

**IN THE CIRCUIT COURT OF  
JEFFERSON COUNTY, WEST VIRGINIA**

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

**Petitioner,**

**v.**

**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 capacity,  
116 E. Washington Street  
Charles Town, WV 25414,**

**Respondents.**

**SERVE ALSO:**

**JEFFERSON COUNTY  
PROSECUTING ATTORNEY,  
CIVIL DIVISION  
Attn: Nathan Cochran, Esq.  
124 E. Washington Street, 2<sup>nd</sup> Floor  
Charles Town, WV, 25414**

**JEFFERSON COUNTY OFFICE OF  
PLANNING AND ZONING  
C/o: Luke Seigfried, County Planner  
116 E. Washington St.  
Charles Town, WV 25414**

**Case No. \_\_\_\_\_**

**Judge \_\_\_\_\_**

**COMPLAINT AND VERIFIED  
PETITION FOR WRIT  
OF PROHIBITION, MANDAMUS,  
AND CERTIORARI**

## **COMPLAINT AND VERIFIED PETITION FOR REVIEW**

Sidewinder Enterprises, LLC d/b/a Mountain Pure (“Mountain Pure”) files this Complaint and Verified Petition for Writ of Prohibition, Mandamus, and Certiorari against the Respondent Jefferson County Planning Commission and its members (the “Planning Commission”). In support of its Petition, Mountain Pure states the following:

### **NATURE OF THE CASE**

1. Mountain Pure seeks to construct and operate a water bottling and processing facility on the location of the former 3-M Plant in Middleway, Jefferson County. It files this Petition to challenge the Planning Commissions’ unlawful rejection of Mountain Pure’s concept plan for the proposed bottling facility at a public workshop held before the Planning Commission in Jefferson County on March 11 and 12, 2025.

2. The Planning Commission’s “rejection” was taken without legal authority and without first providing sufficient notice under the Open Governmental Meetings Act. These unlawful acts are subject to a writ of prohibition as discussed below. Further, the Planning Commission failed to discharge a mandatory obligation to “provide direction” to Mountain Pure so that it could submit a site plan. That failure is subject to a writ of mandamus to compel compliance. In the alternative, even though the Planning Commission was unauthorized to “reject” the concept plan, should the Planning Commission’s “rejection” be considered a decision by a Planning Commission subject to the provisions of W. Va. Code § 8A-9-1, then that decision is reviewable by a petition for certiorari in this Court under that statute. Finally, Mountain Pure seeks a declaratory judgment holding that its project is consistent with the County’s Zoning Ordinance and/or that the water wells proposed in connection with the project are exempt from the requirements of the Zoning Ordinance.

## **PARTIES**

3. Mountain Pure is a Delaware limited liability company registered to do business in West Virginia.

4. Respondent Jefferson County Planning Commission is an administrative agency of Jefferson County, West Virginia.

5. Respondent Mike Shepp is the President of the Jefferson County Planning Commission and has been named in his official capacity.

6. Respondent Aaron Howell is the Vice President of the Jefferson County Planning Commission and has been named in his official capacity.

7. Respondent Wade Louthan is the Secretary of the Jefferson County Planning Commission and has been named in his official capacity.

8. Respondent J Ware is a member of the Jefferson County Planning Commission and has been named in his official capacity.

9. Respondent Donnie Fisher is a member of the Jefferson County Planning Commission and has been named in her official capacity.

10. Respondent Tim Smith is a member of the Jefferson County Planning Commission and has been named in his official capacity.

11. Respondent Bruce Chrisman is a member of the Jefferson County Planning Commission and has been named in his official capacity.

12. Respondent Daniel Hayes is a member of the Jefferson County Planning Commission and has been named in his official capacity.

13. Respondent Cara Keys is a member of the Jefferson County Planning Commission as the Jefferson County Commission's Liaison with the Planning Commission and has been named in her official capacity.

### **JURISDICTION AND VENUE**

14. "Jurisdiction of writs of mandamus and prohibition (except cases whereof cognizance has been taken by the Supreme Court of Appeals or a judge thereof in vacation), shall be in the circuit court of the county in which the record or proceeding is to which the writ relates." W. Va. Code § 53-1-2.

15. Similarly, "[w]ithin thirty days after a decision or order by the planning commission, board of subdivision and land development appeals, or board of zoning appeals, any aggrieved person may present to the circuit court of the county in which the affected premises are located, a duly verified petition for a writ of certiorari[.]" W. Va. Code § 8A-9-1.

16. Additionally, the Open Governmental Meetings Act provides a cause of action against an agency to compel compliance or to enjoin non-compliance with the Act within 120 days of the action complained of in the Circuit Court of the county where the agency regularly meets. W. Va. Code § 6-9A-6.

17. Finally, "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." W. Va. Code § 55-13-1. "Any person . . . whose rights, status or other legal relations are affected by a . . . ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder." W. Va. Code § 55-13-2.

18. This Court has personal jurisdiction over the Planning Commission because the Planning Commission is located in and transacts its business within Jefferson County, West Virginia.

19. Venue is proper in this Court pursuant to W. Va. Code § 56-1-1(a) because the Planning Commission, the real property at issue, and the seat of the County government are all located in Jefferson County.

### **FACTUAL BACKGROUND**


#### ***The Mountain Pure Bottling Facility***

20. Mountain Pure seeks to construct and operate a water bottling plant on the location of the former 3-M Plant in Middleway, Jefferson County. The project would involve the construction and operation of two water wells on a separate parcel located substantially to the east of the former 3-M Plant and the construction of a pipeline in a Division of Highways (“DOH”) right-of-way from the wells to a treatment and bottling facility located on the former 3-M Plant site. *See* Project Narrative (Appendix A<sup>1</sup>) and Concept Plan (Appendix B<sup>2</sup>). One of those water wells would serve as the primary operating well with the other serving as a back-up well. A depiction of the proposed project location follows:

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<sup>1</sup> The Project Narrative is included in part 1 of the Planning Commission’s March 11, 2025 agenda packet at pages 100-105 available at <https://www.jeffersoncountywv.org/Home/ShowDocument?id=27300> (last accessed April 8, 2025).

<sup>2</sup> The Concept Plan is included in part 1 of the Planning Commission’s March 11, 2025 agenda packet at pages 82-87 available at <https://www.jeffersoncountywv.org/Home/ShowDocument?id=27300> (last accessed April 8, 2025).

