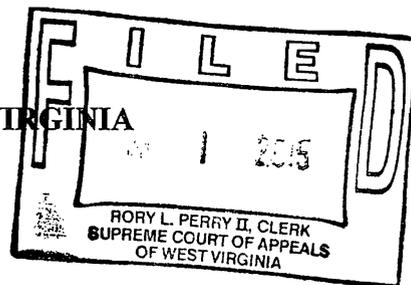


**BRIEF FILED  
WITH MOTION**

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 14-1118**



**HARDY COUNTY COMMISSION; and  
J. MICHAEL TEETS, COMMISSIONER and  
WILLIAM E. KEPLINGER, JR., COMMISSIONER,  
in their official capacity only, Petitioners,**

**vs.**

**JOHN A. ELMORE, B. WAYNE THOMPSON,  
OVID NEED and BONNIE L. HAGGERTY, Respondents.**

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Hon. Andrew N. Frye, Jr., Senior Status Judge  
Circuit Court of Hardy County  
Civil Action 14-C-17

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## INTRODUCTION

The Petitioner, Hardy County Commission (hereafter HCC), incorporates by reference its original brief. HCC adopted an ordinance to establish an ambulance fee to provide emergency ambulance service to the citizens of Hardy County as permitted by West Virginia Code, § 7-15-17. In furtherance of its efforts to provide emergency ambulance service, it purchased at a foreclosure sale the “Baker building”, an existing emergency medical services building<sup>1</sup> which had been vacated by Mathias-Baker Voluntary Emergency Squad, Inc., (hereafter, MBRS) a private ambulance service previously housed in that facility. HCC created the Hardy County Emergency Ambulance Authority by action at a meeting in the late Fall of 2012 when the financial difficulties of MBRS had persisted for over a year. The commission appointed board members by February 2013, provided funding for its operations, and considered multiple options concerning how emergency ambulance service should be provided. Respondents are Hardy County citizens who challenged the adoption of the ordinance and the purchase of the Baker building by filing a civil action (1) to remove two of the members of HCC and (2) to annul the ambulance service fee ordinance and to void the purchase of the Baker building. It is from the backdrop of the actions of HCC in adopting the ordinance and purchasing the building that the underlying lawsuit and this appeal arose.

HCC declines to restate all that was in its prior Brief. The following issues arise from the rulings of the Circuit Court below and HCC seeks reversal of those rulings:

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<sup>1</sup> Both a county commission and a county ambulance authority are authorized to purchase and lease real property in furtherance of their statutory powers and duties. See, West Virginia Code, §§ 7-3-5 and 7-15-10.

1. West Virginia Code §7-15-18 of the Emergency Ambulance Service Act of 1975 (EASA) precludes the necessity of notices, agendas, and procedures which otherwise are required under the Open Governmental Proceedings Act (OGPA) in West Virginia Code §6-9A-3, §6-9A-4, §6-9A-5 and by West Virginia Code §7-1-2.
2. Even assuming, *arguendo*, that some violations of the OGPA and §7-1-2 occurred with respect to the earlier proceedings of the County Commission, the Circuit Court erred as a matter of law by permanently enjoining the County Commission from conducting future proceedings on the same subject matter, if such proceedings comply with the OGPA and §7-1-2.
3. The Circuit Court erred as a matter of law by enjoining the County Commission from legislatively enacting an emergency ambulance service fee unless, and until, ambulance service is otherwise not available to all residents of Hardy County.
4. The Circuit Court erred as a matter of law by failing to give preclusive effect to the findings of fact of a three-judge panel in litigation between these same parties involving the same subject matter.
5. The Circuit Court abused its discretion by (a) excluding evidence that any violation of the Open Government Proceedings Act was unintentional; (b) by excluding evidence that the County Commission's challenged actions were a good faith attempt to comply with its duty to provide emergency ambulance services to the County's residents, including evidence regarding delayed response times and scratched calls in remote areas of the County imposing remedies which exceeded the permissible remedies for violations of the OGPA available under West Virginia Code §6-9A-3(i), §6-9A-6 and §6-9A-7(b).
6. The Circuit Court erred as a matter of law in awarding attorney fees and expenses to the

Respondents in the amount of \$112,000.00, for the reasons set forth in HCC's prior brief.

Wendy J. Miller, John A. Elmore, B. Wayne Thompson, Ovid Need, and Bonnie L. Haggerty (hereafter, Respondents) have raised several issues in their Response Brief. As established in Petitioner's earlier Brief and in its discussion below, Respondents' arguments lack merit, the Circuit Court abused its discretion and committed reversible error, and its orders must be reversed.

