



West Virginia E-Filing Notice

CC-19-2021-C-33

Judge: Debra McLaughlin

To: Kathy M. Santa Barbara
kathy@ksblawofc.com

NOTICE OF FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA
Christopher David Burke v. The Jefferson County Planning Commission
CC-19-2021-C-33

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Laura Storm
CLERK OF THE CIRCUIT COURT
Jefferson County
PO Box 1234
CHARLES TOWN, WV 25414

(304) 728-3231
circuitclerk@jeffersoncountywv.org

In the Circuit Court of Jefferson County, West Virginia

Christopher David Burke,)
Susan Leith Burke,)
Gavin A. Perry,)
Robert D. Aitcheson,)
Wanda C. Aitcheson ET AL,)
Plaintiffs,)
)
vs.))
)
The Jefferson County Planning)
Commission,)
R. Michael Shepp,)
County Commission of Jefferson)
County, WV,)
Stanley W. Dunn,, Jr.,)
Richard Zigler ET AL,)
Defendants)
)

Case No. CC-19-2021-C-33

**ORDER REGARDING VALIDITY OF FILE ZTA 19-03 REGARDING THE SOLAR
TEXT AMENDMENT (STA)**

This Case came for consideration upon the filing of Petitioner’s Complaint for Declaratory Judgement from a decision of the Jefferson County Planning Commission, Respondent’s Response and Intervenors’ Response. The Court has carefully considered the evidence presented by the parties, all papers of record, the arguments of counsel, and pertinent legal authorities. For the reasons set forth in the following opinion, the Court doth find and rule as follows:

I. SUMMARY OF RELEVANT PROCEDURAL FACTS

1. On June 23, 2020, after receiving public comments, conducting a public hearing and engaging in deliberations, the Jefferson County Planning Commission (“Planning Commission”) voted to recommend that the Jefferson County Commission (County Commission”) approve a “Solar Text Amendment” (“STA”) to the Jefferson County Zoning Ordinance (“Zoning Ordinance”) which would permit the construction of

Solar Farms in 8 of the 12 Zoning Districts in Jefferson County, including the Rural Zoning District, as “Principal Permitted Uses.” In making this recommendation, the Planning Commission entered an Order with Findings of Fact and Conclusions of law.

2. The County Commission subsequently received public comments, conducted two (2) public workshops, engaged in deliberations, and voted to approve an amended version of the STA on October 1, 2020 (i.e., the setback requirement was changed from 100’ to 200’). The Motion made and voted upon, as reflected in the meeting minutes, does not include any reference to the comprehensive plan.

3. Some of the Petitioners in the instant case and others filed a petition for Writ of Certiorari and associated injunctive relief challenging the first enactment of the STA on or about November 2, 2020. The Petitioners’ primary allegation was that the STA is not consistent with the Comprehensive Plan, because it authorizes solar farms in the Rural Zoning District as a “Principal Permitted Use” instead of as a “Conditional Use” which requires approval by the Board of Zoning Appeals for each project.

4. On December 10, 2020, the former Petitioners agreed to dismiss the first Petition, without prejudice, in exchange for the County Commission’s agreement to vacate the original STA and return it to the Planning Commission for further review.

5. At its January 12, 2021 meeting, the Planning Commission, after meeting in executive session, scheduled a public hearing on the original Teste Amendment as presented by the Planning Commission to the JC Commission for February 9, 2021. At its regular meeting on January 12, 2021, the Planning Commission again voted to accept public comment and scheduled a hearing to receive public input for the draft STA. In light of the instructions provided by the County Commission, the draft under consideration by the Planning Commission was the original draft recommended to the County Commission on June 23, 2020, which contained a 100’ setback.

6. On February 9, 2021, the Planning Commission conducted a public

hearing, duly noticed, regarding the draft STA. Following the public hearing, the Planning Commission took no action on the proposed STA and instead scheduled a special meeting for February 23, 2021 to consider the proposed STA.

