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

THIS MATTER came on for decision this 9th day of September, 2003, upon the Petitioners' appeals, pursuant to W. Va. Code § 8-24-59, of four adverse decisions of the Respondent Jefferson County Board of Zoning Appeals. Pursuant to the agreement of the parties and prior Order of this Court, the appeals have been consolidated for decision herein because, *inter alia*, the legal principles applicable to each are functionally the same.

In reaching its decision, the Court has carefully considered all of the legal memoranda submitted by the parties.[1] The Court has reviewed the certified record of the case,

[1] It was agreed at the time of consolidation that the parties would submit to the Court a single, consolidated legal brief for consideration (unless the certification of the record in *Kletter 3* necessitated the filing of a supplement to that brief), and that all submissions would be filed in Civil Action No. 02-C-217. Nonetheless, the Court's review reveals that the parties filed multiple briefs and that documents were directed to the case file in Civil Action No. 02-C-348 after the entry of the consolidation Order. This has not only created confusion in the analysis of these cases, but has served to defeat some of the benefits sought to be conferred on both the parties and the Court by the consolidation.

including the recordings of the proceedings before the Board of Zoning Appeals.[2] The Court has studied pertinent legal authorities. As a result of these deliberations, and for the reasons more fully set out in this Opinion Order, the Court has concluded that the decisions of the Board of Zoning Appeals must be Reversed and Remanded.

Findings of Fact

The Court makes the following factual findings:

1. Each of these appeals challenge the Zoning Administrator's review and determination relative to the application for a Conditional Use Permit (hereinafter, "CUP") for the high-density residential development of one of three adjacent parcels of land. As noted at the outset of this Opinion Order, this consolidated case arises from three petitions for writ of *certiorari* seeking review of four decisions of the Jefferson County Board of Zoning Appeals (hereinafter, "the Board" or "BZA") denying each of the Petitioners' four appeals challenging the Zoning Adminstrator's review and conclusions in favor of the CUPs. The identifying information and dates relevant to each of the individual appeals, the proceedings before the Board and the petition to this Court are collected and shown in Table 1, attached hereto, and incorporated by reference herein as factual findings of the Court.[3]

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[2] Because of the extremely poor audio quality of the tape of the Board hearing in *Kletter 2*, it was not susceptible of meaningful review. By Order entered on August 21, 2003, the Court permitted the supplementation of the record with a videotape of the hearing, proffered by the Petitioners, and stipulated by counsel for the BZA and counsel for the developer Intervenors.

[3] For ease of identification, the Court has used "*Kletter 1*" to refer to the appeal respecting the Daniels Forest development, "*Kletter 2*" to refer to the two appeals challenging Forest View, and "*Kletter 3*" to refer to the Aspen Greens appeal. The Court has found this convention to be the least confusing, despite the fact that the second appeal in regards to Forest View was brought to this Court in the same Petition for Writ of *Certiorari* as the appeal respecting Aspen Greens. Where it is necessary to refer to only one of the three proposed developments, the Court has used the subdivision name.

2. Land use and development in Jefferson County is governed by a comprehensive planning and zoning regulatory scheme. The Comprehensive Plan, the Zoning and Development Review Ordinance, and other County ordinances[4] collectively constitute the County's land use regulation, each being an integral part of the comprehensive whole.

3. In accordance with the authority granted by Article 24, Chapter 8 of the West Virginia Code, and, more specifically, pursuant to Code § 8-24-16 *et seq.*, the Jefferson County Commission, in 1972, adopted a Comprehensive Plan for the physical development of the territory within the County's jurisdiction.[5] The Comprehensive Plan includes descriptions of existing conditions, examines growth and development trends and identifies the emerging and future issues with which the County will need to contend. Additionally, the Comprehensive Plan contains recommendations for the future growth and development of the County, so as to promote the public welfare and serve the objectives of planning as identified in State law. *See*, W. Va. Code § 8-24-16.

4. Pursuant to the authority granted by Article 24, Chapter 8 of the West Virginia Code, and, more specifically, Code § 8-24-39, the Jefferson County Commission adopted a county-wide zoning ordinance which it deemed necessary to implement the Comprehensive Plan. The "Zoning and Development Review Ordinance" (hereinafter, "the Ordinance") became effective on October 8, 1988, following approval by the voters of the County.[6] The Ordinance, *inter alia*, divides the County into districts, contains provisions regulating the use and intensity of use within each district and sets forth the procedures for

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

[5] The Comprehensive Plan has twice been re-examined and rewritten, once in 1986 and again in 1994. The Plan currently in use is the version adopted in 1994.

[6] Previously, County voters had defeated zoning.

securing the review of land use proposals that require the approval of the zoning authority, such as the issuance of a CUP.

5. The Ordinance describes the Rural District, as follows:

> The purpose of this district is to provide a location for low density single family residential development in conjunction with providing continued farming activities. This district is generally not intended to be served with public water or sewer facilities, although in situations where the Development Review System is utilized, it may be. A primary function of the low density residential development permitted within this section is to preserve the rural character of the County and the agricultural community. All lots subdivided in the Rural District are subject to Section 5.7(d) Maximum Number of Lots Allowed. The Development Review System does allow for higher density [if] a Conditional Use Permit is issued.

Ordinance, Section 5.7.

6. Article 6 of the Ordinance establishes the Development Review System (hereinafter, "the DRS"), the purpose of which "is to assess a particular sites (sic) development potential." *See,* Ordinance, Section 6.1. Every application for a CUP is subject to the DRS. The DRS is based upon a complex numeric calculation of specific, weighted criteria. This calculation, called the Land Evaluation and Site Assessment (or "LESA"), consists of two components: the Soils Assessment (25%) and the Amenities Assessment (75%). Ordinance Section 6.2.

The Soils Assessment evaluates the soil types found on the parcel proposed for development. Ordinance, Section 6.3. The soil types found in Jefferson County, and the assigned agricultural value of each, is provided in the Ordinance.[7] *Id.* By determining the

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[7] The Court observes that the agricultural value of each soil type has been determined using corn as an indicator crop. As a result, the Soils Assessment may neglect to account for agricultural uses that are not based on crops, such as livestock operations, in its evaluation of the parcel's agricultural viability.

percentage of the parcel composed of each type of soil, and calculating the sum of the *pro rata* value contribution of each, the total value for the parcel is calculated. This total is then weighted so as to contribute 25% of the total LESA score.

In the Amenities Assessment, points are assigned to a parcel on each of nine (9) specific criteria which are weighted, theoretically, on the basis of the importance of their contribution to the overall assessment. Ordinance, Section 6.4. The higher the points assigned on each criterion, the more agriculturally viable (and conversely, the less suitable for development) the parcel is determined to be. The nine criteria (and the maximum points possible for each) are: size of site (6/12),[8] adjacent development (10), distance to growth corridor (6), Comprehensive Plan compatibility (8), proximity to schools (12/0), public water availability (11), public sewer availability (11), roadway adequacy (6/12), and emergency service availability (5). After the points assigned on each of the nine criteria are totaled, the value is weighted so as to contribute 75% of the total LESA score.

Lastly, the weighted scores for the Soils Assessment and the Amenities Assessment are added together to yield the LESA score. For applications received prior to August 9, 2002, parcels receiving a LESA score below 60 were approved to advance to the next step of the DRS, the Compatibility Assessment Meeting. Ordinance, Section 6.5(c). On August 8, 2002, the Jefferson County Commission amended the Ordinance to make a total of less than 55 the cut-off for advancement in the DRS process.

[8] On some of the criteria, the maximum possible points are doubled for non-residential development. For proximity to schools, non-residential development is assigned a zero, presumably because such development will not contribute to the school population or produce school busing issues. In the instant cases, only the residential points are relevant.

7. Article 7 of the Ordinance contains the procedural provisions of the DRS,[9] including application filing instructions, notice requirements and the rules for the conduct of meetings and hearings. With the application for a CUP, a developer must submit a sketch plan showing the layout of the proposed development, with topographical contour lines, which includes the entire original parcel as it existed on October 8, 1988. Ordinance, Section 7.4(b). A tract location map, a soils report and a map showing the distribution of the soil types over the parcel also must be submitted. Ordinance, Section 7.4(c).

In addition to the schematic data described above, the developer must submit support data to provide the information necessary to the LESA computation and to allow meaningful public review and discussion. The Ordinance, Section 7.4(d), requires the developer to submit support data for 23 specific aspects of the proposed project, as follows:

(1) Name and address of owner/developer.
(2) Name and address of contact person.
(3) Type of development proposed.
(4) Acreage of original tract and property to be developed.
(5) General description of surface conditions (topography).
(6) Soil and drainage characteristics.
(7) General location and description of existing structure.
(8) General location and description of existing easements or rights-of-way.
(9) Existing covenants and restrictions on the land.
(10) Intended improvements and proposed building locations including locations of signs.
(11) Intended land uses.
(12) Earth work that would alter topography.
(13) Tentative development schedule.
(14) Extent of the conversion of farm land to urban uses.
(15) Effected (sic) wildlife populations.
(16) Ground water and surface water and sewer lines within 1320 feet.
(17) Distance to fire and emergency services that would serve the site.
(18) Distance to the appropriate elementary, middle, and high school.
(19) Traffic characteristics – type and frequency of traffic; adequacy of existing transportation routes.

[9] The procedures of Article 7 also are used for review of proposals not subject to the DRS, but proceeding under the regulations of the subject zoning district. Section 7.3 delineates the specific stages of the DRS process.

(20) Demand for school services created by this development.
(21) Proximity and relationship to historic structure or properties within two hundred (200) feet.
(22) Proximity to recreational facilities.
(23) Relationship of the project to the Comprehensive Plan.

Ordinance, Section 7.4(d).

8. The Zoning Administrator determines the adequacy of the sketch plan and support data. Any interested party may appeal this determination within 30 days. Ordinance, Section 7.4(g). Ten (10) days are allowed to complete this initial evaluation. Ordinance, Section 7.4(a). Additionally, the Planning and Zoning staff evaluate the applications for CUPs according to Article 6 of the Ordinance (the DRS, described above). Ordinance, Section 7.5.

9. In the instant cases, the three parcels of land proposed for development are located in an unincorporated area of the County zoned as a "Rural District" by the Ordinance. Moreover, the three parcels were created by the division of a common tract and the conveyance from a common grantor. The original tract consisted of approximately 315 acres bounded by Country Club Road to the south and Job Corps Road to the north. Flowing Springs Road formed the western boundary of all but the northernmost portion of the tract, which portion is now designated as Lot 1 and lies on both sides of Flowing Springs Road. The original tract was subdivided in 1992, creating the three parcels now appearing of record as "Lot 1," "Lot 2" and the "Residue." The plat of this initial subdivision appears of record in the Office of the Clerk of the County Commission of Jefferson County, in Flat 573A, previously found at Plat Book No. 10, at page 106.

10. All three of the proposed developments will be accessed via Flowing Springs Road.[10] Flowing Springs Road is classified as a "local service" route within the Highway Classification System. Comprehensive Plan at III3.

11. The developer[11] of each of the three parcels applied to the Jefferson County Planning and Zoning Commission for a CUP for the proposed residential developments, pursuant to the DRS described above. Each developer submitted an application, a sketch plan and support data.

12. The Planning and Zoning staff, and more particularly, the Zoning Administrator,[12] employed the procedure described above in the assessment of the subject development proposals. The Zoning Administrator determined that the applications, sketch plans and support data were adequate. Using the support data submitted by the respective developers, the Zoning Administrator performed the LESA calculation, as a result of which, he determined that each of the three proposed developments "Passes for development." The scores assigned to each of the projects were:

(1) Daniels Forest: 57.04 points;

(2) Forest View: 58.16; and,

(3) Aspen Greens: 56.7 points.

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[10] The sketch plan for Daniels Forest also shows access from Job Corps Road, and Aspen Greens shows an entrance from Country Club Road. Each of these roads feeds into Flowing Springs Road, which, in turn, feeds into the nearest main highway (Route 9).

[11] The owner in fee and the developer of each parcel is shown in Table 1. In their brief, the Intervenors identify the developer of each parcel as a "contract vendee." The Court supposes this to mean that the purchase of the property has not yet been consummated, and further supposes (but does not find) that the consummation of the purchase is conditional upon the approval of the development project by the zoning authorities.

[12] "Zoning Administrator" refers to Paul Raco, whose title, according to documents in the file, is Executive Director of the Office of Planning, Zoning and Engineering.

Within 30 days of the Zoning Administrator's determination with respect to each proposal, the Petitioners[13] herein filed an appeal to the BZA.

13. Upon receiving a passing score from the Zoning Administrator, each developer placed upon the subject property a sign that displayed information (date, time, place) regarding the Compatibility Meeting. Pursuant to Section 7.5(b) of the Ordinance, the sign was prepared and provided to each developer by the zoning office staff. In each instance, the sign placed on the property was placed near the edge of, and facing, the road adjacent to the property.

14. Jan Carey Kletter and his fellow Petitioners are the owners of neighboring properties, and assert that they are aggrieved by the Zoning Administrator's determinations relative to the proposed developments. The Blue family[14] operates a dairy farm on properties across the road from the subject parcels. Petitioner Corliss farms on property nearby.[15] Each of the Petitioners asserts that he/she is aggrieved by the Zoning Administrator's determination that the three parcels are appropriate for high-density development.

The Blues contend that the continuing viability of their farming operations will be jeopardized by conditions produced by the development of 620 home sites.[16] The Blues assert that they must traverse Flowing Springs Road to drive slow-moving tractors and other farm

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[13] The Court notes that Gregory Corliss, one of the Petitioners to this Court, was not a signatory appellant to the BZA in Kletter 1.

[14] Richard, James, John, Paul Michael and Nell Louise Blue, each of whom is a named Petitioners.

[15] In one of the hearings in this Court, the statement was made that Mr. Corliss was an adjacent landowner. The Court can find no proof of this fact in the record. Mr. Corliss was not named as an "adjacent/confronting" landowner in any of the three applications, and the exact location of his farm was not established before the Board.

[16] The Petitioners jointly assert that the proposed developments threaten continued farming operations in the vicinity. Mr. Blue testified before the Board in *Kletter 1*, providing his family's experience as evidence supporting the Petitioners' joint contentions regarding continuing agricultural viability in the face of the developments proposed. For reasons that will be discussed later in this Order, it would not have been feasible for all of the Petitioners to testify before the BZA.

equipment[17] to various points of their farm.[18] They argue that this common usage in farming locales is inconsistent with the significant increase in faster-moving traffic that will attend these developments, and will create a dangerous situation.

Mr. Blue testified that the decreasing availability of drillable water is even now a problem for their operation, which uses 6,000 to 7,000 gallons of water per day. He stated that the lowered water table has already forced them to drill a new well, and that they are now drilling as deep as 1200 feet to find usable water. The Blues also express concern that, with the addition of dense residential developments, the groundwater run-off that drains into Cabin Run, which crosses their property, will expose them and their livestock to harmful pollutants.

In addition to the dangers that the developments will pose to their farm, the Blues also provided evidence that their farming operations pose a threat to the safe and quiet enjoyment of the residents of the proposed developments. Mr. Blue testified that their operations produce noises and smells that will be offensive to nearby residents, and subject them (the Blues) to complaints, protests or other attempts to interfere with their farming activities. Moreover, the Blues assert that their livestock present a real danger to individuals, especially children, who may enter the pastures. The Blues contend that, in view of these known dangers, the addition of such large neighborhoods in close proximity to their farms will subject them to a significantly greater liability exposure and other problems. In sum, Mr. Blue testified that farming activities and large residential populations cannot safely coexist in close proximity to one another.

Mr. Corliss likewise asserts that he is aggrieved by the threat to his farming operations that the proposed development would produce.[19]

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[17] The Blues produced evidence that the top speed of the equipment is 18 m.p.h.

[18] The Blues operate on two properties, located two miles apart.

Dr. Kletter does not farm. He lives near the subject parcels and routinely travels Flowing Springs Road. His assertion of unique harm arises from his professional responsibility to respond to emergency calls at Jefferson Memorial Hospital. Dr. Kletter contends that the traffic congestion that these developments are likely to produce may render him unable to respond to medical emergencies within the acceptable time frame.

15. A public hearing was scheduled in each of the four appeals to the BZA, and the hearings were duly announced by publication and notice to interested parties. By leave of the BZA, each of the developers was permitted to intervene in the appeal involving that developer's project. The hearings were conducted according to the procedures established in the Ordinance at Section 7.7.[20] The established procedure includes time limits on the presentations of the various participants, which are: 30 minutes for the developer or applicant,[21] 15 minutes for each group, 5 minutes for each individual and then 15 minutes for the rebuttal presentation of the developer or applicant. At each of the BZA hearings in these cases, at least one of the Petitioners presented the issues challenged in the appeal, the Zoning Administrator presented his position and the developer presented his position.[22] The Board also accepted comments from members of the public in attendance. In none of the hearings were witnesses offered, questioned and subjected to cross-examination by opposing parties.

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[19] Mr. Corliss did not testify before the Board. *See* fn. 15, *supra.* The Court notes, however, that Mr. Corliss has testified in a previous matter in which this Court has made specific findings regarding his farming operations. *See, Corliss, et al., v. Jefferson County Board of Zoning Appeals,* Civil Action No. 01-C-139.

