IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

RECEIVED
JUL 13 2004
JEFFERSON COUNTY
PLANNING, ZONING AND ENGINEERING

JEFFERSON UTILITIES, INC.,

Petitioner,

v.

CIVIL ACTION NO. 03-C-278
(Judge Steptoe)

JEFFERSON COUNTY BOARD
OF ZONING APPEALS,

Respondent.

RECEIVED
JEFFERSON COUNTY
CIRCUIT COURT

OPINION ORDER

THIS MATTER came on for decision this 9th day of July, 2004, upon the appeal of Jefferson Utilities, Inc. (hereinafter, "JUI"), pursuant to W. Va. Code § 8-24-59 (1998 Rep. Vol.), and of a certification of the Respondent Jefferson County Board of Zoning Appeals (hereinafter, "BZA" or "the Board") dated September 18, 2003, in which the BZA reported that it had been unable to achieve a majority vote so as to resolve the appeal of the Petitioner of an interpretation of the Zoning Administrator.

The Court has considered the pleadings, the memoranda of law submitted by the parties, and the arguments presented at oral argument. The Court has reviewed the entire record of the case, including the recordings of the proceedings before BZA. The Court has studied pertinent legal authorities. For the reasons that follow, the Court has concluded that JUI's appeal must be dismissed.

Procedural History

JUI sought and received from the Zoning Administrator the interpretation of the term "public water" used by the Zoning Administrator in calculating point values under LESA. Upon receipt of an interpretation that was adverse to its interests, JUI appealed to the BZA. The BZA conducted a hearing in the matter on July 17, 2003, but, after deliberation, the Board's vote was two members for and two members against the position asserted by JUI. Because the BZA was unable to achieve the majority vote necessary to act upon the appeal, JUI petitioned this Court for review pursuant to W. Va. Code § 8-24-59. The Board certified its inability to act, and this Court accepted the appeal of the of the Zoning Administrator's interpretation of "public water."[1]

Because the BZA was unable to render a decision in this matter, this case came to the Court without a decision to review. The Court's role in the instant case was, therefore, perceived to be materially different than in the typical zoning "appeal," as it appeared to the Court that the case presented for resolution was the original challenge of the Zoning Administrator's interpretation. Also, it appeared to the Court that if it were to decide the original appeal to the BZA, then this Court would be required to employ the standard of review that the BZA would be required to apply were the case before it. Lastly, the posture of the case caused

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[1] The Board submitted a Motion to Dismiss this matter, which Motion was denied by this Court in its Order of January 7, 2004. The Motion argued that there was no case or controversy upon which judgment could be rendered by this Court, and that to decide the case would be to give an advisory opinion.

This Motion is problematic. In the hearing before the Board, the Zoning Administrator moved to dismiss the appeal on the same grounds. The Board, after deliberation, *unanimously* denied the Motion. *See*, Corrected Certification of the BZA, pp. 1-2. To deny the Zoning Administrator's Motion to Dismiss, the Board must have concluded that there was a case or controversy stated in JUI's appeal. In point of fact, the Board concluded that the express provisions of W. Va. Code § 8-24-55(1) required it to hear the case. Accordingly, the Court is at a loss to understand how the Board can come to this Court, and argue in its own Motion to Dismiss here, that there is no case or controversy at issue. The Board's Motion is entirely at odds with its own prior ruling.

the Court to question whether it would be required to conduct a *de novo* hearing on the case, or could proceed upon the record developed below, with supplementation as might be deemed necessary.

The Court convened a hearing on February 26, 2004, to address these preliminary matters.[2] The Court had found no statutorily-prescribed procedure for its approach to a zoning case in this posture, nor did counsel for either party identify one. However, counsel for JUI asserted that the Court should be guided by the decision announced in *Francis O. Day Co., Inc., v. The West Virginia Reclamation Board of Review*, 188 W. Va. 418, 424 S.E.2d 763 (1992),[3] the holding of which would suggest that the Court has the authority to proceed on the original appeal to the BZA.[4]

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[2] Because only JUI and the Board were parties to the case at the time, only counsel for these entities were in attendance at the February 26 hearing.

[3] In *Francis O. Day*, a case involving the administrative review of a quarry operation, the West Virginia Supreme Court of Appeals concluded that the circuit court should have conducted the appeal that was left unresolved at the administrative board level. The Court reasoned that the Reclamation Board's inability to act "should not leave the litigants in limbo by ending prematurely the appeal process." *Id.* at 421, 424 S.E.2d at 766. The Court held:

> When an administrative agency or board is unable to act because it lacks a statutory quorum or is unable to muster enough votes to meet a statutory requirement of a minimum number of votes necessary for a decision, the agency or board must enter an order allowing the litigants in the case before it to proceed to the next higher -- judicial or administrative -- tribunal.

Id., at Syll. Pt. 2.

[4] The holding of *Francis O. Day* suggests to the Court that where the Board is unable to officially act, its certification of such should allow the parties to proceed directly to this forum without having to file a petition for writ of *certiorari*. Such practice would more plainly cast the case in its actual procedural status. Unfortunately, the statutes provide no procedural mechanism other than *certiorari*, which is a misnomer in this case.

The Court and all counsel present therefore agreed that the posture of this case required the Court to address JUI's original appeal of the Zoning Administrator's interpretation of "public water" as used in Section 6.4(f) of the Ordinance. Having so concluded, the Court determined that the Zoning Administrator was a necessary party to this action, in which conclusion counsel for JUI and the BZA concurred. The Court ordered that the Zoning Administrator be joined as a party in the case, and that no further matters be addressed until the Zoning Administrator was given notice and the opportunity to make an appearance. The Zoning Administrator subsequently appeared in this matter through counsel.[5] At a hearing held on April 30, 2004, the Court entertained the arguments of counsel regarding the remaining preliminary matters and set the matter for final hearing.[6]

Facts

1. The Petitioner, JUI, is a privately-owned, West Virginia corporation, that provides water service as a public utility regulated by the West Virginia Public Service Commission.[7]

2. The Zoning Administrator is an employee of the County whose position is created in the Zoning and Development Review Ordinance, specifically, Section 3.1(a), which states:

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[5] The Zoning Administrator, through counsel, likewise agreed that the case before this Court was JUI's original appeal of his interpretation.

[6] JUI and the BZA had already submitted their memoranda of law pursuant to the schedule established in the order accepting the petition. The Zoning Administrator, through counsel, waived the opportunity offered by the Court to brief the matter, and elected to proceed on oral argument alone.

[7] The Court notes that there are four other water providers in Jefferson County: The Charles Town Water Department, the Harpers Ferry Water Works, the Shepherdstown Water Works, and the Jefferson County Public Service District.

> The provisions of this Ordinance will be administered by the Jefferson County Planning and Zoning Commission. With enactment of the Ordinance, the County Commission shall designate a Zoning Administrator to be under the direct supervision of the Planning and Zoning Commission.

Footnote added. Actually, Section 3.2 of the Ordinance is entitled "Zoning Administrator," but that sections contains virtually no provisions defining the authority and role of the Zoning Administrator. Instead, Section 3.2 describes the process for applying for a zoning certificate before construction, etc., which seems out of place under the chosen title of the Section.