7. On February 23, 2021, the Planning Commission went into Executive Session to receive legal advice regarding the proposed STA. Upon exiting Executive Session 21 minutes later, the minutes of the meeting reflect the following discussion:

The Planning Commission discussed the draft text amendment [STA]. Ms. Alexandra Beaulieu requested that the Planning Commission consider exempting underground utilities from the 25' setback. Ms. Beaulieu explained that underground utilities are typically exempt from setback requirements and noted that the language in the current draft required underground utilities to comply with setbacks. Mr. Shepp and Mr. Knott agreed that underground utilities should not be subject to setback requirements.

Mr. Jack Hefestay requested that Staff provide an overview of the draft text amendment. Ms. Alexandra Beaulieu summarized the draft amendment, noting that the Decommissioning Guidelines and Surety Policy would be separate documents from the Zoning Ordinance. Ms. Beaulieu explained that similar to the current bonding policy for site development projects, the decommissioning guidelines and surety policy would be under the County Commission's purview and enforced by the Office of Engineering.

Mr. Mike Shepp stated that he believes that the draft amendment is consistent with the Comprehensive Plan as a Principal Permitted Use, and where there may be any conflict with the Comprehensive Plan, he stated that there had been significant changes in the County. Mr. Shepp moved that Mr. Cochran provide

an order [SIC] with findings of fact and conclusions of law for consideration at the next meeting for a vote. Mr. Hefestay seconded the motion.

Mr. Matt Knott noted that with regard to changes in the county, he believed that the changes reflected that the County was more in support of alternative energy than not. The motion carried unanimously.

Meeting Minutes of the Jefferson County Planning Commission, February 23, 2021.

8. On March 9, 2021 upon the President announcing the Text Amendment would be considered, Mr. Cochran, the attorney for the Planning Commission, advised the Planning Commission that “because there is some potential for litigation and some issues that I wish to have the Planning Commission receive some legal advice on” he recommended the Planning Commission again go into executive session. Upon coming out of executive session, the Planning Commission voted to adopt the findings of fact and conclusions of law. In the conclusions of law, the Planning Commission found that the STA was consistent with the Comprehensive Plan and to the extent that it may be inconsistent (if at all) the Commission “. . . finds that there have been major changes of an economic, physical or social nature within the area involved which were not anticipated when the comprehensive plan was adopted and those changes have substantially altered the basic characteristics of the area which changes include the demand of citizens for green energy as evidenced during the meetings before the Jefferson County Commission concerning the Rockwool project.”

9. On March 9, 2021, the Jefferson County Planning Commission made the following findings of fact in support of its recommendation that the STA was consistent with the Comprehensive plan:

“2. *The Comprehensive Plan encourages the development of alternative energy sources, such as solar power generation. (Comp. Plan, pp. 89-90 and 93).*

4. *The Comprehensive Plan recognizes the need for flexibility in the use of agricultural properties in order to help struggling farm operators to continue to have viable business opportunities. (Comp. Plan, p. 38). Moreover, the Comprehensive Plan rejects the preservation of farms without farmers. ‘There must be a viable rural economy to maintain the rural landscape.’ (Comp. Plan, p. 72).*

10. On March 9, 2021, the Jefferson County Planning Commission made the following findings of fact regarding solar farms to support its recommendation to the JC Commission that the STA was consistent with the Comprehensive Plan:

“3. *Solar facilities help to preserve the environment in that they generate low or no emissions. Moreover, the STA requires a ‘decommissioning plan’ to restore land to its pre-solar condition after power production ceases and a bond to cover the costs of the decommissioning.*

5. *Solar facilities, as a minimal and reversible impact on the environment, are more likely to retain the rural and farming character of Jefferson County than other forms of development.*

6. *The STA promotes the economic well-being of the county by creating jobs, increasing tax revenues, and generating business opportunities for farmers and other landowners, while having a very low impact upon the environment.*

7. *The STA minimizes the aesthetic impacts of solar facilities by requiring screening, buffering and setbacks. Moreover, the economics of solar facilities require them to be located next to existing electrical substations and transmission lines which are already exempt from zoning restrictions as “essential utilities and equipment” under state law and county ordinance . . .By authorizing solar development near existing infrastructure, which is already exempt from zoning restrictions, the STA further*

minimizes the aesthetic impacts of solar facilities.”