Owners/Applicant:	Sidewinder Enterprises, LLC
Consultant:	Brooke Perry, Integrity Federal Services
Property Location & Legal Description	<p>1 Grace Street, Kearneysville, WV; Parcel IDs: 07002200090000; 07002200340000; and 07002200330009; Size: ~260 acres; 13.25 acres; and 8.31 acres; Zoning District: Industrial-Commercial and Rural</p> 
Adjacent Zoning:	North, South, East, & West: Rural
Proposed Activity:	Water Bottling Factory

See Staff Report from Jefferson County Office of Planning and Zoning to Planning Commission, March 11, 2025, Item # 9 (included as Appendix C<sup>3</sup>). Mountain Pure and the Charles Town Utility Board (“CTUB”) have agreed that Mountain Pure will construct and test the pipeline and related water treatment and other facilities to CTUB’s satisfaction at Mountain Pure’s cost, transfer the same to CTUB, and provide CTUB with the first 50,000 gallons produced from the wells on a daily basis.<sup>4</sup>

<sup>3</sup> The 2025-03-11 Staff Report is included in part 1 of the Planning Commission’s March 11, 2025 agenda packet at pages 7-13 available at <https://www.jeffersoncountywv.org/Home/ShowDocument?id=27300> (last accessed April 8, 2025).

<sup>4</sup> CTUB approved entry into the subject Agreement at a Special Meeting held February 5, 2025. See CTUB Agenda, Feb. 5, 2025, ¶ 2 (w/links to original and redlined “Agreement for Water Service” with Sidewinder) available at <https://d3n9y02raazwpg.cloudfront.net/ctubwv/3deb962d-cf7b-11ef-a9e2-005056a89546-b40c45bd-14cb-4cec-99d7-878d4bbb4578-1738350931.pdf> (last accessed April 8, 2025); and CTUB Minutes, Special Board Meeting, Feb. 5, 2025 (approving final draft agreement with Sidewinder) available at [https://ctubwv.granicus.com/DocumentViewer.php?file=ctubwv\\_1d4bc0ecf7ec23f607a2f79cf8df01b9.pdf](https://ctubwv.granicus.com/DocumentViewer.php?file=ctubwv_1d4bc0ecf7ec23f607a2f79cf8df01b9.pdf)

***The Planning Commission’s Rejection of Mountain Pure’s Concept  
Plan at the March 11 and 12 Public Workshop***

21. The path forward for Mountain Pure, however, was abruptly and unlawfully blocked by the Planning Commission on March 11 and 12, 2025 in a public “workshop” held to consider a “concept plan” for the project.

22. “Concept plans” and the “public workshops” to review them are the first of two steps required to obtain an approved “site plan” from the Planning Commission. The workshops are conducted solely to provide the applicant and the Planning Commission with public input and enable the Planning Commission to “provide direction” to the project proponent so that it may continue to the second step and submit a “site plan” application that complies with the County’s Zoning and Land Development Ordinance (“Zoning Ordinance” or “ZO”)<sup>5</sup> and its Subdivision and Land Development Regulations (“S&LD Reg.”).<sup>6</sup> But here, the Planning Commission did not provide any “direction.”

23. Instead, yielding to the loudest voices in the room, it approved a motion to “reject” the project as inconsistent with the County’s Zoning Ordinance and adjourned the workshop without providing “direction.”<sup>7</sup> The Planning Commission apparently concluded, without

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[&view=1](#) (last accessed April 8, 2025). The Agreement is currently pending approval by the W. Va. Public Service Commission, after which it will be executed.

<sup>5</sup> The Zoning Ordinance is available at <https://www.jeffersoncountywv.org/home/showpublisheddocument/22048/637921840861370000> (last accessed April 8, 2025).

<sup>6</sup> The S&LD Regulations are available at <https://www.jeffersoncountywv.org/home/showpublisheddocument/26046/638569906998870000> (last accessed April 8, 2025).

<sup>7</sup> The Planning Commission has issued “DRAFT Meeting Minutes” for March 11, 2025. The DRAFT Meeting Minutes are attached as Appendix J and are including as pages 3-6 of the agenda packet for the Planning Commission’s April 8, 2025 meeting available at <https://www.jeffersoncountywv.org/Home/ShowDocument?id=27614> (last accessed April 8, 2025). The DRAFT Meeting Minutes provide that “Ms. Keys motioned to reject the Concept Plan as presented on

discussion or explanation, that Mountain Pure’s concept plan was inconsistent with three provisions of the Zoning Ordinance: §§ 1.1(setting out “purpose” of Ordinance); 1.3.D (providing if proposed use is not principal permitted use or conditional use then it is prohibited absent a text amendment); and 4.4.C (defining “prohibited uses” to include “development which would destroy the historical character of a property listed on the West Virginia or National Register of Historic Places.”). *See* n. 7, *supra*.

24. The Planning Commission’s determination that the concept plan was “inconsistent” with the Zoning Ordinance and S&LD Regulations seems to be based on comments submitted by various opponents to Mountain Pure’s project, which argued that several portions of the project were “prohibited” rather than “permitted” uses. First, opponents claimed that the groundwater wells (water withdrawal) were a “prohibited” use because “water withdrawal” is not expressly identified in any of the permitted land uses in the Zoning Ordinance.<sup>8</sup> Second, they claimed that

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account of directly conflicting with the Jefferson County Zoning and Land Development Ordinance Sections 1.1, Section 4.4C, Zoning Use Table, and the Jefferson County Subdivision and Land Development Regulations.” It further provides that Ms. Keys’ motion “carried unanimously”, but does not identify how many present members actually voted and that fact is not clear from the video recording kept by the Planning Commission in its Archived Meetings. The archived recording is available here: <https://www.jeffersoncountywv.org/videos/2025-03-11%20PC%20Mtg.mp4> (last accessed April 8, 2025). The motion by Planning Commission Member Cara Keys starts at about 8:02:50 of the video and the motion and its adoption continue through about 8:05:50. It does not appear that all of the Planning Commission Members actually voted on the motion. The link needs to be downloaded in order to scroll forward through the video.

<sup>8</sup>Appendix C to the Zoning Ordinance is a table of Principal Permitted and Conditional Uses. It does not identify “water withdrawal” or other “granular” activities as a specific use, but identifies dozens of allowable land uses, many of which have historically depended on groundwater wells, especially in rural areas, as an integral part of the land use, including Mobile Home Parks, Campgrounds, Golf Courses, Horse Racing Facilities, Kennels, and Agricultural Tourism. *See* ZO at Appendix C. Many of these uses would be “prohibited” in Jefferson County if the opponents’ views prevailed. The County’s website includes a list of pending and prior “Concept Plans.” *See* <https://www.jeffersoncountywv.org/county-government/departments/engineering-planning-and-zoning/office-of-planning-and-zoning/planning-commission/concept-plans> (last accessed April 8, 2025). The project listed after Sidewinder is 24-5-SP BCL Properties Brewpub Concept Plan. The link to that plan notes that “water will be provided via on-site well[.]” [cont.]



projected truck traffic through Middleway and construction of the waterline in the DOH right-of-way constitutes a “prohibited use” under Section 4.4.C of the Zoning Ordinance because it “would destroy the historical character of property listed on the West Virginia or National Register of Historic Places.”

