substantial evidence," in this instance, is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Maplewood Estates Homeowners Ass'n v. Putnam Cnty. Planning Comm'n*, 218 W. Va. 719, 723, 629 S.E.2d 778, 782 (2006) (citing *In re: Queen*, 196 W. Va. 442, 446; 473 S.E.2d 483, 487). A factual finding that is supported by substantial evidence is conclusive. *Id.* Consequently, a circuit court may not supplant a factual finding of the Board merely by identifying an alternative conclusion that could be supported by substantial evidence. *Id.*

8. The Courts give great deference to the interpretation of planning and zoning codes by the bodies charged with enforcement of those codes. Syl. Pts. 3 and 4, *Corliss v. Jefferson Cnty. Bd. of Zoning Appeals*, 214 W. Va. 535, 536, 591 S.E.2d 93, 94 (2003). Any interpretation of City Codes by the City's planning staff, Planning Commission, or Board of Zoning Appeals should be considered appropriate unless it can be shown to be clearly erroneous. *Id.*

9. Finally, when considering challenges to planning and zoning codes, Courts avoid invalidating the codes in order to permit the decisions of the legislative body promulgating the codes to take effect. Courts are not disposed to declare a zoning ordinance invalid in whole or in part where it is fairly debatable as to whether an action of a municipality is arbitrary or unreasonable. *DeCoals, Inc. v. Board of Zoning Appeals of City of Westover,* 168 W. Va. 339, 284 S.E.2d 856 (1981).

10. In the context of a local zoning decision, "due process requires a hearing before an impartial and neutral tribunal, over which a disinterested adjudicator presides." *Rissler v. Jefferson County Bd. Of Zoning Appeals,* 225 W. Va. 346, 693 S.E.2d 321 (2010). A reviewing court may evaluate the sufficiency of notice and the hearing in administrative decisions generally by consideration of three factors: the plaintiff's property interest affected by the government action; the risk of an erroneous deprivation of a property interest and the value of any additional or substitute procedural safeguards; and the government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976) ("More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e. g., *Goldberg v. Kelly, supra*, 397 U.S., at 263-271, 90 S. Ct., at 1018-1022.").

11. Other jurisdictions considering due process challenges to local zoning hearings have found such hearings to be "less formal" than court proceedings, finding that the local body is not required to allow the landowner to directly cross-examine witnesses and that allowing the landowner to present an opposing viewpoint is typically sufficient. See *G & H Dev., LLC v. Benton-Parish Metro Planning Comm'n*, 641 F. Appx 354, 357-8 (5th Cir. 2016); Plaintiffs claiming denial of due process based on insufficient duration of the hearing must be able to identify the additional evidence they would have presented with extra time and demonstrate that it would have affected the outcome of the decision. *See Club Moulin Rouge LLC v. City of Huntington Beach*, 2005 WL 5517234, at *8 (C.D. Cal. June 22, 2005); *Nance v. City of Albemarle, North Carolina*, 520 F. Supp.3d 758 (4th Cir. 2021); *Hyatt v. Town of Lake Lure*, 114 Fed.Appx. 72 (4th Cir. 2004) (unpublished) ("Hyatt's procedural opportunities, both pre-and-post deprivation, were ample. After having been found by Town officials to be out of compliance with her permit and the LSRs, Hyatt was able to appeal to the Town Council. The Notice of Violation itself stated as much, and Hyatt seized the opportunity, as she should have. Her two opportunities to address the Town Council and the chance to appear before and seek variances from the LSAB show that hers is not one of the cases in which a municipality disregarded the

fundamentals of fair process. Hyatt was represented by counsel, and Town officials considered her requests at some length. "[C]ertainly conducting open community meetings and giving affected parties the opportunity to speak on behalf of their project is constitutionally sufficient."). "Due process of law generally requires that a deprivation of property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' " *Tri-County Paving*, 281 F.3d at 436 (*quoting Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). "However, 'to determine whether a procedural due process violation has occurred, courts must consult the entire panoply of predeprivation and postdeprivation process provided by the state.' " *Id. (quoting Fields v. Durham*, 909 F.2d 94, 97 (4th Cir. 1990)). "The procedures due in zoning cases, and by analogy due in cases such as this one involving regulation of land use through general police powers, are not extensive." *Nance v. City of Albemarle, N. Carolina*, 520 F. Supp. 3d 758, 790 (M.D.N.C. 2021).

Based upon the foregoing **STANDARDS OF REVIEW**, the Court does hereby make the following:

FINDINGS OF FACT

1. On June 11, 2021, SWN submitted its *Application* to the Board, seeking conditional use approval to construct a natural gas well pad, drill natural gas wells, and conduct "Oil/Gas Extraction" activities as defined by the City of Weirton's Unified Development Ordinance (hereinafter referred to as the "UDO") at property identified as Tax Parcel Identification Number 05-06-00W3-0004-

0000 and located at Park Drive within the municipal boundaries of the City of Weirton (the "Property"). (BZA0001-0337)[1]

2. SWN described its proposed use as "construction and maintenance of an approximate 4.2 acre gravel well pad (530' x 355'), a 1.6 acre auxiliary pad (350' x 200'), two soil stockpiles, stormwater best management practices (BMPs), and an approximately 3,167 foot-long access road." (BZA0005)

3. SWN proposed to "drill 14 Gas Wells" as part of its *Application*, but stated that "At this time, only three Gas Wells will be drilled." (BZA0005)

4. SWN noted that "[t]raffic to the site will increase with construction, drilling and completion operations. Traffic will include trucks and trailers to mobilize heavy equipment for construction, drill rigs, and large equipment for completion operations; but will consist mostly of personal pick-up trucks and passenger vehicles for those reporting on site for work after site construction is complete and drilling equipment is delivered." (BZA0006)

5. SWN represented in its *Application* that "A Traffic Impact Study for the Proposed Uses was done. That study concluded that the development of the proposed Brownlee Well Pad will have no significant impact on the operation of the study intersections." (BZA0007)

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[1] The citation to BZA with a number next to it refers to a number from the entire record of the Board of Zoning Appeals hearing filed BZA as three separate parts – the first part coming as an Exhibit with the BZA's *Return to Writ of Certiorari* filed on or about December 22, 2022 (BZA0001 thru BZA0603), the second part coming as an Exhibit with the BZA's *Supplement to Return to Writ of Certiorari* filed on or about April 11, 2023 (BZA0604 thru 0827), and the third part coming as an Exhibit with BZA's *Second Supplement to Return to Writ of Certiorari* filed on or about June 1, 2023 (BZA0828 thru BZA1377).

6. SWN characterized its proposed land use as an "Oil/Gas Extraction" use as defined by the UDO and asserted that the Property was located in the Planned Development District, where Oil/Gas Extractions Uses were only permitted if a Conditional Use Permit was granted by the BZA. (BZA0004).

7. SWN's *Application* stated that it proposed to conduct a four-phase process to produce oil and gas at the Property, consisting of construction, drilling, completions, and production. (BZA0007). These phases included construction of the facilities described in the *Application*, 13-18 days of drilling for each "horizontal leg" of a well, hydraulic fracturing of rock "to stimulate production from new and existing wells by pumping a sand/water mix at a pressure high enough to crack the rock[,]" flowback in which "fracturing fluids will flow back out of the well" during a one-month long, 24-hour per day process. (BZA0009)

8. After completion, SWN stated the wells would produce natural gas to be conveyed by a buried pipeline, and natural gas liquids and condensates to be conveyed by trucks. (BZA0010)

9. In the *Application*, SWN stated that its proposed Oil/Gas Extraction use complied with all standards of the Planned Development District (except, of course, the permitted use table) and the "express standards" for Oil/Gas Extraction uses, citing Section 9.6 (24)(a) of the UDO.

10. At the April 17, 2023, hearing to take additional evidence pursuant to W. Va. Code § 8A-9-6(b) (hereinafter referred to as the "Evidentiary Hearing"), SWN presented testimony that its proposed drill rig would be 165 feet tall, exceeding the 60-foot maximum height limit in Article 10 of the UDO. (BZA1276);

11. Either in its *Application* and/or during the hearing before the BZA, Petitioner represented that:

a. the gas wells it proposed would be located more than 200 feet from any residential use in accordance with Supplemental Regulation 24 of the Land Use Table at Section 9.4 of the UDO. (BZA0011);

b. it had submitted a Type II site plan and related materials that met the conditional use application requirements to establish site layout and building design, among other items. (BZA0011);

c. "The Proposed Uses are compatible with the goals of the Comprehensive Plan and the appropriate and orderly development of the PDD. *Id.*;

12. SWN cited UDO § 3.6.3.1 (which supplies the requirement that the Board consider whether a proposed conditional use is compatible with the goals of the Comprehensive Plan and the orderly development of the district) and referred to Exhibit J of its *Application*. *Id.* Exhibit J consisted of one graphic image of the well pad (as viewed from Route 22) and did not show any surrounding buildings or uses (BZA0198) and one graphic image of the well paid (as viewed from Park Drive) showing an open field and building (BZA0199)

13. SWN's *Application* contained no additional information supporting its assertion that its proposed 14 hydraulic fracturing gas wells would be compatible with the goals of the Comprehensive Plan and with the appropriate and orderly development of the Planned Development District. (BZA0001-0337).