3. According to counsel for the BZA, the Jefferson County Planning and Zoning Commission is the body created under the authority given to County Commissions by the enabling statute to create a Planning Commission, Code § 8-24-1, and should be regarded as the same. Section 3.1(a) of the Ordinance, quoted above, clearly places the administration of the Zoning Ordinance within the scope of the Commission's functions.[8]

4. The BZA is the administrative body duly created by the Jefferson County Commission acting pursuant to the provisions of W. Va. Code § 8-24-51 (1998 Rep. Vol.).

5. Land use and development in Jefferson County is governed by a comprehensive planning and zoning regulatory scheme. The Comprehensive Plan, the Zoning

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[8] The Court would caution that the legal distinction between planning and zoning functions, and the requirement that they be kept administratively separate, gives rise to serious concern about the validity of a Planning *and* Zoning Commission that appears to have been created to administer both planning and zoning ordinances. *See, e.g., Kaufman v. Planning and Zoning Comm'n of City of Fairmont*, 171 W. Va. 174, 298 S.E.2d 148 (1982); *Singer v. Davenport*, 164 W. Va. 665, 264 S.E.2d 637 (1980). To the extent that the Planning Commission serves as an advisor to the County's legislative body, the County Commission, in regard to the enactment of zoning ordinances, the title may be accurate, and offends no legal principle. But, the assignment of zoning administration authority merits closer inspection.

and Development Review Ordinance, and other County ordinances[9] collectively constitute the County's land use regulation, each being an integral part of the comprehensive whole.

6. Pursuant to the authority granted by Article 24, Chapter 8 of the West Virginia Code, and, more specifically, Code § 8-24-39, the Jefferson County Commission adopted a county-wide zoning ordinance which it deemed necessary to implement the Comprehensive Plan. The "Zoning and Development Review Ordinance" (hereinafter, "the Ordinance") became effective on October 8, 1988, following approval by the voters of the County.[10]

7. Article 6 of the Ordinance establishes the Development Review System (hereinafter, "DRS"), the purpose of which is to assess a particular site's development potential. *See,* Ordinance, Section 6.1. The DRS is based upon a complex numeric calculation of specific, weighted factors. This calculation, called the Land Evaluation and Site Assessment (or "LESA"), consists of two components: the Soils Assessment (25% of the total score) and the Amenities Assessment (75% of the total score). Ordinance Section 6.2.

Upon application from an owner or developer for a Conditional Use Permit (hereinafter "CUP") to develop land located in the County's Rural District, the Zoning Administrator calculates the LESA score by assigning and then totaling the points on each of the several listed factors to be considered, according to the criteria described for each. The Zoning Administrator determines the points to be assigned for each factor on the basis of the information included in the support data submitted by the applicant with the CUP application. Ordinance, Section 7.4 (requiring submission of "support data, that will enable the project to be evaluated by

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[9] The Jefferson County Commission also has enacted a Subdivision Ordinance, and ordinances addressing improvement location permits, salvage yards, and flood plain management.

[10] Previously, County voters had defeated zoning.

the Development Review System....."). The Ordinance further provides that, "The Zoning Administrator shall determine if the sketch plan and support data are adequate." Section 7.4(g), added by amendment in 1996. Depending upon the total score that he calculates for the proposal, the Zoning Administrator then determines that the proposed site "passes for development" or does not. Currently, only those proposals receiving a LESA score of 55 or below are eligible for a CUP.[11]

In the Amenities Assessment, points are assigned to a parcel on each of nine (9) specific factors that are weighted, theoretically, on the basis of the importance of their contribution to the overall assessment.[12] Ordinance, Section 6.4. The LESA factor at issue in the present case is that which assesses the availability of public water, which allows for the assignment of a maximum of eleven points. *See,* Ordinance, Section 6.4(f).

8. Section 6.4(f) of the Ordinance provides the scoring criteria for the proposed water system for a development as follows:

> This criterion assesses the availability of existing public water service with available capacity that is approved by the County Health Department and/or Public Service District to the site at the time of the development proposal application.
>
> If there is no public water available, a central water system or private well/wells can be used. The value for a proposed central water system is assigned to the development application recognizing that the system with adequate capacity to serve the development will be approved by the Public Service District, County Health Department and the Department of Natural Resources before preliminary plat or site plan approval occurs. If neither a public or central water system is available, the point value for a private well/wells must be assigned.

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[11] The LESA scoring system is designed so that the higher the points assessed, the more agriculturally viable (and conversely, the less suitable for development) the parcel is determined to be.

[12] The Zoning Administrator's application of the Soils Assessment criteria is not at issue in this case.

AVAILBILITY	POINTS
Existing Public Water is Available or public Water will be built to the site	0
Central water is proposed	3
Private Well/Wells must be Utilized	11

9. The potable water provided by JUI to its customers is drawn from wells owned by JUI, which water is treated at facilities owned and operated by JUI, and then transported throughout large parts of the County through transmission pipelines installed by JUI.[13]

10. The areas of the County that currently are served by JUI are those areas which, under the rules and regulations of the West Virginia Public Service Commission, cannot be served by one of the other water providers in the County.

11. Because of its ability and willingness to develop water supply pipeline systems in areas of the County where other providers are not present, particularly the rural districts, JUI is frequently sought as the water service provider for proposed developments in the Rural District that are subject to the DRS procedures of the Ordinance. As a consequence, JUI is frequently the proposed water system being evaluated in the LESA scoring calculation.

12. Because developers are motivated to achieve the lowest possible LESA score for any proposed development in the Rural District, JUI perceives that its ability to compete on a "level playing field" with other water service providers is directly impacted by the

[13] As part of its evidence in this matter, Jefferson Utilities submitted maps showing its existing pipeline system in the County, and its planned extensions.

LESA value attributed for "proposed water system" where it is the intended provider.[14] In other words, JUI contends that if the LESA value attributed to JUI water service is consistently higher than that attributed to other providers, developers will be less likely to choose JUI.

13. At some point, JUI became aware that when it was the intended water service provider for proposed developments, those developments were being assigned a LESA value of "3" (that is, the central water score) as opposed to "0" (the public water score) for "proposed water system."

14. In furtherance of its concerns, JUI, by letter dated September 16, 2002, requested that the Zoning Administrator provide his interpretation of "public water" as used in the LESA criteria provisions.

15. By letter dated, October 11, 2002, the Zoning Administrator responded, "Please be advised that I, as Zoning Administrator, have already published a decision concerning this matter. I have enclosed a copy of this decision for your perusal. I have not changed my position on this matter." With this letter, the Zoning Administrator enclosed a copy of his prior decision, that being a July 12, 2000, letter to local attorney Peter Chakmakian. In the letter to Chakmakian, the Zoning Administrator acknowledged that the Ordinance does not define its intended meaning of "public water." The Zoning Administrator then explained that he interpreted the word "public" to mean "owned by the government."

16. JUI filed a timely appeal to the BZA, challenging the Zoning Administrator's interpretation of the scoring criteria for the assessment of points for the water system factor, or, more precisely, the interpretation given to the term, "public water."

