



West Virginia E-Filing Notice

CC-19-2025-C-93

Judge: Bridget Cohee

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NOTICE OF FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA
Sidewinder Enterprises LLC v. Jefferson County Planning Commission, President Mike Shepp
CC-19-2025-C-93

The following supporting documents was FILED on 10/10/2025 2:57:27 PM

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

**STATE OF WEST VIRGINIA, EX REL.
SIDEWINDER ENTERPRISES LLC d/b/a
MOUNTAIN PURE,**

Plaintiff,

v.

**Civil Action No. 25-C-93
Honorable Bridget M. Cohee**

**JEFFERSON COUNTY PLANNING
COMMISSION, and its Members, BRUCE
CHRISMAN, DONNIE FISHER, DANIEL
HAYES, AARON HOWELL, CARA
KEYS, WADE LOUTHAN, MIKE
SHEPP, TIM SMITH, AND J WARE, in
their official capacities,**

Defendants.

**RESPONDENT JEFFERSON COUNTY PLANNING COMMISSION'S
RESPONSE IN OPPOSITION TO SIDEWINDER'S BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

COME NOW the Respondents, Jefferson County Planning Commission and its members, Bruce Chrisman, Donnie Fisher, Daniel Hayes, Aaron Howell, Cara Keys, Wade Louthan, Mike Shepp, Time Smith and J Ware, by counsel, James Marshall, III and the law firm of Bailey & Wyant, PLLC, and hereby submit the following Response in Opposition to Sidewinder's Brief in Support of its Petition for Writ of Certiorari.

INTRODUCTION

This case involves a land use dispute, stemming from an out-of-state developer's request to commence and build an industrial-scale groundwater extraction operation for a bottling plant in the Middleway area of Jefferson County, WV. Record at 108. A Concept Plan submitted by the developer shows it intends to build to bottling facilities totaling 1,000,000 sq. ft. for a heavy manufacturing and distribution water bottling plant on the former 3M site which sits on a toxic

plume that will require 770 daily trips (610 employee trips, 160 truck trips) thru the historic Middleway District and withdraw up to 1000 gallons of water per minute (1.4 million gallons per day) from the local water resources. Record at 108. After holding a well-attended and properly noticed public meeting, the Respondent Jefferson County Planning Commission (“Planning Commission”) exercised its discretion to deny the developer’s Concept Plan due to conflicts with the Jefferson County Zoning and Land Development because: (A) it will destroy the historic character of Middleway; (B) it does not meet the purpose of the zoning ordinance; (C) it is not specifically permitted by the zoning ordinance; and (D) it is not consistent with the purpose of the subdivision ordinance. Record at 733. Petitioner Sidewinder Enterprises, LLC asks this Court to overturn the Planning Commission’s March 11–12, 2025, decision rejecting its Concept Plan for a proposed water bottling facility, wells, and a mile-long water pipeline. Petitioner contends the Planning Commission’s role at the concept stage was purely advisory. That is incorrect.

Under West Virginia Code Chapter 8A, and Jefferson County’s duly adopted Zoning Ordinance and Subdivision and Land Development Regulations, the Planning Commission is entrusted with ensuring the proposed development is consistent with zoning classifications, subdivision standards, infrastructure adequacy, and the Comprehensive Plan. This includes authority to reject a project where its uses are not permitted or where the proposal fails to satisfy regulatory purposes of protecting public health, safety, and welfare. Because the Commission acted within its lawful discretion and based its decision on substantial concerns about zoning consistency, infrastructure adequacy, and environmental impacts, the Court should deny the petition and affirm the Commission’s decision.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Sidewinder Enterprises, LLC (“Sidewinder”) seeks to develop a water bottling facility on the site of a former Kodak/3M industrial plant near Middleway, Jefferson County, which sits on a toxic plume of chemicals consisting of dichloroethene and trichloroethene.¹ Record at 103. The Concept Plan includes: (1) a water bottling facility at the 3M site; (2) a primary and backup well located more than a mile to the east of the plant; and (3) a transmission pipeline to carry raw water from the wells to the bottling facility and a new water treatment plant. Record at 108-113, 126-130. The Concept Plan also indicates it could withdraw up to 1000 gallons of water per minute which equates to 1.4 million gallons per day from the local natural resources. Record at 103. There are concerns that the withdraw would lower the water table affecting the wells of local residents. Record at 4601. Further, the extraction of significant amounts of water, while lowering the water table, will influence the direction of ground water flow that could cause the chemicals in the toxic plume to move in a direction that would affect the local water supply. Record at 4540-4541.

