

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COPY

JAN CARY KLETTER, et al.,

Petitioners Below, Appellees,

v.

**JEFFERSON COUNTY ZONING
BOARD OF APPEALS,**

Respondent Below, Appellant,

and,

ELMER LEE RODERICK, ET AL.,

Intervenors Below, Appellees

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**BUCKEYE DEVELOPMENT, LLC, AND JEFFERSON UTILITIES, INC.'S
BRIEF ON APPEAL**

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TABLE OF CONTENTS

I.	KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	1
A.	Nature Of The Ruling Below.....	1
B.	Procedural History	4
II.	STATEMENT OF FACTS	8
A.	Facts Relating to Buckeye’s Case.....	8
B.	Facts relating to the <i>Jefferson Utilities</i> case	13
III.	ASSIGNMENT OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL	17
IV.	STANDARD OF REVIEW	18
V.	DISCUSSION OF LAW	19
A.	The Circuit Court Misinterpreted Section 5.7 of the Ordinance.....	19
B.	Two Of The Circuit Judges In The 23rd Judicial Circuit Have Come To Opposite Conclusions Concerning The Meaning And Application Of This Court’s Decision In <i>Corliss V. Jefferson County Board Of Zoning Appeals</i>	26
1.	Judge Silver’s interpretation of <i>Corliss</i>	26
2.	Judge Steptoe’s interpretation of the <i>Corliss</i> decision.....	27
3.	The two Judges reached opposite conclusions.....	29
C.	The Circuit Court Erred In His July 12, 2004 Decision That The Zoning Administrator Lacks Authority	30
1.	The Circuit Court’s decision is contrary to the Ordinance	32
2.	The Circuit Court’s decision is contrary to <i>Corliss</i>	32
3.	The Circuit Court’s decision is contrary to West Virginia Code.....	34
D.	Jefferson Utilities, Inc. Is A “Public Utility” Within The Meaning Of West Virginia Law	38
1.	The Zoning Administrator’s determination should be reversed because it fails to properly interpret the plain meaning of Section 6.4(f) of the Development Review System.....	39
2.	Jefferson Utilities, Inc. meets the definition of “public utility” under West Virginia Law	40
VI.	RELIEF PRAYED FOR	41

TABLE OF AUTHORITIES

Cases

<i>Affiliated Const. Trades Foundation v. Public Service Com'n of West Virginia</i> , 211 W.Va. 315, 565 S.E.2d 778 (W.Va. 2002).....	40
<i>Barbor v. County Court of Mercer County</i> , 85 W.Va. 359 [101 S.E. 721 (1920)].....	37
<i>Berkeley County Comm'n v. Shiley</i> , 170 W.Va. 684, 295 S.E.2d 924 (1982).....	37
<i>Berlow v. West Virginia Bd. of Medicine</i> , 458 S.E.2d 469, 475, 193 W.Va. 666, 672 (W.Va. 1995).....	25
<i>Blackwell, et al. v. Raco, et al.</i> , Appeal No. AP01-04.....	23
<i>Boley v. Miller</i> , 187 W.Va. 242, 418 S.E.2d 352 (1992).....	35
<i>CDS, Inc. v. Camper</i> , 438 S.E.2d 570, 572, 190 W.Va. 390, 392 (W.Va. 1993).....	25
<i>Charter Communications VI, PLLC v. Community Antenna Service, Inc.</i> , 211 W.Va. 71, 77, 561 S.E.2d 793, 799 (2002).....	36
<i>City of Mullens v. Union Power Co.</i> , 7 S.E.2d 870, 122 W. Va. 179 (1940).....	40
<i>Corliss v. Jefferson County Board of Zoning Appeals</i> , 591 S.E.2d 93, 214 W. Va. 535 (2003).....	passim
<i>Dunlap v. Friedman's, Inc.</i> 213 W.Va. 394, 401, 582 S.E.2d 841, 848 (W.Va. 2003).....	36
<i>Frank's Shoe Store v. W.Va. Human Rights Commission</i> , 179 W.Va. 53, 365 S.E.2d 251 (1986).....	25
<i>Harding v. Board of Zoning Appeals</i> , 219 S.E.2d 324 (1975).....	20
<i>Jackson v. State Farm Mut. Auto. Ins. Co.</i>	35
<i>Jefferson Utilities, Inc. v. Jefferson County Board of Zoning Appeals, et. al.</i> , Civil Action No. 03-C-278.....	passim
<i>Lee-Norse Co. v. Rutledge</i> , 170 W.Va. 162, 291 S.E.2d 477 (1982).....	35
<i>MacElwee, et. al. v. Jefferson County Board of Zoning Appeals and Thorn Hill, LLC, et. al.</i>	26, 27, 28, 29
<i>Martin v. Randolph County Bd. of Educ.</i> , 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995).....	18
<i>Mills v. Van Kirk</i> , 192 W.Va. 695, 453 S.E.2d 678 (1994).....	35
<i>Miners in Gen. Group v. Hix</i> , 123 W.Va. 637, 17 S.E.2d 810 (1941).....	35
<i>Montgomery General Hosp. v. West Virginia Human Rights Com'n</i> , 346 S.E.2d 557, 558, 176 W.Va. 580, 582, (W.Va. 1986).....	26
<i>Muscattell v. Cline</i> , 196 W.Va. 588, 474 S.E.2d 518 (1996).....	19
<i>Pristavec v. Westfield Ins. Co.</i> , 184 W.Va. 331, 400 S.E.2d 575 (1990).....	35
<i>Roberts v. Greiner</i> , 386 S.E.2d 504, 505, 182 W.Va. 137, 138 (W.Va. 1989).....	26
<i>Rollyson v. Jordan</i> , 205 W.Va. 368, 518 S.E.2d 372 (1999).....	35
<i>Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp.</i> , 166 W.Va. 775, 277 S.E.2d 613 (1981).....	24
<i>Singer v. Davenport</i> , 164 W. Va. 665, 668, 264 S.E.2d 637, 640 (1980).....	32
<i>State ex rel. ACF Indus., Inc. v. Vieweg</i> , 204 W.Va. 525, 514 S.E.2d 176 (1999).....	35
<i>State ex rel. City of Wheeling v. Renick</i> , 116 S.E.2d 763, 145 W. Va. 640 (1960).....	40
<i>State ex rel. County Court v. Arthur</i> , 150 W.Va. 293, 145 S.E.2d 34 (1965).....	37
<i>State ex rel. Hechler v. Christian Action Network</i> , 201 W.Va. 71, 491 S.E.2d 618 (1997).....	35

<i>State ex rel. McGraw v. Combs Services</i> , 206 W.Va. 512, 518, 526 S.E.2d 34, 40 (W.Va. 1999)	35
<i>State ex rel. State Line Sparkler of WV, Ltd. v. Teach</i> , 187 W.Va. 271, 274-275, 418 S.E.2d 585, 588 – 589 (W.Va.,1992)	37
<i>Walker v. West Virginia Ethics Com'n</i> , 492 S.E.2d 167, 175, 201 W.Va. 108, 116 (W.Va. 1997)	25
<i>Webb v. West Virginia Board of Medicine</i> , 212 W.Va. 149, 569 S.E.2d 225 (2002).....	18
Statutes	
§8-24-56.....	16
W. Va. Code §24-1-1	40
W. Va. Code §24-2-1	40
W. Va. Code §8-24-55 (1)	34
W.Va.Code, 29-3-5b	37
W.Va.Code, 7-1-3n.....	37
Other Authorities	
5 <i>McQuillan Municipal Corporations</i> § 17.04 (3d ed. 1989).....	37
56 <i>Am.Jur.2d Municipal Corporations, Counties and Other Political Subdivisions</i> § 414 (1971).....	37
Jefferson County Zoning Ordinance.....	passim
Constitutional Provisions	
United States Constitution	39, 40
West Virginia Constitution	39, 40

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

A. Nature of the Ruling Below

This is an appeal from a decision of the Circuit Court of Jefferson County¹, which stopped Appellant Buckeye's² development of its land as a residential subdivision by eliminating Buckeye's conditional use permits. As set forth below, there are at least four decisions in the case, whose orders comprise approximately one hundred eighty (180) pages.³

The three parcels of land which form the basis of this appeal were created by the division of a common tract of land from a common grantor containing 315 acres known as the Roderick Farm and was partitioned among three of the Roderick heirs. The original tract was subdivided in 1992 creating the three parcels now appearing of public record as Lot 1, Lot 2 and Residue. The one lot designated as "residue" was only designated as "residue" by chance, when the term "residue" was written by a surveyor on the plat when the Roderick Farm was subdivided in 1992. There is no inherent right or basis for any of the lots to be called either a "Lot" or "Residue."

¹ The counsel for the Buckeye, is somewhat reluctant to refer to the Judges in the Court below by name, and intends no disrespect in so doing. The fact that there are two separate Judges in the 23rd Judicial Circuit involved in this appeal makes it necessary to utilize the Judges' names to clearly identify the correct Judge.

² Your Appellant, Buckeye Development, LLC, is referred to throughout the Appeal as "Buckeye."

³ The three cases above were consolidated to form Buckeye's case at the Circuit Court level. This Court has consolidated the Buckeye case with an additional case from Judge Steptoe, *Jefferson Utilities*, for purposes of this appeal. That case is styled below as *Jefferson Utilities, Inc. v. Jefferson County Board of*

The individual cases that formed the underlying appeal at the Circuit Court level can be identified as follows:

Names of the Petitioners Below	Civil Action Number and Date of Filing	Development Name, Lot No. and Intervenor Below
Kletter, Blue and Corliss	01-C-331 December 14, 2001	Daniel's Forest, Lot 2 Buckeye Development, LLC
Kletter, Blue and Corliss	02-C-217 August 19, 2002	Forest View, Lot 1 Buckeye Development, LLC
Kletter, Blue and Corliss	02-C-348 December 23, 2002	Aspen Greens, Residue Maurice Gladhill

The basic appeal flows in this case from three key issues.

First, Judge Steptoe has ruled that Section 5.7(d) of the Jefferson County Zoning Ordinance⁴ places severe limits on subdivision of land, and makes a rural parcel of land 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. This decision severely limits Buckeye’s ability to subdivide its land, and is contrary to a clear reading of the last sentence of the first paragraph of Section 5.7 of the Ordinance, which states that “The Development Review System (hereinafter “DRS”) does allow for higher density [if] [sic] a Conditional Use Permit is issued.” *Id.* (Buckeye owns both lot 1 and lot 2 that were described above).