[20] The Court notes that this procedure apparently was developed with the public Compatibility Meetings in mind. The Board, however, also uses this procedure for hearings on appeals, pursuant to Ordinance, Section 7.7(b).

[21] Insofar as this is the procedural protocol employed by the BZA for appeal hearings, the opening 30 minute presentation must be understood to apply to the appellant, even though the Ordinance only speaks in terms of the developer or applicant under the DRS. As noted previously, the procedure obviously was established for the public Compatibility Meetings.

[22] The developers spoke through counsel or an agent.

16. The specific challenges made by the Petitioners in each of the appeals to the BZA are identified and collected in Tables 2, 3 and 4, attached hereto and incorporated herein as findings of the Court.

17. At the end of each of the hearings, the BZA announced its decision on the appeal, although the Findings of Fact and Conclusions of Law were not entered until approximately thirty (30) days later in each appeal. The decision announced in each of the hearings can be summarized as follows:

In Kletter 1, the Board denied the appeals of the Petitioners on all issues presented for consideration.

In the first appeal in Kletter 2, the BZA granted the appeal on three support data issues, those being (1) effected wildlife populations, (2) ground and surface water and sewer lines within 132 feet, and (3) adequacy of existing transportation routes. The Board denied the appeal on all remaining issues. The Board remanded the matter to the Executive Director of Planning, Zoning and Engineering[23] and allowed the developer thirty (30) days to supplement the inadequate support data.

In the second appeal in Kletter 2, the BZA denied the appeal on all issues.

In Kletter 3, the Board granted the appeal on two issues, and denied the appeal on all other issues. The BZA agreed with the Petitioners that the support data was inadequate for effected wildlife populations. Additionally, the Board agreed that the sketch plan failed to show the original plat as is existed in 1988 upon the enactment of the Ordinance. The matter was remanded to the zoning staff, and the developer was allowed a "reasonable time" to supplement his support data and sketch plan.

[23] That is, the Zoning Administrator.

18. Upon subsequent entry of its Findings of Fact and Conclusions of Law, the Board provided each party with a copy of same.

19. Within thirty (30) days of each of the hearings before the Board, the Petitioners filed a Petition for Writ of *Certiorari* to this Court, appealing the adverse rulings. The writ prayed for issued in each case. The owner and contract developer of each of the three tracts was granted leave of the Court to intervene. Additionally, Jefferson Utilities, Inc., in the absence of any objection, was granted leave to intervene in *Kletter 3*.[24]

Assignments of Error

Numerous issues are presented by the Petitioners' assignments of error and the Respondent's and Intervenor's responses thereto.[25] The Petitioners' assignments of error are:

1. That incorrect LESA scores were assigned for

    a. Compatibility with Comprehensive Plan - historical and recreational;

    b. Proximity to schools;

    c. Availability of public water;

    d. Availability of public sewer;

2. That the LESA system is fatally flawed (facial challenge);

3. That the Ordinance prohibits the subdivision of non-residue parcels;

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[24] The Petitioners, in *Kletter 3*, served a "Notice to Interested Party" upon Jefferson Utilities, Inc., whereupon the latter sought leave to intervene as a party. It appears to the Court that the only relationship that Jefferson Utilities has to the proposed development is having been contacted by the developer for the purpose of potentially providing public water and sewer to the home sites. No party objected to the intervention, and the Court has not been asked to decide whether or not Jefferson Utilities, which, as a "member of the public," voiced its objection to the appeal before the Board, is a "property owner" contemplated to be given notice under W. Va. Code § 8-24-60 as an adverse party.

[25] Despite the significant commonality of issues between the three consolidated cases, the Court notes that not all of the assignments of error were asserted in all three of the cases. For assistance in identifying the errors asserted in each of the three underlying cases, the Court again refers the reader to Tables 2, 3 and 4.

4. That the support data submitted was inadequate for:

a. Type of proposed development;

b. General description of surface conditions;

c. Soil and drainage characteristics;

d. Intended locations of improvements and proposed building locations including locations of signs;

e. Extent of conversion of farm lands to urban lands;

f. Effected (sic) wildlife populations;

g. Ground water, surface water and sewer lines within 1320 feet;

h. Distance to fire and emergency services;

i. Traffic type and frequency, and adequacy of existing routes;

5. That the public notice posting of the property was inadequate;

6. That the reduced LESA score cut-off should apply to these projects;

7. That the zoning decision fails to conform to the Comprehensive Plan;

8. That the Compatibility Meetings are conducted so as to deny due process to members of the public;

9. That the Zoning Administrator failed to make the necessary finding regarding the adequacy of the support data;

10. That zoning officials have failed to apply to these project reviews the legal conclusions contained in this Court's orders in prior zoning cases.

The Respondent and Intervenors affirmatively assert that:

1. The Petitioners lack standing to bring this appeal; and,

2. The Petitioners have failed to meet their burden of proof.

The Court notes that the parties have raised three other questions that, beyond this brief treatment, the Court will not address within the scope of this Order. The Petitioners ask this Court to rule that the 30-day time limit for the filing of a Petition for Writ of *Certiorari* does not begin to run until the Board enters its Findings of Fact and Conclusions of Law. Clearly, the rule could not be otherwise. As noted above, the Board in each of these cases announced its decision at the end of the hearing, and subsequently issued its Findings of Fact and Conclusions of Law. The oral announcement by the Board of its decision was, for example, a simple "appeal denied," without findings or conclusions. Until the entry of the Findings of Fact and Conclusions of Law, the Petitioners could not have known which of the factual or legal bases for the decision would be susceptible to a colorable challenge on review, *see, Henry v. Jefferson County Planning Comm'n,* 201 W. Va. 289, 496 S.E.2d 239 (1997), and could not prepare the precise appellate challenge that should be submitted in these cases for meaningful review by this Court. The decision that will actually be reviewed by this Court should be the decision from which appeal is taken.

The Respondent Board asks the Court for advice and direction in establishing guidelines for the assessment of the adequacy of the support data. The Court is of the opinion that the establishment of specific criteria for support data submissions rests exclusively within the province of the county legislative body. Such rule-making is neither the function of the Board nor this Court. If the Board finds direction to be lacking within the existing Ordinance, it should communicate this concern to the County Commission.

The Intervenor, Jefferson Utilities, in its Motion to Intervene and responsive brief, asks this Court to deny the appeal of the Petitioners. Additionally, Jefferson Utilities seeks to have this Court rule that the Zoning Administrator is in error in that he consistently assigns a

value of 3 to the LESA scoring criterion for availability of public water when Jefferson Utilities is the proposed provider of water to the development. Jefferson Utilities argues that, although it is a privately owned company, it is subject to regulation by the Public Service Commission, and provides public water. Accordingly, Jefferson Utilities argues that the LESA score for availability of public water should be zero, not 3. The Court is of the opinion that this issue is not properly before the Court. W. Va. Code § 8-24-59 provides that "any person aggrieved ... by any decision or order of the board" may petition the circuit court for review by *certiorari*. Jefferson Utilities did not appeal the decision of the Board. The Court finds no authority in Chapter 8, Article 2, to allow parties to use intervention in existing appeals as a substitute for the filing of a timely petition.

Analysis

Standard of Review

This appeal asks the Court to reverse decisions of the Jefferson County Board of Zoning Appeals. "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 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.

In order to apply this standard correctly, a court must keep in mind the legal nature and status of zoning regulations when it reviews the decision of a zoning board. 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 and its enforcement, therefore, requires only that the restrictions imposed thereby "are 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. It is with these principles in mind that the Court now turns to the issues presented by this appeal.[26]

Standing

The Intervenors[27] assert that the Petitioners lack standing to challenge the BZA decisions regarding these proposed developments.[28] Their argument against standing is two-fold: (1) That the Petitioners' interests in the decisions of the zoning authority are not such that

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[26] The Court has taken the liberty of not addressing the issues in the order in which they were presented in the Petitions.

[27] The County does not challenge the standing of these specific Petitioners, but objects that strict proof is not made.

[28] It does not appear to the Court that the Intervenors challenged the standing of the Petitioners to bring their appeals before the BZA. There is no mention of standing in any of the four decisions entered by the Board in the underlying matters. As a general rule, this would prevent this Court from addressing the issue pursuant to a writ of *certiorari.* See discussion, *supra.* The Court notes, however, that the issue of standing is raised in nearly all, if not every one, of the BZA appeals brought to this Court, and has been the subject of past rulings. Those analyses merit repeating here, even though the Intervenors may have waived the issue. Moreover, could it be that the Intervenors concede the standing of the Petitioners to appeal to the Board, but challenge their standing to bring a petition for writ of *certiorari* to this Court?

will confer standing to challenge those decisions through appeal; and, (2) That even if the Petitioners' asserted interests were such as would give rise to standing, the Petitioners have failed to prove that those interests are, in fact, threatened by these zoning decisions.

The statutory provision conferring the right to seek review of a BZA decision by writ of *certiorari* in this Court is W. Va. Code § 8-24-59, which states:

> Every decision or order of the board of zoning appeals shall be subject to review by certiorari.
>
> Any person or persons jointly or severally aggrieved by any decision or order of the board of zoning appeals may present to the circuit court of the county in which the premises affected are located a petition duly verified, setting forth that such decision or order is illegal in whole or in part, and specifying the grounds of the alleged illegality. The petition must be presented within thirty days after the date of the decision or the order of the board of zoning appeals complained of.

The instant matters seek review of decisions rendered within the Article 7 DRS process, which adopts the statutory provision in reference to appeals to this Court. It states:

> Any person may appeal any decision of the Board of Appeals to the Circuit Court of Jefferson County subject to Article 8, Chapter 24, Subsection 59, of the West Virginia Code, as amended.

Ordinance, Section 7.6(i).[29] Additionally, Article 8 of the Ordinance identifies those parties who may appeal to the Board:

> An appeal to the Board may be taken by any person, board, associate, corporation or official allegedly aggrieved by any administrative decision based or claimed to be based, in whole or in part, upon the provisions of this Ordinance. The property owner of the subject appeal shall sign the application or an affidavit allowing an agent for the property owner to file the application which shall be submitted.

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[29] The Court observes that the text of Section 7.6(i) mischaracterizes W. Va. Code § 8-24-59 as a *subsection*, when in fact it is a *section*. Because Code § 8-24-59 is a single provision, and contains no subsections, this faulty identification is harmless in this instance. The Court notes, however, that such imprecision in reference to codified law can create confusion and should be avoided.

Ordinance, Section 8.1(a). These provisions must be considered collectively to address the challenge to standing asserted by the Intervenors.

The resolution of the question of standing turns upon the meaning of the word "aggrieved." The Intervenors argue that the word "aggrieved," though not defined within the statute, should be given the meaning consistent with the legal test for standing announced in the case of *Barker v. City of Charleston*, 134 W. Va. 754, 61 S.E.2d 743 (1950). In *Barker*, a case involving the city's decision to abandon part of a street and two alleys, the Court held that only persons whose own property abutted the street or alleys, or persons who would suffer special or peculiar damage or inconvenience not common to all had standing to challenge the decision. *Id.*, at Syll. Pt. 2. The Intervenors argue that none of the Petitioners are abutting landowners,[30] and that none have shown that he/she will suffer any special damage not common to the public at large.

This Court rejected the Intervenors' narrow conceptualization of standing in the case of *Corliss, et al., v. Jefferson County Board of Zoning Appeals*, Civil Action No. 01-C-139. Nothing has been brought to the attention of the Court in these cases that would compel it to conclude that its rationale in *Corliss* was incorrect. Moreover, this Court is of the opinion that even under the narrow holding of *Barker*, 134 W. Va. 754, 61 S.E.2d 743, the Blue family members would have standing to challenge the decision of the Zoning Administrator with

[30] The Intervenors concede that the Blues own a dairy farm diagonally across Flowing Springs Road and across Job Corps Road from the proposed developments. The Court is not convinced that this does not make the Blues adjoining owners. In the usual course of things, the State acquires only a right-of-way in the property under a road, and not ownership in fee. Consequently, the fee estates of the property owners on either side of a road do, in fact, adjoin. Because this evidence was not adduced in these proceedings, however, the Court does not include this among its findings. Moreover, because of the Court's analysis of the standing question, this finding is not necessary to the Court's conclusion. The Court merely points out that the Intervenors' factual assertion may well be wrong.

respect to the proposed developments. The Blues' are "confronting" landowners,[31] as their property is right across the roads from the proposed developments, and they have presented evidence that the farming operations that they conduct on their property will be disadvantaged and threatened by the addition of the high-density residential communities. The threats to their operations are those already recognized by this County's legislative body as real.[32] This Court concludes, therefore, that the Blues are "aggrieved," and, adopting the doctrine of dependent standing, finds it unnecessary to assess individually the standing of the other Petitioners.[33] *See, e.g., Lindsey Creek Area Civic Assoc. v. City of Columbus*, 249 Ga. 488, 292 S.E.2d 61, at n. 4, *citing* 3 Rathkopf, *The Law of Zoning and Planning*, at Section 43.05.

This Court remains convinced that the holding of *Barker* is unduly restrictive in this context for a number of reasons. The Court in *Barker* cited no statutory authority for the petition filed by the citizens, and it may be that the case involved common law standing, and not standing conferred by statute or ordinance. This Court is of the opinion that the legislature can choose to confer standing by statute to persons who may not enjoy standing under common law analysis. Likewise, within the parameters of its statutory authority, the County Commission can choose to confer standing to challenge zoning decisions to persons whose interests may not meet the narrow common law rule of *Barker* and similar cases.

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[31] And may be adjoining, *see* fn. 29, *supra.*

[32] Comprehensive Plan at III-103. Indeed, underlying many of the provisions regarding the preservation of viable agricultural land and the review of proposed developments is the recognition of the general incompatibility of large residential populations in close proximity to farming operations, and the dangers that each typically presents to the other. The reasons behind the nearly universal prohibition against keeping livestock in town have equal force when the town attempts to move to the neighborhood of the livestock.

[33] Although a conclusion is not required, the Court will observe that it is of the opinion that even under the most liberal view of standing, Dr. Kletter's assertion that he has an interest in preserving his current commute time, standing alone, would probably fail to survive a standing analysis.

The Ordinance requires that notice of CUP applications be given to adjacent and confronting property owners by registered mail, and to interested members of the public by publication and posting of the property. The public notice provisions of the Ordinance may be regarded as an acknowledgement that persons other than those owning adjacent land can be aggrieved by decisions of the zoning authorities,[34] and suggests a broad view of standing. Moreover, standing based upon a person's particular interest is not necessarily defeated merely because that interest is shared by persons not before the Court.[35] Special does not mean singular, and the harm to one landowner should not be ignored as a basis for standing simply because similarly injured persons have not the inclination or motivation to complain.

Since the 1950 decision in *Barker*, our Supreme Court has revisited and refined the doctrine of standing on a number of occasions. Notably, in *Tug Valley Recovery Center, Inc. v. Mingo County Commission,* 164 W. Va. 94, 261 S.E.2d 165 (1979), the Court examined statutory standing based upon the word "aggrieved," used in W. Va. Code § 11-3-25.[36] Acknowledging that the resolution of the standing question turned on the definition of the term "any person ... aggrieved," the Court cautioned that the language is not to be construed in some "mystical fashion" but given its ordinary meaning. *Id.* at 100, 261 S.E.2d at 169. The Court concluded that individuals have standing to contest the assessment of properties in their home

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[34] For example, while members of the public at large have an interest in the safety of the public roads, a person who lives along and regularly must use the affected road certainly has a greater degree of interest in that particular road's safety than does a person living elsewhere in the County. An individual may own property several tracts away from the subject parcel, and yet be effected by the drainage and run-off issues created by the topographical alterations caused by a development. A nearby, though not adjacent, farm may find itself plagued by the displaced wildlife that migrates to its greener pastures, threatening the safety of the its livestock by, for example, the introduction of a significantly increased number of burrows and holes.

[35] Even in *Barker* the Court's precise holding was that standing arose from "special or peculiar damage or inconvenience not common to *all*." *Id.*, at Syll Pt. 2. The Court did not suggest that the peculiar injury might not be shared by some.

[36] Code § 11-3-25 provides for petition to the circuit court to challenge the decision rendered by a county commission sitting as a Board of Equalization to consider the question of the tax assessment of a property.

county by statutory appeal after having appeared before the Board of Equalization and Review. *Id.* at 102, 261 S.E.2d at 170. The Court rejected the argument that a person could appeal only the assessment of his or her own property. The Court concluded that every person affected by the county's tax base has a financial interest in assuring that all property be taxed properly, because the underassessment of some properties results in the unequal and discriminatorily higher assessment of others. *Id.* at 104-5, 261 S.E.2d at 171-2. Said the Court:

> ... the concrete and unmistakable interest of the petitioners here becomes crystal clear. We are not dealing with an abstraction, but with the promise of tangible benefit to each and every member of the community. *** An increase in the total tax base will yield higher revenues, thus improving the quality and quantity of services for all county residents. This constitutes the 'direct and substantial interest' required to give a party standing in a controversy.

Id. at 106, 261 S.E.2d at 172.

