NOTICE OF APPEAL

Intermediate Court of Appeals
Supreme Court of Appeals of West Virginia

COPIES OF ALL ORDERS BEING APPEALED

1. **COMPLETE CASE TITLE AND CASE NUMBERS IN LOWER TRIBUNAL**
(Include all party designations, such as plaintiff, intervenor, etc. Use an extra sheet if necessary)

See attached

2. **COUNTY OR LOWER TRIBUNAL APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)** (If the presiding judge was appointed by special assignment, include an explanation of the circumstances on an extra sheet.)

Jefferson County Circuit Court (28th Judicial Circuit)
Honorable Judge Bridget M. Cohee

3. **PETITIONER(S) (list all parties who join in the appeal and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address, phone number, and e-mail address.)**

See attached

4. **RESPONDENT(S) (list all parties against whom the appeal is taken and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. For self-represented parties provide an address, phone number, and e-mail address.)**

See attached.

5. **NON-PARTICIPANT(S)** (list any parties to the lower tribunal action that will not be involved in the appeal and provide the name, firm name, address, telephone number and e-mail address of counsel of record for each non-participant. Provide the name, address, and telephone number of any self-represented litigant who was a party to the lower tribunal action but is not participating in the appeal.)

Not Applicable.

6. DATE OF ENTRY OF JUDGMENT ON APPEAL	7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS
12/12/2025 and 12/17/2025 DATE OF ENTRY OF JUDGMENT ON POST-TRIAL MOTIONS, IF ANY Not applicable.	Not applicable.

8. **ABUSE AND NEGLECT CASES**: On an extra sheet, provide a brief list of the names, ages, and parent's names of all minor children, a description of the current status of the parental rights of each parent as of the filing of the notice of appeal, a description of the proposed permanent placement of each child, and the name of each guardian ad litem appointed in the case.

9a. Is the order or judgment appealed a final decision on the merits as to all issues and all parties? ☒ YES / ☐ NO

If your answer is no, was the order or judgment entered pursuant to R. Civ. P. 54(b)? ☐ YES / ☐ NO

If your answer is no, you must attach a brief explanation as to why the order or judgment being appealed is proper for the court to consider.

9b. Is the family court order entered under W. Va. Code 48-9-203(f)? ☐ YES / ☐ NO

10. Has this case previously been appealed? ☐ YES / ☒ NO

If yes, provide the case name, docket number and disposition of each prior appeal.

11. Are there any related cases currently pending in the Intermediate Court or Supreme Court or in a lower tribunal? ☐ YES / ☒ NO If yes, cite the case, provide the status, and provide a description of how it is related.

12. Is any part of the case confidential? ☐ YES / ☒ NO

If yes, identify which part and provide specific authority for confidentiality.

13. If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

☒ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

14. Do you know of any reason why one or more of the Intermediate Court Judges or Supreme Court Justices should be disqualified from this case? ☐ YES / ☒ NO If yes, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.

CASE NAME: State of West Virginia, ex rel. Sidewinder Enterprises, LLC v. Jefferson County Planning Commission, et al.

NOTICE OF APPEAL

15. Is a transcript of proceedings necessary for the Court to fairly consider the assignments of error in the case?

    ☒ YES / ☐ NO **If yes, you must complete the appellate transcript request form on page 4 of this form.**

16. **NATURE OF THE CASE, RELIEF SOUGHT, and OUTCOME BELOW** (Limit to two double-spaced pages; please attach.)

17. **ASSIGNMENTS OF ERROR** (Express the assignments in the terms and circumstances of the case but without unnecessary detail. Separately number each assignment of error and for each assignment: (1) state the issue; (2) provide a succinct statement as to why the court should review the issue. Limit to eight pages double-spaced; please attach.)

18. **ATTACHMENTS**

    Attach to this notice of appeal the following documents in order: (1) extra sheets containing supplemental information in response to sections 1-14 of this form; (2) a double-spaced statement of the nature of the case, not to exceed two pages, as material required by section 16 of this form; (3) a double-spaced statement of the assignments of error not to exceed eight pages as required by section 17 of this form; (4) a copy of the lower tribunal's decision or order from which you are appealing; (5) a copy of any order deciding a timely post-trial motion; (6) a copy of any order extending the time period for appeal; and (7) the statutory docket fee of $200 (made payable to the State of West Virginia if made by check or money order); or a copy of the lower court's granting of the application for fee waiver in this case. The statutory docket fee does not apply to criminal cases, appeals from the Workers' Compensation Board of Review or original jurisdiction actions. The statutory docket fee does not apply to appeals from family court to the Intermediate Court of Appeals; however, the statutory docket fee applies to appeals from family court to the Supreme Court of Appeals, whether taken directly or after an appeal to the Intermediate Court of Appeals.

NOTICE:
You must file a separate affidavit and application anytime your financial situation no longer meets the official guidelines or anytime the court orders you to do so.

CERTIFICATIONS

I hereby certify that I have performed a review of the case that is reasonable under the circumstances and that the contents of the Notice of Appeal are accurate and complete.

01/09/2026 — Date

Susan R. Snowden — Counsel of record or self-represented party

I hereby certify that on or before the date below, copies of this notice of appeal and attachments were served on all parties to the case, and copies were provided to the clerk of the circuit court from which the appeal is taken and to each court reporter from whom a transcript is requested.

01/09/2026 — Date

Susan R. Snowden — Counsel of record or self-represented party

APPENDIX A – RULES OF APPELLATE PROCEDURE

CASE NAME: State of West Virginia, ex rel. Sidewinder Enterprises, LLC v. Jefferson County Planning Commission, et al.

APPELLATE TRANSCRIPT REQUEST FORM

INSTRUCTIONS:

1. If a transcript is necessary for your appeal, you must complete this form and make appropriate financial arrangements with each court reporter from whom a transcript is requested.
2. Specify each portion of the proceedings that must be transcribed for purposes of appeal. *See* Rule of Appellate Procedure 9(a).
3. A separate request form must be completed for each court reporter from whom a transcript is requested. If you are unsure of the court reporter(s) involved, contact the circuit clerk's office for that information.
4. Failure to make timely and satisfactory arrangements for transcript production, including necessary financial arrangements, may result in denial of motions for extension of the appeal period, or may result in dismissal of the appeal for failure to prosecute.

Name of Court Report, ERO, or Typist: Marcy L. Chandler, RPR

Address of Court Reporter: Jefferson County Courthouse, 110 N. George St. Charles Town, WV 25414

Case No.: CC-19-2025-C-93 **County:** Jefferson **Date of Final Order:** 12/12/2025-12/17/2025

Date of Proceeding	Type of Proceeding	Length of Proceeding	Name of Judge(s)	Portions Previously Prepared
11/10/2025	Hearing-Oral Argument	3 hours	Judge Bridget M. Cohee	Yes(17-page excerpt)

CERTIFICATIONS

I hereby certify that the transcripts requested herein are necessary for a fair consideration of the issues set forth in the Notice of Appeal.

I hereby further certify that I have contacted the court reporter and satisfactory financial arrangements for payment of the transcript have been made as follows:

- ☐ Private funds. (Deposit of $_____ enclosed with court reporter's copy. Attach documentation.)
- ☐ Criminal or habeas corpus appeal with fee waiver (Attach order appointing counsel or order stating defendant is eligible.)
- ☐ Abuse and neglect or delinquency appeal with fee waiver (Attach order appointing counsel.)
- ☒ Advance payment waived by court reporter (Attach documentation.)

01/07/2026 — **Date mailed to court reporter**

Susan R. Snowden — **Counsel of record or self-represented party**

APPENDIX A – RULES OF APPELLATE PROCEDURE

NOTICE OF APPEAL – EXTRA SHEET

CASE NAME: State of West Virginia, ex rel. Sidewinder Enterprises, LLC v. Jefferson County Planning Commission, et al.

Response to SECTION: 1

Jefferson County Circuit Court of West Virginia (28th Judicial Circuit)
Honorable Judge Bridget M. Cohee
Civil Action No. CC-19-2025-C-93

State of West Virginia, ex rel. Sidewinder Enterprises, LLC, Plaintiff/Relator

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, Respondents

and

Jefferson County Foundation, Inc., William E. Hewitt, David Liskey, William White Grantham, Kerry Lynn Grantham, Phyllis Grantham, Andrew Upright, Natalie Grantham Friend, Stacy Chapman, Timothy Smith, Barbara Smith and Mary Lind, Intervenors

APPENDIX A – RULES OF APPELLATE PROCEDURE

NOTICE OF APPEAL – EXTRA SHEET

CASE NAME: State of West Virginia, ex rel. Sidewinder Enterprises, LLC v. Jefferson County Planning Commission, et al.