Additionally, fears were raised by the Jefferson County Historic Landmark’s Commission and Jefferson County Foundation related to construction and operation of the facility. Record 506-529, 4463-4637. Specifically, damage caused during the construction of the proposed pipeline to structures and grave sites along with potential water leakage in the pipeline that could result in sink holes due karst topography of the area. Record 528, 4481. Additionally, the traffic will drastically increase in the Middleway area with up to 770 additional trips per day of which 160 will be trucks. Record at 108. This raised concerns about public safety due to traffic accidents on narrow roadways, as well as potential damage to historic structures in the

¹ The 3M plant participated in a Voluntary Remediation Program and a certificate of completion was issued on June 15, 2018.

Middleway Historic District from vibrations caused by heavy trucks. Record at 523-528, 4478-4485.

In accordance with State land use laws and County ordinances, Sidewinder is required to obtain approval of a “major site plan.” After County Zoning officials determine that the application is complete and compliant with the County’s zoning ordinances, the Respondent Planning Commission is required to conduct a public “workshop” where members of the public and community can provide comments on the proposal. Jefferson County has adopted two complementary land-use regimes: (1) the Zoning and Land Development Ordinance², which governs permitted uses in zoning districts; and (2) the Subdivision and Land Development Regulations³. Both require Planning Commission approval before a project may proceed. Section 20.301 of the Subdivision Regulations specifically prohibits approval of any site plan inconsistent with the Zoning Ordinance.

The site lies in a zoning district that does not list “water bottling” or bulk water transmission pipelines as principal permitted (“P”) or conditional (“CU”) uses. Zoning Ordinance at Appendix C. Under Section 1.3(D) of the Zoning Ordinance, unlisted uses are deemed not permitted (“NP”). Although Sidewinder characterizes the pipeline as “utility infrastructure,” the record reflects that its primary purpose is to serve a private industrial operation, not the general public. Accordingly, it does not fall under the limited public utility exceptions of Subdivision Regulations § 20.104(C).

On November 12, 2024, the Planning Commission held a public workshop on Sidewinder’s Concept Plan. Record at 41. During the workshop, the Planning Commission

2 The Zoning Ordinance is found at:
<https://www.jeffersoncountywv.org/home/showpublisheddocument/22048/637921840861370000>

3 The Subdivision and Land Development Regulations are found at:
<https://www.jeffersoncountywv.org/home/showpublisheddocument/26046/638569906998870000>

determined the Concept Plan was “incomplete” due to the omission of two parcels relevant to the project. Record at 61. The meeting minutes note a “lack of clarity in how the water is navigated from Lake Louise to the 3M site, identifying where the wells are located, identifying issues regarding monitoring wells, and identifying parameters regarding well depth and impact on Middleway residents.” Record at 61. A revised Concept Plan was submitted on December 6, 2024, adding:

- 1) The location of the water line from the well to the bottling plant,
- 2) A plan showing the location of the plume, groundwater monitoring well locations and the areas with non-hazardous material that required WVCEPO oversight during grading,
- 3) Revised conditions to the Concept Plan in response to community concerns related to well monitoring, traffic, water withdrawal rate and ground water sampling and,
- 4) Narratives related to well testing and plume.

Further information was provided by the applicant by attached letter regarding;

- 1) An updated project narrative,
- 2) Well summary and,
- 3) Plume summary.

Record at 98, 107, 733.

A second public workshop was held on March 11, 2025, regarding Sidewinder’s revised Concept Plan. Record at 52, 76. More than six hours of comment from citizens and stakeholders raised concerns about groundwater depletion, traffic, industrial intensity, and the precedent the project would set for future land use. Record at 76. Additionally, significant and large volumes of correspondence from the public were received between November 5, 2024, and March 11, 2025. Record at 770-4425; 4426-4646. The Planning Commission heard evidence regarding alleged Aquifer Impacts. The evidence showed that Sidewinder obtained a Department of Health permit to withdraw up to 1,000 gallons per minute, but testimony raised concerns about long-term effects on residential wells, groundwater supplies and movement of the toxic plume.

Record at 4607-4624. Further, the Commission heard testimony that the majority of the pipeline would be constructed in a West Virginia Division of Highways right-of-way. This raised questions about long-term maintenance, disruption to public infrastructure, and jurisdictional complications.

After hearing the evidence and considering the staff report, the Commission voted in the early morning of March 12, 2025, to reject the Concept Plan. On April 8, 2025, the Planning Commission issued its “Findings of Fact and Conclusions of Law for Project Number 24-6-P.” Record at 733. The Findings of Fact set forth the Planning Commission’s findings regarding Sidewinder’s project and the basis of its decision. Sidewinder now challenges the findings set forth in the Commission's Findings of Fact and Conclusions of Law as well as its overall authority to make decisions regarding whether the project may be approved or not.

