

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-320

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SWN PRODUCTION COMPANY, LLC,

Petitioner Below, Petitioner,

v.

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

Respondents Below, Respondents.

REPLY BRIEF OF PETITIONER,
SWN PRODUCTION COMPANY, LLC

Shawn N. Gallagher
WV I.D. No. 12853
shawn.gallagher@bipc.com
Kathleen Jones Goldman
WV I.D. No. 6917
kathleen.goldman@bipc.com

Buchanan Ingersoll & Rooney LLP
Union Trust Building, Suite 200
501 Grant Street
Pittsburgh, PA 15219
(412) 562-8362

*Counsel for Petitioner,
SWN Production Company, LLC*

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I. INTRODUCTION

In its latest attempt to prevent *any* appellate court from reviewing the BZA's blatantly illegal conduct and decision in this matter, the City¹ in its Response Brief takes the paradoxical position that this Court is both the only Court in West Virginia that has jurisdiction to hear the merits of SWN's appeal, but that this Court should nevertheless refuse to hear the merits of the case. The City advances its disingenuous position of form over substance, even though SWN's appeal was timely filed with the same Clerk and through the same electronic filing system used for both the ICA and this Court. As SWN asserted in its Opening Brief, the ICA did in fact have jurisdiction to hear this appeal under the newly adopted West Virginia Appellate Reorganization Act ("Reorganization Act"). However, SWN nevertheless requests that this Court assume jurisdiction over the merits of this appeal, rather than remanding the case back to the ICA.

With respect to the merits of this matter, the City continues to advance a position that would eviscerate any form of meaningful appellate review of local zoning decisions in West Virginia, rendering the substantial evidence standard entirely meaningless. The City takes the untenable position that a zoning board is vested with complete discretion to deny a conditional use application, provided there is any scintilla of evidence introduced at hearing by the opposition, regardless of its competence. And, as a last resort, the City seeks to arbitrarily limit the evidence considered by this Court because the City is well aware that SWN presented substantial evidence demonstrating compliance with each and every of the UDO's conditional use criteria. The City's Response Brief, and the cases cited therein, actually serve to highlight the reasons why SWN's Application should have been approved by the BZA. SWN thus presents this Reply Brief to correct the City's factual and legal misrepresentations and to address the fallacies in its arguments.

¹ Capitalized terms not defined herein have the meaning ascribed to them in SWN's Opening Brief.

II. ARGUMENT

A. The ICA Had Jurisdiction to Hear This Matter

It is telling that, in its Response brief, the City attempts to gloss over the ICA's most fundamental basis for the ICA's subject matter jurisdiction in this case: It was the City who requested that the two matters underlying this case be consolidated into a *single* civil case, over which the ICA has already asserted subject matter jurisdiction.²

On March 15, 2022, *upon a motion by the City*, the Circuit Court entered an order consolidating the Complaint and Appeal because consolidation “promotes judicial economy by providing efficiencies of *a single forum* for all parties to brief and for this Court to consider legal issues...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.” (A. 2139-44) (emphasis added). The Circuit Court specifically ordered that “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*.” *Id.* As such, both matters underlying this appeal were consolidated into a *single* civil case.³

² The City's argument that SWN waived its right to argue the jurisdictional issue in this matter is meritless. SWN, citing to various statutory provisions, made its argument on the second page of its Opening Brief that the ICA clearly had jurisdiction to hear this matter because of the consolidated nature of the case. The City's assertion that “Petitioner's brief fails to include any authority, argument, or analysis of the ICA's jurisdiction to hear Petitioner's appeal” is simply not true. *See* Response Brief, at p. 22.

³ In the ICA Preemption Opinion reversing the Circuit Court's Decision in the consolidated pre-emption matter (attached as Exhibit A), the ICA expressly recognized that the preemption issue in that matter and the BZA's denial of SWN's conditional use application in this appeal were inextricably intertwined. *Id.* at p. 17-18 (“Here, the objective terms of the Horizontal Well Act directly conflict with the additional requirements of the City's ordinance. On October 1, 2021, the Board issued its written decision denying SWN's application. The Board reasoned that ‘SWN has failed to prove that the proposed conditional use is compatible with the goals of the Comprehensive Plan, including objective 2.3, which provides, in part, that future development in the Three Springs Drive area should be managed ‘to avoid worsening traffic congestion and additional stress on other existing infrastructure.’ The City's approval scheme is in direct conflict with the Horizontal Well Act which vests WVDEP with “sole and exclusive authority” to regulate

Therefore, because the matters were consolidated into a single civil case over which the ICA already asserted jurisdiction, the ICA had jurisdiction to consider the appeal. 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). Indeed, the City did not and cannot cite to a single case where two matters arising out of the same consolidated matter were appealed to separate appellate courts in West Virginia. Thus, it would be illogical and draconian for the Court to affirm the dismissal of this appeal based on lack of subject matter jurisdiction, given the ICA’s prior decision to hear an issue in the same civil case involving the *same facts and underlying administrative appeal process.*⁴

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

the “permitting” and “location” of horizontal gas wells. See W. Va. Code § 22-6A-8(b). This language cannot be reconciled with the City’s position that a municipality retains the authority to require zoning approval for an oil or gas well that has already been approved under the state’s permitting program.”).

⁴ Furthermore, even discounting the consolidation at issue here, while the ICA was 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.*” (“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.*⁴ 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.

The ICA had jurisdiction to hear this 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 had jurisdiction, SWN respectfully requests that the Court exercise its power under Rule 1(b), Rule 2 and W. Va. Code § 51-11-4(b)(1) to “obtain jurisdiction over any civil case filed in the [ICA].”⁵

As set forth above, SWN has a strong legal position that the ICA had jurisdiction over this consolidated appeal. And, although SWN disagrees with the ICA’s conclusion, there is a legitimate question of statutory interpretation raised by the ICA in its Memorandum Decision as to the ICA’s jurisdiction to hear statutory land use appeals under the recently adopted Appellate Reorganization Act, which has created a lack of clarity for appellants in land use matters.⁶ Indeed, the Legislature itself has recognized that the first iteration of the Appellate Reorganization Act lacked the 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, 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,**

⁵ Out of an abundance of caution, SWN also filed a “Motion Requesting that the Supreme Court of Appeals Obtain Jurisdiction Over Appeal Filed in the Intermediate Court of Appeals,” separately docketed with this Court at No. 24-753, which requested the same relief sought herein, and which was refused by this Court without an opinion on August 20, 2024.

⁶ 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 were initially filed with the ICA. This demonstrates that Reorganization Act lacked sufficient clarity regarding jurisdiction over appeals involving municipal land use decisions.

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, less than two years after its enactment, the Legislature found it necessary to amend the Appellate Reorganization Act to clarify that the ICA’s jurisdiction over appeals not only excludes appeals arising from “extraordinary writs” “provided for” in the Extraordinary Remedies Act, but rather to all appeals involving “writs of certiorari” provided for under any statute.⁷

It would be manifestly unjust for this 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 prior to the expiration of the appeal period *with the same Clerk and electronic filing system that accepts filings with this Court*, and which has been fully briefed by the parties. Thus, whether or not this Court determines that the ICA had jurisdiction, it should utilize its power under Rule 1(b), Rule 2 and W. Va. Code § 51-11-4(b)(1) to obtain jurisdiction over the merits this appeal.⁸

C. The Circuit Court Failed to Correctly Apply the Substantial Evidence Standard to the Facts of This Case

1. The Substantial Evidence Standard

With respect to the merits of the BZA’s decision⁹, the City correctly states that “the plainly wrong standard of review is a deferential one, which presumes an administrative tribunal’s actions

⁷ 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.

⁸ Furthermore, it should be noted that almost all jurisdictions with more than one appellate court provide for the transfer of an appeal to the correct court in the event an appeal is improvidently docketed. See, e.g. 28 U.S.C. § 1631; 210 Pa. Code § 751; 10 Del. C. § 1902; Fla. R. App. P. 9.040(b)(1); Ky. R. App. P. 17(G); SCACR 204(1); Ala. Code § 12-1-4.

⁹ The City claims that this Court is barred from hearing the underlying merits of this appeal because this Court has held that it “will not consider questions non-jurisdictional in their nature, not acted upon by the circuit court as an intermediate appellate court.” See Response Brief, at p. 26. Here, however, the Circuit Court did in fact act upon the issues raised by SWN in the instant appeal. And, to the extent the City is

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) (emphasis added). “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). Where a circuit court fails to apply this standard, it has committed an abuse of discretion that warrants reversal. *See Bd. of Zoning Appeals of Town of Shepherdstown v. Tkacz*, 234 W.Va. 201, 203, 764 S.E.2d 532, 534 (2014).