Response to SECTION: 3

Petitioner: State of West Virginia, ex rel. Sidewinder Enterprises, LLC

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APPENDIX A – RULES OF APPELLATE PROCEDURE

NOTICE OF APPEAL – EXTRA SHEET

CASE NAME: State of West Virginia, ex rel. Sidewinder Enterprises, LLC v. Jefferson County Planning Commission, et al.

Response to SECTION: 4

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APPENDIX A – RULES OF APPELLATE PROCEDURE
NOTICE OF APPEAL – EXTRA SHEET

CASE NAME: State of West Virginia, ex rel. Sidewinder Enterprises, LLC v. Jefferson County Planning Commission, et al.

Response to Section: 16 Nature of the Case, Relief Sought, and Outcome Below

Nature of the Case. This appeal arises from the denial of a conceptual site plan for a proposed industrial development on a property that has been used exclusively for industrial purposes for more than four decades and that is located within an area zoned for industrial and commercial use in Jefferson County, West Virginia (the "County"). This appeal presents significant issues regarding the scope of planning commission authority, compliance with statutorily required staged land-use review processes, the constitutional limits of adjudicatory action taken without due process, and whether a court may supply findings that the planning commission did not make.

Sidewinder Enterprises, LLC ("Sidewinder") owns approximately 260 acres near Middleway, West Virginia (the "Property"), which it purchased in 2021. From the early 1960s through 2005, the Property was continuously occupied and operated as an industrial manufacturing facility. These uses involved substantial infrastructure, utilities, and industrial processes consistent with heavy industrial zoning. The Property has never been converted to a non-industrial use and remains zoned for industrial and commercial development.

Sidewinder seeks to construct a water packaging facility ("the Project") on the Property which conforms to its historic industrial use and current zoning classification. Sidewinder is not seeking a zoning change, variance, or conditional use approval of the Property, but instead seeks development consistent with existing zoning entitlements. In order to advance the Project, Sidewinder is required to obtain approval of a major site plan for the Project from the County Planning Commission. This is a multi-phase process consisting of concept plan submission, a public workshop, submission of a site plan application revised as necessary as a result of the workshop, a public hearing and a final site plan decision. This staged process is mandated by statute and local ordinance to ensure orderly review, applicant guidance, and procedural fairness.

Sidewinder initiated the first step of the process by submitting a concept plan to the Staff of the County Office of Planning and Zoning ("County Staff"). A concept plan is conceptual in nature and contemplates that revisions and adjustments will be addressed before a final plan is submitted for approval. Review of the concept plan by County Staff is twofold: (1) determining whether the concept plan is complete and includes all required information; and (2) determining whether the density, use and plan meet the requirements of the County Zoning Ordinance. County Staff determined that Sidewinder's concept plan was complete and conformed with the Zoning Ordinance, without identifying any concerns or necessary revisions. The County Staff provided its findings to the Planning Commission, which scheduled a public workshop that, under its own regulations, is intended to guide the applicant's preparation and submission of a final site plan.

The public workshop was held on March 11-12, 2025. Sidewinder expected that the Planning Commission would identify concerns about the scope or intensity of the Project and "provide direction" enabling Sidewinder to proceed to the next stage of review. Without any advance notice to Sidewinder, the Planning Commission rejected the Project in its entirety, concluding that it violated the County's Zoning Ordinance and was "not consistent with" the "purposes" of the County's Subdivision and Land Development Regulations.

Relief Sought/Outcome Below: Sidewinder filed a Complaint and Verified Petition for Writ of Prohibition, Mandamus and Certiorari with the Circuit Court of Jefferson County ("Circuit Court") seeking to: (1) vacate the Planning Commission's rejection of the concept plan; and (2) compel the Planning Commission to comply with its own regulations and ordinances and provide direction to Sidewinder with respect to the concept plan as submitted and approved by County Staff. Following submission of legal memoranda and after oral argument, the Circuit Court entered an order on December 12, 2025, affirming the Planning Commission's denial of Sidewinder's concept plan. The Circuit Court's Order adopted independent factual conclusions and legal theories not relied upon by the Planning Commission. It is from this Order which Sidewinder appeals.

APPENDIX A – RULES OF APPELLATE PROCEDURE
NOTICE OF APPEAL – EXTRA SHEET

CASE NAME: **State of West Virginia, ex rel. Sidewinder Enterprises, LLC v. Jefferson County Planning Commission, et al.**

Response to Section: 17 Assignments of Error

Assignment of Error No. 1: The Circuit Court exceeded its limited certiorari authority by claiming to have independently reviewed some 12,000 pages of technical reports and comments and making predictive and original factual determinations, rejecting, and crediting expert testimony, and substituting its own judgment for that of the Planning Commission.

This assignment of error presents a pure question of law concerning the scope of a circuit court's certiorari authority under W.Va. Code § 8A-9-6 and established precedent limiting judicial review of administrative land-use decisions. Certiorari review is confined to the record and the opinion below and does not authorize independent fact-finding, credibility determinations, or predictive judgments. Rather than limit its review to the propriety of the Planning Commission's decision to deny the Project in its entirety at the concept plan stage and determine if the Planning Commission applied an erroneous principle of law, was plainly wrong in its factual findings, or acted beyond its jurisdiction, the Circuit Court instead engaged in a de facto trial de novo without taking any sworn testimony or allowing Sidewinder an adequate opportunity to present rebuttal evidence.

The Circuit Court substituted its own factual findings as justification for denying the Project in its entirety based upon (a) the proposed Concept Plan in conjunction with its interpretation and application of relevant zoning regulations; (b) predictive hydrogeological impacts of the Project; (c) likelihood of plume migration; (d) adequacy of monitoring and replacement wells; (e) speculative karst hydrogeology factors associated with the Project; and (f) the reliability/unreliability of expert reports presented to the Planning Commission. These

determinations were neither made by the Planning Commission nor supported by adjudicated evidence. As a result, the Circuit Court exceeded its limited certiorari jurisdiction by conducting a de facto trial de novo, making original and predictive factual findings, weighing, and rejecting expert testimony, and substituting its judgment for that of the Planning Commission.

Assignment of Error No. 2: The Circuit Court erred as a matter of law by dismissing Sidewinder's procedural due process claim and affirming the denial of the Concept Plan at a public workshop that lacked notice of final adjudication, defined issues, evidentiary standards, and a meaningful opportunity to be heard, in violation of constitutional due process and W.Va. Code § 8A-1-1, *et seq.*

Whether a major site plan may be flatly denied at an informal public workshop without notice, defined issues, evidentiary standards, or an opportunity to be heard where the plan itself was in its conceptual stage and the applicant was only seeking the direction of the Planning Commission and not final approval, is a constitutional and statutory due process question subject to plenary review. Procedural due process attaches where governmental action adjudicates property interests or materially impairs lawful use of land.

The Circuit Court erred by dismissing Sidewinder's procedural due process claim and affirming the site plan denial issued at a public workshop that (a) lacked notice of adjudication and/or the full nature of the workshop proceeding; (b) was inconsistent with Sidewinder's statutory/regulatory expectations as acknowledged by the Planning Commission President and Counsel; (c) did not allow for the introduction of evidence or rebuttal; (d) was contrary to the recommendations of the Planning Commission's own Zoning Administrator/Staff; and (e) was otherwise inconsistent with W.Va. Code § 8A-1-1, *et seq.* and fundamental due process requirements.

Assignment of Error No. 3: The Circuit Court erred as a matter of law by affirming a denial at the concept plan stage which effectively adjudicated zoning permissibility, environmental compliance, and water rights, thereby authorizing an *ultra vires* expansion of the Planning Commission's authority and nullifying the staged land-use review process established by W.Va. Code § 8A-1-1, *et seq.* and local subdivision and zoning regulations.

This issue involves statutory interpretation of W.Va. Code § 8A-1-1, *et seq.* in conjunction with local subdivision and zoning regulations and the legal limits of a planning commission's authority at the concept plan stage, a matter of statewide importance affecting land-use administration. The Circuit Court erred by affirming a denial at the concept plan stage which essentially adjudicated zoning permissibility, environmental impact, water rights, and historic preservation issues, thereby collapsing the multi-phased review process provided under the Jefferson County Regulations and authorizing an *ultra vires* expansion of the Planning Commission's authority.

