IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 24-320

SWN PRODUCTION COMPANY, LLC,

Petitioner Below, Petitioner,

v.

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

***Respondents Below, Respondents*.**

RESPONSE BRIEF OF RESPONDENT CITY OF WEIRTON BOARD OF ZONING APPEALS

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I. ASSIGNMENTS OF ERROR

Petitioner's Notice of Appeal represents that Petitioner is appealing the Intermediate Court of Appeals' April 22, 2024, Memorandum Decision finding that Petitioner's appeal of the Circuit Court Conditional Use Decision was improvidently docketed and dismissed for lack of subject matter jurisdiction. *See,* Petitioner's Notice of Appeal Response to Sections 9 and 10. Petitioner requests that this Court reverse the Intermediate Court of Appeals' ("ICA") memorandum decision and find the ICA has jurisdiction to hear the appeal of the Circuit Court's decision. *See,* Petitioner's Supplement to Notice of Appeal. Alternatively, Petitioner requests that this Court obtain jurisdiction over the appeal despite the ICA's dismissal of the appeal. *Id.* Accordingly, Petitioner's scope of its appeal is limited to the memorandum decision of the ICA addressing jurisdiction. Notwithstanding the limited scope of Petitioner's appeal, Petitioner's Notice of Appeal and Opening Brief identifies five (5) assignments of error related to the Circuit Court's August 16, 2023 Conditional Use Decision denying Petitioner's Conditional Use Permit ("CUP") and affirming the City of Weirton Board of Zoning Appeals' ("BZA") denial of Petitioner's application.

Petitioner's Assignment of Error No. 6[1] is the only assignment of error that addresses the ICA's memorandum decision, asserting that the ICA improperly determined that it lacked subject matter jurisdiction to hear Petitioner's appeal and improperly denied Petitioner's Protective Motion for Transfer of Case to SCA. The ICA correctly concluded that it did not have jurisdiction over Petitioner's appeal and appropriately dismissed Petitioner's appeal.

Presuming the Supreme Court of Appeals ("SCA") will address the Circuit Court's denial of the CUP, Petitioner asserts that the Circuit Court abused its discretion by according deference

[1] In the Notice of Appeal, Assignment of Error No. 6 was identified as Assignment of Error No. 1 and 2. In Petitioner's Opening Brief, these two assignments of error were consolidated and identified as Assignment of Error No. 6.

to the BZA and upholding denial of a CUP for a horizontal fracturing well pad with multiple well locations, when Petitioner's application for the CUP failed to demonstrate compliance with the lawfully adopted zoning ordinance of the City of Weirton, and where the BZA's multiple public hearings on Petitioner's application demonstrated that the proposed use of the site would be inconsistent with surrounding uses and interfere with ongoing development at neighboring sites.

The Circuit Court conducted the proper limited review of the BZA decision, and it correctly found that the BZA did not abuse its discretion in determining that Petitioner failed to meet the legal requirements to obtain the CUP. *Corliss v. Jefferson Cnty. Bd. of Zoning Appeals*, 214 W. Va. 535, 537, 591 S.E.2d 93, 95 (2003). With respect to Assignment of Error No. 1, Petitioner cannot establish that it met the legal requirements for the CUP, nor that the Circuit Court abused its discretion in upholding the BZA determination that Petitioner failed to do so. With respect to Assignment of Error No. 2, Petitioner cannot establish that any evidence relied upon by the BZA in denying its application should have been disregarded, nor – to address the relevant legal standard – can Petitioner establish that the Circuit Court abused its discretion in making conclusions based on the evidence presented. With respect to Assignments of Error Nos. 3 and 4, Petitioner can neither establish that it had a Constitutional right to a third public hearing on its application for the CUP, nor that any such right was denied when the Circuit Court allowed Petitioner a discretionary evidentiary hearing to include unlimited additional testimony and evidence. With respect to Assignment of Error No. 5, which asserts the same legal claim as Assignment of Error No. 1, Petitioner cannot establish that the Circuit Court applied the wrong standard of review when the Circuit Court's order recites the proper standard and authorities, and where the Circuit Court conducted the limited review on certiorari required by this Court's precedent.

II. STATEMENT OF THE CASE

A. Relevant Procedural History Pertaining to ICA Decision

Contrary to the introduction of Petitioner's Statement of the Case, this appeal is not seeking review and reversal of the Circuit Court's August 16, 2023 order affirming the BZA's decision to deny Petitioner's CUP. *See,* Petitioner's Opening Brief, pg. 2. The relief sought by Petitioner in this appeal is reversal of the ICA's memorandum decision and a finding that the ICA has jurisdiction to hear the appeal of the Circuit Court's decision affirming the BZA's denial of Petitioner's application for a CUP. *See* Petitioner's Supplement to Notice of Appeal.

On October 29, 2021, Petitioner filed two separate actions relating to the CUP and the City of Weirton's Unified Development Ordinance ("UDO"): (1) Verified Complaint for *Writ of Certiorari* against the Respondent BZA appealing the denial of Petitioner's application for a CUP to engage in natural gas drilling within Weirton City Limits; and (2) a Complaint against the City of Weirton asserting the zoning ordinances are preempted by state law. (AR2140-2141). The two separate actions were later consolidated to resolve common questions of law, as both the *writ of certiorari* and complaint involved the resolution of whether state law preempted Weirton's Unified Development Plan as it pertains to regulation of oil and gas. *Id.* The Circuit Court specifically stayed the writ of certiorari pending determination of the preemption issues presented in the complaint. (AR2144).

After deciding the preemption issue, the Circuit Court moved forward with a hearing on Petitioner's *Writ of Certiorari* as to the BZA's denial of the application for a CUP. The Circuit Court issued its Order Affirming the Decision of the Weirton Board of Zoning Appeals on August 16, 2023. (AR1-58). On September 6, 2023, Petitioner appealed the Circuit Court's decision to the ICA arguing the Circuit Court erred in not overturning the BZA's decision

denying the CUP. (2145-2217). On April 22, 2024, the ICA issued its memorandum decision dismissing the matter for lack of jurisdiction, finding that it does not have appellate jurisdiction over extraordinary remedies. (AR2413-2417). The ICA also refused Petitioner's Protective Motion for Transfer of Case to the Supreme Court and Extension of Time to Perfect Appeal. (AR2319). At the time of the ICA's dismissal, the time for Petitioner's appeal of the Circuit Court order had expired.

Because Petitioner's statement of the case concentrates entirely upon the Circuit Court's August 16, 2023 decision affirming the BZA's denial of the CUP, the following is provided in accordance with Rule 10(d) of the West Virginia Rules of Appellate Procedure to correct any inaccuracy or omission in the Petitioner's brief with respect to the Circuit Court's decision.

B. Introduction as to the CUP

Petitioner sought approval to establish a horizontal fracturing well pad with up to 14 wells in the Planned Development District of Weirton. Petitioner's application for the CUP failed to demonstrate compliance with the lawfully adopted zoning ordinance of the City of Weirton, and where the BZA's multiple public hearings on Petitioner's application demonstrated that the proposed use of the site would be inconsistent with surrounding uses and interfere with ongoing development at neighboring sites. (AR574).

C. Petitioner's Application for the CUP

On June 11, 2021, Petitioner submitted its Conditional Use Application (the "Application") to the BZA, seeking conditional use approval to conduct "Oil/Gas Extraction" activities as defined by the City of Weirton Unified Development Ordinance ("UDO") located at Park Drive within the City of Weirton (the "Property"). (AR573-906). Petitioner proposed to

"drill 14 Gas Wells" as part of its Application, but stated that "At this time, only three Gas Wells will be drilled." (AR574).

In the Application, Petitioner stated that its proposed Oil/Gas Extraction use complied with all standards of the Planned Development District and the "express standards" for Oil/Gas Extraction uses, citing Section 9.6 (24)(a) of the UDO. (AR580). At the April 17, 2023, hearing to take additional evidence pursuant to *W. Va. Code* § 8A-9-6(b) (the "Evidentiary Hearing"), Petitioner testified that its proposed drill rig would be 165 feet tall, exceeding the 60-foot maximum height limit in Article 10 of the UDO. (AR1858).

Petitioner asserted that the gas wells it proposed would be located more than 200 feet from any residential use in accordance with Supplemental Regulation 24 of the Land Use Table at Section 9.4 of the UDO. (AR580). Petitioner represented that it had submitted a Type II site plan and related materials that met the conditional use application requirements to establish site layout and building design, among other items. (AR580). Petitioner represented that "The Proposed Uses are compatible with the goals of the Comprehensive Plan and the appropriate and orderly development of the PDD. *Id*. To support this representation, Petitioner cited *UDO* § 3.6.3.1 (which supplies the requirement that the BZA consider whether a proposed conditional use is compatible with the goals of the Comprehensive Plan and the orderly development of the district) and referred to Exhibit J of its Application. *Id*. Exhibit J consists of one graphic image rendering captioned "Brownlee Well Pad – View from Route 22" and does not show any surrounding buildings or uses (AR767) and one graphic image rendering captioned "Brownlee Well Pad – View from Park Drive", prepared by Civil & Environmental Consultants, showing an open field and building (AR768). Petitioner's application for conditional use permit contained no additional information supporting its assertion that its proposed use would be compatible with

the goals of the Comprehensive Plan and with the appropriate and orderly development of the Planned Development District. (AR573-906).

