

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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ROBERT A. DOERING, JEWELL DOERING,  
PAUL M. BRUNTY, RITA C. BRUNTY,  
DENNY R. CANTERBURY, SR., BILLY R. FALLS  
BETSY FALLS, JESSE HYLTON, KATHLEEN HYLTON,  
THOMAS MCNEELY, MARVIN L. MORGAN,  
DOROTHY J. MORGAN, LAYOLA J. SARVER,  
ROBERT L. SHAFER, SUSANNA M. SHAFER,  
WILLIAM R. WHITE, LINDA S. WILSON,  
ROBERT WILSON, ROBERTA WILSON, SANDRA WILSON,  
EARNEST WYANT, VICKI WYANT,

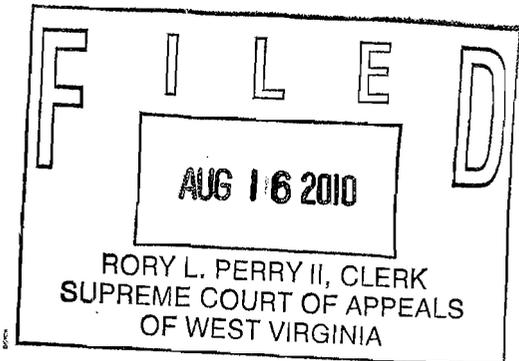
Appellants,

v.

No.

CITY OF RONCEVERTE,  
COUNTY COMMISSION OF GREENBRIER COUNTY,  
WEST VIRGINIA, and  
WEST VIRGINIA FARM PROPERTIES, LLC;

Appellees.



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FROM THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

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BRIEF ON BEHALF OF APPELLANTS,  
ROBERT A. DOERING, et al.

William D. Turner, WVSB #4368  
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Appellees.

**BRIEF OF APPELLANTS**

**I. KIND OF PROCEEDING AND NATURE OF RULING BELOW**

Appellants consist of two groups: the Organ Cave group and the Ronceverte group. Both groups pursue this action to challenge a shoestring, lasso, or lariat annexation by the City of Ronceverte of a financially-troubled subdivision situated some four (4) miles away from the city limits. This is an appeal from August 24, 2009 and October 16, 2009 Orders of the Circuit Court of Greenbrier County, West Virginia (Hon. James J. Rowe presiding), concluding that *none* of Appellants (neither the Organ Cave nor Ronceverte groups) have standing to challenge the lasso annexation by the City of Ronceverte. Appellants seek reversal of the August 24, 2009 and

October 16, 2009 Orders of the Circuit Court of Greenbrier County, and a remand with instructions to enter judgment for them.

## II. STATEMENT OF FACTS

On March 23, 2009, the Ronceverte City Council by a 6-1 vote passed on second reading and adopted Ordinance #2009-01. Said Ordinance annexed the Stoney Glen subdivision, which purportedly was “contiguous” to the City of Ronceverte, but in fact connected solely by way of four (4) miles of Highway U.S. 219, Morgan Hollow Road (County Route 65), and/or Hokes Mill Road (County Route 62).<sup>1</sup> Because Ronceverte claims “contiguity” only by way of *four miles’ length of two connecting highways*, the Stoney Glen annexation here certainly qualifies as an impermissible shoestring, lariat, or lasso annexation. The Ronceverte City Council passed Ordinance #2009-01 pursuant to West Virginia Code § 8-6-4, annexation without an election, sometimes also referred to as annexation without election by petition.

On July 14, 2009, the Greenbrier County Commission (on a 2-1 vote upon reconsideration) approved Ordinance #2009-01 as passed by the City of Ronceverte. Such approval was pursuant to West Virginia Code § 8-6-4(g), which made the County Commission of Greenbrier County, an indispensable party for purposes of this litigation. Appellants do not assert any discretionary wrongdoing on the part of the Greenbrier County Commission; the

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<sup>1</sup>Mayor Gail White of Ronceverte conceded that the purpose of annexing the county roads and U.S. 219 here was to connect the city with Stoney Glen subdivision (“[t]hat was the only way to get to them...”). 8/18/09 T., 28-29.

County Commission simply performed a mandatory ministerial<sup>2</sup> duty in approving the annexation ordinance.

Because this annexation was done without an election and by petition, there were only two petitioners (owning a total of 3 tracts) seeking annexation by the City of Ronceverte. The only annexation appellants were (1) Mr. & Mrs. Bayless (a couple from Virginia presently living in Japan), owners of the only lot sold in Stoney Glen subdivision, and (2) West Virginia Farm Properties, LLC, a Virginia-based real estate developer in the Richmond area, which owns the remaining two tracts in the subdivision. 8/18/09 T., 33, 41-44; Appellants' Exhibit 3. Simply put, there was no election in which any of the many West Virginia voters impacted by this unlawful annexation could vote and be heard. In addition to not being able to vote, the courthouse doors effectively were slammed shut on Appellants by virtue of the Circuit Court's rulings concluding none of them have standing.