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[14] Although Jefferson Utilities enjoys a monopoly in those areas in which it currently operates, it contends that there is competition among the various service providers for those areas not currently served by any provider.

17. Upon notice to the public, as provided in the Ordinance, the BZA heard JUI's appeal on July 17, 2003.

18. Only four members of the five-member BZA were present at the hearing on JUI's appeal.

19. At the conclusion of the hearing before the BZA, and the Board's deliberation of the question presented, the vote was evenly split with two members for and two against granting the reversal of the Zoning Administrator's interpretation of § 6.4(f) of the Ordinance.

20. On October 20, 2003, JUI filed a Petition for Writ of Certiorari to this Court.

21. By Order entered January 7, 2004, this Court accepted this matter for consideration and entered it upon the docket of the Court.

Discussion

Standard of Review

The standard of review that this Court must employ when reviewing the decisions of the BZA has been identified in a number of zoning opinions. *See, e.g., Corliss v. Jefferson County Board of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003); *Wolfe v. Forbes*, 159 W. Va. 34, 45, 217 S.E.2d 899, 906 (1975), as well as numerous other decisions. The Board, being an administrative body with quasi-judicial powers specifically endowed by the Legislature, is entitled to due deference when its decisions are challenged in this Court. Accordingly, this Court may reverse a decision of the BZA only "where the board has applied an erroneous

principle of law, was plainly wrong in its factual findings, or acted beyond the scope of its jurisdiction." *Wolfe v. Forbes*, 159 W. Va. at 45, 217 S.E.2d at 899.

However, the Court is not reviewing a decision of the BZA in this case, but, rather, is "standing in the shoes" of the BZA. Accordingly, this Court is of the opinion that it must employ the same standard that the BZA would be required to apply if it were deciding the case.[15] Unfortunately, the standard of review that the BZA must employ when considering a challenge to the decision of a local zoning official or staff member is not well established. In fact, this Court's review of the case law has revealed no case in which the West Virginia Supreme Court has discussed the standard of review appropriate to the deliberations of a board of zoning appeals in such instance.

In an effort to find the guidance that is lacking within the body of West Virginia's zoning case law, the Court studied the resolution of the question in cases arising in other administrative contexts so as to determine if there were clear principles from which to discern the standard. The Court proceeds in this exercise with caution, particularly with respect to administrative cases that are subject to the Administrative Procedures Act. *See, e.g., Cookman Realty Group, Inc. v. Taylor*, 211 W. Va. 407, 566 S.E.2d 294 (2002), Justice Albright, concurring. (Justice Albright cautions the majority that holdings from non-APA cases should not be cited as authority in APA cases, which would be equally good caution in the converse.) It appears to this Court, however, that although our Supreme Court does sometimes cross-cite between the two scenarios without apparent distinction, a closer reading reveals that the Supreme Court borrows from a different administrative context only where there is a sufficient similarity

[15] A conclusion to which counsel for the parties all agreed.

on the particular issue as to make the comparative contexts analogous. The Court has attempted to be likewise discriminating in its review and study.

Upon review of many cases across administrative contexts, the Court detected a pattern of determining the standard for an administrative review board's review. It appears to this Court that our Supreme Court begins by examining closely the authorizing statutes, from which it identifies the relative powers endowed upon the review board and upon the administrative body or official whose acts or decisions are subject to board review.[16] It likewise examines the administrative regulations. The relative statutory and regulatory powers of the review board and those of the lower agency/officer are then compared.[17]

It appears to be a general rule that, where the lower agency/officer has no quasi-judicial powers and does not conduct evidentiary hearings to reach decisions, the reviewing board's quasi-judicial powers and procedures for evidentiary hearings are intended to establish

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[16] Obviously, the task is concluded quickly where the authorizing statutes expressly provide for *de novo* review and independent decision-making, but often the language chosen by the legislature is not as direct. *See, e.g., Marfork Coal Co. v. Callaghan,* No. 31551 (W. Va. 2004). In *Marfork,* the Supreme Court held that when the Surface Mine Board hears an appeal from a decision of the DEP, the Board is not required to afford deference to the DEP decision, but shall act independently on the evidence before it. *Id.*, at Syll. Pt. 3, *citing,* Syll. Pt. 2, *West Virginia DEP v. Kingwood Coal Co.*, 200 W. Va. 734, 490 S.E.2d 823 (1997). The *Marfork* and *Kingwood Coal* holdings, however, were premised upon W. Va. Code § 22B-1-7(e), which expressly provides that the Board shall conduct a *de novo* review of the DEP decision.

[17] Particularly interesting is the situation where the inferior agency's interpretation of one of the administrative regulations is the subject of the review. At least one circuit court has found that no deference is due an agency interpretation where the agency that administers the regulations is not the agency that promulgated them. *See, e.g., Cookman Realty Group, Inc. v. Taylor,* 211 W. Va. 407, 566 S.E.2d 294 (2002).

In *Cookman,* the DEP appealed an adverse ruling by the Environmental Quality Board. In deciding the case in circuit court, Judge Frye ruled that the Environmental Quality Board owed no deference to the DEP's interpretation of a regulation that it was required to administer. Judge Frye's conclusion in this respect seems to have been premised upon the fact that the regulation in question had not been promulgated by the DEP. The Supreme Court never reached this part of Judge Frye's decision, however, because it found that deference is afforded to an administrative interpretation only where the statute or regulation is ambiguous, and finding that the regulation in question was not ambiguous, it went no further.

that the review board's proceedings are *de novo* and that it must exercise independent judgment upon its own record. This conclusion is particularly apt where individual private or property rights are at issue, because, in such case, Constitutional due process concerns are implicated. Accordingly, the Court concludes that its resolution of the preliminary question in this case must depend upon the determination of the scope of the statutory and regulatory authorization of the BZA as compared to the scope of the powers conferred upon the Zoning Administrator.

The Court turns first to the statutes that authorize and empower the BZA. W. Va. Code § 8-24-55 states:

> The board of zoning appeals shall:
>
> (1) Hear and determine appeals from and review of any order, requirement, decision or determination made by an administrative official or board charged with the enforcement of any ordinance or rule and regulation adopted pursuant to sections thirty-nine through forty-nine of this article;
>
> (2) Permit and authorize exceptions to the district rules and regulations only in the classes of cases or in particular situations, as specified in the ordinance;
>
> (3) Hear and decide special exceptions to the terms of the ordinance upon which the board is required to act under the ordinance; and
>
> (4) Authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.
>
> In exercising its powers and authority, the board of zoning appeals may reverse or affirm, in whole or in part, or may modify the order, requirement, decision or determination appealed from, *as in its opinion ought to be done in the premises, and to this end shall have all the powers and authority of the official or board from whom or which appeal is taken.*

Emphasis added.[18] This language is repeated, but only in part, in the Ordinance, at Section 7.8(b)(1)-(4).[19] The grant of powers to boards of zoning appeals has been summarized by our Supreme Court, which has said that a board of zoning appeals is "an administrative agency acting in a quasi-judicial capacity." *Wolfe v. Forbes*, 159, W. Va. 34, 45, 217 S.E.2d 899, 906 (1975), *quoting, Lee v. Board of Adjustment*, 226 N.C. 107, 111, 37 S.E.2d 128, 132 (1946).