Petitioner represented in its application that "The Proposed Uses will not hinder nor discourage the appropriate development and use of adjacent land and buildings." (AR580). To support this representation, Petitioner cited *UDO* § 3.6.3.1 (which supplies the requirement that the BZA will only approve a conditional use if it will not hinder the appropriate development in the district) and referred to Exhibit J of its Application. *Id*. Exhibit J consists of the two graphic renderings described in Paragraph 14, *supra*, and contains no information with respect to other existing or planned development in the Planned Development District or near the Property. (AR766-8). Petitioner's application for conditional use permit contained no additional information supporting its assertion that its proposed use would neither hinder nor discourage the appropriate development and use of adjacent land and buildings. (AR573-906).

Petitioner represented in its application that "Once the Gas Wells are in production, the Proposed Uses shall not be more objectionable to nearby properties by reason of fumes, noise, vibration, flashing of or glare from lights, and similar nuisance conditions than the operations of any Permitted Use not required a Conditional Use permit in the district." (AR581-2). Petitioner cited Section 3.6.3.1 of the UDO in reference to this representation, which requires the BZA to approve a conditional use *only if* it will not be more objectionable to nearby properties due to the listed hazards than surrounding uses. *Id.* Petitioner relied on Exhibits G and J to its application to support its claim, which contain the two graphic images with no information about surrounding uses (AR766-8), and an aerial photograph of a wellpad that does not represent the Property at issue in this litigation nor show any surrounding uses. (AR718). Petitioner included no other information and made no representations in its application that its proposed Oil/Gas extraction

use would not be more objectionable to nearby properties due to fumes, noise, vibration, lights, or other nuisance conditions prior to wells going into production. (AR573-906).

D. The BZA's First Public Hearing on the Application for the CUP

On August 3, 2021, the BZA held a duly noticed public hearing on Petitioner's application for conditional use permit. (AR1082-1125). Petitioner appeared at the hearing, through legal counsel and by its corporate representatives. (AR1179-1275). Petitioner offered testimony by corporate representatives who described the area as a driveway or off-ramp onto Three Springs Drive at rue 21 and near the Walmart building, described the process of wellpad construction, hydraulic fracturing, and development (AR1193-4), testified that 14 gas wells are planned for this Property – described as a "lateral" or hydraulic fracturing "leg" – but initial plans call for construction of 3 wells (AR1198), described the use of lighting on drill rigs at the Property, the safety plan at the property, and nearby residents (AR1205-6), and that the nearest resident is 1,200 feet from the proposed well pad site. (AR1206).

Petitioner offered testimony by Brian Lantz, a civil engineer employed by Civil & Environmental Consultants and retained by Petitioner. Mr. Lantz testified that the buildings proposed for the site meet the requirements of Table 2 (Development Standards) of the UDO and to his understanding of the geotechnical reports included in Petitioner's application for conditional use permit. (AR1210). Petitioner offered testimony by Jeff DePaolis, traffic engineer with Civil & Environmental Consultants and retained by Petitioner. Mr. DePaolis testified regarding a traffic impact study he conducted for Petitioner (AR1215) and represented that all traffic will come into the site from Route 22, that he chose three intersections to evaluate traffic impacts (AR1216), he assumed "22 trucks arriving that will go through the site, and the same 22 trucks departing after they're empty." (AR1218), that "we analyzed the morning and the peak

hour" and testified that he also estimated 25 employees traveling by car and assumed 25 additional passenger cars, stating "During the morning and peak hour; 22 of those being trucks and 25 being passenger cars. Again, those are one direction. So it would be 94 total trips, 47 in and 47 out." (AR1218), and that the traffic impact study he performed based on the referenced projections indicated that there would be no change in the level of service at the three intersections evaluated. (AR1218-9). Petitioner offered testimony from Bradley Webb, an employee of Absolute Noise Control, which he described as a consulting firm performing noise mitigation for the oil and gas industry. (AR1219). Mr. Webb testified that the nearest occupied structure to "this site" is approximately 1,500 feet. (AR1221). He projected the highest noise impact to "the receiver to the south of the proposed pad site" would be 56.1 decibels, and that the measurement was below the 65 decibel limit established by the County noise ordinance. (AR1222). Petitioner then concluded its presentation of its application to the BZA. (AR1226).

The BZA then opened the public hearing to citizen comments. (AR1229). Barb Barkley, manager of the Fairfield Inn and Suites on Amerihost Drive, off Three Springs Drive, spoke regarding her concerns about the proposed development. (AR1234). Ms. Barkley stated, "And you talked about your facility not being within 1,500 feet of a residence. Now, my hotel is not a residence, but I have people stay at my hotel. So it will be impacted by the traffic, by the noise. I live within 2,000 feet of one of these well pads. I know what the noise is. They will be impacted by the noise as much as you try to (inaudible) it down." (AR1234). Ms. Barkley also stated that the proposed development would negatively impact business at the Fairfield Inn and Suites. (AR1235).

Michael Paprocki, executive director of the Brooke-Hancock-Jefferson Metropolitan Planning Commission stated that his organization represents the transportation interests and the

land use interests of the City of Weirton and of Brooke and Hancock Counties. (AR1260-1). Mr. Paprocki stated the UDO requires that the BZA consider future planned development on Park Drive when determining whether to grant a conditional use permit. *Id*. Mr. Paprocki noted that Petitioner did not include any information about planned development in its application. (AR1261). Mr. Paprocki additionally stated that the application and presentation by Petitioner did not provide information about transportation noise from trucks, the lengths of the trucks to be used, and whether the road geometry is adequate for the proposed truck traffic. *Id*.

Mike Simon stated that he was appearing on behalf of Park Drive Development and noted that Petitioner's application references the requirement that a conditional use will not hinder nor discourage the appropriate development and use of adjacent landowner. (AR1262). Mr. Simon stated that Park Drive Development is the adjacent landowner to the proposed development. (AR1263).

Public comment at the August 3, 2021 hearing then concluded, and Petitioner's counsel made additional argument to the BZA. (AR1270). After Petitioner's counsel concluded Petitioner's presentation of its application, the BZA entertained a motion to table the application pending receipt of additional information regarding the concerns raised at the hearing, including the traffic impact study. (AR1272). The BZA then continued the hearing to its next regular meeting date on September 7, 2021, for the purposes noted. (AR1272-3).

E. The BZA's Second Public Hearing on the Application for the CUP

At the September 7, 2021, meeting, the BZA continued its hearing on Petitioner's Application. (AR1279). Petitioner again appeared by counsel and its corporate representatives. *Id*. In public comment, Barb Barkley stated that she is the general manager of the Fairfield Inn and Suites located at Three Springs Drive and is speaking on behalf of the hotel owners and

management, SJB Hotels and SJB Management Company. (AR1296), that the hotel is located directly by the proposed site and its owners feel the impact in the construction of the pad and future operations will negatively impact its guests and will have a negative impact on its operations and the comfort of its guests. (AR1297). Ms. Barkley stated that, due to the time during which the traffic impact study was conducted by Petitioner, it does not show the true impact on the Fairfield's visitors and guests, and "Not only do we currently see increased traffic on Three Springs Drive with the addition of numerous new businesses, but the ingress and egress of the highway will be severely impacted." (AR1298).

Dr. Eli Dragisch stated that the Weirton Planning Commission developed a plan for development in the Three Springs Drive area that did not permit anything other than residential, light manufacturing, or retail in the area because "that would develop jobs for us" and noted "in the past 20 years, that area has been a bright spot in business development." (AR1299). Dr. Dragisch stated that there is business development along Three Springs Drive, and that granting this permit would be a deterrent to that development. (AR1301).

Eric Frankovitch stated that he is one of the owners of Park Drive Development, and that J.J. Barnebei, Mike Simon, and Jason Bickel, are co-owners appearing with him. (AR1304). Mr. Frankovitch stated that Park Drive Development has acquired 72 acres across from the Walmart right next to the Property where Petitioner proposes to develop and oil/gas extraction use. (AR1304). Mr. Frankovitch stated that the purpose of the development is a commercial operation with residential upstairs and stated "We can't do this development if there's going to be a gas well next to it. It just can't work. And it's not that it's in the plans or it may happen. It's already been approved. The contract for the infrastructure has already been let to (inaudible) construction." (AR1304).

After public comments concluded, Mark Colantonio spoke on behalf of the City of Weirton. (AR1339). Mr. Colantonio presented objections to the traffic impact study prepared for Petitioner. (AR1340), stating that the traffic count used for the study was performed at 8:30-9:30 a.m. and 4:30-5:30 p.m. (AR1342), that the traffic counts were performed on a single day, February 17, 2021, that traffic levels were artificially low on that date due to COVID restrictions, that the weather on the date of the traffic count was eight degrees, resulting in less traffic (AR1342-3), that the traffic impact study is not based on actual site traffic (AR1343), that the estimates indicate an additional 1,000 truck trips per day, that the study accounted for a 1 percent projected increase in traffic but that the traffic increase in the area would be greater due to the additional development occurring and planned at Three Springs Drive (AR1344), that the traffic impact study assumes the truck traffic will come from three separate directions, but that the traffic will all come from the same direction when the water source is in one area (AR1346), that the report failed to account for delays at signalized intersections due to backups or loading at turn lanes, and that accounting for those delays could impact the level of service. (AR1348).

Petitioner's counsel then questioned Mr. Colantonio regarding his qualifications to evaluate traffic studies. (AR1349). Mr. Gallagher and counsel for the BZA then discussed whether Mr. Gallagher was entitled to conduct examination of Mr. Colantonio, and whether Mr. Colantonio was entitled to conduct examination of Mr. DePaolis, the traffic engineer retained by Petitioner. (AR1350). Mr. Gallagher stated, "There were a lot of issues raised today. And we would like a chance for rebuttal – to come back next week. ... We're trying to work with the city. I don't know what else we can do at this point. So if you would like, I would be happy to have these questions answered by Mr. DePaolis right now. If you want to have your engineer ask him, that would be fine as well." (AR1353-4). Mr. Colantonio then questioned Mr. DePaolis regarding

his conduct of the traffic impact study. (AR1354). Mr. DePaolis testified that the estimated truck traffic was based on numbers provided by Petitioner and may change if additional wells are developed. (AR1356), that he is not aware of the direction in which trucks will travel to and from the site (AR1366), that the study does not account for all of the trucks coming from the same direction or leaving toward the same direction (AR1366-7), that the new development on Park Drive is not factored into the traffic impact study (AR1374), and that he did not investigate actual peak traffic times at the area and did not evaluate traffic at lunchtime hours. (AR1378).