25. These arguments were properly rejected by the Zoning Administrator/Staff, which found that Mountain Pure’s project was a permitted use and that the concept plan met the requirements of the Zoning Ordinance and the S&LD Regulations. As further explained below, the Planning Commission had no authority to reject Mountain Pure’s concept plan or overrule the Zoning Administrator/Staff’s determination that Mountain Pure’s project was consistent with the Zoning Ordinance.

### ***Overview of State and County Land Use Law***

26. Counties and their subdivisions are creatures of statute and have only “such powers as are expressly conferred by the Constitution and legislature, together with such as are reasonably

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Further, the location of the bottling plant is zoned as “Industrial/Commercial” use. *See* 2024 Zoning Map, Jefferson County. The Table of “Principal Permitted and Conditional Uses” in Appendix C to the Zoning Ordinance lists all uses considered “Industrial” or “manufacturing” as “P” [permitted] in the IC [Industrial/Commercial] zoning district, including heavy industrial and heavy manufacturing. With very few exceptions, the same is true for uses listed as “Commercial.” The definition of “Heavy Industrial Use” includes “enterprises with significant external effects including but not limited to noise, dust, glare, odors or vibrations . . . This use also includes those land uses characterized by heavy trucking activity or extensive warehousing.” Zoning Ordinance §2.2. The definition of “Manufacturing, Heavy” use includes “packaging or other industrial processing of products primarily from extracted or raw materials . . . or an industrial establishment having potential to produce noise, dust, glare, odors or vibrations beyond its property line.” *Id.* The definition of “Warehousing and Distribution, General” Manufacturing, Heavy” use includes “the storage of goods . . . as well as activities involving significant movement and storage of products or equipment. . . . Facilities may be characterized by extensive warehousing, frequent heavy trucking activity, open storage of material, or nuisances such as dust, noise, and odors.” *Id.* The definition of “Commercial” uses is “[a]ny wholesale, retail or service business activity established to carry on trade.” *Id.* All those uses are permitted by right in the IC zoning district.

and necessarily implied in the full and proper exercise of the powers so expressly given.” Syl. Pt 4, in part, *State ex rel W. Va. Parkways Auth. v. Barr*, 716 S.E. 2d 689 (W. Va. 2011). Similarly, a planning commission has only the powers, duties, and jurisdiction given to it in the ordinance that creates it. W. Va. Code § 8A-2-1(e).

27. West Virginia has enacted comprehensive land use planning laws that authorize counties to create planning commissions and boards of zoning appeals, develop comprehensive plans, adopt zoning ordinances and subdivision and land development rules and to administer those ordinances and rules. *See* W. Va. Code Chapter 8A. As part of that program, Counties are to develop procedures for reviewing and approving both minor and major subdivision or land development projects. W. Va. Code §§ 8A-5-1 to -8.

28. Here, the Staff determined that the project should be reviewed as a Major Site Plan. *See* Staff Report of March 11, 2025, p. 3 (noting project would be reviewed as a Major Site Plan “with a Concept Plan”) (included as Appendix C). The County’s regulations break the public review of Major Site Plans into two parts: first, a “concept plan” stage consisting of submission and review for completeness of the concept plan, a public workshop on the concept plan, and the Planning Commission providing direction on the concept plan; and second, a “site plan” stage consisting of submission and review for completeness of the site plan, a public hearing on the site plan, and the planning commission approving or denying the site plan. *See* S&LD Reg. Figure 24.119A (showing “Concept Plan” process as “Part 1”) & Figure 24.119B (showing “Site Plan” as “Part 2”).

29. The proposal before the Staff and Planning Commission involved the first of these two stages—the review of a “concept plan.” “The submission of a concept plan is a required step for major site plans.” S&LD Reg. § 24.119. Once a concept plan application is submitted to the

Office of Planning and Zoning within the Department of Engineering, Planning and Zoning,<sup>9</sup> its “Staff” is charged with determining “whether the density, use, and plan meet the requirements of the Zoning Ordinance” and “shall identify conditions that would enable the plan to meet the standards” and “also identify any other zoning issues the developer shall address in a [later] site plan submittal.” S&LD Reg. § 24.119.D.1.

30. The Staff is also then responsible for ensuring that public notice is provided of a “Public Workshop” on the concept plan to be conducted before the Planning Commission. *Id.* § 24.119.J. At a “scheduled Planning Commission meeting, the Planning Commission shall hold a public workshop to take public comments, concerns, and inputs on the proposed concept plan.” S&LD, Reg. § 24.120. As the Staff here noted “the first step in processing this Site Plan is this Concept Plan and the required Public Workshop.” Staff Report of March 11, 2025, p. 3.

31. The purpose of the Workshop procedure “is to inform the developer and the Planning Commission with regard to issues that should be addressed in the site plan” to be submitted in the next stage of the process. *Id.* § 24.120.C. “After the close of the public workshop, the Planning Commission shall, during their regular meeting or at a specific public meeting within 14 days, provide direction on the concept plan.” *Id.* § 24.121 (underscoring provided).

32. Under the heading “Direction,” the regulation provides that “[t]he Planning Commission shall direct the preparation of a site plan subject to conditions to be addressed in the site plan application.” *Id.* § 24.121.A (underscoring supplied). “The purpose of this review is to

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<sup>9</sup> The County Department of Engineering, Planning and Zoning is the County’s lead in ensuring that all regulations are met in the review of subdivision plats and site plans. S&LD Reg. § 23.202. This includes review of site plans for “zoning compliance.” *Id.* § 23.202.A. References to “Staff” in the regulations and this petition are to the “staff” of the Department. *See id.* § 26.101.Q (providing that “staff” means the . . . Department . . . , Zoning Administrator, and such other employees or consultants designated by the County Commission.”). “Staff” is charged with a review of zoning compliance under the Zoning Ordinance. *Id.* § 20.301.B (providing that the “zoning review is a function of Staff under provisions of the Zoning Ordinance.”).

guide the developer so that when the [later] site plan application is formally reviewed by the staff, there should not be a whole range of issues being raised for the first time.” *Id.* The receipt of appropriate “direction” is important both to ensure the preparation of an appropriate “site plan” and because the “direction received in the Concept Plan Workshop shall be applicable for a period of two years, with the provision that any amendments to [the Subdivision and Land Development] Regulations or the Zoning Ordinance in the second year shall control.” *Id.* § 24.121.C.

***Water Withdrawal and Essential Utilities Are Always a Permitted Use***

33. State land use law recognizes three categories of land use for zoning purposes: principal permitted uses (authorized subject to any conditions in the zoning ordinance but without the need for further permits or conditions from the Planning Commission or Board of Zoning Appeals); conditional uses (requiring a conditional use permit from the Board of Zoning Appeals) or prohibited uses. *See* W. Va. Code § 8A-7-2; *see also* W. Va. Code § 8A-1-2 (defining terms). Jefferson County’s Zoning Ordinance largely mirrors those statutory provisions. *See* ZO pp. 133-36, Appendix C (classifying various uses as either permitted, not permitted, or conditional uses by zoning district).

