IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

JAN CARY KLETTER, et al.,

Petitioners,

vs.

CIVIL ACTION NO. 02-C-217
(Consolidated 01-C-331-, 02-C-217, 02-C-348)
Judge Steptoe

JEFFERSON COUNTY ZONING
BOARD OF APPEALS,

Respondents,

and,

ELMER LEE RODERICK, et al.,

Intervenors.

OPINION ORDER RESOLVING RULE 60(b) MOTIONS

THIS MATTER came on for decision this 12th day of July, 2004, upon the Motion for Reconsideration of the Jefferson County Board of Zoning Appeals (hereinafter, "BZA" or "Board"), and Memorandum in support thereof, upon the Petitioners' Opposition to Rule 60(b) Motion, and upon the Motion under Rule 60(b) for Relief from Judgment of the Intervenor, Buckeye Development (hereinafter, "Buckeye").

The Board and Buckeye move this Court to vacate its Opinion Order in this matter, entered on September 9, 2003, because of the subsequent announcement by the West Virginia Supreme Court of Appeals of its opinion in *Corliss, et al., v. Jefferson County Board of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003). Pursuant to this Court's careful review

of *Corliss, Id.*, and consideration of the initial oral arguments on the Board's Motion,[1] the Court agreed that the Opinion Order would have to be revised, in whole or in part,[2] but desired that the parties fully brief their positions regarding the extent to which said Order should be altered, in reference to the requirements of *Corliss*.[3] Accordingly, on February 19, 2004,[4] this Court entered an Order Granting Rule 60(b) Motions, in Part, Vacating Finality of Prior Opinion Order and Setting Oral Argument on Motions.[5]

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[1] The initial hearing on the Board's Motion, which was filed November 21, 2003, took place before Buckeye had filed its Motion, and before either party had submitted memoranda in support of their motions. Buckeye submitted its Motion and memorandum on January 21, 2004.

[2] It bears mentioning that it was the initial inclination of this Court to remand each of the consolidated cases to the BZA for reconsideration in light of *Corliss, Id.* Board counsel argued, among other things, that aspects of the BZA's decisions would have been different but for the fact that the BZA believed itself bound to follow the directives of this Court in the underlying case of *Corliss, et al., v. Jefferson County Board of Zoning Appeals*, Civil Action No. 01-C-139. Moreover, this Court's reading of the Supreme Court's *Corliss* opinion led to the conclusion that a remand without directions would be more consistent with the resonant theme of Board autonomy found in the Supreme Court's analysis.

Board counsel strongly objected to this Court's initial decision to remand to the BZA. Counsel argued, in this as well as in at least one other case, that the Board instructed him to file the instant Motion because the Board did not believe itself capable of the reconsideration necessitated by *Corliss* without instruction from this Court, and not because the Board wished counsel to seek a remand so as to attempt the reexamination itself.

[3] As reference to the original Opinion Order in this matter reveals, the instant case contains numerous issues not addressed by the Supreme Court in *Corliss*, and comes to this Court in a different procedural posture than did the *Corliss*.

[4] That is, after the submission of Buckeye's Motion and supporting memorandum.

[5] Subsequent to the entry of the February 19 Order, Buckeye filed a Petition for Writ of *Certiorari* to the West Virginia Supreme Court of Appeals, an issue raised by Petitioners' counsel at oral argument on the subject Motions. Buckeye contends that it questions the authority of this Court to vacate the finality of its own order pending a final resolution of Rule 60(b) motions, which motions the Court had already concluded would be granted at least in part.

Buckeye cited no legal authority for the proposition that this Court, having already concluded that a Rule 60(b) motion would be granted in whole or in part, could not vacate the finality of the order to which such motion pertains, thus sparing litigants the time and expense of preparing appeals that might well become moot when the Court's revised final order is entered.

On April 12, 2004, came the Petitioners, in person and by their counsel, David M. Hammer,[6] and came the Board, by it counsel, J. Michael Cassell, and came Buckeye, by its counsel, Peter L. Chakmakian, Richard G. Gay and Nathan P. Cochan, for oral argument on the Rule 60(b) Motions, pursuant to the aforesaid Order of this Court entered on February 19, 2004. The Court afforded the parties ten additional days following the hearing to supplement their submissions to address specific questions raised by the Court at oral argument.[7] Counsel for Buckeye submitted a supplementation of its prior memorandum.[8]

The Court has carefully considered the Motions and legal memoranda of the parties. The Court has reexamined the record of the proceedings before the Board. The Court has carefully studied the Supreme Court's opinion in *Corliss* as well as other pertinent legal authority. As a result of these deliberations, and for the reasons more fully set forth in this Amended Opinion Order, the Court has concluded that these matters must be remanded to the Board for further proceedings consistent with this Opinion Order.

Introduction

In order to place the instant matter in contextual perspective, the Court believes that it would be helpful to depart from its typical sequence of analysis in an order such as this

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[6] The Court notes that the Petitioners appeared throughout the underlying proceedings in the instant case without benefit of legal counsel. Mr. Hammer entered an appearance on the Petitioners' behalf in response to the Board's Motion for Reconsideration.

[7] The Court notes the objection of Board counsel to questioning on the provisions of the zoning enabling statutes. This Court is of the opinion that when its independent research reveals significant statutory provisions that have bearing upon the case before it, but which none of the counsel has cited in briefs or otherwise brought to the attention of the Court, such law is an appropriate area of questioning.

[8] In point of fact, Buckeye submitted two supplements, one of which was not timely. The Court will address these issues at a later point in this Order.

one This introductory review is intended to place the instant case in temporal relation to this Court's decision in *Corliss*, the Supreme Court's opinion in *Corliss*, and other zoning appeals brought to this Court. Understanding the sequence and timing of these various cases is particularly relevant to the decisions of the BZA and that of this Court at the time of this writing.

The instant case is a consolidated appeal of four decisions of the BZA.[9] The Board rendered its decision in Kletter 1 on December 1, 2001, prior to this Court's announcement of its final order in *Corliss* on February 14, 2002. The BZA rendered its decisions in the two Kletter 2 appeals on September 19, 2002, and December 19, 2002. The BZA's decision in Kletter 3 was issued on January 16, 2003. The Opinion Order resolving these consolidated appeals was entered by the Court in this matter on September 9, 2003. On October 10, 2003, the Supreme Court filed its opinion in the *Corliss* case.

Of course, while the Supreme Court's *Corliss* opinion resolves those issues specifically addressed therein, it by no means resolves all of the zoning law issues with which the Board, or this Court, must contend on a regular basis. In fact, it does not resolve all of the issues raised in the instant case,[10] although it may give insight to the decision that the Supreme Court might render if confronted with some of them. Nonetheless, it is impossible to ignore the

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[9] For ease of identification, the Court herein follows the convention it adopted in the original Opinion Order in this matter. Kletter 1 challenged the Zoning Administrator's decisions regarding the proposed Daniel's Forest subdivision, Kletter 2 collectively refers to two appeals to the BZA of the Zoning Administrator's decisions regarding the proposed Forest View subdivision, and Kletter 3 challenged the Zoning Administrator's decisions regarding the proposed Aspen Greens subdivision.

[10] This Court previously concluded that the *Corliss* opinion resolved any challenge to standing in these matters in favor of the standing of the Petitioners. Additionally, the Court is of the opinion that *Corliss* resolved for these Motions this Court's conclusions that the support data submitted in Kletter 1 and Kletter 2 was generally inadequate to inform the public about the proposed development; clearly, this conclusion does not survive the Supreme Court's ruling. Finally, *Corliss* leads this Court to conclude that where the Board issued conflicting rulings on the same issue across the four underlying matters, this Court should not resolve the conflict, but that the Board should do so. Having resolved these matters prior to oral argument on April 12, 2004, the Court relieved counsel of further argument on these points. April 12, 2004 (morning) Tr at p 9-11.

possible impact that *Corliss's* state of uncertainty may have had on the functioning of the Board in the cases presented in this appeal.

On the other hand, it is essential to acknowledge that the Kletter appeals came to the BZA in an entirely different posture than did the appeal brought in *Corliss*. In *Corliss*, the Board entertained an appeal of the issuance of a Conditional Use Permit ("CUP") by the Jefferson County Planning and Zoning Commission ("the Planning Commission"), following proceedings, including a Neighborhood Compatibility Meeting, conducted by that body. In the Kletter cases, the Petitioners herein appealed determinations of the Zoning Administrator, and not the decisions of the Planning Commission. Any proceedings or decisions that may have followed in the Planning Commission are, therefore, not properly a part of the record in this case, and could not have been considered by the BZA in its deliberations.[11]

Meanwhile, zoning appeals have continued to come to this Court. Of particular interest to the Court, in regards to the instant case, is the matter of *Jefferson Utilities, Inc. v. Jefferson County Board of Zoning Appeals, et al.*, Civil Action No. 03-C-278. In *Jefferson*

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[11] Moreover, there is no indication that the Board did consider or review such subsequent Planning Commission proceedings in rendering its decisions.

The Court notes that Buckeye asserted in the memorandum in support of its Motion that these were appeals to the Board of the issuance of CUPS. *See* Buckeye's Memorandum at paragraphs II.1, II.8 (in which Buckeye attributes to the Zoning Administrator the issuance of CUPS, even though he does not have such authority), II.9, and II.10, for example. This is not correct.

When questioned regarding these assertions at oral argument on these Motions, Buckeye's counsel retreated somewhat from the very definitive statements found in its brief. April 12, 2004 (morning) Tr. at pp. 12-16. The Court continues to question whether or not counsel appreciates the very substantial difference between the BZA's review of the Planning Commission's grant of a CUP, following a series of public meetings before the Commission, and the BZA's review of preliminary determinations of the Zoning Administrator. Additionally, the Court continues to question whether or not counsel understands that any decisions of the Planning Commission rendered subsequent to the appeals to the Board are not part of the record considered by the BZA in these cases, and should not be injected into these proceedings as if they were.