Second, Judge Steptoe has ruled that the Jefferson County Zoning Administrator (hereinafter “Zoning Administrator”) has no discretionary authority to decide any substantive issue, but is instead only allowed to function as a ministerial employee. This ruling affects

Zoning Appeals, et. al., Civil Action No. 03-C-278.

⁴ The Jefferson County Zoning and Development Review Ordinance is referred to throughout the Appeal as the “Ordinance.”

Buckeye because Judge Steptoe has ruled that the Zoning Administrator cannot decide whether the developer, Buckeye, has submitted adequate support data information to the County as part of Buckeye's burden under the Ordinance to obtain a Conditional Use Permit to develop its property. Judge Steptoe's decision is directly contrary to this Court's implied approval of the Zoning Administrator's exercise of discretion in *Corliss*,⁵ and contrary to the Ordinance, which clearly places the initial determination of "adequacy" in the Zoning Administrator's hands.⁶ As a result, Judge Steptoe has also ruled that the decisions made by the Board of Zoning Appeals⁷ in this case are in error because those decisions give deference to the prior decisions of the Zoning Administrator. Instead of applying *Corliss*, Judge Steptoe applied his own prior decision, called *Jefferson Utilities*, as the means of interpreting the Ordinance.

A third issue is that two of the Circuit Judges in the 23rd Judicial Circuit have come to opposite conclusions concerning the meaning and application of this Court's decision in *Corliss*. Judge Gray Silver (in a similar case, called *Thorn Hill*⁸) applied *Corliss* and reversed himself, while Judge Steptoe (in this case) has essentially limited *Corliss* to its facts. This Court should also resolve this conflict in this Appeal.

Buckeye believes that Judge Steptoe has: (1) wrongly interpreted Section 5.7 of the Ordinance, thereby denying Buckeye the ability to subdivide its property, and (2) erred in interpreting the role of the Zoning Administrator and the BZA in accord with his own *Jefferson Utilities* case instead of in accord with *Corliss* and related law, thereby stopping Buckeye's quest

⁵ *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93 (W.Va., 2003).

⁶ Ordinance Section 7.4(g) states in part that "the Zoning Administrator shall determine if the sketch plan and support data are adequate. . ."

⁷ The Board of Zoning Appeals is referred to throughout the Appeal as the "BZA".

towards development of its property, and (3) should have applied *Corliss*, as did Judge Silver, instead of limiting *Corliss* to its facts, and has made other errors as outlined below.

B. Procedural History

By successfully meeting the procedural requirements of the Ordinance, Buckeye obtained a Conditional Use⁹ Permit¹⁰ from the Jefferson County Planning Commission that allowed

⁸ Former Supreme Court Docket No. 031896, which, on Remand, was numbered as Jefferson County Circuit Court Civil Action No. 02-C-40

⁹ As the Court knows, a conditional use permit is a permit to use land in a way that is only permitted under the zoning ordinance if certain conditions are met. Conditional uses are defined as "a use of land or activity permitted only after fulfillment of all local regulations." *Ordinance* at page 6. For example, in this case, the property in which Buckeye is located is zoned as a rural district, but residential subdivisions are permitted if certain conditions are met. This process is explained in greater detail below.

¹⁰ As explained below, there are three proposed residential subdivisions involved in this appeal, of which two, Daniel's Forest and Forest View, are Buckeye's. Each proposed subdivision encompasses one of the three lots outlined above. Specifically, a Conditional Use Permit was issued with regard to the Daniel's Forest property. (See the minutes from the Jefferson County Planning and Zoning Commission dated December 11, 2001, pp. 2 - 3, wherein the conditional use permit was issued with regard to the Daniel's Forest property. The last paragraph of the relevant section of those minutes states: "Mr. Donnelly motioned to issue the conditional use permit with all of the resolved issues outlined in the staff report being a part thereof. Mr. Daily seconded the motion which carried with the vote of seven for and three opposed (Mr. Hammer, Mr. Shiavone and Ms. Smith)."

A Conditional Use Permit was also issued as to the Forest View property. (See minutes showing issuance of the Conditional Use Permit for both properties dated April 8, 2003 which states:

"2. Postponed from the March 11, 2003 meeting. Action on the Conditional Use Permit for the Forest View Subdivision (formerly known as Spring Meadow). Mr. Raco stated Mr. Cassell's memo on issues not allowed as compatibility issues is in the Commissioner's packet. Mr. Schiavone motioned to issue the Conditional Use Permit with all the resolved issues outlined in the Staff Report (copy attached) and the following conditions:

1. Provide a berm or comparable landscape screen to County standards on land to be owned by the Homeowner's Association along the property frontage adjacent to Route 17 (Flowing Springs Road); and,
2. Provide a covenant noting farming activities are a permitted use in the rural district and may include noises, odors, operations at night and other activities characteristic of a farming operation.

Rosella Kern seconded the motion. Ms. Smith motioned to amend the motion to require the developer and/or his representative to meet with the Department of Highways to discuss the amount of land required to widen Route 17 (Flowing Springs Road) if and

Buckeye to proceed toward development of its two residential subdivisions. After the Conditional Use Permit was granted, Kletter¹¹ filed an administrative appeal to the BZA as to all three lots. The BZA denied¹² Kletter's appeal and upheld the Planning Commission's grant of the Conditional Use Permit.

Kletter then appealed the BZA's decision to the Circuit Court of Jefferson County as to all three lots. The Circuit Court issued an *Order*¹³ on September 9, 2003 that vacated the decision of the BZA and eliminated Buckeye's Conditional Use Permits.

While this Appeal begins with the *September 9, 2003 Order* in Buckeye's case, the basis for this appeal encompasses at least four Orders from the Circuit Court below that are woven together in this case and should be considered jointly by this Court.

The first of the four Orders was an eighty-eight (88) page Order issued on September 9,

when it would need to be widened. Mr. Morgan seconded the amendment to the motion which passed with a vote of 8 for and 1 abstention (Mr. Lewandowski because he was not on the board at the time the public hearing was held on the unresolved issues). The amended motion passed with a vote of 8 for and 1 abstention (Mr. Lewandowski for the same reason as the previous vote)."

Buckeye's counsel does not represent the Aspen Green property and makes no representation as to that property.

¹¹ Respondents herein were Petitioners to both the BZA and the Circuit Court below, and, although consisting of three petitions to the circuit court, were consolidated below and are collectively referred to as "Kletter" by the Circuit Court in Footnote 3 of its *September 9, 2003 Order*. The Circuit Court created a Table at the conclusion of its *September 9, 2003 Order*, designated as Table 1, which concisely describes the parties and relevant dates. The name of the residential subdivisions at issue in this case are as follows:

- Daniel's Forest (designated by the Court below as Kletter 1). The Petition number for Daniel's Forest/Kletter 1 before the BZA was AP-01-04;
- Forest View (designated by the Court below as Kletter 2). The Petition number for Forest View/Kletter 2 before the BZA was AP-02-01; and
- Aspen Greens (designated by the Court below as Kletter 3). The Petition number before the BZA for Aspen Greens/Kletter 3 was AP-02-08. Counsel for Buckeye does not represent Aspen Greens.

¹² The BZA first granted the Appeal in part, required more information and a re-submission from the developer, and then ultimately denied the appeal. (*See September 9, 2003 Order* at 12.)

¹³ The Honorable Thomas Steptoe issued the 88 page *Order* overturning the BZA in the Buckeye case on September 9, 2003. The 88 page *Order* of the Circuit Court is referred to throughout the Appeal as the *September 9, 2003 Order*.

2003, by the Circuit Court in Jefferson County (Hon. Judge Thomas Steptoe) vacated the decision of the BZA and thereby stopped the development of Buckeye's residential subdivisions. On October 10, 2003, this Court issued its decision in *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93 (W.Va.,2003). On November 21, 2003, the Jefferson County Planning Commission, (and subsequently, Buckeye) filed a Motion under Rule 60(b) with the Circuit Court in Jefferson County, asking Judge Steptoe to reconsider his decision here in the light of *Corliss*.¹⁴

The second of the four Orders is a 54 page July 12, 2004, Order from Judge Steptoe deciding the Rule 60(b) Motions of Buckeye and the Planning Commission.¹⁵

The *July 12, 2004 Order* did not effectively resolve the original issues raised by Buckeye and the Planning Commission in their challenge to the *September 9, 2003 Order* in their Motions under Rule 60(b).

Buckeye requested that Judge Steptoe stay the matter pending appeal.

The Third of the four Orders is an August 16, 2004 Order¹⁶ denying Buckeye's Motion to stay the orders pending appeal. This same Order attempts to clarify Judge Steptoe's prior 88 page and 54 page Orders.

¹⁴ By *Order* dated December 10, 2003, Judge Steptoe extended the time to file Buckeye's appeal until March 9, 2004. Judge Steptoe had not made a decision on the Rule 60(b) motion as of the time that the extended appeal deadline had been reached on March 9, 2004. Appellants therefore had no safe option save to file a petition for appeal to this Court on March 4, 2004, before the extended appeal deadline expired. (Judge Steptoe had issued an Order on February 19, 2004 that vacated the finality of his *September 9, 2003 Order*. Because Appellants were unsure of the ramifications of this Order on the appeal deadlines, Appellants proceeded to file their appeal within the boundaries of the extended deadline). The March 4, 2004 petition was neither accepted nor denied, and Appellants, upon information and belief, are aware that Judge Steptoe's office caused further action on the appeal by this Court to be informally stayed until Judge Steptoe could reach a decision on the Rule 60(b) Motion.

¹⁵ The 54 page July 12, 2004 Order from Judge Steptoe deciding the Rule 60(b) Motions of Buckeye and the Planning Commission is referred to throughout as the *July 12, 2004 Order*.

¹⁶ This is referenced to throughout as the August 16, 2004 Order.

In the *August 16, 2004 Order*, Judge Steptoe states several points, but does not resolve the underlying issues of this case in light of *Corliss*, and does not resolve the issues raised by Buckeye in its Rule 60(b) Motion.