34. The Legislature has taken two steps to ensure that water withdrawal and associated infrastructure (such as pipelines and treatment facilities) are always considered principal permitted uses, regardless of what a county ordinance or regulation may provide. First, W. Va. Code Chapter 8A (authorizing land use planning and zoning) provides that:

“Nothing in this chapter authorizes an ordinance, rule or regulation preventing or limiting, outside of municipalities or urban areas, the complete use (i) of natural resources by the owner; or (ii) of a tract or contiguous tracts of land of any size for a farm or agricultural operation . . . by the owner.”

W. Va. Code § 8A-7-10(e).

35. Thus, no zoning ordinance can restrict the owner's use of natural resources such as minerals and water. As explained below, Staff relied expressly on this provision and a parallel provision in the Subdivision and Land Development Regulation (§ 20.200) to determine that the water withdrawal contemplated by Mountain Pure's project is a permitted use.

36. Second, the Legislature has declared that "[e]ssential utilities and equipment are a permitted use in any zoning district." W. Va. Code § 8A-7-3(e). Thus, no county may treat essential utilities as either prohibited or conditional uses, and must recognize them as permitted uses.

37. "Essential utilities and equipment" are defined as:

[U]nderground or overhead . . . water and sewage systems, including . . . lines, mains, . . . hydrants, regulating and measuring devices and the structures in which they are housed, and other similar equipment accessories in connection therewith. Essential utility equipment is recognized in three categories:

- (1) Local serving;
- (2) Nonlocal or transmission through the county or municipality; and
- (3) Water and sewer systems, the activities of which are regulated, in whole or part, by one or more of the following state agencies:
  - (A) Public service commission; or
  - (B) Department of environmental protection; or
  - (C) The Department of Health

W. Va. Code § 8A-1-2(f).

38. Section 4.7 of the County ZO parallels and expands upon the essential utility provision of W. Va. Code § 8A-7-3(e) by providing that "essential utility equipment . . . shall be permitted in any zoning district, . . . it being the intention hereof to exempt such essential utility equipment from the application of this Ordinance."

39. Based upon the foregoing, Mountain Pure's counsel explained in a memorandum submitted to the Planning Commission below that its wells, pipelines, and associated facilities are

essential utilities because they constitute a public water system regulated by the Department of Health and will also be regulated by the PSC once they are turned over to the CTUB. *See* Steptoe & Johnson, Response to Opponents Comments, March 5, 2025, ¶ IV. B, pp. 4-5 (included as Appendix D<sup>10</sup>).

***Staff Properly Found That the Project was a Permitted Use and Exclusive Authority to Review Staff's Determination Lies with the Board of Zoning Appeals.***

40. The Zoning Administrator/Staff is charged with performing a zoning review. S&LD Reg. § 20.301.B (“Responsibility: The zoning review is a function of Staff under the provisions of the Zoning Ordinance.”). Staff is required to “submit a report to the Planning Commission along with the agenda for each meeting at which as subdivision plat or site plan is to be discussed,” and “[t]he report shall contain a final decision as to whether the subdivision plat or site plan meets the standards of the Zoning Ordinance.” S&LD Reg. § 20.301.C (underscore supplied); *see also* §§ 23.202.A (“The Department shall review all plat or site plan applications for zoning compliance . . . [and] shall provide the Planning Commission with a written opinion as to whether the plat or site plan complies with the Zoning Ordinance.”); *and* ZO §§ 3.2.A & 3.2.A.2 (“The Zoning Administrator shall administer and enforce the Zoning and Land Development Ordinance”, which responsibilities include “interpret[ing] the provisions of the Ordinance as required by law.”).

41. Exercising the authority granted to it by the County’s Zoning Ordinance and S&LD Regulations, the Zoning Administrator/Staff reported to the Planning Commission in writing at least three times that the project’s units are all permitted or meet the requirements of the Zoning Ordinance and S&LD Regulations. *See* Staff Reports of Dec. 17, 2024, February 11, 2025, and March 11, 2025 (all expressly stating that “the proposed groundwater wells in the Rural Zoning

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<sup>10</sup> The March 5, 2025 Response to Opponents Comments submitted by Steptoe & Johnson is included in part 1 of the Planning Commission’s March 11, 2025 agenda packet at pages 88-99 available at <https://www.jeffersoncountywv.org/Home/ShowDocument?id=27300> (last accessed April 8, 2025).

District are permitted” and that “Staff determined that the proposed Concept Plan meets the requirements of the Zoning Ordinance and the Subdivision Regulations as a Major Site Development with a Concept Plan.”) (copies included as Appendices E<sup>11</sup>, F<sup>12</sup>, and C). Further, in the initial public workshop on the concept plan held on November 12, 2024,<sup>13</sup> the acting zoning administrator discussed the provisions of W. Va. Code § 8A-7-10(e) relative to the well and stated that “we’ve always taken that to mean that we don’t have the right to deny somebody the right to use natural resources that they own,” after which the planning commission president stated that the zoning administrator had made a zoning decision that could be appealed to the Board of Zoning Appeals.<sup>14</sup> Later in that initial public workshop, in response to questions whether the well is a legal use on the property and if that is the finding, the acting zoning administrator responded “Yes.”<sup>15</sup>

42. Likewise in its Reports of December 17, 2024, February 11, 2025, and March 11, 2025 to the Planning Commission, Staff found that “the two heavy manufacturing and distribution structures . . . located on the site of the former 3M/Kodak Plant are permitted” on a parcel “which is zoned Industrial Commercial and has historically been used for industrial/manufacturing uses.”

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<sup>11</sup> The 2024-12-17 Staff Report is included in Planning Commission’s December 17, 2024 agenda packet at pages 7-13 available at <https://www.jeffersoncountywv.org/Home/ShowDocument?id=26878> (last accessed April 8, 2025). The Planning Commission’s December 17, 2024 meeting was canceled.

<sup>12</sup> The 2025-02-11 Staff Report is included in part 1 of the Planning Commission’s February 11, 2025 agenda packet at pages 6-12 at <https://www.jeffersoncountywv.org/Home/ShowDocument?id=27158> (last accessed April 8, 2025).

<sup>13</sup> The archived recording of the subject meeting is available here: <https://www.jeffersoncountywv.org/videos/2024-11-12%20PC%20Mtg.mp4> (last accessed April 8, 2025).

<sup>14</sup> The referenced segment begins at approximately 2:48:30 of the archived recording.

<sup>15</sup> The referenced segment begins at approximately 4:00:40 of the archived recording.

