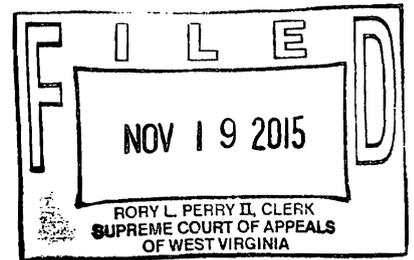


No. 15- 1112



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, a state agency, Petitioner below

Petitioner

v.

HONORABLE ROBERT A. BURNSIDE, Jr.,
Judge of the Circuit Court of Raleigh County, West Virginia, and
MCNB BANK AND TRUST CO., a West Virginia corporation,
and the Sheriff of Raleigh County, West Virginia, Defendants below

Respondents

From the Circuit Court of
Raleigh County, West Virginia
(Civil Action No. 14-C-506)

PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

A. Prohibition is the Only Remedy to Correct a Clear Legal Error.

B. The Respondent Clearly Exceeded Its Legitimate Powers by Requiring the Petitioner to Deposit a Sum of Money Greater than the Sum Established by the Petitioner as Just Compensation as a Condition of Awarding the Petitioner Right of Entry Upon and Defeasible Title To the Subject Property, in Direct Contravention of the Authority Granted the Petitioner by West Virginia Code 54-2-14a.

1. WEST VIRGINIA CODE 54-2-14A GRANTS THE PETITIONER SOLE AND EXCLUSIVE AUTHORITY TO ESTABLISH JUST COMPENSATION TO BE PAID TO A PROPERTY OWNER FOR THE PETITIONER TO OBTAIN RIGHT OF ENTRY AND DEFEASIBLE TITLE TO PROPERTY CONDEMNED FOR PUBLIC ROAD CONSTRUCTION.
2. THE RESPONDENT'S ORDER DISBURSING THE PETITIONER'S REQUIRED DEPOSIT OF \$1,012,500 TO MCNB DISREGARDS CONFLICTS IN STATE LAW REGARDING THE PETITIONER'S RIGHT TO RECOVER AN EXCESS DEPOSIT AND PLACES PUBLIC FUNDS AT UNNECESSARY RISK.

II. STATEMENT OF THE CASE

The present Petition arises from the Order Permitting Deposit and Granting Defeasible Title entered by Respondent Judge Robert A. Burnside, Jr. (hereafter "Respondent") on September 18, 2015 as a result of a hearing held in the Circuit Court of Raleigh County on August 28, 2014 on the Petitioner's Motion for Order Granting Defeasible Title to Subject Property and Permitting Deposit¹. AR 1-9.

Pursuant to its authority under West Virginia Code 54-2-14a, the West Virginia Department of Transportation, Division of Highways, condemned a

¹ The Order which is the subject of this action also includes rulings on the Petitioner's Motion to Quash Civil Case Subpoena and to Impose Sanctions and also on Petitioner's Motion to Quash Second Civil Case Subpoena and to Impose Sanctions. These rulings are not challenged in this Petition for Writ of Prohibition.

parcel of property located in the City of Beckley, Raleigh County, comprised before taking of 0.56 acres formerly used as a Sonic fast-food restaurant. The subject property is located adjacent to the Beckley Plaza Mall at the intersection of Robert C. Byrd Drive (SR 19) and Industrial Drive (CR 21/1). In furtherance of its construction of the East Beckley Bypass, a federally funded project designated ACNH-0019(369), the Petitioner condemned a Noncontrolled Access Right of Way of 14,936 square feet (0.34 ac.) and a Temporary Construction Easement of 9,496 square feet (0.22 ac.), leaving a residue of property of 0.22 acres. AR 26. The property contains the structure, machinery and equipment previously installed to operate the Sonic restaurant. MCNB acquired the subject property in a foreclosure sale. AR 23-35.

The Petitioner filed its Application of the West Virginia Department of Transportation, Division of Highways, a State Agency, to Condemn Land for Public Use (hereafter "the Application") on May 20, 2014. The Application alleged, in part, as follows:

"Petitioner has heretofore tendered to the said Defendants the sum of FOUR HUNDRED SEVENTEEN THOUSAND ONE HUNDRED and 00/100 DOLLARS (\$417,100.00), which is the amount Petitioner estimates to be the fair market value of the property, or estate, right or interest therein sought to be condemned, including all damages, if any, to the residue, beyond all benefits, if any, to be derived by the residue by reason of the taking, and also for any and all damages or compensation of any nature whatsoever to which the Defendants are entitled, arising directly or indirectly from the construction and maintenance of

a highway or the improvement and maintenance of said land and adjoining lands for highway purposes or from work performed or material placed upon or removed from said land or any adjoining lands, and that the compensation herein provided is for any and all damages to the residue of any lands retained by the Defendants. The refusal of the Defendants to accept the aforesaid tender was based upon their belief that said tender was insufficient as just compensation. Petitioner, therefore, institutes this proceeding under the provisions of Code 54-2-14a of the Official Code of the State of West Virginia of 1931, as amended." AR 20-21.