As set forth in the regulations governing the Planning Commission's authority and processes, the workshop review phase is intended to be preliminary and informal in nature and scope, and does not contemplate or authorize the Planning Commission to (a) render final zoning compliance determinations; (b) make environmental impact determinations; (c) make historic preservation findings; or (d) apply common-law water rights doctrines to defeat zoning. By ratifying the Planning Commission's actions and decision, the Circuit Court expanded the Planning Commission's limited authority and nullified the staged land-use review process established by W.Va. Code § 8A-1-1, et seq. and local subdivision and zoning regulations. While the Planning Commission may condition site plan approval on required permits and approvals from other

agencies it may not supplant their authority and approvals as it did here. By ratifying this action, the Circuit Court nullified the statutory framework governing land-use review.

Assignment of Error No. 4: The Circuit Court impermissibly created a de facto county-wide prohibition on commercial groundwater use absent legislative action, violating settled principles that zoning restrictions must be explicit and strictly construed.

Whether a court may judicially impose a county-wide zoning prohibition absent express legislative action presents a question of law requiring de novo review. Zoning restrictions must be explicit and strictly construed in favor of property use. In its findings, the Circuit Court determined that commercial extraction and sale of groundwater is prohibited in every zoning district in Jefferson County, even though no applicable zoning ordinance or subdivision regulation stands for this prohibition. This reasoning converts regulatory silence into prohibition, contrary to settled land-use law.

The rulings of the Circuit Court in this matter have created a de facto prohibition on commercial groundwater use in Jefferson County by treating the absence of language concerning water use in the zoning ordinance as a wholesale ban, contrary to settled principles requiring zoning restrictions to be explicit and strictly construed in favor of property use.

Assignment of Error No. 5: The Circuit Court committed reversible error by transforming a common-law doctrine governing private water disputes into a zoning prohibition, absent statutory authority, or adjudicated water rights violations. (Misapplication of "Reasonable and Beneficial Use" Doctrine)

Whether common-law water rights doctrines may be transformed into zoning prohibitions without statutory authority is an error of law subject to plenary review. The Circuit Court erred by relying upon the reasonable and beneficial use doctrine which governs private water disputes to

affirm denial of Sidewinder's Concept Plan and Project by the Planning Commission and finding that the proposed use of the Property was prohibited by the local zoning ordinance.

The reasonable use doctrine governs private water disputes. It does not empower a county planning commission to preemptively deny a site plan for a projected Project based upon arbitrary findings that the proposed use would involve the unreasonable use of water. Nonetheless, the Circuit Court invoked this doctrine to affirm the Planning Commission's decision as a matter of law without allowing for a full and complete adjudication of the issue.

Assignment of Error No. 6: The Circuit Court failed to apply the plain language of the zoning ordinance to the essential utilities classification and the natural resources extraction exemption as set forth in W.Va. Code §§ 8A-7-3(e) & -10(e); Section 4.7 of the Zoning Ordinance and Sections 20.104.C., 20.200, 20.204, and 20.100.B of the Subdivision Regulations.

This issue involves failure to apply and interpret the plain language of the statutes and the County's Subdivision Regulations and Zoning Ordinance; a legal error reviewed de novo.

The Circuit Court summarily rejected Sidewinder's essential utilities argument as a "strawman" without (a) interpreting the statutory or ordinance definition; (b) applying the ordinance text; and/or (c) addressing similar uses historically permitted in the area. More specifically, the Circuit Court independently determined that Sidewinder's Project is not an essential utility because the residents of Middleway already have private wells and do not need public water. In reaching these conclusions, the Circuit Court erroneously confused an essential utility with a public utility which resulted in conclusory and legally unsupported findings.

Likewise, the Circuit Court rejected the natural resources extraction exemption in W.Va. Code § 8A-7-10(e) and in the Subdivision Regulation ruling that the exemption is inapplicable to

"water" (as not being included within "natural resources") and arbitrarily determining that Sidewinder's proposed water use was not reasonable and beneficial. In reaching this conclusion, the Circuit Court erroneously interpreted W.Va. Code § 8A-7-10(e) in conjunction with W.Va. Code § 22-26-3 to reach a conclusion that was not the intended effect nor the original intent of the West Virginia Legislature. Rather than enforce the application of W.Va. Code § 8A-7-10(e), the Circuit Court exceeded its limited jurisdiction by unnecessarily interpreting and expanding the intent of the statute in order to invoke its own thoughts and findings as to the political, social, economic and scientific issues associated with a landowners' right to utilize natural resources contained on and in their property and the water rights possessed by the State of West Virginia. By interpreting rather than enforcing the statutes as written, the Circuit Court usurped the role of the West Virginia Legislature and committed reversible error.

Assignment of Error No. 7: The Circuit Court committed reversible error by allowing the Planning Commission to override the Zoning Administrator/Staff's determination that Sidewinder's concept plan was consistent with the County's Zoning Ordinance.

The Circuit Court generally failed to recognize the distinction between a zoning review under the County's Zoning Ordinance, which is conducted by the Zoning Administrator/Staff, and the Planning Commission's review, which is limited to the design review criteria set forth in the Subdivision Regulations. While concept plans must meet zoning requirements, both the Zoning Ordinance and the Subdivision Regulations are very clear that that determination "is a function of Staff under provisions of the Zoning Ordinance", that Staff's report to the Planning Commission "shall contain a ***final decision*** as to whether the subdivision plat or Site Plan meets the standards of the Zoning Ordinance", and that "[a]ny appeal of Staff's decision shall be heard by the Board of Zoning Appeals." Subdivision Reg. § 20.301.B&C (emphasis added); *see also* Zoning

Ordinance §§ 3.2.A.2 (providing that Zoning Administrator "shall administer and enforce the Zoning . . . Ordinance" including "interpret[ing] the provisions of the Ordinance as required by law") & 3.2.B (providing that "any decision or action by the Zoning Administrator based on Section 3.2.A is subject to appeal to the Board of Zoning Appeals"). Moreover, the Subdivision Regulations are abundantly clear that Staff's zoning determinations are binding upon the Planning Commission. *See, e.g.*, Subdivision Reg. §§ 20.301.A & 20.303.G.

Accordingly, the Planning Commission never had the authority to deny the concept plan based on a finding that the concept plan is inconsistent with the Zoning Ordinance, and it was reversable error for the Circuit Court to affirm the Planning Commission's decision on that basis.

Even if the Planning Commission possessed authority to apply the Zoning Ordinance during concept plan review, the Circuit Court committed reversible error by affirming zoning violations that were unsupported by the administrative record. Even assuming arguendo that the Planning Commission possessed authority to apply the County's Zoning Ordinance during concept plan review, it nonetheless erred in determining that the proposed project violated Section 4.4 of the Zoning Ordinance based on purported impacts associated with water withdrawal, water line construction, and use of state roads. The record contains no substantial evidence supporting these findings, and the Planning Commission failed to identify facts demonstrating that the proposed concept plan would result in impacts prohibited by Section 4.4. Rather than requiring substantial evidence to support these conclusions, the Circuit Court supplied justification for findings that the Planning Commission did not adequately make and that the administrative record does not support.

The Planning Commission's determinations regarding Section 4.4 were arbitrary and erroneous because they were not grounded in the evidentiary record. Because the Planning Commission's findings concerning alleged impacts from water withdrawal, water line

construction, and use of state roads lack evidentiary support, and because the Circuit Court affirmed those findings without substantial evidence, the Circuit Court's order should be reversed.

Assignment of Error No. 8: The Circuit Court committed reversible error by allowing the Planning Commission to deny Sidewinder's concept plan based on the concept plan's alleged inconsistency with the purpose sections of the Zoning Ordinance and Subdivision Regulations because these provisions are not operative or enforceable, and to the extent that they are construed to be enforceable, they are unconstitutionally vague.

It is well settled that statements of purpose such as those contained in Section 20.101 of the Subdivision Regulations and Section 1.1 of the Zoning Ordinance are prefatory, inoperable, and unenforceable. These statements do not prohibit anything, and cannot serve as a basis for the Planning Commission's rejection of Sidewinder's concept plan. They are not operative.

Additionally, to the extent that the purposes enumerated in Section 20.101 of the Subdivision Regulations and Section 1.1 of the Zoning Ordinance are construed to be enforceable, they are unconstitutionally vague. An ordinance is unconstitutionally vague if an individual of common intelligence must necessarily guess at its meaning. The purpose provisions relied upon by the Planning Commission and the Circuit Court are unconstitutionally vague as an individual of common intelligence would necessarily have to guess at what, if anything, these provisions actually serve to prohibit.

