

14-1209

**FAXED**  
10/29/14

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

**MORGAN COUNTY EMERGENCY  
MEDICAL SERVICES BOARD, INC.,  
and MORGAN COUNTY COMMISSION,  
Plaintiff,**

**v.**

**Civil Action Nos. 13-C-147, 13-C-148, 13-C-149, 13-C-150 and 13-C-151 (Consolidated into 13-C-147)  
Judge Wilkes**

**RANDY WAUGH / WAUGH'S  
MOBILE HOME PARK,  
Defendant.**

**FINAL ORDER GRANTING RELIEF TO PLAINTIFFS MORGAN COUNTY  
EMERGENCY MEDICAL SERVICES BOARD, INC. AND MORGAN COUNTY  
COMMISSION**

This matter came before the Court this 28 day of October, 2014. The Plaintiffs, Morgan County Emergency Medical Services Board, Inc., and the Morgan County Commission, by counsel Richard G. Gay, Esq., and Defendant, Randy Waugh d/b/a Waugh's Mobile Home Park, by counsel Michael L. Scales, Esq., having respectively briefed the Court in writing on the pertinent factual and legal issues, and appeared for oral argument, the Court hereby grants relief to the Plaintiffs, Morgan County Emergency Medical Services Board, Inc., and the Morgan County Commission.

**I. FINDING OF STIPULATED FACTS<sup>1</sup>**

Based on the stipulated facts submitted by the Parties, the Court adopts the stipulated facts as the Court's Findings of Fact as follows:

<sup>1</sup> The Findings of Fact are based wholly on the stipulation of facts contained in the PARTIES' STIPULATION OF FACTS AND JOINT MOTION FOR THE COURT TO DETERMINE ISSUES IN THIS CASE BASED ON STIPULATION; TO VACATE SCHEDULING ORDER ENTERED ON MARCH 4, 2014; AND, TO EITHER ENTER AN ORDER FOR BRIEFING OR ORAL ARGUMENT ON THE ISSUES, OR BOTH filed on April 30, 2014.

1. That Defendant, Randy Waugh, is a natural person, who resides at a residential house with his wife and family at the corner of Morton Grove Road and Timber Ridge Road in Berkeley Springs, Morgan County, West Virginia, who pays his Morgan County Emergency Ambulance Services fee for that location as his residential unit. No claim is being made by Plaintiff for non-payment by Defendant of his emergency ambulance service fees for this location.

2. That MCEMSB is a public corporation which has been incorporated by order of Plaintiff, County Commission of Morgan County, West Virginia pursuant to the provisions of §7-15-4 of the West Virginia Code, and has been charged with the obligation of providing emergency ambulance service for Morgan County, West Virginia pursuant to Article 15, Chapter 7 of the West Virginia Code.

3. That MCEMSB has been assessing and collecting the emergency ambulance service fee from residential units in Morgan County, West Virginia pursuant to the Morgan County, West Virginia Emergency Ambulance Service Fee Ordinance (hereafter referred to as "the Ordinance").

4. The emergency ambulance fee issued only for the deferring of the actual costs of providing the ambulance services, through the MCEMS Board. The amounts collected for the Emergency Ambulance fee are as follows:

|      |              |
|------|--------------|
| 2008 | \$647,011.74 |
| 2009 | \$636,955.13 |
| 2010 | \$648,558.66 |
| 2011 | \$636,487.30 |
| 2012 | \$608,580.36 |

These amounts do not cover the annual operating costs for the emergency ambulance service.

5. That MCEMSB has been filing civil actions in the Magistrate Court of Morgan County, West Virginia for delinquent emergency ambulance service fee against those persons who have not paid their emergency ambulance service fee assessments.

6. That Defendant is the owner of a sixty (60) space mobile home park (Waugh's Mobile Home Park) on U.S. Route 522, south of Berkeley Springs, West Virginia in Morgan County, West Virginia, and forty-five (45) of those sixty (60) mobile home spaces are being rented by Defendant to persons and parties who own their own mobile homes, and only rent the mobile home space from the Defendant. Those forty-five (45) mobile home owners are being assessed by MCEMSB for each's own emergency ambulance service fee.

7. That the remaining fifteen (15) mobile home spaces in Defendant's mobile home park have mobile homes upon them that are also owned by the Defendant. Those fifteen (15) mobile homes and mobile home park spaces are the subject of the claims for emergency ambulance service fees made by MCEMSB in the Magistrate Court Complaints which have been removed to this Court, and are in issue here.

8. Certain of the emergency ambulance service fees against those fifteen (15) mobile homes which are owned by Defendant are for mobile homes which are or were vacant from time to time.

9. That sometime in late June of each year, Defendant provides to the Assessor's Office in Morgan County, West Virginia, a map or description of the sixty (60) mobile home spaces in Waugh's Mobile Home Park which contain the names and addresses of the tenants who are residing at those mobile home lots in Defendant's mobile home park, and also designating those lots which are vacant.