Kent Kesecker, the Certified General Appraiser retained by the Petitioner, calculated fair market value of the property to be taken, along with damages to the residue, to be \$1,012,500. Mr. Kesecker's report includes compensation for machinery and equipment (also referred to as furnishings, fixtures and equipment) appraised by other consultants hired by the Petitioner. AR 30 to 94.

Mr. Kesecker's report, page 2, provides in boldface type as follows:

"E. HYPOTHETICAL CONDITIONS are those conditions that are contrary to what exists but are supposed for the purpose of analysis. The property was once an Exxon gas station. There are groundwater monitoring wells on the site, and they have been observed and photographed by the appraiser. This appraisal is subject to the hypothetical condition that the property is free from contamination. I reserve the right to re-inspect and reconsider any value estimates after reviewing any subsequent reports concerning the site. An email

concerning the leak is included in the addendum to this report.” (emphasis original) AR 32.

The report of Kent Kesecker was reviewed first by Certified General Appraiser R. Scott Barber, the contract review appraiser for the Petitioner, and later by Certified General Appraiser Charles R. Hall, Administrative reviewer acting on behalf of the Petitioner. The Revised Certificate & Statement of Contract Review Appraiser signed by R. Scott Barber and Charles R. Hall provides that the *“fair market value of the land and improvements taken plus damages to the residue, if any, less all benefits, is \$417,100 as of November 9, 2013”*, the date of the report. AR 28.

The Petitioner also prepared a “Revised Statement of Just Compensation and Summary” (hereafter “Statement of Just Compensation”) regarding the property which is the subject of this action, in accordance with 49 CFR 24.102(e) of the Uniform Relocation and Real Property Acquisition Policies Act of 1970. The Statement of Just Compensation provides, in part, as follows:

“The full amount established as just compensation for this parcel is \$417,100. This amount is summarized as follows:

<i>Property Taken</i>	<i>\$140,800.00</i>
<i>Damages to Residue, if any, less benefits, if any</i>	<i>\$136,200.00</i>
<i>Other (Temporary Construction Easement)</i>	<i>\$ 3,200.00</i>
<i>Other (Machinery & Equipment Fair Market Value In-Place)</i>	<i>\$136,900.00</i>
<i>Total</i>	<i>\$417,100.00</i>

Optional Allocation: Owner’s (sic) sell 0.22 Acre Remainder as an Uneconomic Remnant

<i>Property Taken</i>	<i>\$140,800.00</i>
<i>Damages to Residue, if any, less benefits, if any</i>	<i>\$136,200.00</i>
<i>Other (Uneconomic Remnant)</i>	<i>\$ 15,100.00</i>

Other (Machinery & Equipment Fair Market Value)	
In-Place	\$136,900.00
Total	\$429,000.00

\$595,400.00 has been estimated as the cost to remove or clean-up hazardous materials or waste found on the property.²

In the event of Condemnation, the amount to be deposited in Court will be \$417,100." AR 27

Respondent MCNB Bank and Trust Co. (hereafter "MCNB") filed Defendant MCNB Bank and Trust Co.'s Answer and Third-Party Complaint (hereafter "Answer") on June 26, 2014. AR 97-110. The Answer "*denie[d] that the sum of \$417,100.00 constitutes fair market value of the property sought to be condemned and demand[ed] strict proof thereof.*" AR 98. The Answer admits that the condemnation filed by the Petitioner is for a public use. AR 19, 20, 98

The Petitioner filed Petitioner's Motion for Order Granting Defeasible Title to Subject Property and Permitting Deposit on July 3, 2014. AR 111-115. MCNB filed MCNB Bank and Trust Co.'s Response in Opposition to Petitioner's Motion for Order Granting Defeasible Title to Subject Property, or in the Alternative, Request for Additional Bond on July 8, 2014. AR 116-121.