Accordingly, it was error for the Circuit Court to affirm the Planning Commission's denial of Sidewinder's concept plan based on the concept plan's alleged inconsistency with the purposes enumerated in Section 20.101 of the Subdivision Regulations and Section 1.1 of the Zoning Ordinance.

West Virginia E-Filing Notice

CC-19-2025-C-93

Judge: Bridget Cohee

To: Susan R. Snowden
susan.snowden@jacksonkelly.com

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 order - case was FILED on 12/12/2025 4:58:38 PM

Notice Date: 12/12/2025 4:58:38 PM

Tina Renner
CLERK OF THE CIRCUIT COURT
Jefferson County
PO Box 1234
CHARLES TOWN, WV 25414

(304) 728-3231
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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

Sidewinder Enterprises LLC,
Plaintiff,

v.

Case No. CC-19-2025-C-93
Judge Bridget Cohee

Jefferson County Planning Commission, et al.
Defendants

ORDER AFFIRMING JEFFERSON COUNTY PLANNING COMMISSION DENIAL OF CONCEPT PLAN FOR SIDEWINDER ENTERPRISES, LLC TO CONSTRUCT AND OPERATE A WATER BOTTLING AND PROCESSING FACILITY

This matter comes before the court pursuant to W. Va. Code 8A-5-10, upon a writ of certiorari filed by Sidewinder Enterprises, LLC d/b/a Mountain Pure, (Sidewinder). Sidewinder filed its writ to appeal the Jefferson County Planning Commission (JCPC) denial of Sidewinder's concept plan proposing the construction of a water packaging facility in Middleway.

Jefferson County is one of two counties in the State of West Virginia that has adopted county-wide zoning. Chapter 8A of the West Virginia Code addresses Land Use Planning. The primary finding of the Legislature in adopting Chapter 8A is that planning land development and land use is vitally important to a community; and a planning commission is helpful to a community to plan for land development, land use and the future.

W. Va. Code 8A-2-1 authorized a governing body of a county to create a planning commission to promote the orderly development of its jurisdiction. The planning commission shall serve in an advisory capacity to the governing bodies and has certain regulatory powers over land planning. Importantly, governing bodies and planning commissions are authorized by code to carry out the objectives and overall purposes of Chapter 8A as set forth in W. Va. Code 8A-2-1(d). A

planning commission has only those powers, duties and jurisdiction as given to it in the ordinance creating it. W. Va. Code 8A-2-1(e).

W. Va. Code 8A-2-11 specifies the powers and duties of the planning commission. The first duty set forth in the code is to exercise general supervision for the administration of the affairs of the commission. W. Va. Code 8A-2-11(1). It is the planning commission's duty to supervise staff and to make recommendations to the appropriate governing body concerning planning. W. Va. Code 8A-2-11(8).

W. Va. Code 8A-7-10 sets forth the effect of enacting a zoning ordinance. Once a county has enacted a zoning ordinance, all subsequent land development shall be done in accordance with the provisions of the zoning ordinance. Pursuant to the authority granted in W. Va. 8A-5-8(d) and (i), the planning commission issued Findings of Fact and Conclusions of Law for Project Number 24-C-SP. The JCPC considered the submissions and testimony of Sidewinder, all submissions and public comment by citizens, interested parties, and members of the public at large. After a properly noticed public workshop, JCPC denied Sidewinder's application.

Upon the writ of certiorari, the circuit court is required to make an independent review of both law and fact to render judgment as law and justice may require. Here the circuit court must determine whether the Jefferson County Planning Commission (JCPC) applied an erroneous principle of law, was plainly wrong in its factual findings, or acted beyond its jurisdiction in denying the concept plan submitted by Sidewinder.

On November 10, 2025, the court held a hearing on the writ of certiorari. Upon the court's review of over 8,000 documents submitted as the record below and upon the briefs and arguments presented by counsel at the hearing, the court hereby affirms the JCPC's denial of the Sidewinder

concept plan. The court finds that the JCPC acted within its authority, applied the correct principles of law and did not commit error in its factual findings in denying Sidewinder's concept plan.

In syllabus point 5 of *Wolfe v. Forbes*, 159 W. Va. 34, 217 S.E.2d 899 (1975), the Court held: "While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction." Syl. pt. 1, *Jefferson Utilities, Inc.*, supra; syl. pt. 1, *Corliss v. Jefferson County Board of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93 (2003). In this case, the agency below is the planning commission rather than the board of zoning appeals, however the standard of review this circuit court applies is the same. The West Virginia Supreme Court of Appeals in *Jefferson Orchards v. JCBZA*, 225 W. Va. 416, 693 S.E.2d 781 (2010) held that in the context of land use planning and zoning, circuit court jurisdiction is in certiorari to review the decisions and orders of various local entities.

The court finds the concept plan could not be approved due to the correct factual findings of the planning commission that the proposed land use does not conform to the zoning ordinance. Furthermore, the court agrees with the planning commission's findings that multiple environmental, groundwater protection and historical preservation factors pose foreseeable risks of harm to the surrounding community. Sidewinder argues that the JCPC should have provided "direction" on the concept plan. The court disagrees. The concept plan should not have been approved and the JCPC was not required to provide "directions" given the proposed land use is prohibited by the zoning ordinance and given the numerous obstacles that bar the proposed land use. Sidewinder's argument would require JCPC to "give direction" even when the application clearly should be denied ab initio.

INTRODUCTION

Sidewinder seeks to construct a water packaging facility near the historic village of Middleway in Jefferson County, West Virginia. Initially, Sidewinder applied for a waiver from a major subdivision to a minor subdivision for one parcel, Parcel 9, the former location of the 3M/Kodak plant. The initial waiver request was approved; however, the applicant did not provide the proposed use of the property until Sidewinder submitted a concept plan to the planning commission for a major site development more than a year later. Planning commission staff indicated the concept plan was "sufficient" with minor comments and scheduled a public workshop, however, upon the statutory duty to supervise the administration i.e. staff, the planning commission determined the concept plan was not complete. If the application is not complete, then the planning commission may deny the application and must notify the applicant in writing stating the reasons for the denial. W. Va. Code 8A-5-6(c).

Indeed, the JCPC was correct in concluding that Sidewinder had omitted significant aspects of its plan. Sidewinder did not include two other parcels relevant to the development in the original concept plan. Sidewinder omitted providing the location of an offsite supply well, a proposed pipeline, and more concerning, Sidewinder completely failed to address the location of a toxic plume on the 3M/Kodak site being proposed to be used as a water packaging facility. To address the issues raised by the JCPC, Sidewinder submitted a revised plan and added Parcel 34 and Parcel 33.9 to the concept plan as supply well, back up well and access to the well by way of a proposed future water supply line ("pipeline"). Sidewinder also submitted information regarding the toxic plume on the 3M/Kodak property. Upon review of the additional information provided, and after

a public workshop, JCPC denied the concept plan for the major industrial site Mountain Pure Bottling Facility.[1]

According to Sidewinder's own filings, "the groundwater beneath the 3M/Kodak plant is contaminated by prior users and its use is restricted by a "land use covenant" imposed on the property as a condition of a certificate issued by the West Virginia Department of Environmental Protection (WVDEP) for completion of remediation under the West Virginia Voluntary Remediation and Redevelopment Act, W.Va. Code §§ 22-22-1 to -21. Two chemicals are identified as being present in a well on the site designated as Well MW-114D. Additionally, a large toxic plume containing Dichloroethane and Trichloroethene are present on the property and poses a foreseeable risk for potential health effects including cancer, liver, nervous system, circulatory system, kidney and immune system problems according to the EPA ground water and drinking water national primary drinking water regulations.[2]

The 3M/Kodak site was subject to a Voluntary Remediation Program ("VRP"), overseen by the WVDEP. A certificate of completion was issued on June 15, 2018. The certificate of completion imposed specific conditions on the future development of the site, including a restriction on drilling any wells within the limits of the plume or within 300 feet of the well designated as MW114-D. Other conditions are included to reduce the risk of harm by disturbing the plume. Significantly, part of the VRP program included 26 monitoring locations to test well

[1] One of Sidewinder's complaints is that the JCPC issued the denial of the concept plan after a public workshop, not a public hearing. The language in the Subdivision Regulations uses public workshop **or** public hearing. See Section 24.112. There is no dispute that a public workshop was held on March 11 that extended into the early morning hours of March 12, 2025. Denial of the concept plan by the JCPC was issued based upon findings of fact and conclusions of law.