2025-03-11 Staff Report, p. 2 (included as Appendix C); 2025-02-11 Staff Report, p. 2 (included as Appendix F); 2024-12-17 Staff Report, p. 2 (included as Appendix E).<sup>16</sup>

43. Further, Staff reported in each of the three Reports that “the proposed groundwater wells in the Rural Zoning District are permitted in accordance with the following excerpts from the Jefferson County Subdivision and Land Development Regulations and WV Code 8A . . . .” *Id.* In the discussion that followed Staff determined that the proposed ground water withdrawal wells fit within the statutory and regulatory provisions prohibiting any zoning or land use provision from “preventing or limiting, outside of municipalities or urban areas, the complete use (i) of natural resources by the owner; or (ii) of a tract . . . of land for a farm or agricultural operation . . . by the owner.” *Id.*, 2-3 (citing W. Va. Code § 8A-7-10(e) (underscoring supplied)).

44. Staff also determined and reported in each of its Reports that “‘developments for the purpose of extraction or harvesting of resources and for roads on agricultural land for the purpose of conducting the agricultural operation’ *are excluded* from processing under the Subdivision [and Land Development] Regulations.” *Id.*, 2 (quoting S&LD Reg. § 20.200) (underscoring in original; italicization supplied).

45. As noted above, the S&LD Regulations give the Zoning Administrator/Staff the responsibility to render a “final decision as to whether a . . . site plan meets the standards of the Zoning Ordinance” in a report to the Planning Commission. S&LD Reg. § 20.301.C (underscoring supplied). Further, the County’s regulations provide that the Planning Commission shall not deny project approvals on the basis of zoning where “the Zoning Administrator has decided (or the

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<sup>16</sup> Likewise, the minutes of the Planning Commission’s meeting of November 12, 2024, notes that when asked by the Planning Commission Chair about the zoning of the property, the County’s Chief Planner (Jennifer Brockman) “provided clarification and her zoning decision stated that staff interpreted the bottling facility as a manufacturing operation, a principally permitted use in the Industrial/Commercial district.” Planning Commission Minutes, Nov. 12, 2024, ¶ 6, p. 3.



Board of Zoning Appeals has decided on appeal) that the proposed development complies with the Zoning Ordinance.” S&LD Reg. § 20.301.A. This authority extends to determinations whether proposed uses fall within any of the “prohibitions” enumerated in Section 4.4 of the Zoning Ordinance. *See Jefferson Utilities v. Jefferson County Bd. of Zoning Appeals*, 624 S.E. 3d 873, 881 (W. Va. 2005) (ZO “grants the zoning administrator the responsibility for making determinations of prohibited uses of land in Section 4.4.”).

46. The County’s regulations and State law provide that challenges to zoning decisions by the Zoning Administrator are appealable to the Board of Zoning Appeals—not to the Planning Commission. S&LD Reg. § 20.301.B and ZO §§ 3.2.B, 3.4.A.3.a, & 6.1. *See* W. Va. Code § 8A-8-10(a) (“an appeal from any . . . decision or determination made by an administrative official or board charged with the enforcement of a zoning ordinance . . . shall be filed with the board of zoning appeals”).

47. Accordingly, the Planning Commission had no authority to override the Zoning Administrator’s determination of zoning compliance as the basis for “rejecting” Mountain Pure’s concept plan, and any challenge by third-parties as to the concept plan’s consistency with the Zoning Ordinance was required to be lodged with the Board of Zoning Appeals. The time for any such appeal has long passed.

***There Are No Prohibited Impacts on Historic Resources in Violation of Section 4.4 of the Zoning Ordinance, and Even If There Were, The Planning Commission Did Not Have Authority to Enforce Section 4.4***

48. The Jefferson County Landmarks Commission recommended to the Office of Planning and Zoning that it find that the development was “prohibited” under Section 4.4 of the Zoning Ordinance. *See* Landmarks Commission Letter & Report of Jan. 24, 2025 (included as

Appendix G<sup>17</sup>). That section describes additional uses that are “prohibited,” including “C. Any development which would destroy the historical character of a property listed on the West Virginia or National Register of Historic Places.” ZO, § 4.4.C.

49. As explained above, the Zoning Administrator/Staff has exclusive authority to make a final determination as to whether Mountain Pure’s concept plan is consistent with the County’s Zoning Ordinance, including Section 4.4.C. The Zoning Administrator/Staff found that the project was consistent with the Zoning Ordinance. That determination was final and was appealable to the Board of Zoning Appeals; the Planning Commission has no authority to overrule or second guess the Zoning Administrator/Staff’s determination.

50. Nonetheless, the Historic Landmarks Commission and other opponents of the project have argued that planned trucking through Middleway would destroy the historical character of property listed on the West Virginia or National Register of Historic Places as prohibited by Section 4.4.C of the Zoning Ordinance. *See* Landmarks Comm. Ltr. p. 1 & Report, p. 5 (Appendix G). They likewise pointed to the installation of the water line through Middleway as another activity that implicated Section 4.4.C of the Zoning Ordinance. These arguments fail for several reasons.

- a. First, the proposed waterline is the only part of this project that comes anywhere near any historic property, and the waterline is exempt from the requirements of the Zoning Ordinance because it meets the definition of an essential utility under W. Va. Code § 8A-1-2(f). Essential utilities are exempt from zoning requirements. *See* W. Va. Code § 8A-7-3(e).

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<sup>17</sup> The Landmark Commission’s January 24, 2025, letter is included in part 1 of the Planning Commission’s March 11, 2025 agenda packet at pages 15-23 and is available at <https://www.jeffersoncountywv.org/Home/ShowDocument?id=27300> (last accessed April 8, 2025).

- b. Second, even if the waterline was a reviewable part of the project, the Landmarks Commission provided no basis on which the Office of Planning and Zoning could find that the use “would destroy the historical character” of a listed property within the scope of § 4.4.C. Instead, all the Commission did was to offer that “[t]he construction activities related to the water transport pipeline has the potential to cause damage to historic structures[.]” Landmarks Commission Report, p. 5 (underscoring supplied). That sort of conjecture is never sufficient to support a finding of particular impacts. Moreover, the Zoning Ordinance does not and cannot ban “construction activities” near historic structures, and there is no colorable claim that the waterline, which will be buried under the ground in the DOH’s right of way, will “destroy the historical character[.]” If that were the case then the extension or repair of all utilities to areas of historic interest would be prohibited.
- c. Third, Section 4.4.C applies only to “‘development’ which would destroy the historical character of a property listed[.]” The definition of “development” subject to the Ordinance does not include the use of public thoroughfares for transport to and from a project. Instead, “development” is limited to land disturbance and construction:

“The subdivision of land, construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any structure, installation of a sign and any mining, landfill or land disturbance, such as grading, paving and excavations.”

ZO, § 2.2. Potential traffic impacts are therefore not included as “development” subject to the prohibition in Section 4.4.C.

51. Finally, even if the Planning Commission could decide this issue (it cannot), it would still be wholly inappropriate to deny and/or reject Mountain Pure’s concept plan. The entire point of the concept plan is to obtain feedback that will be used to draft a site plan; because the Planning Commission has rejected Mountain Pure’s project without providing direction and

allowing Mountain Pure to prepare a site plan, Mountain Pure has had no meaningful opportunity to offer statements, proffers, *etc.* that might have alleviated objectors' concerns.