Appellants fall into two groups: those that reside in the unincorporated Organ Cave community [the "Organ Cave group or appellants"], where the Stoney Glen subdivision is located, and those that reside in the City of Ronceverte as it existed prior to annexing Stoney Glen subdivision [the "Ronceverte group or appellants"]. Appellants, Robert A. Doering, Jewell Doering, Denny R. Canterbury, Sr., Billy R. Falls, Betsy Falls, Jesse Hylton, Kathleen Hylton, Thomas McNeely, Marvin L. Morgan, Dorothy J. Morgan, Layola J. Sarver, William R. White,

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<sup>2</sup>This Court described a county commission's role as a mere "ministerial" duty in SER City of Charles Town v. County Commission of Jefferson County, 221 W.Va. 317, 655 S.E.2d 63 (2007).

Linda S. Wilson, Robert Wilson, Roberta Wilson, Sandra Wilson, Earnest Wyant, and Vicki Wyant, all reside in the unincorporated Organ Cave community on Morgan Hollow Road (County Route 65), Hokes Mill Road (County Route 62), or Highway U.S. 219.<sup>3</sup> Appellants Paul M. Brunty and Rita C. Brunty, and Robert L. Shafer and Susanna M. Shafer, reside in the City of Ronceverte.

While this litigation was pending in the Circuit Court, the West Virginia Department of Highways revoked its consent to the annexation of U.S. 219, and County Routes 62 and 65 by the City of Ronceverte.<sup>4</sup> See, 7/21/09 Letter from Secretary Mattox to Mayor White, copy attached to Appellants' Complaint as Exhibit 1. In addition, the Greenbrier County Planning Commission on June 24, 2009 revoked Stoney Glen's subdivision permit. 8/18/09 T., 60. Because of the Circuit Court's rulings on standing, it expressed no opinion as to the legal consequences of these actions by the DOH and Planning Commission.<sup>5</sup>

To prove ownership of the county road rights of way by various appellants, Appellants presented testimony from Ward Lefler and Jewell Doering, and offered certified copies of deeds into evidence at the August 18, 2009 evidentiary hearing. Mr. Lefler has 15 years' experience in right-of-way management for the West Virginia Division of Highways ("DOH"); he has been

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<sup>3</sup>For the purposes of the August 18, 2009 evidentiary hearing, Appellants set aside property owners along U.S. 219 and focused on individuals owning the county road rights-of-way of Morgan Hollow Road (County Route 65) and Hokes Mill Road (County Route 62).

<sup>4</sup>The DOH sent a subsequent letter to Ronceverte's Mayor acknowledging the County Commission had approved the annexation. Appellee Ronceverte's Exhibit 1 at 8/18/09 hearing.

<sup>5</sup>Appellees contend these actions were of no legal force and effect because the annexation already was "final."

right-of-way manager for some 7 years at DOH District 9, which is based in Lewisburg. 8/18/09 T., 12-13. Mr. Lefler testified that when the State took over the county road system in 1933, the State Road Commission (a predecessor to the DOH), took whatever title the counties previously held. 8/18/09 T., 14-15. Mr. Lefler explained that the right-of-way taken over by the State in 1933 was 30' in width, and varied from a prescriptive road easement to a fee simple title, depending on the state of the title documentation at the time. 8/18/09 T., 14-16. Morgan Hollow and Hokes Mill Roads were classified as 30' rights-of-way. 8/18/09 T., 16. Mr. Lefler further explained that, while the DOH originally had consented to Ronceverte's annexation of Morgan Hollow and Hokes Mill Roads, and U.S. 219, it subsequently revoked its consent to the annexation (while this litigation was pending in the Circuit Court). 8/18/09 T., 17-18; Appellants' Exhibit 1. Finally, Mr. Lefler confirmed that, where the DOH has a mere right-of-way, the abutting property owner owns the fee simple interest underlying the roadway. 8/18/09 T., 25.

To establish such fee simple ownership of the right of way for Morgan Hollow and Hokes Mill Roads, Appellants offered into evidence certified copies of deeds (and accompanying tax parcel maps) through the testimony of Ms. Jewell Doering. Appellants Exhibits 4 & 5 are properties along Morgan Hollow Road owned by Appellants Jesse and Kathleen Hylton. Mrs. Doering testified that Appellants' Exhibit 4 is Parcel 149 on Appellants' Exhibit 8. 8/18/09 T., 54. Appellants' Exhibit 5 is Parcel 113 on Appellants' Exhibit 8. Id. Appellants' Exhibit 6 is a property along Morgan Hollow Road owned by Appellants Billy R. and Betsy Falls. The Falls property is Parcel 146 on Appellants' Exhibits 8 & 9. 8/18/09 T., 55. Appellants Dorothy J. and Marvin L. Morgan own property along Hokes Mill Road; Appellants' Exhibit 7, the Morgan

property, is Parcel 23.1 on Appellants' Exhibit 9. *Id.* Ms. Doering further testified that there are approximately 98-104 freeholders along Morgan Hollow and Hokes Mill Roads whose sentiments (votes) never were counted by the City of Ronceverte in calculating a "majority of the qualified voters...and a majority of all freeholders of the additional territory..."<sup>6</sup> 8/18/09 T., 57-58. The parties stipulated that Appellants Billy R. Falls, Jesse & Kathleen Hylton, Marvin & Dorothy Jane Morgan, and Robert & Jewell Doering are registered voters in Greenbrier County. 8/18/09 T., 77. Significantly, neither of the annexation appellants, Mr. & Mrs. Bayless (a couple from Virginia presently living in Japan), nor West Virginia Farm Properties, LLC, a Virginia-based real estate developer, are qualified West Virginia voters.