The language emphasized in the above-quoted zoning statute in substance mirrors that found in the administrative review provisions of the Model State Administrative Procedure Act § 4-216(d) (1981).[20] Courts have acknowledged that this language means that the review board is authorized to independently decide matters before it, and to substitute its judgment for that of the officer or agency whose decision is challenged. *See, e.g., Northwest Steelhead and Salmon Council of Trout Unlimited v. Washington State Dept. of Fisheries*, 78 Wash. App. 778, 896 P.2d 1292 (1995). The decision of the inferior officer or agency is a relevant and important

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[18] This language stands in stark contrast to the power given this Court to review a decision of the BZA. *See*, W. Va. Code 8-24-64. This Court is given the power only to pass upon the legality of the decision or order of the BZA, it is not given the power of original decision-making. Moreover, Code § 8-24-64 expressly states that, "... no such review shall be by trial *de novo*."

The statutory language authorizing this Court to review decisions of the BZA, when considered in light of the Supreme Court's explication of this role, make clear that this Court does not engage in independent decision-making.

[19] The Court notes, however, that reference to the authority of the Board is contained in the Article 7 Section titled, "Board of Appeals Approval of Conditional Use Permit," not in Article 8, which is titled, "Appeal Process." Obviously, the powers of the BZA are more extensive than the power to approve conditional uses, and, in fact, are more extensive than revealed in the Ordinance's paraphrasing of part of Code § 8-24-55.

[20] Section 4-216(d) of the Model Act states, in relevant part, "The presiding officer for the review of an initial order shall exercise all the decision-making power that the presiding officer would have had to render a final order had the presiding officer presided over the hearing, ..."

West Virginia's Administrative Procedure Act, found in Chapter 29A of the Code, was adopted by reference to the Model State Administrative Procedure Act of 1961. *See*, W. Va. Code, Chapter 29A, References and Annotations.

part of the record, but it is not binding upon the review board. *See, e.g., Appeal of Dell*, 140 N.H. 484, 668 A.2d 1024 (1995). The standard of review by a reviewing board of an inferior officer/agency's decision is, therefore, *de novo*. *See, e.g., Lebanon Properties I v. North*, 66 S.W.3d 765 (Mo. Ct. App. S.D. 2002); *Manor v. Dept. of Public Welfare*, 796 A.2d 1020 (Pa. Commw. Ct. 2002).

The analyses from the Administrative Procedures Act cases are both instructive and persuasive, but are not dispositive to the proper construction of the statutory language that describes the nature of the review undertaken by a West Virginia board of zoning appeals. This borrowed reasoning would be inapplicable if, for example, statutory provisions authorizing the zoning agency or official reviewed endowed such agency or official with powers that would be inconsistent with the conclusion that the BZA's review is not deferential. Accordingly, the Court must examine the powers granted to the Zoning Administrator.

In contrast to the statutory directive for the creation of the BZA, the enabling statutes do not expressly create or mandate the creation of the position of Zoning Administrator. Instead, the enabling statutes authorize the formation of two bodies necessary to zoning enactment and administration, those being the Planning Commission, Code § 8-24-1, and the Board of Zoning Appeals, Code § 8-24-51, and give those bodies the power to hire necessary employees. *See*, Code § 8-24-14 and 8-24-52, respectively. Of particular interest to the instant case is Code § 8-24-14(4) and (5), which provide:

> To effectuate the purposes of this article, a [planning] commission shall have the power, authority and duty to:
>
> (4) Prescribe the qualifications of, appoint, remove and fix the compensation of, the employees of the commission, such compensation to be in conformity to and in compliance with the salaries and compensation theretofore fixed by the governing body

or county court of such municipalities or counties;

> (5) Delegate to employees authority to perform ministerial acts in all cases except where final action of the commission is necessary[.]

As noted previously in this Order,[21] the Ordinance provides for the administration of the Ordinance and creates the position of Zoning Administrator in Section 3.1(a), which states:

> The provisions of this Ordinance will be administered by the Jefferson County Planning and Zoning Commission. With the enactment of the Ordinance, the County Commission shall designate a Zoning Administrator to be under the direct supervision of the Planning and Zoning Commission.

Section 3.1(a) of the Ordinance, in making the Zoning Administrator subject to the direct supervision of the Planning and Zoning Commission, brings this position within the auspices of Code § 8-24-14(5). Code § 8-24-14(5), in turn, describes the limits of the role. The Zoning Administrator, acting under the supervision of the Commission, is empowered only to perform ministerial acts necessary to the administration of the Ordinance (except in those cases where the final action of the Commission is necessary, in which he cannot be authorized to act at all). The Zoning Administrator, whose grant of power is expressly limited by statute to "ministerial" functions, is not and cannot be endowed with quasi-judicial powers such as those of the Board.

Neither the County Commission nor Planning Commission has authority to confer greater power upon the Zoning Administrator than state law allows him to have. Moreover, because the counties of this State have no inherent judicial power, the County Commission has no such power to delegate to a Board or officer of its own creation. W. Va. Constitution Art. IX, § 11 ("Such commissions may exercise such other powers, and perform such other duties, *not of*

[21] *See*, Finding of Fact No. 2, *supra*.

a judicial nature, as may be prescribed by law.") To the extent that the BZA enjoys quasi-judicial powers, those powers derive from the enabling statutes, and not from the County Commission's creation of the body upon the enactment of the Ordinance.

Accordingly, there is no grant of authority to the Zoning Administrator that would be inconsistent with the conclusion that his decisions are subject to the independent, *de novo* review of the Board. The Court is of the opinion that the express language of Code § 8-24-55, empowering the Board to act *as in its opinion ought to be done*, clearly establishes a non-deferential standard of review that allows the Board to substitute its judgment for that of the Zoning Administrator. In fact, because the Zoning Administrator's authority is merely ministerial in scope, his decisions are singularly inappropriate for deferential review. As the West Virginia Supreme Court of Appeals has stated, the exercise of "a ministerial function [is] not accompanied by the usual presumption of correctness attending the exercise of judicial duties." *Kuhns v. Fair*, 124 W. Va. 761, 222 S.E.2d 455, 457 (1942). It is the presumption of correctness that entitles a lower tribunal to a deferential review of its decisions.[22]

This conclusion is further supported by the very substantial difference between administrative and quasi-judicial zoning powers. The Supreme Court of North Carolina has explained this substantial distinction so succinctly and with such clarity that it merits repeating here. *County of Lancaster, South Carolina v. Mecklenburg County, North Carolina*, 334 N.C. 496, 434 S.E.2d 604 (1993). The North Carolina Court explained:

> In making quasi-judicial decisions, the decisionmakers must "investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." *Black's Law Dictionary* 1245 (6th ed. 1990). In the zoning

[22] As in the case of the presumption of correctness that attends this Court's review of the BZA's decisions and orders.

context, these quasi-judicial decisions involve the application of zoning policies to individual situations, such as variances, special and conditional use permits, and appeals of administrative determinations. *Humble Oil & Refining Co. v. Board of Aldermen,* 284 N.C. 458, 202 S.E.2d 129 (1974); *Jarrell v. Board of Adjustment,* 258 N.C. 476, 128 S.E.2d 879 (1963). These decisions involve two key elements: the finding of facts regarding the specific proposal and the exercise of some discretion in applying the standards of the ordinance.