Kaleb Knowlton the program manager for the planning department, stated that the proposed use by Petitioner is not compatible with the goals of the comprehensive plan, "Specifically Goal Number 2, Objective 2.3 – which I'll reference in the City's 2018 Comprehensive Plan. Objective 2.3 is to facilitate the build-out on Three Springs Drive and the Park Drive area as (inaudible) commercial development." (AR1386-7). Mr. Knowlton stated that the proposed Oil/Gas extraction use would be a detriment to the City's comprehensive plan and would hinder adjacent development. (AR1387). Mr. Knowlton opined that Oil/Gas extraction is not compatible with surrounding uses, stating, "There's ... a rue21 distribution warehouse. But there is no heavier industry there." (AR1388).

Petitioner's counsel then stated to the BZA, "As I had mentioned earlier, we will be here next month, and we would like the opportunity to present a rebuttal case at next month's zoning hearing. We would like the opportunity to respond to the Thrasher report, I guess, that we just received. And I can follow up with Attorney Guida after this hearing. However, we did anticipate some of these issues, and we do have a report that we would like to submit into evidence prepared by Moody & Associates. We only have two copies. We can provide more afterwards. And I believe we have submitted Exhibits A through S, and this would be T. And **I would like to**

present testimony of a professional geologist to respond to some of the issues that were raised today." (AR1392) (emphasis added). Petitioner's counsel was asked by the BZA, "What specifically do you wish to rebut?" and responded, "That whatever issue was raised when we (inaudible) beyond reading the newspapers that there were issues raised about the water source protection plan, which we requested beforehand. I didn't get any response. We understand that there was a 2019 plan that was specifically going to be testified to. We had the 2003 plan. We have somebody who can testify to water issues right now. He's not going to be here on October 5th. But we would like to respond. I can provide his testimony now since he's here and supplement that after this hearing with his specific response to (inaudible) issues that we just received five minutes ago." (AR1394).

The BZA, by member Alexander, then moved to deny a continuance of the hearing, stating "I mean, we're here today. We're here for the same reasons. Water was an issue at the last meeting. I don't see why it wasn't presumed that water would be an issue at this meeting." (AR1396). Upon the motion of Alexander, the BZA voted not to continue the hearing to a future date. (AR1397). The BZA then considered whether to permit testimony of the geologist offered by Attorney Gallagher for Petitioner. (AR1397). Attorneys for Petitioner and the Weirton Area Water BZA engaged in discussion regarding whether an aquifer study or geologist report was required as part of a conditional use application or preempted by state law, and the BZA ultimately did not hear testimony of the geologist offered by Petitioner. (AR1399).

The BZA then entertained a motion to deny the application for conditional use permit and voted unanimously to deny the application. (AR1401). In the course of its two public hearings on Petitioner's application for conditional use permit to conduct Oil/Gas operations at the Property in the Planned Development District, the BZA considered, in addition to the public comment and

statements or testimony of Petitioner and the City of Weirton referenced in the foregoing findings, the following documents: Park Place / Frankovitch Development Plans, showing the forthcoming Park Drive Development described variously by Mr. Frankovitch, Mr. Simon, and Ms. Barker (AR907-1020); Thrasher Engineering report to Weirton Area Water BZA regarding the Ranney aquifer (AR1021-2); Traffic Study prepared for Petitioner (AR1026-1080); Realtor letter opining that the proposed use would negatively impact nearby property values (AR1081).

F. The BZA's Written Decision Denying the Application for the CUP

In accordance with UDO § 3.6, the BZA issued a written decision denying the Application (the "Decision"). (AR1158). The BZA found that the Comprehensive Plan, Objective 2.3, states that the City should "[f]acilitate the build-out of Three Springs/Park Drive area as a mixed-use commercial hub" and that "Changing retail patterns, most significantly the rise of e-commerce, are affecting communities across the country. Given the limited future for big box retail, the City should encourage mixed-use to remain competitive. The strategy for build-out of the Three Springs area should encourage a diverse mix of entertainment, retail, hospitality and high density residential. The City should continue to work with the BDC and other stakeholder to expand the industrial park. Sites should be prepared to attract major tenants that will provide quality employment opportunities for residents and attract new workers to the City. **Future development [in the Three Springs Drive area] should be managed to avoid worsening traffic congestion and additional stress on other existing infrastructure."** (emphases supplied by the BZA). (AR1167).

The BZA found that the traffic study submitted by Petitioner estimated an additional 1,000 trips per day, including trips for trucking water into and out of the site, did not identify the actual routes to be used by truck traffic arriving at or departing the site (AR1168), was flawed because

it used faulty traffic count numbers and information about the direction from which truck traffic would arrive and depart (AR1169), did not adequately account for existing and planned development in the district and additional traffic that would be generated (AR1169), and failed to properly account for delays at traffic signals because it did not use actual data regarding the timing of the signals. (AR1169). The BZA found that the noise assessment or study presented by Webb erroneously identified Angeline Estates as the nearest residential area but that closer residential areas exist at Woodlawn Estates and Beacon Drive, and that information about noise in those areas was not presented. (AR1169-70).

The BZA found that "the Three Springs Drive area is the main commercial area or hub for the City of Weirton" and that "Three Springs Drive area has experienced much business growth for at least the past 20 years, including recent development of the old Wal-Mart and K-Mart sites[.]" (AR1170). The BZA found that "Three Springs Drive area will experience future business growth, including the addition of Aldi, Big Lots and the Park Drive Development[.]" (AR1170). The BZA further found that Park Drive road is a two-lane road with no center turning lane, that the Three Springs Drive area is one of the most traveled roads in the City and traffic flow on Three Springs Drive is routinely congested, that water, sand, and other trucks and vehicles will be using Park Drive to arrive at and depart from the proposed well pad site, and that traffic congestion in the Three Springs area would worsen, and additional stress would be placed on existing infrastructure, if the proposed conditional use were allowed. (AR1170).

The BZA found that the neighborhood character and surrounding property values would be negatively impacted by the proposed conditional use of Oil/Gas extraction. (AR1170). The BZA evaluated each of the Standards for Approval found in Section 3.6.3.1. of the UDO and found that the application failed to meet each standard. (AR1170-71). Based upon its factual

findings, the BZA concluded that it could not issue the requested conditional use permit because Petitioner failed to establish the standards required by the UDO. (AR1171-72).

G. The Supplemental Evidence Considered by the Circuit Court under W. Va. Code §8A-9-6.

After the conclusion of the BZA's proceedings on the Application, and on certiorari review before this Court, Petitioner presented additional testimony and evidence at the Evidentiary Hearing. (AR1817-1959). The Circuit Court did not limit its presentation of evidence at the hearing and allowed Petitioner to introduce unlimited testimony and exhibits, including testimony duplicative of the administrative hearings. On August 16, 2023, the Circuit Court entered its order denying Petitioner's petition for writ of certiorari and affirming the Decision of the Weirton BZA of Zoning Appeals. (AR1-57). It was this Order that the Petitioner improperly appealed to the ICA rather than the SCA and the ICA dismissed for lack of jurisdiction.

III. SUMMARY OF ARGUMENT

The issue directly before this Court is the ICA's dismissal of Petitioner's appeal of the Circuit Court's August 16, 2023 order denying Petitioner's Conditional Use Appeal and affirming the BZA's denial of Petitioner's application to the ICA for lack of jurisdiction. The ICA correctly dismissed the Petitioner's appeal as it does not hear appeals of extraordinary writs such as the Circuit Court's review by certiorari and the ICA did not abuse its discretion in denying Petitioner's Protective Motion for Transfer of Case to the Supreme Court.

Despite the ICA's memorandum decision from which Petitioner appeals being limited to the ICA's jurisdiction to hear and decide the appeal of the Circuit Court's certiorari review of the BZA decision, Petitoiner's brief lacks any discussion regarding the jurisdictional ruling issued by the ICA and is devoid of any case law or substantive explanation as to why the ICA erred. As

such, Petitioner has waived this issue, and the ICA's dismissal should not be considered on appeal. *Addair v. Bryant,* 168 W. Va. 306, 320, 284 S.E.2d 374, 383 (1981); *Birchfield v. Zen's Dev., LLC*, 245 W. Va. 82, 89, 857 S.E.2d 422, 429 (2021).

Petitioner presumes the Supreme Court will overlook the jurisdictional issues and address the merits of the Circuit Court's order, admitting that its opening brief is submitted to address the underlying appeal of the Circuit Court's order. *See*, Petitioner's Brief, pg. 2, fn.1 The five (5) assignments of error pertaining to the Circuit Court's Order should not be considered by this Court because the ICA's decision did not address the merits or questions of substantive law relative to the case. *See, Pettry v. Chesapeake & O. Ry. Co.,* 148 W. Va. 443, 446, 135 S.E.2d 729, 731 (1964)("It has been uniformly held by this Court that it will not consider questions nonjurisdictional in their nature not acted upon by the circuit court.")(internal citations omitted).