11. On March 9, 2021, the Jefferson County Planning Commission made the following findings pertaining to a change that would support the STA to the extent that the STA is inconsistent with the Comprehensive Plan:

“8. . . . However, an additional circumstance which was not anticipated or fully considered when drafting the Future Land Use Guide became apparent during the meetings before the Jefferson County Commission involving Rockwool. These meetings revealed the importance that many of the citizens of Jefferson County attach to favoring low impact commercial and industrial development which has low or no emissions. Solar facilities satisfy these concerns because they have low or no emissions, and otherwise have a minimal and reversible impact upon the environment. . . . “

12. In response to the Planning Commission’s recommendation to approve the STA, but before the County Commission could consider the Planning Commission’s recommendation, Petitioners filed a new set of petitions for Writ of Certiorari regarding the STA on March 30, 2021, and amended the Petition on April 7, 2021, and again on April 12, 2021. This suit has been consolidated under Civil Action No. CC-19-2021-C-33 (the “Planning Commission Case”). The Petitions and amendments are wholly based upon the actions of the Planning Commission in advising the County Commission as stated above.

13. Pursuant to notice and a hearing held on April 12, 2021, the County Commission approved the STA with minor amendments and set its implementation date for April 13, 2021. In approving the STA, the County Commission noted that the Planning Commission found that the STA was consistent with the Comprehensive Plan but no such findings by the County Commission are noted in the April 12 meeting minutes. The County Commission voted to approve the STA following another executive

session, effective April 13, 2021.

14. While the JC Commission, by its President, stated upon the record on April 12, 2021 that the Planning Commission found the Text Amendment to be consistent with the JC Comprehensive Plan, there is no record in the meeting minutes which reflect any Motion or vote. In addition, the President, stated upon the record on April 12, 2021 that the JC Commission found that to the extent the STA was inconsistent with the Comprehensive plan, there had been a change in circumstances. A review of the audio recording reflects that the statutorily required language was stated in the Motion, however, the meeting minutes do not reflect the statutory language. The parties agreed at the hearing before this Court on July 29, that the Motion made, correctly noted the required statutory language that the STA was consistent with the comprehensive plan. The Parties further advised the Court that on August 5, 2021, the meeting minutes for April 12 would be amended to reflect the correct motion made at the April 12 hearing. As of the date of this Order, the record has not been supplemented with said amended minutes.

15. The text amendment revises the Zoning Ordinance in Article 2, Section 2.2, Terms Defined; Article 8, Supplemental Use Regulations by Solar Energy Facilities as a new commercial use; and adds Solar Energy Facilities as a Principal Permitted Use to the table of uses in Appendix C in all but four (4) of the twelve (12) zoning districts, including the Rural District.

16. There JC Commission made no separate findings regarding how the STA is consistent with the Comprehensive Plan, accordingly, this Court presumes that the Commission accepted the findings made by the Planning Commission.

17. On April 14, 2021, the County Commission's decision to approve the STA a second time prompted the Petitioners to file an additional round of lawsuits, seeking

to invalidate the action of the County Commission, which have been consolidated by this Court under Civil Action No. CC-19-2021-C-46 (the “County Commission Case”).

18. Along with the additional round of Petitions, the Petitioners have requested a (1) Temporary Restraining Order (“TRO”) and (2) an Injunction to stop the STA from proceeding. In addition, as of July 29, 2021, Petitioners seek a declaratory judgment that the STA is not consistent with the comprehensive plan and that the JC Commission acted unreasonably, arbitrarily, and capriciously in adopting the STA, therefor, the STA is invalid and in violation of WV Code 8A-7-8 and 8A-7-10.

19. On April 14, 2021, the Court held a hearing on the Petitioners’ original motion for a TRO (and second motion for TRO) in the Planning Commission Case, the result of which was an agreement by which the Court ordered that any applicants for permission to install a solar farm are required to be given a notice of the pending litigation and assumption of the risk.

Further Summary of Procedural Facts Applicable to Allegations of Open Meetings Act and Ethics Violations

20. In the Planning Commission and County Commission cases which were filed in March and April of this year, the Petitioners have alleged that the Planning Commission’s action in recommending that the County Commission approve the STA violates the Open Meetings Act because the Planning Commission and County Commission repeatedly went into Executive Session. As a result, the Petitioners believe that the Planning Commission and County Commission have violated Open Meetings law.