### III. PROCEEDINGS BELOW

At the outset of the August 18, 2009 evidentiary hearing, the Circuit Court announced, *sua sponte*, that the scope of the hearing<sup>7</sup> would be limited solely to the issue of standing, an issue that was raised below by WVFP, but not the City of Ronceverte. After hearing evidence and argument on August 18, 2009, the Circuit Court entered an Order on August 24, 2009 concluding that the Organ Cave Appellants lack standing to contest Ronceverte's lasso annexation of Stoney Glen subdivision. Because a motion to join the Ronceverte appellants had been pending--but not ruled upon by the August 24, 2009 Order--the Circuit Court at Appellants' request conducted a brief hearing, limited to argument only, on August 28, 2009. After the August 28, 2009 hearing, the

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<sup>6</sup>West Virginia Code § 8-6-4(a) provides for annexation without an election by petition of a "majority of the qualified voters...and a majority of all freeholders of the additional territory..."

<sup>7</sup>Appellants were seeking temporary injunctive relief.

Court entered an Order on October 16, 2009, allowing joinder of the Ronceverte Appellants, but concluding they also lack standing to contest Ronceverte's lasso annexation of Stoney Glen subdivision. From these dual orders, Appellants (both the Organ Cave and Ronceverte groups) appeal.

#### **IV. ASSIGNMENTS OF ERROR**

1. The Circuit Court erred by concluding that both the Organ Cave and Ronceverte Appellants lack standing to challenge Ronceverte's lasso annexation of Stoney Glen subdivision.

2. The Circuit Court erred by failing to reach the merits of this case, which this Court should because the dispositive facts are undisputed.

3. On the undisputed facts, Appellees cannot prove that Stoney Glen subdivision is "contiguous" to Ronceverte, as required by W.Va. Code § 8-6-1.

4. On the undisputed facts, Ronceverte unlawfully failed to calculate a majority of freeholders properly.

5. On the undisputed facts, Ronceverte unlawfully allowed non-voters (WVFP and the Baylesses) to petition for annexation.

#### **V. STANDARD OF REVIEW**

Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, [this Court applies] a *de novo* standard of review.

Syll. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995).

## VI. LEGAL ARGUMENT

### A. BOTH THE ORGAN CAVE AND RONCEVERTE APPELLANTS HAVE STANDING TO CHALLENGE RONCEVERTE'S LASSO ANNEXATION OF STONEY GLEN SUBDIVISION.

The Circuit Court failed to reach the merits of this case because it concluded that neither the Organ Cave appellants nor the Ronceverte appellants have standing to maintain this action. Under the Circuit Court's miserly view of standing, the only hypothetical person(s)<sup>8</sup> who conceivably would have standing in this case would be a dissenting property owner from within the boundaries of Stoney Glen subdivision<sup>9</sup> itself. Since only one of over 160 planned lots had been sold by the developer in the financially-troubled subdivision at the time this action was filed, the pool of potential challengers is shockingly small under the Circuit Court's approach. In fact, since the only freeholder besides the developer also petitioned for annexation, *no one* possesses standing here under the Circuit Court's analysis. Adding insult to Appellants' injury, the only cases opposing Appellants' standing cited by WVFP, and relied on by the Circuit Court, arose from *entirely different legal contexts having little or nothing to do with legal standing generally, or standing in annexation disputes specifically.*

Although none of Appellees cited the relevant authorities below, this Court consistently

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<sup>8</sup>The Circuit Court first concluded that Appellants who own the fee simple beneath the relevant county roads (the Organ Cave appellants) lack standing. The Circuit Court subsequently concluded that no resident of Ronceverte (as it existed before the annexation) has standing. The only category left would be a voter / freeholder from within Stoney Glen subdivision because if a Ronceverte resident lacks standing, a citizen from Greenbrier County at large certainly must also.