This Court cannot predict whether or not our Supreme Court would apply the reasoning of *Tug Valley* to the question of standing to challenge the decisions of boards of zoning appeals. The analogy is not difficult to perceive, however. Like taxation, the imposition of zoning regulations is justified only as a means of promoting the public weal. Citizens collectively endure the restriction upon the unencumbered use of their respective properties because such restrictions serve the greater good of ensuring the safe and healthy existence of all. If, as the Petitioners here suggest, the Ordinance is being misinterpreted to relieve some landowners of their share of those restrictions, the result is that others will bear a disparate and unequal burden and will be deprived of the benefits for which those burdens are borne.

Fortunately, the facts presented in these cases enable the Court to resolve this standing challenge on more familiar and established grounds. The Court concludes that

individuals who live in close proximity to a proposed development, who farm and who demonstrate that their farming activities are at risk of being deleteriously affected or even terminated by conditions expected to be generated by the development – such as, increased traffic, lowering of the ground water table, crowding, increased liability exposure, nuisance lawsuits, noise, dust and smell complaints, cut fences, children enticed to play in fields or near livestock, and the myriad of other problems recognized to attend the location of suburban-style residential neighborhoods close to farms and farmers – have standing to appeal the Zoning Administrator's determination that a rural property is suitable for residential development under a conditional use permit. Because the Blue Petitioners are confronting or adjoining landowners who operate a dairy farm, and who have demonstrated that there farming operations would be threatened by the conditions expected to be produced by the proposed developments, they have standing to challenge the Zoning Administrator's determinations in these cases. Insofar as the Court also concludes that the doctrine of dependent standing is appropriate to the resolution of standing challenges in multiple-petitioner matters, the conclusion that the Blues have standing renders the examination of the other Petitioners unnecessary.

Adequacy of Public Notice Posting

The Petitioners urge this Court to rule, as the BZA did not, that the public notice posting on the properties was inadequate. In order to provide public notice of the upcoming Compatibility Meeting, the Ordinance requires the owner/developer to place a sign on the property. The Ordinance states that, "The property shall be posted conspicuously by a zoning notice no less that twenty-eight (28) inches by twenty-two (22) inches in size at least twenty (20)

days before the hearing. Ordinance, Section 7.5(b). Moreover, the Ordinance provides that the applicant will post the property with a sign prepared by the staff. *Id.*

There appears to be no dispute that the subject properties at issue here were posted with signs provided by the zoning staff, and placed on the property near and facing an abutting road. The Petitioners' argument hinges on the meaning of the word "conspicuous." The Petitioners argue that the signs were not conspicuous because they were not large enough to be read from a passing car traveling as fast as 40 miles per hour. Accordingly, the Petitioners argue that interested persons had to endure the danger of stopping on the shoulder-less road to read the sign, which they claim violates another provision of the Ordinance.[37] Also, the Petitioners argue that the signs should have been facing traffic, not facing the road. In none of the cases did the Petitioners assert that they could not see that the signs were there[38] or that they were unaware that the property had been posted.

The BZA found no merit in the Petitioners' argument and concluded in summary fashion that the signage posted by the developers in these cases complied with the provisions of the Ordinance. Paragraph No. 5, Conclusions of Law, Case No. AP-01-04 (*Kletter 1*); Paragraph

[37] Ordinance, Section 10.2(e) states, "No sign which implies the need or requirement of stopping or the existence of danger shall be displayed." Article 10 of the Ordinance contains the zoning regulations for signs and permits, such as for business signs, placed in the County. The Petitioners have taken Section 10.2(e) out of its context. The clear import of Section 10.2(e) is to prohibit the use of signs that mimic legitimate traffic warnings as a stunt to attract attention to one's message. The safety reasons for this restriction are obvious.

[38] In *Kletter 1*, the Petitioners allege that the sign posted on Job Corps Road was obscured by weed and brush, but the photographic evidence submitted by the Petitioners shows no such impediment. The same complaint was not voiced with respect to the sign on Flowing Springs Road. Implicit in these representations is the fact that the property was posted with at least two signs. Accordingly, even if the one sign was totally hidden by brush – which the Petitioners' allegations do not suggest – the developers would appear to the Court to have satisfied the precise requirements of the Ordinance with the placement of only one sign. The Ordinance speaks of "sign" singular, not "signs" plural.

No. 6, Conclusions of Law, Case No. AP-02-01 (*Kletter 2*); Paragraph No. 14, Conclusions of Law, Case No. AP-02-08 (*Kletter 3*).[39] This Court finds no error in the Board's conclusion.

Had the developers placed the sign where it was not visible from the road, the Petitioners' argument might have merit. That did not happen here. The Petitioners took the sign provided to them by the zoning staff, and posted near the edge of the adjacent road. The sign's presence was readily perceived. This clearly satisfies the requirements of the Ordinance.

It appears to the Court that the real gist of the Petitioners argument is that the precise requirements of the Ordinance do not satisfy their perception of what would constitute a conspicuous sign. They want the Ordinance to be more specific about sign placement, size and lettering. To satisfy the Petitioners, the BZA would have to have read into the Ordinance terms that simply are not there. Such an action by the Board would amount to a constructive amendment of the Ordinance, and would be highly improper. The Petitioners' argument would be better made to the County Commission.

The Court, therefore, concludes that a developer satisfies the Ordinance requirements of conspicuous public notice posting of the subject property if he/she places the sign provided by the zoning staff in a position where its presence upon the property can be readily perceived by members of the public who pass thereby. The conclusions of the BZA that the subject properties were posted conspicuously was not in error.

[39] The Court notes that, with regard to this issue, the Board's finding of fact in each case was substantially identical to its conclusion of law. The Court is of the opinion that the finding of fact should have contained such factual determinations as allowed the Board to conclude that the sign was conspicuous. To say that the sign was "adequate" or "conspicuous" is the legal conclusion, not the supportive factual finding.

Compatibility Meetings Deny Due Process to the Public

The Petitioners allege that the conduct of the Compatibility Meetings is hostile to the participation of the public such that the public is denied due process. In support of this argument, the Petitioners assert that the Zoning Administrator and the developers are provided amenities and advantages at the meetings that are denied to the public. Specifically, the Petitioners observe that the developer sits at the head table with the Zoning Administrator, where they can spread out their paperwork and confer when necessary. Citizens in attendance sit in the audience in folding chairs.

The Board acknowledged that this challenge was before it in Kletter 2. *See*, Findings of Fact and Conclusions of Law at p. 2. The Board, however, rendered no finding of fact or conclusion of law on this issue. This Court cannot consider a question that was not raised before the Board, or on which the Board made no conclusion. *Carter v. City of Bluefield*, 132 W. Va. 881, 899, 54 S.E.2d 747, 758 (1949).

The Court finds that this issue is inadequately developed for review. The Court will not review on *certiorari* an issue upon which the Board did not rule. This Court would be disinclined, however, to permit the Board to defeat a legitimate claim of constitutional violation simply by refusing to rule, and could exercise its remand power were such a claim adequately stated by the Petitioners. The Court finds, however, that the assertions advanced by the Petitioners are insufficient to raise an issue of significant constitutional implication, such as the denial of due process. The allegations simply fail to state a *prima facie* claim. The Court concludes that the due process challenge to the conduct of Compatibility Meetings is not properly before the Court in this appeal, and can not be the subject of a ruling by this Court.

Applicability of the Lower LESA Score Limit

In *Kletter 2* and *Kletter 3*, the Petitioners argue that the proposed developments should be subject to the 55-point LESA score cut-off that became effective on August 9, 2002. The Petitioners argue that because the BZA concluded that some elements of each project's support data was inadequate, those applications were not truly "complete" until adequate support data was submitted. If adequate support data was not submitted until August 9, 2002, or later, the Petitioners reason, the lower LESA score limit should be applied to the review of the proposal.

The BZA rejected this argument in both Kletter 2 and Kletter 3. In Kletter 2, the Board stated:

> The Board concludes as a matter of law that the amendment of the Zoning Ordinance by the County Commission of August 8, 2002, contains no language to indicate that it should be applied retroactively. The Board further concludes that the testimony of the staff regarding the intentions of both the Planning and Zoning Commission and the County Commission was persuasive on the issue of retroactivity. The staff testified that it was the intention of both the Planning and Zoning Commission and the County Commission that the Amendment would be applied prospectively."

Paragraph No. 4 of the Conclusions of Law, Case No. AP-02-06. The Board similarly concluded in Kletter 3. *See*, Paragraph No. 2 of the Conclusions of Law, Case No. AP-02-08.

The West Virginia Supreme Court of Appeals has addressed the retroactivity of legislation on numerous occasions. The general rule has been stated as follows:

> The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect.

Syll. Pt. 3, *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002). *See, also,* W. Va. Code § 2-2-10(bb). Although there are exceptions to this rule, none are applicable to the facts at hand.

The BZA applied this rule of law, and the Court can find no error in its conclusion. Additionally, the Court finds little merit in the Petitioners' argument that the Board's determination that specific items of support data were inadequate and required supplementation concomitantly compels the conclusion that the applications were not complete on the date filed.[40] These developers submitted applications and support data that were, under the standards then applied by the zoning authorities, substantially complete.[41] The process for securing a CUP involves several stages of review, each of which may result in the developer being asked to supply additional information. The zoning authority's determination at each stage gives rise to the right of interested parties to file an appeal to the BZA. Applying the Petitioners' logic to the process would result in a situation where all applications existed in a state of limbo until all reviews and appeals were concluded, and no new amendments to the Ordinance intervened. This would not, in the Court's opinion, provide the level of certainty necessary to the efficient administration of the process nor sufficiently protect the rights of property owners to have notice of their legal status before they undertake substantial investments in their land.

Accordingly, the Court concludes that the amendment to the Ordinance, lowering the maximum LESA score for development approval from 60 to 55, applies only to those

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[40] It is important to remember that the intervening event which caused the support data to be deemed incomplete was this Court's decision in *Corliss, et al., v. Jefferson County Board of Zoning Appeals,* Civil Action No. 01-C-139 ("Harvest Hills"). The Forest View application was submitted before the announcement of the Harvest Hills decision, and was consistent with accepted adequacy, as judged by zoning staff at that time. The Aspen Greens application was submitted after the Harvest Hills decision, but also was accompanied by substantially more support data than had been submitted in the past.

[41] The Court is not confronted with the question of whether the 55 points would apply to an application that was not substantially complete.

applications filed on or after August 9, 2002. Because the developers herein filed substantially complete applications on or before August 8, 2002, their applications are subject to the 60-point LESA score criterion.

Failure of the Zoning Administrator to
Decide the Adequacy of the Support Data

The Petitioners assign as an error in *Kletter 2* the alleged failure of the Zoning Administrator to make a specific finding of the adequacy or inadequacy of the developer's support data.[42] The Court finds no factual merit in this assertion. Implicit in the Zoning Administrator's finding that the proposal met the criteria for development is the finding that the support data was adequate to his review.[43] Moreover, Mr. Raco stated in a letter to the developer that he had found the data adequate, which correspondence is included in the certified record of the case.

The Court concludes that the Zoning Administrator did determine that the support data submitted by the developers of Forest View was adequate, and there was no error in the Board's implicit conclusion that such finding was made by the Zoning Administrator.

Failure of the Zoning Administrator to
Follow the Prior Pronouncements of this Court

The Petitioners assign as error in *Kletter 2* and *Kletter 3* the failure of the Zoning Administrator to apply to his review the pronouncements of this Court in the case of *Corliss, et*

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[42] The Board did not address this challenge expressly, but implicitly found that the Zoning Administrator had made the requisite findings of adequacy. *See*, Paragraph No. 9 of the Conclusions of Law, Case No. AP-02-01 (*Kletter 2).*

[43] As Mr. Raco rightly argued in his presentation to the Board.

al., v. Jefferson County Board of Zoning Appeals, Civil Action No. 01-C-139 ("Harvest Hills"), entered February 14, 2002.[44] The Petitioners argue that the rules applied by this Court to the resolution of the *Corliss* case must now be applied by the zoning authorities to the review of the CUP applications of similarly-situated developers, including those in this appeal.

This Court, even when sitting as an appellate Court, is not a court of final resort. Indeed, *Corliss*, the decision upon which the Petitioners seek to rely, is on appeal to the West Virginia Supreme Court of Appeals even as the instant decision is being written. It remains to be seen if the rules laid down by this Court will be upheld. In the meantime, *Corliss* is the law of the land, so to speak, under the precepts of *stare decisis*.

The principle of *stare decisis* may be stated as follows:

> To stand by decided cases; to uphold precedents; to maintain former adjudications, ... The doctrine of *stare decisis* rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by a court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.

In re: Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 536, 45 S.E.2d 113, 118 (1947), *quoting, Black's Law Dictionary*, 3d Ed. Under the rule of *stare decisis*,

> [a] judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.

Woodrum v. Johnson, 210 W. Va. 762, 776, 559 S.E.2d 908, 922 (2001)(Albright, J., dissenting), *quoting, Allegheny Gen. Hosp. v. N.L.R.B.*, 608 F.2d 965, 969-70 (3d Cir., 1979)(footnote

[44] The Zoning Administrator had completed his review of the proposal at issue in *Kletter I* prior to the issuance of the *Corliss* decision. *See*, fn. 39, *supra*.

omitted). Application of the doctrine of *stare decisis* lends predictability to the law; it promotes stability, and is more consistent with the precepts of equal treatment than is the alternative.[45]

This Court, in rendering its decision in *Corliss*, was a court of competent jurisdiction specifically authorized by statue to decide the case. Many of the issues confronted were questions of first impression in West Virginia. Unless and until *Corliss*[46] is reversed by the West Virginia Supreme Court of Appeals, it is the law to be applied to similar material facts by this Court and inferior tribunals in the judicial hierarchy. The Petitioners allege that this did not happen.

The Court disagrees. The review of the record in these matters reveals to the Court that the Board did, in fact, attempt to incorporate the ruling in *Corliss* in its consideration of the *Kletter* cases. For example, the BZA examined the support data under the "adequate for meaningful public review and debate" standard announced in *Corliss*, as a result of which, the developers were required to submit additional information to the Zoning Administrator. To the extent that the Zoning Administrator had failed to apply the rules of Harvest Hills in the first instance,[47] the Board's response should be sufficient to insure that he does so in the future, or face similar correction from the BZA.

The Court, therefore, concludes that when it declares the law on a question of first impression, such decision constitutes judicial precedent and furnishes the rule for the

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[45] Which is not say that a persuasive or novel argument may not compel the Court to reexamine its prior conclusions. While it is desirable to be consistent, it is not desirable to be consistently wrong. "... [I]t is better to be right than to be consistent with the errors of a hundred years." *Lovings v. Norfolk & W.R. Co.*, 47 W. Va. 582, 35 S.E.2d 962, 965 (1900).

[46] Or, for that matter, other land use cases decided by this Court on *certiorari*.

[47] Which finding the Court does not make. The Court notes, however, that the Zoning Administrator argued to the BZA in *Kletter 2* that they were not bound by the *Corliss* decision in subsequent cases. This argument is at odds with the law, cited above.

determination of subsequent cases involving similar facts and arising in this Court or a lower tribunal in the judicial hierarchy. Accordingly, the BZA and Zoning Administrator are subject to the law, as pronounced by this Court on *certiorari*, when cases involving similar material facts are presented to them. Because the Court does not find that the Board concluded otherwise, the Court finds no error assignable to the BZA in these cases.

Support Data

As set forth previously in this Order, the Ordinance requires a developer to submit, with the application for a CUP, twenty-three categories of information collectively denoted as "support data." Ordinance, Section 7.4(d). For a period of time before the Compatibility Assessment Meeting occurs, copies of the application, sketch plan and support data are held for "public review." The Ordinance states that this "provides time for adjacent and confronting property owners to review the application and receive any technical advice they would like to secure before the meeting.

In the recent *Corliss* case, this Court concluded that, as expressed in the Ordinance, the clear purposes of the support data requirement were to allow public review in preparation for discussion of the project's neighborhood compatibility, and to provide material upon which the permit decision would, in part, be based. The purposes for which support data is submitted provide the standard against which it must be evaluated for adequacy. Accordingly, this Court concluded that, while the Zoning Administrator makes the initial determination of the adequacy of the support data submitted, "adequacy" must be judged against the standard of the purposes for which the data is submitted, including that of informing the public. The Court believes that its reasoning in *Corliss* was sound, and adopts it anew herein.

In *Corliss* the Court observed that the packet of support data was a total of 30 pages long, with 23 of those pages consisting of an excerpt from a soils survey of Jefferson County. In response to the twenty-three specific categories of information, the developer in *Corliss* submitted only four pages of narrative or descriptive information. Upon completion of its review, the Court noted that its "opinion is that for a project of this size, the intent of the Ordinance's support data provisions is not served by the submission of four pages of narrative ... addressing the 23 data points as to which information is sought." *Corliss* at page 29. The Court's opinion has not changed.

The Court has reviewed the packets of support data submitted by each of the three developers herein. The packets submitted for the Daniels Forest and Forest View developments are virtually identical to one another in scope. Moreover, they are substantially the same as that submitted in *Corliss*. Accordingly, as in *Corliss*, the Court regards the support data submitted for these two developments to be generally inadequate for the intended purposes.