### ARGUMENT

Petitioner submits that Respondents' Brief is much stronger on rhetoric than on the legal precedent. In this Reply, HCC will respond to the principal arguments raised by the Respondents in their Response Brief.<sup>2</sup>

#### **Burden of proof:**

Respondents devote considerable discussion to the degree of proof required to sustain a finding of a violation of 6-9A-1, et seq., as opposed to that required in a proceeding for removal of a county commissioner. HCC agrees that the threshold in a removal proceeding is by "clear and convincing evidence" while for a proceeding brought under 6-9A-6 the burden is "by a preponderance of evidence". However, it has never suggested that the burden of proof required of Judge Frye was other than "by a preponderance." The distinction is a non-issue in this appeal.

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<sup>2</sup> The issues addressed in the Brief and Reply Brief of J. Michael Teets and William E. Keplinger are in accord with much of what is raised by HCC in its appeal, although the issue of the propriety of the monetary judgment issued against them by Judge Frye is not raised by HCC in its appeal as that issue is a personal individual matter. Appellate discussion of that issue is covered in detail in the separate appeals of Teets and Keplinger. It was mentioned only in a passing comment in HCC's appeal as an observation that the issuance of personal judgments against county commissioners for non-criminal, discretionary acts such as those occurring in the underlying case may have as adverse impact upon the willingness of others State to seek the office of commissioner or other elective and appointive offices. To the extent that the Brief and Reply Brief of Teets and Keplinger address the other issues raised by HCC in its appeal and are not inconsistent therewith, the arguments of Teets and Keplinger are incorporated herein by reference.

**Resolving the inconsistencies between the notice requirements of West Virginia Code, § 6-9A-3 of the OGPA and the statutory exception to notice requirements under West Virginia Code, § 7-15-18 of the Emergency Ambulance Service Act of 1975 (EASA):**

Respondents asserts that there were numerous violations of OGPA, and that Judge Frye was correct in annulling the actions of HCC. Respondents want to gloss over the plain language of §7-15-18 which provides that “[t]his article” [EASA] “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.” [boldface emphasis added] They also ignore the language of the next sentence which clearly and unequivocally abrogates any requirement that the county commission must comply with the notice and agenda requirements of OGPA: “The provisions of this article shall be liberally construed to accomplish its purpose and **no procedure or proceedings, notices, consents or approvals shall be required in connection therewith except as may be prescribed by this article.**” [boldface emphasis added]. As HCC discussed in its earlier Brief, OGPA and EASA were both enacted in 1975. Had the Legislature intended to require that a county commission comply with OGPA, it would have so stated within a provision of EASA. It did not do so. Similarly, if the Legislature had so intended, it could have inserted language in § 6-9A-3 indicating that the exceptions from compliance with any formal procedures, notices, and approvals which are found in § 7-15-18 do not apply to meetings, notices and agendas where OGPA is applicable. It did not do so. The Legislative decision to exempt a county commission from complying with the OGPA is understandable given the critical importance of emergency

ambulance service as set forth in the legislative findings for EASA found in § 7-15-2.<sup>3</sup>

EASA is a body of statutory law, and this Court's well-established rules of statutory construction apply to HCC's assigned errors. *See generally* 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."). *See also* Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968) ("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. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."). No procedures, proceedings, notices, or approvals are required. Indeed, there are no provisions elsewhere in Article 15 which require notices and procedures except in § 7-15-16.<sup>4</sup> Hence, the plain language of § 7-15-18 should be applied, not construed.

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<sup>3</sup> "The legislature hereby finds and declares:

- (a) That a significant part of the population of this State does not have adequate emergency ambulance service;
- (b) That the establishment and maintenance of adequate emergency ambulance systems for the entire State is necessary to promote the health and welfare of the citizens and residents of this State;
- (c) That emergency ambulance service is not likely to become available to all the citizens and residents of this State unless specific requirements therefor are provided by law;
- (d) That emergency ambulance service is a public purpose and a responsibility of government for which public money may be spent; and
- (e) This article is enacted in view of these findings and shall be liberally construed in the light thereof."

<sup>4</sup> § 7-15-16 provides that competitive bids and publication are required for expenditures in excess of \$10,000.00 when an *ambulance authority* purchases supplies, equipment, or materials, or enters into a contract for the construction of a facility. Neither the adoption of the special fee ordinance nor the purchase of the Baker building from Capon Valley Bank by HCC were included under these categories requiring competitive bids or publication.