14. SWN represented in its *Application* that "The Proposed Uses will not hinder nor discourage the appropriate development and use of adjacent land and buildings. (BZA0011).

15. To support this representation, SWN cited *UDO* § 3.6.3.1 (which supplies the requirement that the Board will only approve a conditional use if it will not hinder the appropriate development in the district) and referred to Exhibit J of its *Application. Id.* Exhibit J consisted of the two graphic renderings described in Paragraph 12, *supra*, and contained no information with respect to other existing or planned development in the Planned Development District or near the Property. (BZA0198-9).

16. SWN's *Application* contained no additional information supporting its assertion that its proposed 14 hydraulic fracturing gas wells would neither hinder nor discourage the appropriate development and use of adjacent land and buildings. (BZA0001-0337)

17. SWN represented in its *Application* that "Once the Gas Wells are in production, the Proposed Uses shall not be more objectionable to nearby properties by reason of fumes, noise, vibration, flashing of or glare from lights, and similar nuisance conditions than the operations of any Permitted Use not required by a Conditional Use permit in the district." (BZA0012-3)

18. SWN cited Section 3.6.3.1 of the UDO in reference to this representation, which required the BZA to approve a conditional use only if its use will not be more objectionable to nearby properties due to the listed hazards than surrounding uses. *Id.*

19. SWN relied on Exhibits G and J to its *Application* to support its claim. Exhibit J contains the two graphic images with no information about surrounding uses, noted in Section 12 *supra.* Exhibit G consists of an aerial photograph of a well pad and does not represent the Property at issue in this litigation nor show any surrounding uses. (BZA0149)

20. SWN included no other information in its *Application* in support of its representation that its proposed Oil/Gas extraction use would not be more objectionable to nearby properties due to fumes, noise, vibration, lights, or other nuisance conditions. (BZA0001-0337)

21. SWN made no representation in its *Application* that its proposed Oil/Gas extraction use would not be more objectionable to nearby properties due to fumes, noise, vibration, lights, or other nuisance conditions prior to wells going into production. (BZA0001-0337)

22. On August 3, 2021, the BZA held a duly noticed public hearing on SWN's *Application* for conditional use permit. (BZA0513-0556)

23. SWN appeared at the public hearing, through legal counsel and by its corporate representatives. (BZA0604-0700)

24. SWN offered testimony by Bob Layne, SWN Land Manager, at the public hearing who reviewed Exhibit N to SWN's *Application* for conditional use permit, describing the area as a driveway or off-ramp onto Three Springs Drive at rue 21 and near the Walmart building, and reviewed Exhibit C, describing it as SWN's property lease giving SWN the right to produce oil and gas at the Property. (BZA0617-8)

25. SWN offered additional testimony at the public hearing from Shawn Jackson, operations manager at SWN. (BZA0618) Mr. Jackson described the process of well pad construction, hydraulic fracturing, and development. (BZA0618-9) Mr. Jackson testified that 14 gas wells are planned for this Property – described as a "lateral" or hydraulic fracturing "leg" – but SWN initially planned for construction of 3 wells. (BZA0623)

26. SWN then called Bob Layne, SWN Land Manager, a second time at the public hearing, to testify about the use of lighting on drill rigs at the Property, the safety plan at the property, and nearby residents. (BZA0630-1) Mr. Layne testified that the nearest resident was 1,200 feet from the proposed well pad site. (BZA0631)

27. SWN also offered testimony at the public hearing from Brian Lantz, a civil engineer employed by Civil & Environmental Consultants and retained by SWN. Mr. Lantz testified that the buildings proposed for the site meet the requirements of Table 2 (Development Standards) of the UDO and that the main well pad would measure 355 feet by 550 feet, and an auxiliary well pad would measure 200 feet by 300 feet. (BZA0633) Mr. Lantz also testified to his

understanding of the geotechnical reports included in SWN's *Application*, representing that ""the purpose of the geotechnical report ... to go out and investigate the site, conduct borings, understand the soil and the geology of the site with respect to grading as proposed to construct the site. ... to confirm that the proposed (inaudible) will be stable and can withstand the loading (inaudible) imposed upon it throughout various operations." (BZA0635)

28. SWN also offered testimony at the public hearing from Jeff DePaolis, traffic engineer with Civil & Environmental Consultants and retained by SWN. Mr. DePaolis testified regarding a traffic impact study he conducted for SWN regarding expected traffic arising due to its proposed Oil/Gas extraction use at the Property. (BZA0640) Mr. DePaolis testified that all traffic would come into the site from Route 22, and that he chose three intersections to evaluate traffic impacts: the westbound on- and off-ramps from Route 22 at Three Springs Drive, the eastbound on- and off-ramps from Route 22 at Three Springs Drive, and the intersection of Three Springs Drive and Park Drive. (BZA0641) Mr. DePaolis testified that the referenced intersections currently had a level of service of C or better. (BZA0641-2) Mr. DePaolis testified that, in order to perform the traffic impact study, he assumed "22 trucks arriving that will go through the site, and the same 22 trucks departing after they're empty." (BZA0643) Mr. DePaolis testified that "we analyzed the morning and the peak hour" and testified that he also estimated 25 employees traveling by car and assumed 25 additional passenger cars, stating "During the morning and peak hour; 22 of those being trucks and 25 being passenger cars. Again, those are one direction. So it would

be 94 total trips, 47 in and 47 out." (BZA0643) Mr. DePaolis testified that the traffic impact study he performed based on the referenced projections indicated that there would be no change in the level of service at the three intersections evaluated. (BZA0643-4)

29. SWN offered testimony at the public hearing from Bradley Webb, an employee of Absolute Noise Control, which he described as a consulting firm performing noise mitigation for the oil and gas industry. (BZA0644) Mr. Webb testified that the nearest occupied structure to "this site" is approximately 1,500 feet. (BZA0646) Mr. Webb testified that he projected the highest noise impact to "the receiver to the south of the proposed pad site" would be 56.1 decibels, and he testified that the measurement was below the 65-decibel limit established by the County noise ordinance.

30. SWN then concluded its presentation of its *Application* to the Board. (BZA0651)

31. SWN representatives and the BZA continued a discussion, which began at the start of the hearing, regarding whether SWN had submitted all documentation in support of its *Application* for conditional use permit with its initial *Application*, and whether SWN properly supplemented the *Application* by adding a traffic impact study to the materials presented on the date of the hearing. *Id.*

32. Butch Mastrantoni then spoke at the public hearing on behalf of the City of Weirton. (BZA0651). Mr. Mastrantoni stated that he was the utilities director for the City of Weirton, that city residents received water from the Ohio

River and the Ranney aquifer, and that the watershed for the Ranney aquifer "comes pretty close to the well site they're going to be drilling here[.]" (BZA0652) Mr. Mastrantoni also stated that "this well pad is roughly 32 to 3,500 feet away from any waterline that I currently have that services the area, which means that there is no fire protection as well to this area." (BZA0652) Mr. Mastrantoni also stated that there was no sanitary service to this area. *Id.*

33. The BZA then opened the public hearing to citizen comments. (BZA0654)

34. Ed Bowman spoke about his history living in the area, his concern about noise and light impacts on the Angeline Estates residential area near the site of the proposed well pad, and the impact of water trucks on traffic and noise. (BZA0656-7) Mr. Bowman stated, "[L]et's also take a look at some of the other areas where similar operations have taken place. Board members, I would strongly urge you to speak to the Brooke County Commission and research some of the citizens down there. Just recently over the last couple of weeks, citizens came to the Brooke County Commission complaining about the noise, complaining about the trucks going – there was two accidents according to the newspapers." *Id.* Mr. Bowman also stated, "the location I think is absolutely terrible." (BZA0658)

35. Barb Barkley, manager of the Fairfield Inn and Suites on Amerihost Drive, off of Three Springs Drive, spoke regarding her concerns about the proposed development. (BZA0659) Ms. Barkley stated, "First of all, if you've ever been on Three Springs Drive at 3:00 in the afternoon, you can't go anywhere.