After conducting a hearing and reviewing multiple proposed Orders submitted by the parties, the Court entered the Order Permitting Deposit and Granting Defeasible Title which is the subject of this Petition for Writ of Prohibition (hereafter "the Order"). The Order provides, in part, as follows:

b. "There appears to be no dispute that this case is one in which the Petitioner has the lawful right to take the subject private property

² Although not specifically noted on the Revised Statement of Just Compensation, this estimate of cost was supplied by Core Environmental Services, Inc. AR 29.

for the public purposes stated in the Petition heretofore filed in this case;

- c. *The report of Kent Kesecker, a certified general appraiser hired by the Petitioner, provides that the fair market value of the property sought to be condemned in this proceeding, including the damages, if any, to the residue of the land of the Defendants beyond the benefits, if any, to any such residue by reason of the taking, is One Million Twelve Thousand Five Hundred Dollars (\$1,012,500). The Petitioner, in establishing just compensation pursuant to its obligations under 49 CFR 24, deducted the estimated costs of environmental cleanup and remediation, to-wit: \$595,400, from the sum reported by Kent Kesecker.*
- d. *It is undisputed, for purposes of this hearing, that the subject property was identified as the site of petroleum contamination in or about 1992 and is currently undergoing monitoring by the West Virginia Department of Environmental Protection for said contamination. The Defendant MCNB disputes that it is liable for any such costs and has joined third parties into this action incident to its claim that said third parties bear the liability for said costs.*
- e. *West Virginia Code 54-2-14a provides as follows: "Before entry, taking possession, appropriation, or use, the applicant shall pay into court such sum as it shall estimate to be the fair value of the property, or estate, right, or interest therein, sought to be condemned, including, where applicable, the damages, if any, of the residue beyond the benefits, if any, to such residue, by reason of the taking."*
- f. *The Petitioner's appraiser, Kent Kesecker, calculated fair market value of the property to be taken, along with damages to the residue, to be \$1,012,500. Mr. Kesecker's report includes compensation for machinery and equipment (also referred to as furnishings, fixtures and equipment) appraised by other consultants hired by the Petitioner. The Defendant has obtained an appraisal which establishes the fair market value of the entirety of the property before any taking at \$1,294,100.*
- g. *The Petitioner contends that just compensation in this matter permits it to deduct environmental cleanup and remediation costs from the sum proposed to be deposited by the Petitioner. The Court finds that WV Code 54-2-14a does not allow the Petitioner to deposit less than \$1,012,500.00 in order to gain defeasible title and right of entry to the subject property.*
- h. *The Court finds that it is not required to determine who bears liability for the cost of environmental cleanup and remediation at this stage of*

the proceedings. If the Court ultimately finds Defendant MCNB to be correct in its assertion that it is not liable for said costs, this finding would affect the ultimate award of just compensation to the Defendant, but not necessarily the Court's determination of what initial deposit should be made for the Petitioner to gain right of entry and defeasible title to the subject property.

- i. **At this stage of the proceedings, the Court finds that the report of Petitioner's appraiser, Kent Kesecker, represents the Petitioner's estimate of "fair value" of the property to be taken and damages to the residue at \$1,012,500.** The Petitioner shall be required to deposit the sum of \$1,012,500 with the Clerk of the Court in order to gain right of entry and defeasible title to the property described in the original Application.*
- j. The Petitioner shall deposit as fair value of the property sought to be condemned in this proceeding, including the damages, if any, to the residue of the land of the Defendants beyond the benefits, if any, to any such residue by reason of the taking, the sum of One Million Twelve Thousand Five Hundred Dollars (\$1,012,500).*
- k. Upon the Petitioner's deposit of the total sum of \$1,012,500 with the Clerk of the Court, the Petitioner, its agents, employees and contractors shall be permitted to at once enter upon, take possession of, appropriate and use said land sought to be condemned for the purposes stated in the Petition filed in this case. Upon said deposit, the Petitioner shall immediately be granted defeasible title to the property described in the Petition filed in this case and shown on the plat attached to said Petition in the West Virginia Department of Transportation, Division of Highways, a public corporation, (subject to the provisions of Chapter 54, Article 2, Section 14(a) [sic], of the Official Code of West Virginia, 1931, as amended) which property is situate in the City of Beckley, Raleigh County, West Virginia, and is more particularly bounded and described as follows: [description omitted]*
- l. The Clerk of the Court shall distribute by check the sum of \$1,012,500, representing the Petitioner's estimate of just compensation, to the Defendant MCNB Bank and Trust Co.*
- m. If the Petitioner eventually prevails on its argument that remediation costs affect the fair value, the difference shall be restored to the Petitioner by the mechanism provided by statute.*
- n. The Court defers ruling on whether the Petitioner's deposit of additional monies over and above the sum of \$417,100 affects the*

Petitioner's obligation to pay statutory interest on any final judgment in this matter which exceeds the sum of \$417,100."

AR 1-9 (emphasis added)

As of the filing of this Petition for Writ of Prohibition, no monies have been deposited with the Clerk of the Court and the Petitioner enjoys no right of entry upon the subject property. No scheduling Order has been entered.

