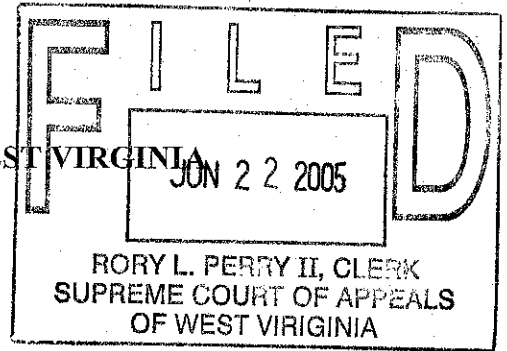


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



JAN CARY KLETTER, et al.,

Appellees,

v.

Docket Nos. 32560, 32561

JEFFERSON COUNTY ZONING  
BOARD OF APPEALS,

Appellant,

and,

ELMER LEE RODERICK, et al.,

Appellants.

**APPELLEES' RESPONSE BRIEF**

**THE OPINION ORDER RESOLVING RULE 60(b) MOTIONS IS NOT REALLY  
A FINAL ORDER AND SHOULD, THEREFORE, BE DISMISSED PURSUANT  
TO R.A.P., RULE 18(a)**

Judge Steptoe's July 12, 2004 Opinion Order Resolving Rule 60(b) Motions ruling was that "the decisions of the Board in the cases consolidated herein are REVERSED and REMANDED to the Board of Zoning Appeals." [Emphasis in original; pp. 53-4]. To date, that remand has not occurred. While it is a fact that Judge Steptoe's order goes on to recite that "[t]his is a final order" such statement would appear to be mere boiler-plate language given the order of remand. Surely, it could not be the position of any party that once the Board decides the matter upon remand there could be no appeal from that decision such as would be the case if in fact the Rule 60(b) order was a "final" order.

Therefore, pursuant to R.A.P. 18(a) this Court should dismiss the appeal as improvidently granted due to the lack of an appealable order and allow the Board to perform its statutory function.

**THE ZONING ADMINISTRATOR IS A “MINISTERIAL OFFICER”**

Buckeye in particular argues at length that the “Zoning Administrator,” a title that exists only within the Jefferson County Zoning Ordinance and not within any enabling statute,<sup>1</sup> has powers and duties beyond those that are ministerial. Indeed, Buckeye presents a “straw man” argument when it asserts “How else can these bodies function, if there is no grant of power to employees to perform their duties.”<sup>2</sup>

Of course, the court below did not state or imply that the “zoning administrator” has no duties or that the office itself should cease functioning. To the contrary, the zoning administrator must answer **preliminary questions** such as in *Corliss*, whether an applicant submitted information responsive to each of the areas of inquiry required by the Zoning Ordinance.

A “ministerial officer” is defined as “[o]ne whose duties are purely ministerial, as distinguished from executive, legislative, or judicial functions, requiring obedience to the mandates of superiors and not involving the exercise of judgment or discretion.” Black’s Law Dictionary, 5<sup>th</sup> Edition. In the context of this case, the “mandates of superiors” with which the zoning administrator is obliged to comply is the Zoning Ordinance as promulgated by the elected County Commissioners of Jefferson County. In contrast, the logical conclusion of Buckeye’s argument is that the zoning administrator does have either executive, legislative, or judicial functions. This conclusion is problematic for

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<sup>1</sup> See Opinion Order Resolving Rule 60(b) Motions, p. 25 for a full discussion of this point.

<sup>2</sup> Buckeye brief, p. 41.

Buckeye because of the complete lack of statutory authority for the exercise of executive, legislative, or judicial functions by the zoning administrator and the usurpation of the statutory scheme embodied in Chapter 8 of the West Virginia code prescribing the duties of planning commissions and boards of zoning appeals, respectively.

The scheme hinted at but not articulated by Buckeye would envision a zoning administrator with authority to act in both quasi-judicial and legislative capacities and whose acts in those capacities would be subject only to deferential review by, one would assume, either the Board of Zoning Appeals or the Planning Commission, depending upon the nature of the decision. Could the West Virginia Legislature have created such an omnipotent bureaucrat? Perhaps. But the court below was constrained to apply Chapter 8 as written, and as written Code § 8-24-14(5) expressly limits the power of the Planning Commission to delegate to its employees "ministerial acts."