**A county commission has the statutory authority to exercise the authority to create an ambulance authority, enact an emergency service fee, and/or to purchase buildings to house the operations of an ambulance service regardless of whether other ambulance service is available in the county:**

Respondents fail to respond to Petitioner's arguments which distinguish between the powers delegated to a county commission to implement emergency ambulance service as opposed to the circumstances when it becomes mandatory for it to take certain actions under § 7-15-4. Indeed, § 7-15-17 provides full authority for adoption of an emergency ambulance service fee separate and apart from § 7-15-4.<sup>5</sup> It provides that the fees collected may be used for the purchase of a building and equipment and to fund the operations of a county ambulance authority. Additionally, § 7-15-18 provides full and complete authority for a county commission to provide emergency ambulance service for a county, to create an ambulance authority and to carry out the powers and duties of such authority.<sup>6</sup> Respondents have repeatedly

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<sup>5</sup> § 7-15-17 provides as follows:

**“Imposition and collection of special emergency ambulance service fee by 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.” [boldface emphasis added]

<sup>6</sup> Apart from EASA, a county commission is also authorized to acquire and own real estate apart from EASA. West Virginia Code, § 7-3-5 provides in pertinent part as follows:

**“County commissions authorized to acquire and convey real estate and contract for construction, etc., and rental of courthouse, jail or other public building.**

The county commission of any county is hereby authorized and empowered to acquire real estate and to convey real estate and to enter into a contract, or lease, or both, with the United States government, or any federal agency authorized to make or enter into a contract, or lease, or with any bank or financial institution, or with any individual or persons for the erection, construction, equipment, leasing and renting of a courthouse, hospital, other public buildings, or jail, with an option to purchase the building and to provide for the payment of a yearly rental for the building by the commission: . . . .”

contended that HCC could only adopt an ordinance for a special ambulance fee “if ambulance service is otherwise unavailable within the county” and the Circuit Court agreed. They assert that restrictive language is found in § 7-15-4 which provides in part as follows: “[e]xcept 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: . . . .” Respondents and the Circuit Court fail to distinguish between the power of HCC to adopt an emergency ambulance fee as opposed to a the duty to do so. Clearly, if no ambulance service were available to all residents of the county, a county would have a duty to provide the services if it has the funds to do so. But there is absolutely nothing in EASA which limits the power of a county commission to provide emergency ambulance service, acquire an emergency ambulance building, and/or create an emergency ambulance authority if it deems the same appropriate for the health and welfare of its citizens and chooses to do so. The Legislative findings of § 7-15-2 were discussed above and in HCC’s prior Brief. The Legislature specifically found that a significant part of the population of this State does not have adequate emergency ambulance service; that establishment and maintenance of adequate emergency ambulance service is necessary to promote the health and welfare of the citizens of this state, that emergency ambulance service is a public purpose and the responsibility of government for which public money may be spent; and that in view of its findings, EASA is to be liberally construed. Respondents dwell extensively on an argument that Article II, § 2 and Article XIV, §§ 1 & 2 of the West Virginia Constitution prohibit passing an ordinance to collect fees from residents without notice to the citizens. Article XIV, §§ 1 & 2 detail the procedures which the Legislature must follow to amend the State Constitution and have

no bearing on the procedures a county commission must follow to adopt a fee ordinance. Article II, § 2 provides that the powers of government reside in the citizens and can only be rightfully exercised in accordance with their will and appointment. HCC agrees wholeheartedly with that provision, but HCC's actions were undertaken to fulfill its obligations. Article II, § 2 simply does not address the issues of this case. Indeed, if the commissioners actions had exceeded the rightful exercise of the citizens' will and appointment, the citizens can resolve the problem in the ballot box or by a removal proceeding. The removal proceeding was pursued and it failed. Respondents cite no case law to support their claims under Article XIV, §§ 1 and 2 and that is understandable because HCC did not undertake to amend the State Constitution and no case exist to support their assertion. With respect to Article II, § 2, the only two cases it cites deal with the obligation of the prosecuting attorney to exercise the sovereign power of the State in prosecution of a criminal proceeding. *State ex rel. Preissler v. Dostert*, 163 W. Va. 719; 260 S.E.2d 279 (1979), a prohibition proceeding in which the circuit court's removal of a prosecutor for failure to prosecute a case in magistrate court was overturned by the Supreme Court); *State ex rel. Hamstead v. Dostert*, 173 W.Va. 133, 313 S.E.2d 409 (1984), another prohibition and habeas corpus proceeding where the prosecutor was jailed by the circuit court for refusing to present a 1<sup>st</sup> degree murder case instead of involuntary manslaughter to a grand jury; again, the Supreme Court rejected Judge Dostert's actions and granted the prosecutor's petitions for habeas corpus and prohibition. Both *Preissler* and *Hamstead* cite Article II, § 2 for the proposition that a prosecuting attorney has a duty to exercise the sovereign power of the people, but neither apply to the facts of this case. Article II, § 2 endows the people with the right to elect public officials. *See, e.g., State ex rel. Citizens Action Group v. Tomblin*, 227 W.Va. 687, 695, 715 S.E.2d 36, 44