Shortly after the Petitioner filed the Application for condemnation, MCNB joined Exxon Mobil and H.C. Lewis Oil Company as Third-Party Defendants in this action, ostensibly for the purpose of determining the liability, if any, of said Third-Party Defendants for the remediation costs offset by the Petitioner in its determination of just compensation. However, by Order Granting Exxon Mobil Company's Reply in Further Support of its Motion to Dismiss or Strike Third-Party Complaint, entered Dec. 11, 2014, the Circuit Court dismissed both Exxon Mobil and H.C. Lewis Oil Company from the proceedings. AR 10-16. This ruling was not appealed and is not challenged in this Petition for Writ of Prohibition, but may assist this Court in understanding the positions of the respective parties in this action.

III. SUMMARY OF ARGUMENT

By Order entered September 18, 2015, the Circuit Court of Raleigh County disregarded the authority of the Petitioner to establish just compensation in a condemnation action and to obtain right of entry on and defeasible title to the property under condemnation upon the Petitioner's deposit of a sum representing the Petitioner's determination of just compensation. Pursuant to its rights and responsibilities under state and federal law, the Petitioner determined that just

compensation for the taking effected by its condemnation was \$417,100. At a right of entry hearing on August 28, 2014, the Circuit Court found the condemnation was for a public purpose, but Ordered that the Petitioner deposit the sum of \$1,012,500 with the Clerk in order to obtain right of entry onto the subject property. This Order seriously usurps the Petitioner's near-absolute authority to establish just compensation pursuant to West Virginia Code 54-2-14a, the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act and other authority more fully set forth below. The Circuit Court further Ordered that, upon the Petitioner's deposit of the said \$1,012,500, the monies be immediately distributed to the Respondent landowner, MCNB Bank and Trust Co., without regard to statutory law limiting the Petitioner's right to recover said funds at the conclusion of the underlying case.

The Circuit Court exceeded its legitimate powers in the September 18, 2015 Order, and extraordinary relief is the only remedy available to correct the error. The Petitioner seeks a Writ of Prohibition preventing the Circuit Court from enforcing its September 18, 2015 Order and requiring the Circuit Court to grant the Petitioner right of entry and defeasible title to the subject property upon the Petitioner's deposit of \$417,100.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is suitable for argument pursuant to Rule 20 of the Rules of Appellate Procedure. Not only is this a case of first impression, but the decision of the Circuit Court usurps the authority of the Petitioner as a condemning

authority, placing nearly \$600,000 in public money at issue. As such, this case should be considered to be “of fundamental public importance”.

V. ARGUMENT

A. **Prohibition is the Only Remedy to Correct a Clear Legal Error.**

Pursuant to West Virginia Code §53-1-1, a “*writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, which the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.*” See also State ex el. Abraham Linc. Corp. v. Bedell, 216 W.Va. 99, 602 S.E.2d 542 (2004).

The Circuit Court acted within its jurisdiction in issuing the September 18, 2015 Order, but exceeded its legitimate powers by usurping the authority of the Petitioner to set just compensation. “*In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.*” State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996). Although all five factors need not be satisfied, it is clear that

the third factor (the existence of clear error as a matter of law) should be given substantial weight. These points will be addressed in order:

1. Whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief – The Order from which the Petitioner seeks relief is not a final Order, so no direct appeal may be had. Further, given the unique procedure in condemnation actions, the legal issue(s) presented herein will likely never be the subject of a final order in a condemnation case.
2. Whether the Petitioner will be damaged or prejudiced in a way that is not correctable on appeal – Extraordinary relief from this Court is necessary to insure compliance with state and federal law granting the Petitioner the exclusive authority to determine just compensation and to acquire right of entry for road construction upon the Petitioner's deposit of said sum into Court. In the matter *sub judice*, there is no appeal or other remedy available until a final judgment is entered on a commissioner's award or jury verdict. The Order under review denies the Petitioner right of entry upon the subject property and defeasible title to the property taken for road construction purposes unless the Petitioner deposits the sum of \$1,012,500 with the Clerk of the Raleigh County Circuit Court. To add further complication, West Virginia Code 54-3-4 provides that when a sum is deposited into Court "as *representing the fair market value of property to be acquired, the amount of the award or verdict pertaining to such property shall not be*

less than such sum.” In other words, failure of this Court to grant extraordinary relief forecloses virtually all the Petitioner's options, brings road construction to a standstill and creating substantial risk that monies deposited by the Petitioner in excess of \$417,100 will never be recovered by the Petitioner.

3. Whether the lower tribunal's order is clearly erroneous as a matter of law – In its application of the provisions of West Virginia Code 54-2-14a, the Circuit Court disregarded express statutory language granting the Petitioner sole and exclusive authority to establish the estimate of just compensation to be paid into the Court at the commencement of an eminent domain proceeding. In so doing, the Court also ignored federal regulations applicable to state road construction projects which are federally funded and therefore subject to the mandates of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C.A. 4601, et. seq.)
4. Whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law – The Petitioner submits that the error of law committed in this case has not previously been the subject of an appeal or request for extraordinary relief to this Court. To the extent that undersigned counsel has served as counsel for the Petitioner since 2003, counsel represents that she is unaware of this issue arising in other cases.