10. That from Defendant's maps, MCEMSB creates its own summary to identify those lots for which it charges Defendant for ambulance fees.

11. That a portion of the Ordinance with which the Defendant takes issue is contained in Section One of that Ordinance, and states in salient portion as follows:

In the event a resident user owns more than one living unit within Morgan County, that resident may not be charged more than one fee provided that such other living unit is permanently unoccupied or occupied only by the resident user. Both occupant and owner shall be jointly and severally liable for payment of such fee for each living unit.

12. That certain of claims made by MCEMSB charge Defendant for emergency ambulance service fees are for those fifteen (15) units, some of which were vacant as of July 1 of the year prior to assessment ("assessment date"), are identified as such on the maps which are presented to the Assessor by Defendant, and identified on the summary prepared by MCEMSB [Ex. 3].

13. The remaining claims made by MCEMSB against Defendant involve Defendant's 15 mobile homes owned by the Defendant which are rented to tenants of the Defendant, but the assessments for emergency ambulance service fee are only made to the Defendant, notwithstanding the fact that the Assessor of Morgan County has been provided the names and addresses of the actual tenants and the name of the actual tenants are listed within the body of the assessment to Defendant.

14. The Ordinance provides that both the Defendant, as owner, and the tenant are jointly and severally liable for the emergency ambulance service fee for those lots that are being rented to tenants, but the emergency ambulance service fee invoice is only sent to the Defendant as the owner of the lot in the mobile home park.

15. The emergency ambulance service fee is assessed the same way the personal property and fire fees are assessed as of July 1 assessment date. The assessments are based upon the tax forms submitted by the taxpayers to the Morgan County Assessor's Office the prior year. Therefore, if the Defendant holds out a mobile home for rent as of the July 1 assessment date, Defendant may not necessarily have a tenant in the mobile home for the entire year, or even when the emergency ambulance bill is sent to the Defendant, but the map/description received from the Defendant is listed effective as of the July 1 assessment date for the assessment of next year's emergency ambulance service fee for each lot assessed. Other than the maps and description requested by the Assessor and provided by the Defendant and short of making a physical inspection of each lot, there is no way for the tax office to know who or if there is an existing occupant at the time of the issuance of the tax bills.

16. That the argument advanced by the Defendant to deny payment of MCEMSB's claims is solely based upon the argument that the emergency ambulance service fee charged Defendant is unconstitutional because Defendant is being assessed those service fees as an unconstitutional *ad valorem* tax upon his ownership of the mobile home spaces and property, and that Defendant is not the residential user with respect to those mobile homes which are being occupied by his tenants; and, being assessed a emergency ambulance service fee for mobile homes that are vacant, and have no residential user. According to Defendant, there should be no charge for vacant units and the tenants should be solely liable for the emergency ambulance service fees, not Defendant.

17. That but for the foregoing defenses, Defendant does not object nor resist the amounts being claimed by MCEMSB as being due and for which Defendant may be liable under the Ordinance, and the parties stipulate that those amounts due, but for Defendant's defenses

contained hereinabove, in the total amount of \$9,372.53, with prejudgment interest accruing thereafter at 7% per annum.

18. That MCEMSB claims that Defendant owes \$358.31 for delinquent emergency ambulance service fees that are for the 5 mobile homes that Defendant asserts were vacant on the assessment date of July 1 prior to the year of assessment, and \$2,581.99 for delinquent emergency ambulance services for lots that Defendant was renting to tenants. See copy of summary sheet attached hereto as Exhibit 3, not including prejudgment interest and court costs.

19. That Defendant has demanded declaratory relief from the Court as to whether MCEMSB solely has the authority to file civil actions in the Magistrate Court, or otherwise in Circuit Court, to collect the emergency ambulance service fee from delinquent payers without the County Commission as a party plaintiff.

20. In addition, the Plaintiffs have demanded declaratory relief as follows, in addition to the judgment as to the delinquent ambulance fees, interest, and court costs:

- a) That the Court declare that the Morgan County Commission has the express power pursuant to W. Va. Code §7-15-4, et seq. to create the Morgan County Emergency Medical Services Board;
- b) That the Court declare that the Morgan County Commission has the authority pursuant to W. Va. Code §7-15-4 by the creation of the Morgan County Emergency Medical Services Board to authorize the Morgan County Emergency Medical Services Board to collect all delinquent ambulance fees to; and
- c) That the Court declare that the Morgan County Emergency Medical Services Board, as a public corporation has the power, both express and implied,

to institute legal proceedings in its own right for the collection of delinquent ambulance fees.

21. That should the Defendant not prevail in this civil action, in whole or in part, the parties agree that Defendant need not post any more than \$4,000.00 cash with the Clerk as a *supersedeas* or appeal bond to appeal to the Supreme Court of Appeals of West Virginia and for a stay.

