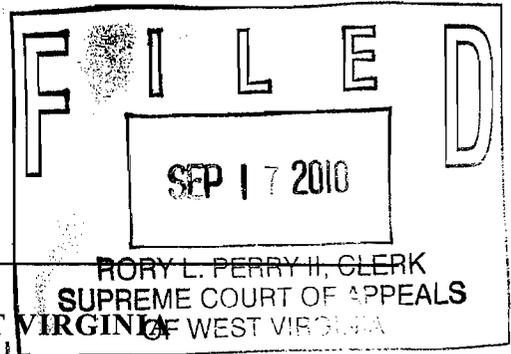


NO. 35553



IN THE SUPREME COURT OF WEST VIRGINIA

**ROBERT A. DOERING, JEWELL DOERING, DENNY R. CANTERBURY SR.,
BILLY R. FALLS, BETSY FALLS, JESSE HYLTON, KATHLEEN HYLTON,
LAYOLA J. SARVER, WILLIAM R. WHITE, LINDA S. WILSON,
ROBERT WILSON, ROBERTA WILSON, SANDRA WILSON,
EARNEST WYANT, and VICKI WYANT,**

Appellants,

v.

**CITY OF RONCEVERTE and COUNTY COMMISSION
OF GREENBRIER COUNTY, WEST VIRGINIA,**

Appellees.

**BRIEF ON BEHALF OF APPELLEE CITY OF RONCEVERTE
AND INTERVENOR WEST VIRGINIA FARM PROPERTIES**

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OMISSIONS OR INACCURACIES IN APPELLANTS' STATEMENTS

1. The appellants failed to state that the proceeding below was an action for certiorari and mandamus, with motions for a temporary restraining order and/or a preliminary injunction. (Appellants' Br. 1.)

2. The appellants have stated that they reside in the unincorporated area outside the City of Ronceverte and in the City but have failed to state that none of them resides in the annexed territory. (Appellants' Br. 3-4.)

3. The appellants have stated that the Department of Highways revoked its consent to the annexation of the roads involved. (Appellants' Br. 4, 5.) The record, however, does not show that the Department is no longer supporting the annexation. (R. 130; Tr., 8/28/09, 23-25.)

4. The appellants characterize Mr. Lefler's testimony as confirming that abutting property owners own the fee simple under the roadway. (Appellants' Br. 5.) The record, however, clearly indicates Mr. Lefler's acknowledgment that the abutting owners have no rights whatsoever beyond the rights held by the general public to the use of either the subsurface or the area above the ground. (Tr., dated 8/28/09, 20-21, 25-26.)

5. The following statements not only constitute opinions as to what the court should conclude on the law, rather than facts, but, as explained *infra*, they are also incorrect on the law:

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.

(Appellants' Br. 2.)

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' Br. 3.)

Significantly, neither of the annexation appellants, Mr. Y 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.

(Appellants' Br. 6.)

6. The appellants failed to state that, on review, the appellants bear the burden of showing that there was error in the proceedings below resulting in the judgment of which they complain, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court. (Appellants' Br. 7.)

STATEMENT TO MEET ALLEGED ERRORS

1. The circuit court did not err in finding that because the appellants cannot show the required injury in fact, they do not have standing to challenge the annexation in issue.
2. The circuit court did not err in failing to reach the merits because, once it concluded that the appellants did not have standing, it was without jurisdiction to address the merits.

Assignments of error 3 through 5 are not properly separate assignments of error at all, since the court below did not address them, but are points of argument on the merits of the annexation.

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ARGUMENT

The appellants argue that the circuit court erred in finding that they lack standing and that this Court should, therefore, decide the case on the merits, in their favor, as the dispositive facts are undisputed. They note that review of purely legal questions is *de novo*. (Appellants' Br. 7 (citing *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 140, 459 S.E.2d 415, 417 (1995)).) It should be noted, however, that in all cases on appeal to this Court, the appellant(s) have the affirmative burden of showing that there was error in the proceedings below that resulted in the judgment complained of—a heavy burden, given the fact that all presumptions are in favor of the correctness of the judgment of the trial court. *E.g.*, *State ex rel. Harper-Adams v. Murray*, 224 W. Va. 86, 90-91, 680 S.E.2d 101, 105-06 (2009) (citing Syl. Pt. 2, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973)); *State ex rel. Corbin v. Haines*, 218 W. Va. 315, 319-20, 624 S.E.2d 752, 756-57 (2005) (same); *Rose v. Thomas Mem. Hosp. Found.*, 208 W. Va. 406, 414, 541 S.E.2d 1, 9 (2000) (same); *see also State ex rel. Evans v. Robinson*, 197 W. Va. 482, 485-86, 475 S.E.2d 858, 861-62 (1996) (stating principle). The appellants cannot meet their burden because the decision below that they do not have standing was correct and is supported by the record.