2. Jefferson Supports Reversal of the Board’s Denial

Although the City acknowledges the substantial evidence standard, it largely ignores it throughout its brief. Instead, the City relies extensively on the Supreme Court of Appeals decision in *Jefferson Orchards, Inc. v. Jefferson County Zoning Bd. of Appeals*, 225 W. Va. 416, 693 S.E.2d 781 (2010), which is both procedurally and factually distinct from this matter.¹⁰ The City’s characterization of *Jefferson* is essentially that the scope and standard of review of a zoning board’s decision is so deferential that a board is free to deny a conditional use application if *any* rebuttal evidence is put before it by an objector. However, *Jefferson* stands for no such proposition.

The applicant in *Jefferson* proposed a 201-unit single family development with a density of 0.78 acres per dwelling, which exceeded the ordinance’s minimum limit of three acres per

arguing that the ICA is akin to a Circuit Court acting in its intermediate appellate capacity prior to the Appellate Reorganization Act, this Court has held that “[t]his statement describes the Court’s general practice, not the ambit of the Court’s constitutional authority. Indeed, nothing in the text of these cases suggests, let alone compels, the conclusion that this Court is prohibited from noticing plain error, or raising an issue *sua sponte*, in the interest of justice.” *In re Timber M.*, 231 W.Va. 44, 64, 743 S.E.2d 352, 372 (2013). Here, the consolidated nature of this appeal and the uncertain jurisdiction created by the n Appellate Reorganization Act require the merits of this case to be heard by this Court “in the interest of justice.” *Id.*

¹⁰ *Jefferson* involved the approval of a conditional use application with conditions, rather than an outright denial, as here.

dwelling.¹¹ The applicant in *Jefferson* submitted its development for LESA scoring to the county, which received a passing score of 57.58 from the County planning office. *Id.* During the subsequent conditional use hearing to consider unresolved issues from the development review process, both the applicant and objectors presented extensive *competing expert witnesses* to testify in detail as to the density of development in the surrounding area. *Id.* at 784. Other than expert testimony regarding density of the surrounding developments, the Applicant in *Jefferson* did not present any other evidence regarding the compatibility of the development.

After the hearing, the board of zoning appeals approved the conditional use application, but modified and conditioned the proposal to include a minimum of 3.76 acres per unit, as opposed to the 0.78 acres per unit proposed. *Id.* The applicant appealed the board’s decision to the Circuit Court, arguing that “other than the LESA scoring requirements, there was no specific substantive criterion governing the decision to deny or issue the permit.” *See Jefferson Orchards, Inc v. Jefferson Cnty. Zoning Bd. of Appeals*, 2008 WL 8928938 (W.Va.Cir.Ct. 2008) (“*Jefferson Circuit Court Decision*”).¹²

In rejecting the applicant’s appeal and determining that objectors’ testimony was appropriate to support the zoning board’s condition of approval, the circuit court distinguished the matter entirely from the Supreme Court of Appeals decision in *Far Away Farm, LLC v. Jefferson*

¹¹ In *Jefferson*, the zoning ordinance allowed a property owner “to create one (1) lot for every ten (10) acres with a minimum lot size of three (3) acres.” *Id.* at 783. The ordinance, however, included a Development Review System, which “does allow for higher density” with regard to projects such as residential subdivisions, if the owner obtains a conditional use permit. *Id.* The ordinance’s Development Review System provided that a “Land Evaluation and Site Assessment, or LESA [to be conducted by county planning staff]...score of 60 points or lower *indicates* that the agricultural potential of the property is less appropriate or less advantageous than the development of the property.” *Id.* (emphasis added).

¹² A copy of the *Jefferson Circuit Court Decision* is attached hereto as Exhibit B.

County BZA, 222 W. Va. 252, 664 S.E.2d 137 (2008),¹³ which unlike *Jefferson*, is almost factually identical to the case at hand:

Though the Supreme Court of Appeals [in *Far Away Farms*] may not have contemplated a ‘general substantive criterion,’ [for conditional use approval] it is not stating that an applicant only need to submit a complete application and have a passing LESA score to be entitled to its [conditional use permit], as Petitioner seems to insinuate. A passing LESA score does not make a project compatible with the area as Petitioner asserts, or the Compatibility Assessment Meeting and the public hearing would not be necessary. ***The reason the Supreme Court of Appeals ordered the Planning Commission in Far Away Farm to grant the [conditional use permit] is that ‘[a]necdotal evidence and mere speculation and conjecture about potential traffic problems is simply insufficient to overcome expert testimony.*** Also, ... the record shows that no evidence was presented refuting or contradicting that presented by [the applicant]...’ on the other unresolved issues. That Court emphasized that [the applicant’s] evidence was not refuted. ***Unlike in Far Away Farm, here Petitioner’s evidence concerning density was refuted by an expert...***

The Court in Far Away Farm stated that anecdotal evidence is insufficient to overcome expert testimony. It pointed out that unless there is better evidence presented to refute or contradict petitioner’s expert testimony, the expert testimony will prevail. In this case, both Petitioner and the opposition to the [conditional use permit] presented expert testimony about how many lots per acre were appropriate...

This case is different in some respects from Far Away Farm. In that case, the BZA outright denied the [conditional use permit]; in this case, the BZA granted a CUP with conditions. Also, importantly, in this case the opposition presented more than anecdotal evidence - it challenged Petitioner’s evidence with its own expert. The BZA heard both experts and Petitioner was given the opportunity to rebut. The BZA relied on Petitioner’s expert for the average lot size - 3.76 acres. ***This is substantial evidence from an expert.*** Therefore, the Court cannot find that the BZA was plainly wrong when it limited Petitioner’s project to one lot per 3.76 acres.

See *Jefferson Circuit Court Decision* (not paginated) (emphasis added). On appeal from the Circuit Court, this Court held that, because the applicant in *Jefferson* did not present any evidence of compatibility at hearing except with respect to the density of the surrounding area, and the only evidence it did produce with respect to density was refuted and proved erroneous by the opposition’s expert, the condition of approval was proper. *Jefferson*, 693 S.E.2d at 787.

¹³ SWN recites the facts and substance of *Far Away Farms* at length in its Opening Brief.

Thus, the City's continued citation to *Jefferson* actually serves to highlight why the instant case is almost identical to *Far Away Farm*, and why the BZA's decision here should be reversed. Like in *Far Away Farm*: (1) this case involves an outright denial of a conditional use application, as opposed to a condition of approval; and (2) in this case, the City and objectors provided only anecdotal, not expert, testimony. And unlike in *Jefferson*: (1) objectors in this case did not provide any expert testimony; (2) SWN was not provided an opportunity to rebut objectors' testimony at hearing; and (3) as set forth below, SWN provided mountains of substantial evidence demonstrating compliance with the specific terms of the UDO, as well as compliance with the general compatibility factors set forth in Section 3.6.3.1 of the UDO.

While *Jefferson* may stand for the proposition that compliance with a specific requirement in a zoning ordinance does not always compel the automatic approval of a conditional use application, *Jefferson* **definitely** stands for the proposition that an applicant who, like SWN in this case, provides unrefuted expert testimony with respect to all of the zoning ordinance's specific and general requirements, is entitled to approval of its conditional use application. As the Court in *Far Away Farms* aptly summarized, "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." *Far Away Farm*, 664 S.E.2d at 145.