<sup>9</sup>For the sake of argument, this discussion ignores the issue, addressed *infra*, of whether such a hypothetical dissenter would have to be a registered voter as well.

has held there are three elements of standing:

First, the party ... [attempting to establish standing] must have suffered an "injury-in-fact"--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection [between] the injury and the conduct forming the basis of the lawsuit. Third, *it must be likely that the injury will be redressed through a favorable decision of the court.*

Findley v. State Farm Mutual Automobile Insurance Co., 213 W.Va. 80, 94-95, 576 S.E.2d 807, 821-22 (2002) (italics in original); Guido v. Guido, 202 W.Va. 198, 202, 503 S.E.2d 511, 515 (1998); Coleman v. Sopher, 194 W.Va. 90, 95, n. 6, 459 S.E.2d 367, 372, n. 6 (1995). Citing inapposite authority<sup>10</sup> from unrelated legal contexts, WVFP contended below that Appellants lack a legally protected property interest, and therefore have no standing to proceed with this action. WVFP, and in turn the Circuit Court, relied heavily on Herold v. Hughes, 141 W.Va. 182, 90 S.E.2d 451 (1955), a case which concerned a dispute over the scope of an easement and whether an additional burden had been placed on the fee in the land from which the easement arose by the construction of a gas pipeline. The Herold Court conceded that if any additional burden existed, the fee owner would have been entitled to takings compensation by virtue of the laying of a gas pipeline within the easement which existed for public highway purposes.

The Herold Court framed the issue as “whether the right or privilege granted [the gas company] is a right or privilege included within the grant of an easement for public road

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<sup>10</sup>Of the other cases cited by WVFP, only Butler v. Price, 212 W.Va. 450, 574 S.E.2d 782 (2002), addresses standing and it is readily distinguishable. The appellant in Butler did “...not have an ownership interest in the property in question,” and consequently lacked standing. 212 W.Va. at 454, 574 S.E.2d at 786. Here, Appellants do have a fee ownership interest. The same distinction applies to Rippetoe v. Odell, 148 W.Va. 639, 276 S.E.2d 793 (1981), another case cited by WVFP.

purposes.” The Court held there was *no additional burden* by virtue of the gas pipeline; stated differently, the Court concluded that the laying of a gas pipeline within a public highway easement constituted a valid transportation right included within the grant of an easement for public road purposes. 141 W.Va. at 194, 90 S.E.2d at 458. Under those circumstances, the Court explained that “...the reversionary right of the owner of the fee in the surface of the street is too remote and contingent to be of any appreciable value or to be regarded as property, which under the Constitution is required to be paid for when its use is appropriated by the public.” 141 W.Va. at 192, 90 S.E.2d at 457. For the purposes of this case, nothing in Herold v. Hughes, indicated that the underlying land owner still did not own the fee in question; that property interest merely was deemed too remote for the gas pipeline to constitute an additional easement burden triggering takings / just compensation constitutional principles. Contrary to the Circuit Court’s conclusion, Herold v. Hughes says *absolutely nothing about standing in annexation disputes* and as such, is irrelevant to that issue in this case.

The ownership of the underlying fee upon conveyance of a public transportation easement<sup>11</sup> cannot be questioned in West Virginia since at least 1919. In Fox v. City of Hinton, 84 W.Va. 239, 99 S.E. 478, 479-80 (1919), this Court flatly stated: “...in this state, upon the acquisition of a public street, the fee of the land remains in the landowner, and the public acquires an easement in the street for travel” (underlining added for emphasis). While Appellants here

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<sup>11</sup>The administration of county road easements was transferred to the State Road Commission in 1933 by operation of W.Va. Code §17-10-1. The State Road Commission took from the counties only the same estate as had been acquired before 1933. See generally, Syll. Pt. 3, Stephenson v. Cavendish, 134 W.Va. 361, 59 S.E.2d 459 (1950).

cannot use their property in a way that is inconsistent with the public transit easement, *they unquestionably own the fee along and beneath the county roads, Morgan Hollow, and Hokes Mill Roads* (and appear to own any portions of U.S. 219 which are not owned by the DOH). Fox v. City of Hinton, *supra*, *cited with approval in*, Herold v. Hughes, *supra*. As fee simple owners, Appellants have a “property interest” that is every bit as entitled to legal protection as any fee claimed by WVFP or Mr. & Mrs. Bayless. This ownership of the fee along and beneath Morgan Hollow / Hokes Mill Roads (and any portions of U.S. 219 not owned by the DOH) conveyed standing to the Organ Cave Appellants here, contrary to the Circuit Court’s conclusion.

Applying the three-part test from Findley v. State Farm Mutual Automobile Insurance Co., 213 W.Va. 80, 576 S.E.2d 807, (2002), the Organ Cave Appellants’ property has been annexed unlawfully; they have been disenfranchised in counting a “majority” of freeholders; no “qualified voters” were required to file the petition; and Ronceverte and the County Commission approved an unlawful lasso annexation. If this is not “injury in fact,” it is difficult to conceive what is. Second, the aforementioned actions are a direct result caused by the unlawful annexation ordinance. Third, it is not only likely, it is certain, that the injuries complained of here will be redressed only through a favorable decision of this Court.<sup>12</sup> Contrary to the Circuit Court’s conclusion, the Organ Cave Appellants have standing to contest the annexation here. Findley v. State Farm Mutual Automobile Insurance Co., *supra*; Guido v. Guido, *supra*; Coleman v. Sopher,

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<sup>12</sup>Appellants have exhausted all avenues of redress before the City Council of Ronceverte and the Greenbrier County Commission (the latter’s role is merely ministerial here under SER City of Charles Town v. County Commission of Jefferson County, 221 W.Va. 317, 655 S.E.2d 63 (2007)).

supra.