Utilities, this Court was required to decide an appeal of a decision of the Zoning Administrator, which was left unresolved when the Board was unable to achieve the majority vote necessary to act upon the appeal. Because of the Court's unusual role in the *Jefferson Utilities* matter, this Court was required to engage in substantial research and study of the legal principles prevailing upon the procedures at the Board level, including, but not limited to, the standard of review that the BZA is required to apply when it considers the appeal of a decision of the Zoning Administrator. For better or worse, this Court's research uncovered a number of statutory directives that had not previously been brought to its attention by any party in any case, and which, in its limited role as an appellate court, this Court had not been called upon to closely analyze previously. However, the Court is now fully cognizant of the reach of these provisions, and is bound to apply the correct law to the cases before it, even if no party or counsel has brought such law to the Court's attention. The research undertaken in the *Jefferson Utilities* matter bears heavily on the resolution of the instant appeals, as it uncovered the statutory directives and legal principles that prevail upon the Board's proceedings and that define the proper role of the Zoning Administrator, whose determinations are at issue here. As a result, the Court's reexamination of its prior Opinion Order in this appeal, though prompted by the *Corliss* decision and the Rule 60(b) Motions, is necessarily undertaken in light of the lessons learned in *Jefferson Utilities*.

Analysis of the Corliss Opinion

As noted previously, the occurrence that prompted the Board and Buckeye to file the Rule 60(b) Motions now pending before the Court was the announcement of the Supreme Court's opinion in *Corliss, et al., v. Jefferson County Board of Zoning Appeals*, 214 W. Va. 535,

591 S.E.2d 93 (2003) [12] Arguments advanced by counsel during hearings in this matter, as well as others, has revealed to the Court a fundamental disagreement among counsel, and, in some instances, between counsel and this Court, as to the understanding to be taken from *Corliss* and the reach of its pronouncements to issues not specifically addressed therein. The Court has considered the arguments of counsel respecting the proper analysis of the *Corliss* decision, but finds that even after such consideration, it cannot agree with some of the views expressed. In view of this general level of disagreement, the Court believes that it may be helpful to clarify its own understanding of the *Corliss* opinion, as that is the understanding ultimately applied to the Court's resolution of the pending Motions to such extent that modification of the prior Opinion Order is compelled by *Corliss*.

In *Corliss*, the Supreme Court addressed three precise assignments of error to this Court. The issues presented were: (1) the adequacy of support data;[13] (2) the method of measurement of adjacent land development;[14] and, (3) standing. Only two of these issues, support data and standing, were raised herein. Nonetheless, the entirety of the *Corliss* decision was analyzed for directives and guidance.

Standing

[12] It seems to the Court more accurate to say that the *Corliss* decision is only partially responsible for the submission of the Rule 60(b) Motions, as it appears to the Court that Buckeye, for example, used its Motion to broadly challenge the prior rulings of this Court, including those that were not specifically addressed in the *Corliss* opinion.

[13] Required by Section 7 4(d) of the Ordinance, part of the Development Review System ("DRS") provisions .

[14] Which is part of the LESA calculation, specifically provided in Section 6 4(b) of the Ordinance.

The Court turns first to standing, which Buckeye challenges in its Motion, ostensibly on the basis of the Supreme Court's ruling in *Corliss*.[15] In *Corliss*, the Supreme Court considered and rejected the challenge of the Board and the owner/developer to this Court's ruling that the citizen petitioners had standing to challenge the issuance of a CUP for the high-density residential development of the rural parcel there in question The Supreme Court stated·

> While the Landowners involved did raise concerns that at first blush might appear to be in common with all the citizens of Jefferson County, such as increased traffic, water table lowering, and other growth-related effects on the existing infrastructure, they proceeded to demonstrate how those concerns would bring about particularized harm given their specific occupational needs as farmers.

Corliss, 591 S.E.2d at 105.

The Supreme Court made clear that concerns which may also be common to the community at large may nonetheless have a particular impact upon neighboring landowners that is sufficient to confer standing to challenge zoning decisions. As a result, it is wholly insufficient to challenge standing solely by identifying the predicate issue as one of general concern. This Court cannot, for example, refuse to confer standing where petitioners invoke concerns about increased traffic (an issue of general concern) if those petitioners are able to show particular injury, prejudice or inconvenience (proof of personal impact). *Corliss* demonstrates that some issues implicate both general public concern and substantial private interests.

The Supreme Court noted that this Court had allowed three of the six petitioners in *Corliss* to proceed under the doctrine of dependent standing. *Id.* at fn. 32 While the Supreme

[15] The Court notes that the newly-enacted zoning and planning law expressly defines "aggrieved person" in § 8A-1-2(b), as one who shows that he or she will "suffer a peculiar injury, prejudice or inconvenience... " This definition appears to the Court to accord with the Supreme Court's existing principles of standing.

Court did not expressly adopt the doctrine of dependent standing, neither did it suggest that this Court's reliance upon the doctrine of dependent standing had been improper [16] This Court is of the opinion that it is sufficient to acknowledge that the validity of dependent standing as a doctrine of West Virginia law remains an open question until such time as the Supreme Court may be inclined to address it specifically.

Adjacent Development Measurement

With respect to the proper method for measuring adjacent development, the Supreme Court chided this Court for substituting its judgment for that of the Board in ruling that an acreage, rather than the linear boundary, method should be used to measure adjacent land. The Supreme Court acknowledged this Court's observation that the Ordinance specifies no method or measurement and that the Zoning Administrator had used the linear method for some

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[16] Nonetheless, Buckeye asserts that the Supreme Court's decision in *Corliss* requires this Court to vacate its standing ruling in the instant cases cases. Buckeye Memorandum, at p. 7, n. 10. Buckeye states that this Court "has, in effect, embraced the law of another jurisdiction and ignored the law of West Virginia in order to create standing in this case where none exists." *Id.*

This assertion is problematic in two respects. First, the petitioners in these cases, with the possible exception of Dr. Kletter, have standing even under the strictest reading of *Corliss*. So, it is incorrect to suggest that this Court created standing where none exists under *Corliss*. Second, allowing Dr. Kletter to remain as a nominal party under the doctrine of dependent standing had no impact on the outcome of this Court's review, as his challenges coincided in all respects with those of the remaining petitioners. In view of these considerations, this Court, in its Order of February 19, 2004, refused to reconsider its prior resolution of the standing challenge.

Additionally, Buckeye's challenge in this regard ignores the reality of decision-making by the circuit courts, which frequently must search the law of other jurisdictions in order to find guidance on issues that our own Supreme Court has yet to address. The process is one that requires a circuit court to extrapolate from the existing pronouncements of our Supreme Court to find those principles and doctrines, not yet adopted, that would likely receive favorable treatment. In identifying the doctrine of dependent standing, this Court did undertake such analysis, and found that the doctrine was not significantly dissimilar from the principle that confers standing on special interest organizations (where an organization composed of many individuals has standing so long as at least one or more of its members would have standing). *See, e.g., Snyder v. Callaghan*, 168 W. Va. 265, 284 S.E.2d 241 (1981).

years [17] 591 S.E.2d at 101. The Supreme Court noted that this Court had relied upon syllabus point 5 of *Hodge v. Ginsberg*, 172 W. Va. 17, 303 S.E.2d 245 (1983).[18] The Supreme Court did not find that the reliance on this rule of statutory construction was in error. The Supreme Court did conclude, however, that this Court failed to explain how the linear method either conflicted with legislative intent or was unduly restrictive, thus indicating that this Court had failed to apply the principle of *Hodge* correctly. Accordingly, the Supreme Court concluded that this Court had merely rewritten the Ordinance provision to suit its own preferences.

Additionally, the Supreme Court accepted the arguments of the appellants that this Court's error was the result of giving undue weight to the Comprehensive Plan as a source document and placing undue emphasis on the singular goal of agricultural preservation. 591 S.E.2d at 103-04. The Supreme Court reasoned:

> Rather than placing the Comprehensive Plan in its proper context--as a reference for purposes of applying the Ordinance -- the lower court declared the Plan and the Ordinance to be on equal footing for purposes of resolving any issues involving interpretation.
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> Our review of the record suggests that the lower court did place undue emphasis on the singular concern of agricultural preservation when in fact this particular objective is but one of many goals identified in either the Ordinance or the Plan.

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[17] Elsewhere, the Supreme Court also attributed to the Board a long-standing approval of the linear method of measurement. 591 S.E.2d at 102. The Court is somewhat confused by this attribution. This Court found no basis in the record of the case to indicate that the Board had ever before entertained a challenge to the adjacent land measurement method that would have provided it the opportunity to render any decision on the issue. So far as this Court was given to understand from the record, it was a question of first impression.

[18] "While the interpretation of a statute by the agency charged with its administration should ordinarily be afforded deference, when that interpretation is unduly restrictive and in conflict with the legislative intent, the agency's interpretation is inapplicable."

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> Critically, the lower court did not find error through the use of the linear method of land measurement--only that the method of acreage measurement was more consistent with the Comprehensive Plan and the goal of farmland preservation. Were farmland preservation the only interest that was sought to be protected through both the Comprehensive Plan and the Ordinance, we might be able to find some merit in the lower court's findings relevant to land measurement Since that is not the case, however, we are compelled to reach the conclusion that the lower court committed error in altering the established method of measuring adjacent land for purposes of evaluating applications seeking a conditional use permit.

591 S.E.2d at 103-04. Thus, the Supreme Court found that this Court had failed to give due deference to the Board's conclusion that the linear boundary method was the appropriate method for determining adjacent development in the *Corliss* case.