The support data submitted by the developer of Aspen Greens, by contrast, is significantly more substantial. The narrative portion of the data, answering the twenty-three specific questions of the Ordinance, fills eleven pages. The descriptions are detailed and far more comprehensive than those submitted for the other two projects or those encountered by this Court in *Corliss*. The narrative is supported by numerous exhibits, including the deed by which the property was conveyed to the current owner.[48] While even this conscientious submission is not, necessarily, without need of minor amendment, it clearly escapes the concern about general inadequacy observed by the Court in *Corliss* and repeated above.

[48] A rather essential piece of evidence that, curiously, is not even required by the Ordinance.

The Court notes that, following the announcement of the *Corliss* decision, the Zoning Administrator notified the developers of Forest View by letter. Therein, he said:

> I, as Zoning Administrator, have found the support data satisfactory for my review and the project qualifies through the LESA Point process. *** However, please take notice of Civil Case 01-C-139. In that case, the Court Order by Judge Steptoe states that he had concerns with the adequacy of the support data for Harvest Hills Subdivision.

Raco Letter to Stone, April 5, 2002.

The Intervenors continue to argue that the Zoning Administrator, and he alone, has the discretion to determine if the support data is adequate. The statements of the Zoning Administrator, such as those in the letter quoted above, establish that the Zoning Administrator accepted as adequate the support data for these projects. The Intervenors suggest that this is the final word. The Intervenors assert that this Court lacks not only the jurisdictional authority, but the technical expertise[49] to review the Zoning Administrator's determination. The Intervenors seem to suggest that the Zoning Administrator's determination is unassailable.

Carried to its logical conclusion, the argument of the Intervenors would endow the Zoning Adminstrator, an employee of the County, with a power that not even elected officials enjoy – that is, a power that when exercised is reviewable by no one. Not only is this position completely at odds with the clear dictates of State law,[50] it is offensive to our constitutional system. It is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Having determined the law, it is the job of

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[49] An argument that is just as unpersuasive here as it is in cases of medical malpractice or toxic torts.

[50] W. Va. Code § 8-24-55(a), 8-24-56, -24-59, and a host of case decisions by the West Virginia Supreme Court of Appeals establish that the acts of zoning officials are subject to review in the established tribunals.

the Court, upon a proper challenge, to insure that the law is applied correctly by those responsible for its administration. No public employee is a law unto himself.

Moreover, the law applicable to the instant inquiry requires no sojourn into the esoteric realm of any technical expertise. The Ordinance, by plain language, requires that the support data not only be adequate for administrative use, but requires that it be adequate to inform the public and enable meaningful review and response. It takes no technical expertise to determine if information is adequate to inform the average member of the public, who, it may be presumed, is not trained in the technical aspects of subdivision development. In fact, if technical expertise was needed to understand the description of a project, it would be difficult to escape the conclusion that the support data was *per se* inadequate for public review.

When the Zoning Administrator states that he has found the "support data adequate for my review," he has answered only one-half of the question. The Court does not doubt that an experienced zoning administrator could proceed with less detail than may be necessary to inform and provoke public discussion. The Ordinance, however, does not allow him to do so.[51] The Ordinance requires the Zoning Administrator to evaluate the support data as much for the public's use as for his own. To the extent that he fails to do that, he fails to apply the standard of the Ordinance and fails to exercise his discretion properly.

The Petitioners, all members of the public, assert that the support data accepted by the Zoning Administrator in these cases was inadequate. The Court now turns to their specific challenges.

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[51] Moreover, the Court fails to see why he would want to do so. Obviously, the better the information provided to the zoning staff, the better their ability to conduct a thorough and accurate assessment of the application. How could the Zoning Administrator claim to be aggrieved by the requirement of a higher quality of support data? Given the important public policy implications attending many of these applications, one would think that the Zoning Administrator would want to have at his disposal the full scope of data required by the Ordinance.

1. Type of proposed development

The Petitioners challenge the support data submitted on this factor by the developers of Daniels Forest and Forest View.

On this element, the Daniels Forest developer submitted the following:

> The project is primarily a single-family residential subdivision, which encompasses approximately 102 acres of land. This land is proposed to be developed into 192 single-family lots with a minimum lot size of 12,000 square feet. Each lot will be served with sanitary sewer provided by the Jefferson County Public Service District, and potable water provided by Jefferson Utilities.

An identical description for this issue (except for the acreage and the number of lots proposed) was submitted by the developer of Forest View.

In *Kletter 1*, the Petitioners argued that the support data provided for the type of the proposed Daniels Forest development was inadequate because it failed to address the apparent scope of the project. The Petitioners noted that the plat submitted with the CUP application showed a subdivision road continuing into the adjacent Lot 2.[52] This, argued the Petitioners, indicated that the developer's intent was to expand the development into the adjacent lot. If so, the Petitioners asserted, the support data was inadequate to reveal the true nature of the development planned. Of course, in only a few months, the developer of Forest View submitted the application for a CUP for the development of Lot 2.

Perhaps unknown to the Petitioners at the time of their *Kletter 1* appeal was the fact that each of the three lots had a different owner. Because the one-time joint owners of the original farm previously decided to partition the acreage into three lots, each owner is now in the position to make independent application for a CUP, even though their efforts may be cooperative and the projects coordinated (as the sharing of subdivision streets would indicate).

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[52] Which, it must be observed, is a pretty good catch for persons lacking "technical expertise" in these matters.

This enabled each owner's contract purchaser/developer to submit a description of one lot's development without reference to the development known to be planned for the adjacent lot(s).

The Petitioners argument seems to be that it is misleading to consider the development of Lots 1 and 2 in isolation, when the actual plan is the continuous and coordinated development of both. The Petitioners seem to perceive that the actual plan is for a single development, albeit one completed in two phases. The Petitioners' argument is not without merit, especially when one considers that the contract purchaser/developer of Lot 1 and Lot 2 is the same and the plat reveals that the two developments will share roads, if not other infrastructure improvements. While there is not enough evidence from which to conclude that this is a single development masquerading as two, the Court acknowledges that there is ample evidence to raise the suspicion.

Even assuming for the sake of argument that the Petitioners are correct, one must then question if it would be relevant to the legitimacy of the results of the DRS evaluation and determination. A developer wishing to build a large subdivision in a rural location might find it necessary to combine two or more parcels of land to provide the number of home sites needed to produce the profit-to-cost ratio sought by the developer. Assuming that the parcels are otherwise susceptible of subdivision under the Ordinance, there does not appear to be any prohibition on combining parcels for a single development. But, could the developer artificially divide the one large development into two or more smaller developments,[53] submit a separate CUP application for each and gain, piecemeal, the approval of the whole? While the Ordinance does not expressly address this scenario, the Court is of the opinion that to allow it to occur would violate the very essence and objective of the DRS.

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[53] That is, one for each parcel.

The problems are obvious. The impact of a 600-home development in a rural area clearly presents more potential problems than does any single development of 200 homes.[54] Because, under the DRS, the Zoning Administrator evaluates each application in isolation,[55] however, a 600 home development that would not survive review as a single plan could nonetheless result from the independent evaluation of three 200-home developments. To allow this outcome would be to defeat the purpose of the DRS.

As noted above, the available facts do not enable the Court to determine if the development of Lot 1 and Lot 2 in this case is, in fact, a single and continuous development. The Court must, therefore, refuse to rule in the Petitioners' favor on this issue. The Court must conclude that the BZA was not in error when it rejected the appeal on this issue.

2. General description of surface conditions

The Petitioners' challenge to the support data submitted on this element pertains only to Daniels Forest. The challenge is not so much a suggestion that the information provided is inadequate as it is an allegation that the information is inaccurate.

On this issue, the developer, in the support data packet, stated the following:

> The area proposed for development is rolling with areas of 2 to 7 percent slope. Areas of similar terrain surround it. The site is rolling and hilly. It is primarily wooded with some areas of dense thick brush. (See USGS Map: Exhibit 1)

The Petitioners contend that this is provably untrue. The Petitioners allege that a large portion of Lot 1 was planted in corn. As evidence, the Petitioners' submitted a photograph corroborating

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[54] Board of Education member Cheryl Huff, speaking as an interested member of the public at the July 18, 2002, BZA hearing pointed out that in general, the County's approval of multiple developments without regard to the number already approved, is creating problems for the BOE in planning for future school needs.

[55] Which practice also allows adjoining developers submitting closely-timed applications to avoid the higher score that may actually be deserved for "adjacent development."

their allegations. The Court notes that neither the Zoning Administrator nor the developer disputed the authenticity of the photograph in the hearing before the Board. The Petitioners' evidence on this issue was competent, material and uncontradicted.

The Court concludes that the Petitioners proved that a portion of Lot 1 was dedicated to crop production. The support data submitted by the developer failed to include this crop production in its description, and was, therefore, inadequate. The Court concludes that the Board erred when it upheld the Zoning Administrator's determination that the support data for this issue was adequate.

3. Soil and drainage characteristics

The Petitioners challenge as inadequate the support data submitted by the Aspen Greens developer on the issue of soils and drainage characteristics. In response to the Ordinance's requirement for information on this factor, the developer provided a narrative divided into two subparts, (a) Soil Types and (b) Drainage Characteristics. The developer delineates the percentage of the total parcel comprised of each soil type. The developer provides detailed information about slope and drainage characteristics, with specific elevations and drainage flow patterns identified. The developer also provides information regarding discussions with the Division of Highways about the problem of standing water on Country Club Road, and submits a copy of the deed of easement obtained to address the problem.

The Petitioners argued to the Board that the developer's support date was inadequate because it needed to include a more detailed discussion of surface water. The Board concluded that "the information provided in the Support Data pertaining to Soil and Drainage Chracteristics is more than adequate. *** This information is sufficient to allow for meaningful

public participation in the Compatibility Process." See, Findings of Fact and Conclusions of Law at Paragraph No. 9 (*Kletter 3*).

The Court agrees. The Petitioners' challenge amounts to little more than a bald assertion that the support data is not enough. This is wholly inadequate to raise a colorable challenge to support data adequacy, as it fails to identify with any specificity even one way in which the information about surface water is incomplete. The Court concludes that the BZA did not err when it upheld the adequacy of the support data for Aspen Greens on the element of "Soil and drainage characteristics."

4. Intended locations of improvements and proposed building locations including locations of signs

The Petitioners assert that the Aspen Greens developer failed to submit adequate support data regarding the location of signs within the proposed development. Upon review of the record, the Court does not find that the issue was raised below. It cannot, therefore, be the subject of a ruling by this Court, for the reasons discussed previously in this opinion.

5. Extent of conversion of farm lands to urban lands

The Petitioners challenge the support data submitted by the developer of Daniels Forest and Forest View as to the extent of conversion of farm lands to urban lands. In support of this challenge, the Petitioners refer to and incorporate their challenge to "General description of surface conditions."

With respect to this item, the developer in Daniels Forest provided the following:

> This site has not been recently utilized for agricultural purposes; it is heavily wooded and does not represent a conversion of potential farmland to residential use. It is zoned "Rural".

Conversely, for Forest View, the developer's support data submitted for this element stated as follows:

> This site has been recently utilized for agricultural purposes; and does represent a conversion of potential farmland to residential use. It is zoned "Rural".

While in both instances, the developer's description was brief, the substance of the representations are diametrically opposite. This Court fails to see how the argument supporting the Petitioner's challenge with respect to Daniels Forest can, therefore, support a challenge to the support data submitted on this element for Forest View. The Forest View developer reveals that the property has been in agricultural production and that the project will convert that land to residential use.

Upon inspection of the record below, the Court does not find that the Petitioners, in their appeal to the Board, challenged the adequacy of the Daniels Forest support data for "Extent of conversion of farm land to urban lands." Because the challenge was not included in the appeal to the BZA, it is not properly before this Court in this appeal.

The Petitioners have failed to present any evidence to support their challenge to the adequacy of the support data submitted for Forest View on the element of "Extent of conversion of farm land to urban lands." Accordingly, the Court concludes that the Board did not err when it concluded that the Zoning Administrator had correctly determined the data to be adequate.

6. Effected (sic) wildlife populations

In each of the appeals to the Board, the Petitioners asserted that the support data submitted for effected wildlife populations was inadequate. The developer of each of the three projects asserted that no rare, threatened or endangered species were known to exist on the

property or to be likely to be affected by the development. Each developer submitted a letter from the Division of Natural Resources attesting to this assertion.[56]

The Petitioners argue that the support data request is not limited in its scope to the impact of the development on rare, threatened or endangered species. The Petitioners argue that the request, at face value, requires the developer to discuss the anticipated effect of the development on the existing wildlife on the property.

The BZA, in *Kletter 3*, agreed with the Petitioners and remanded to the Zoning Administrator for supplementation on this issue. In *Kletter 1* and *Kletter 2*, however, the Board denied the appeal on this issue.[57] Obviously, only one of these conclusions can be correct.

The Court concludes that the BZA was correct when it concluded in *Kletter 3* that the support data is inadequate on this issue when it fails to mention any species of wildlife which may be found on the property. The plain and unambiguous language of this provision makes clear that the developer must submit information about the existing wildlife populations that will be affected by the development, whether those populations are common or rare. Accordingly, the BZA erred when it concluded that the support data in *Kletter 1* and *Kletter 2* was adequate on this element.

7. Ground water, surface water and sewer lines within 1320 feet

In both *Kletter 2* and *Kletter 3*, the Petitioners assert that the support data was inadequate for ground water, surface water and sewer lines within 1320 feet. Upon review of both of the petitions and the supporting brief, however, the Court fails to find any support or

[56] In the first appeal to the Board in *Kletter 2*, the BZA granted the appeal on this issue and remanded, but only to the extent that the Board found that the letter from the DNR, cited in the support data narrative, was not attached to the data. The Board, therefore, remanded only so as to require the developer to provide the DNR letter, but did not address the central contention raised by the Petitioners.

[57] In their second appeal to the Board, the Petitioners again argued that the developer's support data, which by that time included the DNR letter, was inadequate.

argument offered by the Petitioners for this assertion. The onus is on the Petitioners to explain the basis of each assignment of error raised on appeal. Because the Petitioners have failed to do so in regards to this issue, the Court is unable to review the conclusions of the BZA. Because of the presumption of correctness, which was not rebutted by the Petitioners, the conclusion of the Board must be sustained.

8. Distance to fire and emergency services

In their appeal in *Kletter 2,* the Petitioners assert that the developers failed to provide adequate support data for distance to fire and emergency services. Upon review of the record of the proceedings below, the Court does not find that the issue was raised before the BZA, and the Board made no ruling on this issue. Accordingly, it is not properly before the Court in this appeal.

9. Traffic type and frequency, and adequacy of existing routes

In all three cases, the Petitioners challenge the adequacy of the support data submitted by the developer for traffic and adequacy of existing routes. In *Kletter 1* (Daniels Forest), the Board denied the appeal on this issue. In *Kletter 2* (Forest View), upon support data substantially identical to that submitted for Daniels Forest, the BZA granted the appeal on this issue and remanded to the Zoning Administrator for supplementation. After supplementation, the Petitioners again challenged the adequacy of the data, which appeal was denied by the Board. In *Kletter 3*, the Aspens Greens developer submitted considerably more substantial support data reflecting traffic counts and patterns, and the Board denied the Petitioners' appeal on this issue.

The Court finds no error in the determination of the Board regarding the adequacy of this item of support data for Aspen Greens and for Forest View (as supplemented). The Court concludes that in both *Kletter 2* and *Kletter 3*, the conclusion of the BZA was correct and must

be upheld. It necessarily follows, therefore, that the conclusion of the BZA in *Kletter 1* must be in error, as it accepted as adequate the same support data that it properly found to be inadequate in *Kletter 2*.

LESA Scoring

The Petitioners assign as error in these cases the scores assigned to the proposed developments on several of the LESA scoring criteria.[58] In each instance, if the scores asserted by the Petitioners to be the correct ones had been assigned, the proposed development would have received a total LESA score that exceeded 60, and the project would have failed for development potential.

1. Compatibility with Comprehensive Plan – historical and recreational

In their Petition for a Writ of *Certiorari* filed in *Kletter 3*, the Petitioners identify this scoring element as an issue on appeal. Having reviewed the entirety of the Petition and the various briefs filed, the Court can find no development of the argument of the Petitioners in support of their assertion that the ZBA erred in its ruling below. The Petitioners spoke only generally about the potential impact of continued development on the County's historical and recreational amenities, relying on bald assertions and offering no evidence to support their claims.[59] Because the Petitioners failed to meet their burden of proof, the Court has no choice

[58] The Court notes that on the form by which the Petitioners appealed to the Board, the Petitioners asserted for several LESA scoring criteria scores that differed from those assigned by the Zoning Administrator. The explanations for all of these asserted differences, however, were not developed before the Board. Some of the challenged scores were not clearly identified in the Petitions to this Court. The Court does not address herein those scoring challenges that, for whatever reason, are not properly before it in these appeals.

[59] For example, in their presentation to the Board in *Kletter 3*, the Petitioners stated for this item:

> The score was a "1" and instead should of been a "2." A "1" should be assigned if the effect will be neutral. Instead, the proposed development will ruin and overwhelm county parks and recreational sites.

but to conclude that the Zoning Administrator did not err in his scoring of the Aspen Greens proposal on this LESA factor. Accordingly, the Board did not err in concluding that the score assigned was proper.