21. Moreover, in the Petitioners’ brief, they also allege that County Commissioner and Planning Commissioner Steven Stolipher has a financial interest in the passage of the STA and that his participation in deliberations and votes pertaining to

the Solar Text Amendment consequently violated the Ethics Act. Pursuant to the Petitioners' argument, all actions of the Planning Commission and County Commission this year and actions of the Planning Commission last year are invalid as a result.

STANDING

Respondents have argued that in order to have standing to challenge a county or local ordinance, the Petitioners must show it will suffer a particularized harm not suffered by other members of the community generally. See, *Barker v. City of Charleston*, 134 W.Va. 754, 756-757, 61 S.E. 2d 743, 745 (1950). Unlike *Barker v. City of Charleston*, this case is not being decided based upon a writ of certiorari nor as a writ of prohibition but rather is being decided as a declaratory judgment action.

OPEN MEETINGS LAW

W. Va. Code §6-9A-4(b)(12) authorizes public entities to discuss matters in executive session which are confidential in nature "by express provision of . . . state statute or rule of court . . ." This authorization includes the right to receive legal advice from counsel. See, *Capriotti v. Jefferson County Planning Commission*, No. 113-1243, 2015 WL 869318 (W.Va. Feb. 26, 2015) (unpublished).

Jefferson County correctly argues that this Court does not have enough evidence at this time to determine if a violation of open meetings law occurred. This would require the Court to hold an in-camera hearing to take evidence on what matters were discussed in executive session to verify that discussions were limited to legal advice. This procedure is authorized by *Peters v. County Commission of Wood County*, 519 S.E.2d 179, 205 W.Va. 481 (W.Va. 1999).

At this time, this Court does not find it necessary to hold an in-camera hearing as all parties have expressed a desire to have the Court make a more substantive ruling on the ultimate issue in this case, as this is the second time a legal challenge to the text amendment has been filed. The Court does repeat the words of the Court in *Peters*, "[a]

bare claim that the matters to be discussed in a meeting of a public body are privileged, if challenged, does not suffice to close the meeting.” *Id.* at 188.

The Court does find that even if the Court found there was a violation of the open meetings act, the Court is not required to invalidate the actions taken during or following from the wrongfully held private meeting. *McComas v. Board of Education of Fayette Co.*, 197 W.Va. 188, 201, 475 S.E.2d 280, 293 (1996). Accordingly, while this Court does not take lightly the allegations that both the Planning Commission and County Commission violated open meetings law, this matter will be sent back to the JC County Commission for the Commission to decide whether or not the STA is consistent with the Comprehensive plan. The Court is confident that the parties will fully discuss this issue for the benefit of the public.

ETHICS VIOLATION

Mr. Stolipher recused himself from the discussion with counsel and from the vote, accordingly, this Court finds no basis for any claim of violation of ethics.

APPLICABLE LAW

West Virginia has comprehensive land use legislation. *See* W.Va. Code §§ 8A-1-1 to 8A-12-21. It vests county commissions with authority to adopt “comprehensive plans” and zoning ordinances. The Legislature granted such authority to counties to promote the general welfare, lessen congestion, preserve agricultural land, promote orderly development, and divide land jurisdictions into different zoning classifications with different performance standards for each recognized land use. *See* W.Va. Code §§ 8A-7-1 & -2(a) & (b).

“Comprehensive plans” are “plan[s] for physical development ... adopted by a governing body, setting forth guidelines, goals and objectives for all activities that affect growth and development.” W.Va. Code § 8A-1-2(b) (emphasis supplied). But

comprehensive plans are not law; they are just guidelines that lay the foundation for zoning ordinances. *See Singer v Davenport*, 264 S.E. 2d 627, 640 (W.Va. 1980) (rejecting under prior law any suggestion by lower court that Jefferson County’s comprehensive plan has effect as a legal instrument).