Respondent does not concede that review of the Circuit Court's order is before this Court. Assuming the Court reaches the merits of Petitioner's five assignments of errors to the Circuit Court's order, Petitioner cannot establish that the Circuit Court abused its discretion by upholding the BZA's considered decision. The denial of a conditional use permit is a discretionary act of the BZA applying the specific requirements of the UDO. Petitioner failed to establish compliance with the UDO requirements, and the BZA applied specific factual evidence from Petitioner's application, planning staff, and two public hearings to determine that Petitioner's proposed hydraulic fracturing wells did not meet the minimum requirements to obtain a CUP, concluding that the proposed use was different than any surrounding use, would harm current uses and development, and is not consistent with the Comprehensive Plan objectives for the Planned Development District. Nor can Petitioner establish violation of a procedural due process requirement for administrative zoning hearings when the BZA followed

the procedure established by law, held two public hearings at which Petitioner appeared and participated, and when the Circuit Court offered Petitioner an additional opportunity to submit testimony and evidence. Accordingly, Petitioner cannot meet its burden to prove an abuse of discretion by the Circuit Court and the Circuit Court decision should be affirmed.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues presented have been thoroughly decided and oral argument is unnecessary pursuant to Rule 18(a)(3) of the West Virginia Rules of Appellate Procedure. The decision being appealed is based on the ICA's jurisdiction and applicable statutory law. There is no substantial question of law presented and disposition by memorandum decision affirming the ICA's decision is appropriate pursuant to Rule 21(c) of the West Virginia Rules of Appellate Procedure. If this Court considers the circuit court's order, the question will be whether the circuit court abused its discretion when deciding to uphold the BZA's denial of the CUP. In accordance with Rule 18(a)(4) of the Rules of Appellate Procedure, the decisional process as to the Circuit Court's order would not be significantly aided by oral argument.

V. ARGUMENT

A. Standard of Review

1. Review of ICA's Dismissal for Lack of Subject Matter Jurisdiction

Whether the ICA correctly interpreted *W. Va. Code* §§51-11-4(d)(10), 53-3-1 *et seq.*, and 8A-7-9, resulting in its determination that it lacked jurisdiction over Petitioner's appeal of the Circuit Court's Order on its petition for writ of certiorari is a question of law to which a *de novo* standard or review applies. *Holley v. Feagley*, 242 W. Va. 240, 242, 834 S.E.2d 536, 538 (2019).

2. Certiorari Review of Zoning Decisions[2]

Review of planning decisions is afforded by *W. Va. Code*§ 8A-9-1 *et seq*. The Court conducts a limited review of the decisions of bodies charged with planning and zoning administration. *Corliss,* 214 W. Va. 535, 537, 591 S.E.2d 93, 95 (2003) Decisions contravening the limited scope of review and substituting judgment for the administrative bodies' will be reversed. *Id*. The decision of the Board administering the zoning ordinance is entitled to deference by the reviewing Court, and it is presumed that the Board acted correctly. Syl. Pt. 5, *Wolfe v. Forbes*, 159 W. Va. 34,217 S.E.2d 899 (1975); Syl. Pt. 1, *Corliss*, 214 W. Va. 535, 591 S.E.2d 93 (2003); Syl. Pt. 1, *Rissler v. Jefferson County Bd. Of Zoning Appeals*, 225 W. Va. 346,693 S.E.2d 321 (2010); Syl. Pt. 2, *Bd. of Zoning Appeals of the Town of Shepherdstown v. Tkacz*, 234 W. Va. 201, 764 S.E.2d 532 (2014). However, "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." *Id*. When considering challenges to planning and zoning codes, Courts avoid invalidating the codes in order to permit the decisions of the legislative body promulgating the codes to take effect. Courts are not disposed to declare a zoning ordinance invalid in whole or in part where it is fairly debatable as to whether an action of a municipality is arbitrary or unreasonable. *DeCoals, Inc. v. Board of Zoning Appeals of City of Westover*, 168 W.Va. 339, 284 S.E.2d 856 (1981).

3. Procedural Due Process Claims in Zoning Hearings

In the context of a local zoning decision, "due process requires a hearing before an impartial and neutral tribunal, over which a disinterested adjudicator presides." *Rissler v. Jefferson County Bd. of Zoning Appeals*, 225 W. Va. 346, 693 S.E.2d 321 (2010). A reviewing

[2] In the event the Court addresses the assignments of error of the Circuit Court's Order, the remaining sections addresses the appropriate standard of review for that Order.

court may evaluate the sufficiency of notice and the hearing in administrative decisions generally by consideration of three factors: (1) the plaintiff's property interest affected by the government action; (2) the risk of an erroneous deprivation of a property interest and the value of any additional or substitute procedural safeguards; and (3) the government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Local zoning hearings are less formal than court proceedings, and the local body is not required to allow the landowner to directly cross-examine witnesses. Allowing the landowner to present an opposing viewpoint is typically sufficient. *G&H Dev., LLC v. Benton-Parish Metro Planning Comm'n*, 641 F. App'x 354, 357-8 (5th Cir. 2016). Plaintiffs claiming denial of due process based on insufficient duration of the hearing must be able to identify the additional evidence they would have presented with extra time and demonstrate that it would have affected the outcome of the decision. *See Club Moulin Rouge LLC v. City of Huntington Beach*, 2005 WL 5517234, at *8 (C.D. Cal. June 22, 2005); *Nance v. City of Albemarle, North Carolina*, 520 F.Supp.3d 758 (4th Cir. 2021); *Hyatt v. Town of Lake Lure*, 114 Fed. Appx. 72 (4th Cir. 2004) (unpublished).

"Due process of law generally requires that a deprivation of property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Tri-County Paving v Ashe County*, 281 F.3d 430, 436 (2002) (*quoting Mullane v. Cent. Hanover Bank & Tr. Co*., 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). "However, 'to determine whether a procedural due process violation has occurred, courts must consult the entire panoply of predeprivation and postdeprivation process provided by the state.'" *Id. (quoting Fields v. Durham*, 909 F.2d 94, 97 (4th Cir. 1990)). "The procedures due in zoning cases, and by analogy due in cases such as this one involving regulation of land use through general police powers, are

not extensive." *Nance v. City of Albemarle, N. Carolina*, 520 F. Supp. 3d 758, 790 (M.D.N.C. 2021).

B. The Petitioner Has Waived The Jurisdictional Ruling Of the ICA By Failing to Address the Issue in Its Opening Brief. As Such, The ICA Decision Must Be Affirmed.

Aside from identifying the ICA's denial of Petitioner's appeal for lack of subject matter jurisdiction as assignment of error no. 6 and a footnote in which Petitioner's "*Motion to the Supreme Court of Appeals to Obtain Jurisdiction Over Appeal Filed in the Intermediate Court of Appeals*' is attached as Exhibit A, Petitioner's brief does not address the jurisdictional ruling and decision issued by the ICA, from which it seeks relief.[3] Rule 10(c)(7) of the Appellate Rules of Procedure require Petitioner's brief to "contain an argument clearly exhibiting the points of fact and law presented, the standard of review applicable, and citing the authorities relied on, under headings that correspond with the assignments of error." W.Va. R. App. 10(c)(7). Petitioner has an obligation to "plead and prove his case in accordance with established court rules." *State, Dep't of Health v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995).

Attaching a motion as an exhibit in which the jurisdictional issues are mentioned does not meet the bare minimum requirements of West Virginia Rule of Appellate Procedure 10(c)(7). "Judges are not like pigs, hunting for truffles buried in briefs." *Dep't of Health,* 195 W. Va. at 765, 466 S.E.2d at 833. Likewise, Respondent should neither have to hunt for truffles through Petitioner's brief to identify the argument addressing the jurisdictional assignments of error it seeks to raise nor be required to respond to issues not addressed in Petitioner's Opening Brief. This Court has long held that "[a]ssignments of error that are not argued in briefs on appeal maybe deemed by this Court to be waived." *Addair v. Bryant,* 168 W. Va. 306, 320, 284

[3] Respondent will respond separately to Petitioner's Motion Requesting the SCA obtain Jurisdiction over the appeal.

S.E.2d 374, 383 (1981); See also, *Birchfield*, 245 W.Va. at 94, 857 S.E.2d at 43. Appellate Rule 10(7) mirrors the case law and provides further authority for the Court to disregard Petitioner's assignments of errors not adequately supported by specific references to the record on appeal. W.Va. R. App. 10(c)(7).

Because Petitioner's brief fails to include any authority, argument, or analysis of the ICA's jurisdiction to hear Petitioner's appeal of the Circuit Court's Order denying Petitioner's CUP application and upholding the BZA's decision, the subject of the ICA's memorandum decision to which Petitioner appealed, the Petitioner has waived this issue and the ICA's decision should be affirmed.

C. The ICA Correctly Determined that it Did Not Have Jurisdiction Over Petitioner's Appeal and Properly Refused Petitioner's Motion to Transfer

Even assuming Petitioner has not waived the jurisdictional issues by failing to address the same in its brief, the ICA correctly found it did not have jurisdiction of Petitioner's appeal. For the ICA to be able to hear and determine Petitioner's appeal of the Circuit Court's order, it must have jurisdiction of the subject matter. The absence of subject matter jurisdiction is fatal to the ICA's jurisdiction to determine the appeal. Syl. Pt. 4. *State ex rel. Dale v. Stucky,* 232 W. Va. 299, 752 S.E.2d 330, 332 (2013). The ICA did not have the jurisdiction to hear Petitioner's appeal pursuant to *W. Va. Code* §§51-11-4(d)(10), 53-3-1 *et seq*., and 8A-7-9, and accordingly the appeal was properly dismissed. The ICA's dismissal of Petitioner's appeal was consistent with its prior decision dismissing another appeal of a similar issue for lack of jurisdiction. *See, Huntington Realty Corporation v. City of Huntington Board of Zoning Appeals et al*., No. 22-ICA-239 (October 23, 2023).