2. Proximity to schools.

The Petitioners argue that the Zoning Administrator violated the Ordinance by assigning to each of the proposed developments an inappropriately favorable score for proximity to schools. The Petitioners argue, as did the petitioners in *Corliss*, that the score assigned on this element must include the assessment that the schools which the students would attend have the capacity to accept the additional students expected to be produced by the development. The Court rejected this argument in *Corliss*, and, for the same reasons, must reject it now.

The Ordinance provides the scope of this element as follows: "The purpose of assessing the proximity of schools to new development is to avoid excessive busing of students. ... An average of distances for elementary, middle and high schools shall be computed." Ordinance, Section 6.4(e). This language is clear and unambiguous, and allows no creative interpretation or amendment. The LESA points assigned to a proposal are based solely upon the average distance, in miles, to the schools that the students would attend under Board of Education districting, with incrementally greater distances resulting in incrementally higher scores.

In these cases, the Zoning Administrator found that the average distance to schools was 3 miles, such that each project received a score of 3. The Petitioners contend that each project should have received the maximum score of 12. They argue that the schools that

would serve the developments cannot be "appropriate" if they are already at or above capacity, as the Petitioners' unchallenged evidence shows the schools at issue here to be.[60]

As this Court found in *Corliss*, the Ordinance's clear provisions on this element provide only for the assessment of distance, not school capacity. In fact, the word "appropriate" does not appear in Section 6.4(e) as a qualifier to the measurement of school distances.[61] This Court must limit its review to the precise language of the regulation, and the LESA provision in question is not designed to address the question of school capacity. Accordingly, the Court concludes that there was no error in the LESA score assigned for proximity to schools. The BZA conclusion on this issue is without error.

3. Availability of public water

The Petitioners argue that the Ordinance was violated when these developments received incorrectly favorable scores for the element evaluating the availability of public water. The Zoning Administrator assigned three (3) points to each of the developments on this element. According to the Petitioners, the projects should have received scores of eleven (11).[62]

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[60] The Court remains sympathetic to the Petitioners' concerns about overcrowding of the County's schools. Their argument has some force of logic, as well. Code § 8-24-1 makes clear the one of the principal purposes of planning is to insure that "new community centers grow only with adequate highway, utility, health, educational and recreational facilities." Why, then, the Petitioners ask, do the County's planning and zoning officials, purportedly acting pursuant to the authority of Code § 8-24-1 *et seq.*, continue to approve developments that will substantially increase the demand for school services when there is no assurance that plans are in place to expand the schools to meet the demand? Cheryl Huff, a School Board member who spoke at the BZA hearing on July 18, 2002, made clear that there currently are no plans for new building or expansion of existing schools. More disturbing is Ms. Huff's statement that the School Board is frustrated in its efforts to address this problem because it is unable to secure needed information from County planning and zoning authorities.

[61] The word appropriate only appears in Section 7.4(d)(18), which provides that the developer must submit support data showing the "Distance to the appropriate elementary, middle and high school." The Court notes, however, that the Petitioners' belief that school capacity should be considered in CUP applications is not entirely without basis in the Ordinance. The support date submitted by the developer must include information regarding the "demand for school services created by this development." Section 7.4(d)(20). It does strike the Court as odd that the developer is required to submit this information, but that it is not used in the LESA assessment.

[62] As noted previously, Jefferson Utilities has argued that the score should be zero.

According to the Ordinance, "[t]his criterion assesses the availability of existing public water service with available capacity that is approved by the County Health Department and/or Public Service District to the site at the time of the development proposal application." Where public water is already available or will be built to the site, the project receives a score of zero (0), if a central water system will be used, the score assigned is three (3), and if private wells will be used, the project is given the score of eleven (11).

Each of the developers in these cases provided as support data a letter from Jefferson Utilities, Inc. stating that it would be "pleased to provide water service to the proposed subdivision." The Petitioners challenge the proposals' favorable scoring on the argument that the addition of 600 homes across the three parcels will have a deleterious effect on the ground water in the area, and thus, the availability of water, to the disadvantage of neighboring properties.[63] Moreover, the Petitioners suggest that Jefferson Utilities is already overextended in its service commitments and may be facing financial stress.

This Court observed in *Corliss* that the Ordinance specifically acknowledges that points are assigned to project proposals based upon the planned water system, but recognizing that the system had to be approved by the appropriate authorities before preliminary plat or site plan approval. The Court understood this to mean that if the planned system was not actually approved and provided to the site, the final approval for the project would be withheld or subject to reevaluation. The Court again relies on this understanding of the conditional permit process. With this express caveat, the Court concludes that it is not error for the Zoning Administrator to

[63] The Petitioners also make an argument that suggests that a higher score should have been awarded because Jefferson Utilities uses wells to provide water to its customers. The Court fails to see how the source of a public utility's water supply can be imputed to the potential customer under the LESA scoring protocol. Under LESA, the score appropriate for well water is assigned only in instances where *private* wells will be used by the residents. Whatever may be said of Jefferson Utility's wells, they are not private wells.

assign points to a proposed project based upon the water system planned for the development, even though that system is, at that time, still subject to final approval by the appropriate authorities. Accordingly, the Court concludes that the Board did not err in denying the Petitioners' appeal on this scoring issue.

4. Availability of public sewer

The Petitioners assert that the Zoning Administrator violated the Ordinance when he assigned to these projects received erroneously low scores for the availability of public sewer. The Zoning Administrator assigned to each of the projects a score of zero (0) on this element. The Petitioners insist that the projects each should have received a score of eleven (11), because the plan for public sewer service is unsupported by any contractual commitment.

The Ordinance states that "[t]his criterion assesses the availability of existing public sewer service with available capacity that is approved by the County Health Department and/or Public Service District to the site at the time of the development proposal application." Where public sewer service already exists or will be built to the site, the project receives a score of zero (0), if a central sewer system will be used, a score of three (3) is assigned, and if private septic systems will be used, the project is scored eleven (11) on this criterion.[64]

Each of the developers in these cases submitted as support data a letter from the Jefferson County Public Service District ("PSD"). The letter states, in part: "This letter will serve to confirm that the [PSD] is in the process of evaluating sewage collection for the proposed

[64] The Court notes that there is an internal inconsistency between the description of this criterion, which is written in absolute terms, and the scoring instructions. The description is clear that the assessment is of public sewer that is existing, has available capacity and is approved *at the time of the proposal application.* The scoring instructions, on the other hand, allow a zero to be assessed even when the public sewer is not yet existing, is of uncertain capacity and is not yet approved to the site.

development ...." The letter goes on to describe the process by which the PSD considers requests for the extension of service. It concludes by explaining that

> ... the entry into the alternate main extension agreement with the Developer does not mean that the District will reserve capacity to serve all [of the] units. Rather, the agreement is intended to recognize that, as the Developer's system is built out, and as other developments are built out, the District will have to determine whether it is necessary to expand its capacity in order to meet the future growth on its system. If it is ultimately deemed necessary to expand its capacity in order for the District to provide service, it will endeavor to obtain the necessary funds to extend service to meet those needs in an economically reasonable fashion.

The letter is unquestionably tentative, and the Petitioners are correct that it promises no reserve capacity for the developments. Nonetheless, the Court cannot agree with the argument of the Petitioners.

The analysis of this issue is virtually identical to that regarding public water, and the Court adopts the same logic here. As this Court observed in *Corliss*, it is premature at this stage of the process to require proof of reserve capacity for sewage collection and disposal. The Court cautions again, however, that its conclusion in *Corliss* was premised upon the express understanding that the failure of a developer to show that service is certain to be provided will result in a loss of final approval for the project. This caveat is especially pertinent here, as it appears to the Court from the PSD's letter that the PSD will not even assess the viability of providing sewer to the development until after the development is built out.

The Court wishes to insure that its conclusion in *Corliss* and here is not misunderstood. Where a proposed development is approved for a CUP on the basis, at least in part, of receiving a score for public sewer in the LESA evaluation,[65] that development cannot

[65] The Court notes, for example that none of the developments at issue in these appeals would have passed for development under the LESA assessment had they been evaluated for septic tanks. Daniels Forest and Forest View would have failed for development if assessed for a central sewage system (3 points).

proceed unless and until the provision of public sewer is guaranteed. Where such provision fails to occur, the project must be reassessed and must receive a passing LESA score after recalculating for the alternative sewage collection and treatment plan before it can proceed. The proof offered by these developers may be sufficient for the preliminary stage of review, but any changes in the plan for sewage that was assessed by the Zoning Administrator would require reevaluation of the project. To hold otherwise would be to allow conditionally approved developments to proceed on the basis of conditions that might never be met.

With this understanding, the Court again concludes that the Zoning Administrator did not err when he assigned a zero (0) to each of the proposals at issue herein. Accordingly, the Board did not err in denying the Petitioners' appeal on this issue.

Facial Challenge: The Validity of the LESA Scoring System

In all three appeals, the Petitioners argue that the Zoning Administrator assigned inappropriately favorable LESA scores to the three projects, due to an erroneous application of the scoring criteria, as discussed above. The Petitioners further argue that if the Zoning Administrator did apply LESA's scoring criteria as directed by the provisions of the Ordinance, then the LESA scoring protocol is fatally flawed, and is not reasonably designed to achieve its core objectives.[66] This argument constitutes a classic facial challenge to the validity of the LESA provisions of the Ordinance.

The Court has examined the Findings of Fact and Conclusions of Law entered by the BZA. In none of these decisions did the Board address the Petitioners' facial challenge.

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[66] As to the proceedings in this Court, the Petitioners, in Kletter 2 and 3, set forth this argument in a separately-identified section of their Petition and Brief. In Kletter 1, the Petitioners make this argument within the section devoted to LESA scoring challenges, but make it, nonetheless.

"The proposition is elementary that the circuit court can not consider, upon review of the decision of the [board of zoning appeals], a question not presented or passed upon by the board or a question which the board could not and did not decide." *Carter v. City of Bluefield*, 132 W. Va. 881, 899, 54 S.E.2d 747, 758 (1949). Could the Board have decided this question?

The powers of a board of zoning appeals are conferred by the provisions of W. Va. Code § 8-24-55.[67] A perusal of the powers delineated in this authorizing statute reveals that the powers of a board of zoning appeals do not include the power to review the validity of an enactment of the county legislative body. Accordingly, this Court concludes, as did the Court in *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949), that the Board "is without power to consider or determine the validity of the ordinance." *Id.*, Syll. Pt. 3, in part. The Board, therefore, was correct in not addressing the facial challenge to the LESA provisions of the Ordinance, because the Board lacks jurisdiction to consider the question. This Court, then,

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[67] W. Va. Code § 8-24-55 states:

> The board of zoning appeals shall:
>
> (1) Hear and determine appeals from and review of any order, requirement, decision or determination made by an administrative official or board charged with the enforcement of any ordinance or rule and regulation adopted pursuant to sections thirty-nine through forty-nine of this article;
>
> (2) Permit and authorize exceptions to the district rules and regulations only in the classes of cases or in 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.

cannot consider the validity of the Ordinance upon a petition for writ of *certiorari* taken from a final decision of the BZA.[68] The Petitioner's facial challenge to the LESA scoring system, for this reason, must fail.

The Role of the Comprehensive Plan in Zoning Decisions

Throughout the Petitions and briefs filed by the Petitioners in these appeals, and throughout the Petitioners' presentations before the BZA, is the recurring and overriding argument that the Comprehensive Plan is a document that contributes materially to the County's land use regulatory scheme.[69] Under this theory, the Comprehensive Plan has some regulatory impact, and must be considered when questions of interpretation and application of the Ordinance arise. There seems to be a suggestion by the Petitioners that when the ultimate decision regarding development of rural land fails to promote the goals and objectives of the Comprehensive Plan, that decision is an erroneous application of the Ordinance.

In this, as in similar zoning cases which have come before this Court, the County and the developer Intervenors cite the decision in *Singer v. Davenport*, 164 W. Va. 665, 264 S.E.2d 637 (1980) for the proposition that the Comprehensive Plan provides no basis for examining a challenged application of the Ordinance. In support of their reliance on *Singer*, the

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[68] This is not to suggest that there is no procedural mechanism by which an interested party can attack the facial validity of a zoning or other county ordinance, but merely recognizes that such remedy is not afforded by W. Va. Code § 8-24-59. An action for declaratory judgment, a petition for writ of mandamus or prohibition, or a petition for injunctive relief each could provide an opportunity, to a party with standing, to challenge the Ordinance on the grounds of facial invalidity. *See, e.g., Carter v. City of Bluefield*, 132 W. Va. 881, 899-900, 54 S.E.2d 747, 758 (1949). Additionally, a party could petition the court for review on *certiorari* of, for example, an amendment to the Ordinance recommended by the Planning Commission, if such petition were filed within thirty days of such recommendation. *Lower Donnally Assoc. v. Charleston Municipal Planning Comm'n*, 212 W. Va. 623, 575 S.E.2d 233 (2002).

[69] Because this argument permeates the Petitioners' petitions and briefs, and has stimulated response from the Respondents and Intervenors, the Court has chosen to treat it separately.

County and the developers quote the observations of the *Singer* Court that the "comprehensive plan was never intended to replace definite, specific guidelines" and that the comprehensive plan has no "effect as a legal instrument." It is necessary to analyze the *Singer* decision to determine its applicability to the cases at hand.

As an initial matter, the Court notes that neither of the quoted passages was elevated to the status of a syllabus point in the decision. The West Virginia Constitution requires that when the Supreme Court announces a point of law, such point of law must be articulated in a syllabus point in the opinion. W. Va. Const. Art. 8, § 4. *See, also, Walker v. Doe,* 210 W. Va. 490, 558 S.E.2d 290 (2001). The failure of the *Singer* Court to include the persistently quoted language in the syllabus gives rise to doubt that the Court deemed these observations to be regarded as points of law.

Even if the quoted language of *Singer* had been elevated to a point of law,[70] the facts of that case and those at hand would have to present sufficiently similar legal questions in sufficiently similar factual contexts for the pronouncement to provide the law of decision for the issue raised in these appeals. *See*, discussion of precedence, *supra.* A comparison of the *Singer* case to the appeals at bar reveals that similarity of both factual and legal context is lacking.

The *Singer* matter arose in the late 1970s in Jefferson County. At that time, the County Commission had adopted the first version of the Comprehensive Plan, and had adopted the Jefferson County Subdivision Ordinance. No Zoning Ordinance existed for the unincorporated areas of the County. In fact, the voters of this County had "defeated every attempt to enact a countywide zoning ordinance." *Id.* at 668, 264 S.E.2d at 640.

[70] ...or was intended by the Court as a point of law, but was overlooked for inclusion in the syllabus of the opinion...

In *Singer*, the landowner attempted to subdivide an 80-acre tract of unrestricted land for residential development pursuant to the Subdivision Ordinance then in place. The plan met with public opposition. The County Commission refused the final plat application[71] on the basis of the provisions of W. Va. Code § 8-24-30 (1969). On appeal to the Circuit Court, the County also argued that the proposed plat conflicted with the Comprehensive Plan, a reason not previously given to the developer for the refusal of the plat. The Circuit Court disagreed with the County, and ordered the County to approve the plat. The County appealed.

The central question presented in *Singer* was the extent to which the County Commission could oversee the desirability and location of subdivisions on land that was unrestricted as to use. The Supreme Court observed that it is the purpose of zoning to provide a comprehensive plan for land use, while subdivision regulations govern the manner in which land is developed. The ultimate problem in *Singer* was that the County had attempted to accomplish the regulation of land use without the benefit of a duly-enacted zoning ordinance. The guidelines that the County had attempted to impose upon the developer were nowhere to be found in any specific rules. It was in this context that the Supreme Court stated that the "comprehensive plan was never intended to replace definite, specific guidelines; instead, it was to lay the groundwork for the future enactment of zoning laws." *Id.* at 668, 264 S.E.2d at 640.

Eight years after the *Singer* decision, Jefferson County did enact the Zoning and Development Review Ordinance. The County officials at that time must be presumed to have been aware of the *Singer* decision, as it had arisen in this County. Nonetheless, the County Commission adopted and the voters approved an Ordinance that incorporates by reference the County's Comprehensive Plan.

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[71] The developer had revised the plat twice in an effort to dispel negative public sentiment.

Section 1.3 of the Ordinance expressly provides that the "terms of this Ordinance shall be applied to promote the intent in Section 1.1 and the Comprehensive Plan." This provision makes clear that in drafting the Ordinance, the County officials intended to develop a zoning scheme that would give effect, through specific provisions, to the Comprehensive Plan's guidance for the systematic physical development of the County. Section 1.3 makes clear that when a provision of the Ordinance on its face permits of two interpretations in its application, reference should be made to Section 1.1 and the Comprehensive Plan for the intended application. Moreover, Section 1.3 speaks in the mandatory "shall."

Section 1.3 is not the only instance in which the Ordinance refers to the Comprehensive Plan. The LESA scoring protocol requires reference to the Comprehensive Plan on two of its scoring criteria, in which the compatibility with the Comprehensive Plan is assessed. The support data requires a developer to submit information pertaining to the proposal's relationship to the Comprehensive Plan. Section 1.3 and these other provisions make clear that the intent of the Ordinance is to implement the Comprehensive Plan, not to negate it.