The Fourth of the four Orders is a thirty-four (34) page Order from Judge Steptoe in the Jefferson County Circuit Court, titled *Jefferson Utilities, Inc. v. Jefferson County Board of Zoning Appeals, et. al.*, Civil Action No. 03-C-278.¹⁷ The *Jefferson Utilities* Order is relevant here, because Judge Steptoe used the *Jefferson Utilities* decision as a basis for his Order in this case, while limiting *Corliss* to the facts of the *Corliss* case.

It is from these collective Orders that Buckeye brings this appeal.

¹⁷ The *Jefferson Utilities* case was separately appealed, with the Petition for appeal filed on November 9, 2004. This Court has consolidated the *Jefferson Utilities* case with the *Buckeye* case. In this brief, the *Jefferson Utilities* case is referred to as *Jefferson Utilities*, and the Order related thereto is the *Jefferson Utilities Order*.

In the *Jefferson Utilities* case, Judge Steptoe initially issued its 34 page *Jefferson Utilities Order* wherein it conducted an analysis of the role and statutory authority of the zoning administrator. In ruling on a subsequent Motion to stay the enforcement of the judgment in *Jefferson Utilities* pending appeal, the court crystallized its 34 page Order into four succinct points. Specifically, those points are:

- 1) Under West Virginia law in the context of a county zoning ordinance, only the Board of Zoning Appeals has the quasi-judicial power necessary for certain aspects of zoning administration and a County Commission may not confer such powers upon other agencies or ministerial employees.
- 2) In the context of the facts of this case and this county zoning ordinance, the definition of "public water" for purposes of the LESA scoring system is a quasi-judicial determination which cannot be made by a ministerial employee.
- 3) Unlike the standard of review that the Circuit Court is to apply to rulings of the Board of Zoning Appeals (deferential), under West Virginia law, the standard of review that the Board of Zoning Appeals is to apply to cases on appeal before it is de novo.
- 4) Under West Virginia law, the Zoning Administrator in Jefferson County is a ministerial employee

II. STATEMENT OF FACTS

A. Facts Relating to Buckeye's Case

1. This is a consolidated case that arises from three (3) Petitions for Writ of Certiorari seeking review of certain decisions of the Jefferson County BZA. The BZA ultimately denied each of the Petitioners' appeals that challenged the BZA's decisions to uphold the grant of Conditional Use Permits¹⁸ to the developments herein.

2. The sections of land in this case are located in the rural district, as defined by the Ordinance.

3. The Ordinance has established certain zones composed of geographical areas in Jefferson County. Each geographical area, or district, has some uses that are permitted uses¹⁹ and other uses that are allowed only if the developer meets certain conditions, called conditional uses.²⁰

4. Buckeye sought to develop a residential subdivision in Jefferson County, in a zone designated as a Rural District. A Rural District has at least nineteen (19) permitted uses, including low-density single-family residential development and farming.²¹ The Ordinance provides that a piece of property in a Rural District, (where a residential subdivision is not a permitted use) may nonetheless be lawfully used for a residential subdivision if the developer makes application to the Zoning Administrator,²² meets certain conditions, and obtains a

¹⁸ CUP herein.

¹⁹ Permitted uses are defined as the "primary or predominant use of any site. *Ordinance* at page 13.

²⁰ Conditional uses are defined as "a use of land or activity permitted only after fulfillment of all local regulations." *Ordinance* at page 6.

²¹ *Ordinance* at §5.7(a)

²² Paul Raco is the Jefferson County Zoning Administrator and is referred to as the "Zoning Administrator" in this Appeal.

conditional use permit.²³ (“CUP” herein.) through the use of the DRS.

5. The DRS is comprised of two parts, the soils assessment and the amenities assessment. Both the soils assessment and the amenities assessment are given a point score based on a numerical system.

6. The amenities assessment portion of the DRS is an evaluation of various criteria.²⁴ The Zoning Administrator assigns a point score to each of the criterion. The evaluation is given a numerical score based on the importance of a parcel’s agricultural significance or its development potential. A higher score on a particular criterion indicates that the property is better suited for agriculture, and a lower score indicates that the property is more suitable for development. At the time of the events in this case, a project seeking a CUP was required to score a maximum of 60 or less in order to proceed to the next stage of development approval.²⁵

7. As part of this system, the developer is also required to submit support data to the Zoning Administrator, which is information in 23 categories about the property to be developed and the surrounding area.

8. In this case, three parcels of land exist that were all carved out of one parent tract, the Roderick Farm. That farm was partitioned among the Roderick siblings (or their issue).

9. Buckeye sought to develop two of the parcels, known as Daniel’s Forest and

²³ The three parcels are in the rural district, which is addressed in Section 5.7 of the Ordinance. Of particular importance are the last two sentences of the first paragraph of Section 5.7:

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] *sic*. a Conditional Use Permit is issued.

²⁴ The amenities assessment portion of the Development Review System comprises 75% of the overall point score. The criteria considered under the amenities assessment include the site size, the nature of adjacent development, the distances to the growth corridor and to the public schools, the compatibility with the Comprehensive Plan, the availability of public water and sewer, adequacy of roads, and the availability of emergency services.

²⁵ The LESA scores for the 3 parcels are set forth in the *September 9, 2003 Order* on page 28.

Forest View.

10. Buckeye fully complied and lawfully submitted information to the County Planning and Zoning Commission in order to obtain a CUP for residential developments on the property. The developer submitted an application, a sketch plan, and support data.

11. Pursuant to the Planning Commission's procedure, and the terms of the Ordinance, the Zoning Administrator conducted an assessment of the properties and determined that the information submitted to him was adequate under the Ordinance to meet the requirements of the Ordinance to issue a CUP. The Zoning Administrator's assessment also included a LESA assessment.

12. In this case, the Zoning Administrator agreed that the support data submitted to him by Buckeye was adequate, and Buckeye's amenities assessment score, as determined by the Zoning Administrator, was less than the maximum score of 60, which allowed Buckeye to proceed to obtain a CUP. The Jefferson County Planning Commission then granted the CUP to Buckeye as to the Daniel's Forest property and as to the Forest View property.

13. The Kletter petitioners each filed three (3) separate appeals to the BZA from the determination of the Zoning Administrator which were identified by the Court in the *September 9, 2003 Order*, footnote #3, as Kletter 1, Kletter 2, and Kletter 3.

14. Kletter set forth a variety of claims before the BZA, including a claim that the Zoning Administrator was wrong, and that the DRS scores should have been higher, thereby disqualifying Buckeye from obtaining a CUP.²⁶ Kletter further claimed that the support data submitted to the Zoning Administrator by Buckeye was inadequate. The BZA, after

²⁶ Because, as stated above, a higher score would mean that the property would be best suited for agricultural uses, and would lead to a denial of the CUP.

consideration of the Kletter appeal, ultimately denied the appeal, upheld the decision of the Zoning Administrator, and upheld the Planning Commission's decision.

15. As a result, the Kletter Petitioners filed a Writ of Certiorari with the Circuit Court.

16. As the Court notes in the September 9, 2004 Order, the specific challenges made by the petitioners in each of the appeals to the BZA are identified and collected in tables 2, 3, 4, which are attached to the Court's September 9, 2004 Order.

17. As further summarized by the Circuit Court:

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 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 it 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.

September 9, 2003 Order at page 12.

18. The Circuit Court in its *September 9, 2003 Order*, 1) essentially analyzed the entire appeal based on its own *Harvest Hills* decision (at the Circuit Court level which became the *Corliss* decision at the West Virginia Supreme Court of Appeals, and 2) reversed the BZA's

decision for three primary reasons, including holding that the support data submitted to the Zoning Administrator by Buckeye was inadequate in its description of surface conditions, wildlife populations, and traffic. Based on that finding the Circuit Court reversed and vacated the decision of the BZA and vacated Buckeye's CUP. Buckeye's Petition for Appeal to this Court followed.

19. On October 10, 2003, the West Virginia Supreme Court of Appeals issued a decision in *Corliss*.

20. The Circuit Court's *September 9, 2003 Order* in the case below conflicts with the West Virginia Supreme Court of Appeal's October 10, 2003 decision in *Corliss*.

21. On November 21, 2003, the Jefferson County Board of Zoning Appeals filed a Rule 60(b) Motion asking Judge Steptoe to review the underlying decision in light of this Court's decision in *Corliss v. Jefferson County Board of Zoning Appeals*, 591 S.E.2d 93, 214 W. Va. 535 (2003).

22. On January 21, 2004, Buckeye filed a Rule 60(b) Motion asking Judge Steptoe to review the underlying decision in light of this Court's decision in *Corliss v. Jefferson County Board of Zoning Appeals*, 591 S.E.2d 93, 214 W. Va. 535 (2003).

23. On July 12, 2004 Judge Steptoe ruled on the Rule 60(b) Motions in a 54 page Order.

24. On August 16, 2004 Judge Steptoe denied Buckeye's Motion to stay his ruling.

25. On March 4, 2004, Buckeye filed its Petition for Appeal with this Court.

26. On November 12, 2004, Buckeye filed its supplemental Petition for Appeal with this Court.

27. This Court should note that Judge Steptoe's Rule 60(b) decision does not deal

with many of the issues that were raised in the first Petition filed with this Court; therefore, those issues remain to be addressed by this Court.

B. Facts relating to the Jefferson Utilities case

28. Appellant Jefferson Utilities, Inc. was formed as a domestic corporation under the laws of the State of West Virginia on December 23, 1985 for the purpose of owning and operating a public water system in Jefferson County, West Virginia. Subsequently, Jefferson Utilities, Inc. acquired through merger the public water systems of Walnut Grove Utilities, Inc., and Shenandoah Junction Public Water, Inc. Currently, Jefferson Utilities, Inc. owns, maintains, and operates a public water system that serves approximately 1,400 customers. As a result of the public water service provided by Jefferson Utilities, Inc., Jefferson Utilities, Inc. is a “public utility” that is regulated by the West Virginia Public Service Commission and other entities.

29. The Ordinance of Jefferson County, West Virginia, adopted July 7, 1988, as amended, provides the regulatory framework for development within Jefferson County, West Virginia. The Ordinance contains procedures know as the DRS, which provide a stated purpose to assess the development potential of an individual parcel with specific criteria to determine the agricultural longevity of the parcel in combination with the presence of and compatibility with public services adjacent and in close proximity to the parcel.