As important as it is to acknowledge what the Supreme Court did say, it is equally important to admit what it did not say. The Supreme Court did not say that the linear boundary method was dictated by the Ordinance. On the contrary, it acknowledged that the Ordinance prescribed no particular procedure for measurement. Moreover, and more importantly, the Supreme Court did not hold that in any zoning case thereafter, Jefferson County officials were obliged to use the linear boundary method. The Court is of the opinion that it is critical to make this distinction, as there is no indication from the *Corliss* Court that it intended to impede the Board's ability to function autonomously in the future, and to make such rulings as it deems appropriate to the particular circumstances presented in future cases.[19] It is not inconceivable

[19] The more circumscribed reading of *Corliss* has, nonetheless, already begun to take hold in some quarters. *Brown Shop Road, L.L.C. v. Jefferson County Zoning Board of Appeals*, Civil Action No. 03-C-111, a matter pending in this Court when the *Corliss* opinion was released, provides a prime example. When *Corliss* was announced, the developer/petitioner in *Brown Shop Road*, who had received a failing LESA score attributed, in part, to the acreage method of measurement, immediately brought a motion to this Court asking that the matter be remanded to the Board with instructions requiring the Board to apply

that, in a future case, the Board could determine that the linear boundary method rendered a result that was fundamentally unfair to a landowner or not representative of the true state of the facts, and this Court does not read *Corliss* to prevent the Board from ruling that an alternative method should be used in such a case.

Adequacy of Support Data

In addressing the adequacy of the support data, the Supreme Court concluded that this court "correctly recognized that '[t]he responsibility for determining the 'adequacy' of the support data submitted rests with the Zoning Administrator in the first instance, but his determination of adequacy is reviewable by the BZA, in this Court, and in the Supreme Court of Appeals.' " 591 S.E.2d at 98. Furthermore, the Supreme Court found no error with this Court's conclusion regarding the purpose of the support data: "That the lower court recognized the objective underlying the support data requirement is clear from its finding that 'the purpose ... is to reveal issues relating to compatibility and to provoke discussion among the developer/landowner, the interested public and the county's land use officials as to matters that would be relevant to compatibility.' " 591 S.E.2d at 100. The Supreme Court did, however, find this Court in error in its application of both principles to the facts of *Corliss*. In so concluding, the Supreme Court again emphasized the importance of the Board's autonomy and the resultant requirement that this Court give due deference to the ruling of the Board.

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the linear boundary method and recalculate the LESA score. The developer argued that *Corliss* mandated that the Board should do so.

This Court refused to remand with the requested instruction, on the grounds that *Corliss* did not mandate the linear boundary method. This Court reasoned that if it were to remand with such an instruction, it would be guilty of usurping the Board's power to make the determination in the case based upon its own independent judgment, which, in this Court's view, is the primary lesson to be taken from *Corliss*. Ultimately, this Court remanded without instructions, while emphasizing to counsel that under this Court's reading, *Corliss* did not mandate the linear boundary method.

While this Court, for example, found that the support data was inadequate to permit meaningful public discussion, the Supreme Court concluded that vigorous public discourse did, in fact, occur. 591 S.E.2d at 100. Additionally, the Supreme Court concluded that this Court had wrongly placed undue emphasis on the quantity of information produced, while the Ordinance does not specify any level of detail 591 S.E.2d at 101. The Supreme Court observed that although the support data was "abbreviated," there was no failure on the part of the developer to submit information that was responsive to each listed item, such that the information could be deemed inadequate 591 S.E.2d at 99.[20] While the Supreme Court did not favor what it perceived as this Court's attempt to fashion a quantitative standard for assessing the adequacy of support data, it also observed that

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[20] It bears mentioning that the Supreme Court's conclusions regarding this Court's rulings were not unequivocal. The Supreme Court noted:

> *Were the submission of the support data an end in itself* to the DRS process, we might be more inclined to agree with the circuit court's suggestion that extensive detail is required when such data is initially submitted as part of the conditional use permit application. Importantly, that support data provides a launching point from which the public can begin to participate in and the Zoning Administrator and the Commission can conduct the multi-stage reviewing process that is involved in any application for a conditional use permit.

591 S.E.2d at 101.

Unfortunately, subsequent developments in regard to at least one of the parcels at issue in these cases may reveal the fallacy of this Court's assumption, and that of the Supreme Court, that any inadequacies in support data would be ferreted out in the CUP process.

In Kletter 1, Buckeye submitted support data that has, on at least one item, been shown to be false. According to information provided by counsel for Buckeye in this appeal, however, the submission of false information did not prevent Buckeye from securing the issuance of a CUP for the parcel. Buckeye's Post-Hearing Memorandum at 2-3.

In this instance, the particular item of false information submitted was one that neighbors could readily discern as false with the naked eye However, many other aspects of the support data would not be capable of verification by anyone who did not have access to the property – which generally would be all members of the interested public. If all of the "multi-stage review" procedures undertaken by the planning and zoning officials do not serve the basic function of at least verifying the accuracy of the support data, it would seem that the data is, in fact, an end in itself

> "[n]either are we able to hone in some fashion how much detail is required with regard to examining support data for purposes of adequacy In this Court's opinion, the key to determining adequacy has to be based on whether the support data was sufficient in terms of enabling the desired public debate to occur with regard to the proposed development

Id. at , 591 S E 2d at 100.[21]

As in the case of the adjacent land measurement analysis, above, it is as important to admit what the Supreme Court did not say as it is to acknowledge what it did say. At no point in the *Corliss* opinion does the Supreme Court suggest that the support data that it found to be adequate in that case would necessarily be adequate in every instance.[22] Accordingly, it does not foreclose the possibility that the Board, applying the guiding principles of *Corliss*, might nonetheless find that similarly detailed support data is inadequate in another instance. Should the Board so rule in any instance, *Corliss* makes it clear that this Court could not reverse that ruling absent plainly erroneous factual or legal errors on the part of the Board.

Discussion

The Court's Standard of Review

"While on appeal there is a presumption that a board of zoning appeals acted correctly...." Syll. Pt. 3, *Harding v. Board of Zoning Appeals of City of Morgantown*, 159 W. Va. 73, 219 S.E.2d 324 (1975); *Wolfe v. Forbes*, 159 W. Va. 34, 45, 217 S.E.2d 899, 906 (1975). *See also, Henry v. Jefferson County Planning Com'n*, 201 W. Va. 289, 291, 496 S.E.2d

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[21] Which standard, unfortunately, has obvious limitations, where, as here, the petitioners challenged the Zoning Administrator's determination of adequacy, as the Ordinance entitles them to do, before the project had advanced to the Compatibility Assessment Meeting.

[22] Which is an argument that appears to have emerged in the instant case. Because the support data submitted in Kletter 1 and Kletter 2 is substantially the same as that submitted in *Corliss*, Buckeye has argued that it *must* be deemed adequate.

239, 241 (1997); *Ranson v. City of Charleston*, 201 W. Va. 241, 243, 496 S.E.2d 191, 193 (1997); *Shannondale, Inc. v. Jefferson County Planning and Zoning Com'n*, 199 W. Va. 494, 499, 485 S.E.2d 438, 444 (1997). In accord with these precedents, a reviewing court may disturb the decision of a zoning appeals board 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 906.

While the statement of the applicable standard of review is easy enough to recite, its recitation cannot be an exercise of form without substance, words without meaning. The Court has observed in recent zoning cases before it that there seems to be a general lack of consensus or understanding of the scope of review that this Court is required to undertake in the application of this deferential standard. Many parties appear to believe that "deferential" means "cursory," a view that seems to be particularly embraced by the movants herein.[23] For this reason, the Court believes that it may be helpful to explain in some depth the application of this standard of review.

It is of utmost importance to appreciate that even though the standard of review is deferential, it does not allow this Court to conduct a review of the record before it that is either perfunctory or mechanically superficial.[24] If this Court's review were merely cursory, then this

[23] The Court notes in particular that Buckeye's counsel cites this Court's thorough explanation of its legal analysis in the Opinion Order entered herein as evidence that the Court is not giving due deference to the Board. *See*, Buckeye's Brief, at pp. 22-25. The Court fails to see how a comprehensive recital of the analytical process that leads to a conclusion of this Court, set forth for the benefit of the parties to a case, is evidence of anything but the Court's willingness to have its deductive process scrutinized. This Court believes that the zoning cases coming before it are particularly appropriate for this thorough treatment, as the case law in this State remains largely an emerging body. Moreover, the Court assumes that the thorough recitation of its analytical process would assist the review by the Supreme Court should the case be appealed.

[24] As Buckeye's counsel seems to suggest is the case. *See*, April 12, 2004 (afternoon) Tr. at p. 11-12.

Court would, in fact, be acting as a "rubber stamp" for the BZA and not as an appellate court *See, e.g., Cookman Realty Group, Inc. v. Taylor*, 211 W Va. 407, 418 566 S.E.2d 294, 305 (2002), Starcher, J. concurring. (Justice Starcher states, "We refuse to become a rubber stamp for an agency's action," pointing out that the obligation to give due deference to an administrative agency does not mean that the Court must give an agency's decisions controlling weight, but only the weight due under the proper legal analysis. Justice Starcher's apt observation implicitly recognizes the fact that there must be a meaningful analysis.)

To determine if the BZA "has applied an erroneous principle of law," this Court must first determine if the Board identified the proper rule of law to be applied to the question before it. If the BZA has failed to identify the correct legal principle as the rule of decision, then this Court must conclude that the Board applied an erroneous principle of law. If, however, the Court determines that the BZA identified the proper rule of law, the Court must proceed to determine if the Board applied that rule of law correctly. If the Court discovers that the Board made a mistake in applying the proper rule of law, it must again conclude that the BZA applied an erroneous principle of law. To demonstrate that it has applied the correct law correctly, the Board's decision must reflect that: (1) the BZA actually made a factual finding for each element that is necessary to the operation of the legal rule; and, (2) each conclusion of law follows rationally from the findings of fact.[25]

The logical bridge between findings of fact and conclusions of law must be built upon factual findings that are supported by the evidence in the record. To determine if the Board "was plainly wrong in its factual findings," this Court must examine the entire record that the

[25] It should go without saying that the Board must actually identify the rule of law that it has applied to the question, whether that rule be a provision of the Ordinance, a statute or a common law principle.