Administrative decisions are routine, nondiscretionary zoning ordinance implementation matters carried out by the staff, including issuance of permits for permitted uses. Phillip P. Green, Jr., *Legal Responsibilities of the Local Zoning Administrator in North Carolina* 30 (2d ed. 1987). In general, the zoning administrator is a purely administrative or ministerial agent following the literal provisions of the ordinance. *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E.2d 128 (1946). The zoning administrator may well engage in some fact finding, as in making an initial determination as to whether a nonconforming use was in existence at the time a zoning provision was adopted. *Ornoff v. City of Durham,* 221 N.C. 457, 20 S.E.2d 380 (1942). But, in such instances, this involves determining objective facts that do not involve an element of discretion.

The distinction is important because due process requirements for quasi-judicial zoning decisions mandate that all fair trial standards be observed when these decisions are made. This includes an evidentiary hearing with the right of the parties to offer evidence; cross- examine adverse witnesses; inspect documents; have sworn testimony; and have written findings of fact supported by competent, substantial, and material evidence. *Humble Oil & Refining Co. v. Board of Aldermen,* 284 N.C. at 470, 202 S.E.2d at 137; *see generally* David W. Owens, *Zoning Hearings: Knowing Which Rules to Apply,* Popular Government, Spring 1993, at 26. By contrast, an administrative zoning decision is made without a hearing at all, with the staff member reviewing an application to determine if it is complete and whether it complies with objective standards set forth in the zoning ordinance.

Id., at 507-8, 434 S.E.2d at 612.[23]

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[23] *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E.2d 128 (1946), on which the *Mecklenburg* Court in part depended for its observations, was cited by the West Virginia Supreme Court of Appeals as a "leading case" in *Wolfe v. Forbes,* 159 W. Va. 34, 45, 217 S.E.2d 899, 906 (1975).

The Court's discussion in *Mecklenburg County, Id.*, emphasizes that the performance of ministerial functions does not involve policy considerations guiding discretion on the part of the administrator, but the mere application of literal requirements of the Ordinance. The West Virginia Supreme Court also has recognized this important limitation on ministerial functions in a number of cases.[24] *See, e.g.*, Syll. Pt. 8, *Kaufman v. Planning and Zoning Comm'n of City of Fairmont*, 171 W. Va. 174, 298 S.E.2d 148 (1982)(wherein the Court held that when a plat meets all of the requirements specified in the subdivision ordinance, plat approval is a mere ministerial act which allows no discretion on the part of the commission. The Court, in its opinion, explained that the commission could not avoid its ministerial duty to approve the plat submitted, and lacked the discretion to weigh policy considerations that were not expressed as criteria in the ordinance provisions for plat approval.).

Application of these legal precepts to the facts of the case at hand requires this Court to conclude that when the Board reviews a decision of the Zoning Administrator, it must independently decide the matter on the record developed before it. It cannot place upon

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It is also significant that the wording of North Carolina's zoning enabling statute is substantially the same to that of West Virginia in its description of the review undertaken by the board of zoning appeals. The North Carolina statute provides:

> The board of adjustment may reverse or affirm, in whole or in part, or may modify the order, requirement, decision, or determination appealed from, and shall make any order, requirement, decision, or determination that in its opinion ought to be made in the circumstances. To this end the board has all of the powers of the officer from whom appeal is taken.

N.C.G.S.A. § 153A-345(b).

[24] The West Virginia Court's discussions of the scope of ministerial authority, which is consistent with the observations of the North Carolina Court, most typically appear in cases involving the availability of writs of mandamus or prohibition, *see, e.g., State ex rel. Orlofske v. City of Wheeling*, 212 W. Va. 538, 575 S.E.2d 148 (2002), or addressing the public duty doctrine. *Walker v. Meadows*, 206 W. Va. 78, 521 S.E.2d 801 (1999). In each such case, the West Virginia Supreme Court has described ministerial acts as non-discretionary, operational duties.

challengers the burden of proving that the Zoning Administrator "abused his discretion" because, legally, the Zoning Administrator has no discretion to abuse. Nonetheless, in several zoning cases appealed to this Court in recent years, the Board has imposed this burden upon parties who have appealed a decision of the Zoning Administrator. The research that the Court has been obliged to undertake because of the unique posture of the instant case makes clear the error of imposing this burden.

In point of fact, by limiting commission employees to the performance of ministerial duties, the enabling statutes deny the Zoning Administrator the authority to act at all in matters requiring the exercise of discretion, the weighing of evidence, the drawing of inferences from evidence, the interpretation of law or the balancing of sometimes competing policy concerns. It bears mentioning, however, that even if the Ordinance did not place the Zoning Administrator under the direct supervision of the Planning Commission and bring the position within the auspices of Code § 8-24-14, but had instead created a separate zoning commission for the administration of the Ordinance, it still could not endow such commission or its chief officer with quasi-judicial powers. As noted previously, the County Commission cannot delegate power that it does not itself hold, and nowhere in the whole of Article 24, Chapter 8 is the County Commission authorized to create an administrative body or officer with quasi-judicial powers.[25] The Zoning Administrator's administrative role must, therefore, be limited to the application of clearly-stated, specific criteria to objective facts.[26]

In so concluding, this Court is mindful that it is implicitly finding unlawful those delegations of power to the Zoning Administrator that are inconsistent with the limits of

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[25] Except for the expressly statutorily-authorized BZA.

[26] To the extent that the criteria are not stated with adequate specificity, the solution should be to amend the Ordinance, not to illegally enlarge the powers of the Zoning Administrator.

ministerial functioning. The Court also is mindful that the Zoning Administrator may have operated outside of these limits, with the blessing of the County Commission, for some years. The longevity of this practice, however, cannot change the clear and unambiguous statutory mandates, which this Court is bound to apply. On this point, our Supreme Court has spoken definitively.

"Infinite authority exists for the law proposition that the powers and duties of all governmental officers are 'limited and defined by laws,' by statute where one exists as in this case. It is the sole criterion of authority, and no custom can enlarge or vitiate it. *The Floyd Acceptances*, 7 Wall. 666 [19 L.Ed.169]." *City of Fairmont v. Hawkins*, 172 W. Va. 240, 244, 304 S.E.2d 824, 828 (1983), *quoting, State v. Chilton*, 49 W. Va. 453, 457, 39 S.E.612, 614 (1901). "The law is clear that where a specific statute or ordinance exists prescribing how official acts should be done, the statutory mandate may not be circumvented by permitting the public official to show that in the past the required statutory procedure has been ignored." *Id.*

On the basis of all of the foregoing, the Court concludes that W. Va. Code § 8-24-55 (1998 Rep. Vol.) requires the Board to apply a *de novo* standard of review when it reviews any order, requirement, decision or determination of an administrative officer or board charged with the administration of the zoning Ordinance. Because this Court had determined, with the agreement of all counsel,[27] that it must apply to this matter the same standard of review that the

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[27] The Court is obliged to note, however, that counsel did not reach the same conclusion as this Court, and instead argued that the BZA's review of this (any?) decision of the Zoning Administrator is deferential. Counsel argued this position without any apparent reference to or study of the statutory and case law reviewed by this Court. In fact, the counsel argued primarily from the single quote found in *Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc.*, 166 W. Va. 775, 779, 277 S.E.2d 613, 616 (1981): "Interpretations of statutes by bodies charged with their administration are given great weight."