There is yet another problem: at footnote 36 the court below mentions discussion by counsel regarding the fact that Mr. Paul Raco, the long serving Director of the Office of Planning, Zoning and Engineering, is **not**, contrary to § 8-24-14(4), an employee of the Planning Commission in any way, shape, or form. As the head of a county department, Mr. Raco is paid by, evaluated by, and answers only to the Jefferson County Commission. While the BZA and its counsel would have the courts believe the fiction that Mr. Raco selects the correct "hat" to wear depending upon the circumstances and thus at times acts as the "zoning administrator," what has happened in Jefferson County in bureaucratic terms is that an "executive," *i.e.*, a department head, with all of the power of an executive to formulate policy and direction, chooses when and how to "guide" the decisions of the fictitious "zoning administrator" to reach the goals that the executive

chooses, as opposed to the goals and direction of the Planning Commission as contemplated by the Legislature. This manipulation of the statutory scheme established by the Legislature for the implementation of zoning deprives citizens of due process of law because Mr. Raco acts unilaterally and dehors the Planning Commission despite ostensibly being, at times, the “zoning administrator.”<sup>3</sup> Thus, zones established as “rural” under the Zoning Ordinance and upon which farmers and other residents relied in purchasing real property are literally bulldozed and slated for high density residential development as Mr. Raco decides how the Zoning Ordinance is interpreted and implemented.<sup>4</sup> The problems engendered by Mr. Raco’s dual role seem to recur with startling regularity in land use litigation arising out of Jefferson County.

For example, and as referenced by Judge Steptoe,<sup>5</sup> there is the “insidious” way in which assertions by Mr. Raco become accepted as “facts” even though they have never been tested. Thus, it happened in *Corliss* that a large farm in the rural zone was subjected to Mr. Raco’s choice of using the linear means of adjacent land measurement and such means of measurement was asserted to have the long-standing approval of the BZA when, in fact, there is no record of the BZA having ever considered such an issue.<sup>6</sup> Now in the instant case, Buckeye seeks to insert into the record an affidavit from Mr. Raco that the Respondents here have never had the opportunity to test.<sup>7</sup>

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<sup>3</sup> See Opinion Order, entered July 9, 2004 in Jefferson Utilities v. JCBZA, Civil Action No. 03-C-278 beginning at p. 31.

<sup>4</sup> Ironically, this is the very same problem about which Jefferson Utilities complains: Mr. Raco has determined that it is not a public utility. It is clear that the BZA, and not Mr. Raco, should be making decisions in the first instance as to the meaning of terms within the Zoning Ordinance.

<sup>5</sup> Opinion Order Resolving Rule 60(b) Motions, p. 46; footnote 77.

<sup>6</sup> The individual appellees in *Corliss* appeared *pro se*.

<sup>7</sup> Buckeye’s brief, p. 23, fn. 31; see also Opinion Order Resolving Rule 60(b) Motions, p. 45 “Extra-Record Averments.”

In short, this Court should hold that 1) Judge Steptoe was correct in his holding that the position of “zoning administrator” created by the Jefferson Zoning Ordinance is a ministerial officer within the statutory scheme authorized in Chapter 8 of the West Virginia Code, and 2) that it is a denial of Due Process for a department head with executive responsibilities and who is not employed by the Planning Commission to also serve as the “zoning administrator.”

### ADEQUACY OF SUPPORT DATA

This Court should recognize the mischief that has arisen from its decision in *Corliss*. Specifically, *Corliss* should not stand for the proposition that an applicant can provide false or misleading statements in its CUP application. False and misleading statements do not, as was the stated objective in *Corliss*, provide sufficient information so as to allow meaningful public participation in discussion about projects that have enormous potential to impact the well-being of Jefferson County.<sup>8</sup>

On the contrary, the public ordinarily does not have the right to trespass on private property to ascertain whether a developer’s statements in its CUP application are true. Sometimes, as happened in Kletter 1, a false statement such as extent of conversion of farmland to urban uses can be identified by observation from a public road. But that is the exceptional situation, not the rule.