Board had before it,[26] and determine if each finding of fact is supported by the reliable, probative and substantial evidence in the record as a whole. "'Substantial evidence' is more than a scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *In re Queen*, 196 W. Va. 442, 446, 473 S E.2d 483, 487 (1996). Operation of the substantial evidence rule does not depend upon the record being devoid of conflicting evidence. The deference due the Board's findings of fact, and reasonable inferences drawn therefrom, require this Court to uphold the BZA's factual findings, even if this Court might have weighed the competing evidence differently. *Id.* Once again, however, this Court cannot act as a rubber stamp. *Id.* at 447, 473 S.E.2d at 488. Where there is considerable evidence in the record to counter the Board's ultimate findings of fact, the record should demonstrate that the Board considered all of the evidence, and the Board should minimally articulate its assessment of the evidence so as to allow for the proper review by this Court. *Id.* at fn. 5.

To determine if the Board has acted beyond the scope of its jurisdiction, this Court looks primarily to the authority of the enabling statutes. Primarily, this review requires the Court to confirm that the BZA's decision did not exceed the scope of the power granted to it by law.[27] Additionally, the Court will review the record to determine that the Board complied with the statutorily-prescribed procedures, as the adherence to defined procedures and the integrity of the resultant decision are inextricably related.

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[26] The Court can examine only the record that the Board actually had before it for consideration. It should be unnecessary to point out that no BZA decision can be supported by facts that were in the possession of the parties, but which were not presented to the Board. Aspects of this case have forced the Court to question, however, if this is clearly understood by the participants in these cases.

[27] As in the case where the Board's action constitutes a *de facto* amendment of the Ordinance Because the Board is bereft of legislative powers, it cannot amend or repeal any part of the Ordinance that it enforces

In order for the Court to perform the analysis dictated by the applicable standard of review, it is essential that the Board fully develop the record below so as to reveal all evidence upon which it relied in making its factual findings, and, that the Board document its reasoning in findings of fact and conclusions of law that are sufficient to support its ultimate decision. *Burkey v. Board of Zoning Appeals of the City of Moundsville ex rel. Thompson*, 213 W Va. 581, 584 S.E.2d 215 (2003)[28] *See, also, American Tower Corporation v. Common Council of the City of Beckley*, 210 W. Va. 345, 557 S.E.2d 752 (2001); Syll Pt. 4, *Harding v. Board of Zoning Appeals of City of Morgantown*, 159 W. Va. 73, 219 S.E.2d 324 (1975).

The Nature of Zoning Regulation

For this Court to apply properly the applicable standard of review, it must keep in mind the legal nature and status of zoning regulations. The enactment and enforcement of a zoning ordinance is an exercise of the broad police power of the state, as delegated to the local governing body. *Par-Mar v. City of Parkersburg*, 183 W. Va. 706, 709, 398 S.E.2d 532, 535 (1990). Although it has been said that the police power is not susceptible of precise definition, it is generally accepted that it is the power to enact laws, within constitutional limits, to promote and preserve the peace, security, safety, morals, health and general welfare of the community. *State ex rel. West Virginia Dept. of Natural Resources v. Cline*, 200 W. Va. 101, 488 S.E.2d 376 (1997); *State v. Ivey*, 196 W. Va. 571, 474 S.E.2d 501 (1996); *State ex rel. City of Princeton v. Buckner*, 180 W. Va. 457, 377 S.E.2d 139 (1988). The legitimacy of a zoning ordinance's enactment and enforcement, therefore, requires only that the restrictions imposed thereby "are

[28] "The duty of a board of zoning appeals to show the grounds of its decision or order . . arises when the board makes its decision or enters its order, . . . That duty takes the form of setting forth findings of fact and conclusions of law contemporaneous with the board's ruling." *Burkey*, 213 W. Va. at 584, 584 S.E.2d at 218.

not arbitrary or unreasonable and bear a substantial relation to the public health, safety, morals, or the general welfare of the municipality " Syll Pt 7, in part, *Carter v. City of Bluefield*, 132 W Va 881, 54 S.E.2d 747 (1949)

While the broad reach of the police power legitimizes the enactment and enforcement of zoning regulations, land use decisions that lack firm footing within the express terms of the ordinance lay beyond the grasp of zoning officials Statutes in derogation of the common law must be strictly construed *Kilgore's Adm'r v. Hanley*, 27 W Va 451 (1886) Zoning regulations are legislative enactments in derogation of the common law. Accordingly, zoning provisions are limited to their express terms, and are not entitled to the aid of liberal construction. *See, e.g., Coppola v. Zoning Bd. of Appeals*, 23 Conn. App. 636, 583 A.2d 650 (1990)("Zoning regulations, as they are in derogation of common law property rights, cannot be construed to include or exclude by implication what is not clearly within their express terms." *Id.* at 640-41, 583 A.2d at 652). *See, also,* 1 Yokley, Zoning Law and Practice, § 1-4, p. 1-6 (4th ed. 2000). That which is not explicitly stated in the Ordinance will not be provided by this Court, nor may it be supplied by the Board or the Zoning Administrator.

Accordingly, when this Court considers whether or not "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, such deliberation must begin with a close reading of the authorizing statutes and the zoning provisions at issue The Court must examine the zoning authority's application of the provisions and insure that it does not exceed the reach of the precise language of the ordinance or of the statutory authorization.

The Board's Standard of Review

The appeals to the Board in these matters challenged decisions and determinations of the Zoning Administrator made in relation to applications for CUPs As noted above, this Court, in *Jefferson Utilities*, was required to "step into the shoes of" the BZA to resolve an appeal on which the Board was unable to act, as a result of which, this Court was obliged to determine the preliminary question of the standard of review applicable to the Board's determination of appeals before it. The understanding gained by the Court thereby is relevant to this, and any, review of Board decisions, and bears repeating here

Because the standard of review employed by the Board is integral to its decision-making process, it is appropriate for this Court, in reviewing the Board's decisions, to determine that the BZA applied the appropriate standard of review to the matter before it. In short, the proper standard of review is an overriding principle of law applicable to all aspects of an appellate proceeding, and is, therefore, a principle of law that the tribunal must correctly apply to be free of legal error. Accordingly, the Court believes that it is necessary to identify and explain the standard of review that the Board is obliged to apply to its consideration of the challenges to the decisions of the Zoning Administrator.

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 the case law. In fact, this Court's review of the case law 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,[29] a closer reading reveals that the Supreme Court borrows from a different administrative context only where there is a sufficient similarity on the particular issue as to make the comparative contexts analogous. This Court 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.[30] It likewise

[29] Our Supreme Court also cites from other administrative contexts in zoning cases. *See, e.g., Corliss, et al., v. Jefferson County Board of Zoning Appeals, 214 W. Va. 535, 591 S.E.2d 93 (2003).*

[30] Obviously, the task is concluded quickly where, for example, 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.

examines the administrative regulations. The relative statutory and regulatory powers of the review board and those of the lower agency/officer are then compared [31]

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 that the review board's proceedings are original and *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 in regard to minimum fair trial standards. Accordingly, the Court concludes that the determination of the standard of review applicable to the instant Board proceedings 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

[31] 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.

> 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.[32] This language is repeated, but only in part, in the Ordinance, at Section 7.8(b)(1)-(4).[33] The statutory 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

[32] 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 *do novo*."

[33] 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 review the issuance or denial of conditional uses, and, in fact, are more extensive than revealed in the Ordinance's paraphrasing of part of Code § 8-24-55.

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)[34] 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 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 review board is thus a body that decides matters before it as an original tribunal for which the decision appealed is merely part of the record considered.

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

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[34] 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.

zoning agency or official to be reviewed endowed such agency or official with powers that would be inconsistent with the conclusion that the BZA's review is nondeferential. 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[.]

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).[35] Thus, Code § 8-24-14(5) describes the limits of the role. The Zoning Administrator, acting under the supervision of the Commission,[36] 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 of Zoning Appeals.

Neither the County Commission nor the 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

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[35] 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, despite its inclusive "Planning and Zoning" title. The Court would note that the seal of the Planning Commission, found in the record of these matters, identifies the body only as the "Jefferson County Planning Commission." When the body began using the more expansive name, the Court does not know. Suffice it to say, however, that the title is at odds with its official seal.

[36] It is important to note, however, that at oral argument in this matter, counsel for the Board reported that some time ago the County Commission reorganized the Office of Planning, Zoning and Engineering such that the administrative organization set out in the Ordinance may not reflect the current organization. April 12, 2004 (morning) Tr. at p. 59. Counsel for the Petitioners, who was, at the time of oral argument in this matter, a member of the Planning Commission, represented that organizational changes had been made but that corresponding changes to the Ordinance were not. April 12, 2004 (morning) Tr. at p. 60. Petitioner's counsel also represented that at no time had the Planning Commission had any authority over the Zoning Administrator, despite what Section 3.1 of the Ordinance says. *Id.*

The remarks of Board counsel, coupled with those of Petitioner's counsel, are somewhat disconcerting, as they would suggest that the County Commission has made organizational changes relative to the administration of the Ordinance that are, in the absence of an amendment to the Ordinance, at odds with its express terms. Moreover, these remarks also suggest that, even before such changes, the Ordinance was administered in certain ways that did not comply with the provisions thereof.

such other duties, *not of 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 at the time of 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.[37]

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

[37] 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.
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> 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 [38]

[38] *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 undertaking policy considerations to guide discretion on the part of the administrator, but the mere application of literal requirements of the Ordinance.[39] The West Virginia Supreme Court also has recognized this important limitation on ministerial functions in a number of cases.[40] *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 specific criteria in the ordinance provisions for plat approval.).

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).

[39] Nonetheless, the Intervenors in these consolidated appeals openly and candidly – or, perhaps, merely without appreciation of the significance – describe the Zoning Administrator's determinations as based upon his "policy determinations and factual findings " Consolidated Brief of Buckeye, et al., at p. 17.

[40] 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. *See, e.g., 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

Application of these legal precepts 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.[41] It cannot place upon challengers the burden of proving that the Zoning Administrator "abused his discretion" because, legally, the Zoning Administrator has no discretion to abuse.[42] The full extent of the administrative power of the Zoning Administrator is the application of the literal requirements of the Ordinance to objectively factual situations.