### **COUNT I: WRIT OF PROHIBITION**

52. Mountain Pure incorporates by reference the allegations of the preceding paragraphs as if the same were fully set forth and incorporated herein.

53. “A writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction exceeds its legitimate powers.” Syl. Pt. 1, *State ex rel. Brum v. Bradley*, 214 W. Va. 493, 495, 590 S.E.2d 686, 688 (2003) (quoting Syl. Pt. 1, *State ex rel. UMWA International Union v. Maynard*, 176 W. Va. 131, 342 S.E.2d 96 (1985)).

54. Here, the Planning Commission lacked any authority to “reject” or “deny” or “disapprove” Mountain Pure’s project at the March 11 and 12 public workshop. Its only authority, and indeed its obligation, was to provide “direction” on Mountain Pure’s concept plan.

55. As stated in S&LD Reg. §§ 24.120 and 24.121, the purpose of the workshop procedure “is to inform the developer and the Planning Commission with regard to issues that should be addressed in the [later submitted] site plan” and “[a]fter the close of the public workshop, the Planning Commission shall, during their regular meeting or at a specific public meeting within 14 days, provide direction on the concept plan.”

56. Section 24.121.A states that “[t]he Planning Commission shall direct the preparation of a site plan subject to conditions to be addressed in the site plan application.” *Id.* “The purpose of this review is to guide the developer so that when the [later] site plan application is formally reviewed by the staff, there should not be a whole range of issues being raised for the first time.” *Id.*

57. The County’s regulations are clear—there was no basis for the Planning Commission’s decision to deny or reject Mountain Pure’s concept plan. Instead, the Planning Commission is required to provide “direction” for “the developer to proceed to prepare a site plan [under] Section 24.122[.]” *Id.* § 24.121.C.

58. Indeed, three separate discussions in the earlier initial public workshop to discuss Mountain Pure’s concept plan held on November 12, 2024, made clear to the Planning Commission that denial of the Concept Plan was not permissible.

59. First, the Planning Commission asked the Zoning Administrator to repeat the Planning Commission’s role. In response, the Zoning Administrator read, mostly verbatim, the provisions of S&LD Reg. § 24.121—including that “[a]fter the close of the public workshop, the Planning Commission shall, during their regular meeting or at a specific public meeting within 14 days, provide direction on the concept plan” and that “[t]he Planning Commission shall direct the preparation of a site plan subject to conditions to be addressed in the site plan application.” No mention was made of any option to deny the concept plan.<sup>18</sup>

60. Second, the Planning Commission’s President stated that it had been asked several times to just say no (*i.e.*, deny the concept plan) and asked whether that was an option. In response, the Planning Commission’s counsel, Mr. Cochran, stated that “based on the subdivision ordinance, the purpose of this meeting is to provide direction to the applicant for issues that should be addressed in the site plan.” Mr. Cochran went on to explain that such direction could be provided that night or at another time, presented the option of the Planning Commission determining that the application was incomplete, and stated that “the point is, I think, you can’t deny this concept plan because of conditions outside the zoning and subdivision ordinance” and “under the terms of

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<sup>18</sup> The referenced segment begins at approximately 3:45:10 of the archived recording available at: <https://www.jeffersoncountywv.org/videos/2024-11-12%20PC%20Mtg.mp4> (last accessed April 8, 2025).

the ordinance and here we are talking about applying the law here – applying our regulations – under that you can’t force him to do things that aren’t specific to the subdivision ordinance.”<sup>19</sup> As set forth in the minutes of the meeting, Mr. Cochran advised that any “vote would determine whether the application is complete and provide direction on preparing the Site Plan or find the application to be incomplete and allow for the applicant to resubmit at a later date.” Planning Commission Meeting Minutes, Nov. 12, 2024, ¶6, p. 4 (included as Appendix H).<sup>20</sup>

61. Third, when Commissioner Keys stated that she thought the Planning Commission should consider rejecting the concept plan, the Planning Commission President interrupted and stated: “Let me make a suggestion to you. I’m not sure what the legal implications of rejecting it are. I don’t think we can reject it. I think [inaudible] can decide the application is incomplete and they can resubmit it at a later date.”<sup>21</sup>

62. Thus, when faced with a concept plan, the Zoning Administrator, the Planning Commission’s counsel, and its President each made clear that the Planning Commission has only two choices: consider the plan complete and provide direction or determine it is incomplete in some specific manner and allow for re-submission. The Planning Commission has no authority to “reject” a plan as contrary to the Zoning Ordinance or otherwise.<sup>22</sup>

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<sup>19</sup> The referenced segment begins at approximately 3:47:00 of the archived recording available at: <https://www.jeffersoncountywv.org/videos/2024-11-12%20PC%20Mtg.mp4> (last accessed April 8, 2025).

<sup>20</sup> The first page of the November 12, 2024 minutes bears the correct date. The subsequent pages mistakenly show a date of October 8, 2024. The meeting minutes are available at <https://www.jeffersoncountywv.org/Home/ShowDocument?id=27042> (last accessed April 8, 2025).

<sup>21</sup> The referenced segment begins at approximately 4:02:20 of the archived recording available at: <https://www.jeffersoncountywv.org/videos/2024-11-12%20PC%20Mtg.mp4> (last accessed April 8, 2025).

<sup>22</sup> In the case of Mountain Pure, the Planning Commission voted in the November 12, 2024 meeting to find the application “incomplete” “due to the omission of two parcels relevant to the project from the plan.” Planning Commission Minutes of Nov. 12, 2024, ¶6, p.4 (Appendix H). Mountain Pure resubmitted the Plan with the two parcels included. A workshop on the supplemented application was to have been held on

63. Further, even if the Planning Commission has authority to “reject” a concept plan, it does not have the authority to do so based on an assertion that the proposed “uses” are not “permitted” under the County’s Zoning Ordinance because that authority is given expressly to the Zoning Administrator and not to the Planning Commission.

64. The S&LD Regulations give the Zoning Administrator/Staff the authority to render a “final decision as to whether a . . . site plan meets the standards of the Zoning Ordinance” in a report to the Planning Commission. S&LD Reg. § 20.301.C (underscoring supplied); *see also* ZO § 3.2.A (“The Zoning Administrator shall administer and enforce the Zoning and Land Development Ordinance.”). This authority includes the authority to determine whether proposed uses fall within any of the “prohibitions” enumerated in Section 4.4 of the Zoning Ordinance. *See Jefferson Utilities* 624 S.E. 3d at 881. That authority does not rest with the Planning Commission.