## II. CONCLUSIONS OF LAW

### A. Standard of Review

A *de novo* review is appropriate standard of review in this case. In *McClure v. City of Hurricane*, 227 W. Va. 482 (2010), the Court stated:

“... A *de novo* standard of review also governs the interpretation of any statutory provision, or in this case, a municipal ordinance as it involves a purely legal question. See Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't of W.Va.*, 195 W. Va. 573, 466 S.E.2d 424 (1995).”

*Id.* at 485.

### B. Rules for Construing Statutes

The West Virginia Supreme Court of Appeals has developed a significant body of law to assist in construing statutes.

W. Va. Code §7-15-18 specifically provides for the liberal construction of the statute at issue here in the creation and application of emergency ambulance service by stating:

This article shall constitute full and complete authority for the provision of emergency ambulance service within a county by a county commission and for the creation of any authority and carrying out the powers and duties of any such authority. The provisions of this article shall be liberally construed to accomplish its purpose and no procedure or proceedings, notices, consents of approvals shall be required in connection therewith except as may be prescribed by this article.

*Id.*

Syllabus Pt. 1 of *Town of Burnsville v. Kwik-Pik, Inc.*, (although applying to the interpretation of a municipal ordinance) states the presumptions for interpreting statutes and ordinances.

The rules for construing statutes also apply to the interpretation of municipal ordinances. There is generally a presumption that an ordinance is valid when it appears that its subject matter is within a municipality's power and it has been lawfully adopted. The burden of proof is on the person asserting that the ordinance is invalid.

*Town of Burnsville v. Kwik-Pik, Inc.*, 185 W. Va. 696, 697 (1991). See also Syl. Pt. 5, *Far Away Farm v. Jefferson County Board of Zoning Appeals*, 22 W. Va. 252 (2008)

And, the West Virginia Supreme Court has provided specific rules for interpreting statutes:

When faced with a matter of statutory construction, the first inquiry involves an assessment of the specific statutory language at issue as well as a consideration of the underlying legislative intent. See *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. at 587, 466 S.E.2d at 438 ("We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed."); Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975) ("The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature."). If the language used by the Legislature is plain, the statute should be applied and not construed. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). However, if the statutory language is not clear, the statute is ambiguous and must be construed to ascertain the meaning intended by the Legislature. "A statute that is ambiguous must be construed before it can be applied." Syl. pt. 1, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992).

*Griffith v. Frontier West Virginia, Inc.*, 719 S.E.2d 747, 754 (W. Va., 2011)

### C. Rules for Construing Ordinances

Courts of this state presume a county or municipal ordinance to be valid unless it is unreasonable. In *Ellison v. City of Parkersburg*, 168 W. Va. 468 (1981), the Supreme Court of Appeals held:

The standard of review of an ordinance exercising such power as that granted by W. Va. Code, 8-13-13 [1971] is the reasonableness of the ordinance. *See Harvey v. Elkins*, 65 W. Va. 305, 64 S.E. 247 (1909). The determination of whether an ordinance reasonably serves the purpose for which it was enacted is initially made by the municipal authorities. Their passage of the ordinance gives it a presumptive validity and a court should not hold the ordinance to be invalid unless it is clear that the ordinance is unreasonable. *Henderson v. Bluefield*, 98 W. Va. 640, 127 S.E. 492 (1925).

*Id.* at 472. Accordingly, the Ordinance at issue in the instant case will be held valid unless it is shown by the Defendant to be an unreasonable method of collecting emergency ambulance fees.

**D. The Morgan County Commission is Empowered by Statute to Create an Ambulance Authority, and to Delegate to Said Authority All Powers which the Commission May Exercise in the Administration of Emergency Ambulance Services.**

W. Va. Code §7-15-4 authorizes the Morgan County Commission<sup>2</sup> to create an emergency ambulance service authority and states that authority<sup>3</sup> shall constitute a public corporation providing:

“Except as hereinafter provided and in addition to all other duties imposed upon it by law, the county commission shall cause emergency ambulance service to be made available to all the residents of the county where such service is not otherwise available: Provided, however, That the duty imposed upon county commissions by this article shall not be construed in such manner as to impose a duty to cause such emergency ambulance service to be provided unless the commission shall make an affirmative determination that there are funds available therefor by the inclusion of a projected expenditure for such purpose in the current levy estimate, and in the event that such county commission shall make such determination the commission shall not be under a duty to cause such service to be provided beyond a level commensurate with the amount of funds actually available for such purpose.

*The county commission may provide the service directly through its agents, servants and employees; or through private enterprise; or by its designees; or by contracting with individuals, groups, associations, corporations or otherwise; or it may cause such services to be provided by an authority, as provided for in this article; and any municipality or county, or both, or any two or more contiguous counties, or any combination thereof, may create an authority, each participating government, acting individually, of an appropriate ordinance or order. Each authority shall constitute a public corporation, and as such, shall*

<sup>2</sup> The Morgan County Commission is also called the “Commission” herein.