Fundamentally, "jurisdiction of the subject-matter can only be acquired by virtue of the constitution or of some statute." *Stucky*, 232 W.Va. at 303-4, 752 S.E.2d at 334-36. West

Virginia Code §51-11-4(b)(1)-(7) defines the specific matters over which the ICA has jurisdiction. Specifically excluded from the ICA's jurisdiction are appeals involving "[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[.]" *W. Va. Code* § 51-11-4(d)(10). This statute is clear and unambiguous and consistent with West Virginia Rule of Appellate Procedure 1, which also excludes from the ICA's jurisdiction "Extraordinary remedies and the appeal of any extraordinary remedy, including in *habeas corpus*." The decision Petitioner appealed to the ICA was an order regarding an extraordinary remedy. Certiorari is among the extraordinary remedies defined by W. Va. Code §§ 53-1-1 *et seq*., specifically governed by *W. Va. Code* §§ 53-3-1 *et seq*. "Certiorari 'is an extraordinary remedy, used in cases where there has been an error in justice, which cannot be reviewed and corrected by the ordinary forms of procedure.'" *Foster Foundation v. Gainer*, 228 W. Va. 99, 104, 717 S.E.2d 883, 888 (2011) (*quoting Ashworth v. Hatcher*, 98 W.Va. 323, 325, 128 S.E. 93, 94 (1924)).

The jurisdictional limitation of *W.Va. Code §*51-11-4(d)(10) is further consistent with the Land Use Planning Act and *W. Va. Code* §8A-9-7, entitled "Appeal from final judgment of circuit court or judge," which provides, "An appeal may be taken to the West Virginia Supreme Court of Appeals from the final judgment of the court or judge reversing, affirming or modifying the decision or order of the … board of zoning appeals …." *Id*. Petitioner's assertion that the appeal process for review of certiorari under the Land Use Planning Act is somehow distinct from obtaining a writ of certiorari under the Extraordinary Remedies Act is nonsensical and there is no source for such a claim. According to Petitioner's position, when the Circuit Court reviews a land use decision, its decision to do so can only be reviewed by the SCA, but the Circuit Court's decision based on its review by certiorari is outside the jurisdiction of the ICA. This is

inconsistent with W.Va. Code § 8A-9-7 which specifically provides that the decision of the court affirming the decision of a board of zoning appeals may be taken to the SCA and inconsistent with W.Va. Code §55-11-4(d)(10) that also excludes "any appeal of a decision or order of another court regarding an extraordinary remedy."

The legislature recently amended *W.Va. Code §* 51-11-4(d)(10) to specify that the writ of certiorari as well as writ of prohibition, writ of mandamus, quo warranto, habeas corpus, special receivers and arrest in civil cases are excluded from the ICA's jurisdiction. These are the same extraordinary remedies identified in *W.Va. Code* § 53-1-1, *et seq*. The legislature just spelled out the extraordinary remedies rather than generally referring to the statute. The amendment did nothing to change or alter the ICA's jurisdiction.

Petitioner also contends that because the cause of action for *writ of certiorari* as to the BZA's decision was consolidated with Petitioner's separate declaratory judgment action asserting the UDO is preempted by state law, the *writ of certiorari* is now considered a "civil action" thereby giving the ICA jurisdiction pursuant to W.Va. Code § 51-11-4(b)(1). Petitioner ignores the fact that the Circuit Court did not consolidate both matters for all purposes. (AR2143). Importantly, when issuing its decision upholding the BZA's decision, the Court noted it was reviewing a writ of certiorari, an extraordinary remedy and performed its review by certiorari pursuant to W.Va. Code §8A-9-1. (AR5-6). Merely consolidating the two actions to resolve the common question of law applicable to both does not turn Petitioner's *writ of certiorari* into a "civil action." Simply because a claim is designated a civil case, subject to the rules of civil procedure, does not remove its categorization as an extraordinary remedy. *See Jefferson Orchards, Inc. v. Jefferson County Zoning Bd. Of Appeals,* 225 W.Va. 416, 420-21, 693 S.E.2d 781, 785-6 and fn10. As this Court noted in *Jefferson Orchards,* the duty of a

reviewing tribunal in certiorari is akin to the exercise of original jurisdiction: "On certiorari, the circuit court is required to make an independent review of both law and fact in order to render judgment as law and justice may require." Syl. pt. 2, *Wysong ex rel. Ramsey v. Walker,* 224 W.Va. 437, 686 S.E.2d 219 (2009). *See,* syl. pt. 5, *Humphreys, Adm. v. Monroe County Court,* 90 W.Va. 315, 110 S.E.701 (1922)(indicating that, upon certiorari from the action of a county court, the circuit court has jurisdiction to hear and determine the matter in controversy, "upon the record made in the county court," and enter such judgment as the county court should have entered.)." *Id.* at 225 W.Va. 421, 693 S.E.2d 786. That is what the Circuit Court did in its order affirming the BZA's ruling. There can be no dispute that the decision Petitioner's appeal of the Circuit Court's order is one involving an extraordinary remedy of which the ICA does not have jurisdiction to hear and determine.

Additionally, the ICA properly refused Petitioner's Protective Motion to Transfer of Case to the Supreme Court. "Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket." Syl. Pt. 5, *Stucky,* 232 W.Va. at 301, 752 S.E.2d at 334. Because the ICA had no subject matter jurisdiction over the appeal, it also lacked the authority to grant Petitioner's Protective Motion and properly refused the motion. *Id.*

The ICA appropriately determined it lacked subject matter jurisdiction over Plaintiff's appeal, and accordingly, properly dismissed the appeal and refused Petitioner's Protective Motion to Transfer of Case to the Supreme Court and its decision should be affirmed.

D. Petitioner's Assignments of Error 1 Through 5 Are Not Properly Before This Court and Should Not Be Considered.

The ICA decision from which Petitioner appeals did not address the merits of the underlying appeal of the Circuit Court's order, only the Court's subject matter jurisdiction.

(AR2413-2417). Yet, Petitioner's entire opening brief centers on the assignments of errors in the Circuit Court's order upholding the BZA denial of Petitioner's application for the CUP. Petitioner admits its opening brief "addresses the merits of the underlying appeal." *See,* Petitioner's opening brief, pg. 2, fn. 1.

This Court has repeatedly held that it "will not consider questions nonjurisdictional in their nature, not acted upon by the circuit court as an intermediate appellate court." Syl. Pt. 1, *Pettry v. Chesapeake and Ohio Railway Company,* 148 W.Va. 443, 135 S.E.2d 729; Syl. Pt. 3, *Chafin v. Wellman,* 156 W.Va. 236, 192 S.E.2d 490 (1972); *Ryan v. Ryan,* 220 W. Va. 1, 7, 640 S.E.2d 64, 70 (2006). The five assignments of error pertaining to the Circuit Court's order do not relate to the ICA's jurisdictional ruling Petitioner is appealing. *See* Notice of Appeal. The ICA dismissal of the appeal was based strictly jurisdictional considerations and did not address the circuit court's decision. Petitioner is attempting to utilize its appeal of the ICA's dismissal on jurisdictional grounds to improperly place the assignments of error of the Circuit Court's order before this Court and submitted the almost identical brief to the one filed in the ICA.

Because the ICA's decision was limited to subject matter jurisdiction and did not address the Circuit Court's decision upholding the BZA's decision, the Circuit Court's decision and Petitioner's alleged assignments of error with that Order are not properly before this Court and should not be considered. In accordance with *Pettry, Chafin and Ryan,* this Court should refrain from deciding upon the other five assignments of error in Petitioner's brief.

E. The Circuit Court Did Not Abuse Its Discretion by Upholding the BZA Determination that Petitioner Failed to Meet Requirements for a CUP. [4]

[4] Insofar as this Court may address the other five assignments of error pertaining to the Circuit Court's order, Respondent is addressing them below. Respondent maintains the SCA should not address the other assignments of error as the ICA decision being appealed was limited to subject matter jurisdiction, did not address the Circuit Court's decision upholding the BZA's finding that Petitioners failed to meet the requirements for a CUP, and are not properly before this Court.

Petitioner contends that its Application for the CUP met all "objective criteria" for a CUP and that it was an abuse of discretion for the Circuit Court to uphold the BZA determination that Petitioner failed to meet legal requirements such as compatibility with surrounding land uses. Instead, Petitioner failed to meet even the requirements it deems objective, and, more importantly, asks this Court to ignore ample evidence that Petitioner's proposed use is incompatible with surrounding established uses.

1. Petitioner's Proposed Use Did Not Comply with Express Requirements of the UDO.

Petitioner argues that the Circuit Court abused its discretion by failing to find that Petitioner must receive a CUP based on meeting certain technical standards in the UDO. (Pet. Br. § III.A.). Petitioner's argument fails for two reasons: (1) Petitioner did not meet even the minimum UDO standards for the Planned Development District (PDD), and (2) the BZA is not limited to technical standards when deciding whether to grant a CUP. *Jefferson Orchards, Inc.*, 225 W. Va. at 422, 693 S.E.2d at 787.

Petitioner's site plan in the Application did meet one technical standard specific to Oil/Gas Extraction uses – a 200-foot separation from residential use[5] – but it failed to comply with the PDD height limit, proposing multiple structures taller than 60 feet. UDO § 10.2.1 (Development Table for PDD with maximum 60-foot height limit). The site plan Petitioner proposed in the Application is not permitted in the PDD.