65. The County’s regulations and West Virginia law further provide that challenges to zoning decisions by the Zoning Administrator are appealable to the Board of Zoning Appeals—not to the Planning Commission. S&LD Reg. § 20.301.B and ZO §§ 3.2.B, 3.4.A.3.a, & 6.1; *see also* W. Va. Code § 8A-8-10(a) (“an appeal from any . . . decision or determination made by an administrative official or board charged with the enforcement of a zoning ordinance . . . shall be filed with the board of zoning appeals”).

66. The Planning Commission therefore had no authority to override the Zoning Administrator’s determination of zoning compliance as the basis for “rejecting” Mountain Pure’s Concept Plan.

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December 17, 2024, but was delayed due to injunction and moved to February 11, 2025 and (due to inclement weather) moved again to March 11, 2025.

67. Mountain Pure has a clear interest in the expedient and lawful approval of its proposed bottling plant, and the Planning Commission's unlawful rejection of Mountain Pure's concept plan has impaired Mountain Pure's interest.

68. Moreover, Mountain Pure has no other adequate remedy at law by which it may challenge the Planning Commission's unlawful rejection of Mountain Pure's concept plan.

69. Accordingly, Mountain Pure asks that the Court issue a writ of prohibition vacating the Planning Commission's unlawful rejection of Mountain Pure's concept plan and order the Planning Commission to provide the "direction" required by S&LD Reg. § 24.121.

## **COUNT II: WRIT OF MANDAMUS**

70. Mountain Pure incorporates by reference the allegations of the preceding paragraphs as if the same were fully set forth and incorporated herein.

71. "The purpose of mandamus is to compel one to perform a legal duty imposed by law[.]" *State ex rel. Bd. of Educ. v. Johnson*, 156 W. Va. 39, 43, 190 S.E.2d 483, 486 (1972). "Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty[.]" Syl. Pt. 2, in part, *State ex rel. W. Va. Dep't of Health & Human Res. v. Bloom*, 247 W. Va. 433, 436, 880 S.E.2d 899, 902 (2022) (quoting Syl. Pt. 2, *State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 386 S.E.2d 640 (1989)).

72. After the close of the March 11 and 12 public workshop, the Jefferson County Subdivision and Land Development Regulations required the Planning Commission to provide direction on Mountain Pure's concept plan. S&LD Reg. § 24.121. That "direction" was due no later than 14 days after the workshop of March 11-12, 2025. *See* S&LD Reg. § 24.121.



73. More than 14 days have passed since the workshop, and the Planning Commission has failed to provide any direction within the meaning of the Subdivision and Land Development regulations.

74. The Planning Commission's failure to provide the direction prescribe by S&LD Reg. § 24.121 was a clear breach of a mandatory obligation and legal duty for which mandamus will lie. *See Smith v. Bayer*, 182 W. Va. 495, 499, 388 S.E.2d 851, 855 (1989) (holding that a "writ of mandamus will lie to compel the Planning Commission to follow administrative rules and regulations" when there is no other remedy available).

75. Because the Planning Commission did not provide direction on Mountain Pure's concept plan and instead rejected the plan, the Planning Commission has clearly violated S&LD Reg. § 24.121.

76. Again, Mountain Pure has a clear interest in the expedient and lawful approval of its proposed bottling plant, and the Planning Commission's failure to provide direction on Mountain Pure's concept plan as required by S&LD Reg. § 24.121 has impaired Mountain Pure's interest and violated its clear legal right to such direction.

77. Mountain Pure has no other adequate remedy at law by which to compel the Planning Commission to comply with S&LD Reg. § 24.121.

78. Accordingly, Mountain Pure asks that the Court issue a writ of mandamus to compel the Planning Commission to provide direction on Mountain Pure's concept plan as required by S&LD Reg. § 24.121.

79. Moreover, the Planning Commission's counsel, as well as the Zoning Administrator and Planning Commission President, made clear that the Planning Commission could not "deny [Mountain Pure's] concept plan." *See* ¶¶ 58-62, *supra* (citing archived video).

80. Given the Planning Commission's disregard at the March 11-12, 2025, meeting for such guidance and instructions, the Planning Commissions' actions in rejecting Mountain Pure's concept plan were deliberately and knowingly carried out in dereliction of its clear legal duty.

81. "Where a public official has deliberately and knowingly refused to exercise a clear legal duty, a presumption exists in favor of an award of attorney's fees; unless extraordinary circumstances indicate an award would be inappropriate, attorney's fees will be allowed." Syl. Pt. 3, *State ex rel. W. Virginia Highlands Conservancy, Inc. v. W. Virginia Div. of Env't Prot.*, 193 W. Va. 650, 651, 458 S.E.2d 88, 89 (1995).

82. Accordingly, Mountain Pure also asks this Court to award it attorney's fees it has incurred in bringing this action.

### **COUNT III: WRIT OF CERTIORARI**

83. Mountain Pure incorporates by reference the allegations of the preceding paragraphs as if the same were fully set forth and incorporated herein.

84. Pursuant to W. Va. Code § 8A-9-1, "[e]very decision or order of the planning commission . . . is subject to review by certiorari" and "within thirty days after a decision or order by the planning commission . . . any aggrieved person may present to the circuit court of the county in which the affected premises are located, a duly verified petition for a writ of certiorari[.]"

85. As explained above, the Planning Commission's decision to reject Mountain Pure's concept plan was illegal because the County's land use regulations only provided the Planning Commission with the authority and corresponding obligation to provide "direction" on the plan. *See* S&LD Reg. §§ 24.120 & 24.121.

86. The Planning Commission's determination that Mountain Pure's project was inconsistent with the Zoning Ordinance was likewise illegal because exclusive authority to make

that determination is vested in the Zoning Administrator/Staff and the Zoning Administrator/Staff's determination is subject to review before the Board of Zoning Appeals, not the Planning Commission. *See* Count I, *supra*.

87. Additionally, even if the Planning Commission had the authority to review and/or overrule the Zoning Administrator/Staff's determination that Mountain Pure's proposal was consistent with the Zoning Ordinance (it does not), the Planning Commission's conclusion that Mountain Pure's project is inconsistent with and/or prohibited by the Zoning Ordinance is clearly wrong.

88. As explained before the Planning Commission below, the wells, pipelines, and associated facilities proposed by Mountain Pure are essential utilities because they constitute a public water system regulated by the Department of Health and will also be regulated by the PSC once they are turned over to the CTUB. *See* W. Va. Code § 8A-1-2(f). Essential utilities are always a permitted use. W. Va. Code § 8A-7-3(e).

89. The proposed ground water withdrawal wells also fit within the statutory and regulatory provisions prohibiting any zoning or land use provision from "preventing or limiting, outside of municipalities or urban areas, the complete use (i) of natural resources by the owner[.]" W. Va. Code § 8A-7-10(e) (underscoring added).

90. Furthermore, as explained by Staff below, "the two heavy manufacturing and distribution structures . . . located on the site of the former 3M/Kodak Plant are permitted" on a parcel "which is zoned Industrial Commercial and has historically been used for industrial/manufacturing uses." Staff Report, March 11, 2025, p.2 (included as Appendix C).