LEGAL STANDARD

Review of a planning commission decision is limited. Under W. Va. Code § 8A-9-1, decisions of a planning commission are subject to review by certiorari but may be overturned only if clearly erroneous, arbitrary and capricious, or in excess of statutory authority. See *Smith v. Bayer Corp.*, 388 S.E.2d 851, 855 (W. Va. 1989) (writs of prohibition and mandamus appropriate only where agency exceeds jurisdiction or abuses discretion). West Virginia courts consistently defer to local land-use bodies on matters within their expertise. See *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W. Va. 252, 664 S.E.2d 763 (2008) (deference accorded to zoning decisions unless clearly wrong.).

ARGUMENT

A. The Planning Commission Acted Within Its Statutory and Regulatory Authority and the Petition for Writ of Certiorari fails.

A writ of certiorari, at common law, serves the purpose of “bringing before the court for

inspection the record of the proceedings of an inferior tribunal in order that the superior court may determine from the face of the record whether the inferior court has exceeded it[s] jurisdiction or has not proceeded according to the essential requirements of the law.” *Lower Donnelly Ass’n*, 212 W. Va. at 629-30. The Legislature, in enacting W. Va. Code § 8A-9-1, made the common law remedy of certiorari available to persons challenging the decision of a planning commission so there could be a “review of the record developed by these bodies as a convenient means of assuring adherence to the requirements of the law without necessarily providing a means of attaching their proper exercise of discretion.” *Id.* “In cases involving a planning commission decision,” a court may only “disturb a decision ‘where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or acted beyond its jurisdiction.’” *Kaufman v. Plan. & Zoning Comm’n of City of Fairmont*, 171 W. Va. 172 (1982). Sidewinder’s brief, as lengthy as it is, does not carry the burden of proving the Planning Commission was plainly wrong or that it acted outside the scope of its authority.

1. Planning Commissions Possess Express and Implied Authority to Evaluate Compliance with Both the Zoning Ordinance and Subdivision Regulations.

The Planning Commission was within its rights to deny the concept plan as it has the clear authority to do so. The Supreme Court of Appeals has repeatedly held that local planning commissions are vested with broad discretion in performing its duties. In *Kaufman v. Planning & Zoning Comm’n*, 298 S.E.2d 148 (W. Va. 1982), the Court emphasized that a reviewing court should not disturb a planning body’s decision unless it “applied an erroneous principle of law, was plainly wrong in its factual findings, or acted beyond its jurisdiction.” Likewise, in *Maplewood Estates Homeowners Ass’n v. Putnam Cnty. Planning Comm’n*, 629 S.E.2d 778 (W. Va. 2006), the Court reaffirmed that “a planning commission’s factual determinations and discretionary judgments are entitled to deference unless clearly arbitrary or capricious.”

Under W. Va. Code §8A-5-8(d), a planning commission is expressly authorized to “approve, deny or hold” applications. Furthermore, “The planning commission shall approve the application after the planning commission determines that an application is complete and meets the requirements of the governing body’s subdivision and land development ordinance[...].” W. Va. Code § 8A-5-8(f). Subdivision Regulations (Art. 20 §§ 20.102, 20.105A) designate the Planning Commission – not the Staff – as the final decision-making body. Additionally, the zoning ordinance establishes, “All departments, officials, and public employees of Jefferson County which are vested with the duty or authority to issue permits or licenses shall issue no permit or license for any use, building, or purpose if the same would be in conflict with the provisions of this Ordinance.” Zoning Ordinance at Section 3.1(D). After public comment and debate at the public workshop, the Planning Commission made thorough findings of fact and concluded that the Concept Plan should be denied because it did not comply with Jefferson County’s zoning and land development ordinance. Record at 733. This is clearly within the authority of the Planning Commission.

Under W. Va. Code § 8A-2-1(e), “[a] planning commission has only those powers, duties and jurisdiction as given to it in the ordinance creating it.” According to the subdivision regulations, “The County Planning Commission shall be the agency overseeing the review of subdivisions and site development. This is a function that grants limited authority for the approval. The duties are identified in W.Va. Code §8A-2-11 and the Planning Commission By-Laws.” Amended Sub Regs § 23.200. Under West Virginia Code, a planning commission also has the statutory power to, “Invoke any legal, equitable or special remedy for the enforcement of the provisions of this article or any ordinance, rule and regulation or any action taken thereunder...” W. Va. Code § 8A-2-11(12). Additionally, the Jefferson County Zoning and

Land Development Ordinance gives the Planning Commission certain powers including, but not limited to, the power to “Review applications for major site plans, major subdivisions, and waivers from minimum standards, pursuant to the Subdivision and Land Development Regulations.” Jefferson County Zoning and Land Development Ordinance at § 3.4(B)(2)⁴. The Jefferson County Subdivision and Land Development Regulations specifically state that its purpose is to:

[F]acilitate the County Government’s review of proposals for development of land either by subdivision plat or site plan, to ensure that proposed subdivision plats or site plans meet the standards of the Jefferson County Zoning Ordinance and satisfy the legal requirements of the State and County for the subdivision and development of land, and to promote efficient and attractive development **in a manner that reduces off-site impacts.**

Amended Sub Regs § 20.101 (emphasis added). This should include all powers reasonably necessary to carry out the duties assigned by the Legislature, including ensuring that land development proposals conform to the zoning ordinance and subdivision regulations.