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, thus bringing the position within the auspices of Code § 8-24-14, but had instead created a separate zoning commission for the administration of the Ordinance,[43] 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

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[41] The Court observes that this understanding of § 8-24-55 is infinitely more consistent with the resonant theme of Board autonomy that permeates the Supreme Court's *Corliss* opinion than is an understanding that relegates the Board to a lesser role.

[42] Nor can the Board allow itself to be misled to believe that it must defer to the judgment of the Zoning Administrator, a proposition that stands the statutory structure on its head.

[43] In *Jefferson Utilities*, this Court examined the propriety of the Planning Commission being given the authority to administer the *Zoning* Ordinance. It appears to this Court that the delegation to the Planning Commission of the authority to administer the Zoning Ordinance, including the authority to hear and decide CUPs, violates the separate authorities of planning and zoning as observed in *Singer v Davenport*, 164 W. Va. 665, 264 S.E.2d 637 (1980), and other decisions, as well as the enabling statutes.

Commission authorized to create an administrative body or officer with quasi-judicial powers.[44] The Zoning Administrator's administrative role must, therefore, be limited to the application of clearly-stated, specific criteria to objective facts.[45]

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

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[44] As noted above, in creating the statutorily-authorized BZA, the County Commission does not endow it with quasi-judicial power. That power derives from the statutes

[45] To the extent that the criteria are not stated with adequate specificity to permit purely ministerial application, the solution should be to amend the Ordinance, not to illegally enlarge the powers of the Zoning Administrator

any order, requirement, decision or determination of an administrative officer or board charged with the administration of the Zoning Ordinance. Review of the decisions rendered by the Board in these appeals does not permit the Court to conclude that the Board consistently applied the proper standard of review to the issues under consideration. Failure to apply the appropriate standard of review constitutes the application of an erroneous principle of law.

For example, in Kletter 1, the Board concluded that the Zoning Administrator has "discretion" to determine whether or not the sketch plan and support data are adequate, and further concluded that he did not "abuse his discretion." Kletter 1, Conclusion of Law No. 6.[46] Although the notion has somehow evolved that the Ordinance grants the Zoning Administrator the discretion to determine the adequacy of the sketch plan and support data,[47] in point of fact, the Ordinance, does not say that. The Ordinance, at Section 7.4(g) actually says only: "The Zoning Administrator shall determine if the sketch plan and support data are adequate."[48] In a related section of the Ordinance, it states that the staff reviews the application materials (which include the sketch plan and support data) for *completeness*. Ordinance, Section 7.4(b). Insofar as neither the County Commission nor the Planning Commission has the power to delegate to the

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[46] In Kletter 2, the Board's conclusion was less absolute, as it concluded that the Zoning Administrator has discretion to "initially determine" the adequacy of support data. Kletter 2, Conclusion of Law No. 7.

Also, in Kletter 3, the Board appears to have placed the burden on the Petitioners to show that the Zoning Administrator's calculation of the Soils Assessment was "in error." This may have been only a choice of a phrase unrelated to the review standard used by the Board, but it is equally plausible to read the phrase as a statement of a deferential level of review

[47] *See, e.g.*, Consolidated Brief of Buckeye, et al., at pp 16-17, 29-30

[48] Note that the word "discretion" is not used.

Zoning Administrator any discretionary, non-ministerial authority,[49] it seems clear that the Zoning Administrator's determination of the adequacy of the sketch plan and support data must be understood to mean the ministerial function of determining that the submissions are complete (i.e., that the sketch plan includes all required schematics, and that the support data includes information about each listed item).[50] These are objective determinations that are within the realm of ministerial functioning. However, to the extent that the determination of the "adequacy" of the support data is understood to mean its sufficiency for the overall review process and public discussion, the determination would be one requiring the weighing of non-objective facts and making conclusions therefrom,[51] which process is decidedly quasi-judicial

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[49] Moreover, this Court is without authority to endow the Zoning Administrator with quasi-judicial powers, which it would implicitly be doing if it were to accept the arguments that he has broad discretion to make decisions based upon non-objective facts.

[50] Which is operationally consistent with the Supreme Court's observations that the Ordinance does not specify a quantity of data but merely lists topics to be addressed. 591 S.E.2d at 100. Absent any other specifically-stated criteria in the Ordinance, the Zoning Adminstrator could have no other function but to determine that applicants actually submitted a response to each item. *Kaufman v. Planning and Zoning Comm'n of City of Fairmont*, 171 W. Va. 174, 298 S.E.2d 148 (1982).

[51] As for example, reviewing the quality of the public discussion at a Compatibility Assessment Meeting, and determining if the public appeared adequately informed to engage in meaningful discourse about the project as a means of determining that the support data was adequate. *See, Corliss*, 591 S.E.2d 93, 100. Consideration of the quality of the discussion at the Compatibility Assessment Meeting, urged by the *Corliss* Court, presents a more practical aspect of why this determination cannot belong to the Zoning Administrator: the Meeting occurs after all of his determinations are complete.

Of course, as counsel for the Board suggested, the Supreme Court's conclusion that this is a method by which the adequacy of support data can be determined presents practical problems for the Board as well. As counsel pointed out, determining adequacy by the quality of discussion at the Compatibility Assessment Meeting is a standard that speaks in terms of results. April 12, 2004 (afternoon) Tr. at p. 90. Unlike the appeals in *Corliss*, the Board may be faced with challenges to the Zoning Administrator's determination of adequacy that, under the time limits of the Ordinance, predate the Compatibility Assessment Meeting. In short, the Board may be faced with a support data challenge that fundamentally says, "We've reviewed the support data, and assert that it is not sufficient to enable us to prepare ourselves to participate meaningfully in the upcoming Compatibility Assessment Meeting." The results-based assessment of *Corliss* provides no guidance to the Board in making its determination in this instance.

This Court perceives that another unintended consequence of *Corliss's* after-the-fact analysis of support data is possible. Perceptive neighbors who challenge the support data upon its initial submission and

and cannot be undertaken by the Zoning Administrator. The Board, being the only zoning body with quasi-judicial authority, is the only body that could render such a decision. And, quite conveniently and coincidentally, Section 7.4(g) of the Ordinance further provides that the Zoning Administrator's determination of the "adequacy" of the sketch plan and support data may be appealed to the Board.

Because the Board did not consistently apply a non-deferential, *de novo* standard of review to its consideration of the underlying appeals, it applied an erroneous principle of law.

Conduct of Board Proceedings

The adequacy of the proceedings before the Board is also an integral aspect of its decision-making process, and must be examined by this Court in any review. Proceedings before the Board are required to be conducted according to procedural rules promulgated by the Board. W. Va. Code § 8-24-54 provides:

> The board of zoning appeals *shall* adopt such rules and regulations concerning the filing of appeals, applications for variances and exceptions, the giving of notice and the conduct of hearings as shall be necessary to carry out its duties under the terms of this article.
>
> The board shall keep minutes of its proceedings, keep records of all official actions and shall record the vote on all actions taken. All minutes and records shall be filed in the office of the board and shall be public records.

Emphasis added [52]

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acceptance may conclude that there is a premium on remaining silent at the Compatibility Assessment Meeting so as to prove their inability to participate meaningfully, and preserve the validity of their appeal challenges. As a result, the value of the Compatibility Assessment Meetings would be greatly undermined.

[52] Significantly, the Court is informed by counsel for the Board that the Office of Planning, Zoning and Engineering, is the custodian of the records of the Board. April 12, 2004 (afternoon) Tr at p 85 So far

In Jefferson County, it is the County Commission, and not the Board, that has promulgated the rules and regulations for the conduct of hearings before the BZA. Ordinance, Section 7.7(b)-(d). The procedures prescribed are the same as those used by the Planning Commission for Compatibility Assessment Meetings.

Compatibility Assessment Meetings are not quasi-judicial hearings. These meetings are designed only to allow members of the public to voice their concerns about the potential impact of a proposed development. Accordingly, these proceedings do not provide adequate opportunity for the orderly presentation of all witnesses that may be necessary to a party's challenge or defense thereto, and provide no opportunity for the cross-examination of the witnesses of the opposing party(ies).[53]

This Court observed in its original Opinion Order in the instant cases that

> ... the adequacy of the process afforded [parties] to advance their evidence and make their proofs in these cases is highly questionable. As noted previously, the procedure followed by the BZA for these appeals is the process that was developed for Compatibility Meetings. The differences between the nature of such meetings and appeals to the Board do not support the use of identical procedures.

Opinion Order of September 9, 2003, at p. 75.

As the North Carolina Supreme Court noted in *County of Lancaster, South Carolina v. Mecklenburg County, North Carolina*, 334 N.C 496, 434 S E 2d 604 (1993):

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as the Court has been made aware, the Board does not have an office in which such records are filed and maintained.

[53] Counsel for the Board acknowledged that the proceedings afford no opportunity for cross-examination April 12, 2004 (afternoon) Tr. at p 77.

Moreover, the parties are often blind-sided by the remarks made by members of the public in attendance at Board hearings, and are afforded no opportunity to respond, except "on the fly." This prevents parties from having notice of the assertions to which they are entitled to have a meaningful opportunity to respond.

> 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.

Id., at 508, 434 S.E.2d at 612. *See, also, Right to Cross-Examination of Witnesses in Hearings before Administrative Zoning Authorities*, 27 A.L.R. 1304 (current through July, 2004).

The statutory law unambiguously requires that Board to promulgate its own rules for the conduct of its hearings. W. Va. Code § 8-24-54.[54] Constitutional due process considerations require that those procedures so promulgated comport with minimum fair trial standards.[55]

W. Va. Code § 8-24-54,[56] also requires that the Board develop the applications for variances and exceptions (which would include conditional uses). It appears that the applications for variances and CUPs in Jefferson County have been developed by the Planning Commission or the Office of Planning, Zoning and Engineering, not by the Board.[57] The underlying logic of W. Va. Code § 8-24-54 is that the Board, being the body that must decide the matters, is in the best position to know what information it needs from an applicant. Neither the Planning Commission nor the zoning staff may, by the development of the applications, decide for the

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[54] The newly-enacted zoning law also contains this requirement. W. Va. Code § 8A-8-9(6).