[2] 89 Fed. Reg. 102568 (Rules and Regulations EPA 40 CFR Part 751, Trichloroethylene (TCE); Regulation Under the Toxic Substances Control Act (TSCA).

water. Throughout the record there are repeated references to the 3M/Kodak site having participated in a Voluntary Remediation Program (VRP) overseen by the WVDEP. The record contains evidence of chemicals ***dichloroethane and trichloroethene*** being monitored. The most recent data submitted in the Integrity Federal Services document indicate that the chemicals are still present within the "plume" above the WVDEP de minimis levels. The court finds the development of a water bottling plant on the site will likely cause a disturbance of the toxic plume that cannot be adequately contained or monitored given the karst topography lying under the Well MW-1140 and the toxic plume. The circuit court finds that the proposed concept plan is in violation of Section 4.4B which states: No land use shall be conducted that creates any injurious, noxious, or otherwise objectionable fire, explosive heat, or other hazard; noise, or vibration; smoke, dust, odor, gases, or other form of air pollution; or emit dangerous radioactivity in such a manner that if permitted would adversely affect the uses of an adjacent property or contaminate the ground water or surface waterways of the County. The court finds the existing hazards identified at Sidewinder's proposed bottling facility site, given the karst hydrogeology beneath the site, it is clearly foreseeable that the chemicals in the toxic plume may be drawn down into the aquifer if Sidewinder begins pumping over 1.4 million gallons of water a day from the aquifer below the plume.

The JCPC were correct in considering evidence submitted into the record below that the industrial scale of groundwater extraction proposed by Sidewinder could move the chemicals in this toxic plume into drinking water wells by creating a cone of depression for regional groundwater flow. The historic village of Middleway lies between the 3M/Kodak plume and the proposed supply well. There is no public water supply in Middleway. All residents rely upon well water. The presence of the toxic plume is a foreseeable risk to the residents of Middleway and other water users who draw from the aquifer.

Upon first blush, the presence of this toxic plume is perilous enough that the JCPC had a duty to uphold the purpose of the zoning ordinance to protect and encourage the health, safety and general welfare of present and future population of Jefferson County. The industrial scale drawdown of water from the aquifer below this toxic plume raises a foreseeable risk that the toxic plume and the chemicals present in Well MW-114D may affect the health, safety and general welfare of present and future population of Jefferson County. Sidewinder acknowledges the risks to the local residence. Sidewinder proposes to monitor private wells within a half mile of its supply well and to replace wells where yields are reduced such that the yield is not sufficient for the residential or existing use. Because of the contamination risks from the location of the 3M/Kodak contaminated well and toxic plume described above, there is no guarantee a replacement well will provide safe drinkable water.

The JCPC did not limit its review of the concept plan to this environmental health risk of the chemicals still present on the 3M/Kodak site. The land use application concept plan submitted in its revised form spans three zoning districts and proposes to extract water at an industrial scale. In addition to the 3M/Kodak property on Parcel 9, which is zoned Industrial/Commercial, Sidewinder's concept plan also includes a proposed pipeline to extract and transfer water from a source well and a backup well located over a mile to the east of the proposed bottling facility. These added parcels, 34 and 33.9, are not zoned Industrial/Commercial, they are in Rural and Village districts, thus the JCPC was required to consider whether the proposed land use in the concept plan met the requirements in "R" rural and "V" village zoning districts.

The JCPC did correctly conclude that the proposed land use does not meet the requirements set forth in the subdivision and land development ordinance. The bottling facility is 1,000,000 square feet. The estimated traffic will generate well over 700 daily trips through the tiny

historic village of Middleway (600 employee trips, 160 tractor trailer truck trips). The concept plan also proposes the withdrawal and extraction of up to 1000 gallons of water per minute, in excess of 1.4 million gallons ***per day*** from the local water resources.

The JCPC correctly denied Sidewinder's concept plan because it cannot meet the requirements of the Jefferson County Zoning and Land Development Ordinance.

Parcels 34 and 33.9 are zoned rural "R" and the concept plan includes them as a supply well for a **major industrial development** and proposes to build a pipeline through rural land and the historic village of Middleway (zoned "V") to supply its commercial bottling facility with water. The industrial scale of the project is massive. Regarding rural zoning, **no industrial uses of any kind are permitted**. Moreover, the JCPC correctly concluded that the commercial extraction of groundwater for bottling and sale is not specifically permitted by the zoning ordinance in any zoning district. Additionally, the JCPC found the proposed development will destroy the historic character of Middleway and that the plan conflicts with the purpose of the zoning ordinance. The court finds no error in the findings of facts and conclusions of law made by the JCPC and further finds that the JCPC had the authority to deny the concept plan pursuant to W. Va. Code 8A-5-8(d).

JURISDICTION, VENUE AND STANDING

This writ of certiorari is properly before the Circuit Court pursuant to W. Va. Code § 8A-9-1: "[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[.]" 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. When a court, created and in existence by virtue of the Constitution, is granted certain jurisdiction by that document, the legislature has no power to impair the essential nature or jurisdiction thereof unless specific authority is conferred upon the legislature by the Constitution.

In addition to the jurisdiction of the court for purposes of the writ, the circuit court has jurisdiction over the rights of landowners in the waters of a watercourse common to both. *Halltown Paperboard Co. v. C. L. Robinson Corp.*, 150 W. Va. 624, 624, 148 S.E.2d 721, 722 (1966). Further, venue is proper in this Court pursuant to W. Va. Code § 56-1-1(a) because the JCPC, the real property at issue, the properties affected by the proposed development, the water resource proposed to be extracted and sold, and the seat of the County government are all located in Jefferson County.

Upon a prior hearing held July 15, 2025, the circuit court granted a motion to intervene by Jefferson County Foundation, Inc. and William E. Hewitt, David Liskey, William White Grantham, Kerry Lynn Grantham, Phyllis Grantham, Andrew Upright, Natalie Grantham Friend, Stacy Chapman, Timothy Smith, Barbara Smith and Mary Lind (the "Intervenors"). The court found several of the Intervenors own real property abutting or adjacent to Lake Louise, a lake contiguous to parcel 34. Lake Louise is zoned rural. Sidewinder's proposed water extraction is on an industrial scale, and it is foreseeable that it will cause a drawdown of the surrounding water table and unreasonably use water that the Intervenors rely upon from springs and wells on their property and under Lake Louise. The Intervenors submitted a report authored by hydrogeologist Dr. Chris Groves dated February 4, 2025, entitled Karst Hydrogeology and the Potential for Associated Environmental Impacts Resulting from the Mountain Pure Bottling Facility, Jefferson County, West Virginia. At a prior hearing on July 15, 2025, the Court heard testimony from Intervenor

William White Grantham, confirming his family has owned real property adjacent to Lake Louise for over three hundred years, he currently relies on wells to provide water for both agricultural and residential purposes, and those wells will be affected by the massive extraction and bottling of water proposed by Sidewinder. [3]

The court granted Intervenors status to others who own real property located within the Middleway Historic District, which is recognized in the National Registry of Historic Places. These residents of Jefferson County object to Sidewinder building a pipeline through the tiny historic village and further object to the trucking route proposed by the Sidewinder concept plan. Both the pipeline and the traffic impact will likely cause structural risks to the historic homes, soil subsidence, and construction-related impacts on the integrity of the historic buildings. The Intervenors submitted a letter from the engineering firm of Wiss, Janney, Elstner Associates, Inc., entitled Middleway Historic District Preliminary Impact Assessment of Mountain Pure Development. At the prior hearing on July 15, 2025, the Court heard testimony from Intervenor Stacy Chapman, confirming she owns a historic home in Middleway, that the pipeline and truck route would run within a few feet of her house, and that construction of the pipeline and ongoing traffic from heavy trucks would cause foreseeable structural damage to her home.

The Jefferson County Foundation was also granted intervenor status and opposed Sidewinder's Concept Plan. The Foundation's mission is to support and promote effective and accountable government, sustainable development, and the protection of health, heritage, and the environment in Jefferson County and the Eastern Panhandle of West Virginia. At the hearing on

[3] Remaining questions exist as to the impact the extraction of water from the supply well on Parcel 34 would have on Lake Louise and Turkey Run. The lake is "marl wetlands" that falls within protections of the WVDEP. The proposed extraction of groundwater to bottle and sell is likely to have a detrimental impact on the lake and Turkey Run, which would also violate the reasonable use doctrine.