Petitioner argues that it has an entitlement to a CUP by meeting technical standards in a zoning code, but this theory is not supported by law. Instead, the CUP is a discretionary permit that involves local BZA members evaluating surrounding land uses and ensuring conditional uses

[5] A second standard, requiring that any Oil/Gas Extraction use comply with applicable regulations of the West Virginia Department of Environmental Protection, is a continuing obligation of the site operator. UDO § 9.4.1, Supplemental Regulation 24.

are compatible. *Jefferson Orchards, Inc.*, 225 W. Va. at 422, 693 S.E.2d at 787. It is generally accepted that the BZA consideration of the CUP is discretionary. 8A McQuillin Mun. Corp. § 25:372 (3d ed.) ("To constitute an abuse of discretion, the zoning authority's decision must be based on information that is so lacking in fact and foundation that it is clearly unreasonable."). Petitioner relies on *Far Away Farm*, decided before *Jefferson Orchards*, for its claim that a BZA is limited to technical standards when reviewing a CUP. (Pet. Br. 26). But *Jefferson Orchards* expressly considered *Far Away Farm* and held that a CUP decision is not strictly limited to technical standards and can consider surrounding land uses – granting the CUP only if the use will be compatible. *Jefferson Orchards, Inc.*, 225 W. Va. at 422, 693 S.E.2d at 787.

In *Far Away Farm*, the Court ruled that the applicant was entitled to a conditional use permit when (1) it met the technical requirements of the zoning regulation – a passing Land Evaluation and Site Assessment ("LESA") score – and (2) the applicant submitted substantial evidence that it complied with other conditional use permits, and (3) as to the only disputed compliance issues there was "no evidence other than anecdotal experiences related by some members of the public was presented at the public hearing to contradict [applicant's] traffic study" and "with respect to the other unresolved issues which primarily concerned the construction and design of the development and the history of the property, the record shows that no evidence was presented refuting or contradicting that presented by [the applicant]." *Far Away Farm*, 222 W. Va. at 260, 664 S.E.2d at 145.

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. (AR580-2, 766-8). Through multiple public hearings, the BZA considered specific evidence identifying the surrounding uses including a hotel, a mixed-use shopping and residential center in

development, and other established businesses. (AR1234, 1262). The BZA heard evidence of specific issues created by establishment of hydraulic fracturing wells that would harm those existing businesses and prevent the completion of the mixed-use development. *Id*., AR1295-7 (Hvizdos and Barkley testimony), AR1304-6 (Frankovitch testimony),AR907-1020 (Park Drive Development Plans).

The BZA also heard from Petitioner's own hired consultants that the traffic study it performed did not accurately describe traffic flow to operate the site and contained other errors. (AR1356-78). Both planning staff guidance and historical information submitted in public testimony established that the area at issue within the Planned Development District did not permit anything other than residential, light manufacturing, or retail in the area because "that would develop jobs for us" and noted "in the past 20 years, that area has been a bright spot in business development." (AR1299, 1312-14, 1388) (quoting Dragisch testimony). The record before the BZA is undisputed that there is no heavy industry such as hydraulic fracturing wells in this area. (AR1388).

In short, this case is distinct from *Far Away Farm* because Petitioner failed to present substantial evidence that its proposed hydraulic fracturing wells would be compatible with surrounding development and meet other conditional use permit criteria specified in the UDO, and because the BZA decision relies on specific evidence showing that Petitioner failed to meet those conditions.

Petitioner argues that the public comments and the planning staff testimony should be entirely disregarded as speculative, while its retained consultants testimony should be regarded as evidence. This argument misreads *Far Away Farm* and disregards *Jefferson Orchards*. In *Jefferson Orchards,* the applicant likewise established a passing LESA score in response to the

only technical requirements for a CUP, but the Supreme Court denied its attempt to force issuance of a CUP when the decision challenged properly considered the established uses in the surrounding area and determined that applicant's proposed use did not fit. 225 W. Va. at 422, 693 S.E.2d at 787.

Just as Petitioner argues here, in its initial petition to the Supreme Court of Appeals of West Virginia, "Jefferson Orchards, Inc., alleged, inter alia, that, in view of the passing LESA score and the compatibility of the project with the surrounding residential developments, the Board of Zoning Appeals committed error in modifying and restricting the conditional use permit on the basis of density." 225 W. Va. at 419-420, 693 S.E.2d at 784-5. The Circuit Court correctly noted that the claim was in error: "Although [the Supreme Court, in *Far Away Farm, LLC*] 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. * * *If the Supreme Court simply required that the Planning Commission issue the CUP that Petitioner requested, it could have remanded this case directly to the Planning Commission directing it issue the CUP as it did in the Far Away Farm case. But, it did not." *Jefferson Orchards*. at 225 W. Va. 420, 693 S.E.2d 785.

In *Jefferson Orchards*, "The appellant contend[ed] that the conditional use permit, as modified and restricted by the decisions below, renders the proposed subdivision economically unfeasible and violates its right, after having otherwise satisfied all procedural and substantive requirements, to proceed with the subdivision as originally designed and presented." 225 W. Va. at 417, 693 S.E.2d at 782. "In April 2002, the appellant, Jefferson Orchards, Inc., submitted an application to the Jefferson County Planning and Zoning Commission for a Conditional Use

Permit to develop a residential subdivision to be known as Paynes Ford Station. The subdivision would consist of 201 single-family dwellings on 141.6 acres in Jefferson County with an average lot size of .78 acres per dwelling. The proposed subdivision extended into adjoining Berkeley County where an additional 17 dwellings were planned. As stated by the appellant, the proposed subdivision would be compatible with the neighboring Quail Ridge and Chapel View residential subdivisions already in existence. Moreover, Jefferson Orchards, Inc., states that Berkeley County approved its proposal and agreed to provide water and sewer services for the entire proposed subdivision with regard to both Counties." *Id*. at 225 W. Va. 418, 693 S.E.2d 783.

Just as Petitioner contends in this case, the appellant in *Jefferson Orchards* relied on its compliance with specific standards of the zoning code as sufficient to show its entitlement to a conditional use permit. *Id*. The Board "granted the application of Jefferson Orchards for a Conditional Use Permit. However, the Board modified and restricted the proposal as to Jefferson County with the following proviso: 'that the density be no more than 3.76 acres per unit with a maximum possible build out of 37 units.'" *Id*. at 225 W. Va. 419, 693 S.E.2d 784.

Jefferson Orchards' argument, as summarized by the Supreme Court, mirrors the argument made by Petitioner SWN in this case: "the appellant asserts that the Ordinance, applicable in this case, contains no mandate to evaluate the density of a proposed development and compare it to its surrounding neighborhood. In that regard, Jefferson Orchards, Inc., insists that the proposed subdivision, as originally planned, is completely compatible with the existing Quail Ridge and Chapel View subdivisions and that there was no rational basis for imposing "3.76 acres per unit" with regard to Jefferson Orchards, Inc., when no such restriction was imposed on either Quail Ridge or Chapel View. Accordingly, Jefferson Orchards, Inc., contends

that, having met all the requirements, which include a passing LESA score and a successful Compatibility Assessment Meeting, it is entitled to a CUP for Paynes Ford Station, as originally designed and presented, as a matter of law." *Id*. at 225 W. Va. 422, 693 S.E.2d at 787.

However, meeting specific technical requirements is a necessary, but not sufficient, element of obtaining a conditional use permit. As the Supreme Court stated, "As the Circuit Court observed, **each proposal will have different issues to be resolved, and a passing LESA score, for example, does not, of itself, render a project compatible with the surrounding area.**" *Id*. (emphasis added). The Supreme Court rejected the appellant's argument, and upheld the Circuit Court ruling, which confirmed the BZA's discretion in considering community needs for orderly development. *Id*. at 225 W. Va. 423, 693 S.E.2d at 788. Here, the BZA properly surveyed surrounding uses and found that Petitioner's proposed use was not similar to surrounding uses, was incompatible with continuance and development of those uses, and did not meet the purposes of the Planned Development District.

Special permit criteria typically require that the proposed use must be in harmony with the pattern of development in the neighborhood and must be consistent with the intent of the zoning district. 2 Am. Law Zoning § 14:10 (5th ed.). Just as in *Jefferson Orchards*, the BZA is not required to grant a CUP merely because Petitioner established compliance with a technical standard that is part of the CUP regulations. Instead, there is a presumption that a board of zoning appeals acted correctly. *Id*. at Syl. Pt. 1. The Circuit Court applied the correct presumption that the BZA acted correctly, found no application of an erroneous principle of law nor plainly wrong factual findings, and properly upheld the administrative decision.

2. The Circuit Court Did Not Abuse Its Discretion by Upholding the BZA Decision that Petitioner Failed to Establish Compliance with Conditional Use Permit Requirements in the UDO

Petitioner argues that the Circuit Court abused its discretion, and the BZA applied an erroneous principle of law, when finding that Petitioner failed to establish compliance with the conditional use permit requirements in the UDO. (Pet. Br. At 28). Petitioner mistakenly argues that a conditional use permit is by definition an appropriate use, and its argument fails to address the requirements of the conditional use regulations, the substantial evidence in the record demonstrating the proposed hydraulic fracturing wells do not comply with CUP requirements in this location, and the presumption in favor of BZA's findings.

The City of Weirton adopted its zoning code pursuant to the legislative authority in the Land Use Planning Act, *W. Va. Code* § 8A-1-1 *et seq*., designating the zoning code the "Unified Development Ordinance" ("UDO").[6] The UDO establishes Zoning Districts, Zoning Map, and Permitted Uses at Article 9. Section 9.1.2.8. defines the Planned Development District, where the Property is located, as follows:

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

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

> This district is intended to create, preserve and enhance industrial areas devoted to manufacturing and other non-commercial and non-residential uses which are potentially incompatible with most other activities, and are typically appropriate to areas of the City which are somewhat distant from residential areas and have

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

> access to suitable and adequate railroad, waterway, or highway shipping facilities. It is the expectation that such manufacturing or other non-residential uses would have operating characteristics that are considered more obnoxious or unpleasant than those in the M-1 districts, but would not be so obnoxious nor unpleasant that they would be detrimental to surrounding properties or to other parts of the City. The district provides an area where industrial/office/warehouse activities can be accommodated in an integrated plan evolving around world-class transportation connections.