<sup>3</sup> The Ambulance Authority is called the MCEMSB and also called the “Authority” herein.

*have perpetual existence.* The authority shall be known by such name as may be established. (emphasis added)

Along with the authority to provide the ambulance service, it is uncontested in the present case that the Commission has the statutory authority to collect emergency ambulance service fees. W. Va. Code § 7-15-17 governs the imposition and collection of special emergency ambulance service fees by the County Commission:

A county commission may, by ordinance, impose upon and collect from the users of emergency ambulance service within the county a special service fee, which shall be known as the "special emergency ambulance service fee." The proceeds from the imposition and collection of any special service fee shall be deposited in a special fund and used only to pay reasonable and necessary expenses actually incurred and the cost of buildings and equipment used in providing emergency ambulance service to residents of the county. The proceeds may be used to pay for, in whole or in part, the establishment, maintenance and operation of an authority, as provided for in this article: Provided, That an ambulance company or authority receiving funds from the special emergency ambulance fees collected pursuant to this section may not be precluded from making nonemergency transports."

W. Va. Code §7-15-17.

One issue raised by Defendant is whether the Authority can step into the shoes of the Commission and collect the delinquent ambulance fees without the Commission being a party to those collection efforts. The essential question before the Court is whether that delegation of authority to the MCEMSB lawfully included the ability of the MCEMSB to sue to collect delinquent fees without joining the Morgan County Commission as a co-plaintiff. For the reasons stated herein, the Court finds that the Authority can collect the delinquent fees without the Commission being a party because the Commission, by creating the Authority, has imbued the authority with all of the powers in the statute and delegated its authority based on the creation of the Ambulance Authority.

W. Va. Code, *supra*, clearly describes the Authority as a "Public corporation." It is therefore apparent that the legislature intended to authorize the County Commission to create the Ambulance Authority, and that the Authority act as a public corporation.

The term "public corporation" has a well-recognized legal significance and is generally held to be one created by the State for political purposes and to act as an agency in the administration of government. We gave this explanation in *State ex rel. Sams v. Ohio Valley General Hospital Association*, 149 W.Va. 229, 140 S.E.2d 457, 460 (1965), in which we quoted this language from *Levin v. Sinai Hospital of Baltimore City*, 186 Md. 174, 46 A.2d 298 (1946): " 'A public corporation is an instrumentality of the State, founded and owned by the State in the public interest, supported by public funds, and governed by managers deriving their authority from the State.' " See also *Meisel v. Tri-State Airport Authority*, 135 W.Va. 528, 64 S.E.2d 32 (1951).

*White v. Berryman*, 187 W.Va. 323, 329-330 (1992).

The Ambulance Authority is expressly empowered by statute to:

- (a) To sue and be sued, implead and be impleaded;
- (b) To have and use a seal...;
- (c) To make and adopt all rules and regulations and bylaws as may be necessary or desirable to enable it to exercise the powers and perform the duties conferred or imposed upon it by the provisions of this article;
- (d) To provide emergency ambulance service, maintain and operate such service, and employ, in its discretion, planning consultants, attorneys, accountants, superintendents, managers and such other employees and agents as may be necessary in its judgment and fix their compensation;
- (e) To acquire by grant, purchase, gift, devise or lease and to hold, use, sell, lease or otherwise dispose of real and personal property of every kind and nature whatsoever...;
- (f) To enter into contracts and agreements which are necessary, convenient or useful to carry out the purposes of this article with any person...;
- (g) To enter into contracts and agreements for superintendence and management services with any person...;
- (h) To execute security agreements, contracts, leases, equipment trust certificates and any other forms of contract or agreement...;

- (i) To apply for, receive and use grants...;
- (j) To encumber or mortgage all or any part of its facilities and equipment;
- (k) To render all services permitted pursuant to article four-c, chapter sixteen of this code, including, but not limited to, emergency and nonemergency transportation; and
- (l) To do any and all things necessary or convenient to carry out the powers given in this article unless otherwise forbidden by law.

W. Va. Code §7-15-10 (portions omitted)

Particularly notable, W. Va. Code, 7-15-10(1) authorizes the authority to do any and all things *necessary or convenient* to carry out the powers given in this article [15], unless otherwise forbidden by law. The Defendant argues that the language of W. Va. Code §7-15-17 requires the County Commission to "... impose upon and collect from the users of emergency ambulance service..." the fee here being Seventy-Five Dollars (\$75.00) per "resident user" of a "living unit" as defined in the Morgan County Ambulance Fee Ordinance. While a colorable argument can be made that the collection of delinquent fees by the Ambulance Authority without joining the County Commission is not *necessary* to the execution of the other enumerated duties, it is certainly *convenient* to allow the EMS Board to manage its own financial affairs without diverting the time and attention of the County Commission to fee collection.