3. SWN Provided Substantial Evidence Demonstrating Compliance with all of the UDO's Specific and General Requirements

In its Response Brief, the City disingenuously characterizes SWN's argument regarding compliance with the UDO's "technical standards," essentially asserting that it is SWN's position that compliance with the 200' setback from residential properties should result in automatic

approval of the Application. To be sure, as SWN explained in its Opening Brief, it is SWN's position that SWN's compliance with the specific objective "technical standards" in the UDO should, absent sufficient rebuttal through competent testimony, result in a presumption that all of the UDO's general subjective criteria have been satisfied.¹⁴ However, as set forth at length in SWN's Opening Brief, there was no competent rebuttal evidence offered by objectors. And, even if the initial burden to show compliance with such subjective general compatibility criteria was properly placed on SWN, it nevertheless met its burden to show compliance with each and every such requirement. Although, it would be almost impossible to address each of the City's misrepresentations of the evidence and testimony provided by SWN in this case, SWN will now address the most egregious of the City's misstatements.

i. SWN's Application Complied with the UDO's Submission Requirements

Throughout its Response Brief, the City repeatedly states that SWN's initial application submission was deficient because it should have included all of the information required for the Board to render its decision, rather than simply satisfying the UDO's initial submission requirements. *See e.g.*, Response Brief, at p. 28 ("In this case, Petitioner made no attempt to demonstrate compliance with the UDO's conditional use permit requirements beyond its boilerplate statements in the Application."); Response Brief, at p. 37("[SWN's] application only

¹⁴ Because of the relatively few number of municipalities in West Virginia that have enacted zoning ordinances, 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; *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).

addressed these Standards for Approval by conclusory statements and attachment of three graphic image renderings”). However, with its initial submission, SWN was only obligated to submit the material referenced in Section 3.6.2.1 of the UDO, which included a site plan and “[a]ny other information deemed helpful by the applicant or necessary by the Board of Zoning Appeals to explain the nature of the proposed use and its consistency with the standards established by this Section for Conditional Use permits.” SWN met these requirements by submitting detailed site plans and providing more than 240 pages of plans, studies and reports in support of the Application. (A. 570-892). Indeed, when questioned 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).

The City’s position with respect to SWN’s initial application submission would entirely obviate the need for a public hearing in the first place. As explained in *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93, 101 (2003), the information provided with an initial conditional use application “provides a launching point from which the public can begin to participate in and the Zoning Administrator and the Commission can conduct the multi-stage reviewing process that is involved in any application for a conditional use permit.” Therefore, SWN’s initial Application was merely the starting point, after which SWN presented expert testimony over three days of hearings to demonstrate compliance with each and every of the UDO’s requirements for conditional uses. Accordingly, the litany of substantive deficiencies alleged by the City as to SWN’s initial Application are entirely irrelevant because each item was subsequently addressed at the hearings on this matter. *See* Response Brief, at pp. 4-6.

ii. SWN Demonstrated Compliance with the UDO’s Express Criteria for Uses in the PDD District

Despite the fact that it was not a ground for the BZA’s denial, the City now asserts the red herring argument that the Application should have been denied solely because the height of the

temporary drill rig does not comply with the PDD District’s maximum 60’ *building* height requirement. The prominence of this novel assertion in the Response Brief demonstrates how weak its remaining arguments actually are. However, as demonstrated by SWN, the drill rig is a temporary piece of equipment that will only be placed on the site for 13-18 days for each of three legs of the wells that are proposed, after which it will be removed. (A. 577). Therefore, the drill rig is not a “building”¹⁵ that is subject to the UDO’s maximum “building height”¹⁶ requirements. Taken to its logical conclusion, the City’s position would mean that temporary crane equipment could not be utilized to construct buildings in the UDO’s C-3 Commercial District, where the maximum building height is also 60’. UDO § 10.2 (Table 2). Such a proposition is absurd and should be summarily disregarded.¹⁷ And, in any event, the height of the drill rig was not cited as a ground for denial by the BZA or Circuit Court and cannot serve as one now.

iii. SWN Demonstrated Compliance with the UDO’s General Conditional Use Requirements for Compatibility

In its Response Brief, the City baldly claims that “[SWN] had advance notice of [the compatibility requirements in Section 3.6.2.1] due to their adoption in the Codified Ordinances of the City of Weirton, and it neglected to substantively address these requirements either in its Application or its presentation to the BZA.” *See* Response Brief, at p. 36. However, as set forth in Section III.B of SWN’s Opening Brief, the record demonstrates that, throughout the three hearings

¹⁵ “Building” is defined as “A *Structure having a roof supported by columns or walls*, for the shelter, support, enclosure, or protection of persons, animals, chattels or property. When separated by party walls, without opening through such walls, each portion of such a Building shall be considered a separate structure.” UDO § 2.3 (emphasis added).

¹⁶ “Building height” is defined as “The vertical distance measured from the lot ground level to the highest point of the roof for a flat roof, to the deck line of a mansard roof, and to the mean height between eaves and ridges of gable, hip, and gambrel roofs. On lots with topographic elevation changes, the lot ground level shall be construed to mean the halfway point between the highest and lowest elevations of the Building Footprint.” UDO § 2.3 (emphasis added).

¹⁷ The only portion of the Brownlee Pad that is arguably subject to the UDO’s 60’ “building height” requirements are the permanent condensate holding tanks, which are 20’ in height. (A. 1850).

on this matter, SWN presented substantial and un rebutted evidence that the Brownlee Pad complied with each and every such requirement.

The City identifies a long list of areas in which it claims that SWN did not demonstrate compliance with the compatibility factors. *See* City's Reply Brief, at pp. 36-38. However, the City's contentions can essentially be distilled into two assertions: (1) SWN did not demonstrate that the Brownlee Pad¹⁸ would be compatible with development in the surrounding area in the PDD District; and (2) the Brownlee Pad would generate detrimental traffic impacts. Each of the City's contentions are belied by the record.

(a) Compatibility with the Surrounding Area

With respect to compatibility with the area surrounding the Brownlee Pad, SWN provided expert testimony from Mr. DePaolis that he reviewed Objective 2.3 of the City 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 in the surrounding area. (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.

¹⁸ The City repeatedly attempts to classify the Brownlee Pad as an "industrial" use, which it declares is not compatible with development in the PDD District. However, the record is clear that, after construction and drilling operations are completed, the Brownlee Pad will be an almost entirely passive use that is much less intense than almost any other use permitted in the PDD District. (A. 1851).

BY MR. SIMONTON: What reason is that?

THE WITNESS: 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.)

Also, with respect to compatibility, SWN presented evidence that the Brownlee Pad will be located in the outskirts of the City 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). 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). 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.

Mr. Webb further testified as to the compatibility of the noise impacts of the proposed Brownlee Pad on the surrounding area. 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, 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).

With respect to water impacts on the surrounding neighborhood, 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. Further, all lighting will be temporary and limited to the Subject Property. (A. 1205). All lighting will be directed away from adjacent properties and roadways. *Id.*

In sum, SWN provided credible expert testimony that the Brownlee Pad, which is located in the center of a large vacant parcel and not visible from adjacent properties, will be compatible with uses in the surrounding area. Furthermore, 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). Therefore, the City's argument that SWN did not demonstrate the Brownlee Pad would be compatible with development in the surrounding area is entirely meritless.

(b) Traffic Impacts

Regarding potential traffic impacts, at the Evidentiary Hearing, Mr. DePaolis comprehensively and systematically addressed all of the reasons why the Board's findings with respect to the Traffic Study were erroneous. With respect to the Mr. Colantino's assertion that 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.* He explained that the ITE issued guidance on how traffic counts should be conducted, which included the use of historical traffic data were available. *Id.* As he testified, that is the exact guidance that he used for the Traffic Study. 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.* As a result of his analysis, Mr. DePaolis concluded that, to a reasonable degree of traffic engineering certainty, the additional traffic generated by the Brownlee Pad during the 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 Proposed Uses. (A. 1219).

But, despite Mr. DePaolis' expert testimony, 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). However, as in *Far Away Farm*, 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 SWN's Traffic Study. As this court has held, such “[a]necdotal 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).

Accordingly, the Circuit Court erred by finding that the BZA's decision was supported by substantial evidence, where no “reasonable mind” could possibly find Mr. Colantonio's testimony adequate to rebut the extensive expert testimony of Mr. DePaolis provided at the BZA hearing and Evidentiary Hearing. *See Maplewood Estates*, 629 S.E.2d at 782. Nor could a reasonable mind find the lay testimony offered by objectors sufficient to overcome SWN's other expert testimony on the other compatibility issues.

D. Due Process Requires Consideration of all the Testimony and Evidence Introduced by SWN at the Evidentiary Hearing

Despite again reciting its tome of extra-jurisdictional case law on administrative due process concerns, the City misunderstands SWN's due process argument in this case. SWN is not asking that the BZA's decision be reversed because it was deprived of due process. Although SWN maintains it was most certainly deprived its due process rights at the BZA level, that deprivation was cured (at least in part) when the Circuit Court agreed that SWN's due process rights had been violated and granted SWN's motion to hold the Evidentiary Hearing. In this appeal, SWN is merely asserting that the Circuit Court abused its discretion by capriciously disregarding substantial evidence that it heard at the Evidentiary Hearing, which was only held because the Circuit Court agreed that the BZA deprived SWN of its due process rights in the first place.