Although there was essentially no factual development<sup>13</sup> of the issue below, the Ronceverte Appellants also have standing. Applying the three-part test, the municipality in which they live, own property, pay taxes, and vote, has approved an unlawful lasso annexation which, by snaking out four miles from an otherwise compact community, will stretch vital municipal services beyond the limits of public safety. Although the Ronceverte Appellants vote in and are directly impacted by their town's unlawful annexation, no "qualified voters" from the annexed area were required to file the petition.<sup>14</sup> Thus, the Ronceverte Appellants have suffered "injury in fact."<sup>15</sup> Second, the aforementioned actions are a direct result caused by the unlawful annexation ordinance. Third, it is certain that the injuries complained of here will be redressed only through a favorable decision of this Court. Contrary to the Circuit Court's conclusion,<sup>16</sup> the Ronceverte

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<sup>13</sup>Because the Circuit Court granted leave to amend to add the Ronceverte Appellants simultaneously with its order dismissing the case, there was essentially no factual development below relating to them.

<sup>14</sup>This fatal deficiency is sufficient, standing alone, to invalidate the annexation. If freeholders and voters residing in Ronceverte lack standing to contest this unlawful act by their municipality, then no one has standing here.

<sup>15</sup>Assuming, arguendo, the Organ Cave Appellants lack standing, an alternate basis for standing by the Ronceverte Appellants is *jus tertii* standing, as discussed by Chief Justice Davis in her concurring opinion in SER Abraham Line Corp. v. Bedell, 216 W.Va. 99, 602 S.E.2d 542 (2004) (per curiam). The Ronceverte Appellants have suffered an injury in fact; they are close family relations to certain of the Organ Cave Appellants; and (if the Organ Cave Appellants lack standing) there certainly would exist a hindrance to their ability to protect their own interests. 216 W.Va. at 113, 602 S.E.2d at 556.

<sup>16</sup>The Circuit Court relied to some extent on a minor boundary adjustment case in dismissing the Ronceverte Appellants. 8/29/09 T., p. 11. However, minor boundary adjustment annexations are a completely different statutory creature than annexations without an election by petition. It may be defensible to take a more restrictive view of legal standing in minor boundary

Appellants have standing to contest the annexation here. Findley v. State Farm Mutual Automobile Insurance Co., *supra*; Guido v. Guido, *supra*; Coleman v. Sopher, *supra*.

In summary, the Circuit Court's standing analysis was derailed by Appellees' citation of inapposite authority having nothing to do with standing generally, or standing in annexation disputes specifically. Application of the three-part test from Findley v. State Farm Mutual Automobile Insurance Co., *supra*, yields the inescapable conclusion that both groups of Appellants have standing here.

**B. THE CIRCUIT COURT ERRED BY FAILING TO REACH THE MERITS OF THIS CASE, WHICH THIS COURT SHOULD AS THE DISPOSITIVE FACTS ARE UNDISPUTED.**

Appellants submit that this case presents an exception to this Court's usual practice of not considering questions the lower court has not addressed.<sup>17</sup> Here, the Circuit Court artificially truncated the proceedings below by limiting the legal inquiry to the issue of standing. Second, and more importantly, *no amount of evidentiary development or legal analysis* in the Circuit Court will change the *immutable and uncontroverted facts and controlling law, discussed infra, which are dispositive of this appeal.*<sup>18</sup> In Whitlow v. Board of Educ. of Kanawha County, 190

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adjustments than in annexations by petition because the former, by definition, typically involve less drastic and controversial changes to a municipality's boundaries.

<sup>17</sup>"This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syllabus Pt. 2, Sands v. Security Trust Co., 143 W.Va. 522, 102 S.E.2d 733 (1958).

<sup>18</sup>These legal issues were raised below by pleading or amendment; they simply were not adjudicated by virtue of the Circuit Court's limiting its ruling to standing.

W.Va. 223, 226-227, 438 S.E.2d 15, 18-19 (W.Va.1993), this court considered the merits of the issue presented even though it had not been addressed by the lower court. This court explained:

The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.

In this case, we are confronted with very limited and essentially undisputed facts. The constitutional issue raised for the first time on appeal is the controlling issue in the resolution of the case. If the statute is unconstitutional, the case should not be dismissed. Furthermore, the issue is one of substantial public interest that may recur in the future. These two considerations are in line with our basic standards for deciding when to examine matters in a prohibition proceeding. *See Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

Whitlow v. Board of Education of Kanawha County, 190 W.Va. 223, 226-227, 438 S.E.2d 15, 18-19 (W.Va.1993). Similarly in this case, the controlling facts are undisputed and the issue of lasso annexations is bound to recur.