Further, the rule against absurdity states that "... a well established cannon of statutory construction counsels against ... an irrational result [for] [i]t is the duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results." *Charter Communications VI, PLLC v. Community Antenna Service, Inc.*, 211 W.Va. 71, 77 (2002) (citations omitted), as quoted in *Dunlap v. Friedman's, Inc.*, 213 W.Va. 394, 401 (2003) (Davis, J., dissenting). "As helpful as the various rules of statutory construction

may be in determining legislative intent, perhaps the soundest guidance comes from the Supreme Court's admonition that we give the language of a statute a "commonsensical meaning." *State v. McGilton*, 729 S.E.2d 876, 883-884 (W.Va. 2012), citing *United States v. Universal Corp.*, 344 U.S. 218, 221 (1952).

The enabling provisions of W.Va. Code §7-15-10 (the Emergency Ambulance Service Act of 1975) are designed to fully empower the Ambulance Authority once the Authority is created by the County Commission to administer the emergency services program in Morgan County. The Defendants' argument, that the Ambulance Authority created at the election of the County Commission lacks certain aspects of the Commission's statutory authority, would defy rules of statutory construction and place an unnecessary hurdle in the administration of the ambulance service. It is unlikely that this was the intent of the legislature in enacting the statute. Here, the most commonsensical interpretation of W. Va. Code § 7-15-4 is that an Ambulance Authority created pursuant to that section steps into the shoes of the County Commission, assuming all powers the Commission would have in a like role.

Additionally, W. Va. Code §7-15-4 authorizes the Commission to "provide the service directly through its agents, servants and employees; or through private enterprise; or by its designees; or by contracting with individuals, groups, associations, corporations or otherwise; or it may cause such services to be provided by an authority." By extending several options for administering the service, the intent of the legislature appears to be to give the County Commission broad latitude in doing so. These are not stated as conditional options; it must be assumed that if the Commission is empowered to take a certain action, an Ambulance Authority created at the commission's election under this statute would step into the shoes of the Commission, and exercise identical powers. A conclusion that a county commission which

elects to administer its ambulance service via a created authority may delegate every function thereof except for the collection of fees contradicts the aforementioned principles of statutory construction.

The Defendant, on the other hand, relies primarily on a 2013 opinion letter by the West Virginia Attorney General to the Hardy County Prosecuting Attorney's Office, wherein the Attorney General's Office addressed this very question, advising that an ambulance authority created under the statutory provisions considered herein was not empowered to collect fees independent of the creating county commission. *See* Opinion of the Attorney General's Office Regarding the Collection of Unpaid Emergency Ambulance Service Fees (November 8, 2013) (hereinafter "AG Opinion"). In reaching this, the Attorney General takes the statutory language "[a] county commission may, by ordinance, impose upon and collect from the users of emergency ambulance service within the county a special service fee" to strictly mean that the collection of these fees is a function only of the county commission to the exclusion of an Ambulance Authority should the county elect to create one (emphasis supplied). *See id.* The Attorney General goes on to opine that according to the maxim of *expression unius est exclusion alterius*, if the legislature intended the collection of delinquent fees to be a power of the Ambulance Authority, it would have been included in the "detailed" enumerated list of powers vested in an Ambulance Authority. *See* AG Opinion; *See also* W. Va. Code § 7-15-10.

As an initial matter, it should be stated that opinions of the Attorney General are not binding on this Court.

Opinions of the Attorney General are not considered as precedent to be followed by this Court. *State v. Conley*, 118 W.Va. 508, 190 S.E. 908. *See McKee v. Foster*, 219 Or. 322, 347 P.2d 585. The indication in the Attorney General's opinion that the lottery statute of this state must be strictly construed is not the law in this state. Code, 61-10-14, as amended, requires that all laws for suppressing lotteries be construed as remedial

and therefore are liberally construed. *State v. Matthews*, 117 W.Va. 97, 184 S.E. 665.

*State v. Wassick*, 156 W.Va. 128, 133-134 (1972). Considering such, the Defendant's, invocation of *expression unius est exclusio alterius* is in this context unpersuasive. A principle that would suggest that the legislature did not intend an Ambulance Authority to exercise powers not expressly enumerated in W. Va. Code § 7-15-10 is seemingly inapplicable in the presence of a *necessary or convenient* clause.

Consequently, the Court holds the Authority has the express power to collect fees because that power was lawfully delegated to it by the County Commission pursuant to statute, W. Va. Code §7-15-4. The delegation of that power is not beyond the scope of the enabling act, but instead complies with the act.