5. Whether the lower tribunal's order raises new and important problems or issues of law of first impression – West Virginia Code 54-2-14a grants the Petitioner the authority to take real property for public road construction upon a showing that the taking is for a public use and upon the Petitioner's deposit with the Court the sum established by the Petitioner as just compensation. Once the Petitioner complies with these two (2) criteria, the Petitioner is entitled to entry upon and defeasible title to the subject property. This authority flows from a combination of state law and federal law, to-wit: West Virginia Code 54-2-14a and the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act. The Circuit Court seriously usurped powers delegated to the Petitioner which are critical to the efficient and orderly construction of public roads, which certainly raises a “new and important problem” to be addressed by this Court.

Examination of the five (5) factors, as addressed above, lead to the inescapable conclusion that the error committed by the Circuit Court must be addressed through extraordinary relief.

B. The Respondent Clearly Exceeded His Legitimate Powers by Requiring the Petitioner to Deposit a Sum of Money Greater than the Sum Established by the Petitioner as Just Compensation as a Condition of Awarding the Petitioner Right of Entry Upon and Defeasible Title To the Subject Property, in Direct Contravention of the Authority Granted the Petitioner by West Virginia Code 54-2-14a.

1. WEST VIRGINIA CODE 54-2-14a GRANTS THE PETITIONER SOLE AND EXCLUSIVE AUTHORITY TO ESTABLISH JUST COMPENSATION TO BE PAID TO A PROPERTY OWNER FOR THE PETITIONER TO OBTAIN RIGHT OF ENTRY AND DEFEASIBLE

TITLE TO PROPERTY CONDEMNED FOR PUBLIC ROAD CONSTRUCTION.

The Petitioner possesses exclusive authority to determine just compensation in eminent domain proceedings initiated by the Division of Highways, subject to the landowner's ultimate right to a commissioner's award or jury trial. In formulating the ruling set forth in the September 18, 2015 Order, the Circuit Court relied on the provisions of West Virginia Code 54-2-14a: "*Before entry, taking possession, appropriation, or use, the applicant shall pay into court such sum as it shall estimate to be the fair value of the property, or estate, right, or interest therein, sought to be condemned, including, where applicable, the damages, if any, of the residue beyond the benefits, if any, to such residue, by reason of the taking.*" AR 3 (emphasis added) The Circuit Court correctly found that "[T]here appears to be no dispute that this case is one in which the Petitioner has the lawful right to take the subject private property for the public purposes stated in the Petition heretofore filed in this case". AR 2. Rather than deferring to the near-absolute authority of the Petitioner to establish fair value, also known as just compensation, the Circuit Court impermissibly substituted its judgment for that of the Petitioner and failed to perform its mandatory, non-discretionary duty to grant the Petitioner right of entry on the subject property.

The unique position of the Petitioner, as the condemning authority, to establish just compensation flows both from West Virginia Code 54-2-14a and from the federal regulations applicable to federally funded projects. The East Beckley Bypass project receives federal assistance from the U.S. Highway Administration, rendering the entire project subject to the Uniform Relocation

Assistance and Real Property Acquisition Policies Act, (42 U.S.C.A. 4601, et. seq., hereinafter referred to as the "Federal Act") Pursuant to 42 U.S.C. 4655(a), the Federal Act requires that a state agency comply with the Federal Act's policies whenever the agency seeks federal financial assistance for "*any program or project which will result in the acquisition of real property.*" West Virginia Code 17-2A-20 specifies that the Petitioner "*shall provide a relocation assistance program that must comply with and implement the federal laws and regulations relating to relocation assistance to displaced persons as set forth in the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970.*" In addition, West Virginia Code 54-3-3 applies the federal real property acquisition policies to all state agencies with powers of eminent domain. See also, Huntington Urban Renewal Authority v. Commercial Adjunct Co., 161 W.Va. 360, 242 S.E.2d 562 (1978).

Pursuant to the Federal Act, federal funding and approval of state programs is available only where the state agency provides assurances that, "*in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title*" 42 U.S.C. 4655(a)(1). See also West Virginia Dep't of Transp. V. Dodson Mobile Homes Sales & Servs., Inc., 218 W.Va. 121, 125, 624 S.E.2d 468, 472 (2005) Unless an impediment to compliance exists in the West Virginia Constitution, Highways must fully comply with 42 U.S.C. 4651 when acquiring real property for a project for which it receives federal funding.