July 15, 2025, Dr. Christine Wimer provided testimony confirming the Foundation's mission and the Foundation's opposition to the concept plan based upon Sidewinder's project being contrary to sustainable development and posing risks to the health, heritage, and environment of Jefferson County.

REVIEW OF WEST VIRGINIA LAND USE AND PLANNING

The clear language in W. Va. Code 8A-5-8 contemplates three potential actions by the planning commission. W. Va. Code 8A-5-8(d) allows for the planning commission to vote to approve, **deny** or hold the application for major site development. (Emphasis added). There was no direction that could be given to create a site plan that could be approved given the numerous risks of potential for harm to the quality and quantity of water and the basic violations of the Zoning Ordinance.

JCPC and Sidewinder agree that the first two steps to obtain an approved site plan are submission of the concept plan and the public workshop to review the concept plan. Sidewinder takes the position that workshops are conducted solely to provide the applicant and the JCPC with public input and to enable the JCPC "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. Sidewinder takes the position that the JCPC lacks the authority to deny the application at the concept plan stage and that the approval of the site plan is solely determine by the **staff.** (Emphasis added).

The circuit court finds that West Virginia Code 8A-5-8(d) is clear and unambiguous and provides the authority for the planning commission to approve, **deny** or hold the application. The

Court finds that the JCPC acted pursuant to the authority granted in W. Va. Code 8A-5-8(d) when it found that the concept plan did not meet the requirements of the governing body's subdivision and land development ordinances pursuant to the JCPC authority pursuant W. Va. Code 8A-5-8(f) and subsequently denied the application.

Sidewinder argues JCPC had no authority to override the staff's determination of zoning compliance as the basis for "rejecting" the 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. Following this reasoning to its logical end would require the JCPC to appeal a staff decision to the Board of Zoning Appeals if it disagreed with the administrator's determination. This is an absurd argument that fails based on the absurd outcome. The argument would require a county planning commission to appeal to a county board of zoning appeal as opposed to the planning commission exercising its statutory duty of oversight of the administration generally. It would also run contrary to the planning commission authority to **deny** the application pursuant to W. Va. Code 8A-5-8(d).

Delegation of authority to staff does not waive oversight and responsibility to determine if the application meets the requirements of the zoning ordinance. In fact, accountability and oversight are core responsibilities of the JCPC pursuant to W. Va. Code 8A-5-8(f). Otherwise, the JCPC would be a "rubber stamp" of staff determination of the most basic requirement of a concept plan that the proposed land use meet the requirements of the zoning ordinance. Here, **staff erred** in finding that the proposed concept plan was not prohibited by the zoning ordinance. JCPC correctly concluded that there is no authorized use in Jefferson County for the industrial scale extraction and sale of water in any zoning designation, including major industrial sites. Further, the court finds in favor of the JCPC denial of the concept plan because the concept plan was

inconsistent with three other provisions of the Jefferson County Zoning and Land Development Ordinance further discussed below.

Section 24.119(I) of the Subdivision and Land Development Regulations states that the concept plan shall not be approved if the development cannot conform to the Zoning Ordinance, or if other factors make the development impossible. Sec. 24.119(I). Approving a concept plan that proposes unauthorized use would be an exercise in futility. The JCPC should not have "provided direction" because to do so would be sending Sidewinder down a dead-end street. The proposed land use is not authorized in any zoning district under the current zoning ordinance, and this proposal had multiple barriers involving three separate zoning districts. The concept plan could not possibly be approved.

The court finds that JCPC correctly concluded that the Sidewinder proposed concept plan fails to meet the requirements of the Zoning and Land Development Ordinance because the land use proposed does not protect and encourage the health, safety and general welfare of the present and future population of Jefferson County, it fails to promote environmentally sound growth, it fails to encourage the conservation of natural resources, and it fails to encourage historic preservation.

Regarding the extraction, bottling and selling of water, this use is not one in the list of the principal permitted or conditional uses in any zoning district, and is therefore prohibited as though it was included in the list of prohibitions. Applicants desiring inclusion of a use not specifically permitted in the ordinance may apply for a text amendment, following the provisions outlined in Article 12 of the zoning ordinance. The court finds no error in the JCPC finding that water extraction (surface or ground water) for sale is not a principal permitted use in any zone in Jefferson County by the zoning ordinance.

REVIEW OF WEST VIRGINIA WATER RIGHTS

Freshwater is essential to life. The right to use freshwater is limited to be used reasonably and beneficially. The JCPC's denial of the concept plan was rationally related to the imperative public interest of protecting Jefferson County residents' access to freshwater. The EPA estimates each person uses an average of 82 gallons of water a day at home. Sidewinder's concept plan proposed to remove 1.4 million gallons a day from the water cycle in Jefferson County. Sidewinder's plan to withdraw, divert, extract, and sell water will have a direct and negative impact on other residents of Jefferson County and their right to use water reasonably and beneficially to meet their needs. Sidewinder does not have the right to unreasonably remove, bottle and sell water for profit and to the detriment of other residents of the county. The JCPC was correct in concluding that Sidewinder's proposed land use is prohibited in every zoning district and indeed the court concludes the proposed use violates longstanding state law governing water use.

Sidewinder stated in its brief that "no zoning ordinance can restrict the owner's use of natural resources such as minerals and water." This argument fails completely for several reasons, first because West Virginia Code 22-26-3 clearly states that **the waters of the state of West Virginia are held by the state for the use and benefit of its citizens.** Second, **county planning authorities are specifically listed** in the state and local agencies and entities that have regulatory, research, planning and other functions relating to water resources in W. Va. Code 22-26-3(g). **The code requires cooperation from a list of state agencies and local government entities including county planning authorities to assist in the management and protection of the state waters for present and future use and enjoyment and for the protection of the environment**. Thus, the prohibition of extraction of water for bottling and selling for profit in all zoning areas in

Jefferson County conforms with the state law governing the protection of water for the use and benefit of the citizens.

Public policy in West Virginia protects water. W. Va. Code 22-12-2 (a)(2) states that 50% of West Virginia's overall population and over 90% of the state's rural population depend on groundwater for drinking water. W. Va. Code 22-12-2(a)(3) states that a rural lifestyle has created a quality of life in many parts of West Virginia, which is highly valued. Maintaining this lifestyle depends upon protecting groundwater to avoid increased expenses associated with providing treated drinking water supplies to rural households. Further, W. Va. Code 22-12-2(a)(4) states that West Virginia's groundwater resources are geologically complex, with the nature and vulnerability of groundwater aquifers and recharge areas not fully known. W. Va. Code 22-12-2(a)(6) states that groundwaters and surface waters can be highly interconnected. The quality of any given groundwater can have a significant impact on the quality of groundwaters and surface waters to which it is hydrologically connected.

Long established caselaw in West Virginia limits the use of water to that which is reasonable, beneficial and not harmful to others. In *Morris Associates, Inc. v. Priddy*, 181 W. Va. 588 (1989) Syl pt. 2 states:

> Generally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact. The principle is well established that the owner of land through which a natural watercourse passes is entitled to the flow of the water as it is wont to flow by nature without diminution or alteration, that the owner may insist that the water shall flow in the usual quantity in its natural place, and at its natural height… *McCausland v. Jarrell*, 136 W. Va. 569, 580, 68 S.E.2d 729, 737 (1951). Internal citations omitted.

The status of West Virginia water rights leads the court to conclude that both surface and ground water are held in public trust by the state for the reasonable and beneficial use of such water. Thus, the use of this shared, life essential resource must be reasonable and beneficial, and the extraction, diversion and removal of water must not harm others. Sidewinder's proposed extraction of more than 1.4 million gallons a day is not reasonable and beneficial and creates foreseeable harm to residents of Jefferson County by unreasonably reducing water availability for residential, agricultural, livestock, recreational and other purposes.[4]

Sidewinder argued that the proposed water withdrawal and pipeline are "essential utilities" and are therefore permitted use in any zoning district. The circuit court rejects this argument outright and finds that Sidewinder's concept plan does not fit within the permitted use for essential utilities. Sidewinder, like every other property owner, is limited pursuant to West Virginia law to a reasonable and beneficial use of water, that does not infringe upon the rights of others. Sidewinder is attempting to use the "essential utilities" argument to justify Sidewinder's intent to use the industrial pipeline to divert and extract water from rural properties at an industrial scale to bottle and sell for profit. This is not an essential utility. It is a strawman argument. Sidewinders scale of water extraction is prohibited by Jefferson County's zoning ordinance because it violates the reasonable and beneficial use limitations on water under West Virginia law.