[55] Obviously, the proper nature of the particular proceeding is determined by reference to the issues at hand Where the issues are properly framed as pure questions of law, such as in the case where facts are not in dispute and the only issue to be decided is the correct interpretation or application of a provision of the Ordinance, argument alone may suffice, and the presentation of evidence as a fact-finding mechanism may not be necessary. Where facts are in dispute, however, this cannot be the limit of the proceeding.

[56] as well as the new law, at W Va. Code §8A-8-9(6) .

[57] Ordinance, Section 8.1(c) *See, also*, April 12, 2004 (afternoon) Tr at p. 79

Board what information it should have available from an applicant.

In purporting to dictate to the Board, through the provisions of the Ordinance, the rules for the conduct of proceedings before it, the County Commission has unlawfully usurped the authority of the Board to promulgate its own rules of procedure. Additionally, the County Commission has further impeded the proper functioning of the Board by subjecting it to a hearing procedure that is wholly unsuitable for the quasi-judicial nature of Board proceedings. As a result, parties who appear before the Board have been forced to participate in proceedings that are suspect and may be Constitutionally infirm.

The ramifications of this dubious manner of operation are clearly evident in the instant cases.[58] The presentation of evidence within the procedural parameters provided by the Compatibility Meeting structure was unreasonably truncated and wholly inadequate to the number of issues under consideration. The written submissions of the developers were accepted as factual evidence even though not one witness was present to proffer them or to be cross-examined about their contents, despite the fact that the Petitioners challenged the veracity of some of the factual assertions contained in those submissions. Moreover, the Zoning Administrator, who was present, could not be considered a competent witness to present the developer's evidence, beyond verifying that it was the information submitted with the application, as it would appear that he had little personal knowledge regarding the veracity or source of that information.[59] It is impossible not to conclude that the inadequate procedure

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[58] *See* section entitled, "Burden of Proof," Opinion Order of September 9, 2003, in this matter, beginning at p 73.

[59] At the very least, he appeared not to know that a parcel claimed in the support data to be mainly wooded was, in fact, a field of corn. Kletter 1

This reveals how very easily inaccurate information can be accepted without confirmation, and how applicants may secure unfairly favorable LESA scores. This only accentuates the need for a proper fact-

unlawfully imposed upon the Board by the Ordinance substantially impacts the ability of the Board to develop sufficient, competent evidence from which to decide disputed facts, and to ultimately render well-reasoned decisions.

The Court concludes that, according to the clear and unambiguous mandates of W. Va. Code § 8-24-54 (8A-8-9(6)), the Board must promulgate the rules and regulations for the conduct of proceedings before it, and must develop the applications to be submitted for those matters that the Board will hear. The rules for proceedings so promulgated must comport with minimum fair hearing standards.[60] The failure of the Board to conduct its hearings according to the legal mandates constitutes an erroneous application of law. Upon remand, the parties to the instant matters must be afforded the opportunity to be heard in a proper proceeding, according to rules promulgated by the Board.

Deliberations and Decisions of the Board

As the Court observed previously in this Opinion Order, it cannot perform the requisite analysis on review unless the Board reveals all evidence upon which it relied in making its factual findings, and documents its reasoning in findings of fact and conclusions of law that are sufficient to support its ultimate decision. The exposition of the Board's finding of necessary facts and its reasoning in applying the zoning provisions to those facts are required aspects of the Board's decision-making. *Burkey v. Board of Zoning Appeals of the City of Moundsville ex rel. Thompson*, 213 W. Va. 581, 584 S.E.2d 215 (2003) *See, also, American Tower Corporation v. Common Council of the City of Beckley*, 210 W. Va. 345, 557 S.E.2d 752 (2001); Syll. Pt. 4,

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finding hearing in those cases where the LESA scores and underlying data are challenged to the Board, and brings into focus why the Board's review must be *de novo*, not deferential

[60] It must be emphasized that the adoption of minimum fair hearing standards does not mean that the Board must operate with the formality of a Court. These standards can be met while still maintaining an informality that is more hospitable to members of the public than is the typical courtroom proceeding.

Harding v. Board of Zoning Appeals of City of Morgantown, 159 W. Va. 73, 219 S.E.2d 324 (1975). Moreover, where the Board's decision fails to reveal its fact-finding and reasoning, this Court is not permitted to infer the basis of its ultimate ruling. *Burkey*, 213 W. Va. at 585, 584 S.E.2d at 219.

Implicit in these requirements is the understanding that the Board's written decision not only reveals findings of fact and reasoned conclusions of law, but that those findings and conclusions were actually made by the Board. Moreover, this Court is of the opinion that the deference accorded the decisions of a board of zoning appeals presupposes that a board has engaged in the required decision-making process. Where the proper process has not been undertaken, a court's upholding of a zoning board's ultimate decision merely compounds the underlying defect and serves to deny litigants the process to which they are due.

The audio-tapes included in the records of the proceedings before the Board in the instant cases afford this Court the unique advantage of being able to listen to the Board's deliberations. The tapes of these deliberations reveal a fundamental noncompliance with the requirements of *Burkey* and other Supreme Court decisions. The tapes of these deliberations reveal that the Board does not examine and weigh the evidence presented on each issue in the appeal, does not collectively determine its factual determinations relative to each issue, and does not then apply the Ordinance requirements to the factual findings so as to make conclusions

Fundamentally, the Board, upon motion of one of its members, decides to grant or deny the appeal. The vote is taken, and the matter is concluded even though the Board has neither discussed nor weighed the evidence before it, decided what the evidence has proven, or

made specific conclusions relative to the specific issues presented in the appeal [61] The Board resumes the public meeting and announces its ruling, generally without explanation. At its next meeting, the Board is presented for signature a written decision replete with findings of fact and conclusions of law that were not actually made by the Board in its deliberations.

It is difficult for this Court to reconcile the written decisions with the deliberations that actually occurred. It is as if the author of the written decisions determined which findings and conclusions the Board could have made to reach its ultimate disposition of the appeal, and then wrote the decision to reflect that the Board did make them. Some might argue that by the act of entering the written decision, the Board adopts those findings and conclusions as its own, but this is a specious argument that, in the proven absence of productive deliberations, supports and approves of an after-the-fact justification for a decision already fully made. The Court is of the opinion that this process is suspect in light of the rather clear instruction found in *Burkey*.

The decisions of the Board confronting the Court in these consolidated cases, however, present an even more fundamental problem. With the exception of Kletter 3,[62] the written decisions of the Board fail to build the "logical bridge" between evidence, fact finding and conclusions In the absence of the necessary and sufficient factual findings predicate to the conclusions, this Court could only uphold the Board by impermissibly inferring its reasoning.

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[61] The only exception to this process occurs when the motion made is, as in Kletter 2 and 3, a motion to deny the appeal except upon one or more of the issues. The Board then engages in some measure of analysis relative to each of those issues It does not, however, engage in any analysis of the remaining issues, which are, apparently, deemed resolved by the general decision to deny the appeal on all remaining issues.

[62] The Court commends the Board for producing a clear, cogent, well-written decision in Kletter 3, which presents none of the infirmities of the decisions produced in Kletter 1 and 2 This Court remains concerned, however, about the degree to which this written decision reflects the actual deliberations of the Board.

Burkey, 213 W. Va. at 585, 584 S.E.2d at 219. As a result, they are not susceptible of review by this Court.

The written decision in Kletter 1 contains but six findings of fact, even though the appeal asserted eleven specific issues. Of those six findings of fact, number 4, number 6, and the first part of number 2, do not state factual findings at all, but are conclusions. Finding number 3, as it relates to the Jefferson County Public Service District, simply misstates the evidence.[63] As a result, some of the Board's six conclusions appear without any factual predicate whatsoever (part of conclusion number 2, conclusion number 5). Moreover, by addressing the Petitioners' five challenges to support data as a single issue, instead of addressing the specific challenges to the adequacy of the data submitted for particular items, the Board wholly failed to correctly conclude that Buckeye submitted false information on the issue of "general description of surface conditions." Consequently, the Board concluded that the support data as a whole was adequate, even though it included information that was shown to be false by the only reliable and uncontroverted evidence on the issue.

The Board's written decision of July 17, 2002, in Kletter 2, is a considerably more adequate expression of the logical bridge between fact and conclusion, and allows the Court a better idea of the Board's reasoning. However, it, too, contains some factual and conclusory defects. Finding of Fact number 8 is a conclusion, not a statement of fact. This conclusion is merely paraphrased and restated in conclusion number 6, such that it is a conclusion without any predicate fact. Finding number 5, like finding 3 in Kletter 1, simply misstates the evidence in

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[63] The PSD's letter speaks for itself. It nowhere says that it is ready and willing to provide sewer service to the proposed development, but describes the process by which it would make the determination as the development is built out. It is impossible to conclude from this letter that there is any intention on the part of the PSD to even consider service extensions to the site before it is actually developed.

regards to the Jefferson County Public Service District. This leads to conclusion number 3, which is, then, plainly wrong as to the PSD. Finding number 10 is likewise a conclusion, not a statement of fact.

Even if there were no other reasons requiring the remand of these cases, this Court would be obliged to remand Kletter 1, because the decision is fundamentally unreviewable under the standards of *Burkey*, 213 W. Va. 581, 584 S.E.2d 215, and this Court could not uphold it without impermissibly inferring reasoning that is not apparent. Kletter 2 would have to be remanded as to those facts and conclusions identified above, under the same principles. Kletter 3, however, would not be remanded on these grounds.

Certification of the Record

The proper return to the writ of *certiorari* issued by this Court in any zoning appeal is critical to the review undertaken. It is essential that this Court have before it the record developed by the Board, and only the record developed by the Board. If the record returned does not reflect all of the evidence that the Board had and considered, then it is impossible to determine that the Board's findings are based upon the reliable, probative and substantial evidence in the whole record.[64] On the other hand, the Board's decision cannot be upheld on the basis of evidence that it did not have and could not have considered, and it is improper to present to this Court, as part of the "record," any evidence that was not actually developed before the Board.[65] In sum, this Court must have an accurate record; failing to include evidence that should

[64] As a result of which, this Court might reasonably decide that the Board's findings are not supported by substantial evidence, when, in fact a complete record would reveal that they were

[65] As a result of which, this Court could be misled to believe that the Board's findings were supported by substantial evidence in the record, when in fact they were not

be included or including evidence that should not be included are both mistakes that threaten the integrity of the review process.