In the recent case of In re Charleston Gazette FOIA Request, 222 W.Va. 771, 671 S.E.2d 776 (2008), this Court agreed with the Charleston Gazette that it should adjudicate a statutory issue which the circuit court below had not reached (because it dismissed the Gazette's complaint sua sponte). The following language used by this Court is equally applicable in rationale to this case:

...the *Gazette* argues that this Court should not simply remand the underlying case to the circuit court, but instead, should decide this case on its merits. It points out that it has already been more than one year since its original FOIA request and that by the time the matter is returned to the circuit court and addressed there, then appealed again to this Court, it could be years before the case is finally resolved. The *Gazette* maintains that given the importance of timely record disclosure under FOIA, this case presents an exception to this Court's usual practice of not considering questions the lower court has not addressed.

222 W.Va. at 776, 671 S.E.2d at 781. In this case, all parties, WVFP included (although it may not acknowledge it), share an interest in expeditious resolution of the merits of this appeal.

Perhaps more importantly, no amount of evidentiary development or analysis below will change the immutable and uncontroverted facts and circumstances and controlling law, discussed *infra*, which are dispositive of the merits of this appeal. Under these circumstances, this Court should not hesitate to address those merits, consistent with the following discussion. Whitlow v. Board of Education of Kanawha County, *supra*; In re Charleston Gazette FOIA Request, *supra*.

**C. APPELLEES CANNOT POSSIBLY PROVE THAT STONEY GLEN SUBDIVISION IS “CONTIGUOUS,” AS REQUIRED BY W.VA. CODE § 8-6-1.**

West Virginia Code § 8-6-1, provides that, “[u]nincorporated territory may be annexed to and become a part of a municipality *contiguous thereto* only in accordance with the provisions of this article.” (Italics added for emphasis). Contiguity, as required by West Virginia Code § 8-6-1, surely contemplates a more substantial contact between a municipality and the territory annexed than the mere artifice of a lasso or shoestring connection (highway / road) to a subdivision otherwise situated some four (4) miles distant from the closest existing boundary of a small, compact municipality, such as Ronceverte. In this case, no amount of evidentiary development can change the geography and statutory language which is controlling. The mere shape of

Ronceverte after the Stoney Glen annexation proves Appellants' point--after passage of Ordinance #2009-01, the City of Ronceverte now resembles a grossly unbalanced and twisted dumbbell, and is so bizarre, tortured and distorted as to be wholly irrational and contrary to West Virginia Code § 8-6-1.

Appellees did not contest Appellants' assertion in the Circuit Court that for more than 100 years, the *overwhelming majority* of courts around the country have held that a lasso annexation, if solely for the purpose of connecting the territory annexed with the main corporate body, is per se illegal as not satisfying the contiguity requirement for annexation. In response to Appellants' authorities, Appellees simply cited small minority view caselaw (WVFP) and attempted to make other unavailing arguments (City of Ronceverte). The City of Ronceverte relied on inapposite caselaw involving annexation by minor boundary disputes.

Former Justice Starcher ably explained the distinctions between the three types of annexation in this State in his concurring opinion in SER City of Charles Town v. County Commission of Jefferson County, 221 W.Va. 317, 655 S.E.2d 63 (2007). Ronceverte relied on W.Va. Code §8-6-5(f)(1) to attempt to define "contiguity" in W.Va. Code §8-6-1; this was erroneous. W.Va. Code §8-6-5(f)(1) provides:

(f) In making its final decision on an application for annexation by minor boundary adjustment, the county commission shall, at a minimum, consider the following factors:

(1) Whether the territory proposed for annexation is contiguous to the corporate limits of the municipality. **For purposes of this section**, "contiguous" means that at the time the application for annexation is submitted, the territory proposed for annexation either abuts directly on the municipal boundary or is separated from the municipal boundary by an unincorporated street or highway, or street or highway right-of-way, a creek or river, or the right-of-way of a railroad or other public

service corporation, or lands owned by the state or the federal government...

(bold & underlining added for emphasis). Clearly, the Legislature opted to define “contiguous” in minor boundary adjustment cases under §5 of the statute, and expressly limited its definition to that section of the Code only. A different definition prevails in the Code relating to annexations without an election by petition.

The term contiguous<sup>19</sup> in W.Va. Code §8-6-1, which controls §4 of the statute<sup>20</sup>, simply is not informed by the definition of contiguous in §8-6-5(f)(1). With regard to statutory interpretation, this Court has held consistently:

[i]t is axiomatic that, “[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.”

Syll. Pt. 1, Miners in General Group v. Hix, 123 W.Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds*, Lee-Norse Co. v. Rutledge, 170 W.Va. 162, 291 S.E.2d 477 (1982); Accord, Syll. Pt. 6, Apollo Civic Theatre, Inc. v. State Tax Commissioner of West Virginia, 223 W. Va. 79, 672 S.E.2d 215 (2008); Syll. Pt. 6, in part, State ex rel. Cohen v. Manchin, 175 W.Va. 525, 336 S.E.2d 171 (1984) (“Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.”). Resort to dictionaries yields the following first

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<sup>19</sup>Ronceverte’s theory that In re City of Beckley, 194 W.Va. 423, 460 S.E.2d 669 (1995), is “the seminal case in West Virginia on the requirement of contiguity” is misplaced for the same reason. In re City of Beckley is a minor boundary adjustment case, not one involving annexation without election by petition. As such, its holding is irrelevant to this dispute.