30. Effectively, the DRS contains a Land Evaluation and Site Assessment component (hereinafter “LESA”), which is a numerical rating system, performed by the Zoning Administrator, comprised of specific criteria detailed in Section 6.3 The Soils Assessment, and Section 6.4 Amenities Assessment. In that regard, a total score of 55 or less under the LESA evaluation advances a proposed use to the Compatibility Assessment Meeting under Section 6.2

Issuance of a Conditional Use Permit and Section 6.5 Computation of Soils/Amenities Assessment.

31. The criteria utilized under the DRS embodies planning and land use principles and are weighted such that high numerical values indicate agricultural viability and low numerical values indicate that the proposed development is more appropriate for the affected parcel. For example, Section 6.4 (f) Public Water Availability, which is weighted with 11 points, assesses the availability of existing public water service with available capacity that is approved by the appropriate governmental body to the parcel. Specifically, 11 points are assigned when private wells are to be utilized, and zero (0) points are to be assigned when existing public water is available to the parcel or public water will be built to the parcel. Fundamentally, it is clear that the use of private wells support agricultural land uses that are generally low density uses, and it is also clear that the use of existing public water, or the use of public water to be built to the parcel, supports non-agricultural land uses that are higher density uses, which uses include higher density residential subdivisions.

32. Historically, many applicants proposing residential subdivisions under the DRS have detailed in their application that the proposed subdivision will rely upon public water being built to the affected parcel. In support of their position, these applicants have typically submitted a letter from the public utility illustrating that public water will be extended to the parcel in conformance with the requirements of Section 6.4 (f) Public Water Availability.

33. The assessment of points under this scenario by the Zoning Administrator has resulted in inequitable results, namely, the Zoning Administrator has not assessed all public utilities with the same point value. The Zoning Administrator assessed the government owned "public utilities" at "0" and Jefferson Utilities, Inc. at "3" points because the Zoning

Administrator does not believe that Jefferson Utilities, Inc. is a public utility, notwithstanding the fact that Jefferson Utilities, Inc.'s actions and charges to customers are governed by the Public Service Commission.

34. As a result of the inequitable results, Jefferson Utilities, Inc., by letter to the Zoning Administrator dated September 16, 2002, explained that the Zoning Administrator's interpretation of Section 6.4 (f) Public Water Availability has created differing results among the following public utilities: Jefferson County Public Service District, Charles Town Water Department, Harpers Ferry Water Works, Shepherdstown Waterworks, and Jefferson Utilities, Inc., and Jefferson Utilities, Inc. further requested that the Zoning Administrator provide a written determination relative thereto.

35. As a timely response was not forthcoming, Jefferson Utilities, Inc. contacted the Jefferson County Department of Planning, Zoning & Engineering in February of 2003 regarding the status of the determination referred to hereinabove, and Jefferson Utilities, Inc. was told by a representative of the Jefferson County Department of Planning, Zoning & Engineering that a response would be mailed. Consequently, Jefferson Utilities, Inc. received a response from the Zoning Administrator on March 6, 2003, by U.S. mail.

36. Pursuant to Section 8.2 of the Ordinance, Jefferson Utilities, Inc., as an aggrieved party, timely filed an appeal of the determination of the Zoning Administrator to the Jefferson County BZA on April 7, 2003. Subsequently, the Jefferson County Department of Planning, Zoning & Engineering scheduled the appeal for public hearing on June 19, 2003.

37. Ultimately, after the being continued by the Zoning Administrator, the BZA convened for the public hearing on July 17, 2003 for AP03-04 in the Old Charles Town Library Meeting Room, moved to deny the Motion, seconded by Mr. Trumble, and upon a unanimous

vote, the BZA did deny the Motion.

38. The BZA then heard Jefferson Utilities, Inc.'s arguments in favor of its Appeal (AP03-04), as well as the Zoning Administrator's arguments in opposition of AP03-04. The BZA then opened the public hearing for public testimony, and Mr. Jim Sirkamp spoke in favor of the Zoning Administrator's position. The BZA closed the public hearing, and deliberated in private upon AP03-04, then reconvened in open session, whereupon, Mr. Bresee moved to uphold the Zoning Administrator's determination and to deny AP03-04, seconded by Mr. Trumble, and upon a vote of Mr. Bresee and Mr. Trumble in favor of said motion and a vote of Mr. Rockwell and Ms. Hine in opposition to said motion, said motion failed due to the lack of a majority. Then Mr. Rockwell moved to overturn the Zoning Administrator's determination and to approve AP03-04 in part and to deny AP03-04 in part, seconded by Mr. Trumble, and upon a vote of Mr. Rockwell and Ms. Hine in favor of said motion and a vote of Mr. Trumble and Mr. Bresee in opposition to said motion, said motion failed due to the lack of a majority.

39. Ultimately, the Jefferson County Department of Planning, Zoning & Engineering, by facsimile letter dated September 19, 2003, forwarded to counsel for Jefferson Utilities, Inc. the Corrected Certification of the BZA and Order pertaining to AP03-04, entered as of September 18, 2003. Jefferson Utilities, Inc.'s receipt of the Order by facsimile on September 19, 2003, was sixty four (64) days after the public hearing held for AP03-04, a time period that is thirty four (34) days in excess of the thirty (30) day period requiring the BZA to render its determination.

40. Finally, Jefferson Utilities, Inc. timely filed with the Circuit Court a duly verified Petition for Writ of Certiorari pursuant to W. Va. Code §8-24-59, alleging that the BZA's failure to reverse the determination of the Zoning Administrator, which was arbitrary and capricious, as

stated in AP03-04 constituted a failure to exercise its power to hear and determine as stated in W. Va. Code §8-24-55 and §8-24-56, and as such, the BZA's actions constituted an illegal act.

41. The Circuit Court initially issued a 34 page Order in this case wherein it conducted an analysis of the role and statutory authority of the zoning administrator. In ruling on a subsequent Motion to stay the enforcement of the judgment in this case pending appeal, the court crystallized its 34 page Order into four succinct points. Specifically, those points are:

- 1) Under West Virginia law in the context of a county zoning ordinance, only the Board of Zoning Appeals has the quasi-judicial power necessary for certain aspects of zoning administration and a County Commission may not confer such powers upon other agencies or ministerial employees.
- 2) In the context of the facts of this case and this county zoning ordinance, the definition of "public water" for purposes of the LESA scoring system is a quasi-judicial determination which cannot be made by a ministerial employee.
- 3) Unlike the standard of review that the Circuit Court is to apply to rulings of the Board of Zoning Appeals (deferential), under West Virginia law, the standard of review that the Board of Zoning Appeals is to apply to cases on appeal before it is *de novo*.
- 4) Under West Virginia law, the Zoning Administration in Jefferson County is a ministerial employee.

42. Jefferson Utilities, Inc. filed a separate appeal, with the Petition for Appeal filed on November 9, 2004. Specifically, Jefferson Utilities, Inc. seeks a determination that it is a "public utility" within the meaning of the Ordinance Section 6.4(F) and that Jefferson Utilities, Inc. should be assessed "0" points in any evaluation under Section 6.4(F) of the Ordinance.

III. ASSIGNMENT OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

The Court, in overturning the considered opinion of the BZA, made the following errors,

which this Court should review.

- A. The Circuit Court Misinterpreted Section 5.7 Of The Ordinance
- B. Two Of The Circuit Judges In The 23rd Judicial Circuit Have Come To Opposite Conclusions Concerning The Meaning And Application Of This Court's Decision In *Corliss v. Jefferson County Board Of Zoning Appeals*
 - 1. Judge Silver's interpretation of *Corliss*
 - 2. Judge Steptoe's interpretation of the *Corliss* decision
 - a. Judge Steptoe failed to apply *Corliss*
 - b. Judge Steptoe applied his own prior decision as the interpretative guide in this case
 - 3. The two Judges reached opposite conclusions
- C. The Circuit Court Erred In His July 12, 2004 Decision That The Zoning Administrator Lacks Authority
 - 1. The Circuit Court's decision is contrary to the Ordinance
 - 2. The Circuit Court's decision is contrary to *Corliss*
 - 3. The Circuit Court's decision is contrary to West Virginia Code
- D. Jefferson Utilities, Inc. is a "public utility" within the meaning of West Virginia Law
 - 1. The Zoning Administrator's determination should be reversed because it fails to properly interpret the plain meaning of Section 6.4(f) of the Development Review System.
 - 2. Jefferson Utilities, Inc. meets the definition of "public utility" under West Virginia Law

IV. STANDARD OF REVIEW

The standard of review in an appeal of the nature was recently set forth in the *Corliss* decision:

As we explained in *Webb v. West Virginia Board of Medicine*, 212 W.Va. 149, 569 S.E.2d 225 (2002), "[o]n appeal, this Court reviews the decisions of the circuit court under the same standard of judicial review that the lower court was required to apply to the decision of the administrative agency." *Id.* at 155, 569 S.E.2d at 231; accord *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995). The standard that applied to the circuit court's review of the consolidated appeals from the Zoning Board was announced in syllabus point five of

Wolfe v. Forbes, 159 W.Va. 34, 217 S.E.2d 899 (1975): "While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction."

We have further recognized that "[i]n cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." Syl. Pt. 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

Corliss v. Jefferson County Bd. of Zoning Appeals, 214 W.Va. 535, 591 S.E.2d 93 (W.Va., 2003)

V. DISCUSSION OF LAW

A. The Circuit Court Misinterpreted Section 5.7 of the Ordinance

The Circuit Court misinterpreted Section 5.7 of the Ordinance in this case and ruled that Buckeye's two parcels of property under review in this appeal cannot be further subdivided. (See *September 9, 2003 Order* at 62 – 73.) Judge Steptoe concentrated his analysis on a portion of the first paragraph of Section 5.7, which states that "all lots" are to be subject to Section 5.7(d). The Circuit Court's limitation on further subdivision is based on Section 5.7(d) of the zoning ordinance, which 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 Subsections 5.7 (d)1, 5.7(d)3 below. A property owner may use a combination of these subsections, provided that the number of lots are prorated by density."