Board was required to apply, this Court's review of the challenge before it will likewise be *de novo*.

The Zoning Administrator's Definition of "Public Water"

As noted earlier in this Opinion Order, the Zoning Administrator brought before the BZA a Motion to Dismiss premised upon the argument that his definition of "public water" was not justiciable because it did not present a case or controversy. Although the Board denied this Motion by unanimous vote, it nonetheless resurrected the very same Motion to Dismiss at the outset of the case before this Court. After joining as a party, the Zoning Administrator reasserted his Motion in oral argument before this Court.

The legal analysis of the standard of review compels this Court to reexamine the assertion that the Zoning Administrator's interpretation of the term "public water" does not present a justiciable issue for this Court. The Court undertakes this reexamination independent

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While this Court is aware of the validity of the statement of the general rule found in *Security National*, it likewise believes that unstudied reliance upon it is unfounded in this or any other context. To do so ignores that significant developments in the analysis and refinement of the rule found in later cases. Significantly, the Court would direct counsel's attention to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 19 W. Va. 573, 466 S.E.2d 424 (1995)("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." *Id.*, at Syll. Pt. 1); *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W. Va. 326, 472 S.E.2d 411 (1996); *Cookman Realty Group, Inc. v. Taylor*, 211 W. Va. 407, 566 S.E.2d 294 (2002).

Additionally, the Court would note that the rule quoted in *Security National Bank* refers to the review relationship between the courts and the administrative agencies, not to the review process within the administrative hierarchy.

Finally, the Court would note that the rule stated in *Security National Bank* would not be applicable to this case in any event, as the rule affords deference only to the interpretations of bodies charged with the administration of the statutes in question. As noted above, the Jefferson County Zoning and Planning Commission is charged with the administration of the Zoning Ordinance, and there is no evidence, not even in Mr. Raco's letters, that the interpretation in question is the interpretation of the Commission and not merely that of Mr. Raco. In point of fact, the Zoning Administrator's letters expressly attribute the interpretation to himself, speaking only in terms of the singular, "I."

of the Motion of the Board, not because the Motion was earlier denied, but because the Court is of the opinion that in unanimously voting to deny the same motion in its proceedings, the Board has already acquiesced the justiciability of JUI's appeal. In general, a party who acquiesces in a judgment of the lower court waives the right to contest such judgment on appeal. *See, generally,* 5 Am.Jur.2d *Appellate Review* § 618. How much more applicable should this rule be where the party asserting the argument actually rendered the judgment below? This Court will not entertain the BZA's challenge to its own prior judgments.[28]

The Zoning Administrator renewed his Motion to Dismiss at oral argument. The Zoning Administrator argues that because he was not required to give JUI a decision in response to its request, his gratuitous provision of his interpretation of Ordinance § 6.4(f) cannot be the subject of an appeal to the Board.[29] But, the Zoning Administrator rendered this decision on two separate occasions. In response to JUI, he stated, "Please be advised that I, as Zoning Administrator, have already *published a decision* concerning this matter. I have enclosed a copy of this decision for your perusal." He submitted a Memorandum to the Board in this matter in which he referred to his act as a *ruling*. Moreover, the Zoning Administrator made clear that he had in the past, and would continue in the future, to calculate LESA scores according to his

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[28] Moreover, the Court notes that the BZA is not the real party in interest to this proceeding, and, therefore, is without standing to move for its dismissal. The Board was, however, allowed to remain after the joinder of the Zoning Administrator because of the Court's perception of its very real interest in the resolution of the preliminary questions.

[29] In addition to the argument that, because the appeal does not relate to a particular project or proposal, it does not present a case or controversy. While JUI's question did not relate to a particular development proposal, the Court notes that there are pending cases in this Court in which JUI is the proposed provider and that the proposal has been given a score of "3" for proposed water system. This was also the case in some resolved cases.

definition of "public water." Terms like "published a decision" and "ruling" certainly sound to the Court like the assertion that one's pronouncements carry the imprimatur of an official act.[30]

Also troubling is the Zoning Administrator's stated perception of the rules of statutory construction. In his testimony before the BZA, the Zoning Administrator rejected the definitions of "public" utilities found in state statutes, such as those of the Public Service Commission or Department of Health, as having no bearing upon the construction of the terms used in the LESA protocols. The Zoning Administrator argued that, "if the ordinance said blue is orange everywhere you just read the word blue it would be orange in the ordinance." *See*, Tr. at p. 80. While one wonders why a County Commission that meant "orange" would draft a zoning regulation that said "blue," the Zoning Administrator's argument is still unavailing in the instant context. In point of fact, the Ordinance does not define the term "public water" at all, which brings this provision squarely under the principles of statutory construction, and not the Zoning Administrator's example.

"In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning *in the connection in which they are used.*" Syll. Pt. 1, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941)(Emphasis added). The term "public water," as used in the LESA provisions of the Ordinance, relates to the provision of water service to a facility or development. The Zoning Administrator neither provided a sound basis for departing from the commonly understood meaning of this term when used in this context, nor seemed to appreciate the need to do so.

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[30] And judicial acts, at that.

Because of what the research has revealed, the Court is of the opinion that it must reexamine the question of whether or not this appeal presents a justiciable controversy.

As noted earlier, the Ordinance provision in question, Section 6.4(f), is a part of the LESA scoring protocol, which is part of the process by which proposed developments, particularly in the Rural District, are evaluated for CUPs. Under the provisions of the Ordinance, the Planning and Zoning Commission is the administrative body that hears and decides applications for, and issues or denies CUPs. Ordinance, Sections 3.1(c) and 7.6(g). Even assuming, *arguendo*, that the calculation of the LESA score for any given proposed development were a purely ministerial act,[31] it could not, under the clear and unambiguous language of W.Va.

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[31] An assertion that is debatable given that the Ordinance also authorizes the Zoning Administrator to determine the adequacy of the submitted information used to perform the calculation. Ordinance, Section 7.4(g). The Ordinance contains no criteria or standards whatsoever from which the adequacy of such data is to be determined, thereby leaving the Zoning Administrator to make this determination using his own unrestrained "discretion." Because the quality of the information provided bears upon the quality of the entire review process, this unbridled discretion cannot be said to be unsubstantial.