**E. The Morgan County EMS Board May Collect Emergency Ambulance Fees Assessed to Rental Properties from Landlords and Tenants Jointly and Severally.**

Defendant claims the emergency ambulance fee is being assessed to him unlawfully as pertaining to the rental mobile homes in question. This ordinance was enacted pursuant to the state enabling statute for the creation of ambulance authorities, which states that “[a] county commission may, by ordinance, impose upon and collect from the users of emergency ambulance service within the county a special service fee, which shall be known the “special emergency ambulance service fee.” W. Va. Code § 7-15-17 (emphasis supplied). Defendant asks the Court primarily to find the entire ordinance facially invalid as an ad valorem tax violative of the equal and uniform taxation clause of W. Va. Const. Art. X, § 1, and, in the alternative, invalidate only the joint and several liability provision.

The crux of the Defendant's argument here is that he is not a “user” of emergency ambulance services at those homes because he does not reside on the premises, and thus may not

be assessed the emergency ambulance service fee. In support of his argument, the Defendant cites *Clay County Citizens for Fair Taxation v. Clay County Commission*, 192 W. Va. 408 (1994). In that opinion, the Supreme Court of Appeals of West Virginia found that a \$25 fee assessed to each household, but not to mineral owners or owners of undeveloped land, did not violate the equal and uniform taxation provision of W. Va. Const. Art. X, § 1, because it was a fee assessed to the users of a service rather than an additional ad valorem tax. See *id.* In so finding, the Court defined the word “user” in W. Va. Code § 17-5-17 to mean “any person to whom emergency ambulance service is made available under the provisions of the article.” The Court in *Clay County Citizens* went on to state that a service fee is valid and enforceable where it “succeeds in tying the burden of the fee to the usage of the service in a sufficiently reasonable way to satisfy requirements of W. Va. Code § 7-15-17.” *Id.* at 411.

Defendant argues that the fee at issue is more akin to the fee invalidated by the Supreme Court of Appeals in *McCoy v. City of Sistersville*, 120 W. Va. 471 (1938). In that case, the Court found, as the Defendant asserts in the instant case, that Sistersville’s ordinances collecting various fees for such services as fire protection, street lighting, garbage collection, and sewage to be an additional ad valorem tax burdening the owners of property rather than the users of services. *Id.* The Court found all but one of the services at issue to be public improvements used by the community at large, regardless of property ownership, while the fee was charged only to property owners. *Id.* In addition, the *McCoy* Court rejected the argument made by the Plaintiff in the instant case, that the costs assessed to owners of rental property can be passed on to tenant users through increased rent as inherently unreliable. *Id.*

However, the *McCoy* opinion was rendered under W. Va. Code § 8-4-20 (1933), a precursor statute governing the police power of municipal corporations. The modern incarnation

of the statute, W. Va. Code § 8-13-13 (1971), features a grant of “plenary power and authority” not present in the 1933 statute. See *City of Princeton v. Stamper*, 195 W. Va. 685 n. 5 (1995). The “plenary power and authority” language was added pursuant to the Supreme Court of Appeals’ opinion in *Ellison v. City of Parkersburg*, 168 W. Va. 468 n. 1 (1981), discussed at length below. See *Stamper* at n. 5.

The County Commission, and therefore the Ambulance Authority, is equally empowered to the extent of a municipal corporation under the new statute. W. Va. Code § 7-15-18 states that the article constitutes a delegation of “full and complete authority for the provision of ambulance services within a county by a county commission and for the creation of any authority and carrying out the powers and duties of any such authority.” *Id.* Further, the statute provides that the powers granted to the county commission therein should be “liberally construed to accomplish its purpose...” *Id.* A similar comparison between the powers of municipalities under § 8-13-13 and county commissions under § 7-15-17 by the Court in *Clay County Citizens*, finding the fee at issue in that case to be similar to the fee in dispute in *Ellison*, relying in large part on that case in upholding Clay County’s ambulance fee scheme discussed above. See *Clay County Citizens* at 412.

A nearly identical collection scheme to the one presently employed by Morgan County was found to be reasonable by the Supreme Court of Appeals in *Ellison*. Therein, the Court found that “in operation, [the system of billing the owner primarily] should work fairly and effectively to serve the purpose of placing the cost of services on the user of the service.” *Ellison* at 473. The Parkersburg ordinance, in relevant part, read as follows:

Each property owner or occupant of a residential unit shall be responsible for the payment of a charge of Forty-eight Dollars (\$48.00) per year for solid waste collection

and disposal service per residential unit... (b) The rates and charges specified by Section (a) herein shall be billed to the owners of each and every residential unit provided, that upon application by the occupant of any residential unit, filed with the Director of Finance and accompanied by an appropriate affidavit showing the occupant's status as such, such bills may be rendered to the occupant.

Parkersburg Code § 955.07 (1979). Similarly, the Morgan County ordinance at issue provides that:

In the event a resident user owns more than one living unit within Morgan County, that resident may not be charged more than one fee, provided that such other living unit is permanently unoccupied or occupied only by the resident user. Both occupant and owner shall be jointly and severally liable for payment of such fee for each living unit.