Based on this section, the Court ruled that Section 5.7(d) limits further subdivision to only those parcels that were "on record as of October 5, 1988," and disallows subdivision of

parcels created after that date. (See *September 9, 2003 Order* at 67) The Circuit Court therefore concluded that all three of the lots must pass through the restriction of Section 5.7(d), and only the lot designated as “residue” can be further subdivided, because it was the only one of the three lots that was theoretically “on record as of October 5, 1988.” (*September 9, 2003 Order* at 66 – 67, 73).²⁷

At first blush, the interpretation seems to have merit. A closer reading of the entirety of Section 5.7, however, completely disproves the interpretation and shows the Circuit Court’s adoption of that interpretation to be misplaced. Note the entirety of the first full paragraph of Section 5.7:

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 5.7d Maximum Number of Lots Allowed. The Development Review System does allow for higher density [if] [sic] a Conditional use Permit is issued.

Id.

Read in context, the first paragraph of Section 5.7 contains an exception, a gateway, to

²⁷ The Court has made the same error that was discussed in *Harding v. Board of Zoning Appeals*, 219 S.E.2d 324 (1975). In *Harding*, the court in effect applied a subdivision ordinance instead of allowing the Conditional Use procedure to operate.

“A special exception or conditional use, unlike a variance, does not involve the varying of an ordinance, but rather compliance with it. When it is granted, a special exception or conditional use permits certain uses which the ordinance authorizes under stated conditions.”

Id.

In this case, the opening paragraph of §5.7 contains a gateway into the Development Review System which allows the Conditional Use procedure to operate to remove the proposed development from the confines of §5.7(d).

the provisions of the DRS.²⁸ That gateway is contained in the last sentence of that paragraph, which states “The Development Review System does allow for higher density [if]²⁹ [sic] a Conditional Use Permit is issued.” *Id.* The exception exists in order that a person could develop his or her property by subjecting the property to the development review process of Section 7, thereby escaping the restrictions against further subdivision of Section 5.7(d). Stated another way, if a person wishes to develop his or her property, he or she can subject their property to the development review provisions of Section 7, thus avoiding Section 5.7(d), by using the exception contained in the last sentence of paragraph 5.7.³⁰

²⁸ The Zoning Ordinance itself works together to allow for uses which are not listed as principal permitted uses, but are instead conditional uses. In other words, these are uses which are appropriate if certain conditions are met. The Ordinance supports the conditional use process in numerous places, including: Sections 1.3, 4.1, 4.10, 5.7, 6.1 and Article 7.

²⁹ The Circuit Court itself interpreted Section 5.7 by inserting an [if] in the last sentence of the first paragraph. *See September 9, 2003 Order* at p. 66.

³⁰ Section 5.7(d) of the Ordinance should not be read out of context. The Ordinance contemplates a lengthy process to obtain approval for property development and contains numerous sections instructing interested parties the correct procedure to follow in proceeding through the development review system and obtaining a conditional use permit. Those sections include, but are not limited to, the following:

Section 6.1 Development Review System (DRS)

The purpose of the Development Review System (also referred to as DRS) is to assess a particular sites development potential based on criteria which determine the agricultural longevity of the parcel in combination with the presence of and compatibility with public services adjacent and in close proximity to the site. The DRS is a numerical rating system designed to function within the framework of the traditional zoning districts referenced in this ordinance. All commercial uses and those uses which are not permitted in zoning districts shall be governed by the procedures set forth in Article 7 and all sections that reference requirements to obtain a conditional use permit. It shall be unlawful to commence construction of any commercial uses or uses which are not permitted uses in a zoning district without obtaining conditional use permit approval.

Section 6.2 Issuance of a Conditional Use Permit

Application for a conditional use permit shall be made before construction of any uses not listed as permitted uses within the appropriate zoning district. Upon receipt of an application, the site will be evaluated by the Planning and Zoning Staff using the Development Review System. The two major components of the System, the Soils Assessment and the Amenities Assessment, consist of criterion which each possess a numerical value that is weighted relative to its importance as an indicator of a

In the *Kletter 1 / Daniels Forest* appeal to the BZA, the BZA heard and rejected the argument upon which Judge Steptoe based his interpretation of Section 5.7(d). Note this excerpt from the appeal before the BZA, quoted in the *September 9, 2003 Order* at p. 63:

parcel's agricultural significance or its development potential. The total numerical value of the combined criteria is 100 points: the Soil Assessment contributes 25 points and the Amenities Assessment contributes 75 points. The highest total numerical value of the combined criteria indicates that a parcel is more suitable for agricultural, whereas, the lowest numerical value indicates that development is more appropriate for the site. A score of 60 points or less advances the application to the Compatibility Assessment as provided in Section 7.6. A score of more than 60 points may be evaluated by the Board of Appeals before it can be advanced to the Compatibility Assessment Meeting Stage.

<u>CRITERION</u>	<u>CRITERION WEIGHT</u>
(a) Size of site	6 (12) pts.
(b) Adjacent development	10 pts.
(c) Distance to Growth Corridor	6 pts.
(d) Comprehensive Plan Compatibility	8 pts.
(e) Proximity to Schools	12 (0) pts.
(f) Public Water Availability	11 pts.
(g) Public Sewer Availability	11 pts.
(h) Roadway Adequacy	6 (12) pts.
(i) Emergency Service Availability	5 pts.
% (a) Size of Site (6 pts.)	

Section 7.3 General Development Review System Requirements

(a) If a developer's proposal is not listed as a principal permitted use in a zoning district, he must submit a Development Review System application for his project subject to the requirements of Section 7.4.

(b) Filing an application with the Planning and Zoning Staff is the first of several states within the Development Review System. Those stages are listed below.

- (1) Filing the application
- (2) Planning and Zoning Staff Evaluation of the Development Review System
- (3) Compatibility Assessment Meeting
- (4) Public hearings
- (5) Planning and Zoning Commission's Decision on the issuance or denial of the Conditional Use Permit
- (6) Board of Appeal's decision on any appeal processed

3. The Board concludes that the Conditional Use Permit process allows a prospective subdivider to subdivide the property into 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 the 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 only do this 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.

Id., see also *Blackwell, et al. v. Raco, et al.*, Appeal No. AP01-04

The BZA read the last sentence of Ordinance Section 5.7 literally, which states that “the Development Review System does allow for higher density [if] (sic) a conditional use permit is issued.” Under the BZA’s literal reading of Section 5.7, participation in the DRS procedure and the obtaining of a conditional use permit allows the subdivision to be taken out of the confines of the limitation on further subdivision of lots in Section 5.7(d).

The Circuit Court, however, disregarding the BZA’s interpretation of its own ordinance,³¹

³¹ This was also a consistent interpretation with that of the Zoning Administrator. See Affidavit of Paul Raco, which Buckeye attempted to enter into evidence in the case below, but was denied by Judge Steptoe. That Affidavit stated in part:

“This letter is in response to your letter regarding my policy (until the Circuit Court Decision on the three Roderick properties) on the application of the Development Review System (DRS) on parcels not deemed the residue. My interpretation, until the aforementioned court decision, was that the Development Review System did indeed supersede Article 5, Section 5.7 of the Zoning Ordinance. Furthermore, this interpretation was in place from 1988 until the court decision.

One example of this interpretation was two Conditional Use Applications that were reviewed in 1989, Glenn Woods (Z89-10) and Glenn Meadows II (Z89-11). Although one wasn’t residue, they were processed simultaneously on one parcel of land.”

While Judge Steptoe goes to some length in his *July 12, 2004 Order* to distinguish this Affidavit, (*See July 12, 2004 Order* at p. 49) as being only Raco’s opinion as to an official position of the BZA, it is apparent from the Affidavit that the BZA also followed this procedure, or else appeals would have ensued. *See also* the Letter from Paul Raco, Zoning Administrator that was read into the record in a proceeding in the Circuit Court below by Peter Chakmakian.

ignored the exception contained in Section 5.7 and instead focused on the provisions of Section 5.7(d) that preclude subdivision as though the Section 5.7 exception did not exist. The Circuit Court therefore erred in its interpretation of Section 5.7 of the Ordinance by ignoring the exceptions contained therein which allow all property to escape Section 5.7(d) by going through the DRS.

By disregarding the BZA's interpretation of its own Ordinance, the Circuit Court improperly interfered with the interpretation of the Ordinance by the agency charged with its interpretation, i.e., the BZA, thereby violating the *Corliss* decision.

3. "Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." Syl. Pt. 4, *Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp.*, 166 W.Va. 775, 277 S.E.2d 613 (1981).

Syl. Pt. 3, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93 (W.Va., 2003)

In *Corliss*, this Court recognized and re-affirmed that a Court should defer to an agency's interpretation of its own ordinance unless "clearly erroneous." *Id.* Further, *Corliss* implicitly agreed with the interpretation of the Zoning Administrator and the BZA as to Section 5.7 finding that the "ordinance provides a mechanism whereby a 'conditional use permit' application may be filed to seek the Commission's permission for an already approved use of the land." *Corliss* at p. 95.

The Circuit Court, in its *September 9, 2003 Order*, made no finding that the BZA was "clearly erroneous" in its interpretation and application of the Ordinance, as required by the *Corliss* decision.

Absent the "clearly erroneous" finding by the Court, where there are two reasonable

interpretations of an issue in which discretion is vested in an agency to act, the Court must defer to the agency's interpretation, even if the Court might have reached the alternate conclusion.

“A reviewing court must evaluate the record of the agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless of whether the Court would have reached a different conclusion on the same set of facts. (Interpreting agency decision).”

Frank's Shoe Store v. W.Va. Human Rights Commission, 179 W.Va. 53, 365 S.E. 2d 251 (1986)³²

Buckeye attempted to resolve this issue by filing its Rule 60(b) Motion, which was decided by Judge Steptoe in the *July 12, 2004 Order*.

The Court conducted an analysis of the BZA's decision making process in the *July 12, 2004 Order* and concluded that the BZA's decision was based on an erroneous principle of law. (*July 12, 2004 Order* at p. 34) However, the Court seemed to indicate that the “erroneous principle” was that the BZA's erred in giving the zoning administrator deference in his decision regarding the adequacy of the support data. It is unclear whether the “erroneous principle” in the Court's analysis of the BZA's decision is applicable to the Section 5.7 issue.