In an attempt to further it's "essential utilities" argument, Sidewinder argues that essential utilities are permitted in all zoning districts and suggests that Sidewinder's agreement with the Charles Town Utility Board ("CTUB") converts its industrial pipeline into a public utility. This argument also fails. Sidewinder intends to build a pipeline to pump water from Parcel 34 to Parcel

[4] The court further finds that the TRIAD Engineering hydrogeological report submitted by Sidewinder is not a reliable estimation of the impact the removal of 1.4 million gallons of water per day will have on the surrounding water users. TRIAD fails to address the karst hydrogeology of the region.

9 for its industrial use. Then lease of the pipeline to CTUB for a nominal amount, $1 a year for 100 years, obfuscates the prohibited commercial supply well in a rural zone. There is currently no need for CTUB to provide a public water supply to private residences within the rural areas surrounding Parcel 34, 33.9 and 9. The agreement with CTUB is an attempt to give the water pipeline the essence of a public utility while transferring millions of gallons of water from a rural parcel to an industrial parcel.

Furthermore, public utilities are still subject to the reasonable use doctrine. *Pence*, 52 S.E. at 705 ("The rule applies to municipal corporations and water companies equally with individuals."); see also Canada v. City of Shawnee, 64 P.2d 694, 695 (Okla. 1936) ("There is no apparent reason for saying that, because the defendant is a municipal corporation, seeking water for the inhabitants of the city, it may do what a private owner of the land may not do."). Thus, this agreement with CTUB does not overcome the violations of the zoning ordinance and the unreasonable use of water. Currently, private wells are the only source of drinking water in Middleway; there is no need for a public water supply. W. Va. Code 22-12-2(a)(3) expressly recognizes the quality of life in rural areas depends upon protecting groundwater to avoid increasing expenses associated with providing treated drinking water supplies to rural households.

The circuit court finds that Sidewinder's concept plan proposed to create a diversion (extraction, bottling and sale) of a natural water course. It is clearly foreseeable that actual damage will occur to other landowners. However, the principles of water rights are well established in West Virginia as set forth in *Roberts v. Martin* and repeatedly affirmed in subsequent case law does not require a showing of actual damage. **Actual damage is not a required showing to have standing to object to the unreasonable use as an infringement of a legal right, which imports damage.** *Roberts v. Martin*, 72 W. Va. 92, 77 S.E. 535, 535 (1913).

The right of a riparian proprietor to have the water of the stream pass his land in its natural flow is a right annexed to the soil and exists as parcel of the land. The right of a riparian owner to the natural flow of the stream is not dependent upon its value to him or the use which he makes of it. The right of a lower riparian owner to the natural flow of the stream is subject only to a reasonable use of the water by the upper riparian owners as it runs through their lands before reaching his. No legal right exists in a riparian owner to divert water of the stream for use beyond his riparian land, and any such diversion and use is an infringement of the rights of lower riparian proprietors who are thereby deprived of the flow. A stream begins at its source, when it comes to the surface, and a diversion of it at the spring head is just as much a diversion as if the water had been taken lower down. Equity has jurisdiction to vindicate the right of a riparian owner to the natural flow of the stream by restraining an unlawful diversion of the water from its natural course. *Roberts v. Martin*, 72 W. Va. 92, 77 S.E. 535, 535 (1913).

Unlike other natural resources that may be extracted, water is necessary for humans to exist.

> "Water in some form is necessary to the very existence of man and to the enjoyment of his land. Without it his land becomes a desert, of no value for agricultural purposes and unfit for habitation. In this respect, water may be **unlike oil or gas, or other such subterranean substances**, which, while useful to man, are not absolutely necessary to his existence or to the enjoyment of his land and may be abstracted therefrom without destroying the value of the land. These substances may be termed merely commercial products…",

Pence v. Carney, 58 W. Va. 296, 52 S.E. 702, 706 (1905).

The court rejects Sidewinder's argument that local governments cannot regulate industrial and/or commercial extraction of groundwater. West Virginia law clearly applies the reasonable and beneficial use doctrine, as set forth in Pence:

> "We must yield assent to the later doctrine of reasonable and beneficial use, which constitutes rather a qualification of the early rule than an announcement of a new rule. The later doctrine seems to us to be sustained by the weight of authority as well as by the weight of reason. What is a reasonable and beneficial use under this later doctrine must be determined in the light of the facts and circumstances appearing in each case as it arises."
>
> Pence v. Carney, 58 W. Va. 296, 52 S.E. 702, 706 (1905)

The water that Sidewinder is proposing to extract, bottle and sell is relied upon by many adjacent rural landowners and the village of Middleway. Intervenors object to the unreasonable and nonbeneficial extraction and use of said groundwater. The court in Pence issued "the right of the plaintiffs to proceed by a bill for an injunction, or otherwise, against the defendants for any future unlawful extraction, use, or waste of said underground water which may be found or obtained upon their lands, resulting in injury to the property or rights of the plaintiffs." Pence v. Carney, 58 W. Va. 296, 52 S.E. 702, 707 (1905). The proposed rate of extraction of groundwater by Sidewinder is not reasonable use in light of all the circumstances, and there are foreseeable risks of harm to others who share the right to use of the water.

Based solely upon the prohibition of the extraction of water for sale as **not permitted in any zoning district**, the JCPC was correct in denying the concept plan. However, the analysis did not conclude at this bar alone, and indeed the other grounds for denial are likewise supported by the facts and law.

JEFFERSON COUNTY ZONING ORDINANCE AND SUBDIVISION AND LAND DEVELOPMENT REGULATION

After the enactment of a zoning ordinance by a county, all subsequent land development shall be done in accordance with the provisions of the zoning ordinance. W. Va. Code 8A-7-10(a). If a use of a property that does not conform to the zoning ordinance has ceased and the property has been vacant for one year, abandonment will be presumed. 8A-7-10(d). Any future use of the land shall conform with the provisions of the zoning ordinance regulation the use where the land, buildings or structures are located.

Sidewinder's concept plan is not limited to Parcel 9, which is zoned Industrial/Commercial. Sidewinder also seeks to develop Parcel 34, the Lake Louise and Turkey Run parcels where the groundwater extraction is proposed to occur at a supply well. Parcel 34 is in "R" rural district of the Zoning Ordinance, which is intended for "low density single family residential development. Zoning Ordinance at § 5.7. The area between Lake Louise and the proposed water bottling facility where the proposed pipeline and truck route will be located are within "R" rural district and the historic village of Middleway is in "V" village district. Neither of these districts are intended for **any sort of industrial use**. The plain language of the zoning ordinance prohibits the industrial land use the Sidewinder concept plan seeks to conduct outside of the water bottling facility in the "R" and "V" districts. There is a vast difference between using water for agricultural purposes, which returns to the local water cycle, and bottling water for sale, thereby removing it from the local water cycle.

Sidewinder argues that W. Va. Code Section 8A-7-10(e) somehow overrides state and local control over the reasonable and beneficial use of ground water. The circuit court points out the basic principle of law that the meaning of any statute must be read in context and interpreted in such a way as to avoid inconsistencies. To that end, the court finds that Section 8A-7-10 must be

read together with other laws governing water use and the caselaw defining reasonable and beneficial use. Specifically, water does not fall within the "natural resources" referenced in W. Va. Code 8A-7-10(e). It is specifically treated in the code different from other natural resources in West Virginia Code 22-26-3, which clearly states that **the waters of the state of West Virginia are held by the state for the use and benefit of its citizens.** Second, **county planning authorities are specifically listed** in the state and local agencies and entities that have regulatory, research, planning and other functions relating to water resources in W. Va. Code 22-26-3(g). Thus, the court rejects Sidewinders argument and finds that W. Va. Code 8A-7-10€ does not apply carte blanche to water to allow Sidewinder to sidestep the land use restrictions on rural and village districts in this instance and do whatever it wishes under the argument that 8A-7-10 overrides the effect of zoning ordinances. It does not, and to argue otherwise flies in the face of statutory and case law protection.