Now, if you have a whole lot of trucks – the gas trucks that bring your product out – Three Springs Drive is going to be a mess." (BZA0659) Ms. Barkley stated, "And you talked about your facility not being within 1,500 feet of a residence. Now, my hotel is not a residence, but I have people stay at my hotel. So it will be impacted by the traffic, by the noise. I live within 2,000 feet of one of these well pads. I know what the noise is. They will be impacted by the noise as much as you try to (inaudible) it down." (BZA0659) Ms. Barkley also stated that the proposed development would negatively impact business at the Fairfield inn and Suites. (BZA0660)

36. Eron Check, Hancock County Commissioner representing the Weirton District, expressed her support for the project and stated that it would have tax benefits for the community. (BZA0661)

37. Michael Paprocki, executive director of the Brooke-Hancock-Jefferson Metropolitan Planning Commission stated that his organization represented the transportation interests and the land use interests of the City of Weirton and of Brooke and Hancock Counties. (BZA0685-6) Mr. Paprocki stated the UDO required that the Board consider future planned development on Park Drive when determining whether to grant a conditional use permit. *Id.* Mr. Paprocki noted that SWN did not include any information about planned development in its *Application.* (BZA0686) Mr. Paprocki additionally stated that the *Application* and presentation by SWN did not provide information about transportation noise from trucks, the lengths of the trucks to be used, and whether the road geometry is adequate for the proposed truck traffic. *Id.*

38. Attorney Mike Simon stated that he was appearing on behalf of Park Drive Development. (BZA0687) Attorney Simon noted that SWN's *Application* referenced the requirement that a conditional use would not hinder nor discourage the appropriate development and use of adjacent landowner. (BZA0687) Attorney Simon stated that Park Drive Development was the adjacent landowner to the proposed development. (BZA0688) Attorney Simon asked for information about when the traffic impact study performed for SWN was completed, and why it was not submitted prior to the hearing. *Id.* Attorney Simon noted that the study was performed in May but not submitted to the Board until the August 3rd hearing. (BZA0689)

39. Joe DiBartolomeo stated that he was a longtime Weirton resident and lived in the Angeline Estates residential area. (BZA0690) Mr. DiBartolomeo stated that the SWN *Application* materials incorrectly identified the location of the well pad, that the traffic impact study did not consider a forthcoming development, and that this was a key area in the future development of the City. (BZA0691) Mr. DiBartolomeo stated that the proposed Oil/Gas extraction use would hinder the development of Attorney Simon's property, which would include residential uses on the second floor. (BZA0692)

40. Public comment at the August 3, 2021 hearing then concluded. (BZA0695)

41. SWN counsel Shawn Gallagher then spoke in response to the public comments, stating that the proposed use was a short-term project, that this would not be a "constant noise operation, truck traffic operation" and that "[i]t could be viewed more as a construction project." (BZA0695) Attorney Gallagher stated, "Your ordinance provides for this use. It allows it in this area. As an applicant, all we can do is come and comply with the requirements of the zoning ordinances, which we have done." (BZA0696)

42. After Attorney Gallagher concluded SWN's presentation of its *Application*, the BZA entertained a motion to table the *Application* pending receipt of additional information regarding the concerns raised at the hearing, including the traffic impact study. (BZA0697)

43. SWN counsel, Attorney Gallagher, stated, "I mean, I would ask that the engineer or anybody from the city that would like to reach out to use or have a discussion with us or questions beforehand just to make it a little bit more beneficial for the Board before the hearing." (BZA0697)

44. The BZA then continued the hearing to its next regular meeting date on September 7, 2021, for the purposes noted. (BZA0697-8).

45. At the September 7, 2021, meeting (hereinafter referred to as the "second public meeting"), the BZA continued its hearing on SWN's *Application* for conditional use permit, as stated in the transcript of the August 3, 2021 hearing. (BZA0704) SWN again appeared by counsel and its corporate representatives. *Id.*

46. The BZA received a resolution of the Weirton Area Water Board opposing issuance of a conditional use permit for drilling at the Property until the water board determined that such drilling would not adversely affect the Ranney well. (BZA0705) The BZA also received correspondence from Ray and Jillian Pratt opposing approval of the *Application* for conditional use permit. *Id.*

47. The BZA then conducted a citizens' comment portion of the meeting. (BZA0709)

48. George Hvizdak stated that he owned 36 acres adjacent to the Property and opposed the conditional use permit because it would limit more appropriate development of adjacent property. (BZA0720)

49. Barb Barkley stated that she was the general manager of the Fairfield Inn and Suites located at Three Springs Drive and was speaking on behalf of the hotel owners and management, SJB Hotels and SJB Management Company. (BZA0721) Ms. Barkley stated that the Fairfield was located directly by the proposed site and its owners felt that the impact in the construction of the pad, future operations, would negatively impact its guests and would have a negative impact on its operations and the comfort of its guests. (BZA0722) Ms. Barkley stated that the proposed development would also negatively impact all of the businesses located in the Three Springs Drive area. *Id.* Ms. Barkley stated, "With the recent announcement of the City of the Park Drive area development, we fear the construction of a well pad ... will deter the progress of that development and future hospitality businesses coming to this area." (BZA0722) Ms. Barkley stated that, due to the time during which the traffic

impact study was conducted by SWN, it did not show the true impact on the Fairfield's visitors and guests, and "Not only do we currently see increased traffic on Three Springs Drive with the addition of numerous new businesses, but the ingress and egress of the highway will be severely impacted." (BZA0723)

50. Dr. Eli Dragisich stated that the Weirton Planning Commission developed a plan for development in the Three Springs Drive area that did not permit anything other than residential, light manufacturing, or retail in the area because "that would develop jobs for us" and noted "in the past 20 years, that area has been a bright spot in business development." (BZA0724) Dr. Dragisich stated that there is business development along Three Springs Drive, and that granting this permit would be a deterrent to that development. (BZA0726)

51. Attorney Eric Frankovitch stated that he was one of the owners of the Park Drive Development, and that J.J. Barnebei, Attorney Mike Simon, and Jason Bickel, were co-owners appearing with him. (BZA0729) Attorney Frankovitch stated that Park Drive Development had acquired 72 acres across from the Walmart right next to the Property where SWN proposed to develop its oil/gas extraction use. (BZA0729) Attorney Frankovitch stated that the purpose of the development was a commercial operations with residential upstairs and stated, "We can't do this development if there's going to be a gas well next to it. It just can't work. And it's not that it's in the plans or it may happen. It's already been approved. The contract for the infrastructure has already been let to (inaudible) construction." (BZA0730) Attorney Frankovitch stated that there was reason to deny the permit under the UDO because it would be detrimental

to local property values. (BZA0731) Attorney Frankovitch stated, "This absolutely will stop the development of what's I think going to be one of the nicest areas in the region. Because we can't do it if you have a gas well next to it." (BZA0731)

52. Joe DiBartolomeo stated that the Comprehensive Plan goals provided for facilitating the building at Three Springs Park Drive as a mixed-use development with a mix of entertainment, retail, hospitality, and high-density residential uses. (BZA0737) Mr. DiBartolomeo stated that a gas well pad did not promote the Comprehensive Plan goal. (BZA0737-8)

53. After public comments concluded, Attorney Mark Colantonio spoke on behalf of the City of Weirton. (BZA0764) Attorney Colantonio presented objections to the traffic impact study prepared for SWN. (BZA0765) Attorney Colantonio stated that the traffic count used for the study was performed at 8:30-9:30 a.m. and 4:30-5:30 p.m. (BZA0767) Attorney Colantonio stated that the traffic counts were performed on a single day, February 17, 2021. *Id.* Attorney Colantonio stated that traffic levels were artificially low on that date due to COVID restrictions. *Id.* Mr. Colantonio stated that the weather on the date of the traffic count was eight degrees, resulting in less traffic. (BZA0767-8) Attorney Colantonio stated that the traffic impact study used an estimated number of truck trips only based on the site operator (SWN) direction and was not based on actual site traffic. (BZA0768) Attorney Colantonio stated that the estimates indicated an additional 1,000 truck trips per day. *Id.* Attorney Colantonio stated that the study accounted for a 1 percent projected increase in

traffic but that the traffic increase in the area would be greater due to the additional development occurring and planned at Three Springs Drive. (BZA0769) Attorney Colantonio stated that the traffic impact study assumed the truck traffic would come from three separate directions, but that the traffic would all come from the same direction when the water source was in one area. (BZA0771) Attorney Colantonio stated that the traffic impact study assumed 20 percent of truck traffic would be directed toward Cove Road downtown, but that the assumption was incorrect because the trucks had no destination in that direction. (BZA0771) Attorney Colantonio stated that the report failed to account for delays at signalized intersections due to backups or loading at turn lanes, and that accounting for those delays could impact the level of service. (BZA0773)

54. SWN counsel, Attorney Gallagher, then questioned Attorney Colantonio regarding his qualifications to evaluate traffic studies. (BZA0774)

55. Attorney Gallagher and counsel for the BZA then discussed whether Attorney Gallagher was entitled to conduct examination of Attorney Colantonio, and whether Attorney Colantonio was entitled to conduct examination of Mr. DePaolis, the traffic engineer retained by SWN. (BZA0775) Attorney Gallagher stated, "There were a lot of issues raised today. And we would like a chance for rebuttal – to come back next week. ... We're trying to work with the city. I don't know what else we can do at this point. So if you would like, I would be happy to have these questions answered by Mr. DePaolis right now. If you want to have your engineer ask him, that would be fine as well." (BZA0778-9)

56. Attorney Colantonio then questioned Mr. DePaolis regarding his conduct of the traffic impact study. (BZA0779) Mr. DePaolis stated that the estimated truck traffic was based on numbers provided by SWN and may change if additional wells were developed. (BZA0781) Mr. DePaolis stated that he was not aware of the direction in which trucks would travel to and from the site. (BZA0791) Mr. DePaolis stated that the study did not account for all of the trucks coming from the same direction or leaving toward the same direction. (BZA0791-2) Mr. DePaolis related that the study results regarding delay at traffic lights was based on software and not on the actual delay timer used at the traffic signals at the intersections studied. (BZA0794-5) Mr. DePaolis further stated that the new development on Park Drive was not factored into the traffic impact study. (BZA0799) Mr. DePaolis was asked why he chose to use 8:30-9:30 a.m. and 4:30-5:30 p.m. for the traffic study and said in response that those were the peak hours. Mr. DePaolis testified that he did not investigate actual peak traffic times at the area and did not evaluate traffic at lunchtime hours. (BZA0803)

57. Shawn Jackson, SWN Operations Manager, then discussed the timing of construction, completion, and production operations and his estimates of the times during which truck traffic would be generated. (BZA0806)

58. Kaleb Knowlton, program manager for the City of Weirton planning department, then presented to the BZA on behalf of the City of Weirton. (BZA0810) Mr. Knowlton stated that the proposed use by SWN was not compatible with the goals of the comprehensive plan, "Specifically Goal Number 2, Objective 2.3 – which I'll reference in the City's 2018 Comprehensive Plan.