<sup>20</sup>W.Va. Code § 8-6-1, provides that, “[u]nincorporated territory may be annexed to and become a part of a municipality contiguous thereto only in accordance with the provisions of *this article*.” Since §1 obviously is part of Article 6, Ronceverte must comply therewith.

definitions of contiguous: “touching, in actual contact, next in space; meeting at a common boundary, bordering, adjoining,” Oxford English Dictionary Online (2009), and “being in actual contact : touching along a boundary or at a point,” Merriam-Webster Online Dictionary (2009).

It cannot be said that an isolated island consisting of a subdivision four (4) miles’ distant from Ronceverte proper, connected only by two roadways, is “next in space;” “meeting at a common boundary, bordering or adjoining;” or “touching along a boundary...” Thus, Stoney Glen is not contiguous to Ronceverte, as required by W.Va. Code §8-6-1. *Miners in General Group v. Hix, supra.*

While this court has not addressed lasso annexations previously, numerous other courts have. Significantly, the *overwhelming majority of courts* that have ascertained the ordinary meaning of “contiguous,” and defined it where a legislature has not, support Appellants. See, e.g., *City of Rapid City, S.D. v. Anderson*, 2000 SD 77, 612 N.W.2d 289, 294 (2000) (“contiguous” and “adjoining” indicate physical touching with common border of reasonable length or width; city’s annexation of...airport via 200’ right of way for 4.7 miles not “contiguous”); *People of City of Charleston v. Witmer*, 304 Ill.App.3d 386, 709 N.E.2d 998 (1999) (“contiguous for any reasonable interpretation of the [Illinois Code] must mean contiguous in the sense of adjacent to and parallel to the existing municipal limits...”; “strip or corridor annexation...has always been condemned by the courts of this State”); *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20, 24 (1992) (“the City of Hastings is reaching out like a finger, along Highway 6, a 120-foot-wide strip, to the college campus...the requirement of contiguity has not been achieved in

this case, since the boundary of the area sought to be annexed is not substantially adjacent to the boundary of the city”); SER Delaware Department of Transportation v. City of Milford, 576 A.2d 618, 624 (1989) (“[t]his Court holds only that the General Assembly could not by its choice of the single undefined word, ‘contiguous’...fairly be said to have authorized the City to annex outlying property by the corridor or shoestring method”); City of Middletown v. McGee, 39 Ohio St.3d 284, 287, 530 N.E.2d 902, 905 (1988) (adjacent, contiguous, and adjoining not defined in Ohio Code; Ohio courts “have frowned upon<sup>21</sup> the use of connecting strips of land to meet the contiguity requirement when annexing outlying territory not otherwise connected to the annexing municipality”) Wescom, Inc. v. Woodridge Park District, 49 Ill.App.3d 903, 364 N.E.2d 721 (1977) (whether annexed territory is contiguous to and adjoins municipality means “a touching or adjoining in a reasonably substantial physical sense;” corridor of right-of-way running 120.5' wide for ½ mile to land not contiguous); Town of Mt. Pleasant v. City of Racine, 24 Wis.2d 41, 45 127 N.W.2d 757, 759 (1964) (“the tendency of subdividers to reach far out into the countryside for vacant land and their desire to attach it to the city of services is natural; however, this can lead to annexations which in reality are no more than isolated areas connected by means of a technical strip a few feet wide. Such a result does not coincide with legislative intent, and tends to create crazy-quilt boundaries which are difficult for both city and town to administer.”); Potvin v. Village of Chubbuck, 76 Idaho, 453, 284 P.2d 414 (1955) (“...’adjacent’ and ‘contiguous’...must be construed to...[mean] the territory to be annexed must be adjoining, contiguous, coterminous or

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<sup>21</sup>The Ohio ruling is significant because Ohio statutes favor and encourage annexation by cities.

abutting”; the nearest point of the Village...to the [annexed] property...is approximately three miles, except for the intervening five-foot strip...[t]he only apparent purpose of the strip is to provide a connecting link with the land actually sought to be annexed...a three-mile gap will divide the Village from the proposed addition and the essentials of contiguity and adjacency are lacking.”) Clark v. Holt, 218 Ark. 504, 237 S.W.2d 483, 485 (1951) (“the use of a strip of land 50 feet wide and 3060 feet long...does not constitute contiguity under a statute authorizing annexation, the use of such strip being a mere subterfuge, and not a compliance with the law.”) In fact, the courts have reached the same result *even where statutes do not use, or only selectively use, the term “contiguous.”* See, e.g., Township of Owosso v. City of Owosso, 385 Mich. 587, 189 N.W.2d 421 (1971) (where statute silent, contiguity is required and entails more than a “mere touching” of parcels; annexation of 240 acre parcel connected by strip 1326’ in length and 282’ in width invalidated); Ridings v. City of Owensboro, 383 S.W.2d 510 (Ky. 1964) (contiguity required though Kentucky statutes largely silent on subject; annexation of 3 parcels 2200’, 3600’, and 10,000’ using highways to connect invalidated).