Regardless, it now appears that the City agrees with SWN that at least some of the evidence introduced by SWN at the Evidentiary Hearing should have been considered by the Circuit Court.

See Response Brief, a p. 38 (“[E]ven if Petitioner could establish some due process right beyond the procedures clearly provided by the BZA, *the Circuit Court granted Petitioner unfettered opportunity to present any additional evidence...*”) (emphasis added); Response Brief, a p. 45 (“Nor can Petitioner establish violation of a due process requirement for administrative zoning hearing when...the Circuit Court offered Petitioner an additional opportunity to submit testimony and evidence.”). The only disagreement between SWN and the City now appears to be the *scope* of the evidence at the Evidentiary Hearing that should have been considered by the Circuit Court.

The City maintains that only the rebuttal testimony of Mr. Walentosky relating to hydrogeological issues should be considered in the substantial evidence analysis. See Response Brief, at p. 41-42 (“In particular, Petitioner 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.”); Response Brief, at p. 40 (“Petitioner 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 hearing the BZA held”). The reason for the City’s position is obvious: When SWN was finally offered a full and fair opportunity at the Evidentiary Hearing to rebut the unsubstantiated testimony of the public regarding traffic and other compatibility concerns, SWN’s experts systematically dismantled the BZA’s asserted reasons for denial.

The City’s argument that SWN only requested rebuttal testimony with respect to hydrogeological concerns (and as a result the Circuit Court’s consideration should have been limited to such) is more than disingenuous. Rather, it is outright deceitful and belied by the record. SWN’s counsel, on multiple occasions, asked for an additional hearing to provide rebuttal evidence. See (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?*”) (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). Thus, it is more than clear SWN’s counsel requested a continuance to allow for rebuttal to the myriad of unsubstantiated concerns raised by the public and City.

Because the Circuit Court granted SWN’s motion to hold the Evidentiary Hearing and then arbitrarily chose to consider only some of the evidence presented by SWN, while capriciously disregarding the remainder of the substantial evidence presented to it, the Circuit Court abused its discretion. Therefore, this Court should consider *all* of the evidence presented by SWN at the Evidentiary Hearing in evaluating the Circuit Court’s substantial evidence analysis, which evidence demonstrates that SWN complied with all of the UDO’s criteria for conditional uses.

III. CONCLUSION

If this case does not represent 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 by an appellate court.¹⁹ Accordingly, SWN respectfully requests that this Honorable Court reverse the ICA Memorandum Decision, but nevertheless assume jurisdiction over the merits of this appeal and order that the City and BZA immediately issue the conditional use permit requested by SWN.

¹⁹ Here, instead of basing its decision on SWN’s expert evidence and testimony, the BZA and Circuit Court relied entirely on lay testimony, giving 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. The City’s position that a zoning board’s duty to consider a conditional use application is entirely discretionary flies in the face of this Court’s mandate that “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.” *Far Away Farm*, 664 S.E.2d at 145.

Respectfully submitted,

Dated: September 9, 2024

/s/ Shawn N. Gallagher

Shawn N. Gallagher

WV I.D. No. 12853

Kathleen J. Goldman

WV I.D. No. 6917

Buchanan Ingersoll & Rooney LLP

Union Trust Building, Suite 200

501 Grant Street

Pittsburgh, PA 15219

(412) 562-8362

Counsel for Petitioner

Exhibit A

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

2023 Fall Term

FILED

November 1, 2023

No. 22-ICA-83

released at 3:00 p.m.
EDYTHE NASH GAISER, CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

SWN PRODUCTION COMPANY, LLC,
Plaintiff Below, Petitioner,

v.

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

Appeal from the Circuit Court of Brooke County
Honorable Jason A. Cuomo, Judge
Nos. CC-05-2021-P-35 & CC-05-2021-C-71

REVERSED

Submitted: September 19, 2023
Filed: November 1, 2023

Shawn N. Gallagher, Esq.
Kathleen Jones Goldman, Esq.
Buchanan Ingersoll & Rooney PC
Pittsburgh, Pennsylvania
Counsel for Petitioner

Ryan P. Simonton, Esq.
Margaret E. Lewis
Kay Casto & Chaney, PLLC
Morgantown, West Virginia

Vincent S. Gurrera, Esq.
Gurrera Law Offices, PLLC
Weirton, West Virginia

Daniel J. Guida, Esq.
Guida Law Office
Weirton, West Virginia
Counsel for Respondent City of
Weirton

JUDGE SCARR delivered the Opinion of the Court.

SCARR, JUDGE:

Petitioner, SWN Production Company, LLC (“SWN”), appeals the August 23, 2022, “Order Regarding Pre-Emption” entered by the Circuit Court of Brooke County. In that order, the circuit court concluded that Respondent City of Weirton’s (“City”) municipal zoning ordinances were not preempted by either the West Virginia Oil and Gas Act or the Natural Gas Horizontal Well Control Act (“Horizontal Well Act”).¹ On appeal, SWN argues that the circuit court erred by failing to recognize that the Horizontal Well Act delegates “sole and exclusive authority” over all aspects of the permitting and location of oil and gas exploration and production activities to the Secretary of the West Virginia Department of Environmental Protection (“WVDEP”).

For the reasons discussed below, this Court reverses the August 23, 2022, “Order Regarding Pre-Emption,” entered by the Circuit Court of Brooke County.

I. Facts and Procedural Background

SWN Production Company, LLC is a Texas-based natural gas exploration and production company. The City of Weirton is a Class II city² located in the northern panhandle.

¹ The Oil and Gas Act is codified within West Virginia Code § 22-6-1 *et seq.* The Horizontal Well Act is codified within West Virginia Code § 22-6A-1 *et seq.*

² West Virginia Code § 8-1-3 (1969) classifies cities with a population between 10,000 and 50,000 as Class II.

On June 11, 2021, SWN submitted its application for a conditional use permit to the City in order to obtain local zoning approval under the City's then existing Unified Development Ordinance ("UDO") for drilling at a well site located on a parcel within the City known as the Brownlee Site. Under the UDO, the setback requirement for drilling sites was 200 feet from any residential, church, or school use.

On July 7, 2021, the City enacted a new Unified Development Ordinance ("NUDO") which increased the setback requirement to 2,500 feet from any residential, church, or school use and removed oil and gas extraction as a permitted conditional use anywhere in the City except for industrial-zoned districts. The Brownlee Site is not within an industrial zone.

On August 3, 2021, and September 7, 2021, the City of Weirton Board of Zoning Appeals ("Board") conducted hearings on SWN's application for a conditional use permit. On October 1, 2021, the Board issued its written decision denying SWN's application. The Board reasoned that "SWN has failed to prove that the proposed conditional use is compatible with the goals of the [City's] Comprehensive Plan, including objective 2.3, which provides[,] in part[,] that future development in the Three Springs Drive area should be managed 'to avoid worsening traffic congestion and additional stress on other existing infrastructure.'" "

On October 18, 2021, SWN applied to the West Virginia Department of Environmental Protection (“WVDEP”) for permits to drill for and develop natural gas at the Brownlee Site. On February 8, 2022, WVDEP issued SWN Well Work Permit No. 47-009-00328-00-00 for the Brownlee Site.

On October 29, 2021, SWN filed a Petition for Writ of Certiorari in the Circuit Court of Brooke County seeking review of the Board’s denial of SWN’s conditional use permit. Also on October 29, 2021, SWN filed a Verified Complaint against the City in the Circuit Court of Brooke County. The Verified Complaint sought to have the circuit court declare that the West Virginia Oil and Gas Act preempted the UDO and NUDO. The Verified Complaint also asserted a claim for a taking by the City, as well as a count seeking injunctive relief to prevent the City from enforcing the UDO or NUDO. On March 14, 2022, the circuit court issued an order consolidating the two matters. In that order, the circuit court also stayed the issues presented in the Writ of Certiorari until the circuit court made a final determination on the preemption issues presented by the Verified Complaint. On March 29, 2022, SWN filed its First Amended Verified Complaint which set forth the same causes of action as the Verified Complaint but added information about the WVDEP permit for the Brownlee Site.