Zoning ordinances are the means of effectuating the guidelines in comprehensive plans. “Zoning” is defined as “the division of a municipality or county into districts or zones which specify permitted and conditional uses and development standards...” W.Va. Code § 8A-1-2(gg). By contrast to “comprehensive plans,” zoning ordinances are “law,” and the adoption and amendment of zoning ordinances are considered “legislative” acts that are not subject to the same review as final orders of executive or county agencies. *See Brouzas v. City of Morgantown*, 144 W. Va. 1, 12, 106 S.E. 2d 244, 250 (1958).

The Legislature created three broad categories of land uses for zoning ordinances:

“Essential utilities and equipment,” which are considered permissible wherever located; W.Va. Code §§ 8A-1-2(f) & 8A-7-3.

“Permitted uses,” which are allowed within a zoning district without the need for a “variance” or “conditional use permit”; W.Va. Code § 8A-1-2(u).

and

“Conditional uses,” which may be permitted in a particular zoning district only after review by a board of zoning appeals and upon issuance of a conditional use permit. W.Va. Code §8A-1-2(d).

To aid governing bodies in the adoption and implementation of comprehensive plans and zoning ordinances, the Legislature authorizes and encourages them to create “planning commissions.” W.Va. Code §§ 8A-1-1(a)(2) (“a planning commission is

helpful”); 8A-2-1 to -2 (authorizing creation or continuation of planning commissions). Planning commissions “serve in an advisory capacity” and exercise such powers and duties as are given by a municipality or county commission. W.Va. Code § 8A-2-1(a) to -1(e). Jefferson County has a planning commission. *See* Jefferson County Zoning and Land Development Ordinance, § 3.4.B (2019) (available at <http://www.jeffersoncountywv.org/home/showdocument?id=17486>).

Pursuant to its Zoning and Land Use Ordinance, the Jefferson County Commission empowered the County Planning Commission to “prepare the Jefferson County Comprehensive Plan and recommend [it] to the County Commission for adoption or amendment.” Ordinance, § 3.4 B.2.f. The most recent Comprehensive Plan was adopted by the County Commission in 2015 (available at <http://www.jeffersoncountywv.org/home/showdocument?id=2219>).

The Planning Commission also plays a support role in amendments to the Zoning Ordinance. Specifically, it is charged with recommending to the County Commission whether a proposed amendment is compatible with the Comprehensive Plan. *See* Zoning Ordinance §§ 3.4.B.2.b, c & d (authorizing Planning Commission to review requests for new zoning amendments and to recommend amendments) & 12.1.B (authorizing Planning Commission and to review proposed amendments and make recommendations to the County Commission “regarding compatibility with the Comprehensive Plan.”)

That authority dovetails with the legislative authority given the County Commission to amend its Zoning Ordinance. The County Commission may amend its ordinance after seeking the advice of the Planning Commission and then finding that “the amendment is consistent with the adopted Comprehensive Plan.” W.Va. Code §8A-7-8(a). The statute provides that “before amending the zoning ordinance, the governing body with the advice of the planning commission, must find that the amendment is consistent with the adopted comprehensive plan.” W.Va. Code §8A-7-8(a). Additionally, a County Commission can nonetheless approve an amendment that is not consistent with the Comprehensive Plan if it finds that there have been major economic, physical or social changes which were not anticipated when the plan was adopted and that those changes have substantially altered the characteristics of the area.” W.Va. Code § 8A-7-8(a).

W. VA. Code 8A-7-8(a) requires that prior to amending a zoning ordinance, the county commission, with the advice of the planning commission, ‘must find that the amendment is consistent with the adopted comprehensive plan.’ In the event that a text amendment is inconsistent with the comprehensive plan ‘then the governing body with the advice of the planning commission, must find that there have been major changes of

an economic, physical or social nature within the area involved which were not anticipated when the comprehensive plan was adopted, and those changes have substantially altered the basic characteristics of the area.” W.Va. Code 8A-7-8(a)

W.Va. Code 8A-7-10(a) requires that after a zoning ordinance has been enacted ‘all subsequent land development must be done in accordance with the provisions of the zoning ordinance.’”