Site plans must be approved by the Planning Commission. Amended Sub Regs § 20.102. Additionally, a concept plan must be approved by the Planning Commission in order for a property right to vest in the developer into order to undertake and complete the site development pursuant to WV Code §8A-5-12⁵. “[A] vested property right . . . is established when . . . the Concept Plan (under these Regulations) is approved by the Planning Commission.” Amended Sub Regs § 20.105A.

The Jefferson County Subdivision and Land Development Regulations establish a two-part review process: (1) a zoning review conducted by Staff under § 20.301; and (2) a site-specific development review by the Planning Commission under §§ 20.302–20.303.

4 The applicable Zoning Ordinance was prepared by the Planning Commission and the applicable amended version was adopted by the Jefferson County Commission on June 16, 2022.

5 “A vested property right is a right to undertake and complete the land development. The right is established when the land development plan and plat is approved by the planning commission and is only applicable under the terms

Section 20.303 requires the Commission to evaluate, inter alia, *design review criteria* concerning traffic, landscaping, compatibility with surrounding uses, and effects on historic and environmental resources. These are not mere formalities—they reflect the Planning Commission’s legislative function to implement the purposes of the Ordinance.

Sidewinder’s argument that Staff⁶ are the final arbiter of zoning matters is incorrect. While part of Staff’s role is indeed to “review all plat or site plan applications for zoning compliance,” that does not make Staff the final arbiter of zoning matters, because the Planning Commission is not bound to accept the Staff report. Subdivision Reg § 23.202(A). As the Regulations clearly state, Staff’s role is to “provide the Planning Commission with a written **opinion** as to whether the plat or site plan complies with the Zoning Ordinance.” *Id.* (emphasis added.)

The Staff Report’s own analysis of zoning compliance underscores that the Planning Commission possesses authority to consider zoning matters when acting on an application. Section 24.119(H) expressly provides that agency reviews may include “reasons why the plan should be denied.” A Staff recommendation urging denial of a Concept Plan would be meaningless if the Commission lacked the authority to deny it. Moreover, the Staff’s evaluation of compliance with the Zoning Ordinance confirms that zoning noncompliance is a proper and substantive basis for denial—not a collateral consideration, but a core criterion within the Commission’s delegated review authority.

To even qualify for review of a Concept Plan, an applicant must submit “Zoning Information . . . including [u]se designations for all adjoining and confronting parcels.”

and conditions of the approved land development plan and plat.” WV Code § 8A-5-12(a).

⁶ “Staff” as that term is used herein, does not refer to Planning Commission staff. Rather, as used herein, “Staff” refers to “Jefferson County Department of Engineering, Planning and Zoning, Zoning Administrator, and such other employees or consultants designated by the County Commission.” Amended Sub Regs § 26.101(Q).

Amended Sub Regs § 24.119(B)(3). If Staff determines from this information “that the development cannot conform to the Zoning Ordinance,” then the Concept Plan must be deemed incomplete and may not proceed to a Public Workshop. *Id.* § 24.119(I). Because Staff is expressly authorized to deny an application as incomplete for failure to comply with the Zoning Ordinance, it follows that the Planning Commission—on whose delegated behalf Staff acts—retains that same authority, and more.

To hold otherwise would invert the structure of local governance and render the Planning Commission meaningless. If only Staff could determine whether a project conforms to zoning, while the Planning Commission itself lacked the power to act on that determination, the Planning Commission would be reduced to a ministerial body with no real authority; a mere rubber stamp for County employees rather than a deliberative governing entity entrusted by statute with land-use decisions. The Subdivision Regulations do not contemplate such an abdication, which is specifically evidenced by the requirement that a concept plan must be approved by the Planning Commission before a property right can vest to proceed with the development. Amended Sub Regs § 20.105A. The Staff is envisioned as providing technical assistance and preliminary review, while the Planning Commission exercises the final, substantive judgment that gives democratic legitimacy to local land-use regulation.

Sidewinder’s contrary interpretation would strip the Planning Commission of the very discretion the Legislature conferred upon it, transforming a decision-making body into a passive conduit for bureaucratic recommendations. The law requires precisely the opposite: Staff advises, the Planning Commission decides. Any other reading would nullify the Planning Commission’s statutory purpose and subvert the public accountability that Chapter 8A was designed to preserve.

Accordingly, the Planning Commission's authority at the concept plan stage necessarily encompasses the ability to evaluate whether a proposal is consistent with the Zoning Ordinance, the Subdivision Regulations, and the Comprehensive Plan's guiding purposes. Nothing in § 24.121 strips that discretion or mandates automatic advancement of a concept plan once filed. The phrase "shall provide direction" in § 24.121 cannot be construed to override the Planning Commission's duty to ensure compliance with law and protection of public welfare and ultimately approve the concept plan.