No such impediment exists in state law. To the contrary, W. Va. Code 54-3-1, et. seq. (1988) (Repl. Vol. 2008), which implemented the Federal Relocation Act, requires condemning agencies to adopt rules and regulations to implement its provisions, and grants such agencies the power and authority to do the same, to-wit:

*"In order to . . . satisfy the requirements of adequately compensating displaced persons under such federal acts, each acquiring agency is hereby required and is hereby granted plenary power and authority to adopt rules and regulations, which shall have the force and effect of law, **to implement the provisions of such federal acts and make applicable to such acquiring agency the policies and requirements of such federal acts which are pertinent to the mission and functions of such acquiring agency**, including, without in any way limiting the generality of the foregoing, the carrying out of all procedures and the making of all financial assistance payments, relocation assistance payments, replacement housing payments, loans and expense reimbursement payments required by such federal acts, **subject only to any restrictions or limitations imposed by the constitution of the State of West Virginia.** . . . "* (emphasis added)

The Petitioner, as the condemning Agency, is the sole entity charged with responsibility for determining just compensation, subject to the right of every landowner to a commissioner's award or jury trial. 49 CFR 24.102(d) provides that "*Before the initiation of negotiations, the Agency shall establish an amount which it believes is just compensation for the real property. The amount shall not be less than the approved appraisal of the fair market value of the property, taking into account the value of allowable damages or benefits to any remaining property. **An Agency official must establish the amount believed to be just compensation.**" (emphasis added)*

49 CFR 24.103 sets forth the “Criteria for appraisals” applicable to the work performed by all appraisers contracted to value real property in federally-funded projects, including Petitioner’s appraiser Kent Kesecker. As part of the real property acquisition process, 49 CFR 24.104 requires that the Petitioner retain the services of a review appraiser to review and determine the reliability of the opinions of the appraiser, in this case Kent Kesecker. In certain circumstances, the review appraiser is authorized to independently review, present and analyze market information in conformance with §24.103 to support a recommended or approved value. §24.104(b). Finally, either the review appraiser or the condemning authority’s staff appraiser (in this case Charles R. Hall) develops and reports the amount to be just compensation. See §24.104(a) or, alternatively, §24.104(c). This process complies with the mandatory provisions of 49 CFR 24.102(d) that an agency official, to-wit: Division of Highways employee Charles R. Hall, CGA, establish just compensation. The Circuit Court misapplied the provisions of WV Code 54-2-14a when it relied on Kent Kesecker’s determination of the fair market value of the property at \$1,012,500 without regard to the totality of the entire process of determining just compensation.

The federal law cited herein enhances the authority granted the Petitioner in West Virginia Code 54-2-14a.

“[T]he Legislature has determined through W. Va. Code § 54-3-3 that, ‘subject only to any restrictions or limitations imposed by the constitution of the State of West Virginia,’ the Federal Relocation Act is binding on the State and its subdivisions. There is no provision in W. Va. Code § 54-3-3 which authorizes the imposition of limitations on any requirement under the Federal Relocation Act

by state statutes or regulations, non-constitutionally based judicial decisions or court rules, or local ordinances. The statute provides clearly that a state constitutional violation could nullify provisions of the Federal Relocation Act. In other words, the Legislature chose to bind the State to the Federal Relocation Act, so long as it was not in conflict with the state constitution.” State ex rel. West Virginia Department of Transportation v. Reed, 724 S.E.2d 320, 328 (2012)

The Circuit Court is without authority to require that the Petitioner pay any sum greater than \$417,100 in order to obtain right of entry upon the subject property. The East Beckley Bypass project’s status as a federally assisted project requires the Petitioner to follow the regulations set forth in the Federal Act or risk the loss of federal reimbursement for highway construction projects.

The report of Kent Kesecker, as reviewed and modified by review appraiser R. Scott Barber, and further reviewed and approved by agency official Charles R. Hall, is the basis for the Petitioner’s determination of just compensation of \$417,100 and represents the only sum the Petitioner may be required to deposit in order to obtain right of entry.

2. THE RESPONDENT’S ORDER DISBURSING THE PETITIONER’S REQUIRED DEPOSIT OF \$1,012,500 TO MCNB DISREGARDS CONFLICTS IN STATE LAW REGARDING THE PETITIONER’S RIGHT TO RECOVER AN EXCESS DEPOSIT AND PLACES PUBLIC FUNDS AT UNNECESSARY RISK.

The September 18, 2015 Order provides, in part, as follows:

1. *The Clerk of the Court shall distribute by check the sum of \$1,012,500, representing the Petitioner’s estimate of just compensation, to the Defendant MCNB Bank and Trust Co.*

*m. If the Petitioner eventually prevails on its argument that remediation costs affect the fair value, **the difference shall be restored to the Petitioner by the mechanism provided by statute.***

(Emphasis added) AR 6.