No discovery was conducted on the preemption issue and there was no hearing. On August 23, 2022, the circuit court issued its “Order Regarding Pre-Emption.” In that order, the circuit court held that the Legislature did not intend for West Virginia

Code § 22-6-1 *et seq.* or West Virginia Code § 22-6A-1 *et seq.* to expressly or impliedly preempt the authority of municipalities to enact reasonable and rational zoning ordinances under West Virginia Code § 8A-1-1 *et seq.* The circuit court interpreted those statutes to mean:

[T]he operation...and... permitting of [oil and gas] companies is...to be “largely, if not completely, regulated by the [WVDEP]; and that local municipalities, although not permitted to completely ban the lawful operation of oil and gas companies within their city limits, are permitted to pass reasonable and rational zoning ordinances/regulations to allow said companies to operate therein while protecting the health, welfare, and safety of its citizens.”

The circuit court then noted: “If the Supreme Court of Appeals of West Virginia wants to tell our communities they have lost that ability...then it will have to do so without having had any express direction from our [L]egislature.” The circuit court dismissed SWN’s preemption count from its amended complaint, lifted the stay on the issues presented in the Writ of Certiorari, and permitted the parties to proceed with discovery on all other remaining issues. It is from this order that SWN appeals to the Intermediate Court of Appeals.

On September 15, 2023, four days before oral argument, this Court was notified by the City’s counsel that the NUDO enacted on June 7, 2021, was repealed by the City on or about September 11, 2023, re-enacting the previous UDO adopted in 2005. Oral argument was held before this Court on September 19, 2023, with all parties appearing in person.

II. Standard of Review

“A circuit court’s entry of a declaratory judgment is reviewed *de novo*.” Syl. Pt. 3, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995). Our decision in this case requires an examination of various statutory provisions and resolutions of questions of law. “Where the issue on an appeal from the circuit court is clearly a question of law involving an interpretation of a statute, we apply a *de novo* standard of review.” *City of Morgantown v. Nuzum Trucking Co.*, 237 W. Va. 226, 230, 786 S.E.2d 486, 490 (2016) (quoting Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)).

III. Discussion

As a preliminary matter, this Court notes that the City’s recent repeal of the NUDO, raises the issue of mootness. The repealed ordinance appears to have eliminated the primary setback requirement at issue in this case; however, during oral argument, the parties indicated that there were and are still additional steps and regulatory requirements under the re-enacted UDO from 2005 before SWN may proceed with drilling, even after the WVDEP had issued them a permit to begin doing so.³ Thus, this Court finds that this

³ Additionally, SWN argues that both the UDO and NUDO are facially preempted. Further, this Court is not aware of the additional requirements that SWN must complete before the City will issue them a permit to begin drilling.

matter is not moot, and even if it were, it would fall into one of the exceptions to the mootness doctrine.⁴

SWN argues that the circuit court erred by determining that municipal zoning regulations are neither expressly or impliedly preempted by the West Virginia Oil and Gas Act, West Virginia Code § 22-6-1 *et seq.*, as amended to address horizontal drilling by West Virginia Code § 22-6A-1 *et seq.*, where the Horizontal Well Act delegates “sole and exclusive authority” over all aspects of the permitting and location of oil and gas exploration and production activities to the Secretary of the West Virginia Department of Environmental Protection.

⁴ The West Virginia Supreme Court of Appeals has repeatedly stated:

“Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.”

Syl. Pt. 3, *State ex rel. W. Va. Secondary Sch. Activities Comm’n. v. Cuomo*, __ W. Va. __, 880 S.E.2d 46 (2022) (quoting Syl. Pt. 1, *Israel ex rel. v. W. Va. Secondary Sch. Activities Comm’n.*, 182 W. Va. 454, 388 S.E.2d 480 (1989)).

The City argues in response that there is no express or implied preemption of its local zoning laws within West Virginia Code § 22-6-1 *et seq.*, and the City has specific authority to adopt zoning laws under the Land Use Planning Act, West Virginia Code § 8A-7-1 *et seq.*

A. Legislative Acts

Because our analysis requires this Court to reconcile the meaning of West Virginia Code § 22-6-1 *et seq.*, and § 22-6A-6 *et seq.* with West Virginia Code § 8A-1-1 *et seq.*, we must attempt to ascertain the intent of the Legislature.⁵ *Smith v. State Workmen’s Comp. Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975) (“The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.”) “A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” *City of Morgantown v. Nuzum Trucking Co.*, 237 W. Va. 226, 230, 786 S.E.2d 486, 490 (2016) (quoting Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951)).

⁵ This opinion only addresses preemption in regard to the West Virginia Code § 22-6A-1 *et seq.*, the horizontal well act. This Court notes that this act was enacted after the already existing West Virginia Oil and Gas Act, amending it for the sole purpose of addressing horizontal drilling.

Under Chapter 22 of the West Virginia Code, titled “Environmental Resources” our Legislature created the West Virginia Department of Environmental Protection (“DEP”) for the purpose of:

[C]arry[ing] out the environmental functions of government in the most efficient and cost[-]effective manner, to protect human health and safety, and to the greatest degree practicable, to prevent injury to plant, animal and aquatic life, improve and maintain the quality of life of our citizens, and promote economic development consistent with environmental goals and standards.

W. Va. Code § 22-1-1(a)(5) (2001).

Further, the Legislature declared that:

It is the policy of the State of West Virginia, in cooperation with other governmental agencies, public and private organizations, and the citizens of the state, to use all practicable means and measures to prevent or eliminate harm to the environment and biosphere, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations. The purpose of this chapter are:

- (1) To strengthen the commitment of this state to restore, maintain and protect the environment;
- (2) To consolidate environmental regulatory programs in a single state agency;...
- (8) To improve the management and effectiveness of state environmental protection programs;

W. Va. Code § 22-1-1(b).

Specifically, the West Virginia Oil and Gas Act provides that the Secretary of the WVDEP (or their designee) “shall have as his or her duty the supervision of the execution and enforcement of matters related to oil and gas set out in § 22-6-1 *et seq.* [] [and] § 22-6A-1 *et seq.*... of this code.” W. Va. Code § 22-6-2(a) (2023). Also, “[t]he [S]ecretary shall have full charge of the oil and gas matter set out in § 22-6-1 *et seq.* [] [and] § 22-6A-1 *et seq.*....of this code.” W. Va. Code § 22-6-2(c). Further, the secretary shall “[p]erform all duties as the permit issuing authority for the state in all matters pertaining to the exploration, development, production, storage and recovery of this state’s oil and gas.” W. Va. Code § 22-6-2(c)(15).⁶ “[T]he Legislature has made it clear...that all environmental programs in West Virginia are to be regulated by the D[e]partment of Environmental Protection.” *Solid Waste Serv. of W. Va. v. Pub. Serv. Comm’n*, 188 W. Va. 117, 122, 422 S.E.2d 839, 844 (1992).

B. Preemption

As a general rule, “preemption is disfavored in the absence of convincing evidence warranting its application.” *In re Flood Litigation*, 216 W. Va. 534, 547, 607

⁶ The Secretary is also empowered to “[a]dopt rules with respect to the issuance, denial, retention, suspension or revocation of permits authorizations and requirements of this chapter, which rules shall assure that the rules, permits, and authorizations issued by the [S]ecretary are adequate to satisfy the purposes of § 22-6-1 *et seq.*, [] [and] § 22-6A-1 *et seq.* ... of this code....” W. Va. Code § 22-6-2(c)(16).

S.E.2d 863, 876 (2004) (quoting *Hartley Marine Corp. v. Mierke*, 196 W. Va. 669, 673, 474 S.E.2d 599, 603 (1996)). “As a result, there is a strong presumption that [the Legislature] does not intend to preempt areas of traditional [municipal] regulation.” *Id.* (quoting *Chevy Chase Bank v. McCamant*, 204 W. Va. 195, 300, 512 S.E.2d 217, 222 (1998)). Nevertheless, where supported preemption may either be express or implied. *See id.* “To establish a case of express preemption requires proof that Congress, through specific language, preempted the specific field covered by state law.... To prevail on a claim of implied preemption, ‘evidence of a congressional intent to pre-empt the specific field covered by state law’ must be pinpointed.” *Id.* (quoting *Hartley*, 196 W. Va. at 674, 474 S.E.2d at 604).