Alternatively, if the Court determines (based on the distinctive roles of the zoning administrator and the planning commission)⁷ that the Zoning Administrator stands apart from the Planning Commission staff and that the Planning Commission cannot overrule the determination of the zoning administrator, there are specific issues in this case that the zoning administrator did not address. Specifically, those issues are raised in the Findings of Fact and Conclusions of Law, and more specifically referenced at paragraphs 21-24 of the Findings. Record at 733. It is those issues that the Planning Commission primarily based its decision.

B. The Planning Commission's Findings of Fact and Conclusions of Law that the concept plan does not comply with the zoning ordinance are not arbitrary or capricious and thus cannot be overturned.

The Planning Commission determined the Concept Plan violated the zoning ordinance because of the damaging impact the construction and operation of the development will have on the community. While the zoning administrator generally opined the concept plan complied with zoning, it did not address the issues specifically addressed by the Planning Commission in its denial. Accordingly, upon review of the information presented, the Planning Commission provided specific Findings of Fact and Conclusions of Law as to reasons the Concept Plan did not comply with Jefferson County's Zoning Ordinance. Record at 733.

1. The Planning Commission Lawfully Applied Section 4.4(c) of the Zoning Ordinance.

Section 4.4(C) of the Jefferson County Zoning Ordinance prohibits development that destroys the character of a listed historic property. Section 4.4(C) also provides that “any development which would destroy the historical character of a property listed on the West Virginia or National Register of Historic Places shall not be permitted.” This provision implements the statutory authority granted under W. Va. Code § 8A-7-2(b)(3), which allows a zoning ordinance to “[designate] historic districts and [regulate] the uses of land and the design of buildings within or affecting such districts.” The phrase “within or affecting” recognizes that protection of a historic district necessarily extends to activities proximate to it that would undermine its integrity.

The Planning Commission rightfully determined—after a six-hour public workshop—that the proposed Sidewinder bottling plant and pipeline system, which would result in over 160 heavy-truck trips per day through the Middleway Historic District, would “destroy the historic character” of that District. The evidence before the Commission, including traffic projections and public testimony, amply supported that conclusion and indicates that the decision of the Planning Commission was not plainly wrong. Record at 108, 506-529,

Further, The Planning Commission’s interpretation of Section 4.4(C) is entitled to deference. In *Jefferson Utils., Inc. v. Jefferson County Bd. of Zoning Appeals*, 624 S.E.2d 873 (W. Va. 2005), the Supreme Court held that “an administrative body’s interpretation of its own zoning ordinance is entitled to great weight and will not be disturbed unless clearly erroneous or inconsistent with the ordinance’s plain meaning.” Here, the Commission’s interpretation—that off-site impacts such as heavy truck traffic through a listed district constitute “development

⁷ *Singer v. Davenport*, 164 W. Va. 665, 264 S.E.2d 637 (1980)

which would destroy” historic character—is a permissible and reasonable reading of § 4.4(C).

Sidewinder’s narrow reading, limiting the prohibition only to physical construction *within* the district, would render § 4.4(C) meaningless in cases where a large industrial project’s external impacts devastate a protected historic area. The Commission’s interpretation, consistent with legislative purpose, therefore, controls and, again, is not plainly wrong.

2. The Planning Commission Properly Found Sidewinder’s Proposed Concept Plan Was Inconsistent with the Purposes of the Zoning and Subdivision Ordinances.

The Zoning Ordinance clearly states its purpose in Section 1.1. In Section 1.1 of the Zoning Ordinance states that its purpose is, among other things, to: “(A) Protect and encourage the health, safety and general welfare of the present and future population of Jefferson County . . . ; (F) Encourage and support commercial, industrial, and agricultural activities while maintaining land use order and compatibility. . . ; [and] (K) Encourage historic preservation.” Similarly, Subdivision Regulation § 20.101 declares that the intent of the Regulations is “to promote efficient and attractive development in a manner that reduces off-site impacts.” The Planning Commission concluded that Sidewinder’s project, as proposed, would negatively impact the health, safety and general welfare of the area because of increased traffic and detrimental impact on water resources. Record at 740. These findings directly relate to the Ordinances’ express purposes. The Commission did not invent new standards; it applied the general welfare and preservation mandates.

In *West Virginia Citizens Action Group v. Public Service Comm’n*, 425 S.E.2d 602, 611 (W. Va. 1992), the Court held that agencies must interpret their governing statutes to effectuate legislative purposes. The Commission’s reliance on the stated purposes of the Ordinances is thus

fully proper. Far from being mere advice, these purposes provide enforceable criteria guiding local land use decisions.