Because of the intervening adoption of a zoning ordinance, the circumstances now confronting the Court in land use cases is different than that confronting the Supreme Court in *Singer*. Nothing in the *Singer* decision suggests to this Court that a zoning ordinance cannot include a specific rule adopting by reference as an interpretive source the jurisdiction's comprehensive plan. Indeed, the *Singer* Court's observation about the limitations of the Comprehensive Plan was prefaced by the statement, "*When the voters have rejected zoning ordinances*, the Planning Commission may not enforce zoning under the guise of the comprehensive plan." *Id.* The circumstances now existing are that the voters of this County have approved countywide zoning, and the Ordinance approved by the voters expressly includes

the Comprehensive Plan as part of the regulatory scheme of the zoning. The Court is of the opinion that, under these circumstances, the statements of the *Singer* Court are inapplicable.

The Comprehensive Plan is not an alternative regulatory document. It does not "trump" the specific provisions of the Ordinance. The Comprehensive Plan does not provide the specific rules for physical development of the County. It does, however, assist the zoning officials and this Court to discern the intended and proper application of the specific rules found in the Ordinance. To hold otherwise would be to ignore a specific provision of the Ordinance itself, Section 1.3, which enjoys the same vitality as any other provision in the Ordinance.

The Court in *Singer* observed that it would be "absurd to suggest that the consultants who drew up the comprehensive plan were empowered to determine the future land use of Jefferson County." Indeed, it would. The Court notes, however, that the Comprehensive Plan was not hoisted upon the County by a group of hired consultants, but was adopted, after public comment and legislative process, by the County Commission. These elected officials could have rejected the recommendations of the consultants in any or all respects had they not reflected the legislative intent of the Commission acting pursuant to their general authority to plan and zone. Moreover, the voters could have kept the Comprehensive Plan a regulatory nullity by rejecting the Ordinance.

In these cases, the Intervenors consistently argue against any contribution by the duly-adopted Comprehensive Plan. By contrast, they persist in their insistence that the Zoning Administrator has unfettered and unreviewable discretion and authority to interpret and administer the Ordinance. How can it be absurd to accept the interpretive authority of the Comprehensive Plan, and not be absurd to accept that a single County employee is "empowered to determine the future land use of Jefferson County"? Nonetheless, the Intervenors would have

this Court accept the decisions, interpretations and applications of the Zoning Administrator even if his determinations do not reflect the purposes of the Ordinance listed in Section 1.1 or the guidance of the Comprehensive Plan to which this Court is directed by Section 1.3. The Court is without discretion to ignore these express provisions.

The Intervenors also challenge the propriety of reference to the Comprehensive Plan by pointing out that the current Comprehensive Plan, the 1994 version, was not the version in use when zoning was enacted in 1988. The Intervenors seem to suggest that the Ordinance cannot incorporate by reference another legislative document and implicitly include any of that document's subsequent amendments and modifications.[72] The analysis of the Comprehensive Plan issues asserted by the Petitioners, however, would be the same under either the 1986 or the 1994 version of the Plan. Review of the 1986 Comprehensive Plan reveals that the sections devoted to long-term planning for agricultural and rural land are virtually the same as in the 1994 version.

Both the 1986 and 1994 Comprehensive Plans focus upon the problems confronting the County in the goal of preserving the our "rural way of life." 1986 Comp. Plan at III-94; 1994 Comp. Plan at III-101. Both conclude, "If farming is to continue, the best agricultural land needs to be preserved." 1986 Comp. Plan at III-96; 1994 Comp. Plan at III-102. Both observe, "Unregulated growth is one of the major problems for local farmers...." 1986 Comp. Plan at III-96; 1994 Comp. Plan at III-103. Both versions express the same four General

[72] A question the Court is not asked to answer.

Goals for agricultural/rural land in the County. 1986 Comp. Plan at III-99; 1994 Comp. Plan at III-105-106.[73]

It is the 1986 Comprehensive Plan that recommended: "The LESA system of farmland evaluation should be considered as a method of regulating overall growth in the County." At III-100.[74] In accordance with this suggestion, the Ordinance adopted in 1988 included the LESA scoring protocol.[75] By 1994, the Comprehensive Plan was recommending: "The LESA system of farmland evaluation should be continued *and modified so that the most valuable farmland is preserved* while allowing some rural land to be developed into low density." At III-106, emphasis added. Ironically, the Court now confronts the assertion, *inter alia*, that it is the application of the LESA system, as interpreted by the zoning officials, that is promoting the rapid conversion of valuable farmland to high-density urban development, the diametric opposite of its intended objective.

As suggested by the analysis above, the Court does conclude that the Comprehensive Plan is an integral part of the land use regulatory scheme of Jefferson County, as it is expressly incorporated by the Ordinance through Section 1.3. The Comprehensive Plan may be understood as the statement of policy that the Ordinance is intended to implement through the application of its specific rules. It does not necessarily follow, however, that in any specific instance, the application of a provision of the Ordinance that appears to defeat the goals and policies expressed in the Comprehensive Plan may be nullified as invalid.

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[73] The Goals are mirrored in the purposes of the Ordinance, which include: "Encourage the maintenance of an agricultural base in the County at a level sufficient to insure he continued viability of farming." Ordinance, Section 1.1(e).

[74] In the 1986 Comprehensive Plan, it was explained that the LESA system originally was developed by the Soil Conservation Service, and was first used in Jefferson County by the Farmland Advisory Committee to the County Commission.

[75] Subsequent amendments have added criteria not present in the original.

The Ordinance states that it is intended to promote the goals of the Comprehensive Plan. The Court must afford the Ordinance the benefit of the presumption that, as drafted, it is designed to do what it states to be its purpose. If the Ordinance has been so designed, then theoretically, the Ordinance, through the comprehensive application of its provisions across situations, will yield as the net result a progressive development of the County that is consistent with the goals of the Comprehensive Plan. This result may be expected even though the application of any single provision of the Ordinance may appear in isolation to violate the goals of the Comprehensive Plan and the Ordinance itself. The inherent synergy of a legislative whole is not necessarily defeated by the apparent failure of one of its parts. Accordingly, the allegation that the Ordinance is not being applied in a manner that promotes the goals of the Comprehensive Plan cannot be sustained upon the identification of one, or even several, provisions that, when applied, appear to yield a result in conflict with those goals. It is the net result across applications that must be shown.

It also is necessary to keep in mind that the zoning officials and staff are not policy makers. It is not the function or authority of these persons to decide what the outcome in a given case should be and then apply the Ordinance to this end. The sole function of the zoning officials is to conscientiously apply the Ordinance in strict adherence to the plain language of its provisions. Where those provisions are not clear and unambiguous, the zoning staff, and more importantly, the Zoning Administrator, must attempt to interpret them by reference to the overriding policy goals found in the Comprehensive Plan and Section 1.1 of the Ordinance. The zoning staff has no authority, however, to interpret a provision that is clear and unambiguous on its face. Such a provision must simply be applied as written, even if, as written, it either appears or is proven to defeat a goal of the Comprehensive Plan.

Where parties assert that the goals of the Comprehensive Plan are not being promoted by the application of the Ordinance, and the basis of the assertion is the result of a faithful application of a clear and unambiguous provision, there is no remedy in *certiorari*. Such an assertion would constitute a classic facial challenge, because, at its core, is the contention that the Ordinance provision is not written so as to promote the public policy expressed in the Comprehensive Plan. As discussed previously in this Order, this Court is without authority to entertain a facial challenge on appeal from a decision of the BZA.

The Court concludes, therefore, that the policy goals expressed in the Comprehensive Plan can be invoked to successfully challenge the interpretation or application of a provision of the Ordinance only where (1) the provision is susceptible of interpretation under established legal principles; (2) the interpretations reasonably permitted by the language of the provisions include an interpretation that is consistent with the Comprehensive Plan; and, (3) the zoning officials have adopted an interpretation that is contrary to the goals of the Comprehensive Plan.

The Court concludes that a party may successfully invoke the Comprehensive Plan to challenge a zoning decision that is the result of the application of multiple provisions of the Ordinance, only where (1) one or more of the applicable provisions is susceptible of interpretation; (2) the interpretation reasonably permitted by the language of one or more of such provisions includes an interpretation that is consistent with the Comprehensive Plan; (3) the interpretation adopted by the zoning officials for one or more of such provisions is contrary to the goals of the Comprehensive Plan; and, (4) but for the interpretations that are inconsistent with the Comprehensive Plan, the outcome of the zoning decision would have been an outcome that was consistent with the goals of the Comprehensive Plan.

The Court concludes that a party may invoke the Comprehensive Plan to challenge a zoning decision that is the result of a faithful application of clear and unambiguous provisions of the Ordinance only through a facial challenge properly brought before the Court.

Only the Residue Parcel can Subdivide

In *Kletter 1* and *Kletter 2*, the Petitioners argue that neither of the parcels is permitted to further subdivide, under the DRS or otherwise. The Petitioners argue that the express terms of the Ordinance, found in Section 5.7, limit subdivision of rural property to those parcels existing of record on October 8, 1988, or the residue[76] of any prior subdivisions of such parcels.[77] It is undisputed in these cases that these three parcels were created in 1992 from the Roderick farm that existed on October 8, 1988. Because neither Lot 1 (Daniels Forest - *Kletter 1*) nor Lot 2 (Forest View - *Kletter 2*) was designated as the Residue parcel in the 1992 subdivision, the Petitioners argue that neither has any development rights that can be exercised under the Ordinance.[78]

The Zoning Administrator and the Intervenors conversely argue that parcels processed through the DRS are not subject to Section 5.7(d) of the Ordinance at all. They argue that the DRS allows a developer to completely bypass the provisions of Section 5.7(d) and

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[76] The Petitioners also speak in terms of the "parent parcel." As the discussion that follows will show, the Ordinance defines the parent parcel as the parcel existing on October 5, 1988, as it then existed or less the acreage of any prior subdivision. The residue parcel is the parcel so designated in a prior minor subdivision, and, if application is later made for the subdivision of such residue, it is then the parent parcel for the purpose of such application. *See* Subdivision Ordinance Section 5.1.a(1).

[77] This argument was particularly well presented by a member of the public, Paul Burke, who spoke at the hearing before the BZA on November 15, 2001 (*Kletter 1*). Mr. Burke, citing the provisions of the Ordinance, offered a cogent explanation of the way in which a rural parcel would first progress through Section 5.7 to determine if the parcel was eligible to proceed to the DRS process.

[78] Conversely, the Residue parcel, for which the Aspen Greens development is proposed in *Kletter 3*, retained the development rights of the original parcel, according to the Petitioners.

proceed directly to the DRS to gain approval for higher density development. Under this scenario, any rural lot is potentially eligible for high density subdivision.

The Board disagreed with the interpretation urged by the Petitioners. In *Kletter 1* it concluded that

> ... the Conditional Use Permit process allows a prospective subdivider to subdivide the property into [a] greater number of lots with a greater density than may be allowed in the rural district pursuant to Section 5.7, Zoning Ordinance. The Board concludes that section 5.7(d)(3 and 4) does not apply in [this] stage of the proceedings. The developer seeks to subdivide his property into a greater number of lots than may be allowed by section 5.7. The developer may do this only if he complies with the Conditional Use Permit Process and obtains the permit. Therefore the board concludes that the limitation set forth in section 5.7 pertaining to the subdivision of a residue or parent parcel are not applicable at this stage of the process.

Kletter 1, Conclusions of Law, Paragraph No. 3. The BZA rendered substantially the same conclusion in *Kletter 2.*

The Court observes that the Petitioners do not deny that the DRS may allow a rural parcel to be subdivided into a greater number of residential lots, with greater density, than would normally be allowed under the provisions of the Ordinance relating to property in the Rural District. It appears to the Court, however, that the gist of the Petitioners' argument is that not all rural lots are eligible to apply through the DRS for such special permits. The Petitioners contend that the express terms of the Ordinance identify those rural parcels that are eligible for high-density development, and that only those lots may apply for a CUP through the DRS. The Petitioners' argument challenges the interpretation of the Ordinance employed by zoning officials, which they contend is defeated by the express terms of the applicable Ordinance provisions.

As the Court has noted earlier in this opinion, any analysis of an interpretation of the Ordinance must begin with a close reading of the Ordinance itself. Section 5.7 of the Ordinance sets out the provisions relating to land use in the Rural District. The principal permitted uses for this district are enumerated in Section 5.7(a) of the Ordinance.

The Court initially observes that the use at issue in these cases is single-family residential use. Such use is explicitly allowed by the Ordinance. Ordinance, Section 5.7(a)(3). In accordance with its stated purpose,[79] however, the Ordinance generally restricts residential use in the Rural District to parcels of not less than 40,000 square feet, or slightly less than one acre. Ordinance, Section 5.7(b). With the obvious goal of promoting the preservation of valuable farmable land, in accordance with the stated purpose of the Rural District, the provisions of Section 5.7 also limit the number of residential lots into which a rural parcel may be subdivided and provides time restrictions to curb the rapidity with which any total subdivision could occur. Accordingly, in these cases, where the developer wishes to accomplish an immediate and total subdivision of farmland into lots as small as 12,000 square feet, the issue is not use, but the density of use and acceleration of farmland conversion.[80] It is these two elements of the proposals at issue that create the circumstances where a Conditional Use Permit is required for the developments.

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[79] *See* Ordinance, Section 5.7, Introductory Paragraph.

[80] The Court notes that, in the context of zoning, "use" is a term of art that denotes the purpose for which property may be utilized. 83 Am. Jur. 2d *Zoning and Planning* § 156 (2002 Cum. Sup.). It refers to function, such as residential, commercial or industrial, and must be distinguished from the regulation of uses within the districts where they are allowed. Set-back requirements, minimum lot size restrictions, and like provisions are the regulation of uses, not the uses themselves. The Court perceives that in the Ordinance, the word "use" is sometimes employed without regard to this distinction. In the instant appeals, the issue is the regulation of residential use in the Rural District. Each proposal required a CUP not because of the proposed use, but because of the desire to avoid the usual restrictions on such use. If Section 5.7 did not expressly adopt the conditional use permit process to allow a greater number and density of residential lots in the Rural District, the developers in these cases would be forced to seek variances, not CUPs.

The Court observes that while a conditional use permit "does not entail making an exception to the ordinance but rather permitting certain uses which the ordinance authorizes under stated conditions," *Harding v. Bd. of Zoning Appeals of City of Morgantown,* 159 W. Va. 73, 78, 219 S.E.2d 324, 328 (1975), there is no presumption in favor of permitting a conditional use. It is a use permitted only when certain conditions are met, and the burden is on the applicant to prove that conditions exist under which the proposed use may be allowed by a zoning ordinance. As explained in one learned treatise, conditional uses "lie between those that are prohibited and those allowed by right because they comply with a zoning code in all detail." Yokley, Zoning Law and Practice § 21-1 (4th Ed. 2002 Rev.). Conditional uses are not allowed by right. Yokley also observes that ordinances commonly require that proposed conditional uses will not conflict with the comprehensive plan, will provide a use that will serve the welfare of the public and not the needs of private individuals, and will not adversely affect a particular neighborhood. *Id.*

The introductory paragraph to Section 5.7 of the Ordinance twice states that a primary function of the Rural District is to preserve continued farming in the County. The Comprehensive Plan reiterates this goal in extensive discussion and specific recommendations. Comprehensive Plan at III-100 to III-107. The preservation of agriculture also is an express purpose of the Ordinance. Ordinance, Section 1.1(e).

It is impossible to disagree with the Petitioners that the successive permitting of developments such as those at issue in these appeals defeats the purpose, stated in both the Comprehensive Plan and the Ordinance, of preserving valuable farmland so as to allow continued farming and preserve the rural character of the County. The immediate and total conversion of 315 acres of previously-farmed rural land into 600-plus home sites and necessary

infrastructure would appear, at a glance, to be precisely the outcome that the Comprehensive Plan and the Ordinance purport to oppose. Nonetheless, these general considerations would have to give way unless the express provisions of the Ordinance prevent the proposed developments.

The Petitioners contend that the express provisions of the Ordinance do prevent such an outcome. According to the Petitioners' reading, the Ordinance prevents the developments in question by allocating high-density development rights only to those parcels that are not the product of previous subdivision. Following this reading, roughly one third of the original farm at issue here could be densely developed, while the remaining two-thirds would be preserved as agricultural land. Under this argument, a proper balance is maintained because both development and farmland preservation are served. This only occurs, however, if rural parcels are not allowed to by-pass Section 5.7 on their way to the DRS.

It is necessary to wind one's way through the provisions of the Ordinance to determine if the Petitioners' logic is supported. Section 5.7 contains the provisions that regulate the Rural District. The introductory paragraph of Section 5.7, quoted in its entirety earlier in this opinion, provides:

> *All* lots subdivided in the Rural District are subject to Section 5.7d Maximum Number of Lots Allowed. The Development Review System does allow for higher density [if] a Conditional Use Permit is issued.

Emphasis added. Under the argument of the Respondent and the Intervenors, the final sentence of the quoted passage conducts a developer directly to the DRS without further consideration of the provisions of Section 5.7.