Moreover, the lack of clear standards for the submission of this data violates the precepts established by the Supreme Court that regulations must sufficiently restrain the discretion of the administrators to insure fair administration and to sufficiently inform land owners of the requirements that they will need to meet. *See, e.g., Kaufman*, 171 W. Va. 174, 298 S.E.2d 148; *Singer v. Davenport*, 164 W. Va. 665, 264 S.E.2d 637 (1980); *State ex rel. Ammerman v. City of Phillippi*, 136 W. Va. 120, 124, 65 S.E.2d 713, 715 (1951). The West Virginia Supreme Court has unequivocally denounced the lack of clearly expressed standards as allowing arbitrary and capricious decision-making. *Id.*

Even if this infirmity did not exist, the failure of the Ordinance to clearly define the terms used in the LESA factors (such as "public water") would present another. The failure of the Ordinance to define the terms used in the LESA criteria – and particularly those which permit diverse interpretations or that may be terms of art – prevent the scoring protocol from being truly objective. In the absence of these two aspects of the LESA calculation process, it would be a purely administrative act, as it would then be a mathematical formula that could be performed by reference to purely objective facts.

The lack of stated definitions is problematic even if it is the Planning Commission that performs the LESA calculation. It offends the clear standards principles, stated in the cases cited above, no matter which official or body is involved. The Court's research reveals that the terms "public water" and "central water" may be terms of art in the area of land development, but these commonly-accepted definitions may not be the intended import of the terms as used in the Ordinance. The one and only way for the meaning of the terms to be established for use in the DRS process is for the Ordinance to expressly define their intended meanings.

Code § 8-24-14(5), be delegated to an administrative employee of the Planning Commission. A CUP being a case in which, under the Ordinance, "final action of the commission is necessary," it is one of the cases in which the authority to perform ministerial acts cannot be delegated to Commission employees. Consequently, the ministerial acts that are part of the evaluation of an application for a CUP cannot be delegated to the Zoning Administrator.[32] Because the LESA calculation cannot be delegated to the Zoning Administrator, the interpretation of terms necessary to that evaluation are wholly outside the scope of his authority. *See*, discussion, *supra* at pp. 19-20.

Because the interpretation of the term "public water" used in the Ordinance, Section 6.4(f), is outside of the lawful authority of the Zoning Administrator, his letter to JUI can be regarded as his opinion only, not an official act.[33] Not being an official act, the letter is not an "order, requirement, decision or determination made by an administrative official or board charged with enforcement of any ordinance or rule and regulation." As an unofficial act, the letter does not present a justiciable issue that can be the subject of an appeal to the Board.

In view of the foregoing, it is the conclusion of the Court that this matter must be dismissed for lack of justiciability.

In so concluding, the Court finds itself in the unusual position of having begun this case as the tribunal of original appeal, in the place of the Board, but ending at the one question that the Board did decide during its efforts to resolve this matter. As such, the argument might be made that this Court is again reviewing a decision of the Board, and not acting as the original tribunal. To the extent that this argument could have merit, it is the

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[32] Nor, to any other employee.

[33] So being, it goes without saying that the interpretation of the term can have no binding effect upon the administration of the DRS process for permitting conditional uses.

conclusion of the Court, based upon the foregoing analysis and with due deference to the Board, that the BZA applied an erroneous principle of law when it implicitly ruled, by denying the motion to dismiss, that this appeal presented a justiciable issue.

Additional Considerations

The Ordinance endows the Planning Commission with the authority to hear and decide conditional use permits. As noted above, W. Va. Code § 8-24-55 provides that a board of zoning appeals shall:

> (2) Permit and authorize exceptions to the district rules and regulations only in the classes of cases or in or in particular situations, as specified in the ordinance;
>
> (3) Hear and decide special exceptions to the terms of the ordinance upon which the board is required to act under the ordinance; ....

In *American Tower Corp. v. Common Council of the City of Beckley*, 210 W. Va. 345, 557 S.E.2d 752 (2001), the Supreme Court invalidated the procedure for the issuance of CUPs established in the zoning ordinance of Beckley. Under the city's ordinance, the board of zoning appeals was required to hear and decide applications for CUPs, but the city council reserved unto itself the power to approve or reject the board's decision. The Supreme Court held that this violated the clear and unambiguous language of Code § 8-24-55(3). *Id.*, at 348-9, 557 S.E.2d at 755-6. However, in so concluding, the Court took note that the issuance of the CUP in question was one upon which the board was required to act under the ordinance. *Id.*

The Court observes that the language chosen by the legislature in Code § 8-24-55(3) is, at a glance, somewhat troubling as it could be interpreted to mean that a board of zoning appeals need not be the body that performs the quasi-judicial functions necessary to the

determination of many CUPs. This interpretation, however, seems wholly at odds with the statutory mandate that a county may not enact zoning at all without the contemporaneous establishment of a board of zoning appeals with the statutorily-endowed quasi-judicial powers. If boards of zoning appeals were not needed to hear and decide zoning ordinance issues requiring the employment of such quasi-judicial power – that is, if this function could be delegated to some other body – then why would the legislature have been so insistent that a board be established upon the enactment of a zoning ordinance?

This Court's review of the case law in other states having similar zoning enabling statutes leads it to a different understanding of the term "upon which the board is required to act under the ordinance." In particular, the North Carolina case previously cited, *County of Lancaster, South Carolina v. Mecklenburg County, North Carolina*, 334 N.C. 496, 434 S.E.2d 604 (1993) offers a reasonable explanation. The North Carolina court pointed out that, where adequately definite and specific criteria are provided in the ordinance, some conditional use permit applications could be determined with reference to entirely objective facts. Where this is the case, the decision does not require the application of quasi-judicial powers (fact-finding, etc.), and can be made by a purely administrative official, subject to appeal to the board. As a consequence, an ordinance may delegate objectively-determined CUP applications to an administrative official, while reserving to the board those decisions requiring quasi-judicial determination.

The Court is of the opinion that, if understood in this light, Code § 8-24-55(3) does not negate the role of boards of zoning appeals in regards to CUP applications, but merely allows for the possibility that those requiring only objective determinations might be delegated to an administrative official or employee instead of the board.

Jefferson County's Ordinance does not require the BZA to hear and decide CUPs, but merely to hear appeals from the Planning Commission's decisions in these cases. Ordinance, Section 7.6(h) and 7.8(b)(1). Does this constitute a special exception upon which the board is "required to act under the ordinance"? Moreover, even if the Board is not required to act, does it follow that it is permissible for the Planning Commission to hear and decide CUP applications that arise under the *zoning* Ordinance?

As seen in numerous cases before this Court in which a CUP was at issue, the Ordinance fails to set forth specific, stated conditions upon which a landowner is entitled to a CUP. As a consequence, these applications are decided on the finding that the site is suitable for development (the LESA score)[34] and upon such other considerations, such as those raised by members of the public at neighborhood compatibility meetings, as the Commission chooses to address.[35] In short, the decision to grant a CUP is one which is guided by few criteria and no conditions expressly stated in the Ordinance, and is, therefore, almost entirely dependent upon the Planning Commission's exercise of discretion in the determination of non-objective facts and the making of policy judgments relative to those facts, so as to apply such zoning policies to

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[34] The LESA calculation being the one part of the CUP process established by the Ordinance that does contain relatively specific criteria, although, as seen in this case, these criteria sometimes lack clarity and working definitions necessary to their application. Thus, an exercise of discretion becomes necessary.