This portion of the Order Permitting Deposit and Granting Defeasible Title reflects the Circuit Court's questionable attempt to balance the interests of the respective parties by requiring the Petitioner to deposit a sum greater than \$417,100 as just compensation³, while purportedly preserving the Petitioner's right to a refund of any excess deposit if the Petitioner ultimately prevails. This attempt, however, is fraught with risk for the Petitioner, as the effects of "the mechanism provided by statute" are unclear. While West Virginia Code 54-2-14a authorizes a refund of excess monies paid by the Petitioner if the deposit exceeds the final judgment, WV Code 54-3-4, enacted incident to West Virginia's adoption of the federal Act, specifically bars the refund to the Petitioner of monies paid into Court as "fair market value". It is of note that the Circuit Court did not specify the statute upon which the Court relied in concluding that any excess deposit would be refunded to the Petitioner "by the mechanism provided by statute."

West Virginia law contains multiple conflicting statutes regarding recovery of a deposit in excess of the final judgment by a condemning agency.⁴ However, the Petitioner filed this action under the authority granted it by WV Code 54-2-14a, and the Circuit Court relied substantially on the

³ Paragraph (l) reflects the Circuit Court's incorrect statement that \$1,025,100 represents any estimate of just compensation by the Petitioner. It does not.

⁴ See, e.g., WV Code 54-2-14; WV Code 54-2-16.

provisions of said statute when making its ruling. WV Code 54-2-14a provides:

“If the amount which has been paid into court pursuant to this section exceeds the amount allowed by the report of the condemnation commissioners, or the verdict of a jury, if there be one, the excess shall be repaid to the applicant out of such fund in court, or, if the amount remaining in the fund be insufficient, then the persons to whom the fund, or any part thereof, has been paid, shall reimburse the applicant, on a pro rata basis, but without interest.” (emphasis added)

The provisions of West Virginia Code 54-2-14a must then be juxtaposed against the conflicting provisions of WV Code 54-3-4, to-wit:

“Neither the provisions of this article nor any rules and regulations promulgated pursuant to section three of this article shall be construed or interpreted so as to create any element of value or damage not in existence prior to the effective date of this article in any condemnation proceedings brought under the power of eminent domain exercised by any state agency except to the extent, if any, required by applicable law of the United States; but, notwithstanding any other provision of law, whenever an acquiring agency in a condemnation proceeding pays a sum into court as representing the fair market value of property to be acquired, the amount of the award or verdict pertaining to such property shall not be less than such sum.”⁵ (emphasis added)

Neither West Virginia Code 54-2-14a nor 54-3-4 makes specific reference to “just compensation” as described in federal law, but any sum paid into Court by an “acquiring agency” obviously refers to the same “just compensation” which federal law requires be set by the Petitioner. The Petitioner specifically brought WV Code 54-3-4, and its effect on the Court’s Order from the bench on August 28, 2014, to the Circuit Court’s attention in a proposed Order tendered on or about May 29, 2015. AR 124-135. The Circuit

⁵ The underlined language does not appear in 42 USCS 4601, but was added by the WV Legislature incident to its adoption of WV Code 54-3-4 in 1972.

Court ignored the provisions of 54-3-4 when issuing the September 18, 2015 Order.

There appears to be no statute or specific case decision resolving the conflict between the provisions of WV Code 54-3-4 and 54-2-14a. Neither statute serves to amend the other, nor does either statute qualify as “general” and the other “specific”, for purposes of applying the laws regarding statutory construction.

WV Code 54-3-4 was enacted in 1972 in the form quoted above, and prohibits the refund of any monies deposited by the Petitioner regardless of the ultimate verdict of a jury. (Acts of Legislature, Reg. Sess. 1972, Ch. 53). Subsequent amendments in 1988 effected no change in this language of the statute. (Acts of the Legislature, Reg. Sess. 1988, Ch. 111)

WV Code 54-2-14a was enacted in 1963 with the language quoted above, specifically providing that the Petitioner be able to recover excess monies deposited with the Clerk. (Acts of Legislature, Reg. Sess. 1963, Ch. 65) Said Code section was substantially amended and reenacted in 1981. The reenactment retained the language authorizing recovery of an excess deposit without amendment. (Acts of Legislature, Reg. Sess. 1981, Ch. 109)

Under the rules of statutory construction, WV Code 54-2-14a is given controlling effect. *“As a general rule of statutory construction, if several statutory provisions cannot be harmonized, controlling effect must be given to the last enactment of the Legislature.”* Syl. Pt. 2, State ex. rel. WV DHHR vs. WV PERS, 393 S.E.2d 677, 183 W.Va. 39 (1990). However, this Court has

never been called upon to rule on the express question of which of these competing statute controls. Nothing has occurred to date in this case that would foreclose MCNB from challenging the Petitioner's right to recover an excess payment in the future, nor is there any guarantee that MCNB would refund such monies when ordered. Therefore, the error committed by the Circuit Court will only be compounded if the September 18, 2015 Order is permitted to stand, as any deposit by the Petitioner in excess of \$417,100 would be distributed to MCNB immediately upon its deposit and the Petitioner would bear the risk that the Petitioner would then be unable to recover its overpayment if the final judgment is less than \$1,012,500.