The use of the term "all lots" suggests otherwise. The word "all" is comprehensive in its inclusiveness, and by its clear and common meaning denotes every one. The Court finds no justification for ignoring this clear and unambiguous term, unless, upon

closer inspection, it becomes obvious that giving the term its clear meaning would create ambiguity or inconsistency with the specific provisions intended to regulate the subdivision of rural land. Can "all" rural lots be subject to Section 5.7(d) Maximum Number of Lots Allowed and still be allowed a "higher density" under the DRS?

To answer this question, it is important to distinguish between "number" of lots and "density" of lots. These are not synonymous terms. The word "number" means quantity, while the word "density" means the quantity per unit measure. The American Heritage Dictionary (3d Ed. 1994). The difference in these terms makes clear that the two sentences quoted above are not necessarily inconsistent or disjunctive. Accordingly, the Court must proceed to examine Section 5.7(d).

Section 5.7(d) of the Ordinance makes provision for the subdivision of rural land as a matter of express right. The introductory paragraph of Section 5.7(d) states:

> All parcels of land that were on record as of October 5, 1988 are entitled to subdivide for single family detached residences based on Subsection 5.7(d)1, 5.7(d)2 or 5.7(d)3 below. A property owner may use a combination of these subsections, provided that the number of lots are (sic) prorated by density.

Accordingly, the opening passage of Section 5.7(d) identifies those rural lots that are eligible to subdivide as being the parcels of record on the effective date of the Ordinance. Pursuant to the maxim *inclusio unius est exclusio alterius*,[81] the Ordinance would disallow the subdivision of parcels created after October 5, 1988.

Three methods of such subdivision of right are provided in the paragraphs to which the reader is directed by the opening paragraph of Section 5.7(d). Section 5.7(d)1 allows an owner to create one (1) lot for every ten (10) acres of land, with a minimum lot size of three

[81] "The inclusion of one thing is the exclusion of another."

(3) acres. Section 5.7(d)1.a. The Ordinance specifies that in calculating the maximum number of lots allowed, the acreage of the "present parent parcel" does not include the acreage severed in any subdivision made between October 5, 1988 and the date of application under this section. Using Section 5.7(d)1, an owner of 100 acres that existed as a parcel of record on October 5, 1988, could, for example, create ten residential lots of three acres each, preserving a 70-acre parcel which retains the rights of the original parcel and could be further subdivided according to the provisions of the Ordinance. None of the ten lots so created, however, would be eligible for future subdivision, as none existed on October 5, 1988.

Section 5.7(d)2 allows the owner of a rural parcel to create by subdivision clustered residential lots, the stated purpose of which is to encourage the preservation of the best farmland by allowing the clustering of smaller lots, presumably on the less agriculturally desirable portions of the tract. Section 5.7(d)2.a.1 and 5.7(d)2.e.1. An owner of a parcel existing on October 5, 1988, is allowed to create one (1) lot, with a minimum lot size of 40,000 square feet, for every fifteen (15) acres of the parent parcel. As in the case of Section 5.7(d)1 subdivisions, the acreage used for calculation does not include such acreage that was severed in a prior subdivision. Section 5.7(d)2.b.1.a. Section 5.7(d)2 does, however, allow an owner to transfer his/her development rights under this paragraph to a contiguous parcel that he/she also owns, allowing the contiguous parcel to create more lots than would otherwise be permitted. Using the example from above, the owner of a 100 acre parcel that was of record on October 5, 1988, could create six (6) lots of 40,000 square feet each, leaving just over 94 acres which would retain the rights of the original parcel to be further subdivided as may be permitted by the provisions of the Ordinance. Moreover, if such owner also held the adjacent 100 acre parcel, he/she could instead cluster twelve (12) lots on that parcel under this paragraph of Section 5.7(d).

In terms of the number of lots permitted, Section 5.7(d)3 provides the most flexible option. Section 5.7(d) 3 provides:

> Not in addition to subsections 5.7(d)1 and 5.7(d)2 above, any property that was a lot of record as of October 5, 1988 may create 3 total lots (including the residue) during any five year period. Applications which exceed this number during any five year period shall be processed utilizing the Development Review System. *** Only the residue or parent parcel may qualify under this provision once the original subdivision takes place.

Section 5.7(d)3, therefore, provides two means by which an eligible rural parcel could subdivide, the three lots in five years subdivision by right, or an expedited subdivision of a greater number of lots under the DRS.

This provision may be understood using again the example of the owner of a 100-acre rural parcel extant on October 5, 1988, or the remainder of such from a prior subdivision. Such owner could severe two lots of not less that 40,000 square feet[82], retaining the residue of such subdivision, but he/she could not do so in the same five year period that a prior subdivision under was made. Five years later, the owner could again create two more lots, or he/she could subdivide as provided in either 5.7(d)1 or 5.7(d)2.[83] In this way, a landowner could, eventually, subdivide the entirety of a large rural parcel, but that development would take place gradually over time.[84]

The Court additionally observes that that while Section 5.7(d)3 expressly states that only the residue parcel is eligible for further subdivision under that provision, nothing in the Ordinance dictates which of the parcels must be designated as the residue. It appears to the

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[82] Ordinance, Section 5.7(b).

[83] Assuming that the owner had unused development rights under these sections.

[84] The Court notes that Section 5.7(d)3 dovetails with Article 5 of the Subdivision Ordinance, which identifies such subdivisions as "minor subdivisions." To qualify as a minor subdivision, only three (3) lots, including the residue or parent parcel, may be created in any five year period. Subdivision Ordinance, Section 5.1.a(1).

Court that an owner could employ Section 5.7(d)3 to create three lots, and designate one of the lots to be conveyed as the residue, thereby passing to the grantee the right of further subdivision. Alternatively, an owner intending to divest him/herself of all of the property could create and convey three lots, one of which is designated as the residue, and the grantee of which would obtain the further subdivision rights of the original parcel (and, presumably, pay additional consideration therefor).

Taken in its entirety, Section 5.7(d) establishes a carefully crafted zoning scheme to regulate the conversion of farmland into residential lots. If it is lawful for the County Commission to create a zoning district for the purpose of preserving rural and agricultural land, then it most certainly is lawful for this authority to regulate the encroachment on such land by urbanization, so long as such regulation is not arbitrary or unrelated to the public welfare. The Court does not find that the regulatory restrictions on the development of rural land, found in Section 5.7, are either arbitrary or unrelated to the public weal. Given the potentially devastating impact on public services brought to light in these cases, the prevention of the unchecked development of vast expanses of open land in brief periods of time cannot be said to be an illegitimate use of the police power as exercised through zoning. In the place of such unchecked growth, the Ordinance, particularly Section 5.7, establishes a regulatory mechanism by which rural land generally will be developed gradually into low-density residential use. Additionally, this scheme protects those who wish to continue farming from the harmful effects of urban pressure and crowding.[85]

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[85] This Court rejects the suggestion of the Intervenors, who argue in their brief that the preservation of food-producing land does not promote the public welfare as does the conservation of, for example, coastal lands. Certainly, the production of food is important to the welfare of the public.

Obviously, not all rural landowners wish to commit all of their land to farming, nor do they have to do so under the Ordinance. Section 5.7 affords a rural landowner a wide latitude of control over the use and development of his/her property. It provides the opportunity to engage in development of right, so as to allow an owner to reap economic benefits from the land. Although the Ordinance places certain restrictions on such development, it enables the landowner to elect the manner in which both present and future development will occur within these regulations. Under this regulatory scheme, the options available for large rural parcels that existed prior to zoning have been preserved, albeit restricted in scope so as to achieve the balance intended in the creation of a Rural District. Additionally, a landowner who wishes to develop an entire parcel without such restrictions may apply through the DRS for a permit to do so. What the Ordinance does not do is afford all of these options to persons who acquire rural lots created after zoning became effective, such persons being on notice of the regulatory restrictions then in place.[86]

Read *in pari materia*, the provisions of Section 5.7(d) define two primary aspects on which the development of rural land is dependent. First, these provisions define and identify which rural land is eligible to be subdivided. Second, these provisions regulate the number and density of lots that can be created. The subdivision of rural land, therefore, involves a two-step process of characterization and regulation.

The explicit terms of Section 5.7 of the Ordinance provide that the DRS may be utilized to allow a greater number[87] and density[88] of lots than is allowed of right in the Rural

[86] The Court notes, however, that the Ordinance does not purport to be a static instrument, and expressly recognizes that future amendments could expand the development rights of rural parcels. Ordinance, Section 5.7(d)4.

[87] Ordinance, Section 5.7(d)3.

[88] Ordinance, Section 5.7, Introductory Paragraph.

District: There is no provision, however, that indicates that the DRS may be utilized for the purpose of characterizing which rural land is eligible for development. Moreover, there is no provision within Article 6 of the Ordinance (the DRS) which purports to identify which rural parcels are eligible to apply for high-density development under the LESA system.

As noted previously, the opening provisions of Section 5.7 explicitly state that *all* lots subdivided in the Rural District are subject to Section 5.7(d). Section 5.7(d), provides that parcels existing of record on October 5, 1988, may be subdivided under its provisions. Under the express terms of the Ordinance, the number and density of lots allowed under the provisions of Section 5.7(d) may be greater if a CUP is secured. This exception, however, does not indicate, suggest or imply that a lot not subject to subdivision in the first instance becomes eligible simply by applying to the DRS. The Court is of the opinion that a rural parcel proceeds to the DRS through Section 5.7(d), and not around it.

To reach this conclusion, the Court need only read through the clear language of the Ordinance. To sustain the argument of the Respondent and the Intervenors, however, the Court would have to ignore certain express provisions, skip over the entire section regulating the Rural District and engage in interpretation where interpretation is not warranted. Moreover, the goals of the Comprehensive Plan and the purposes of the Ordinance are not implemented by the process urged by the Respondent and Intervenors,[89] but are given effect by the process argued by the Petitioners.

[89] Viewed in its most favorable light, the argument of the Respondent and Intervenors, when measured against the equally plausible argument of the Petitioners, could be said to indicate that the relevant provisions of the Ordinance are ambiguous. Assuming, *arguendo* that the provisions were ambiguous, which the Court does not find, then the preferred interpretation would be that which promotes the goals of the Comprehensive Plan and the purposes of the Ordinance, as noted in the preceding section.

In view of the foregoing, the Court concludes that a rural parcel is eligible to subdivide only if that parcel was a lot of record on October 5, 1988, or is the residue of a prior subdivision of such parcel. A greater number or density of lots into which such eligible parcel may be subdivided under Section 5.7(d) may be allowed if a Conditional Use Permit is granted through the DRS process. Accordingly, the Court concludes that the BZA was in error when it concluded that the DRS allows a non-residue rural parcel to avoid the provisions of Section 5.7(d) to secure development rights via a CUP.

Burden of Proof

Throughout their briefs and in proceedings, the County and the developers argue vigorously that the Petitioners' contentions cannot prevail because the Petitioners have failed to meet their burden of proving that the decisions of the zoning authorities are incorrect. The County and the developers point out that there is a strong presumption that the BZA 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). The Petitioners bear the burden of overcoming this strong presumption.

Emerging from the review of the Petitioners' presentations to the Board and their briefs to this Court is the implication that the Petitioners do not comprehend the concept of burden of proof. In several instances, the Petitioners have sought to support their arguments by bald assertions, unsubstantiated conclusions and pure conjecture. Where material is offered as evidence by the Petitioners, it is often material with virtually no evidentiary value under recognized legal principles. Within this opinion, the Court has identified these deficits where

they appear, and has summarily upheld the Board's conclusions against such insufficient challenges.

In other instances, the arguments of the Petitioners are properly supported by evidence, but the form of presentation makes the connection difficult to perceive. The briefs and like materials presented to this Court and to the Board do not follow a clear and concise format that allows the reader to comprehend easily the progression of logic from evidence to conclusion. The conclusions, the arguments leading to them and the evidence supporting both are often scattered across disjointed documentary submissions that attempt to ameliorate with force of conviction that which they lack in presentation of reasoning. It is unlikely that opposing parties or the Board would or could devote the endless hours that this Court has found necessary to locate and analyze the corresponding elements of the Petitioners' various oral and written presentations in these appeals. In the usual course of things, it would be natural that the Respondents and Intervenors would conclude, as they have here, that the Petitioners' challenges are unsupported by proof.

The Court is of the opinion that the challenge to the Petitioners' proof must be measured against the quality and quantity of opposing evidence and the procedures available to the Petitioners to advance their claims. The Court finds both to be lacking to at least the same degree as the deficiency asserted against the Petitioners. Both will be examined in turn.

In the process described earlier in this Order, the Zoning Administrator makes determinations based upon the data submitted by the developers. Certainly, a legitimate way for interested citizens to challenge these determinations is to present evidence that contradicts the data upon which the determinations were based. Even a cursory review of the support data

submitted for Daniels Forest and Forest View reveals that in many places it consists of little more than bald assertions and the unsubstantiated opinions of the developers.[90]

It is necessary to remember that these cases involve applications for CUPs, and the burden is on the developer in the first instance to show, by adequate evidence, that the proposal is entitled to a special exception. There is no inchoate presumption in favor of the issuance of a CUP. Upon review of the data submitted, this Court has determined that neither Daniels Forest nor Forest View provided adequate support data. It must necessarily follow, then, that for neither proposal has the initial burden of proof been met. If the developers have failed to meet their initial burden of proof, then how does the burden shift to the Petitioners? How can the Petitioners be required to refute the developer's evidence until the developer has made, to borrow the phrase, a *prima facie* case? This Court is of the opinion, and does conclude, that the Petitioners cannot be required to disprove the developer's proof until such proof is adequately set out and properly supported, because to impose such a requirement would be akin to demanding that the Petitioners prove the "universal negative." As noted in *Corliss*, the current view of the burden of the Petitioners impermissibly shifts to the public the proactive role that is properly the duty of the developer. If the zoning authorities continue to accept vague and unsubstantiated assertions as support data, then the interested citizens who respond can be held to no higher quality of proof. Such is the essence of equal protection.

Even where the burden of proof has properly shifted to the Petitioners, the adequacy of the process afforded for them to advance their evidence and make their proofs in

[90] For example, in regards to affected wildlife populations, the developer of Daniels Forest states, "Wildlife populations will not be affected although some nests or dens of individual animals may be displaced." This assertion is offered without any audit of the existing wildlife populations, survey of adequate and available alternative habitats, etc. Unless the developer possesses an undisclosed expertise in wildlife management, this is a wholly unsupported conjecture.

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. Under these procedures, the Petitioners have only thirty minutes to present their case. This allows barely enough time for the Petitioners to identify their specific challenges, let alone to flesh them out with evidence. The Petitioners attempt instead to present their evidence in documentary packets, which they don't have time to explain and the Board, apparently believing itself compelled to announce a decision at the end of the hearing, doesn't have time to review.[91] The hearings are scheduled on the agenda of regularly-scheduled Board meetings, and, therefore, compete for time with numerous other issues on that agenda. All in all, the hearings are simply not likely to produce the quality of the proof that the County and the Intervenors attempt to demand of the Petitioners.

Nonetheless, the Petitioners have managed to produce some evidence that is suitable for review. One example bears examination. Contrary to the suggestion of the Intervenors, the testimony of James Blue[92] was competent, material and adequate to establish that the proposed developments would pose a risk to his tenured farming operations. Mr. Blue testified from his personal experience of decades of farming, which unquestionably constitutes competent evidence. The personal experiences that he recounted mirror the compatibility concerns expressed in both the Ordinance and the Comprehensive Plan. Mr. Blue explained how

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[91] The Court notes that the Intervenors have objected to the Petitioners' presenting their evidence in this form at the hearings. The Intervenors suggest that all of the Petitioners' evidence should be attached to their appeal form. This Court agrees with the response of Board member Groh, who pointed out that, in the normal course of legal proceedings, the hearing is the proper place for the proffer of evidence, not the pleadings. *See*, July 18, 2002, hearing (*Kletter 2*). Upon adequate notice pleading, the Petitioners are entitled to present their evidence at the hearing.

[92] *Kletter 1*.

the changing conditions had already impacted his farm's ability to operate, and quite logically explained how the exacerbation of these conditions would have even more deleterious effects. The Intervenors suggest that Mr. Blue must prove to a certainty that the injurious effects will follow the proposed development of the land in question. The Court disagrees. The only way to prove or disprove these concerns to a certainty would be to build out the developments and then see what happens. This is precisely what the review and public comment provisions of the Ordinance are designed to avoid, recognizing that once built, a development cannot be "unbuilt." Additionally, the Court notes that the evidence presented by Mr. Blue was of the same caliber as that accepted by the Supreme Court in the recent case of *Burkey v. Bd. of Zoning Appeals of the City of Moundsville*, No. 31060 (2003).

The Court concludes that, except where expressly noted in this Order, the Petitioners have produced adequate evidence to allow the Board and this Court to consider their challenges. Where the Court has ruled in favor of the Petitioners' arguments, there is the implicit conclusion that the Petitioners met their burden of proof on the specific issues in question. In so concluding, however, the Court does not deny that the Petitioners' presentations create challenges for all participants in these appeals, and the Court feels obliged to comment on those difficulties.