Morgan County, West Virginia Special Emergency Ambulance Service Fee Ordinance (hereinafter "Ordinance") at 3.

The reasoning of the *Ellison* Court is equally pertinent here. Like in *Ellison*, the party challenging the ordinance argues that a fee for a service provided by a county-created authority may not be assessed primarily to a non-resident owner, because they do not constitute a "user" as contemplated by the state legislature.

"The [party challenging the validity of a fee structure] ha[s] the burden of proving that the... ordinance clearly failed to reasonably serve the purpose for which it was enacted." *Cooper v. City of Charleston*, 218 W. Va. 279, 287 (2005). As noted by both the *Ellison* Court and the Plaintiff, the residency of tenants is fleeting, and direct collection therefrom would place a great burden on the Commission to assess fees in the correct shares to the correct tenants. The Defendant appears correct in his assertion that the tenants of property are the true users of the ambulance service; and the Courts of this state have already found billing the owner of property primarily is a reasonable method of assessing the fee to these true users, leaving the matter between the private parties to the lease as to who will be the ultimate payer.

Accordingly, this Court finds that the provisions for ambulance service in the Morgan County Ordinance “ties the burden of the fee to the usage of the service in a sufficiently reasonable way” to pass statutory and constitutional muster. See *Clay County Citizens* at Syl. Pt. 1. The ambulance fee here supports the provision of ambulance service. Additionally, the assessment of emergency ambulance fees to owners and tenants of rental property jointly and severally reasonably serves the purpose for which it was enacted, and the fee structure at issue is thus valid. See *Cooper* at 287.

**F. Exempting Only Structures which are Permanently Unoccupied is a Reasonable Method of Assessing the Emergency Ambulance Fee, and Defendant has Failed to Pursue this Remedy.**

Defendant argues that he should not be liable for the fee if the mobile home rental unit is vacant at the time he supplies the information to the Assessor’s office (prior to July 1 of each year). As is the case with many other property assessments, due to the administrative burden of determining the status of a property throughout the year, a residence is either “occupied” or “unoccupied” for the purposes of this statute as of the assessment date of July 1. In the case that it is unoccupied, the fee is billed solely to the owner, after which, if the owner believes he has been assessed a fee in error for a permanently unoccupied property, the Morgan County Ordinance provides that:

If a user believes that he/she is erroneously charged an ambulance service fee, the EMS agency shall provide, upon the resident’s request, an exoneration form. The form shall be filled out by the resident/owner and returned to the EMS agency. The EMS agency shall, within a reasonable time, cause to be investigated any request for exoneration... If the Commission does not exonerate or modify as requested by the property owner, an appeal may be filed, in pursuance to this article, with the Circuit Court of Morgan County.

Ordinance at 3.

To support his contention, Defendant returns to *Clay County Citizens Court's* acknowledgement that owners of undeveloped land do not use ambulance services to argue that, likewise, there are no users of ambulance services at vacant residences. See *Clay County Citizens* at 410. Defendant goes on to assert that, in order to be equitably applied, assessment of this fee must be treated like any other property assessment matter: its status on the date of assessment, occupied or otherwise, must govern whether there will be a fee assessed for that year. According to Defendant, this approach would satisfy both the equity angle by not assessing a fee to the owner of an unoccupied residence, and also relieve the assessor of an administrative burden by relying on a single date of assessment to determine status.

However, West Virginia courts "will not invalidate a fee merely because a litigant is able to suggest other possible ways of taxation and opine that such examples are more equitable." *Cooper* at 279. Put another way, the fee assessment practice employed need not be *the most* equitable method possible in order to be upheld; it need only be *an* equitable method. Further, Plaintiff's concerns about the enforceability of Defendant's suggested collection method against unscrupulous landlords are well-received. As pointed out by Plaintiff, dishonest owners of rental property wishing to avoid payment of ambulance fees assessed on July 1 could begin to arrange all of their leases to run from July 2 to June 30, completely dodging the assessment of ambulance fees. In order to avoid such a practice, it is reasonable for the Commission to employ a procedure which ensures that a currently unoccupied property will remain so for the foreseeable future before exonerating its owner.

In construing the application of the ordinance, and in balancing the duties and equities between these parties, the Court finds that it may be reasonably presumed, in the absence of special circumstances, that properties held out for rent are likely to be occupied in the future.

Not all rental properties are so situated, and the Commission has provided a mechanism through which Mr. Waugh may contend that some of his trailers fall into that category, of which he has failed to avail himself. The intent of the Ordinance is to charge those persons with property meeting the definition of "living unit" for the fee. It is up to the owner of the "living unit" to pursue an erroneous assessment of fees. Thus, because Defendant's presently unoccupied rental units have not been exonerated as permanently unoccupied, a fee is owed for each of the units for the years in question.