It appears that, in the *July 12, 2004 Order*, the Court did not find that the BZA was “clearly erroneous” in its interpretation and application of Section 5.7 of the Ordinance, as required by the *Corliss* decision. If the Court's reference on page 52 of the *July 12, 2004 Order* did amount to a finding as to Section 5.7, the Court erred because the “erroneous principle” in the Court's analysis is founded on the Court's conclusion in *Jefferson Utilities* that the zoning

³² See also *Walker v. West Virginia Ethics Com'n*, 492 S.E.2d 167, 175, 201 W.Va. 108, 116 (W.Va. 1997); *Berlow v. West Virginia Bd. of Medicine*, 458 S.E.2d 469, 475, 193 W.Va. 666, 672 (W.Va. 1995); *CDS, Inc. v. Camper*, 438 S.E.2d 570, 572, 190 W.Va. 390, 392 (W.Va. 1993); *Roberts v. Greiner*, 386

administrator has no inherent decision making authority. The “erroneous principle” is not founded on *Corliss*.

This Court should therefore overturn the decision because the Court committed error in misinterpreting the Ordinance and overruling the underlying decision of the Zoning Administrator and the BZA.

B. Two Of The Circuit Judges In The 23rd Judicial Circuit Have Come To Opposite Conclusions Concerning The Meaning And Application Of This Court’s Decision In Corliss V. Jefferson County Board Of Zoning Appeals

There are two different interpretations of the effect of the *Corliss* decision in the 23rd Judicial Circuit, first by Judge Gray Silver and now, in the instant case, by Judge Steptoe.

1. Judge Silver’s interpretation of *Corliss*

Judge Silver decided the case of *MacElwee, et. al. v. Jefferson County Board of Zoning Appeals and Thorn Hill, LLC, et. al.* (herein “*Thorn Hill*”) shortly after Judge Steptoe decided the underlying Circuit Court level *Corliss* case.³³ *Thorn Hill* appealed Judge Silver’s decision.

When this Court reversed Judge Steptoe’s decision in *Corliss*, the *Thorn Hill* Petitioners asked this Court to remand the *Thorn Hill* case to Judge Silver for further deliberation and consideration in light of this Court’s *Corliss* opinion, because the underlying Circuit Court Orders in *Thorn Hill* and *Corliss* were virtually identical.

S.E.2d 504, 505, 182 W.Va. 137, 138 (W.Va. 1989); *Montgomery General Hosp. v. West Virginia Human Rights Com’n*, 346 S.E.2d 557, 558, 176 W.Va. 580, 582, (W.Va. 1986).

³³ In *Thorn Hill*, at the Circuit Court level, Judge Silver adopted Judge Steptoe’s reasoning (and in fact, mostly the exact language) in Judge Steptoe’s underlying Circuit Court level *Corliss* decision. After Judge Silver issued his Order in *Thorn Hill*, *Thorn Hill* filed a Petition for Appeal in this Court, alleging many of the same legal errors which were raised in *Corliss*, since the Judge Steptoe’s Order and Judge Silver’s Order were in large part identical.

On remand, Judge Silver carefully considered his prior decision in light of the *Corliss* decision and reversed himself. Judge Silver held:

While the Court's use of the Circuit Court decision is not improper in itself, the subsequent reversal of the *Corliss* case requires reversal of *Thorn Hill*. The language of the two Orders is virtually identical as to their substantive provisions. Where the Orders are not identical, they employ the same legal analysis of the issues presented. As such, the clear and unequivocal reversal of *Corliss* requires the reversal of *Thorn Hill*.

Thorn Hill Order on Remand, p. 13.

Thus, Judge Silver carefully followed the *Corliss* decision and applied it to the facts of *Thorn Hill*. In so doing, Judge Silver implicitly acknowledged that the Zoning Administrator had discretionary authority.

2. Judge Steptoe's interpretation of the *Corliss* decision

a) Judge Steptoe failed to apply *Corliss*

Buckeye filed a Motion under Rule 60(b) with the Circuit Court in Jefferson County, asking Judge Steptoe to reconsider his decision in the instant case in the light of *Corliss*. Rather than applying the spirit of the *Corliss* decision, Judge Steptoe has carefully parsed the words of the *Corliss* case, and concentrated on what *Corliss* did not say instead of concentrating on what *Corliss* did say.³⁴

³⁴ Judge Steptoe states this conclusion, or a variation on this conclusion, in a variety of places:

- With regard to the adjacent land measurement issue, Judge Steptoe said: "As important as it is to acknowledge what the Supreme Court did say, it is equally important to admit what it did not say." (See July 12, 2004 *Order*, p. 11) Judge Steptoe then went on to find that this Court did not prescribe any particular adjacent land measurement method.
- With regard to the support data issue, Judge Steptoe said: "... it is as important to admit what the Supreme Court did not say as it is to acknowledge what it did say." (See *Rule 60(b) Order*, p. 14) Judge Steptoe then went on to find that the Board might "find that similarly detailed support data is inadequate in another instance." *Id.*

b) Judge Steptoe applied his own prior decision as the interpretative guide in this case

Instead of applying *Corliss*, Judge Steptoe looked to a decision which he had previously made in the Jefferson County Circuit Court, titled *Jefferson Utilities, Inc. v. Jefferson County Board of Zoning Appeals, et. al.*, Civil Action No. 03-C-278.³⁵ Judge Steptoe concluded that:

“As a result, the Court’s reexamination of its prior opinion Order in this appeal, though prompted by the *Corliss* decision and the Rule 60(b) motions, is necessarily undertaken in light of the lessons learned in *Jefferson Utilities*.”

(July 12, 2004 Order, p.6).

Judge Steptoe applied his own analysis based on *Jefferson Utilities* and a variety of North Carolina decisions to the facts of the instant case, while carefully parsing the *Corliss* decision and effectively limiting *Corliss* to the facts of that case.

The effect of Judge Steptoe’s application of his own *Jefferson Utilities* opinion was to totally eliminate the discretion of the Zoning Administrator, reducing the Zoning Administrator in Jefferson County to a ministerial status possessing no authority, discretion, or decision making ability, and having no ability to make significant determinations regarding the sufficiency or applicability of zoning matters. Judge Steptoe’s decision has wholly ignored this Court’s ruling in the *Corliss* case, wherein this Court (while admittedly not directly deciding this issue) assumed and affirmed that the Zoning Administrator had discretion to determine a variety of matters under the Ordinance which were dealt with in the *Corliss* opinion, including but not

³⁵ The Jefferson Utilities case was separately appealed, with the Petition for appeal filed on November 9, 2004. This Court has consolidated the *Jefferson Utilities* appeal with the Buckeye case for purpose of appeal.

limited to the sufficiency of support data, and other matters which were given to the Zoning Administrator by the Ordinance.³⁶

The *Thorn Hill* decision is significant because it, like *Corliss*, implicitly recognizes that the reason the County Commission created the Zoning Administrator was to administrate the myriad issues involved in a planning and zoning office. The staff must process initial information and make initial determinations, or the system will grind to a halt. The effect of Judge Steptoe's ruling in the instant case is to force the administrative decisions out of the hands of the administrator and into the hands of the BZA, who are essentially lay people, employed elsewhere, and who would be overwhelmed by the sheer volume of decisions that would be required to conduct the planning and zoning function in Jefferson County on a day to day basis.

3. The two Judges reached opposite conclusions

Nowhere is the contrast between the two Court's rulings more pronounced than in the issue of the Zoning Administrator's role and authority to make meaningful decisions in this case. Judge Silver in *Thorn Hill* acknowledges that "the zoning administrator agreed that the support data submitted to him was adequate" (See *Thorn Hill Amended Order* p. 5) and that "the Zoning Administrator and the BZA had upheld the adequacy of the support data." (See *Thorn Hill Amended Order* p. 13) Thus, Judge Silver acknowledges in *Thorn Hill*, as this Court did in *Corliss*, that the Zoning Administrator had the ability to make determinations as to the sufficiency of support data.

Contrary to Judge Silver's decision, Judge Steptoe in the instant case ultimately holds

³⁶ The Ordinance gives the Zoning Administrator a variety of responsibilities and authority, including Section 3.1(a) of the Ordinance.

that the Zoning Administrator has no decision making authority. (*July 12, 2004 Opinion Order Resolving Rule 60(b) Motions* at pp. 26 and 30)

Thus, when faced with similar issues related to the Zoning Administrator's statutory authority to decide substantive issues, two of the Circuit Judges in the 23rd Judicial Circuit have come to opposite decisions concerning the meaning of the *Corliss* decision. Judge Silver acknowledges that the Zoning Administrator has authority to make administrative determinations, while Judge Steptoe explicitly holds that the Zoning Administrator has virtually no decision making authority. The result is confusion in the local administrative bodies, the local bar, and the members of the public seeking zoning determinations as to the proper procedural steps to take in a zoning application. This Court should clarify and standardize the meaning of the *Corliss* decision in this Circuit in this appeal.

C. The Circuit Court Erred In His July 12, 2004 Decision That The Zoning Administrator Lacks Authority

In the *July 12, 2004 Order*, Judge Steptoe conducted a lengthy review of the zoning / subdivision process, and concluded that the BZA had committed an error of law because it applied a wrong standard of review to the administrator's decision to give Buckeye passing scores on the LESA system. (*July 12, 2004 Order* at 34). Judge Steptoe held that the zoning administrator was little more than a ministerial employee, with no discretionary authority or decision-making ability.³⁷ The Court opined that the zoning administrator could not make any

³⁷ The Circuit Court's findings of error in the *September 9, 2003 Order* regarding the BZA's decisions as to support data (p. 34), description of surface conditions (p. 39), effected wildlife population (p. 42), traffic type (p. 44), and the subdivision of the residue (p. 73) were not adequately dealt with in the July 12, 2004 Rule 60(b) Order. However, all of the findings of error seem to fall under Judge Steptoe's

discretionary determinations as to, for example, the adequacy of support data, (*July 12, 2004 Order* pp 33 - 34); that these determinations are quasi judicial functions – i.e., that the BZA must make those determinations *de novo*, and that the underlying determinations by the BZA, based on the zoning administrator’s decision, were therefore wrong, and an error of law.

While Judge Steptoe ostensibly bases his *July 12, 2004 Order* on a determination that the BZA “applied an erroneous principle of law” (*July 12, 2004 Order* at 34) the foundational concept that gives rise to this conclusion is Judge Steptoe’s own decision in *Jefferson Utilities* that the Zoning Administrator has no discretion. Judge Steptoe is therefore applying his own *Jefferson Utilities* decision, instead of this Court’s decision in *Corliss*, to determine that the BZA “applied an erroneous principle of law.”