DECLARATORY JUDGMENT

The Court has reviewed extensively the law regarding a writ of certiorari, injunctive relief, and declaratory judgement actions. In *Largent v. Zoning Board of Appeals for the Town of Paw Paw*, 671 S.E. 2d 794, 222 W.Va. 789 (W.Va. 2008) the Court reviewed a declaratory judgment action regarding the validity of a 1972 zoning ordinance. In that case, Petitioner challenged the validity of the Zoning Ordinance based on its failure to meet the legal prerequisite of having a comprehensive plan in place. The Court in *Largent* noted that the zoning ordinance is a statutory mechanism for carrying out a comprehensive plan.

In this case, petitioners challenge the Text Amendment based on the fact that the amendment is not consistent with the comprehensive plan.

A finding of whether the STA was consistent with the comprehensive plan, is not just a catch phrase that the planning commission and County Commission must say prior to enacting an amendment to the Zoning Ordinance. By law, the Zoning Ordinance cannot be amended without the JC Commission first making this finding. In the instant case, a review of the recordings of meetings and the meeting minutes, submitted as the record, leads this Court to conclude the JC Commission has never focused any of its discussions on the comprehensive plan, but rather, the Commission relies on the recommendation of its planning commission. That recommendation from the planning commission, is stated clearly in a document entitled “Findings of Facts and

Conclusions of Law File No. ZTA 19-03". Because the decision made in April, 2021 was the second time the JC Commission voted in favor of the STA, this Court looked back at the decision made on October 1, 2020, when the JC Commission first voted in favor of the STA in addition to the 2021 meetings. A review of the process undertaken by the JC Commission back in October 2020, leads this Court to conclude that in making its decision to adopt the STA, the JC Commission, adopted the findings made by the planning commission, to reach its conclusion that the amendment was consistent with the comprehensive plan and to the extent it was not consistent that there were changes in the area that support the current amendment. The record submitted by the Jefferson County Commission, contains no other document making any other fact finding regarding how the STA might be consistent with the STA.

A review of the "Findings of Facts and Conclusions of Law" clearly reflects that only number "2. The Comprehensive Plan encourages the development of alternative energy sources, such as solar power generation (Comp. Plan, pp 89-90 and 93) and number "4. The Comprehensive Plan recognizes the need for flexibility in the use of agricultural properties in order to help struggling farm operators to continue to have viable business opportunities. (Comp. Plan, p. 38) make any reference to the actual comprehensive plan. Moreover, number 4 of the Findings, clearly states that the Comprehensive Plan rejects the preservation of farms without farmers. 'There must be a viable rural economy to maintain the rural landscape. (Comp. Plan p. 72). No other finding made by the Planning Commission references the Comprehensive Plan, therefore these are the only two (2) paragraphs that the Court can rely upon in determining whether or not the County Commission's decision to adopt the text amendment was unreasonable, arbitrary, and capricious in making its findings that the STA was consistent with the comprehensive plan.

While listed by the Planning Commission as a factor in support of the text

amendment, paragraph 4, would actually appear to be inconsistent with the text amendment. Paragraph 4 clearly indicates that “the Comprehensive Plan rejects the preservation of farms without farmers.” Farms without Farmers is exactly what the STA permits, as it would allow solar farms throughout all rural areas, which make up 70 percent of the county. While the Planning Commission accurately notes that the Comprehensive Plan encourages the development of alternative energy sources, such as solar power generation, the plan also sets forth areas where solar farms/energy can be utilized.

A review of the record, submitted by the JC Commission and Jefferson County Planning Commission, shows that there is very little discussion about the comprehensive plan. The County Commission makes no factual findings and leaves this Court to guess that it is adopting the finding of the Planning Commission when it votes to conclude that the STA is consistent with the comprehensive plan.

ACCORDINGLY, this Court concludes that both the Planning Commission and County Commission’s factual basis to support its conclusion that the Solar Text amendment is consistent with the Comprehensive Plan is woefully lacking. The arguments cited by the attorney’s arguing their points in favor or against the STA are contained no where in the record of the County Commission who is statutorily required to make such factual findings if the Court and public is to have trust in its legal conclusion.

The Statutory requirement of WV Code 8A-7-8 is the legal standard for when a County Commission may adopt a text amendment. In *Chapman v. Huntington*, the Court held, “[t]he factual finding of a city council to the effect that slum areas exist within the city is entitled to great respect and is not subject to attack unless clearly wrong.” 121 W.Va. 319, 3 S.E.2d 502 (1939).