the testimony of the following witnesses: Theodore Garrett, Farnum Reid, George Trump, and Margaret Delawder. (See, App., pages 2330 - 2366). HCC ultimately concluded that the existing service was not adequate and implemented a plan to resolve the emergency ambulance service needs for the future. Hence, even if HCC could only act if emergency ambulance service were otherwise unavailable in the county under the narrow construction of § 7-15-4, the circuit court erroneously disregarded the language of § 7-15-2 which made clear that the “other available ambulance service” contemplated must be “adequate” emergency ambulance service.

Respondents may not agree with the implementation of HCC’s statutorily authorized actions, but the proper remedy is at the ballot box, not in the courtroom. Under any analysis of the above statutes, HCC was authorized to enact the fee and to purchase the building. The circuit court’s failure properly to construe the competing statutes and/or its misreading of the same was an abuse of discretion and clear legal error warranting reversal.

**Lack of Budgeted Funds to Operate the Emergency Ambulance Authority:**

Respondents suggest that no funding was available to defray the costs to operate the emergency ambulance service or to pay for the building. For what purposes do they think the funds generated from the special fee ordinance would be used? The special emergency ambulance service fee is the very device by which the operations of the ambulance authority would operate.<sup>8</sup> However, Judge Frye’s orders directed HCC to refund the fees collected to the citizens who had paid it, and enjoined HCC from collecting the fees in the future. The circuit court’s injunctive action has cramped the ability of the Hardy County Ambulance Authority to

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<sup>8</sup> If the funds from the special fee ordinance were not sufficient to meet the obligations of the ambulance authority, the county commission could provide additional funding from its budget, but the underlying purpose for the fee ordinance was to finance the operations of the authority within its statutory limits.

expand its services. The ambulances and chase vehicles the ambulance which the authority purchased, and the use of the Baker building by the county to house the vehicles and to provide a centralized base of operations for the paramedics it has employed have allowed the ambulance authority to operate in a restricted fashion. Unless this Court reverses the prospective injunctions against HCC, the county-wide emergency ambulance service cannot function effectively or adequately.

**The Error and Harm Arising From the Breadth of the Prospective Injunction:**

§ 6-9A-6 authorizes a circuit court to compel compliance or enjoin noncompliance with the provisions of this article and to void a decision made in violation of this article. But the effect of Judge Frye’s Order entered October 10, 2014, exceeded his lawful authority and was an abuse of discretion. The Court not only voided the purchase of the Baker building and the fee ordinance, but it also enjoined the commission prospectively from correcting the errors by simply reaffirming the purchase at a subsequent meeting. Both HCC and Teets and Keplinger in their respective Briefs have contended that the circuit court lacks power to enjoin substantive acts taken by the county commission at future meetings so long as they comply with the OGPA and §7-1-2. Careful review of the applicable language of § 6-9A-6 supports their position on this issue: “The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation of this article. **An injunction may also order that subsequent actions be taken or decisions be made in conformity with the provisions of this article . . . .**” [boldface emphasis added]. That language clearly contemplates that if prospective injunctive relief is granted, the court may compel that any subsequent actions of the commission comply with the provisions of the OGPA. But it does not