“A municipal corporation is a creature of the State[] and can only perform such functions of government as may have been conferred by the constitution[] or delegated to it by the law-making authority of the State.” Syl. Pt. 1, *Toler v. City of Huntington*, 153 W. Va. 313, 168 S.E.2d 551 (1969) (quoting Syl. Pt. 1, *Brackman’s Inc. v. City of Huntington*, 126 W. Va. 21, 27 S.E.2d 71 (1943)). “A municipal corporation has only the powers granted to it by the [L]egislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. If any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.” Syl. Pt. 2, *State ex rel. Charleston v. Hutchinson*, 154 W. Va. 585, 176 S.E.2d 691 (1970). “When a provision of a municipal ordinance is inconsistent or in conflict with a statute enacted by the Legislature the statute prevails and the municipal ordinance is of

no force and effect.” Syl. Pt. 1, *Davidson v. Shoney’s Big Boy Rest.*, 181 W. Va. 65, 380 S.E.2d 232 (1989) (quoting Syl. Pt. 1, *Vector Co. v. Bd. of Zoning Appeals*, 155 W. Va. 362, 184 S.E.2d 301 (1971)); *see also Brackman’s Inc.*, 126 W. Va. at ___, 27 S.E.2d at 78 (any inconsistency between state and local law “must be resolved in favor of the State”). A municipal ordinance conflicts with a state statute if it espouses a view that is inconsistent and irreconcilable with that contained in a state statute. *See Vector Co*, 155 W. Va. at 366-67, 184 S.E.2d at 304 (1971).

i. Express Preemption

First, SWN argues that the Legislature in enacting West Virginia Code § 22-6A-6(b) (2011) plainly and expressly stated its intent to preempt the entire field of oil and gas regulation, even in those areas that are traditionally left to local zoning ordinances, such as site location. Specifically, West Virginia Code § 22-6A-6(b) provides that:

Except for the duties and obligations conferred by statute upon the shallow gas well review board pursuant to article eight, chapter twenty-two-c of this code, the coalbed methane review board pursuant to article twenty-one of this chapter, and the oil and gas conservation commission pursuant to article nine, chapter twenty-two-c of this code, *the [WVDEP] has sole and exclusive authority to regulate the permitting, location, spacing, drilling, fracturing, stimulation, well completion activities, operation, any and all other drilling and production processes, plugging and reclamation of oil and gas wells and production operations within the state.*

(Emphasis Added).

In response the City argues that there is no provision in the Land Use Planning Act that exempts oil and gas development from zoning laws. Further, the City asserts that the Legislature did address zoning applications to oil and gas development specifically within the Land Use Planning Act and chose not to prohibit zoning. West Virginia Code § 8A-7-10(3) (2004) provides that:

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; or (ii) of a tract of contiguous tracts of land of any size for a farm or agricultural operation as defined in § 19-19-2 by the owner.

The Legislature is well aware of how to preempt zoning laws when it intends to do so. In the Land Use Planning Act, it made express preemptions for other uses: group residential facilities must be permitted in all residential districts pursuant to West Virginia Code § 8A-11-1; essential utilities and equipment are a permitted use in any zoning district, West Virginia Code § 8A-7-3(e). This shows that the Legislature is presumed to know the effect of its actions, and it will speak clearly when it intends to preempt another law.

To establish a case of express preemption requires proof that the legislature, through specific and plain language in the statute, preempted the specific field covered by local law. *See Morgan v. Ford Motor Co.*, 224 W. Va. 62, 69-70, 680 S.E.2d 77, 84-85 (2009). However, this Court finds it unnecessary to engage in a more exhaustive express preemption analysis because, in this case, West Virginia Code § 22-6-1 *et seq.*, and § 22-

6A-6 *et seq.* clearly preempt the City’s NUDO (which has been repealed) and UDO under implied conflict preemption.⁷

ii. Implied Preemption

Where a law does not expressly preempt other laws, it may still operate to preempt them if it is intended to occupy the entire regulatory field or if there exists a conflict between the laws such that compliance with both is impossible. *See Morgan*, 224 W. Va. 62, 680 S.E.2d 77, 85 (2009) at fn. 8. There are two types of implied preemption, which are field preemption and conflict preemption. *See In re Flood Litigation*, 216 W. Va. 534, 547, 607 S.E.2d 863, 876 (2004).⁸

[F]ield pre-emption[] [occurs] where the scheme of federal regulation is “ ‘ so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” and conflict pre-emption[] [occurs] where “compliance with both federal and state regulations is a

⁷ In reaching our decision, we take no position on the policy issues raised by these preemption arguments before us in regard to express preemption, leaving that up to the Legislature. Preemption clearly raises issues of line drawing between different state statutes enacted by the Legislature, and although there are certainly opposing arguments that can and have been made in regard to express preemption, we find that there is sufficient direction by the Legislature to conclude the City’s ordinance is preempted under implied conflict preemption.

⁸ The parties also dispute whether West Virginia Code § 22-6A-1 *et seq.*, impliedly preempts the City under implied field preemption. However, because this Court finds that implied conflict preemption resolves that matter before us, we will not engage in an analysis of implied field preemption.

physical impossibility,” or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]”

Id. (citation omitted).

On appeal, SWN argues that the Horizontal Well Act directly conflicts with the specific requirements of the City’s ordinances. For example, the Horizontal Well Act provides that “the center of well pads may not be located within six hundred twenty-five feet of an occupied dwelling structure.” *See* W. Va. Code § 22-6A-12 (2011). In contrast, the NUDO, which only permits oil and gas extraction in the City’s industrial districts, provides that “[n]o well may be located closer than two thousand five hundred (2,500) feet of any residential, church or school use.” *See* NUDO § 9.6.20(a). Further, SWN asserts that even under the now re-enacted UDO, the Horizontal Well Act and the local zoning ordinance have fundamental conflicts, because the UDO purports to vest final approval of well locations in a body other than WVDEP. The City’s approval scheme is in direct conflict with the Horizontal Well Act’s express language, which vests WVDEP with “sole and exclusive” authority to regulate the “permitting” and “location” of horizontal gas wells. W. Va. Code § 22-6A-8(d) (2011). SWN argues that this language in the Horizontal Well Act cannot be reconciled with the City’s local ordinance which provides requirements or vests final approval in a body other than the WVDEP. We agree.

In response, the City argues that there is a false conflict between the City’s local ordinance under the Land Use Planning Act and the Horizontal Well Act. The zoning

regulations at issue make no attempt to regulate the operation of oil and gas wells governed by Chapter 22, Article 6. The City relies on *Longwell v. Hodge*, 171 W. Va. 45, 297 S.E.2d 820 (1982), where the Supreme Court of Appeals found a false conflict, stating:

What we have here is the perfect example of a “false conflict.” The State, by licensing the sale of beer, neither acquires, nor seeks to acquire, any positive interest in the operation of taverns or restaurants selling beer at particular locations within municipalities. Rather, the State’s interest is defensive, to assure that beer is not sold by an “unsuitable person” or in an “unsuitable place.” See W. Va. Code § 11-16-12 [1972]. Thus, to the extent that a municipality is not seeking to encroach on the licensing or taxing authority the State holds unto itself, the municipality may zone either to allow or not allow beer-selling restaurants just as it may zone other land uses.

Longwell, 171 W. Va. at 49, 297 S.E.2d at 824.

Conflict preemption arises where a state statute and municipal ordinance are in direct conflict, where a municipal ordinance stands as an added obstacle to an already enacted legislative statute. See *Metro Tristate, Inc. v. Pub. Serv. Comm’n of W. Va.*, 245 W. Va. 495, 504, 859 S.E.2d 438, 447 (2021) (“Conflict preemption arises from a direct clash between state and federal law, and ‘conventional conflict pre-emption principles require pre-emption “where [...] state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”’)” (quoting *Boggs v. Boggs*, 520 U.S. 833, 844 (1997))). Under conflict preemption, municipal ordinances are preempted

where they directly conflict with a statute enacted by the Legislature. *See Id.*⁹ “When a provision of a municipal ordinance is inconsistent or in conflict with a statute enacted by the Legislature the statute prevails and the municipal ordinance is of no force and effect.” Syl. Pt. 2, *Am. Tower Corp. v. Common Council of Beckley*, 210 W. Va. 345, 557 S.E.2d 752 (2001) (quoting Syl. Pt. 1, *Vector Co.*, 155 W. Va. at 362, 367, 184 S.E.2d at 301, 304). Further, the West Virginia Constitution provides that “any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this Constitution or the general laws of the State then in effect, or thereafter, from time to time enacted.” W. Va. Const. art. VI, § 39a.