Id. A Conditional Use is not by definition an appropriate use in a zoning district; instead, it is subject to the limitations and conditions specified by the UDO, and a permit issued by BZA is required. UDO § 9.4.4. In accordance with the Land Use Table, incorporated into the UDO by Section 9.4.1, "'Oil/Gas Extraction' is a Conditional Use in all districts. It is subject to Supplemental Regulation number 24."[7]

Under the UDO, Petitioner was required to apply to the BZA for a conditional use permit in order to establish an "Oil/Gas Extraction" use in the Planned Development District. *See UDO* §§9.4.1, 9.4.4. Pursuant to *W. Va. Code* § 8A-1-2(d), "'Conditional use' means a use which because of special requirements or characteristics may be permitted in a particular zoning district only after review by the board of zoning appeals and upon issuance of a conditional use permit, and subject to the limitations and conditions specified in the zoning ordinance." When it is granted, a special exception or conditional use permits certain uses which the ordinance authorizes under stated conditions. *Corliss v. Jefferson County Bd. Of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003). The decision to grant or deny a conditional use permit is a discretionary action of the body administering the zoning ordinance. *W. Va. Code* §8A-8-9(3).

[7] Supplemental Regulation 24 provides the following:
Oil and gas extraction activities shall comply with the following:
a. No well may be located closer than two hundred (200) feet to any residential use.
b. All oil and gas exploration shall be subject to the Oil and Gas Laws, Chapter Twenty-two, Article Four, of the Code of West Virginia, as amended, and the rules and regulations of the West Virginia Department of Environment (sic) Protection.

The UDO establishes procedures for the BZA to hear applications for conditional uses at Section 3.6. Section 3.6.1.1. of the UDO states the purpose of conditional uses, in relevant part, as follows: "The establishment of a Conditional Use permit procedure provides Weirton with such flexibility to provide for certain uses which shall be permitted only if adequate conditions exist or can be imposed that will make such uses compatible with the purposes of this Ordinance and the Comprehensive Plan. The Conditional Use permit procedure shall provide for some measure of individualized judgment and the imposing of conditions on certain uses, in order to make them compatible with uses in the surrounding area. It is further intended that the Conditional Use permit, through a site plan review process, shall provide a method whereby it can be determined whether or not a use would cause any damage, hazard, nuisance, or other detriment to persons or property in the vicinity." *Id.*

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

> The Board of Zoning Appeals may approve an application for a Conditional Use permit, subject to such reasonable conditions and restrictions as are directly related to and incidental to the proposed Conditional Use permit, if it finds that the following general standards have been met:
>
> (A) The proposed use is compatible with the goals of the Comprehensive Plan.
>
> (B) The proposed use shall be compatible with the appropriate and orderly development of the district, taking into consideration the location and size of the use, the nature and intensity of the operations involved in or conducted in connection with such use, the size of the site in relation to the use, the assembly of persons in connection with the use, and the location of the site with respect to streets giving access to the site.
>
> (C) The proposed site development shall be such that the use will not hinder nor discourage the appropriate development and use of adjacent land and buildings, taking into consideration the location, nature and height of buildings, the location, nature and height of walls and fences, and the nature and extent of landscaping on the site.
>
> (D) Neighborhood character and surrounding property values shall be reasonably safeguarded.

> (E) Operations in connection with the use shall not be offensive, dangerous, destructive of property values and basic environmental characteristics, or detrimental to the public interest of the community. They shall not be more objectionable to nearby properties by reason of fumes, noise, vibration, flashing of or glare from lights, and similar nuisance conditions than the operations of any Permitted Use not requiring a Conditional Use permit in the district.
>
> (F) The character and appearance of the proposed use, buildings, structures, and/or outdoor signs should be in general harmony or better, with the character and appearance of the surrounding neighborhood.

Id. Petitioner had advance notice of these requirements 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 Hartley Hill Hunt Club v. County Com'n of Ritchie County,* 220 W. Va. 382, 647 S.E.2d 818 (2007) (citizens are presumed to know the law).

The BZA is uniquely positioned to make the determination regarding what land uses are compatible with existing uses and community plans. *Corliss v. Jefferson County Bd. Of Zoning Appeals,* 214 W. Va. at 542, 591 S.E.2d at 100. Particularly where the Decision makes clear that "a detailed public debate did occur," the review of the conditional use application only to decide whether a different conclusion could be reached based on the evidence presented to the BZA would improperly substitute the decision of the Court for the administrative determination by the BZA. *Id*.

With respect to Petitioner's claim that the BZA Decision is supported by insufficient evidence, "the plainly wrong standard of review is a deferential one, which presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." *Bd. of Zoning Appeals of Town of Shepherdstown v. Tkacz,* 764 S.E.2d 532, 538 (W. Va. 2014) (*quoting Conley v. Workers' Comp. Div*., 199 W.Va. 196, 199, 483 S.E.2d 542, 545 (1997)). "Substantial evidence," in this instance, is "such relevant evidence that a reasonable

mind might accept as adequate to support a conclusion." *Maplewood Estates Homeowners Ass'n v. Putnam Cnty. Planning Comm'n*, 218 W. Va. 719, 723, 629 S.E.2d 778, 782 (2006) (citing *In re: Queen*, 196 W.Va. 442, 446; 473 S.E.2d 483, 487).

Petitioner's application only addressed these Standards for Approval by conclusory statements and attachment of three graphic image renderings that showed an aerial photograph of a wellpad at a different site and two renderings of views from Route 22 in the area of the Property, but did not depict surrounding uses. (AR718, 767-8). Petitioner offered testimony regarding expected light impacts through Bob Layne, noise impacts through Mr. Webb, and traffic impacts through Mr. DePaolis, which were considered and evaluated in the Decision. (AR1166-1171). Petitioner did not offer testimony or evidence about surrounding heavy industry or Oil/Gas extraction uses or compatibility of its proposed use with mixed-use commercial development. *See* AR579-908; AR1166-1171). The BZA heard substantial evidence that Petitioner's proposed development would significantly increase traffic in an area that is known by the community to be congested (AR1298), that Petitioner's proposed development would harm an existing hotel business adjacent to the Property (AR1297-8), that Petitioner's proposed development would hinder or stop the planned development of another adjacent property with mixed-use commercial development consistent with the goals of the Comprehensive Plan (AR1262, 1304), and that similar heavy industry does not exist in the area of the Property and that accordingly the proposed Oil/Gas extraction use is not consistent with surrounding uses. (AR1388).

The Courts give great deference to the interpretation of planning and zoning codes by the bodies charged with enforcement of those codes. Syl. Pts. 3 and 4, *Corliss*, 214 W. Va. at 536, 591 S.E.2d at 94. Any interpretation of City Codes by the City's planning staff, Planning

Commission, or BZA should be considered appropriate unless it can be shown to be clearly erroneous. *Id*.

Based on the supported factual findings in its Decision, and its review of the Standards for Approval of conditional use permit applications in the UDO, the BZA concluded that the conditional use permit should not issue because the proposed Oil/Gas extraction use would not "encourage a diverse mix of entertainment, retail, hospitality and high density residential" nor manage future development "to avoid worsening traffic congestion and additional stress on other existing infrastructure." (AR1167). Based on the detailed record, and the Findings and Conclusions of the BZA in its Decision, the Court cannot improperly substitute its judgment for the exercise of sound discretion by the BZA in applying the goals of the Comprehensive Plan and the Standards of Approval in the UDO to deny a conditional use permit for Oil/Gas extraction in this area of the Planned Development District. *See Corliss*, 214 W. Va. at 542, 591 S.E.2d at 100.

F. The BZA and Circuit Court Proceedings Met All Procedural Due Process Requirements for Zoning Administrative Hearings

In its last argument, Petitioner complains that the BZA and Circuit Court denied it due process in the CUP process. (Pet. Br. At 37). While Petitioner argues the Circuit Court's careful review of procedural due process requirements in administrative zoning hearings is a "treatise" that should be ignored, Petitioner relies on authority that considers public school expulsion proceedings and is inapposite to this case. In addition, even 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 in the certiorari proceedings under W. Va. Code 8A-9-1 *et seq*.

The UDO establishes specific notice and hearing requirements for consideration of an application for conditional use permit. *UDO* § 3.6.1.4.(E)-(H). Under the UDO, the Planning Director publishes a legal advertisement providing notice of the BZA's hearing on the application: "The Planning Director shall publish a Class I legal advertisement describing the request for a Conditional Use permit in a local newspaper of general circulation at least fifteen (15) days prior to the scheduled public hearing before the Board of Zoning Appeals." *UDO* § 3.6.1.5(E). The UDO requires that the BZA hold one scheduled public hearing, as identified in the published legal notice, on the application for conditional use permit. *UDO* § 3.6.1.5(F). The BZA decision to grant or deny the application for conditional use permit is required to be reduced to writing and delivered to the applicant. *UDO* § 3.6.1.5 (G)-(H).