Objective 2.3 is to facilitate the build-out on Three Springs Drive and the Park Drive area as (inaudible) commercial development." (BZA0811-2) Mr. Knowlton stated that the proposed Oil/Gas extraction use would be a detriment to the City's comprehensive plan and would hinder adjacent development. (BZA0812) Mr. Knowlton also stated that he believed the proposed Oil/Gas extraction use would be detrimental to property values in the area and stated that Oil/Gas extraction was not compatible with surrounding uses, stating, "There's ... a rue21 distribution warehouse. But there is no heavier industry there." (BZA0813)

59. SWN Counsel Shawn Gallagher cross-examined Mr. Knowlton. (BZA0814) Attorney Gallagher then stated to the Board, "As I had mentioned earlier, we will be here next month, and we would like the opportunity to present a rebuttal case at next month's zoning hearing. We would like the opportunity to respond to the Thrasher report, I guess, that we just received. And I can follow up with Attorney Guida after this hearing. However, we did anticipate some of these issues, and we do have a report that we would like to submit into evidence prepared by Moody & Associates. We only have two copies. We can provide more afterwards. And I believe we have submitted Exhibits A through S, and this would be T. And I would like to present testimony of a professional geologist to respond to some of the issues that were raised today." (BZA0817)

60. Attorney Gurrera responded, "There is not one new issue that was raised today. Every issue that came up today was a rebuttal to what they said a month ago, which was the purpose of today's hearing. And they presented their evidence. We presented our rebuttal evidence. I didn't bring in any new information." (BZA0819) Attorney Gallagher was asked by the Board, "What specifically do you wish to rebut?" (BZA0820) Attorney Gallagher responded, "That whatever issue was raised when we (inaudible) beyond reading the newspapers that there were issues raised about the water source protection plan, which we requested beforehand. I didn't get any response. We understand that there was a 2019 plan that was specifically going to be testified to. We had the 2003 plan. We have somebody who can testify to water issues right now. He's not going to be here on October 5th. But we would like to respond. I can provide his testimony now since he's here and supplement that after this hearing with his specific response to (inaudible) issues that we just received five minutes ago." (BZA0819)

61. The BZA, by and through board member Attorney Amanda Alexander, then moved to deny a continuance of the hearing, stating "I mean, we're here today. We're here for the same reasons. Water was an issue at the last meeting. I don't see why it wasn't presumed that water would be an issue at this meeting." (BZA0821) Upon the motion of Attorney Alexander, the BZA voted not to continue the hearing to a future date. (BZA0822)

62. The BZA then considered whether to permit testimony of the geologist offered by Attorney Gallagher for SWN. (BZA0822)

63. Attorneys for SWN and the Weirton Area Water Board engaged in discussions regarding whether an aquifer study or geologist report was required as part of its *Application* or preempted by state law, and the Board ultimately did not hear testimony of the geologist offered by SWN. (BZA0824)

64. The BZA then entertained a motion to deny the *Application* for conditional use permit and voted unanimously to deny the *Application.* (BZA0826)

65. In the course of its two public hearings on SWN's *Application* for conditional use permit to conduct Oil/Gas operations at the Property in the Planned Development District, the BZA considered, in addition to the public comments and statements or testimony of SWN and the City of Weirton as referenced above, the following documents:

a. Park Place/Frankovitch Development Plans, showing the forthcoming Park Drive Development described variously by Attorney Frankovitch, Attorney Simon, and Ms. Barker. (BZA0338-0451);

b. Thrasher Engineering report to Weirton Area Water Board regarding the Ranney aquifer. (BZA0452-3);

c. Traffic Study prepared for SWN. (BZA0457-511); and

d. Realtor letter opining that the proposed use would negatively impact nearby property values. (BZA0512).

66. In accordance with the procedures for consideration of applications for conditional use permits at Section 3.6 of the UDO, the BZA issued a written decision describing its reasons for denying SWN's *Application* (hereinafter referred to as the "Decision"). (BZA0589)

67. The Decision included 52 numbered findings of the BZA and 9 numbered conclusions addressing whether SWN's *Application* for conditional use permit met the requirements of the UDO. (BZA0597-602) In finding that it did not meet the requirements of the UDO, the BZA's Decision:

a. noted that Section 3.6.3(A) of the UDO required it to determine that a proposed conditional use was compatible with the goals of the City's Comprehensive Plan in order to grant the conditional use permit. (BZA0598);

b. found that the Comprehensive Plan, Objective 2.3, stated that the City should "[f]acilitate the build-out of Three Springs/Park Drive area as a mixed-use commercial hub." *Id.*;

c. found that Objective 2.3 further stated in part:

> Changing retail patterns, most significantly the rise of e-commerce, are affecting communities across the country. Given the limited future for big box retail, the City should encourage mixed-use to remain competitive. The strategy for build-out of the Three Springs area should encourage a diverse mix of entertainment, retail, hospitality, and high density residential. The City should continue to work with the BDC and other stakeholders to expand the industrial park. Sites should be prepared to attract major tenants that will provide quality employment opportunities for residents and attract new workers to the City. ***Future development [in the Three Springs Drive area] should be managed to avoid worsening traffic congestion and additional stress on other existing infrastructure.***

(emphasis original) (BZA0598);

d. found that the traffic study submitted by SWN regarding its proposed use estimated an additional 1,000 trips per day, including trips for trucking water into and out of the site. The BZA found that the traffic study did not identify the actual routes to be used by truck traffic arriving at or departing the site. (BZA0599) The BZA found that the traffic study was flawed because it used faulty traffic count numbers and information about the direction from which truck traffic would arrive and depart. (BZA0600) The BZA also found that the traffic study did not adequately account for existing and planned development in the district and additional traffic that would be generated. (BZA0600) The BZA found that the traffic study failed to properly account for delays at traffic signals because it did not use actual data regarding the timing of the signals. (BZA0600);

e. found that the noise assessment or study presented by Webb erroneously identified Angeline Estates as the nearest residential area but that closer residential areas exist at Woodlawn Estates and Beacon Drive, and that information about noise in those areas was not presented. (BZA0600-01);

f. found that "the Three Springs Drive area is the main commercial area or hub for the City of Weirton" and also that "Three Springs Drive area has experienced much business growth for at least the

past 20 years, including recent development of the old Wal-Mart and K-Mart sites[.]" (BZA0601);

g. found that "Three Springs Drive area will experience future business growth, including the addition of Aldi, Big Lots and the Park Drive Development[.]" *Id.*;

h. found that Park Drive road was a two-lane road with no center turning lane, that the Three Springs Drive area was one of the most traveled roads in the City and traffic flow on Three Springs Drive was routinely congested, that water, sand, and other trucks and vehicles would be using Park Drive to arrive at and depart from the proposed well pad site, and that traffic congestion in the Three Springs area would worsen, and additional stress would be placed on existing infrastructure, if the proposed conditional use were allowed. (BZA0601);

i. found that the neighborhood character and surrounding property values would be negatively impacted by the proposed conditional use of Oil/Gas extraction. (BZA0601); and

j. evaluated each of the Standards for Approval found in Section 3.6.3.1. of the UDO and found that the *Application* failed to meet each standard. (BZA0601-2)

68. Based upon its factual findings, the BZA concluded that it could not issue the requested conditional use permit because SWN failed to establish the standards required by the UDO. (BZA0602-3)

69. After the conclusion of the BZA's proceedings on the *Application*, and on certiorari review before this Court, SWN presented additional testimony and evidence at the Evidentiary Hearing as follows:

a. SWN introduced the "Moody and Associates Hydrogeologic Evaluation Report" which it requested to submit to the BZA at the September 7, 2021 hearing. (BZA0973-1023);

b. SWN also offered the testimony of Jeffrey Walentosky, the geologist SWN sought to have testify before the Board at the September 7, 2021 hearing. (BZA1335);

c. SWN offered testimony of Shawn Jackson, operations manager for SWN, and Jeffrey DePaolis, traffic engineer retained by SWN. (BZA1237) Testimony of Mr. Jackson and Mr. DePaolis was not a subject on which SWN requested rebuttal or additional evidence before the BZA at its September 7, 2021 hearing. (BZA0819);

d. SWN introduced into evidence a WVDEP Well Work Permit (BZA1024-1055), a DOH Permit #06-2021-0459 (BZA1056-1074), an exhibit captioned "Pictures of Other Area Properties" (BZA1075-1078), and the City of Weirton Comprehensive Plan (BZA1079-1234). None of these additional exhibits were the subject of SWN's request for rebuttal or additional testimony before the BZA at its September 7, 2021 hearing. (BZA0819)