If this Court awards the extraordinary relief requested herein, the interests of MCNB in any additional monies due it are well-protected. West Virginia law safeguards the interests of landowners in condemnation cases to a degree which far exceeds the level of protection awarded other judgment creditors. While a typical judgment creditor collects interest on his or her judgment at a rate of seven percent (7%) (WV Code 56-6-31; "Determination and Dissemination of the Rate of Interest on Judgments and Decrees for the year 2015", Administrative Order of the West Virginia Supreme Court of Appeals entered January 1, 2015), a landowner who enjoys a judgment for just compensation greater than the sum originally deposited by the Petitioner collects interest on the unpaid sum from the date of entry on the land through payment of the judgment at a rate of ten percent (10%). WV Code 54-2-14a.

The Petitioner is further taxed with all costs of the proceedings. WV Code 54-2-16a.

VI. CONCLUSION

The September 18, 2015 Order violates the Circuit Court's mandatory, non-discretionary duty to grant the Petitioner right of entry and defeasible title to the property condemned, upon the Petitioner's showing that the condemnation is for a public use and that the Petitioner's estimate of just compensation has been deposited with the Court. Therefore, the Circuit Court exceeded its legitimate powers when it Ordered the Petitioner to deposit the sum of \$1,012,500 with the Clerk of the Court as what can only be described as the Circuit Court's estimate of just compensation. This Court should exercise its discretion to prohibit this serious usurpation of powers which are delegated solely and exclusively to the Petitioner.

WHEREFORE, for the foregoing reasons, Highways respectfully requests that this Honorable Court issue a rule to show cause in the underlying action pursuant to W. Va. Code 53-1-9 and grant a Writ of Prohibition in this matter to prohibit the Respondent from enforcing the Order entered September 18, 2015. Further, that the Respondent be Ordered to grant the Petitioner right of entry and defeasible title to the subject property upon the Petitioner's deposit with the Clerk of the Circuit Court of Raleigh County of the sum of \$417,100.

Respectfully submitted,
**WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS, a state agency,**
By counsel



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Counsel for the Petitioners

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF RALEIGH, to-wit:

Thomas Camden, District Manager, West Virginia Department of Transportation, Division of Highways, District 10, 270 Hardwood Lane, Princeton, WV, 24740-2737, named in the foregoing Petition for Writ of Prohibition, being duly sworn, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be upon information and belief, and that so far as they are stated to be upon information, he believes them to be true.

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS, a state agency,

By: 
Thomas Camden
Its: District Manager

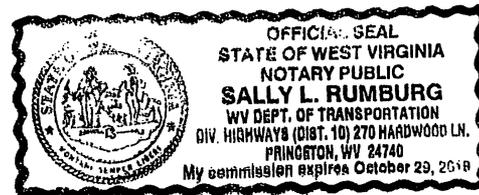
STATE OF WEST VIRGINIA,
COUNTY OF Mercer, to-wit:

I, Sally Rumburg, a notary public in and for said state, do hereby certify that Thomas Camden, who signed the writing above, bearing date the 3 day of November, 2015 for the West Virginia Department of Transportation, Division of Highways, has this day acknowledged before me the said writing to be the act and deed of said state agency.

Given under my hand this 3 day of November, 2015.

Sally L. Rumburg
Notary Public

My commissioner expires: October 29, 2019



CERTIFICATE OF SERVICE

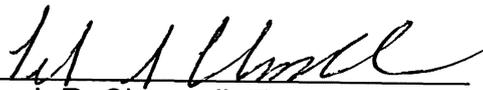
The undersigned counsel for the Petitioner hereby certifies that she did serve a true copy of the attached Petition for Writ of Prohibition, Appendix Record and Motion for Leave to Include Documents Not Contained in the Record on this the 19th day of November, 2015 by U.S. Mail, to all parties at the following addresses:

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Vivian H. Basdekis, Esq.
Jackson Kelly PLLC
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Counsel for Respondent MCNB Bank and Trust Co.

Honorable Judge Robert A. Burnside, Jr.
Tenth Judicial Circuit of West Virginia
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Beckley, WV 25802
Counsel for Wood County Sheriff and Judge Robert A. Burnside, Jr.

Paul Flanagan, Clerk
Circuit Court of Raleigh County, West Virginia
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Leah R. Chappell, Esq.