Under West Virginia Code § 22-6-1 *et seq.* as amended by West Virginia Code § 22-6A-1 *et seq.*, the Legislature explicitly set forth a comprehensive framework for the application for oil well permits. The applicant is required to specifically set forth the type of well, the location, the depth, the purpose of the well, and fees associated with the well, etc. *See* W. Va. Code §§ 22-6A-7, 9; *see also* W. Va. Code § 22-6-6(c) (1994). The Horizontal Well Act provides that the WVDEP may not issue a drilling permit if it determines that: “(1) The proposed well work will constitute a hazard to the safety of persons; (2) The plan for soil erosion and sediment control is not adequate or effective; (3) Damage would occur to publicly owned lands or resources; or (4) The proposed well work

⁹ “Under an implied conflict preemption analysis, federal statutory or policy language explicitly signaling an intent to preempt state law is not necessary.” *Metro*, 245 W. Va. at 504, 869 S.E.2d at 447.

fails to protect fresh water sources or supplies.”¹⁰ W. Va. Code § 22-6A-8(d). Additionally, the WVDEP must confirm that all well location restrictions set forth in the Horizontal Well Act have been satisfied. *See* W. Va. Code § 22-6A-8(e). Finally, the WVDEP is tasked with promptly reviewing and considering all comments raised by the public and appeals of applications.¹¹ *See* W. Va. Code §§ 22-6A-8(f), 9. The circuit court held that because the City is generally empowered by the Land Use Planning Act, West Virginia Code § 8A-7-1, to enact traditional zoning laws, and that the Land Use Planning Act does not specifically limit the City’s ability to regulate oil and gas, the City retains the power to enact and regulate oil and gas through its zoning laws; even when a permit has been approved authorizing a proposed well in a specific location.

Here, the objective terms of the Horizontal Well Act directly conflict with the additional requirements of the City’s ordinance. On October 1, 2021, the Board issued its written decision denying SWN’s application. The Board reasoned that “SWN has failed to prove that the proposed conditional use is compatible with the goals of the Comprehensive Plan, including objective 2.3, which provides, in part, that future development in the Three Springs Drive area should be managed ‘to avoid worsening

¹⁰ The Director is given the sole discretion to authorize or deny the issuance of a permit on the basis of numerous factors. *See* W. Va. Code §§ 22-6-6(h), 11.

¹¹ Further, pursuant to West Virginia Code §§ 22-6-9, -17, the regulations further state the specific requirements for notice to property owners, the procedure for filing comments, the process for setting hearings upon objections to such drilling, as well as the procedures for an appeal process.

traffic congestion and additional stress on other existing infrastructure.” On October 18, 2021, SWN applied to the WVDEP for permits to drill for and develop natural gas at the Brownlee Site. On February 8, 2022, WVDEP issued SWN Well Work Permit No. 47-009-00328-00-00 for the Brownlee Site.

Clearly, under the now repealed NUDO there was a direct conflict between the state statute and city ordinance. Under the City’s NUDO the setback requirement was 2,500 feet, while the state only requires a setback requirement of 625 feet. *See* W. Va. Code § 22-6A-12; *see also* NUDO § 9.6.20(a). These setback requirements cannot be reconciled and are in direct conflict with each other. Further, to the extent that the City’s re-enacted UDO has other requirements which conflict with the state statute, it is also preempted under conflict preemption.¹² Even absent express preemption, the City’s ordinance is in direct conflict with the state’s Horizontal Well Act, where the Legislature has vested in the WVDEP sole and exclusive authority to regulate the permitting, location, and any and all other drilling and productions processes of oil and gas wells and production operations within the state. *See* W. Va. Code § 22-6A-6(b).¹³

¹² This Court is not saying that fees or certain paperwork create a direct conflict, however, to the extent that SWN must go through further hearings or administrative procedures, and/or there are other regulatory requirements that conflict, a direct conflict exists between the City’s UDO and the WVDEP’s authority to grant permits.

¹³ *See EQT Prod. Co. v. Wender*, 870 F.3d 322 (4th Cir. 2017). There, a county commission, relying on its general authority to abate public nuisances, issued a blanket ban on all disposal of wastewater from drilling operations within county lines based on concerns that wastewater storage locations were leaking wastewater into local waterways.

Once the WVDEP issued a permit, the City cannot hinder SWN's ability to begin drilling. The City's approval scheme is in direct conflict with the Horizontal Well Act which vests WVDEP with "sole and exclusive authority" to regulate the "permitting" and "location" of horizontal gas wells. *See* W. Va. Code § 22-6A-8(b). This language cannot be reconciled with the City's position that a municipality retains the authority to require zoning approval for an oil or gas well that has already been approved under the state's permitting program.

IV. Conclusion

For the foregoing reasons, this Court reverses the August 23, 2022, "Order Regarding Pre-Emption," entered by the Circuit Court of Brooke County.

Reversed.

See Id. The storage and disposal of wastewater is specifically regulated by the WVDEP who is charged with protecting against water pollution arising from oil and gas production. *See Id.* In *EQT*, the Fourth Circuit held that the county's ordinance created a conflict with the WVDEP's statutory authority and was preempted by state law. *See Id.* at 332, 336-37.

Exhibit B

2008 WL 8928938 (W.Va.Cir.Ct.) (Trial Order)
Circuit Court of West Virginia.
Jefferson County

JEFFERSON ORCHARDS, INC, Petitioner,

v.

JEFFERSON COUNTY ZONING BOARD OF APPEALS, A public body; Paul Raco, Zoning Administrator, Thomas Trumble, Member, Edwin T. Kelly, II, Member, Tiffany Hine, Chairperson
Christy Hubble, Member, Jeff Bresee, Member, and Frances Morgan, Member, Respondents.

No. 06-C-388.
December 30, 2008.

Order Directing Issuance of Conditional Use Permit

Honorable [Thomas W. Steptoe, Jr.](#), Judge.

On June 19, 2008, the West Virginia Supreme Court of Appeals granted Petitioner's appeal and remanded this case to this Court for reconsideration in light of its decision in *Far Away Farm, LLC v. Jefferson Bd of Zoning Appeals*, 222 W. Va 252,654 S.E.2d 137 (2008). Previously, this Court granted a writ of certiorari only on the issue of whether the April 8,2005 version of the Jefferson County Zoning and Land Development Ordinance applied to Petitioner's conditional use permit (CUP) application. *Far Away Farm* effectively answers that question--the ordinance as it existed prior to April 8,2005 applies to this case. This Court then ordered the parties to submit in writing their positions on whether or not this Court should remand this case to the Jefferson County Planning Commission, and, if so, what direction, if any, it should give the Ultimately, this Court found that it had a record from which it could make a decision on the merits on the Petition for Certiorari and ordered briefing on the merits. After review of the certified record, parties' briefs, all attachments, and applicable law, the Court ORDERS the Jefferson County Planning Commission to issue Petitioner's CUP as the Jefferson County Board of Zoning Appeals previously ordered *except* omitting the two requirements that the developer test all wells adjacent to the property and maintain the native vegetation along Opequon Creek.

Standard of Review

“While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction.” Syl. pt. 1, *Corliss v. Jefferson County Bd of Zoning Appeals*, 214 W. Va. 535, S.E.2d 93 (2003). The plainly wrong standard presumes an administrative tribunal's actions are valid as long as the factual findings are supported by substantial evidence. *Maplewood Estates Homeowners Ass'n v. Putnam County Planning Com'n*, 2006 WL 842878, 629 S.E.2d 778, 782 (W. Va. 2006). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* And a factual finding supported by substantial evidence is conclusive. *Id.*

Law and Reasoning

In regards to its CUP, Petitioner contends that consideration of density is irrelevant under the old ordinance, and the Jefferson County government does not have jurisdiction to require Petitioner to do the things it ordered in paragraphs 18 through 21 under “Conclusions of Law.” It disputes the correctness of the conditions that the BZA mandated under paragraphs 19 through 22 under “Conclusions of Law.” Finally, Petitioner argues that the *Far Away Farm* decision stands for the proposition that

an applicant is entitled to a CUP if it has a passing Land Evaluation and Site Assessment (LESA) score and participated in a Neighborhood Compatibility Assessment meeting and a public hearing, if required.

First, the Court notes that *Far Away Farm* held that because the old ordinance applied rather than the new one, the BZA did not have jurisdiction to consider Petitioner's CUP application. The same analysis applies to this case, which is why this case was remanded for reconsideration in view of *Far Away Farm*. As a result, the BZA's decision in this case regarding Petitioner's application is void as a matter of law. Even so, the Court may review the BZA's record and make a decision regarding Petitioner's CUP because of the Supreme Court of Appeals* precedent in *Far Away Farm* - it made a decision regarding the CUP in that case based upon the BZA's record.¹ In feet, in that case as in this, the Planning Commission was not involved in Petitioner's CUP application in any way. Consequently, the Court may make a decision regarding the CUP. Furthermore, under the precedent of *Far Away Farm*, if this Court determines that a CUP should issue, then this Court must direct the Planning Commission, and not the BZA, to issue it, because, under the applicable law, the Planning Commission is the appropriate agency to issue CUPs.