Based upon the foregoing **FINDINGS OF FACT**, the Court does hereby make the following:

CONCLUSIONS OF LAW

1. State law grants specific authority to cities to adopt zoning laws. *W. Va. Code* § 8A-7-1. The legislature found that local authority to plan land development is "vitally important" to a community. W. Va. Code § 8A-1-1(a)(1). To preserve those vital interests, municipal governing bodies are authorized to enact a zoning ordinance. W. Va. Code § 8A-7-1(a)(3). The zoning ordinance must promote "general public welfare, health, safety, comfort and morals" and provide "a plan so that adequate light, air, convenience of access and safety from fire, flood and other danger is secured." W. Va. Code § 8A-7-2(a). The zoning ordinance also must plan to lessen congestion, promote attractiveness and convenience, and promote orderly development. *Id.*

2. Zoning codes may designate or prohibit specific land uses; divide the land into districts allowing certain uses and establish performance standards for those uses; regulate height, area, bulk, use and architectural features of buildings; and regulate traffic flow and access. W. Va. Code § 8A-7-2(b).[2]

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[2] In the consolidated civil action, SWN separately argues that the Board had no authority to consider its application for conditional use permit because, SWN claims state law preempts the application of the UDO to any oil/gas extraction use. Those arguments have been resolved by separate order of this Court, now pending on appeal before the Intermediate Court of Appeals of West Virginia and are not subject of this Order. With respect to legislative zoning authority as applied to oil/gas extraction uses, the legislature did address zoning's application to oil and gas development specifically within the Land Use Planning Act, and it chose not to prohibit zoning for these uses. W. Va. Code § 8A-7-10(e). The legislature struck a balance, directing that zoning may not prevent full development of oil and gas resources *outside of* municipalities or urban areas. ("Nothing in this chapter authorizes an ordinance, rule or regulation preventing or limiting, outside of municipalities or urban areas, the complete use (i) of natural resources by the owner;

3. The City of Weirton adopted its zoning code pursuant to the legislative authority in the Land Use Planning Act, W. Va. Code § 8A-1-1 *et seq.*, designating the zoning code the "Unified Development Ordinance" ("UDO").

4. The UDO[3] establishes Zoning Districts, Zoning Map, and Permitted uses at Article 9. Section 9.1.2.8. defines the Planned Development District, where the Property is located, as follows:

> This district is intended to promote development of large tracts of land in a planned and orderly manner. The purpose of this zoning district is to encourage a unified, orderly, and creative flexible use of large parcels with close access to major transportation systems. The district allows flexibility in planning and development and provides a process for evaluating plans to assure compatibility with adjacent parcels. Planned Development Districts should provide for the establishment of areas in which diverse commercial, light industrial and residential uses may be brought together as a compatible and unified plan of development which is in the best interest and the general welfare of the public.

5. The UDO separately establishes an M-2 District for Heavy Industrial/Light Industrial/Commercial District at Section 9.1.2.10, which provides:

> This district is intended to create, preserve and enhance industrial areas devoted to manufacturing and other non-commercial and non-residential uses which are potentially incompatible with most other activities, and are typically appropriate to areas of the City which are somewhat distant from residential areas and have access to suitable and adequate railroad, waterway, or highway shipping facilities. It is the expectation that such manufacturing or other non-residential uses would have operating characteristics that are considered more obnoxious or unpleasant than those in the M-1

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or (ii) of a tract or contiguous tracts of land of any size for a farm or agricultural operation as defined in § 19-19-2 by the owner. For purposes of this article, agritourism includes, but is not limited to, the definition set forth in § 19-36-2."). Within municipalities, zoning laws are generally authorized to regulate the use of natural resources by the owner.

[3] The full text of the adopted UDO is available at the following link: https://www.cityofweirton.com/DocumentCenter/View/1263/Complete-UDO-2021-PDF?bidId=

districts, but would not be so obnoxious nor unpleasant that they would be detrimental to surrounding properties or to other parts of the City. The district provides an area where industrial/office/warehouse activities can be accommodated in an integrated plan evolving around world-class transportation connections.

6. Section 9.4 of the UDO establishes the Permitted Land Use Table, and Section 9.4.1 provides the following: "The Permitted Land Use Table (Table 1) and its contents are incorporated into this Article and identify the types of land uses that are permitted in each of the zoning districts established within the City."

7. Section 9.4.4 of the UDO defines Permitted, Accessory, and Conditional Uses as follows:

P: Use is permitted by right in a particular zone; a permit is required.

A: Use is permitted as an Accessory Use in a particular zone; a permit is required.

C: Use is allowed as a Conditional Use in a particular zone subject to the limitations and conditions specified; a permit is required.

8. In accordance with the Land Use Table, incorporated into the UDO by Section 9.4.1, *supra*, " 'Oil/Gas Extraction' is a Conditional Use in all districts. It is subject to Supplemental Regulation number 24."

9. Supplemental Regulation 24 provides the following:

Oil and gas extraction activities shall comply with the following:

a. No well may be located closer than two hundred (200) feet to any residential use.

b. All oil and gas exploration shall be subject to the Oil and Gas Laws, Chapter Twenty-two, Article Four, of the Code of West

Virginia, as amended, and the rules and regulations of the West Virginia Department of Environment (sic) Protection.

10. Article 10 of the UDO establishes Development Standards applicable to property development within the City, including specific standards applicable to certain zoning districts. The Intent of the Development Standards is defined in Section 10.1 of the UDO as follows: "It is the intent of this Article to provide density and dimensional standards which serve to define the development character of an area, and to ensure the compatibility of development with the environmental characteristics, accessibility levels, and special amenities offered by the development site and with surrounding land uses. The standards are established in Table 2, Development Standards."

11. Section 10.2.1. of the UDO incorporates the Development Standards Table, with district-specific standards, into the UDO, as follows: "The Development Standards Table (Table 2) and its contents are incorporated into this Article and identify the types of development standards to which property can be developed in each zoning district established throughout the City."

12. The Development Standards Table includes a designation for the Planned Development District (designated "PDD"), with lot coverage requirements for buildings and accessory uses, and a maximum height of 60 feet.

13. Under the UDO, SWN was required to apply to the Board for a conditional use permit in order to establish an "Oil/Gas Extraction" use in the Planned Development District. See UDO §§9.4.1, 9.4.4.

14. Pursuant to W. Va. Code § 8A-1-2(d), " 'Conditional use' means a use which because of special requirements or characteristics may be permitted in a particular zoning district only after review by the board of zoning appeals and upon issuance of a conditional use permit, and subject to the limitations and conditions specified in the zoning ordinance." When it is granted, a special exception or conditional use permits certain uses which the ordinance authorizes under stated conditions. *Corliss v. Jefferson County Bd. Of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003).

15. The decision to grant or deny a conditional use permit is a discretionary action of the body administering the zoning ordinance. W. Va. Code §8A-8-9(3) ("A board of zoning appeals has the following powers and duties:(3) Hear and decide conditional uses of the zoning ordinance upon which the board is required to act under the zoning ordinance;").

16. The UDO establishes procedures for the Board to hear applications for conditional uses at Section 3.6. Section 3.6.1.1. of the UDO states the purpose of conditional uses, in relevant part, as follows:

> The establishment of a Conditional Use permit procedure provides Weirton with such flexibility to provide for certain uses which shall be permitted only if adequate conditions exist or can be imposed that will make such uses compatible with the purposes of this Ordinance and the Comprehensive Plan. The Conditional Use permit procedure shall provide for some measure of individualized judgment and the imposing of conditions on certain uses, in order to make them compatible with uses in the surrounding area. It is further intended that the Conditional Use permit, through a site plan review process, shall provide a method whereby it can be determined whether or not a use would cause any damage, hazard, nuisance, or other detriment to persons or property in the vicinity.

17. The application process for a conditional use permit is prescribed by Section 3.6.1.5. of the UDO. An applicant must submit a preliminary site plan, preliminary building plans, and any other information deemed helpful by the applicant or necessary by the Board to explain the nature of the proposed use and its consistency with the standards established for conditional use permits.

18. The UDO establishes specific notice and hearing requirements for consideration of an application for conditional use permit. UDO § 3.6.1.4.(E)-(H).

19. Under the UDO, the Planning Director publishes a legal advertisement providing notice of the Board's hearing on the application:

> The Planning Director shall publish a Class I legal advertisement describing the request for a Conditional Use permit in a local newspaper of general circulation at least fifteen (15) days prior to the scheduled public hearing before the Board of Zoning Appeals.