3. The Planning Commission Correctly Determined that the Proposed Water Withdrawal Site was a Prohibited Use.

The Planning Commission concluded after the public workshop that the groundwater extraction wells proposed for the Rural Zoning District were not “permitted” or “conditional” uses under the Zoning Use Table. Zoning Ordinance at Appx C. The proposed ground water wells are in the Rural Zoning District. Record at 500. These wells are to be used to supply the two heavy manufacturing and distribution structures. However, the rural district where the wells are located are not zoned for industrial use. Zoning Ordinance at Appx C. Furthermore, the proposed use of water extraction for a commercial bottling plant is not listed as a permitted use in the zoning district. Therefore, the Planning Commission determined that this proposal was prohibited under Zoning Ordinance § 1.3(D).

Sidewinder argues that these wells fall under the statutory exemption for “essential utilities” found in W. Va. Code §8A-7-3(e) or for “natural resource extraction” under §8A-7-10(e). Both of these arguments fail. W. Va. Code § 8A-7-3(e) exempts “essential utilities and equipment” from zoning *where used to serve the public*. Sidewinder’s private commercial well field, intended to supply its own bottling operation, is not an “essential utility” serving the public at large. Further, § 8A-7-10(e) protects only an owner’s right to use natural resources “outside of urban areas” for the owner’s benefit. Sidewinder seeks to extract and transport groundwater across multiple parcels, using public rights-of-way, to supply a separate industrial facility. That activity constitutes an integrated industrial process, not localized resource extraction. Lastly, in *State ex rel. BSW Dev. Grp. v. City of Martinsburg*, 238 S.E.2d 101 (W. Va. 1977), the Court upheld municipal authority to regulate land use where a developer’s proposed

use would substantially affect surrounding property and public resources. Similarly, the Planning Commission's decision here is appropriate to protect public health and welfare.

C. The Planning Commission Fully Complied with the West Virginia Open Governmental Proceedings Act

Sidewinder's claim that the Planning Commission violated the West Virginia Open Governmental Proceedings Act ("Open Meetings Act"), W. Va. Code § 6-9A-1 et seq., lacks merit. The agenda for the March 11, 2025, meeting clearly identified the matter as follows:

9. Public Workshop: Mountain Pure Concept Plan for a Major Site Development. The proposal consists of the following: Phase 1: a 304,000 square foot bottling facility with associated parking on a proposed 30-acre parcel; and, Phase 2: a 696,000 square foot bottling facility with associated parking on a proposed 66-acre parcel. The proposal will include the required stormwater management facilities. Property Owners: Sidewinder Enterprises, LLC; 1 Grace St, Kearneysville, WV; Parcel ID: 07002200090000; Size: ~260 acres; Zoning District: Industrial Commercial; Parcel ID: 07002200320000; Size 13.22 acres; Zoning District: Rural (supply well). Property Owner: RLMHP LLC & Photoglou Living Trust; Easement Owner: Sidewinder Enterprises, LLC; Parcel ID: 07002200330009; Size: 8.31 acres; Zoning District: Rural (waterline easement) (File #24-6-SP).

Record at 53. The Open Meetings Act requires that meetings of governing bodies be open to the public and that reasonable advance notice, including the date, time, place, and subject matter of the meeting, be made available. See W. Va. Code § 6-9A-3(a) and (d). Nothing in the statute or controlling precedent requires a governing body to forecast or declare in its agenda that it intends to take final action on a matter at a meeting as Sidewinder wants this Court to believe.

The Open Meetings Act's purpose is to ensure that the public can observe the conduct of governmental business, not to dictate whether a governing body may deliberate or reach a vote. See W. Va. Code § 6-9A-1. W. Va. Code § 6-9A-3(a) simply provides that "all meetings of any governing body shall be open to the public." A "meeting" includes any convening of a quorum "to make a decision or to deliberate toward a decision." W. Va. Code § 6-9A-2(5). Thus, the Act

expressly contemplates meetings where discussion or deliberation occurs toward a decision; it does not require that a decision actually be made. The Jefferson County Planning Commission’s March 11 meeting and agenda squarely fits within this framework—a duly noticed public meeting for the purpose of discussing the Sidewinder concept plan, consistent with the transparency requirements of the statute.

Sidewinder’s reliance on *Capriotti v. Jefferson County Planning Comm'n*, 2015 W. Va. LEXIS 134, *1 (Feb. 26, 2015), is misplaced. *Capriotti* did not hold that an agenda must expressly state that a vote or final action will occur. Rather, the Court addressed the adequacy of the notice’s specificity—that is, whether the agenda reasonably informed the public of the subjects to be discussed. The decision focused on the content of the agenda, not on predicting whether a governing body would ultimately take action. The Court emphasized that the purpose of the notice requirement “is to fulfill the Legislature’s stated policy of maintaining an ‘[o]pen government’ and providing ‘public access to information.’” *Id.* at *15 (quoting W. Va. Code § 6-9A-1).