[35] It bears remembering that the very definition of a conditional use permit is that it is a use that the ordinance authorizes *under stated conditions* which are legislatively prescribed. *Harding v. Board of Zoning Appeals of City of Morgantown,* 159 W. Va. 73, 77-8, 219 S.E.2d 324, 327-8 (1975). By failing to legislatively prescribe the conditions for conditional uses, the Jefferson County Ordinance has failed to establish the definitional criteria for the permit process. It cannot be said the LESA criteria are the stated conditions for a CUP, as the Board has successfully argued that the LESA calculation is a mere preliminary assessment in the DRS process. *Corliss v. Jefferson County Board of Zoning Appeals,* 214 W.Va. 535, 591 S.E.2d 93 (2003). Beyond that preliminary assessment, there are no criteria stated in the Ordinance. Accordingly, the Planning Commission determines to grant or deny CUP applications based upon the resolution of concerns that it chooses from among those expressed at public meetings. Its choice of concerns to address, being wholly unguided by stated criteria, is infinitely subject to arbitrary and capricious decision-making.

individual situations. The decision-making process of the Planning Commission in regard to CUPs is decidedly quasi-judicial.

The questions that this situation raises are: (1) Do the enabling statutes endow the Planning Commission with quasi-judicial powers?, and, (2) Is the Planning Commission, even if it does enjoy quasi-judicial powers, lawfully authorized to decide zoning matters? Clearly, it is beneficial to consider the second question first.

In 1969, the Attorney General of the State of West Virginia, issued an opinion in which he concluded that the legislature intended that subdivision control and zoning be separate functions of the county government. 53 W. Va. Op. Atty. Gen. 271 (1969). The Attorney General noted that "[t]his separation is most clearly manifested by the provision for creation of a board of zoning appeals (no member of whom shall be a member of the planning commission)...." *Id.*, at p. 5.[36] The Attorney General's opinion, in part, led the West Virginia Supreme Court of Appeals to later observe that "there is a distinction between regulating the manner in which a subdivision can be constructed and regulating where land can be devoted to subdivision use. The former is the province of a planning commission, while *the latter is exclusively the province of a zoning commission.*" *Singer v. Davenport,* 164 W. Va. 665, 672, 264 S.E.2d 637, 642 (1980)(emphasis added). The Court indicated the continuing vitality of *Singer's* observations in *Kaufman v. Planning and Zoning Commission of the City of Fairmont,* 171 W. Va. 174, 298 S.E.2d 148 (1982).

The Court perceives that the line may be drawn upon Constitutional principles. Zoning regulation burdens the right to use one's property as one sees fits (for example, to

[36] In this particular context, the Attorney General was cautioning that the enactment of regulations for subdivision control must be "based upon and confined to" the applicable provision of the enabling statute, rather than upon the broader zoning authority. 53 W. Va. Op. Atty. Gen 271, at p. 4.

subdivide and convey), while planning regulation merely enforces standards for accomplishing a chosen use (for example, the schematic requirements for a recordable plat of such subdivision). The former touches upon fundamental rights, while the latter does not. As noted by the North Carolina Supreme Court, due process concerns attend many zoning decisions, which is why the exercise of quasi-judicial power is necessary in those zoning contexts. As such, it is of utmost importance that these private property decisions be made by the body legally empowered to address them.

In neither *Singer* nor Kaufman did the Supreme Court fully explore the extent of the delineation between the a planning commission and a zoning administration body, but its comments make clear that these are two separate administrative bodies serving two distinct purposes. Moreover, a review of the enabling statutes reveals no instance in which a planning commission is empowered to administer zoning ordinances. Based upon these sources, the Court is inclined to conclude that the Planning Commission is not endowed with the power to administer the Zoning Ordinance or make zoning decisions.

Although the Jefferson County Commission has bestowed the inclusive title of "Planning *and* Zoning Commission" upon that body, the fact remains that it is a single body performing both planning functions and zoning administration. Moreover, Mr. Raco has been identified to the Court as both the Zoning Administrator and the Director of Planning, which indicates that he is administering both zoning and planning regulations. This appears to the Court to violate the "separation of powers" that the Attorney General believed to have been established by the enabling statutes, and that the Supreme Court has suggested is required. As a result of the structure chosen by the County, nearly all of the significant land use and

development decisions in Jefferson County are being rendered by one appointed body, while the law rather clearly envisions the checks and balances of two.

The County's failure to distinguish between the administration of planning and zoning makes the role of the Zoning Administrator – who works under the "direct supervision" of the Planning (and Zoning) Commission acting as the zoning administration body – even less authoritative than it might otherwise be under a properly established zoning administration plan.

Conclusion

The statutes authorizing the County Commission to enact zoning regulations endow the Board of Zoning Appeals, and only that body, with the quasi-judicial power necessary to certain aspects of zoning administration. Nonetheless, the County Commission has placed some of these decisions, including the issuance or denial of conditional use permits, within the authority of the Planning Commission, whose lawful administrative authority is limited to planning matters. Moreover, the County Commission has, through the Ordinance, further diluted the rightful power of the BZA by delegating to the Zoning Administrator, a ministerial official, decisions which require the determination of non-objective facts and the exercise of substantial discretion.

Additionally, the Ordinance fails to establish clearly defined conditions under which a landowner is entitled to secure a conditional use permit. As a result, permit decisions are rendered on the basis of the virtually unbridled discretion of the Planning Commission members of the moment. To the extent that the LESA scoring protocol might provide a clear statement of permit standards at the preliminary phases of consideration, it is plagued by poorly

worded, ambiguous provisions, and relies upon key terms that are not defined within the Ordinance.[37]

Within the context of this systemic confusion of administrative roles, and evasive regulatory standards, it should come as no surprise that the Zoning Administrator would be placed in the position of rendering judgments that exceed the scope of his ministerial functions. As a purely ministerial official, however, his role does not include the power to establish policy. The interpretation of terms such as that at issue in the instant case, however, results in a *de facto* determination of zoning policy that is exclusively the province of the County's legislative body. In the realm of zoning, it is the duty of administrators to apply the laws, not to make them.

For this reason, and for those discussed within the body of this Order, the Zoning Administrator is, and was, without authority to render a decision regarding the interpretation of "public water" as used in Section 6.4(f) of the Ordinance. Accordingly, the Zoning Administrator's rendering such a decision was not an official act, but a nullity, and is, therefore, not an order, requirement, decision or determination that can be appealed to the Board of Zoning Appeals. The Zoning Administrator's decision, in this instance, does not present a justiciable controversy, and must be dismissed.

Decision

In view of all of the foregoing, it is ADJUDGED and ORDERED that the this matter should be, and hereby is DISMISSED.

This is a final Order. The Clerk is directed to retire this case from the active docket of the Court and place it among causes ended.

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[37] Which, unfortunately, is characteristic of the entire Ordinance.

The Clerk is further directed to send attested copies of this Order to all counsel of record for the parties herein.

ENTER: July 9, 2004

THOMAS W. STEPTOE, JR., CIRCUIT JUDGE

A TRUE COPY
ATTEST:

PATRICIA A. NOLAND
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY ______
DEPUTY CLERK

The Clerk is directed to retire this action from the active docket and place it among causes ended.

3CC
G. Kennedy
M. Sorensen
M. Cassell
7-12-04
LR