UDO § 3.6.1.5(E).

20. The UDO requires that the Board hold one scheduled public hearing, as identified in the published legal notice, on the application for conditional use permit. UDO § 3.6.1.5(F) ("The Board of Zoning Appeals shall hold a duly scheduled public hearing to review the complete site plan and application for the Conditional Use permit request.").

21. The Board's decision to grant or deny the application for conditional use permit is required to be reduced to writing and delivered to the applicant. UDO § 3.6.1.5 (G)-(H).

22. Any applicant whose application is denied is granted the right to appeal to the Circuit Court with jurisdiction of the involved property within thirty days of the decision. W. Va. Code §§ 8A-9-1 *et seq.*; *UDO* § 3.6.1.5.(H).

23. The UDO establishes specific standards for approval (or denial) of a conditional use application, at Section 3.6.2.1., as follows:

> The Board of Zoning Appeals may approve an application for a Conditional Use permit, subject to such reasonable conditions and restrictions as are directly related to and incidental to the proposed Conditional Use permit, if it finds that the following general standards have been met:
>
> > (A) The proposed use is compatible with the goals of the Comprehensive Plan.
> >
> > (B) The proposed use shall be compatible with the appropriate and orderly development of the district, taking into consideration the location and size of the use, the nature and intensity of the operations involved in or conducted in connection with such use, the size of the site in relation to the use, the assembly of persons in connection with the use, and the location of the site with respect to streets giving access to the site.
> >
> > (C) The proposed site development shall be such that the use will not hinder nor discourage the appropriate development and use of adjacent land and buildings, taking into consideration the location, nature and height of buildings, the location, nature and height of walls and fences, and the nature and extent of landscaping on the site.
> >
> > (D) Neighborhood character and surrounding property values shall be reasonably safeguarded.
> >
> > (E) Operations in connection with the use shall not be offensive, dangerous, destructive of property values and basic environmental characteristics, or detrimental to the public interest of the community. They shall not be more objectionable to nearby properties by reason of fumes, noise, vibration, flashing of or glare from lights, and similar nuisance conditions than the operations of any Permitted Use not requiring a Conditional Use permit in the district.

> (F) The character and appearance of the proposed use, buildings, structures, and/or outdoor signs should be in general harmony or better, with the character and appearance of the surrounding neighborhood.

24. The Board is presumed to be correct when exercising its discretion to administer the zoning ordinance. *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003).

25. The Board's decision can only be disturbed if it was illegal because it applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction. *Id.*

26. The Board's "actions are valid as long as the decision is supported by substantial evidence." *Tkacz*, 234 W. Va. 201, 764 S.E.2d 532,538, *supra.*

27. The Board is uniquely positioned to make the determination regarding what land uses are compatible with existing uses and community plans. *Corliss*, 214 W. Va. at 542, 591 S.E.2d at 100, *supra.*

28. Particularly where the Board's decision makes clear that "a detailed public debate did occur," the review of the conditional use application only to decide whether a different conclusion could be reached based on the evidence presented to the Board would improperly substitute the decision of the Court for the administrative determination by the Board. *Id.*

DISCUSSION

I. SWN'S DUE PROCESS CLAIM

SWN claims it was denied due process due to the BZA's closing of the hearing over SWN's objection, and the BZA'S denial of SWN's request to present the report of a geologist. SWN makes no claim that the BZA was not impartial. See *Rissler v. Jefferson County Bd. Of Zoning Appeals*, 225 W. Va. 346, 693 S.E.2d 321 (2010).

Due process is guaranteed by the Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. Article III, section 10 of the West Virginia Constitution also contains due process protections: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

Such protections extend to judicial, as well as administrative, proceedings:

> Due process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments.

Syl. pt. 2, *State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960)." *Rissler*, 225 W. Va. 346, 693 S.E.2d 321, at FN4.

In *Rissler*, the Court concluded that an aggrieved party was denied due process because the tribunal was not impartial – a member of the board of zoning appeals previously represented the applicant developer, and the board's attorney subsequently went to work for the developer's counsel. 225 W. Va. 355, 693 S.E.2d 330 ("...we are quite concerned that Board member Rockwell's participation in the proceedings involving Thornhill's CUP application, wherein

Thornhill is Mr. Rockwell's former client, gives rise to the "appearance of impropriety.""). Unlike in *Rissler*, in the case sub judice SWN identifies no actual or apparent bias of any member of the BZA in rendering the Decision. Thus, under the standard set out in *Rissler*, the BZA's hearings met due process requirements for consideration of SWN's *Application*.

Instead, SWN contends that it was denied due process because it was denied the opportunity to present a geologist report in rebuttal to testimony presented to the BZA at the second public hearing. (BZA0817; see also *Petition for Writ of Certiorari*, ¶ 10) Under *Mathews, supra,* three factors are evaluated to determine whether due process was provided in an administrative hearing: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. 319, 335 (1976).

The private interest involved in this matter is obtaining a conditional use permit to drill for oil and gas, which is a discretionary decision of boards of zoning appeals based on their evaluation of evidence related to community land use. *Corliss v. Jefferson County Bd. Of Zoning Appeals*, 214 W. Va. At 542, 591 S.E.2d at 100. SWN has no protected property interest in obtaining a discretionary conditional use permit, because "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more

than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Gardner v. City of Baltimore,* 969 F.2d 63, 66 (4th Cir. 1992).

In the case of a regulatory permit, a legitimate claim of entitlement exists where "the local agency lacks all discretion to deny issuance of the permit or to withhold its approval." *Id.* Thus, "[e]ven if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of a local agency to deny issuance suffices to defeat the existence of a federally protected property interest." *Id.* Even if SWN already possessed a conditional use permit and were challenging its revocation, the availability of judicial review for revocation of the permit would provide adequate process. See *Ruttenberg v. Jones,* 283 Fed. Appx. 121 (4th Cir. 2008) (unpublished).

In this case, the BZA has established detailed, publicly available procedures and standards by ordinance, which govern the review of all conditional use permit applications. UDO § 3.6. SWN was on notice of the BZA's hearings, procedures, and standards for approval, and addressed those standards specifically in its written Application. (BZA0001-0339) The BZA conducted its proceedings at public meetings after published legal notice. (BZA0557-561; BZA0583-588) SWN was present, and represented by and through legal counsel, at each of the two public hearings conducted on its *Application,* was represented by multiple corporate representatives at each of the two public hearings conducted on its *Application* and offered retained expert testimony at each of the two public hearings conducted on its *Application.* (BZA0557-561; BZA0583-588) In addition to its written application materials,

SWN submitted at the public hearing, and the BZA considered, a traffic impact study and noise study – which SWN offered in support of its assertion that its proposed Oil/Gas extraction use would reasonably safeguard neighborhood character and surrounding property values, would be compatible with orderly development, and would not be destructive of property values or the public interest of the community. (BZA0604-0700; see UDO § 3.6.2.1.)

Regarding the second *Eldridge* factor, SWN cannot establish the probable value, if any, of its proposed additional or substitute procedural safeguards. 424 U.S. 319, 335. In particular, SWN argues that it should have been permitted to offer a geology report and testimony of a geologist at the September 7, 2021 hearing before the BZA or be permitted to continue the hearing to a third hearing date to offer rebuttal evidence. (BZA0817; see also *Petition for Writ of Certiorari*, ¶ 10) However, the geologist testimony and report bear little relation to the Standards for Approval of a conditional use permit under the UDO.

The BZA's denial of SWN's *Application* was based on SWN's failure to meet the Standards for Approval by being incompatible with the goals of the Comprehensive Plan to promote continued mixed-use development in the Three Springs Drive Area; by hindering or discouraging use of adjacent land and buildings such as the Fairfield Inn and Suites and the Park Drive Development; and by being detrimental to the public interest due to increasing truck traffic in a congested mixed-use commercial area. (BZA0597-0602) SWN appears to argue that it was denied "due process" by the BZA because it was denied the right to have additional hearings each time something it felt was "new" so that it could

respond as it deems fit. This argument cannot withstand constitutional due process muster.

Under the third *Matthews* factor, the government has a significant interest in limiting the time devoted to administrative hearings to ensure the government can function efficiently. This is especially so when the review procedure prescribed by W. Va. Code § 8A-9-6(b) provides an opportunity for the reviewing court to take additional evidence to supplement the administrative record. In this case, the Court has permitted SWN to produce the "additional evidence" that SWN sought to introduce before the BZA (and allowed SWN to produce additional testimony and documents that were **not** the subject of its request for rebuttal to the BZA). This Court does not find that such "additional evidence" demonstrates any illegality or constitutional infirmity of the BZA's Decision, nor that the BZA applied a clearly erroneous principle of law or plainly wrong factual finding in its Decision on the *Application*.