Capriotti reaffirmed that the purpose of § 6-9A-3(d) is to enable citizens “to decide whether to attend and observe.” *Id.* The agenda item at issue here plainly achieved that purpose by informing the public exactly which project and subject would be discussed. Nothing in *Capriotti* requires an agency to append to each agenda item a notation announcing in advance whether a vote or other “action” will occur.

To the Respondent’s knowledge, no West Virginia court has ever held that a governing body must list beside each agenda item the specific action it expects to take, if any.⁸ Indeed,

⁸ The West Virginia Governmental Ethics Commission is expressly authorized by W. Va. Code § 6-9A-11 to issue interpretive opinions on the Open Meetings Act. The Respondent is similarly unaware of any Advisory Opinion issued by the West Virginia Governmental Ethics Commission’s Committee on Open Governmental Meetings that interprets the Open Meetings Act to require a governing body’s agenda to spell out the precise action it intends to

such a rule would be preposterous. Requiring a governing body to determine and publish in advance the precise “action” it will take on each agenda item would defeat the very transparency the Open Meetings Act was enacted to protect. To decide what “action” should be listed, members would have to confer privately to reach a consensus before the meeting—precisely the kind of non-public deliberation the Open Meetings Act prohibits. Such pre-meeting discussions among a quorum “to make a decision or to deliberate toward a decision” would themselves constitute a “meeting” under § 6-9A-2(5), thereby creating the very violation the Petitioner claims to avoid. In short, Sidewinder’s interpretation would require governing bodies to violate the Open Meetings Act in order to comply with it. The law neither contemplates nor tolerates such circular absurdities. The Open Meetings Act demands openness, not clairvoyance. The Planning Commission must notify the public of the subject matter to be discussed, not predict the outcome of its deliberations. The text, structure, and purpose of the statute confirm that distinction.

The Planning Commission’s March 11, 2025, workshop complied fully with the Open Meetings Act. The agenda provided specific, reasonable notice of the topic under discussion; the meeting was open to the public; and the Commission’s deliberations concerning the Sidewinder concept plan fell squarely within the Act’s scope. Neither *Capriotti* nor the Ethics Commission’s interpretive guidance imposes any requirement that an agenda forecast the possibility of a vote or final action. The Open Meetings Act guarantees transparency—not clairvoyance—and the Planning Commission’s conduct fully satisfied both the letter and spirit of the law.

D. Sidewinder Is Not Entitled To Reasonable Attorney’s Fees.

Sidewinder’s request for attorney’s fees under the Open Meetings Act and its reliance on *State ex rel. Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection*,

take on a particular matter.

193 W. Va. 650, 458 S.E.2d 88 (1995), are misplaced. The circumstances of this case bear no resemblance to *Highlands Conservancy*, and there is no statutory or equitable basis for awarding fees against the Jefferson County Planning Commission.

In *Highlands*, the West Virginia Supreme Court of Appeals held that attorney's fees may be awarded to a petitioner who successfully compels a state agency to comply with a clear, nondiscretionary legal duty through a mandamus action. *Id.* at 653, 458 S.E.2d at 91. That holding, however, arose from a mandamus proceeding involving a state agency's clear refusal to perform a statutory duty. The Division of Environmental Protection had clearly disregarded a mandatory, nondiscretionary statutory duty under W. Va. Code § 22A-3-11(g) and related regulations requiring it to use funds from the Special Reclamation Fund to treat acid mine drainage at forfeited mining sites. *Id.* at 652, 458 S.E.2d at 90. The Court's fee award thus rested on the agency's willful disregard of a mandatory legal obligation and the petitioner's success in obtaining relief that benefitted the general public.

By contrast, this case does not involve a mandamus proceeding, a statutory violation, or any willful misconduct. The Planning Commission conducted an open, properly noticed public meeting, in full compliance with the Open Meetings Act. There has been no judicial finding of a violation, no order compelling the Planning Commission to act, and no conferral of any public "benefit" beyond what the Planning Commission already provided through its transparent and lawful process. *Highlands Conservancy* therefore offers no basis for a fee award.

Furthermore, none of the factors identified in *Highlands* supports an award of fees here. In *Highlands*, the Supreme Court explained that when determining whether attorney's fees should be awarded in cases alleging public-interest violations, courts should consider:

- (a) the relative clarity by which the legal duty was established;
- (b) whether the ruling promoted the general public interest or merely protected the

private interest of the petitioner or a small group of individuals; and
(c) whether the petitioner has adequate financial resources such that petitioner can afford to protect his or her own interests in court and as between the government and petitioner, which party can better bear the financial burden of litigation.

Id. at 654, 458 S.E.2d at 92. Each factor weighs heavily against Sidewinder’s request.