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<sup>8</sup> See Opinion Order Resolving Rule 60(b) Motions, p. 51. For example, one such residential development known as “Huntfield”, located approximately one mile south of Charles Town and which has now been annexed into Charles Town, projects a build-out of over 3000 dwelling units in which it is expected that more than 9000 people will reside. The implications for the County and effected municipalities in terms of sewage treatment, water supply, road infrastructure, schools, fire, police, ambulance service, and other county services presented by residential development are enormous and costly. While Huntfield is the largest approved development in Jefferson County to date, numerous other developments each with anticipated numbers of dwelling units in the hundreds are also wending their way through the review process.

For example, the CUP application requires information about 23 data points. *Corliss*, 591 S.E.2d at 98, f.n. 19. Some of those data points should be routine and mundane, such as the name of the developer. But even as to routine information such as identifying information, if there is no recourse for providing false information, a developer who has proven to be a scofflaw or worse in the past can readily escape detection by misidentifying itself through some parent, subsidiary, or shell corporate name.

Situations more likely to occur though are where false or inaccurate information is provided in response to several of the substantive information required, for example, (11) intended land uses, (12) earth work that could alter topography, and (16) ground water and surface water and sewer lines within 1320 feet. While it is quite difficult to prove the negative, *i.e.*, that if the information provided by a developer had been truthful and accurate public participation would have occurred and members of the public would have raised certain specific concerns, it would be a fundamental miscarriage of justice and a complete abrogation of the public's right to participate as contemplated by the Jefferson County Zoning Ordinance to thus conclude that the developer is free to "fill in the 23 blanks" in any false or inaccurate manner it sees fit: for if the public does not appear to protest (because it has been misled) the CUP will likely be approved, or, if the public does appear in response to false and inaccurate information, the developer then asserts the holding of *Corliss* and argues "see, although mistakes were made in the application, the policy of promoting public discussion has been served because the public appeared and because "information" has been provided in response to all 23 data points, the CUP should be approved."

This Court has never approved of deception and it should not allow its holding in *Corliss* to be so construed now. There should be a high duty upon an applicant to a public process to provide accurate and truthful information. Judge Steptoe's decision requiring accurate and truthful information should be affirmed.

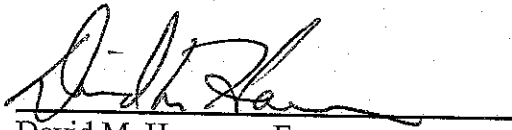
**INTERPRETATION OF SECTION 5.7(d)**

The Appellees believe that Judge Steptoe was entirely correct in his reading of the language of Section 5.7(d). "All" does indeed mean "all". Buckeye, an experienced developer with competent legal counsel readily available to it that has contracted with the landowner(s) for the development of the Daniels Forest and Forest View parcels should not be heard to complain that the designation of a "residue" parcel, years after the enactment of the Zoning ordinance and of which it was on notice prior to entering into its contract(s) with the landowners, was simply by "chance."

Likewise, to the extent that one or more of the landowning heirs to the Roderick farm claim to be aggrieved by their deceased grantor's choice as to how to subdivide land subsequent to the 1988 enactment of the Zoning Ordinance, that issue could have or should have been litigated in the context of probate – not before the Board of Zoning Appeals.

WHEREFORE, the Appellees respectfully request that the instant appeal be dismissed, or in the alternative, that the relief sought by the Appellants be denied in its entirety and that this matter be remanded in accordance with Judge Steptoe's order.

Dated this the 21<sup>st</sup> day of June, 2005.

A handwritten signature in black ink, appearing to read "David M. Hammer", written over a horizontal line.

David M. Hammer, Esq.

WV Bar ID 5047

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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

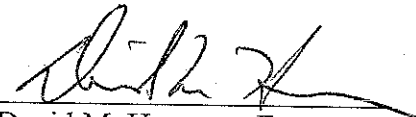
I, David M. Hammer, hereby certify that a true and exact copy of the foregoing  
"Appellees' Response Brief" was served on this 21st day of June, 2005 upon the  
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