As local zoning hearings are less formal than court proceedings, the local body is not required to allow the landowner to directly cross-examine witnesses. Allowing the landowner to present an opposing viewpoint is typically sufficient see *G & H Dev., LLC v. Benton-Parish Metro. Planning Comm'n*, 641 F. Appx. 354, 357-8 (5th Cir. 2016). In *G & H Dev.*, the Court recited the following procedural history and claims:

> G & H argues that it was denied procedural due process at the hearing for its second subdivision application because it was not afforded the opportunity to be heard 'in a meaningful manner.' It states that the Board of Adjustment did not allow G & H to submit testimony under oath or to cross-examine Penwell, and that the

> Board of Adjustment was represented by the same lawyer who was representing the MPC, which was a party to the hearing. The Board responds that the hearing complied with the relevant provisions of the Bossier Parish Code, which require '[p]ublic notice' of a hearing of appeal and 'due notice' to the appellant. Those provisions further provide that the chairman 'may administer oaths and compel attendance of witnesses' and that the Board 'shall not be bound by legal rules of evidence.' The Board notes that G & H has not alleged that it lacked notice of the hearing or that it was denied the right to participate.

641 Fed. Appx. 354, 356–58. The Fifth Circuit found that G & H was not denied due process, because it had notice of the hearing and appeared to present its claims:

> The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. The district court concluded that it was enough that G & H received notice of the Board of Adjustment and Police Jury hearings and was allowed to be heard at both. Even assuming that the zoning decision made in this case was adjudicative, rather than legislative or quasi-legislative, and that the rejection of G & H's application entailed the deprivation of a property interest, such that procedural due process rights attached, G & H was not denied those rights. *Mathews v. Eldridge* requires 'some form of hearing ... before an individual is finally deprived of a property interest,' but it does not require the particular procedural protections that G & H demands. '[T]he *Mathews* balancing test 'permits varied types of hearings, from informal to more formal evidentiary hearings,' depending on the application of the *Mathews* factors to a given case. As the Board points out, G & H's amended complaint does not indicate how its inability to cross-examine Penwell deprived it of a meaningful opportunity to be heard or increased the risk of an erroneous deprivation. G & H also misleadingly asserts that it was not permitted to present 'testimony.' What G & H apparently means by this is only that it was not allowed to cross-examine Penwell or to compel unwilling witnesses to testify; but representatives of G & H spoke at length, and there is no evidence that G & H was prevented from including any information or testimony of willing witnesses in its presentation. That G & H decided to forgo its right under Louisiana state law to appeal the Board of Adjustment's decision in

> state court only strengthens our conclusion that any deprivation that occurred was not erroneous.

G & H Dev., L.L.C. v. Benton-Par. Metro. Plan. Commn., 641 Fed. Appx. 354, 356–58 (5th Cir. 2016)(unpublished).

Just as in *G & H Dev.*, SWN is not entitled to the particular procedure it demands. SWN had a public hearing and the opportunity to present its *Application*, which is constitutionally sufficient for an administrative zoning decision. To the extent that SWN characterizes its claim as a failure of the BZA to provide a hearing of sufficient length, the claim likewise fails. Local boards often need to limit the time allocated to each speaker and to each agenda item to prevent prolonged meetings and duplicative testimony. The additional evidence SWN sought to present, given more time, did not address the BZA's denial of SWN's application based on its failure to meet the Standards for Approval by being incompatible with goals of the Comprehensive Plan to promote continued mixed-use development in the Three Springs Drive Area, by hindering or discouraging use of adjacent land and buildings such as the Fairfield Inn and Suites and the Park Drive Development, and by being detrimental to the public interest due to increasing truck traffic in a congested mixed-use commercial area. (BZA0597-0602; see *Club Moulin Rouge, LLC v. City of Huntington Beach*, 2005 WL 5517234, at *8 (C.D. Cal. June 22, 2005))

Actual notice of, and appearance at, a public hearing considering a zoning decision is commonly found to satisfy due process requirements for zoning decisions. As the District Court found in *Nance v. City of Albemarle, North Carolina*, 520 F. Supp. 3d 758, 790, "certainly conducting open community

meetings and giving affected parties the opportunity to speak on behalf of their project is constitutionally sufficient." See also *Tri County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002) (the Fourth Circuit found that an applicant, whose (existing) permit was subject of a body's decision, received adequate process when they had notice of the hearing where the permit was discussed and they in fact appeared and made their presentation to the board. "During the October meeting, the Jordans were given notice that the plant and the moratorium would again be discussed at the November 18, 1998 Commissioners' meeting. Leonard Jordan testified that he attended this second meeting and that he also attended the Commissioners' meeting on November 15, 1999, when the PIDO was discussed and passed. TCP was given the opportunity to comment at these public meetings. TCP simply lost the political battle in the County. If, as Eastlake teaches, a community can make land-use decisions through a popular referendum with no hearings of any kind and still satisfy the mandates of due process, certainly conducting open community meetings and giving affected parties the opportunity to speak on behalf of their project is constitutionally sufficient."). Likewise, in *Hyatt v. Town Lake*, 114 Fed. Appx. 72 at *4, the Court found that an applicant for variance received adequate process when she had notice of the hearing, appeared with legal counsel at two hearings, and the board considered her requests at some length:

> Her two opportunities to address the Town Council and the chance to appear before and seek variances from the LSAB show that hers is not one of the cases in which a municipality disregarded the fundamentals of fair process. Hyatt was represented by counsel, and Town officials considered her requests at some length.

Here, Petitioner SWN received the same opportunities as the affected landowners in these 4th Circuit decisions, if not more, by having its lengthy written *Application* considered by administrative staff and the BZA, and by appearing at two public hearings of the BZA with legal counsel and by its representatives and retained expert witnesses.

ACCORDINGLY, this Court **FINDS** and **CONCLUDES** that SWN has failed to establish that the BZA's administrative hearings denied it sufficient due process rights. As such, the BZA Decision cannot be invalidated on that ground.

II. BZA'S DENIAL OF THE CONDITIONAL USE PERMIT

As to the substance of BZA's Decision, SWN contends that it was entitled to a conditional use permit because it met technical standards of the UDO relating to Oil/Gas extraction uses. (*Petition for Writ of Certiorari*, ¶ 10, 69.a.,b.,c.) SWN also contends that the BZA's decision "erred" by relying on testimony of Kaleb Knowlton, a planner with the City of Weirton; the testimony of Attorney Mark Colantonio related to traffic studies; and by considering public comments. (*Petition for Writ of Certiorari*, ¶ 69). However, such an assertion does not establish that the BZA made an illegal decision based on a clearly erroneous principle of law or a plainly wrong factual finding pursuant to W. Va. Code § 8A-9-1 *et seq.*

Petitioner is not entitled to a conditional use permit merely because certain technical standards in the zoning code have been satisfied, nor because other permits have been granted, even in the same area. *Jefferson Orchards, Inc. v. Jefferson County Zoning Bd. of Appeals*, 225 W. Va. 416, 423, 693 S.E.2d 781,

788 (2010) ("Discussing the 3.76 calculation, the order observed that density is a fair consideration under the Development Review System of the Jefferson County Ordinance. In the observation of this Court, nothing in the Ordinance mandates that Jefferson Orchards, Inc., is entitled to a CUP that mirrors the permits issued to Quail Ridge and Chapel View.").

The consideration of a conditional use permit application by the BZA is discretionary and is based on the BZA's unique role in the community to identify and promote compatible land uses. As found by the Court in *Jefferson Orchards, supra*, an applicant's reliance on its compliance with specific standards of the zoning code as somehow being sufficient to show its entitlement to a conditional use permit is misplaced. "The Circuit Court properly concluded that meeting specified technical standards is insufficient to entitle an applicant to a conditional use permit." *Id.* at 225 W. Va. 420-21, 693 S.E.2d at 785-6. Rather, as the *Jefferson Orchards* Court continued, the conditional use permit process is intended to allow an applicant an opportunity to seek development that is otherwise not permitted by the zoning ordinance, and the Board of Zoning Appeals' consideration of the project's compatibility with surrounding areas was proper. *Id.*

In the case at bar, SWN's argument is similar to that of the applicant in *Jefferson Orchards*, which was rejected by the Court in *Jefferson Orchards* – i.e., SWN contends that it was entitled to a conditional use permit application because its *Application* asserted that it complied with technical standards for Oil/Gas extraction uses such as setbacks and building heights. (*Petition for Writ*

of Certiorari, ¶¶ 10, 69). While meeting specific technical requirements may be necessary in an attempt to convince a Board to grant an application for conditional use, consideration of such technical requirements is not the only factor for a Board to consider. As the *Jefferson Orchards* Court stated:

> As the Circuit Court observed, each proposal will have different issues to be resolved, and a passing LESA score, for example, does not, of itself, render a project compatible with the surrounding area.

Id. Consideration of conditional use permit applications involves the exercise of ***discretion*** by the BZA. *Jefferson Orchards, Inc.*, 224 W. Va. 423, 693 S.E.2d 788; *see also W. Va. Code* § 8A-1-2(d), ("'Conditional use' means a use which because of special requirements or characteristics may be permitted in a particular zoning district only after review by the board of zoning appeals and upon issuance of a conditional use permit, and subject to the limitations and conditions specified in the zoning ordinance.") Weirton's UDO clearly sets out the Standards for Approval of conditional use permit applications, which require the BZA to consider the goals of the comprehensive plan, the impact on surrounding uses and development, and potential harm to the community for these uses with "special requirements," such as Oil/Gas extraction. *See W. Va. Code* § 8A-1-2(d).