91. Finally, as explained above, there is no reason to believe or any basis for concluding that Mountain Pure's project would destroy the historical character of property listed on the West

Virginia or National Register of Historic Places as prohibited by Section 4.4. In any event, Mountain Pure’s opportunity to address any such concerns and offer mitigating measures should be available at the later site plan stage of the process, which has been denied to Mountain Pure due to the Planning Commission’s unlawful denial of the concept plan and refusal to provide direction.

92. Based on the foregoing, Mountain Pure asks that this Court vacate the Planning Commission’s illegal rejection of its concept plan and order the Planning Commission to provide direction on the plan as required by applicable law.

**COUNT IV: VIOLATION OF WEST VIRGINIA  
OPEN GOVERNMENTAL MEETINGS ACT**

93. Mountain Pure incorporates by reference the allegations of the preceding paragraphs as if the same were fully set forth and incorporated herein.

94. The Open Governmental Meetings Act (“OGMA”) requires governing bodies of State and County agencies to provide for prior notice of the “date, time, place and agenda of all regularly scheduled meetings.” *See* W. Va. Code § 6-9A-3(d).

95. Here, the agenda for the Planning Commission’s meeting of March 11, 2015 notified the public of a “public workshop” on the “Mountain Pure Concept Plan.” *See* Agenda, March 11, 2025, ¶ 9 (included as Appendix I<sup>23</sup>). The notice did not indicate that the Planning Commission would do anything more than conduct the “workshop” described above and thereafter provide “direction” as required by the County’s rules.

96. Because the Planning Commission’s agenda notice only stated that a workshop would be conducted, the agenda did not adequately advise the public that the Planning Commission

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<sup>23</sup> The 2025-03-11 Agenda is included in part 1 of the Planning Commission’s March 11, 2025 agenda packet at pages 1-2 available at <https://www.jeffersoncountywv.org/Home/ShowDocument?id=27300> (last accessed April 8, 2025).

might take action to reject Mountain Pure's concept plan. *See Capriotti v. Jefferson Cnty. Plan. Comm'n*, No. 13-1243, 2015 W. Va. LEXIS 134, 2015 WL 869318, at \*6 (W. Va. Feb. 26, 2015) (memorandum decision) (holding that the Planning Commissions' agenda notices must contain more than generic references to adequately inform the public of the specific items to be considered).

97. The OGMA provides that anyone aggrieved by a violation of the Act may bring an action against a violating public agency in the County in which the public agency regularly meets within 120 days of the violation. W. Va. Code § 6-9A-6. The Court is empowered "to compel compliance or enjoin noncompliance and to annul a decision made in violation of [the OGMA]." *Id.*

98. The Circuit Court is authorized to grant attorney's fees in a successful action to enforce the OGMA "unless the Court finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust." W. Va. Code § 6-9A-7(b).

99. Accordingly, Mountain Pure asks that this Court annul the Planning Commission's rejection of its concept plan because that issue was not properly noticed on the agenda for the March 11 and 12 public workshop and its consideration by the Planning Commission therefore violated the OGMA.

100. Mountain Pure also asks this Court to award it attorney's fees incurred by this action.

#### **COUNT V: DECLARATORY JUDGMENT**

101. Mountain Pure incorporates by reference the allegations of the preceding paragraphs as if the same were fully set forth and incorporated herein.

102. Pursuant to West Virginia’s Uniform Declaratory Judgment Act, W. Va. Code § 55-13-1 *et. seq.*, “[a]ny person . . . whose rights, status or other legal relations are affected by a . . . ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder.” W. Va. Code § 55-13-2.

103. Section 10 of the Uniform Declaratory Judgment Act provides that “the court may make such award of costs as may seem equitable and just.” W. Va. Code § 55-13-10.

104. As explained above, the Zoning Administrator/Staff has exclusive authority to make a final determination as to whether Mountain Pure’s concept plan is consistent with the County’s Zoning Ordinance, including Section 4.4.C. The Zoning Administrator/Staff found that the project was consistent with the Zoning Ordinance, and the Planning Commission has no authority to overrule or second guess the Zoning Administrator/Staff’s determination.

105. The Zoning Administrator/Staffs determination that Mountain Pure’s Project is consistent with the Zoning Ordinance is appealable to the Board of Zoning Appeals, not the Planning Commission, and the time for lodging such an appeal has expired. *See, e.g.*, S&LD Reg. § 20.301.B and ZO §§ 3.2.B, 3.4.A.3.a, & 6.1; *see also* W. Va. Code § 8A-8-10(a).

106. Accordingly, Mountain Pure asks that this Court hold that the Zoning Administrator/Staff’s determination that Mountain Pure’s project is consistent with the Zoning Ordinance is final and that the Planning Commission cannot reject Mountain Pure’s project based on its alleged inconsistency with the Zoning Ordinance.

107. Additionally, Mountain pure asks that this Court hold that the proposed water wells are exempt from the requirements of the Zoning Ordinance both because (1) they constitute an essential utility under W. Va. Code § 8A-7-3(e), and (2) they fall within the purview of uses

protected by W. Va. Code § 8A-7-10(e), which prohibits any Zoning Ordinance from interfering with the complete use of natural resources by the property owner.

WHEREFORE, Petitioner Sidewinder Enterprises, LLC d/b/a Mountain Pure prays that this Court vacate the Planning Commission's unlawful rejection of its concept plan and order the Planning Commission to provide direction on the plan as required by applicable law. Mountain Pure further requests that it be awarded its reasonable costs, expenses, and attorney's fees incurred in litigating this matter.

Dated this 10<sup>th</sup> day of April, 2025.

**SIDEWINDER ENTERPRISES, LLC**  
**d/b/a MOUNTAIN PURE**  
By Counsel

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VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to wit:

I, Sean Masterson, Co-Owner for Sidewinder Enterprises LLC d/b/a Mountain Pure, being first duly sworn, state that I have read the foregoing *Complaint and Verified Petition for Writ of Prohibition, Mandamus, and Certiorari*, and that the factual representations contained therein are true and accurate to the best of my information, belief, and knowledge.

  
\_\_\_\_\_

Taken, subscribed, and sworn to before me this 10<sup>th</sup> day of April, 2025.

My commission expires: September 28, 2028.



  
\_\_\_\_\_  
Notary Public

**CERTIFICATE OF SERVICE**

I, Susan Snowden, hereby certify that I have instructed the Jefferson County Clerk of Courts to issue summons and a copy of the foregoing ***Complaint and Verified Petition for Writ of Prohibition, Mandamus, and Certiorari*** to Respondent Jefferson County Planning Commission via certified mail this 10<sup>th</sup> day of April, 2025, pursuant to W. Va. R. Civ. P. 4(c)(2)(E).

/s/Susan Snowden, Esq.  
SUSAN SNOWDEN (WVSB #3644)