W. Va. Code § 8-24-63 prescribes the manner in which the Board must respond to a writ of *certiorari* issued by this Court. It provides:

> The return to the writ of certiorari by the board of zoning appeals must concisely set forth such facts and data as may be pertinent and present material to show the grounds of the decision or order appealed from. The return must be verified by the secretary of the board.
>
> The board shall not be required to return the original papers acted upon by it. It shall be sufficient to return certified copies of all or such portion of the papers as may be called for by the writ.

In each of the instant cases, the return of the record was made and verified by the Zoning Administrator, not the secretary for the Board.[66] Also, in each of the three cases, the record returned to this Court includes materials that post-date the hearings before the Board, and, in some instances, appear to be related to entirely different administrative proceedings.[67] Furthermore, in only a few instances is this Court able to definitively determine which materials the Board actually received and considered, and which were not.

Counsel for the Board explained to this Court that the Zoning Administrator certifies all of the records in these proceedings as the custodian of all of the records in the Office of Zoning, Planning and Engineering.[68] Moreover, counsel explained that all of the records pertaining to a project are maintained by the Zoning Administrator in the Office of Planning,

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[66] Who was identified to the Court as one Becky Burns April 12, 2004 (afternoon) Tr at p 84.

[67] For example, the record certified in Kletter 2 contains items relating to Planning Commission proceedings occurring as much as four months after the hearing before the Board

[68] April 12, 2004 (afternoon) Tr at p. 84-86

Zoning and Engineering, not just those of the Board, but those of the Planning Commission, as well.[69] While the statutes do not suggest to this Court that the records of the Board's proceedings are to be commingled with the records of other administrative planning and zoning bodies,[70] that is not the Court's concern at present. What is the issue is that, whatever records are collectively maintained by the Zoning Administrator in his office, the only ones that are to be certified to this Court in an appeal from the Board are those materials that were actually a part of the record of the Board. That clearly was not done here. Accordingly, this Court really cannot tell which information the Board received, considered or relied upon, and which it did not.[71]

The Zoning Administrator is not the Board nor an employee thereof. He is an official whose decisions are appealed to and reviewed by the Board. This creates a situation where it is imperative that all concerned recognize and maintain the distinctions between the two.[72] This Court is interested in the information that was available to the Zoning Administrator only to the extent that such information was actually accepted by the Board as evidence in its proceedings.[73]

Buckeye argues that the failure of the secretary for the Board to verify the return

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[69] *Id.*

[70] *See, e.g.*, W. Va. Code § 8-24-54.

[71] Except to the extent that the Court is relatively sure that the Board did not consider materials received in the Zoning Administrator's office after the hearing in the matter.

[72] Even in the absence of any other reason, the distinction must be maintained in order to avoid the appearance of impropriety. This Court is reminded that, as recently as the time period in which the *Corliss* appeal to the Board was heard, it was apparently common for the Zoning Administrator or his staff members to remain with the Board during its non-public deliberations, even in those matters in which the decisions of the Zoning Office were at issue. *Knott v. Meyers*, Civil Action No. 99-C-59.

[73] W. Va. Code § 8-24-56 provides that, upon request of the Board, the official or board from whom appeal is taken shall transmit to the Board all documents, plans and papers that constitute the record of the action from which appeal is taken. Whether or not the Board made such a request in these cases is not revealed in the record.

to the writs in these cases is of no consequence.[74] Buckeye may be correct that the error is harmless, but it cannot be denied that the Code § 8-24-63 is clear and unambiguous in its requirement that the Board's secretary verify the return to a writ of *certiorari* Even if it the violation of this statute is substantively harmless, it certainly has the capacity to create a public perception of impropriety when the very person whose decision is the subject of the Board's review is the same person that certifies the record to this Court. Furthermore, it appears not to be substantively harmless in these cases, as the Zoning Administrator has certified his files, and not the Board's record, to this Court for review.

The Court is reminded of the words of the West Virginia Supreme Court of Appeals, quoted previously herein. "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." *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). In the instant cases, however, the record certified to this Court would be improper no matter who had verified it.

This Court concludes that it does not have before it a proper record for review.

Extra-Record Averments

Compounding the difficulty encountered by this Court because of the uncertainty of the record before it in each of these consolidated cases is the assertion, in the submissions to

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[74] April 12, 2004 (afternoon) Tr at p. 87-88. Buckeye's counsel suggests that the provision is directory instead of mandatory, but does not explain his legal basis for this conclusion

this Court, of factual averments that appear to be wholly unsupported in the record of the proceedings before the Board.[75] While this may appear to be of minor importance, it is problematic for the Court on several levels. In the first place, when a party or its counsel makes a factual assertion that would influence this Court's review of the Board's ultimate ruling, it compels the Court to undertake a time-consuming reexamination of the record of the Board; when the fact is one that was not part of the record developed, that search amounts to nothing more than a wild goose chase and a waste of the Court's time. Secondly, when a party or its counsel asserts a fact that was not developed before the Board, it is, generally speaking, impossible that such fact, even if true, influenced the Board's decision-making; as such, the Court is of the opinion that the party making the assertion, in observation of its duty of candor to the Court, has an obligation to accurately present the fact as one not established by the evidence or considered by the Board. Third, when a party or its counsel asserts as fact that which the record of the Board's proceedings does not reveal, this Court has no means of ascertaining the party's or counsel's good faith basis, under Rule 11, for making the assertion.[76] Fourth, the assertion of such a fact works a fundamental unfairness to the opposing party. And, lastly, as this Court has seen, such assertions have an insidious way of becoming accepted as the facts of the case if not timely intercepted.[77]

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[75] The Court is not referring to the situation where a party makes a proper motion, pursuant to W Va. Code § 8-24-64, to supplement the evidence below. The Court's concern is directed solely at those instances where a party, supports its arguments to this Court, in part, by reference to facts that were not developed before the Board.

[76] The Court would remind counsel that compliance with W.V.R.Civ P. 11 is determined as of the moment that the assertion is made. The fact that subsequent investigation may reveal that the assertion happened to be correct does not excuse the fact that the party or counsel did not have a good faith basis at the moment that the averment was made to the Court. Rank speculation and wishful thinking do not constitute good faith bases under Rule 11.

[77] Two examples come immediately to mind. As the Court observed earlier, the Supreme Court in *Corliss* apparently accepted as fact that the linear method of adjacent land measurement enjoyed long-

Several such assertions were advanced by Buckeye in its brief in support of the Rule 60(b) Motion now before the Court. In each instance, the Court granted Buckeye ten days to supplement its memorandum[78] with citations to the record evidence which would support its assertions.[79] Buckeye submitted a supplemental memorandum within the period allowed by the Court on most, but not all, of the issues.

Regarding, for example, the assertion that these cases were appeals to the Board

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standing approval of the Board, even though the record is devoid of any reference to prior Board rulings on the question, and this Court knows of no case where the Board had been called upon to decide it.

Additionally, *Corliss* suggests acceptance of the factual premise that is implicit in the argument of the developer in that case that the Comprehensive Plan could not be a source for understanding the intended application of Ordinance provisions because the Ordinance was adopted in 1988, but the Comprehensive Plan was not adopted until 1994. *See, Corliss*, at n. 18. In point of fact, the county's first Comprehensive Plan was adopted in 1972, and was subsequently revised in 1986 and 1994. The provisions setting forth the policies for the harmonious development of the Rural District found in the Plan that was in effect at the time of the enactment of the Ordinance, that is, the 1986 Plan, are substantially identical to those found in the 1994 Comprehensive Plan. Any suggestion that the Rural District policies found in the current Comprehensive Plan "post-date" the enactment of the Ordinance is simply unfounded. Moreover, Section 1.3's admonition that the provisions of the Ordinance shall be applied so as to promote the intent of, *inter alia*, the Comprehensive Plan, suggests to the Court an original intention to enact a flexible document that would remain viable in spite of the changing circumstances that may be reflected in the subsequent, periodic revisions of the Comprehensive Plan.

[78] The Court did not order Buckeye to supplement, but merely afforded it the opportunity to do so if it so chose.

[79] Although less "factual" in nature, Buckeye also attributed to this Court an order that it did not make. On page 50 of the original Opinion Order in this matter, this Court refused to find error in the Board's approval of the water and sewer LESA scores assigned by he Zoning Administrator In so doing, the Court expounded on its understanding that, in the multi-stage DRS process, a project that secured a CUP upon, *inter alia*, its representation that it would have "public sewer" would not get final plat approval if that proposed service was not ultimately committed by the service provider. This explanation is consistent with this Court's understanding, formed, in part, on the basis of the representations to this Court in *Corliss*, that this is why LESA scores had to be seen as mere preliminary assessments (an understanding that the Supreme Court also seems to have gained in *Corliss*). Buckeye mischaracterizes this rather obvious explanation of the Court's understanding as an attempt by the Court to order the Board to interpret the provision in a particular way. April 12, 2004 (morning) Tr. at p. 34-36. Buckeye's Memorandum at p. 7 This Court can only observe that if its understanding of the preliminary nature of LESA calculations is incorrect, the understanding on which the Supreme Court based its holding with regard to the adequacy of support data is equally incorrect, and bears candid correction by the parties. In particular, it bears correction by Buckeye, which stands to gain the most if the understanding is wrong.

challenging the issuance of CUPS,[80] Buckeye produced information from Planning Commission meeting minutes showing that a CUP was issued in Kletter 1, but not in Kletter 2. While the Court appreciates the effort behind Buckeye's supplementation, it fears that Buckeye missed the point of the Court's original concern.