In *Far Away Farm*, the Supreme Court analyzed the record, which included the hearings from the BZA. Although it recognized that “other than the LESA scoring requirements, there was no specific substantive criterion governing the decision to deny or issue the permit,” the Court does not agree with Petitioner's interpretation that only a successful LESA score and a compatibility hearing are necessary to mandate the issuance of a CUP.  *Far Away Farm, LLC*, 664 S.E.2d at 144. In feet, the Supreme Court spent approximately three pages of its opinion reviewing the record and found that no one submitted any evidence to overcome Far Away Farm's evidence to support the issuance of its CUP.

Petitioner states numerous times in its briefs that the Supreme Court of Appeals found that a LESA score is the only ‘substantive criterion’ in the Ordinance. To the contrary, the Supreme Court found that it was the only ‘specific substantive criterion,’ governing the BZA's decision to deny or issue the permit. A cursory look at the Ordinance demonstrates that there is another substantive criterion - compatibility of the applicant's project to the existing areas adjacent to the site. This criterion is general, not specific, because no compatibility assessment will consist of the same exact standards as a LESA score has. Each project will have different issues to be resolved as each application is unique.

Though the Supreme Court of Appeals may not have contemplated a ‘general substantive criterion,’ it is not stating that an applicant only need to submit a complete application and have a passing LESA score to be entitled to its CUP, as Petitioner seems to insinuate. A passing LESA score does not make a project compatible with the area as Petitioner asserts, or the Compatibility Assessment Meeting and the public hearing would not be necessary. The reason the Supreme Court of Appeals ordered the Planning Commission in *Far Away Farm* to grant the CUP is that “[a]necdotal evidence and mere speculation and conjecture about potential traffic problems is simply insufficient to overcome expert testimony. Also, ... the record shows that no evidence was presented refuting or contradicting that presented by FAF ...” on the other unresolved issues. *Id.* at 145. That Court emphasized that FAF's evidence was not refuted. Unlike in *Far Away Farm*, here Petitioner's evidence concerning density was refuted by an expert.

Petitioner's assertion that density is irrelevant under the applicable Ordinance is misplaced Ordinance § 5.7 provides that property owners may only subdivide one lot per every tea acres and that the minimum lot size is three acres. Ordinance § 5.7(d) (as amended on May 18, 1996). However, it allows a higher density if an applicant uses the Development Review System (DRS) and the BZA issues a CUP. Ordinance § 5.7. Still, the “purpose of this [rural] district is to provide a location for low density single family residential development in conjunction with providing continued farming activities.” *Id.* This functions “to preserve the rural character of the County and the agricultural community.” *Id.* The CUP process is intended to provide a developer an opportunity to seek permission to increase the density beyond that which is normally allowed in the rural zone. *Jefferson Utilities, Inc. v. Jefferson County Bd Of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d §73 (2005).

In a rural district, density is the type of use rather than the amount of use. Density determines what a rural district is. As the Ordinance explicitly states, “[t]he purpose of this district is to provide a location for low density single family residential development” The Ordinance only allows a density of one lot per ten acres. It defines a rural district based on density for

the purpose of preserving the rural character of the County. The Ordinance mandates that the BZA evaluate the density of a proposed development and compare it to its surrounding neighborhood. Thus, the Court cannot agree with Petitioner that density is irrelevant or that the applicable zoning agency cannot compare the proposed development's density to its neighborhood's density when determining compatibility.

This Court does not agree with Petitioner's argument that Jefferson County government does not have jurisdictional authority to require Petitioner to comply with the conditions it set forth in paragraphs 18-21 in the 'Conclusions of Law' section of the BZA's Order. This Court finds that the Ordinance allows the Jefferson County government to require Petitioner to comply. Ordinance § 7.6(g) states that the "Planning and Zoning Commission shall issue, issue with conditions, or deny the conditional use permit" Ordinance § 7.6 (as originally adopted). This provides the legal authority to the Jefferson County government to set conditions as it did in paragraphs 18-21.

Lastly, Petitioner believes that the BZA erroneously ordered the conditions in paragraphs 19 through 22. In Paragraph 22, the BZA limited the density to one lot per 3.76 acres. The Court in *Far Away Farm* stated that anecdotal evidence is insufficient to overcome expert testimony. It pointed out that unless there is better evidence presented to refute or contradict petitioner's expert testimony, the expert testimony will prevail. In this case, both Petitioner and the opposition to the CUP presented expert testimony about how many lots per acre were appropriate.

Petitioner's expert testified that average density in the surrounding neighborhood was one lot per 1.98 acres. In contrast, the opposition's expert testified that the average density was 13.3 acres per house. After being called to rebut that number, Petitioner's expert stated that the calculation of 13.3 acres per house was flawed because it did not include lots and subdivisions recently approved and included acreage in Berkeley County. However, he did admit that if he included the large parcels in the surrounding neighborhood, which he had excluded, the average lot size in the area would be 3.76 acres.

This case is different in some respects from *Far Away Farm*. In that case, the BZA outright denied the CUP; in this case, the BZA granted a CUP with conditions. Also, importantly, in this case the opposition presented more than anecdotal evidence - it challenged Petitioner's evidence with its own expert. The BZA heard both experts and Petitioner was given the opportunity to rebut. The BZA relied on Petitioner's expert for the average lot size - 3.76 acres. This is substantial evidence from an expert. Therefore, the Court cannot find that the BZA was plainly wrong when it limited Petitioner's project to one lot per 3.76 acres. Thus, the Court AFFIRMS paragraph 22 under "Conclusions of Law" in the BZA's Order that granted Petitioner's CUP.

In paragraph 21, the BZA mandated that the "developer maintain the native vegetation along Opequon Creek. After reviewing the map in the record, the Court FINDS this requirement to be erroneous because it appears that the creek does not border Petitioner's proposed subdivision.

In paragraph 20, the BZA mandated "a 100 foot buffer along Highland Meadows' bonier." Petitioner argues that this would destroy its ability to create the development as planned and that with the exception of 4 of 12 houses along the border, the houses are not within 100 feet of Petitioner's development. After review of the record, the Court cannot find that this is erroneous. Furthermore, many applicants' projects do not receive approval for the same as originally planned - this is not a valid argument against the BZA conditions. Therefore, the Court AFFIRMS paragraph 20 under "Conclusions of Law" in the BZA's Order that granted Petitioner's CUP.

In paragraph 19, the BZA required "the developer to test all wells adjacent to the property before and after construction." Petitioner argues this is erroneous because the property will have public water and sewer. The Court agrees with Petitioner. In addition, the Court FINDS this requirement erroneous because one of Petitioner's experts testified that there was no evidence of groundwater contamination. No rebuttal testimony was presented. Thus, Court FINDS this requirement to be erroneous because it is unnecessary based upon the evidence.

ACCORDINGLY, all is so ORDERED.

The Court notes all parties' exceptions and objections to all adverse rulings.

The Clerk shall ENTER this ORDER, and shall forward an attested copy to counsel and pro se parties of record.

ENTERED this 30th day of December, 2008.

<<signature>>

Honorable Thomas W. Steptoe, Jr.

Judge, 23rd Circuit

Footnotes

- 1 In addition, if the Supreme Court of Appeals thought that only the Planning Commission could make a decision regarding the CUP in this case, logically it would have remanded to the Planning Commission rather than the Circuit Court.

End of Document

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2024, I served the foregoing ***Reply Brief of Petitioner*** upon the Respondents’ counsel via the West Virginia E-Filing System (File & Serve Express), to the following:

Vincent S. Gurrera, Esq.
Gurrera Law Offices, PLLC
P.O. Box 2308
Weirton, WV 26062

Daniel J. Guida, Esq.
Guida Law Offices
3374 Main Street
Weirton, WV 26062

Ryan P. Simonton, Esq.
Margaret E. Lewis, Esq.
Kay Casto & Chaney, PLLC
150 Clay Street, Suite 100
Morgantown, WV 26505

/s/ Shawn N. Gallagher
Shawn N. Gallagher