While respecting their right to appear *pro se* in the tribunals of this State, the Court has little doubt that the Petitioners have disadvantaged their objectives in choosing to proceed in these matters without benefit of legal counsel. The land use cases coming before this Court in recent years present difficult, complex and often arcane legal questions that are unaided by a body of legal precedent. With this Court's decision in *Corliss* now resting in the breast of the West Virginia Supreme Court of Appeals, and others sure to follow, there is no exaggeration

in the forecast that from the cases arising in this County a new body of law will be established for the entire State. Because these cases present issues that are often unique to Jefferson County, the very future of this County's citizens may hinge upon the ultimate resolution of these legal questions. This reality should impose upon every party in these cases a sense of the utmost duty to represent their respective positions with the highest degree of legal acumen and scholarship. When parties undertake to represent themselves in these cases, they risk not only their own interest in the case at hand, but the interests of all of the citizens of this County. Courts cannot premise their conclusions on the arguments that a party would have developed had they been possessed of the expertise necessary to have known to do so. Because the courts cannot make the arguments for any party, it is axiomatic that the quality of the decisions rendered is highly dependent upon the quality of the presentations made. The Court urges the Petitioners, and indeed all parties, to consider the potentially far-reaching implications of these land use appeals when preparing to bring these matters into the courts.

Summary of Points of Law

These appeals presented numerous issues and the Court was required to undertake substantial analysis for their resolution. Because many of these issues presented questions of first impression,[93] the Court was, at times, called upon to determine the rules of law that would provide the rules of decision. Due to the length of this Opinion Order, the Court deems it advisable to summarize the points of law upon which this Court's conclusions were based, both those drawn from precedent and those announced by this Court. The legal principles employed by the Court in this Opinion Order are:

[93] In most instances, these questions of first impression related only to the meaning or interpretation of the Ordinance.

1. While on appeal there is a presumption that the Board of Zoning Appeals acted correctly, therefore, this Court should reverse the decision only where the Board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction. The party challenging a decision of the Board bears the burden of overcoming this strong presumption.

2. Zoning regulations, being in derogation of common law property rights, must be strictly construed; that is, such regulations cannot be construed to include or exclude by implication that which is not clearly within their express terms.

3. Individuals who live in close proximity to a proposed development, who farm and who demonstrate that their farming activities are at risk of being deleteriously affected or even terminated by conditions expected to be generated by the development have standing to appeal the Zoning Administrator's determination that a rural property is suitable for residential development under a conditional use permit.

4. Under the doctrine of dependent standing, individuals or groups who may not have standing to protest an action of the zoning authority may proceed as petitioners if they are joined by other individuals who do have standing under the appropriate analysis.

5. A developer satisfies the Ordinance requirements of conspicuous public notice posting of the subject property if he/she places the sign provided by the zoning staff in a position where its presence upon the property can be readily perceived by members of the public who pass thereby.

6. The Court cannot consider on *certiorari* a question that was not raised before the Board, or on which the Board made no conclusion.

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7. The Board is without power to consider or determine the validity of the Ordinance. Accordingly, the Court cannot entertain, on *certiorari*, issues that challenge the validity of the provisions of the Ordinance.

8. The presumption is that a statute or regulation is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect.

9. The principle of *stare decisis* requires tribunals to stand by decided cases, to uphold precedents and to maintain former adjudications. The doctrine of *stare decisis* rests upon the principle that the law by which persons are governed should be fixed, definite, and known, and that, when the law is declared by a court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.

10. Under the principle of *stare decisis*, a judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.

11. The purposes of requiring applicants for CUPs to submit support data are (1) to allow public review in preparation for discussion of the project's neighborhood compatibility; and (2) and to provide material upon which the permit decision will, in part, be based. These purposes provide the standard against which support data must be evaluated for adequacy. Accordingly, when the Zoning Administrator determines the adequacy of the support

data submitted, "adequacy" must be judged against the standard of the purposes for which the data is submitted, including that of informing the public.

12. The express language of the Ordinance provides that the LESA points assigned for "proximity to schools" reflects the assessment of distance, not school capacity.

13. The LESA provisions of the Ordinance allow points to be assigned to project proposals based upon the planned water and sewer systems, but the systems must be approved by the appropriate authorities before plat or site plan approval. It is not error for the Zoning Administrator to assign points to a proposed project for "availability of public water" or "availability of public sewer" based upon the systems planned for the development, even though the systems are, at that time, still subject to final approval by the appropriate authorities.

14. The countywide Ordinance approved by the voters of this County, expressly incorporates the Comprehensive Plan as part of the regulatory scheme of the zoning. Under this express incorporation, the Comprehensive Plan is an integral part of the land use regulatory scheme of Jefferson County, and must be understood as the statement of policy that the Ordinance is intended to implement through the application of its specific rules.

15. Under Section 1.3 of the Ordinance, when a provision of the Ordinance on its face admits of two interpretations in its application, reference must be made to Section 1.1 of the Ordinance and the Comprehensive Plan for the intended application.

16. The policy goals expressed in the Comprehensive Plan can be invoked to successfully challenge the interpretation or application of a provision of the Ordinance only where (1) the provision is susceptible of interpretation under established legal principles; (2) the interpretations reasonably permitted by the language of the provisions include an interpretation

that is consistent with the Comprehensive Plan; and, (3) the zoning officials have adopted an interpretation that is contrary to the goals of the Comprehensive Plan.

17. A party may successfully invoke the Comprehensive Plan to challenge a zoning decision that is the result of the application of multiple provisions of the Ordinance, only where (1) one or more of the applicable provisions is susceptible of interpretation; (2) the interpretation reasonably permitted by the language of one or more of such provisions includes an interpretation that is consistent with the Comprehensive Plan; (3) the interpretation adopted by the zoning officials for one or more of such provisions is contrary to the goals of the Comprehensive Plan; and, (4) but for the interpretations that are inconsistent with the Comprehensive Plan, the outcome of the zoning decision would have been an outcome that was consistent with the goals of the Comprehensive Plan.

18. A party may invoke the Comprehensive Plan to challenge a zoning decision that is the result of a faithful application of clear and unambiguous provisions of the Ordinance only through a facial challenge properly brought before the Court.

19. While a conditional use permit does not entail making an exception to the ordinance but rather permitting certain uses which the ordinance authorizes under stated conditions, there is no presumption in favor of permitting a conditional use. It is a use permitted only when certain conditions are met, and the burden is on the applicant to prove that conditions exist under which the proposed use may be allowed by a zoning ordinance.

20. Section 5.7(d) of the Ordinance defines two primary elements on which the development of rural land is dependent. First, these provisions define and identify which rural land is eligible to be subdivided. Second, these provisions regulate the number and density

of lots that can be created from eligible parcels. The subdivision of rural land, therefore, involves the two-step process of characterization and regulation.

21. Under the express provisions of the Ordinance, all lots subdivided in the Rural District are subject to Section 5.7(d). The Development Review System does allow for higher density if a Conditional Use Permit is issued. The DRS provides for a conditional exception to the limitation on the number and density of rural residential lots, but only Section 5.7(d) identifies the rural land that is eligible to be subdivided. Accordingly, where the high-density subdivision of a rural parcel is proposed, reference must be made to Section 5.7(d) to determine if the parcel is eligible for subdivision before proceeding to the DRS to determine if the proposal qualifies for a number and/or density CUP.

22. Section 5.7(d) of the Ordinance provides that a rural parcel is eligible to subdivide only if that parcel was a lot of record on October 5, 1988, or is the residue of a prior subdivision of such parcel.

23. The burden is on the applicant to prove the existence of the conditions that entitle a proposed development to a CUP.

24. Until a developer has presented adequate evidence to support the issuance of a CUP, parties opposing the issuance of the CUP cannot be required to disprove that the proposal is entitled to a CUP. To require such proof from opponents before the developer has made adequate proof of entitlement impermissibly shifts to the public the burden of proof that belongs to the developer.

25. Zoning authorities may not demand from parties opposing the issuance of a CUP a higher quality and quantum of evidence than those authorities have accepted from the developer.

26. Interested parties who oppose the issuance of a CUP need not prove to a certainty that the development will have a harmful impact on their interests and property. It is sufficient that such opponents show that the injurious results are reasonably likely to occur.

Conclusions of Law

The conclusions of law announced in this Opinion Order are:

1. The Blue family members are "aggrieved" within the meaning of the Ordinance and have standing to protest the zoning decisions at issue in these appeals.

2. Because the Blue family members are found to have standing in these appeals, under the doctrine of dependent standing it is unnecessary to assess individually the standing of the other Petitioners.

3. The BZA did not err when it concluded that the subject properties were posted conspicuously.

4. Because the BZA did not rule on the Petitioners' challenge to the conduct of Compatibility Meetings, and because the Petitioners failed to adequately develop their challenge, the issue is not properly before the Court in these appeals.

5. The amendment to the Ordinance, lowering the maximum LESA score for development approval from 60 to 55, applies only to those applications filed on or after August 9, 2002. Because the developers herein filed substantially complete applications on or before August 8, 2002, their applications are subject to the 60-point LESA score criterion. There was no error in the conclusion of the Board that the 55-point LESA score applied to the subject applications.

6. By deciding that the proposal "passed for development," the Zoning Administrator determined that the support data submitted by the developers of Forest View was adequate, and there was no error in the Board's implicit conclusion that such finding was made by the Zoning Administrator.

7. The BZA and Zoning Administrator are subject to the law, as pronounced by this Court on *certiorari*, when subsequent cases involving similar material facts are presented to them. The Board did not conclude otherwise, and the Court finds no error in the conclusion of the BZA on this issue.

8. Under the adequacy standard, the support data submitted for Daniels Forest and Forest View are generally inadequate for the intended purposes. The support data submitted for Aspen Greens does not fail for general inadequacy.

9. As to the challenges of the Petitioners to specific items of support data, the Court has concluded that:

a. The Board did not err when it denied the Petitioners' appeal for the adequacy of support data for "Type of development proposed."

b. The Petitioners proved that a portion of Lot 1 was dedicated to crop production, but the support data submitted by the developer of Daniels Forest failed to include this crop production in its description of "General description of surface conditions." The Board erred when it upheld the Zoning Administrator's determination that the support data for this issue was adequate.

c. The BZA did not err when it upheld the adequacy of the support data for Aspen Greens on the element of "Soil and drainage characteristics."

d. The Petitioners failed to raise before the BZA their challenges to

the adequacy of the support data submitted by (1) Aspen Greens for "Intended locations of improvements and proposed building locations including locations of signs;" (2) Daniels Forest for "Extent of conversion of farm land to urban lands;" and (3) Forest View for "Distance to fire and emergency services." Because these challenges were not included in the appeal to the BZA, they not properly before this Court in these appeals.

e. The Petitioners failed to present any evidence to support their challenges to the adequacy of the support data submitted for Daniels Forest and Forest View on the element of "Extent of conversion of farm land to urban lands;" The Board did not err when it concluded that the Zoning Administrator had correctly determined the data to be adequate.

f. Support data for "Effected wildlife populations" is inadequate when it fails to mention any species of wildlife which may be found on the property. Accordingly, the BZA erred when it concluded that the support data submitted for Daniels Forest and Forest View was adequate on this element, but was correct when it concluded in *Kletter 3* that the support data was inadequate on this issue.

g. The Board did not err when it concluded that the support data submitted for Forest View and Aspen Greens was adequate for " Traffic type and frequency, and adequacy of existing routes," but erred when it concluded that the support data submitted for Daniels Forest on this element was adequate.

10. With respect to the Petitioners' specific challenges to LESA scoring assessments, the Court concludes that:

a. Because the Petitioners produced no evidence to rebut the LESA

score assigned by the Zoning Administrator for Aspen Greens on the element of "Compatibility with Comprehensive Plan – historical and recreational," the Board did not err in concluding that the score assigned was proper.

b. There was no error in the LESA score assigned for "proximity to schools" for each of the three developments.

c. The Board did not err in denying the Petitioners' appeals on the "availability of public water."

d. The Board did not err in denying the Petitioners' appeals on the "availability of public sewer."

11. The Board was correct in not addressing the facial challenge to the LESA provisions of the Ordinance, because the Board lacks jurisdiction to consider the question.

12. The BZA was in error when it concluded that the DRS allows a non-residue rural parcel to avoid the provisions of Section 5.7(d) to secure development rights via a CUP.

Decision

In view of all of the foregoing, it is ADJUDGED and ORDERED that the decisions of the Board of Zoning Appeals denying Petitioners' appeals with respect to the three developments at issue herein should be, and are, hereby, REVERSED, and these matters are REMANDED to the Board for further action in accordance with the rulings herein.

The Court expressly reserves its discretion to reconsider this Order, upon the motion of either party, following the announcement of the decision of the West Virginia

Supreme Court of Appeals in *Corliss, et al., v. Jefferson County Board of Zoning Appeals*, No. 3119.

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 the *pro se* parties and to all counsel of record for the parties and Intervenors herein.

ENTER: 9/9/03

THOMAS W. STEPTOE, JR., CIRCUIT JUDGE

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

3cc
M. Cassell -
P. Chakmakian
J. Rotter
9-10-03
PR

2cc
G. Corliss
R. Bull
9-10-03
PR

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

KLETTER V. BOZA, et al.
Consolidated Appeals

Individual Case Identification and Procedural History

Style and Civil Action No.	BOZA Case No.	Project Proposed	BOZA Hrg Date(s)	BOZA FOF/COL	Petition Filed	Order Granting Appeal Entered
Kletter, et al. vs. Jeff. Co. BOZA, Elmer Lee Roderick, Buckeye Development CA No. 01-C-331	AP01-04	Daniels Forest 192 homesites 102 acres (Lot1)	11-15-01	12-20-01	12-14-01	12-17-01
Kletter, et al. vs. Jeff. Co. BOZA, Jane & Robert Stone, Buckeye Development* CA No. 02-C-217	AP02-01 and AP02-06	Forest View 225 homesites 102 acres (Lot 2)	07-18-02 and 11-21-02	09-19-02 and 12-19-02	8-19-02 and 12-23-02	12-13-02 and 04-30-03
Kletter, et al. vs. Jeff. Co. BOZA, Maurice Gladhill, Roderick Planes, LLC CA No. 02-C-348	AP02-08	Aspen Greens 203 homesites 110.7 acres (Residue)	12-19-02	01-16-03	12-23-02	04-30-03

* The Petitioners twice appealed the zoning decisions for Forest View. In the first appeal, the Board remanded for inadequate support data on three elements. In the second appeal, the Petitioners asserted that the supplemented support data was still inadequate, and also asserted that the newly-adopted, lower LESA score cut-off should apply to the project.

Table 1

KLETTER V. BOZA, et al.
Consolidated Appeals

Appellate Issues

Case		LESA scoring*	LESA facial challenge	Only residue can divide	Inadequate support data**	Public notice sign size and placement	55 point LESA score applies	Not conform to Comprehensive Plan	Compatibility meetings hostile to public	ZA failed to find data (in)adequate	ZA failed to follow Court's decision
Kletter 1	Appeal	YES	YES	YES	YES	YES	N/A	YES	NO	NO	NO
	BOZA	YES	NO	YES	YES	YES	N/A	YES	NO	NO	NO
Kletter 2	Appeal	YES	YES	YES	YES	YES	YES	YES	YES	YES	?
	BOZA	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES
Kletter 3	Appeal	YES	YES	N/A	YES	YES	YES	YES	NO	NO	YES
	BOZA	YES	YES	N/A	YES	YES	YES	YES	NO	NO	YES

* Refer to Table 3 for a listing of the specific LESA scoring issues raised.
** Refer to Table 4 for a listing of the specific elements of support data asserted to be inadequate.

Table 2

KLETTER V. BOZA, et al.
Consolidated Appeals

LESA Scoring Issues

Case		#1 Soils	#5.b Comp Plan Compatibility - historical and recreational	#5.c Land use compatibility	#6 Proximity to schools	#7 Availability of public water	#8 Availability of public sewer
Kletter 1	Appeal	NO	NO	NO	YES	YES	YES
	BOZA	NO	NO	NO	YES	YES	YES
Kletter 2	Appeal	NO	NO	NO	YES	YES	YES
	BOZA	YES	YES	YES	YES	YES	YES
Kletter 3	Appeal	NO	YES	NO	YES	YES	YES
	BOZA	YES	YES	YES	YES	YES	YES

Table 3

KLETTER V. BOZA, et al.
Consolidated Appeals

Support Data Challenges

Case		# 3 - Type of proposed development	#5 – General description of surface conditions	#6 – Soil and drainage characteristics	#10 – Intended ... locations of signs	#14 – Extent conversion of farm land to urban lands	#15 – Effected wildlife populations	#16 – Ground, surface water; sewer lines w/in 1320 ft.	#17 – Distance to fire, emergency services	#19 – Traffic type/frequency ; adequacy of existing routes
Kletter 1	**Appeal**	YES	YES	NO	NO	NO	NO	NO	NO	YES
	BOZA	YES	YES	NO	NO	YES	YES	NO	NO	YES
Kletter 2	**Appeal**	YES	NO	NO	NO	YES	?	YES	YES	YES
	BOZA	YES	NO	YES	NO	YES	YES	YES	NO	YES
Kletter 3	**Appeal**	NO	NO	YES	YES	NO	NO	YES	NO	NO
	BOZA	NO	NO	YES	NO	NO	YES	YES	NO	YES

Table 4