### III. CONCLUSION

In view of the above, the stipulated facts, briefs and arguments in this case, and the entire record, the Court holds that:

- a) That the lawful delegation of power over the provision of emergency ambulance services to the Morgan County EMS Board includes the power of the authority to collect fees and costs, and this power is not beyond the scope of the statute;
- b) That the Emergency Ambulance Service Fee is a valid user fee and not an ad valorem tax;
- c) That the collection of emergency ambulance fees for rental properties from landlords and tenants jointly and severally is a valid method of collection;
- d) That collection of a fee from all rental properties not exonerated as "permanently unoccupied" is a reasonable method of fee assessment; and
- e) That the Defendant's units offered for rent have not been exonerated as "permanently unoccupied" and, consequently, a fee is owed for each rental unit for the years in question.

This is the FINAL ORDER of this Court. The Court notes the objection of all parties to any adverse rulings herein. The Clerk shall enter this Order as of this date, provide a copy of this Order to all parties, through counsel, and retire this case and place it among the causes ended, and shall provide certified copies of it to the following counsel of record:

**Counsel for Plaintiffs:**  
Richard G. Gay, Esq.  
31 Congress Street  
Berkeley Springs, West Virginia 25411

**Counsel for Defendant:**  
Michael L. Scales Esq.  
314 W. John Street  
PO Box 6097  
Martinsburg, West Virginia 25402

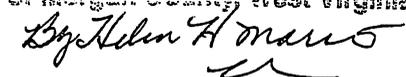
*CC: 10-29-14  
Richard Gay  
Michael Scales*



CHRISTOPHER C. WILKES, JUDGE  
TWENTY-THIRD JUDICIAL CIRCUIT  
MORGAN COUNTY, WEST VIRGINIA

GUARDIAN  MAG   
DOM  MH   
CIVIL  JUVENILE   
CRIMINAL  ADM   
ORDER BOOK 45  
PAGE 281 INITIAL  
DATE 10-29-14

A TRUE COPY, ATTEST:

  
Clerk of the Circuit Court  
of Morgan County, West Virginia  


**FILED**

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

STAY

MORGAN COUNTY EMERGENCY  
MEDICAL SERVICES BOARD, INC.  
and COUNTY COMMISSION OF  
MORGAN COUNTY, WEST VIRGINIA,

Plaintiffs

v.  
  
RANDY WAUGH/WAUGH'S  
MOBILE HOME PARK,

Civil Action Nos. 13-C-147, 13-C-148,  
13-C-149, 13-C-150 and 13-C-151  
(Consolidated into 13-C-147)  
Hon. Christopher C. Wilkes

Defendant.

**ORDER GRANTING STAY PENDING APPEAL TO THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**THIS MATTER** came before the Court pursuant to the motion by Defendant for a stay of the decision and execution of the judgment entered by the Court pending an appeal by the defendant of this Court's Order of October 28, 2014 to the Supreme Court of Appeals of West Virginia.

It appearing to the Court the parties had stipulated in their Stipulation of Facts that should Defendant not prevail in this civil action, the following would apply:

21. That should the Defendant not prevail in this civil action, in whole or in part, the parties agree that Defendant need not post any more than \$4,000.00 cash with the Clerk as a *supersedeas* or appeal bond to appeal to the Supreme Court of Appeals of West Virginia and for a stay.

It appearing to the Court the parties have agreed that no more than \$4,000.00 need be paid by the Defendant as a *supersedeas* or appeal bond, it is **ORDERED** as follows:

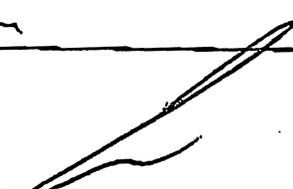
1. That Defendant, upon posting a \$4,000.00 cash bond with the Clerk of this Court, is granted a stay of the execution of the Court's judgment and order of October 28, 2014, for an appeal to the Supreme Court of Appeals of West Virginia.

2. That the stay shall remain in full force and effect until further order of this Court.

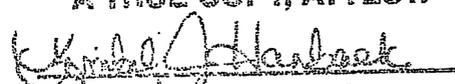
The Clerk is directed to mail an attested copy of this Order to counsel of record: Michael

L. Scales, Esq. and Richard G. Gay, Esq.

ENTER this 6 day of November, 2014.

  
\_\_\_\_\_  
Christopher C. Wilkes, Judge of the Circuit Court of Morgan County, West Virginia

*CC: 11-6-14  
Michael Scales  
Richard Gay*

A TRUE COPY, ATTEST:  
  
\_\_\_\_\_  
Cynthia A. Harbo  
Clerk of the Circuit Court of Morgan County, West Virginia

*By John F. Mans*

GUARDIAN  MAQ   
DOM  MH   
CIVIL  JUVENILE   
CRIMINAL  ADM   
ORDER BOOK 45  
PAGE 321 INITIAL  
DATE 11-6-14