suggest that the court can enjoin subsequent governmental actions if the commission complies with the OGPA. The injunctive order issued by the court below essentially requires HCC to initiate the process of building purchase from its inception. This is not possible given the judge's ruling on failure to join the necessary parties. Unless Capon Valley Bank and the trustee were joined as parties, HCC cannot file a viable action to set aside the foreclosure sale. Judge Frye's refusal to compel the joinder of the necessary parties leaves the commission in a procedural vacuum. There is no sound legal reason for enjoining HCC from correcting any deficiencies simply by providing public proper notice of the meeting and preparing an agenda which details the circumstances under which the commission will act and indicating that a vote will be taken to approve and ratify the purchase of the Baker building.<sup>9</sup> That is all that Respondents claim would have been required before the sale was approved in August of 2013, and there is no sound legal argument why the purchase cannot be ratified by providing the requisite statutory notice and agenda today. As a practical matter, the media attention to the public debate about the purchase of the Baker building and about this lawsuit have no doubt amplified the notice to the citizens of Hardy County beyond anything the statutory notice and agenda would have required. If future compliance with OGPA is required, the judicial system has no basis for interference with ratification of the existing purchase. As mentioned previously, the proper remedy if the community is dissatisfied would be at the ballot box in future elections for the office of county commission. HCC and the other petitioners raised this issue in their initial briefs and Respondents have failed to respond to it in any logical manner in their Brief.

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<sup>9</sup> Although this Court was not asked to address the propriety of the planning commission correcting some of its errors in *Capriotti*, the case discloses that it attempted to do so. See, slip opinion, page 4

They simply are unable to cite any case to justify the Circuit Court's prospective injunction for the lawfully conducted substantive acts of the commission. A court is not empowered to substitute its judgment for that of a county commission in determining the needs of the county for emergency ambulance service. As pointed out above, the circuit court mistakenly construed "where such service is not otherwise available" to mean that the commission lacked the power to adopt the fee ordinance or purchase the building. That language made it mandatory that a commission provide such service when other service is not available, but it certainly did not prohibit the commission from electing to take such actions as the statute permits if it chose to do so. Moreover, the requirement in §§ 7-15-2 and 7-15-18 that the statute be liberally construed authorizes the commission to exercise its discretion liberally. The circuit court's findings and remedies achieved the opposite result. The actions constituted an abuse of discretion and should be reversed.

**Issue Preclusion, collateral estoppel and *res judicata*:**

Respondents assert that the doctrines of issue preclusion, collateral estoppel and *res judicata* are inapplicable to the proceedings held by Judge Frye. Although these doctrines constitute one ground for appeal, they are not the primary issue. HCC concurs that these doctrines do not apply to many of the findings in the Order denying the removal of the two commissioners. But where the findings detailed the reasons HCC adopted the ambulance fee ordinance and purchased the Baker building, and where they inferred that Teets and Keplinger had acted in good faith, they should have been given due weight by Judge Frye in adopting his findings under the OGPA and § 7-1-2. (See, e.g., App., p. 451; p. 456 ¶ 26; p. 460 ¶ 40) Clearly, the bifurcated proceedings involved the same testimony, the same exhibits, the same

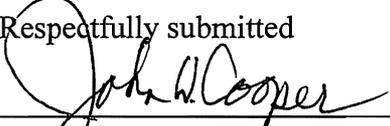
parties, the same counsel, and the same statutes governing open governmental meetings and emergency ambulance services. Judge Frye had the authority to decide the issues involving whether there were violations of § 6-9A-3 of the Open Governmental Proceeding Act (OGPA). But when he concluded that violations of OGPA had occurred, the findings in the removal proceeding which demonstrated the good faith and explained the motives of Teets and Keplinger in dealing with an ambulance crisis should have been given some deference. Instead, Judge Frye disregarded and rejected them and made completely contrary findings and conclusions despite using the same evidence and record from the removal proceeding. His failure to give any credence or merit to these findings constituted error and was an abuse of discretion.

**Counsel fees awarded to Respondents' Counsel:**

HCC's position respecting the counsel fees which the Circuit Court awarded to Respondent's counsel was adequately addressed in the prior Brief and will not be supplemented herein.

**CONCLUSION**

The Hardy County Commission reiterates its earlier prayer for relief in its original Brief.

Respectfully submitted  
  
Special Prosecuting Attorney and Counsel  
For Hardy County Commission

**CERTIFICATE OF SERVICE**

I, John W. Cooper, undersigned counsel for Petitioner Hardy County Commission, do hereby certify that I have caused a true and exact copy of the foregoing Reply Brief of Hardy County Commission to be served this 10<sup>th</sup> day of August, 2015, by first class United States mail, postage prepaid, upon the following:

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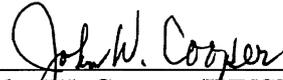
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