This Court did not question Buckeye's assertion on this point because it wished to confirm that any of the subject projects did or did not secure a CUP. The Court's concern was that Buckeye's assertion framed the appeals to the Board in these matters in an inaccurate way that required correction. There is a substantial difference in the Board's review of the Planning Commission's decision, rendered following a defined public process, to issue or deny a CUP, and the review of a preliminary decision of a single administrative employee. These cases involved the latter, not the former, and the distinction is important to the proper analysis of these appeals.

Suffice it to say that Buckeye's supplemental submission provided no proof whatsoever that its assertion regarding the nature of the proceedings before the Board was an accurate portrayal.

Buckeye made an untimely supplementation on one issue. Specifically, Buckeye did not make a timely supplementation to support its assertion that the Board has "for years" employed the interpretation of Section 5.7(d)[81] that is challenged by the Petitioners in the instant case.[82] The supplementation that was made consisted of an affidavit from the Zoning

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[80] April 12, 2004 (morning) Tr. at pp. 12-16 Buckeye's Memorandum at pp. 2-4, 23

[81] April 12, 2004 (morning) Tr at pp. 23-28; April 12, 2004 (afternoon) Tr at p 40 Buckeye's Memorandum at p 8; *see, also,* p. 10 at n. 14 Moreover, counsel for the Petitioners represented that Buckeye also had made this factual assertion in the brief in support of its petition for writ of *certiorari* to the Supreme Court, which was filed in advance of the hearing on the instant motions April 12, 2004 (morning) Tr at p. 32.

[82] The supplement was not submitted within ten days, but was submitted two months after oral argument

Administrator wherein he stated that he was responding to the request of Buckeye's counsel, set forth in a letter of April 21, 2004,[83] which questioned him regarding the "policy of the Jefferson County Department of Planning Zoning and Engineering" regarding Section 5.7(d) of the Ordinance. The Zoning Administrator, in response, stated, in essence, that the challenged interpretation had been *his* interpretation for many years. The Affidavit gives no indication of a long-standing approval of that interpretation by the Board, or even suggests that the Board had ever, before the instant cases, been confronted with the question. Again, the Court believes that Buckeye misunderstood the point of this Court's inquiry.[84]

This Court did not question an assertion that the *Zoning Administrator* had adopted and used any given interpretation of a provision of the Ordinance "for years." It questioned the assertion that the *Board* had adopted the interpretation in question "for years." Consequently, attempting to answer the question by submission of an affidavit from the Zoning Administrator attesting to his interpretation is wholly nonresponsive.[85] This Court does not review the decisions of the Zoning Administrator, but those of the Board, and those are the decisions that are of interest in these consolidated appeals.

When a party argues to this Court that the Board has approved a given application or interpretation of the Ordinance for years, there are few discernible reasons for such assertion but an attempt to further bolster the presumptive correctness of the Board's ruling by creating the

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[83] That is, the request to Mr Raco is dated but one day before the deadline to submit supplementations granted by this Court.

[84] Moreover, the fact that Buckeye had to send an inquiry to the Zoning Administrator in order to seek confirmation of an assertion that it already had made before this Court – and has apparently already included in a petition to the Supreme Court – rather tends to indicate that it did not have a factual basis for the assertion at the time that it was made.

[85] It would be like seeking an affidavit from a member of the bar to use as proof of this Court's prior interpretations of a point of law.

impression that it is the tenured product of multiple opportunities for analysis yielding the same result.

The Board does not have operational oversight of the Zoning Administrator and his staff, and does not give on-the-spot approval of the practices of that office The Board makes a decision regarding the proper application or interpretation of a provision of the Ordinance only when an appeal is brought before it that provides the occasion for review. Until such occasion is presented to the Board, its approval or disapproval of the interpretations and applications used by the Zoning Administrator have not been made and cannot be known. Until such time as the Board entertains an appeal, reviews a determination of the Zoning Administrator and approves his determination, his working interpretations and applications are his alone and cannot be attributed to the Board. If one assumes that the decisions of the Zoning Administrator are the decisions of the Board, the Board becomes superfluous and might just as well be abolished.

The Court cannot make this point in strong enough terms: the Zoning Administrator does not share a common identity with the Board of Zoning Appeals. He does not think for the Board, he does not speak for the Board and he does not act for the Board. His decisions are not the Board's decisions, and it is wholly improper to attribute to the Board those decisions that are, in fact, those of the Zoning Administrator alone.

Buckeye failed to prove the veracity of its assertion that the Board has used the challenged interpretation of 5.7(d) "for years." Neither the record of these cases nor the supplementation by Buckeye provides any evidence whatsoever that the Board had, before Kletter 1, ever confronted a challenge to the Zoning Administrator's interpretation of Section 5 7(d) of the Ordinance

Substantive Challenges

Having already determined that these matters must be remanded to the Board for the various reasons discussed above, and in keeping with the lessons of *Corliss*, 214 W. Va. 535, 591 S.E 2d 93 (2003), this Court concludes that it is proper that these cases be remanded to the Board without directions as to the ultimate rulings that it should make on the substantive issues presented. It necessarily follows, therefore, that the substantive conclusions of this Court in the original Opinion Order are not binding upon the Board in its review on remand.[86] The Board should apply its independent judgment to the evidence developed in proper proceedings to resolve the questions presented "as in its opinion ought to be done," W. Va. Code § 8-24-55, limited only by the applicable rules of statutory and case law.

Adequacy of Support Data

Corliss imposes few limitations upon the Board's exercise of its discretion. As to the adequacy of support data, for example, *Corliss* establishes only that in determining adequacy, the Board should consider whether the information provided is responsive to the item listed and whether the information is sufficient to inform the public so as to allow meaningful public participation in discussion about the projects. The *Corliss* Court did not, however, dictate that the Board must find any particular quantum or quality of information adequate, leaving the Board to exercise its discretion to apply the two-prong standard of adequacy to the particulars of the project before it Specifically, the Supreme Court did not require that the support data that it found to be adequate in *Corliss* would necessarily be adequate in all cases

It does, however, seem to this Court to be axiomatic that, in order to be adequate,

[86] Which is not to say that the Board cannot decide to take from the Opinion Order such reasoning as, in its opinion, is proper

support data must be accurate and truthful The *Corliss* Court did not have occasion to address the circumstance, presented herein, where colorable challenges to the truthfulness of data submissions are advanced. This Court is confident, however, that in no case would the Supreme Court require the Board to accept as adequate that which is shown, by competent evidence, to be inaccurate.

In its original decisions in these cases, the Board rendered certain rulings that were inconsistent. That is, data accepted as adequate in one case was deemed inadequate in another. Clearly, the Board should resolve these inconsistencies or should clearly explain the differential determinations.[87]

Interpretation of Section 5.7(d)

The interpretation of the provision of an ordinance, like the interpretation of a statute or regulation, is a process that is subject to established rules of statutory interpretation and construction. *See, e.g.*, Syll. Pt. 1, in part, *Town of Burnsville v. Kwik-Pik*, 185 W. Va. 696, 408 S.E.2d 646 (1991). While the Board must exercise its discretion in the resolution of this issue, that discretion must be exercised within the bounds of the established rules of law for the question at hand. In a properly supported decision on this issue, the Board will identify the rules of interpretation or construction that it employed, and explain its reasoning in the application of that rule to the provision at hand.

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[87] Because every piece of land is unique, development proposals present different concerns These cases, however, involve proposals for parcels that were once a single parcel. Of course, this does not mean that the parcels are identical, either But, where differences give rise to concerns that may prompt the call for more detailed support data, those concerns should be clearly identified so as to explain the requirement of additional submissions. The Court also notes that while Kletter 1 and Kletter 2 involve very similar proposals from the same developer, the proposal in Kletter 3 is significantly different in many respects The Board may or may not find that these differences relate to the consideration of support data adequacy

One of the most honored of such rules is that when a valid statute is clear and unambiguous, it must be given full force and effect according to its plain words and provisions; that is, it is impermissible to "interpret" an unambiguous statute. *See, e.g., Cookman Realty Group, Inc. v. Taylor*, 211 W. Va. 407, 566 S.E.2d 294 (2002), and cases cited therein. Accordingly, before the Board can undertake to interpret Section 5.7(d), it must first determine that it is ambiguous. Only if it finds and identifies an ambiguity can it resort to the rules of statutory interpretation and construction to resolve the ambiguity.

In this exercise, the Board may wish to consider the observations of the Supreme Court in *Francis O. Day Co., Inc. v. Director, Division of Environmental Protection*, 191 W. Va. 134, 443 S.E.2d 602 (1994).[88] The Court said, "Unlike many other words or phrases, 'all' is not susceptible to ambiguous interpretations – 'all' means everything as opposed to nothing." *Id.* at 140, 443 S.E.2d at 609.

Ruling

On the basis of all of the foregoing, it is hereby ORDERED that the decisions of

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[88] In *Day*, a limestone quarry operator was denied a mining permit by the Director, pursuant to W. Va. Code § 22A-4-10 of the surface mining and reclamation act. Section 22A-4-10 provided that, because some areas could not be reclaimed, to the end that mining would produce various adverse environmental consequences, the commissioner was empowered to delete certain areas from "all" surface mining operations. Limestone quarry operations are not susceptible of reclamation. Accordingly, another provision of the act excluded such limestone operations from reclamation and bonding requirements. Day argued that, under this exclusion, § 22A-4-10 could not be made applicable to limestone quarry operations, as it basically addressed reclamation considerations. The Supreme Court disagreed, concluding that "all" meant "all," such that the commissioner did have the power to deny a permit to quarry the area in question because of the adverse impact that was likely to result from the operation.

The Court applied the statute in a way that honored the lack of ambiguity in the word "all," despite the fact that other provisions of the act seemed to allow quarry operations to bypass § 22A-4-10 on their way to a permit.

the Board in the cases consolidated herein are REVERESED and REMANDED to the Board of Zoning Appeals.

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.

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

ENTER: July 12, 2004

THOMAS W. STEPTOE, JR., CIRCUIT JUDGE

A TRUE COPY
ATTEST:
PATRICIA A. NOLAND
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.
BY _____
DEPUTY CLERK

3cc
D. Hammer
M. Casell
P. Chakrakian
7-12-04
LR