"Due process is guaranteed by the Fourteenth Amendment to the United States Constitution: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. Article III, section 10 of the West Virginia Constitution also contains due process protections: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." Such protections extend to judicial, as well as administrative, proceedings: "Due process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments." Syl. pt. 2, *State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960)." *Rissler*, 225 W. Va. 346, 693 S.E.2d 321, at FN4. In *Rissler*, the Court concluded that an aggrieved party was denied due process because the tribunal was not impartial – a member of the BZA previously represented the applicant developer, and the BZA's attorney subsequently went to work for the developer's counsel. 225 W. Va. 355, 693 S.E.2d 330. Petitioner identifies no actual or apparent bias of any member of

the BZA in the decision at issue in this case. Thus, under the standard set out in *Rissler*, the BZA hearings met due process requirements for consideration of an application for conditional use permit. Instead, 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 on the conditional use permit application. (AR1392; Petition for Writ of Certiorari, ¶ 10).

Under *Mathews v. Eldridge*, three factors are evaluated to determine whether due process was provided in an administrative hearing: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. 319, 335 (1976). The private interest involved in this matter is obtaining a conditional use permit to drill for oil and gas, which is a discretionary decision of BZAs based on their evaluation of evidence related to community land use. *Corliss*, 214 W. Va. at 542, 591 S.E.2d at 100. Petitioner has no protected property interest in obtaining a discretionary conditional use permit, because "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Gardner v. City of Baltimore*, 969 F.2d 63, 66 (4th Cir.1992). In the case of a regulatory permit, a legitimate claim of entitlement exists where "the local agency lacks all discretion to deny issuance of the permit or to withhold its approval." *Id*. Thus, "[e]ven if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of a local agency to deny issuance

suffices to defeat the existence of a federally protected property interest." *Id*. Even if Petitioner already possessed a conditional use permit and were challenging its revocation, the availability of judicial review for revocation of the permit would provide adequate process. *Ruttenberg v. Jones*, 283 Fed. Appx. 121 (4th Cir. 2008) (unpublished).

In this case, the BZA (and the City of Weirton) have established detailed, publicly available procedures and standards by ordinance, which govern the review of all conditional use permit applications. UDO § 3.6. Petitioner was on notice of the BZA's hearings procedures and Standards for Approval and addressed those standards specifically in its written application filed with the BZA. *Id*; *see also* AR570-908. The BZA conducted its proceedings at public meetings after it published legal notice. (AR1126-130; AR1152-157). Petitioner was present through legal counsel at each of the two public hearings conducted on its application, was represented by multiple corporate representatives at each of the two public hearings conducted on its application, and offered retained expert testimony at each of the two public hearings conducted on its application. (AR1126-130; AR1152-157). In addition to its written application materials, Petitioner submitted at the public hearing, and the BZA considered, a traffic impact study and noise study that Petitioner offered in support of its assertion that its proposed Oil/Gas extraction use would reasonably safeguard neighborhood character and surrounding property values, would be compatible with orderly development, and would not be destructive of property values or the public interest of the community. (AR1179-1275; see UDO § 3.6.2.1.).

Regarding the second *Eldridge* factor, Petitioner cannot establish any value of its proposed additional or substitute procedural safeguards. 424 U.S. 319, 335. 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. (AR1392; Petition for Writ of Certiorari, ¶ 10). The BZA's denial of Petitioner's application was based on its failure to meet the Standards for Approval by being incompatible with goals of the Comprehensive Plan to promote continued mixed-use development in the Three Springs Drive Area, hindering or discouraging use of adjacent land and buildings such as the Fairfield Inn and Suites and the Park Drive Development, and detrimental to the public interest due to increasing truck traffic in a congested mixed-use commercial area. (AR1166-171). The geologist testimony and report bears little or no relation to the Standards for Approval of a conditional use permit under the UDO. *See* UDO § 3.6.2.1.

More generally, Petitioner appears to argue that its entitlement to a hearing encompasses a right to continue the hearing indefinitely to respond to any matters that may arise. Under the third *Mathews* factor, the government has a significant interest in limiting the time devoted to administrative hearings to ensure the government can function efficiently. This is especially so when the review procedure prescribed by *W. Va. Code* § 8A-9-6(b) provides an opportunity for the reviewing court to take additional evidence to supplement the administrative record. In this case, the Circuit Court admitted the additional evidence that Petitioner sought to introduce before the BZA (and allowed Petitioner to produce additional testimony and documents that were not the subject of its request for rebuttal to the BZA) and Petitioner's rebuttal evidence failed to demonstrate any application of a clearly erroneous principle of law or plainly wrong factual finding in the BZA's Decision.

As local zoning hearings are less formal than court proceedings, the local body is not required to allow the landowner to directly cross-examine witnesses. Allowing the landowner to present an opposing viewpoint is typically sufficient. *See G&H Dev., LLC v. Benton-Parish*

Metro. Planning Comm'n, 641 F. App'x. 354, 357-8 (5th Cir. 2016). Just as in *G&H Dev.*, Petitioner is not entitled to the particular procedure it demands. Petitioner had a public hearing and the opportunity to present its application, which is constitutionally sufficient for an administrative zoning decision. To the extent that Petitioner characterizes its claim as a failure of the BZA to provide a hearing of sufficient length, the claim likewise fails. Local boards often need to limit the time allocated to each speaker and to each agenda item to prevent prolonged meetings and duplicative testimony. The additional evidence Petitioner sought to present, given more time, did not address the BZA denial of Petitioner's application based on its failure to meet the Standards for Approval (AR1166-171); *see Club Moulin Rouge, LLC v. City of Huntington Beach*, 2005 WL 5517234, at *8 (C.D. Cal. June 22, 2005).

Actual notice of, and appearance at, a public hearing considering a zoning decision is commonly found to satisfy due process requirements for zoning decisions. As the District Court found in *Nance v. City of Albemarle, North Carolina*, "certainly conducting open community meetings and giving affected parties the opportunity to speak on behalf of their project is constitutionally sufficient." 520 F. Supp. 3d 758, 790. The Fourth Circuit held in *Tri County Paving, Inc. v. Ashe County*, that an applicant whose (existing) permit was subject of a body's decision received adequate process when they had notice of the hearing where the permit was discussed and they in fact appeared and made their presentation to the board. 281 F.3d 430 (4th Cir. 2002).[8] In *Hyatt v. Town Lake*, an applicant for variance received adequate process when she had notice of the hearing, appeared with legal counsel at two hearings, and the board

[8] Specifically, the Court found the following: "During the October meeting, the Jordans were given notice that the plant and the moratorium would again be discussed at the November 18, 1998 Commissioners' meeting. Leonard Jordan testified that he attended this second meeting and that he also attended the Commissioners' meeting on November 15, 1999, when the PIDO was discussed and passed. TCP was given the opportunity to comment at these public meetings. TCP simply lost the political battle in the County. If, as Eastlake teaches, a community can make land-use decisions through a popular referendum with no hearings of any kind and still satisfy the mandates of due process, certainly conducting open community meetings and giving affected parties the opportunity to speak on behalf of their project is constitutionally sufficient."

considered her requests at some length. 114 Fed. Appx. 72 at *4. Petitioner received the same opportunities as the affected landowners in these Fourth Circuit decisions, if not more, by having its lengthy written application for conditional use permit considered by administrative staff and the BZA, and by appearing at two public hearings of the BZA with legal counsel and by its representatives and retained expert witnesses.

Petitioner fails to establish on appeal that was denied its fundamental due process rights because it was present at two separate hearings conducted by the BZA, the hearings were conducted in accordance with duly adopted ordinances of the City of Weirton, and there is no record evidence of any claim that the BZA was not impartial. *Rissler v. Jefferson County Bd. Of Zoning Appeals*, 225 W. Va. at 352, 693 S.E.2d at 327. Moreover, the risk of an erroneous decision created by the BZA's refusal to consider the Hydrogeologic Evaluation Report and testimony of Mr. Walentosky was minimal considering that the Decision contained only one finding related to hydrogeology, and that the hydrogeologic report or testimony of Walentosky do not address the Standards for Approval of Conditional Uses, Section 3.6 of the UDO. *Mathews v. Eldridge*, 424 U.S. 319, 335.

VI. CONCLUSION

This appeal arises from the ICA's decision dismissing Petitioner's appeal for being improvidently docketed and lacking subject matter jurisdiction to address the Circuit Court's decision. Petitioner's brief does not address those issues; as such Petitioner has waived the same and the issue should not be . The ICA does not hear appeals of extraordinary writs such as the Circuit Court's review by certiorari, and properly dismissed the appeal. Accordingly, the ICA's decision should be affirmed and this Court should decline to address the remainder of Petitioner's appeal.

If the Court reaches the merits of the Circuit Court's ruling, the Petitioner cannot establish that the Circuit Court abused its discretion by upholding the BZA's considered decision. Petitioner failed to establish compliance with the UDO requirements to obtain the permit, and the BZA applied specific factual evidence from Petitioner's application, planning staff, and two public hearings to determine that Petitioner's proposed hydraulic fracturing wells did not meet the minimum requirements to obtain a CUP, concluding that the proposed use was different than any surrounding use, would harm current uses and development, and is not consistent with the Comprehensive Plan objectives for the Planned Development District. Nor can Petitioner establish violation of a procedural due process requirement for administrative zoning hearings when the BZA followed the procedure established by law, held two public hearings at which Petitioner appeared and participated, and when the Circuit Court offered Petitioner an additional opportunity to submit testimony and evidence. Accordingly, Petitioner cannot meet its burden to prove an abuse of discretion by the Circuit Court and the Circuit Court decision should be affirmed.

City of Weirton Board of Zoning of Appeals,
By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SWN PRODUCTION COMPANY, LLC

Petitioner

v. **No. 24-320**

CITY OF WEIRTON BOARD ZONING APPEALS
And CITY OF WEIRTON

Respondents,

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August 2024, I served the foregoing *Response Brief of City of Weirton Board Zoning Appeals* upon the following counsel via the West Virginia E-Filing System (File & Serve Express), to the following:

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