Faced with this avalanche of adverse authority, WVFP cited cases from three jurisdictions, per curiam decisions from Alabama and New York, and a California case. In two of those jurisdictions, there is additional authority which actually supports Appellants, City of Fultondale v. City of Birmingham, 507 S.2d 489, 491 (Ala. 1987) (“we hold that the use of public road rights-of-way to create contiguity is unreasonable and invalid as a matter of law”); People ex rel. Lemoore Land & Fruit Growing Co. v. City of Lemoore, 37 Cal. App. 79, 84, 174 P. 93, (1918) (setting aside lasso annexation). The case cited by WVFP of Village of Saranac Lake v. Gillispie,

261 A.D. 854, 24 N.Y.S.2d 403 (1941) (per curiam), involved a sewage treatment plant and strip consisting of a connecting pipeline being annexed by a municipality and as such, is readily distinguishable from this case, which involves an attempt to reach out to a non-contiguous “subdivision” having, at present, a single house foundation in it. Whatever WVFP’s cases stand for, Appellants’ authorities are the better-reasoned and overwhelming majority rule.

**D. APPELLEE CITY OF RONCEVERTE FAILED TO CALCULATE A MAJORITY OF FREEHOLDERS PROPERLY.**

Although the Circuit Court did not reach the issue, there is yet another basis on which the Stoney Glen annexation should be invalidated by this Court: Ronceverte did not calculate a majority of freeholders properly. W.Va. Code § 8-6-4(a) provides for annexation without an election by petition of a “majority of the qualified voters...and a majority of all freeholders of the additional territory...” On the freeholders prong of this statute, Appellant Jewell Doering testified that there are approximately 98-104 freeholders along Morgan Hollow and Hokes Mill Roads whose sentiments never were counted by the City of Ronceverte in calculating a “a majority of all freeholders of the additional territory...” 8/18/09 T., 57-58. Several of these freeholders, including but not limited to, Jesse and Kathleen Hylton, Billy R. and Betsy Falls, and Dorothy J. and Marvin L. Morgan, are Appellants in this case, and obviously oppose the annexation petition.<sup>22</sup>

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<sup>22</sup>These individuals alone outweigh those counted by Ronceverte for purposes of W.Va. Code § 8-6-4(a).

**E. APPELLEE CITY OF RONCEVERTE UNLAWFULLY ALLOWED NON-VOTERS TO FILE THE ANNEXATION PETITION.**

In its Order entered on October 16, 2009, the Circuit Court allowed Appellants to amend their pleadings to assert an additional legal claim—that Ronceverte unlawfully allowed non-voters to file the annexation petition. Significantly, Appellees do not contest that neither of the annexation appellants here—the Baylesses and WVFP—are registered voters in West Virginia. W.Va. Code § 8-6-4(a) provides for annexation without an election by petition of a “majority of the qualified voters...and a majority of all freeholders of the additional territory...” [underlining added for emphasis]. W.Va. Code §8-6-4(a) does not allow for annexation without an election by petition by a majority of the qualified voters *or* a majority of all freeholders of the additional territory. It is uncontroverted that none of the entities / individuals who filed the annexation petition here were “qualified voters;” this fatal defect invalidates that petition as a matter of law. Under these circumstances, this Court should do what the Circuit Court failed to do—invalidate the subject annexation.

**VII. CONCLUSION**

Returning to an overview of this appeal, the Circuit Court erred by artificially constraining the proceedings below and concluding that both the Organ Cave and Ronceverte Appellants lack standing to challenge Ronceverte’s lasso annexation of Stoney Glen subdivision. This case, in which controlling facts cannot be changed by factual development or legal analysis, presents an exception to this Court’s general rule of not addressing on appeal non-jurisdictional issues not decided by a circuit court. On the undisputed facts, Appellees cannot possibly prove that Stoney

Glen subdivision is “contiguous” to Ronceverte, as required by W.Va. Code § 8-6-1. In addition, Ronceverte unlawfully failed to calculate a majority of freeholders properly. Finally and perhaps most obviously, Ronceverte unlawfully allowed non-voters (WVFP and the Baylesses) to petition for annexation. Under these circumstances, Appellants respectfully pray that this Court reverse the decisions below, and remand this case with instructions to enter judgment for Appellants on the merits.

Respectfully submitted,  
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CERTIFICATE OF SERVICE

I, William D. Turner, counsel for Appellants, Robert A. Doering, et a., do hereby certify that I have served the foregoing *Brief on Behalf of Appellants, Robert A Doering, et al.* upon counsel for the Appellees, by mailing a true and exact copy thereof, via United States First Class Mail, postage paid, on this the 13<sup>th</sup> day of August, 2010, and addressed as follows:

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