With respect to SWN's claim that the BZA's Decision was not supported by sufficient evidence due to its claims that Mr. Knowlton, Mr. Colantonio, or members of the community who spoke in the citizen comment portions of the public hearing were not competent to offer testimony to the BZA, the Court is mindful that "the plainly wrong standard of review is a deferential one, which

presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." *Bd. of Zoning Appeals of Town of Shepherdstown v. Tkacz*, 764 S.E.2d 532, 538 (W. Va. 2014) (*quoting Conley v. Workers' Comp. Div.*, 199 W.Va. 196, 199, 483 S.E.2d 542, 545 (1997)). "Substantial evidence," in this instance, is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Maplewood Estates Homeowners Ass'n v. Putnam Cnty. Planning Comm'n*, 218 W. Va. 719, 723, 629 S.E.2d 778, 782 (2006) (citing *In re: Queen*, 196 W.Va. 442, 446; 473 S.E.2d 483, 487).

SWN's *Application* only addressed these Standards for Approval by conclusory statements and attachment of three graphic image renderings that showed an aerial photograph of a well pad at a different site and two renderings of views from Route 22 in the area of the Property but did not depict surrounding uses. (BZA0149, 0198-9). SWN offered testimony regarding expected light impacts through Bob Layne, noise impacts through Mr. Webb, and traffic impacts through Mr. DePaolis, which were considered and evaluated in the BZA's Decision. (BZA0597-0602). SWN did not offer testimony or evidence about surrounding heavy industry or Oil/Gas extraction uses or compatibility of its proposed use with mixed-use commercial development. See BZA001-0339; BZA0597-0602)

The BZA heard substantial evidence that: (1) SWN's proposed development would significantly increase traffic in an area that is known by the community to be congested. (BZA0723); (2) SWN's proposed development would

harm an existing hotel business adjacent to the Property. (BZA0722-3); (3) SWN's proposed development would hinder or stop the planned development of another adjacent property with mixed-use commercial development consistent with the goals of the Comprehensive Plan. (BZA0687, 0729); and (4) similar heavy industry does not exist in the area of the Property and that the proposed Oil/Gas extraction use was not consistent with surrounding uses. (BZA0813)

The Courts give great deference to the interpretation of planning and zoning codes by the bodies charged with enforcement of those codes. Syl. Pts. 3 and 4, *Corliss v. Jefferson Cnty. Bd. of Zoning Appeals*, 214 W. Va. 535, 536, 591 S.E.2d 93, 94 (2003). Any interpretation of City Codes by the City's planning staff, Planning Commission, or Board of Zoning Appeals should be considered appropriate unless it can be shown to be clearly erroneous. *Id.*

The BZA heard substantial evidence from Attorney Colantonio (and Mr. DePaolis) that the traffic impact study offered by SWN did not accurately account for current or projected traffic conditions in the area of the Property. (BZA0794-5, 0799) The BZA found that the traffic study submitted by SWN regarding its proposed use estimated an additional 1,000 trips per day, including trips for trucking water into and out of the site and did not identify the actual routes to be used by truck traffic arriving at or departing the site. (BZA0599) The BZA found "that water, sand, and other trucks and vehicles will be using Park Drive to arrive at and depart from the proposed well pad site, and that traffic congestion in the Three Springs area would worsen, and additional stress would

be placed on existing infrastructure if the proposed conditional use were allowed." (BZA0601)

A factual finding that is supported by substantial evidence is conclusive. *Tkacz*, 234 W. Va. 201, 764 S.E.2d 532,538 (2014) (*citing Conley v. Workers' Comp Div.*, 199 W.Va. 196, 199,483 S.E.2d 542,545 (1997)). Consequently, a circuit court may not supplant a factual finding of the Board merely by identifying an alternative conclusion that could be supported by substantial evidence. *Id.*

Based upon supported factual findings and its review of the Standards for Approval of conditional use permit applications in the UDO, the BZA concluded that the conditional use permit should not issue because the proposed Oil/Gas extraction use would not "encourage a diverse mix of entertainment, retail, hospitality and high density residential" nor manage future development "to avoid worsening traffic congestion and additional stress on other existing infrastructure." (BZA0598). In light of the detailed record before this Court, the Findings and Conclusions of the BZA in its Decision, this Court cannot improperly substitute its judgment for the exercise of sound discretion by the BZA in applying the goals of the Comprehensive Plan and the Standards of Approval in the UDO to deny a conditional use permit for Oil/Gas extraction in this area of the Planned Development District. See *Corliss v. Jefferson County Bd. Of Zoning Appeals*, 214 W. Va. At 542, 591 S.E.2d at 100.

ACCORDINGLY, this Court **FINDS** and **CONCLUDES** that SWN has failed to meet its burden to establish that the BZA's decision was based upon "plainly wrong" factual findings or based upon an application of a "clearly erroneous" principle of law.

CONCLUSION & ORDER

Based upon all of the foregoing, this Court **AFFIRMS** the Decision of the Weirton Board of Zoning Appeals. SWN failed to establish that it was denied constitutional due process as a result of the hearings conducted by the Board. SWN failed to establish that the Board's decision was based upon "plainly wrong" factual findings. SWN failed to establish that the Board's decision was based upon the application of a "clearly erroneous" principle of law.

Case No. 21-P-35 (*SWN Production Co., LLC v. City of Weirton Board of Zoning Appeals*) is hereby **DISMISSED WITH PREJUDICE** and the Clerk is **ORDERED** to remove the same from this Court's docket. Case No. 21-C-71 (*SWN Production Co., LLC v. City of Weirton*) is to remain on the docket, while the same is currently pending on appeal, until further Order of this Court.

DATED this 16th day of August, 2023.

Hon. Jason A. Cuomo, Judge
First Judicial Circuit
State of West Virginia

Exhibit D

West Virginia E-Filing Notice

CC-05-2021-C-71

Judge: Jason A. Cuomo

To: Shawn Norman Gallagher
shawn.gallagher@bipc.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA
SWN Production Company, LLC v. City of Weirton
CC-05-2021-C-71

The following order - case was FILED on 12/8/2022 7:32:46 AM

Notice Date: 12/8/2022 7:32:46 AM

Glenda Brooks
CLERK OF THE CIRCUIT COURT
Brooke County
P.O. Box 474
WELLSBURG, WV 26070

(304) 737-3662
Glenda.Brooks@courtswv.gov

/s/ Jason A. Cuomo
Circuit Court Judge
Ref. Code: 22MX560WX

E-FILED | 12/8/2022 7:32 AM
CC-05-2021-C-71
Brooke County Circuit Clerk
Glenda Brooks

In the Circuit Court of Brooke County, West Virginia

SWN Production Company, LLC,
Plaintiff,

v.

Case No. CC-05-2021-C-71
Judge Jason A. Cuomo

City of Weirton,
Defendant

Order Issuing Writ of Certiorari, Directing City of Weirton Board of Zoning Appeals to file its return to the Writ, and granting SWN Production's Motion to Schedule Hearing to Take Additional Testimony and Evidence

On **December 7, 2022**, the Court held a hearing in the above-styled case on Petitioner's "SWN Production Company, LLC's Motion to Scheduling Hearing to Take Additional Testimony and Evidence" (the "Motion") and other scheduling matters before the Court. Petitioner SWN Production Company appeared by counsel Shawn Gallagher, Esq., and Kathleen Goldman, Esq., and Respondent City of Weirton Board of Zoning Appeals appeared by counsel Ryan Simonton, Esq., Vincent Gurrera, Esq., and Daniel Guida, Esq. Upon consideration of the Motion, Response and Reply thereto, review of applicable law and the Court's file, and for reasons otherwise appearing in the record, the Court is of the opinion to and does hereby ORDER the following:

1. The writ of certiorari is granted pursuant to *W. Va. Code* § 8A-9-3 and Respondent shall file its return in accordance with *W. Va. Code* § 8A-9-5 on or before December 22, 2022.
2. Petitioner's Motion is granted as provided in this order. The parties will jointly agree upon a date convenient to the Court to schedule a hearing to take such additional testimony as the Court deems necessary pursuant to *W. Va. Code* § 8A-9-6 and will jointly submit a proposed order scheduling such hearing and providing for such other

matters as may need to be addressed in relation to the hearing.

The Court **ORDERS** the Clerk to provide attested copies of this Order to all counsel of record.

/s/ Jason A. Cuomo
Circuit Court Judge
1st Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SWN PRODUCTION COMPANY, LLC,	:	
	:	
Petitioner,	:	No. 24-320
v.	:	
	:	
CITY OF WEIRTON and	:	
CITY OF WEIRTON BOARD OF	:	
ZONING APPEALS,	:	
	:	
Respondents.	:	

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2024, I served the foregoing ***Opening Brief of Petitioner*** upon the Respondents' counsel via the West Virginia E-Filing System (File & Serve Express), to the following:

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/s/ Shawn N. Gallagher
Shawn N. Gallagher