Respondents have argued the standard which the Court must apply is the “fairly debatable” standard which the Court adopted as the standard when the Circuit Court

reviews the validity of a zoning ordinance as it is applied to a particular property. In the instant case, the Petitioners challenge the validity of the Text Amendment to the Zoning Ordinance, not how it is applied. Petitioner's claim that the Text Amendment is not consistent with the comprehensive plan and therefor is invalid as the amendment would violate WV Code 8A-7-8. The Court in reviewing this legislative action of the County Commission applies the following legal standard of review, whether or not they were "clearly wrong" giving deference to the decision of the legislative body.

Upon review of the "Findings of Facts and Conclusions of Law" of the JC Planning Commission, the same having been accepted by the County Commission without change, this Court does find that the conclusion of the County Commission that permitting Solar Farms is consistent with the policy of the comprehensive plan that *"rejects the preservation of farms without farmers. 'There must be a viable rural economy to maintain the rural landscape.' (Comp. Plan, p. 72)*, is clearly wrong. The County Commission, by adopting the STA has allowed commercial activity in the form of Solar Farms in all rural areas without any protection for the policy of preserving "farms without farmers". In that the only other finding made which cites the comprehensive plan is the fact that the plan encourages alternative energy, the Court cannot find that the JC Commission has met its statutory requirement of ensuring the STA is consistent with the comprehensive plan. The comprehensive plan and zoning ordinance already make provisions for where alternative energy can be located. Accordingly, because the STA proposes new areas in which to locate alternative energy, the court must next look to whether or not there has been a substantial change in the area to warrant the change which is otherwise inconsistent with the comprehensive plan.

ACCORDINGLY, the Court next looks to the conclusion stated by the Jefferson County Commission (as recommended by the planning commission), that to the extent that the STA might be inconsistent "the Commission finds that there have been major

changes of an economic, physical, or social nature within the area involved which were not anticipated when the comprehensive plan was adopted, and those changes have substantially altered the basic characteristics of the area. . .” Both the planning commission and county commission site to a discussion with citizens during meetings before the County Commission involving Rockwool, from which discussions, the JC Commission concluded that there is a demand for green energy. However, nowhere in the record are there any factual findings on which the Court can rely where either the Planning Commission or County Commission found the “basic characteristics of the area” had been changed. A change in attitude of people, is not the type of change referred to in WV Code 8A-7-8 which requires a change in a physical location involving a change in the area’s economics, physical or social nature, so as to support a decision to change an area that has been designated rural to now permit commercial business (solar farms) as a permitted use throughout an otherwise rural area.

Because the JC County Commission failed to make any factual findings on which this Court can find that the STA is consistent with the comprehensive plan or that there has been a change in the area, the STA was not legally adopted. This Court does find the “Findings of Fact” to be woefully lacking in any reference to the Comprehensive plan, noting that they contain only 2 citations to the comprehensive plan and only one of the two actually speaks in favor of solar energy. ACCORDINGLY, this Court does find that the STA is invalid and unenforceable.

The Court did previously advise the parties that it would hear argument on attorney fees after entering an Order on the ultimate issue of the case. Accordingly, pursuant to Trial Court 22 the Court does Order that the Petitioner file any Memorandum of Law in support of its Claim for Attorney Fees and Costs and serve a copy upon all non-moving parties. Non-moving parties shall e-file a **written response within 15 calendar days of the entry date of this order** and serve copies of the same on

the moving party. The moving party shall thereafter have **10 calendar days from the date of service of the response to e-file a reply memorandum**, if desired. At the conclusion of the pleading cycle, **both the movant and the non-moving parties shall e-file proposed orders** for the convenience of the court, taking account of the arguments and counterarguments made within the pleading cycle. The proposed orders shall also be furnished, in editable format, to the Court's Judicial Assistant by email. Thereafter the Court will rule on the motion based upon the pleadings and the record or schedule a hearing.

The clerk shall provide copies of this Order to counsel via e-file and to any pro se party.

/s/ Debra McLaughlin
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtsww.gov/e-file/ for more details.