To determine whether a proposed use is permitted in a zoning district, the Zoning Ordinance defines Principal, Conditional, and Prohibited Uses. Principal permitted uses are allowed by right in a particular district. Conditionally permitted uses are only allowed in a particular district with a conditional use permit from the Board of Zoning Appeals. Prohibited uses are not allowed in a particular district. When a concept plan is submitted the first question for review is whether the proposed land use is permitted in the district where the subject property is located. If the proposed use is prohibited, the planning commission cannot be required to "provide direction" as argued by Sidewinder. If the land use contemplated in the concept plan is a prohibited use, the concept plan should be denied ab initio. The court finds in favor of JCPC and the Intervenors finding that Sidewinder's contemplated groundwater extraction and associated

infrastructure of building a pipeline to transport water are prohibited uses for several different and independent reasons.

JCPC correctly concluded that it must not approve and therefore denied Sidewinder's concept plan due to the Zoning Ordinance prohibition of commercial water extraction. The court finds this is a prohibited use pursuant to Zoning Ordinance § 1.3D. of the Zoning Ordinance. If a proposed use is not one in the list of the principal permitted or conditional uses in each zoning district, it shall be prohibited as though it was included in the list of prohibitions. Commercial groundwater extraction appears nowhere in Appendix C of the Zoning Ordinance, which lists the permitted uses in each district.

The court finds that commercial groundwater extraction is not an enumerated use in the zoning ordinance. Commercial groundwater extraction is prohibited and would require an application for a text amendment for commercial groundwater extraction to be added as permitted use. In this case, even if it were permitted as an industrial use, which it is not, it would still be prohibited in "R" rural districts because the supply well is on Parcel 34, zoned "R" rural.

Independent of the court agreeing with the JCPC finding that the proposed use is prohibited, the court further finds that commercial groundwater extraction will violate state law protections, making it a prohibited use under the zoning ordinance pursuant to Zoning Ordinance § 4.4A which provides that "[a]ny existing or proposed use which is determined to conflict with any existing ordinance or laws of Jefferson County or law or regulation of the State of West Virginia or other governmental agency shall be prohibited even though such use may be allowed under the terms of this Ordinance. As explained above, because Sidewinder's contemplated groundwater extraction violates the reasonable and beneficial use doctrine, it is barred by the zoning ordinance that prohibits use determined to conflict with state law. West Virginia follows

the "reasonable and beneficial use" doctrine, whereby landowners only have the right to the reasonable and beneficial use of groundwater. *See Pence v. Carney*, 52 S.E. 702 (W. Va. 1905).

HISTORIC PRESERVATION VIOLATIONS OF ZONING ORDINANCE

In addition to the prohibited groundwater extraction use, the Sidewinder concept plan violates the Zoning Ordinance Section 4.4(C) which states: 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. The court finds that the JCPC was within its authority and made clear and correct factual findings when it denied the concept plan based in part upon the destruction necessary to install a pipeline. Sidewinder's proposed plan to install a water pipeline from Parcel 34 and 33.9 to the bottling facility at Parcel 9, directly through the historic rural village of Middleway poses significant structural risks to historic properties. Middleway was added to the National Register of Historic Places in 1980 and has approximately sixty historical structures from the 1700 and 1800 that have been carefully preserved. The oldest structure was built in 1750. Many of the historical structures are built from logs with stack stone foundations. Middleway's historic district includes a Civil War Hospital, battlefield, and civil war era graves (both marked and unmarked).

The JCPC also was within its authority and made clear and correct factual findings that in addition to the negative impact building the pipeline will have on the historic village, buildings and graves, the heavy tractor-trailer truck traffic from the water bottling facility will cause foreseeable and irreparable harm to the integrity of the buildings listed on the historical registry. As stated previously, Sidewinder estimates its proposed water facility will generate 160 tractor trailer trips daily and over 600 car trips by employees through the narrow streets of the historic village.

CONCLUSION

The circuit court has completed an independent review of the law and facts upon the writ of certiorari filed by Sidewinder Enterprises, LLC d/b/a Mountain Pure, (Sidewinder). The circuit finds that the Jefferson County Planning Commission (JCPC) acted within its authority, was clear and correct in its factual findings and applied the correct principles of law when it issued the denial of Sidewinder's concept plan. The environmental health hazards of withdrawing water from the aquifer beneath the contaminated well and toxic plume alone were grounds to deny the concept plan. In addition, the proposed industrial scale withdraw of water violates state law doctrine governing the reasonable and beneficial use of water. The proposed industry scale removal of water at the rate of 1.4 million gallons a day is not reasonable and will cause foreseeable harm to other water users. The JCPC correctly found that the water extraction for a commercial bottling plant is not one in the list of the principal or conditional uses in any zoning district. The JCPC correctly found that the installation of a water pipeline through Middleway and the commercial tractor trailer and employee traffic impact will destroy the historic preservation of Middleway. Furthermore, the Intervenors in this case have shown to the court foreseeable and irreparable harm if the concept plan were allowed to proceed.

The Clerk shall transmit an attested copy of this Order to all counsel of record.

Bridget M. Cohee
Circuit Court Judge
28th Judicial Circuit

West Virginia E-Filing Notice

CC-19-2025-C-93

Judge: Bridget Cohee

To: Robert G. McLusky
rmclusky@jacksonkelly.com

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 order - case - final was FILED on 12/17/2025 2:11:16 PM

Notice Date: 12/17/2025 2:11:16 PM

Tina Renner
CLERK OF THE CIRCUIT COURT
Jefferson County
PO Box 1234
CHARLES TOWN, WV 25414

(304) 728-3231
circuitclerk@jeffersoncountywv.org

In the Circuit Court of Jefferson County, West Virginia

Sidewinder Enterprises LLC,
Plaintiff,

v.

Case No. CC-19-2025-C-93
Judge Bridget Cohee

Jefferson County Planning Commission, President Mike Shepp, Jefferson County Prosecuting Attorney, Civil Division, Nathan Cochran, Esq., Jefferson County Office of Planning and Zoning, Luke Seigfried, County Planner,
Defendants

FINAL ORDER

Upon the entry of the Order herein entered on December 12, 2025, denying the relief sought by Sidewinder Enterprises, and affirmed the Jefferson County Planning Commission (JCPC) denial of the concept plan for the construction and operation of a water bottling and processing facility, Counsel for Sidewinder informally requested clarification as to whether the Order was a final and appealable Order.

The parties previously agreed that the "Complaint and Verified Petition for Writ of Prohibition, Mandamus and Certiorari" was more properly addressed as a Writ of Certiorari to the circuit court, and the Writ of Prohibition and Mandamus were stayed pending the resolution of the Writ of Certiorari.

The Court conducted an independent review of the record, and at the conclusion of the hearing on the Writ of Certiorari verbally ruled in favor of the JCPC, affirming the denial of the concept plan. At that time, the parties further agreed that the actions seeking Writ of Prohibition and Mandamus were moot given the court finding that the JCPC acted within its authority and did not err in its findings of facts and conclusions of

law denying the concept plan.

WHEREFORE, all claims brought in this action by Sidewinder Enterprises asking this court to vacate the Planning Commission's denial of the concept plan have been fully resolved by the December 12, 2025 Order, which is a final and appealable Order.

FURTHERMORE, this case is dismissed from the Court's active docket.

The Clerk shall transmit an attested copy of this Order to all counsel of record and place this matter among causes ended.

/s/ Bridget Cohee
Circuit Court Judge
28th Judicial Circuit

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

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January 7, 2026

Marcy L. Chandler, RPR
Jefferson County Courthouse
110 N. George St.
Charles Town, WV 25414

Via E-mail: marcy.chandler@courtswv.gov and U.S. Mail

Re: Sidewinder Enterprises, LLC v. Jefferson County Planning Commission, et al.
Civil Action No. CC-19-2025-C-93
Request for Transcript

Dear Marcy:

I am counsel of record for Sidewinder Enterprises, LLC ("Sidewinder") in the above-referenced matter. Sidewinder intends to appeal the decision entered by the Court on December 12, 2025. As part of the appeal, we will need a complete transcript associated with the hearing conducted by the Court on November 10, 2025. Please accept this correspondence as a formal request for a transcript for the November 10, 2025 hearing.

Pursuant to your conversation with my office concerning the costs associated with the transcript, this correspondence shall also confirm that you have waived advance payment for the transcript. Once the transcript is completed, please provide us with an invoice and we will promptly submit payment for the same.

I appreciate your cooperation in this matter. Please contact me with any questions or concerns.

Sincerely,

JACKSON KELLY PLLC

Susan R. Snowden