Note the following opinions from Judge Steptoe’s *July 12, 2004 Order*, and the subsequent Order denying the Stay:

- The Zoning Administrator only has authority to “perform ministerial acts” (*July 12, 2004 Order*, p.26).
- . . . the Zoning Administrator’s authority is merely ministerial in scope . . . (*July 12, 2004 Order*, p.27).
- Holding that the Zoning Administrator is not entitled to a “presumption of correctness” because the Zoning Administrator has only a “ministerial function” (*July 12, 2004 Order*, p.27).
- Holding the “Zoning Administrator has no discretion to abuse” (*July 12, 2004 Order*, p.30).
- Holding that the County Commission may not confer zoning administration on “ministerial employees” (Order Denying Motion for Stay, P. 2)

The Circuit Court’s conclusion is contrary to the Ordinance, *Corliss*, and to state statutes. As set forth below, the Zoning Administrator falls under the deferential standard accorded to the

general concept that the BZA was in error because it treated the Zoning Administrator as though he had discretion. As set forth above, Buckeye believes Judge Steptoe erred in this determination.

BZA under *Corliss* because he is an “administrative official or board charged with the enforcement of an ordinance” within the meaning of W. Va. Code §8-24-55 (1). Thus, the Zoning Administrator should be accorded deference in accord with the *Corliss/Wolfe* standard, and it was an error to hold otherwise.³⁸

1. The Circuit Court’s decision is contrary to the Ordinance

The decision is in error because it did not apply the clear directive of the Ordinance that decisions as to the adequacy of the support data are within the realm of the Zoning Administrator. In Section 7.4(g), the Ordinance squarely addresses who has responsibility for finding submitted support data to be inadequate: “The Zoning Administrator shall determine if the sketch plan and support data are adequate.” As set forth below, *Corliss* applied this section of the Ordinance and citing the Ordinance as authority held that the Zoning Administrator had the discretionary authority to make determinations of adequacy regarding the support data issue.

2. The Circuit Court’s decision is contrary to *Corliss*

The Circuit Court also erred because it failed to apply the *Corliss* language that states that the determination of “adequacy of the support data submitted rests with the zoning administrator . . .” Instead, the Court decided that the determination of “adequacy” by the zoning administrator is not a substantive determination of adequacy, but is instead only a clerical determination, i.e., as to whether there was information submitted, not whether the information is truly “adequate.”

³⁸ The Court below purposely distinguished and did not follow *Singer v. Davenport*, 164 W. Va. 665, 668, 264 S.E.2d 637, 640 (1980), which mandates that a county comprehensive plan is to be used only as an aid in enacting future zoning ordinances. Ignoring *Singer*, the Court used the Jefferson County

This Court in *Corliss* conducted an extensive analysis of the Zoning Administrator's evaluation of the subdivision data in that case. The *Corliss* Court did not find that the Zoning Administrator had no statutory authority; in fact, it upheld the determination of the same Zoning Administrator that Judge Steptoe has now found to be without authority to make decisions on the issues presented in this case.

Some of this Court's observations in *Corliss* regarding the Zoning Administrator were:

- As part of that process, a Land Evaluation and Site Assessment ("LESA") was performed by the Zoning Administrator, Paul Raco. *Corliss*, 214 W.Va. 535, 538, 591 S.E.2d 93, 96 (W.Va.,2003)
- In section 7.4(g), the Ordinance squarely addresses who has responsibility for finding submitted support data to be inadequate: "The Zoning Administrator shall determine if the sketch plan and support data are adequate." In this case, the submission of Arcadia's support data did not prompt the Zoning Administrator to make a finding of inadequacy. *Corliss*, 214 W.Va. 535, 541, 591 S.E.2d 93; 99 (W.Va.,2003)
- The Zoning Administrator was correct in his observation that the Ordinance " simply lists things to address. It doesn't explain what is acceptable." *Corliss*, 214 W.Va. 535, 542, 591 S.E.2d 93, 100 (W.Va.,2003)
- In this Court's opinion, the key to determining adequacy has to be based on whether the support data was sufficient in terms of enabling the desired public debate to occur with regard to the proposed development. Both the Zoning Administrator and the Zoning Board found the support data submitted by Arcadia adequate to enable the desired goal of public discourse on the proposed development. *Corliss*, 214 W.Va. 535, 542, 591 S.E.2d 93, 100 (W.Va.,2003)
- The record in this case suggests that the lower court overlooked its duty to give the appropriate amount of deference to the administrative decision and Zoning Board's affirmance of that decision regarding the adequacy of the support data. *Corliss*, 214 W.Va. 535, 542-543, 591 S.E.2d 93,100 (W.Va.,2003)

Comprehensive Plan to interpret the existing ordinance. The Court specifically held that *Singer* is inapplicable to the Zoning Ordinance of Jefferson County. (*September 9, 2003 Order* at p. 57)

- Importantly, that support data provides a launching point from which the public can begin to participate in and the Zoning Administrator and the Commission can conduct the multi-stage reviewing process that is involved in any application for a conditional use permit. *Corliss*, 214 W.Va. 535, 543, 591 S.E.2d 93, 101 (W.Va.,2003)

Further, The *Corliss* Court found no error in the Zoning Administrator's statutory authority to make decisions as to land measurement. Instead, this Court conducted a thorough analysis as to whether the "Zoning Administrator erred by using the boundary or linear method of land measurement in calculating that part of the LESA score which pertains to adjacent development." *Corliss*, 214 W.Va. 535, 543, 591 S.E.2d 93, 101 (W.Va., 2003).

The *Corliss* case is replete with instances where this Court observed that the Zoning Administrator actively participated in decision making and review of issues presented in the zoning context. In none of these instances did this Court indicate that the Zoning Administrator lacked the statutory authority to make decisions.

3. The Circuit Court's decision is contrary to West Virginia Code

W. Va. Code §8-24-55(1) states that a decision or determination of an "administrative official or board charged with the enforcement of an ordinance" may be appealed to the BZA.³⁹ It is axiomatic that the Zoning Administrator is an "administrative official . . . charged with the enforcement of an ordinance," thus, the statute contemplates that the administrative official can make substantive decisions, or there would be nothing to appeal.

The statutory grant of power to the County Commission, and, subsequently, to the

³⁹ It is also true that a "decision" cannot mean every cognitive process undertaken by any government official. If the term "decision" means any determination of the Zoning Administrator or the Planning

County Planning Commission, necessarily implies the grant of powers necessary to carry out the statutorily created duties of those bodies. This in turn implies the grant of power to employees and administrative officials that are necessary to the performance of those same duties. How else can these bodies function, if there is no grant of power to employees to perform their duties?

It is the law of this State that a statute, ordinance, or law should be interpreted⁴⁰ to make sense, and in a way that furthers the purpose of the ordinance.⁴¹

Both the Ordinance and the statute itself, when read as a whole, are designed to allow evaluations of subdivisions by the local planning commission and its staff. The analysis by the

Commission on any issue, then appeals could be filed as to every administrative detail. This also cannot be the result contemplated by the appeals process. However, this is not the case here.

⁴⁰ Concerning our construction of statutory terms, this Court has said that "[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syllabus Point 1, *Miners in Gen. Group v. Hix*, 123 W.Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W.Va. 162, 291 S.E.2d 477 (1982). *Jackson v. State Farm Mut. Auto. Ins. Co.* 2004 WL 1488566 (W.Va.,2004)

⁴¹ This Court has held:

"When interpreting statutes promulgated by the Legislature, we first discern the objective of the enactment." "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975)." Syl. pt. 6, *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999). In gleaning legislative intent, we endeavor to construe the scrutinized provision consistently with the purpose of the general body of law of which it forms a part.

'Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.' Syllabus Point 3, *Smith v. State Workmen's Compensation Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975)." Syllabus point 3, *Boley v. Miller*, 187 W.Va. 242, 418 S.E.2d 352 (1992). Syl. pt. 3, *Rollyson v. Jordan*, 205 W.Va. 368, 518 S.E.2d 372 (1999). See also Syl. pt. 4, in part, *State ex rel. Hechler v. Christian Action Network*, 201 W.Va. 71, 491 S.E.2d 618 (1997) ("In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." (internal quotations and citations omitted)); Syl. pt. 2, in part, *Mills v. Van Kirk*, 192 W.Va. 695, 453 S.E.2d 678 (1994) ("To determine the true intent of the legislature, courts are to examine the statute in its entirety and not select 'any single part, provision, section, sentence, phrase or word.' Syllabus Point 3, in part, *Pristavec v. Westfield Ins. Co.*, 184 W.Va. 331, 400 S.E.2d 575 (1990).").

Circuit Court (in this case, i.e., that the Zoning Administrator has no discretionary decision-making authority with only ministerial functions), has wholly thwarted this overriding purpose and stopped the Ordinance from operating as it was intended. This cannot be the proper interpretation of this section, under the statutory construction rules outlined herein.

The rule against absurdity states that “. . . a well established canon of statutory construction counsels against . . . an irrational result [for] [i]t is the duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.” *Charter Communications VI, PLLC v. Community Antenna Service, Inc.*, 211 W.Va. 71, 77, 561 S.E.2d 793, 799 (2002) (citations omitted), as quoted in *Dunlap v. Friedman's, Inc.* 213 W.Va. 394, 401, 582 S.E.2d 841, 848 (W.Va. 2003) (Davis, J., dissenting opinion).

The Circuit Court’s interpretation of this statute, i.e., eliminating the Zoning Administrator’s discretionary role, would lead to “absurd, inconsistent, unjust or unreasonable results” *Id.* The Planning Commission, or the BZA, under the Circuit Court’s analysis, would have to collectively perform all analysis and perform every discretionary task in all subdivision matters.⁴²

Other decisions of this Court are illustrative of the principle of derived or implied power. In Berkeley County, for example, the local building code enforcement office, had filed criminal

State ex rel. McGraw v. Combs Services, 206 W.Va. 512, 518, 526 S.E.2d 34, 40 (W.Va. 1999).