1. The Legal Duty Allegedly Violated Was Not “Clearly Established”

Under *Highlands*, fees in a non-willful case turn in part on whether the public body’s duty was “clearly established.” In this record, it wasn’t. There is a genuine, good-faith dispute on multiple intersecting fronts. First, the Respondent grounds authority to approve/deny/hold in W. Va. Code § 8A-5-8(d)–(f) at the application stage and emphasizes the Planning Commission’s obligation to ensure compliance before approval.

Petitioner, by contrast, reads Subdivision Reg. § 24.121 (“shall provide direction” after a concept plan workshop) as foreclosing denial at that preliminary step. Reconciling a general state grant of approval/denial power with a local, stage-specific “direction” procedure is a real interpretive problem—precisely the kind of ambiguity that defeats any claim that a clear, nondiscretionary duty existed.

Also, as noted above, cases like *Kaufman* and *Maplewood Estates* explain that planning bodies receive deference on mixed law-and-policy judgments unless they apply an erroneous legal principle or act beyond jurisdiction. If the law already built in deference for this exact kind of line-drawing (e.g., whether a submission “meets the requirements” vs. only merits “direction”), then the duty isn’t “clear” in the *Highlands* sense.

2. This Case Serves a Private Commercial Interest, Not the General Public Interest

The second *Highlands* factor asks whether the litigation confers a general public benefit or merely protects a private interest. In *Highlands*, the petitioner’s mandamus action advanced a

public right thereby serving the interests of all West Virginians. The Court awarded fees precisely because the litigation vindicated a systemic public entitlement, not a private grievance.

Here, by contrast, Sidewinder is a private developer pursuing its own land-use approval. Its appeal challenges a single planning decision that affects only its proposed commercial project, not the public at large. The alleged Open Meetings Act issue is derivative of that private dispute; it does not expand public access to governmental proceedings, establish a new transparency standard, or alter the rights of any other citizen.

Sidewinder's litigation is therefore purely self-interested, intended to advance its own development project rather than to vindicate any broader public right. The *Highlands* Court made clear that fee shifting is inappropriate in precisely these circumstances—where a litigant “merely protect[s] a private interest . . . or a small group of individuals.” *Id.* at 654, 458 S.E.2d at 92. That is exactly the situation here.

3. The Relative Financial Resources Weigh Against a Fee Award

The third *Highlands* factor concerns whether the petitioner lacks financial means to protect its interests and whether the equities favor shifting costs to the public body. In *Highlands*, the Court noted that the Conservancy was a small non-profit organization acting in the public interest against a large state agency. The Court's reasoning was rooted in the disparity of resources between a volunteer environmental group and a government department.

The same cannot be said here. Sidewinder Enterprises is a commercial development entity pursuing a project of substantial scale and economic potential. It has ample financial resources and a direct economic stake in the outcome of its own development application. It is not a pro bono public-interest litigant seeking to vindicate citizen rights; it is a private business seeking regulatory approval.

By contrast, the Planning Commission is a small local governmental body funded by limited public resources. Shifting attorney’s fees from a private developer to a publicly funded commission would invert the equitable rationale of *Highlands*, forcing taxpayers to subsidize private commercial litigation. The *Highlands* Court intended precisely the opposite result—fee shifting to promote access for those *without* financial means, not to enrich those who possess them.

Wherefore, the Jefferson County Planning Commission, its members, Bruce Chrisman, Donnie Fisher, Daniel Hayes, Aaron Howell, Cara Keys, Wade Louthan, Mike Shepp, Time Smith and J Ware, request the Court deny the Petition for Writ of Certiorari, affirm the decision of the Jefferson County Planning Commission, and for such further relief the Court deems just and proper.

**JEFFERSON COUNTY PLANNING
COMMISSION, and its Members, BRUCE
CHRISMAN, DONNIE FISHER, DANIEL
HAYES, AARON HOWELL, CARA KEYS,
WADE LOUTHAN, MIKE SHEPP, TIM
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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

**STATE OF WEST VIRGINIA, EX REL.
SIDEWINDER ENTERPRISES LLC d/b/a
MOUNTAIN PURE,**

Plaintiff,

v.

**Civil Action No. 25-C-93
Honorable Bridget M. Cohee**

**JEFFERSON COUNTY PLANNING
COMMISSION, and its Members, BRUCE
CHRISMAN, DONNIE FISHER, DANIEL
HAYES, AARON HOWELL, CARA
KEYS, WADE LOUTHAN, MIKE
SHEPP, TIM SMITH, AND J WARE, in
their official capacities,**

Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Respondent Jefferson County Planning Commission's Response in Opposition to Sidewinder's Brief in Support of Petition for Writ of Certiorari** was electronically filed with the Clerk of the Court using the Court's E-Filing system, which will send notification of such filing to the following on this day, October 10, 2025:

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