⁴² It is curious that, in a prior case, Judge Steptoe held that the Zoning Administrator properly exercised his discretion on exactly the same issue relative to a LESA evaluation pertaining to a proposed residential development known as Harvest Hills, which was later appealed to the West Virginia Supreme Court of Appeals in the *Corliss* case. Although the aforementioned Order of the Circuit Court has been reversed by the West Virginia Supreme Court of Appeals, neither party appealed the Court’s finding regarding the function of the Zoning Administrator nor did the West Virginia Supreme Court of Appeals find error in the finding.

complaints against alleged building code violators, who were ultimately arrested. With regard to the delegation of power to a County Commission relating to enforcement of building codes, the Berkeley County Circuit Court ruled that penalties for violation of a building code could not be enforced because those penalties were not specifically authorized by statute. This Court reversed the Berkeley County Circuit Court and held:

The general rule with regard to the powers of county governments is set forth in Syllabus Point 1 of *State ex rel. County Court v. Arthur*, 150 W.Va. 293, 145 S.E.2d 34 (1965):

" 'The county [commission] is a corporation created by statute, and possessed only of such powers as are expressly conferred by the Constitution and legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given. It can do only such things as are authorized by law, and in the mode prescribed.' Point 3, syllabus, *Barbor v. County Court of Mercer County*, 85 W.Va. 359 [101 S.E. 721 (1920)]."

See also Berkeley County Comm'n v. Shiley, 170 W.Va. 684, 295 S.E.2d 924 (1982). It is undisputed that neither W.Va.Code, 29-3-5b nor W.Va.Code, 7-1-3n expressly authorizes a county commission adopting the state building code to enact penalties for violations thereof. Nor are we directed to any general grant of power to impose penalties for the violation of county ordinances, such as that conferred upon municipalities.

* * *

It appears, however, that such power may arise by implication. The general rule is that a grant of the police power to a local government or political subdivision necessarily includes the right to carry it into effect and empowers the governing body to use proper means to enforce its ordinances. *See generally 5 McQuillan Municipal Corporations* § 17.04 (3d ed. 1989); *56 Am.Jur.2d Municipal Corporations, Counties and Other Political Subdivisions* § 414 (1971). Pursuant to this rule, it has been held that even in the absence of an express grant of authority, the power to punish by a pecuniary fine or penalty is implied from the delegation by the legislature of the right to enforce a particular police power through ordinances or regulations.

State ex rel. State Line Sparkler of WV, Ltd. v. Teach, 187 W.Va. 271, 274-275, 418 S.E.2d 585, 588 - 589 (W.Va., 1992) (Portions omitted)

Like the enforcement action of the building code enforcement officer in *State Line*

Sparkler, the Zoning Administrator in *Jefferson Utilities* is merely carrying out the logical extension of the lawful powers granted to the County Commission and the Planning Commission under West Virginia Code and the Zoning Ordinance. The application of the statute and the Ordinance is a functional impossibility without a person such as the Zoning Administrator to evaluate a given subdivision's compliance with the ordinance. Significant to this case is the fact that the Ordinance creates the position of Zoning Administrator, and the authority flowing to the Zoning Administrator comes from the Ordinance. The system would not function without the Zoning Administrator to handle the initial determinations and administrative details. The statute also implies the Zoning Administrator's authority, and this Court should find that the Circuit Court erred in holding otherwise.

D. Jefferson Utilities, Inc. is a "public utility" within the meaning of West Virginia Law

With regard to the *Jefferson Utilities* case, which was consolidated herein, the Circuit Court erred in not vacating the Order of the BZA dated September 18, 2003, and reversing the determination of the Zoning Administrator. The Circuit Court should have ruled that Jefferson Utilities, Inc. is a public utility for purposes of Section 6.4(f) of the DRS and that zero (0) points should be assigned when Jefferson Utilities, Inc.'s existing public water system is available to a proposed development or when the existing public water system will be extended to the proposed development.

The Zoning Administrator's initial determination dated July 12, 2000 and reaffirmation thereafter on March 6, 2003, which forms the basis of the Jefferson Utilities, Inc.'s appeal, effectively holds that for purposes of Section 6.4(f) of the DRS, public water systems are defined as "public" when they are owned by a governmental entity. The Zoning Administrator defined

public water systems as “privately owned” or “central” when they are owned by a private entity that is regulated by governmental bodies. Under the Zoning Administrator’s interpretation, then, only the governmentally-owned systems can be “public utilities” and thereby qualify for zero (0) points in a DRS evaluation. This interpretation is plainly wrong and clearly violates the equal protection afforded to Jefferson Utilities, Inc. under the Constitutions of West Virginia and the United States.

1. The Zoning Administrator’s determination should be reversed because it fails to properly interpret the plain meaning of Section 6.4(f) of the Development Review System.

The critical terms at issue in Section 6.4(f) of the DRS are “public water” and “privately owned” or “central water.” The Zoning Administrator is correct in his assertion that public water is not a defined term; however, his interpretation of the word public and his subsequent interpretation of the term public water are flawed and must be reversed.

The Zoning Administrator interprets the word “public” to mean “owned by the people,” which translates into “government owned.” Thus, the Zoning Administrator opines that public water is only that form of water system that is government-owned. The Zoning Administrator opines that “privately owned” or “central water” is that form of water system that is privately owned but governmentally regulated – and is therefore not subject to the same point score as a “government owned” system because it is not a “public utility.” This interpretation is incorrect because it is a misstatement of the meaning of the word “public,” and because it is inconsistent with the statutes and administrative rules of the State of West Virginia relative to public water systems.

2. Jefferson Utilities, Inc. meets the definition of “public utility” under West Virginia Law

This Court has reviewed the issue of public utilities in the context of public and private ownership.

In *Wilhite v. Public Service Commission*, 149 S.E.2d 273, 150 W. Va. 747 (1966), this Court interpreted W. Va. Code §24-1-1 et seq., and held that a public utility is established where there is a dedication or a holding out either expressed or implied that such person, firm or corporation is engaged in business of supplying his or its product or services as a class or any part thereof as distinguished from the serving of only particular individuals.

More importantly, in *State ex rel. City of Wheeling v. Renick*, 116 S.E.2d 763, 145 W. Va. 640 (1960), this Court interpreted W. Va. Code § 24-1-1 et seq., and held that all public utilities, whether publicly owned or privately owned, are subject to the same treatment and supervision of the Public Service Commission. (See also *City of Mullens v. Union Power Co.*, 7 S.E.2d 870, 122 W. Va. 179 (1940).

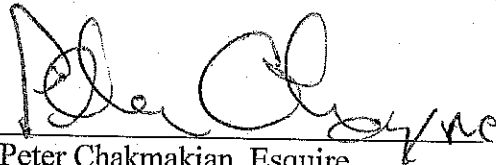
See also *Affiliated Const. Trades Foundation v. Public Service Com'n of West Virginia*, 211 W.Va. 315, 565 S.E.2d 778 (W.Va. 2002), which states in Syl. Pt. 7. that “Electric generation and transmission facilities intended solely for the sale of electricity on the wholesale market are within the statutory definition of a public utility set forth in W. Va. Code §24-2-1 (1991) (Repl.Vol.2001) whenever it appears that the electricity produced will, in the course of distribution, ultimately be sold to the public.”

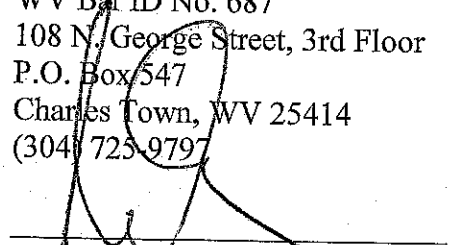
Thus, Jefferson Utilities, Inc. is a “public utility” under both statutory and case law in the State of West Virginia and is due the equal protection afforded by the Constitutions of the United States and West Virginia. The disparate treatment caused by the determination of the Zoning

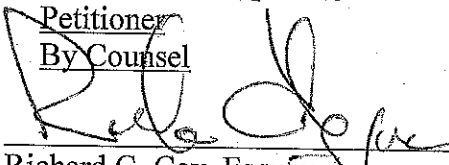
Administrator is impermissible. This Court should reverse the Circuit Court holding that the determination of the Zoning Administrator was not a decision and require the Zoning Administrator to assess a score of zero (0) points when Jefferson Utilities, Inc.'s existing public water system is available to a proposed development or when the existing public water system will be extended to the proposed development.

VI. RELIEF PRAYED FOR

Based on the foregoing, this Court should overturn the Circuit Court of Jefferson County and send this matter back to the Commission for the express purpose of reinstating the Conditional Use Permits that were previously issued to Buckeye in this case. Further, this Court should hold that Jefferson Utilities, Inc. is a "public utility" under the meaning of West Virginia Law and Section 6.4(f) of the Ordinance.


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAN CARY KLETTER, et al.,

Petitioners Below, Appellees,

v.

DOCKET NO. 32560
DOCKET NO. 32561

JEFFERSON COUNTY ZONING
BOARD OF APPEALS,

Respondent Below, Appellant,

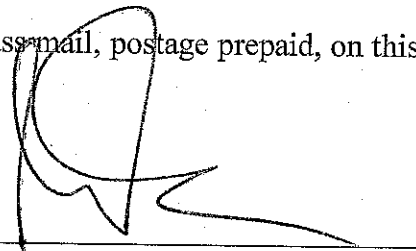
and,

ELMER LEE RODERICK, ET AL.,

Intervenors Below, Appellees

CERTIFICATE OF SERVICE

I, Richard G. Gay and/or Nathan P. Cochran, hereby certify that an exact copy of the foregoing **BUCKEYE DEVELOPMENT, LLC AND JEFFERSON UTILITIES, INC.'S BRIEF ON APPEAL and CERTIFICATE OF SERVICE** has been served upon David Hammer, Esquire, Hammer & Ferretti, & Schiavoni, 408 West King Street, Martinsburg, WV 25401, Gregory K. Jones, Esquire, Office of the Prosecuting Attorney, P.O. Box 729, Charles Town, WV 25414 and Michael Lorensen, Esquire, Bowles Rice McDavid Graff & Love, P.O. Drawer 1419, Martinsburg, WV 25402 by United States first-class mail, postage prepaid, on this 16th day of May, 2005.



Peter Chakmakian, Esquire
Richard G. Gay, Esquire
Nathan P. Cochran, Esquire