Since the circuit court correctly determined that the appellants do not have standing, since a decision of the merits would constitute an improper interference with legislative powers, and since there was no decision on the merits below, this Court should affirm the circuit court's decision and should certainly not reach the merits of the case. Even if the

Court should determine that it has the authority to reach the merits, it should find against the appellants because the appellants, as a matter of law, cannot prevail on the merits.

I. SINCE THE APPELLANTS CANNOT SHOW THAT THE ANNEXATION INTERFERES WITH ANY LEGALLY PROTECTED INTEREST, THE CIRCUIT COURT PROPERLY DETERMINED THAT THEY ARE WITHOUT STANDING TO BRING THIS ACTION.

The appellants continue to assert that they have standing based on their purported fee ownership interest in the property under the roads involved in the challenged annexation. The appellants have not pointed to any errors in the circuit court's factual findings but, rather, appear to disagree with the court on the law. The circuit court's analysis of the law, however, which is careful, complete, and well supported by citation to the law, is clearly correct.

As a preliminary matter, it is well established in West Virginia, as elsewhere, that annexation is entirely a statutory matter. *E.g.*, *State ex rel. City of Charles Town v. County Comm'n of Jefferson County*, 221 W. Va. 317, 322-23, 655 S.E.2d 63, 68-69 (2007); *In re City of Morgantown*, 159 W. Va. 788, 794, 226 S.E.2d 900, 904 (1976); *see also City of Asbury v. Iowa City Dev. Bd.*, 723 N.W.2d 188, 193 (Iowa 2006); *City of Louisville v. Fiscal Ct. of Jefferson County*, 623 S.W.2d 219, 225 (Ky. 1981); *Town of Greenfield v. City of Milwaukee*, 272 Wis. 388, 391-92, 75 N.W.2d 434, 436 (1956). Standing to challenge an annexation is, likewise, determined by interests created by the annexation statutes.

Under the West Virginia annexation statutes, there are three different paths to annexation: First, under W. Va. Code § 8-6-2, annexation may be accomplished upon an

election initiated by a petition; second, under W. Va. Code § 8-6-4, annexation may be accomplished without an election upon petition of a majority of the voters and freeholders of the additional territory; and, finally, under W. Va. Code § 8-6-5, annexation may be accomplished, under proper circumstances, "by minor boundary adjustment." The annexation at issue was accomplished under § 8-6-4, *without any requirement for an election*, upon a petition of a majority of the voters and freeholders of the annexed territory. The appellants are neither freeholders nor voters of the annexed territory.

The circuit court specifically, and correctly, found that the appellants' evidence was insufficient to show that any of them is an owner in fee of the land underlying the public roads involved. (Order, 8/24/09, 8.) The court went on to explain, however, that even if there were appellants who own property in fee under one of the roads, their interest, pursuant to the language in *Herold v. Hughes*, 141 W. Va. 182, 191, 90 S.E.2d 451, 456 (1955), is too remote and contingent to be regarded as property for purposes of annexation requirements. (Order, 8/24/09, 8.) The court further determined that the abutters, whether or not owners of the fee, presently retain only the same rights to the roadway as the public generally. (Order, 8/24/09, 8.) Since the interest of the abutters—whether or not they own the fee to the center of the road—is merely a reversionary right, too remote and contingent to be regarded as a present property right, it cannot, as a matter of law, form the basis for any claim of injury in fact, such as a violation of easement rights. *See Stephenson v. Cavendish*, 134 W. Va. 361, 361, 59 S.E.2d 459, 461 (1950) (referring to interest in roadways as a reversionary fee simple estate).

The appellants have not shown how the court's finding is factually incorrect. They assert, rather, that the circuit court's view on standing is miserly, that the cases cited by their opponents do not specifically address standing in the context of annexation, and that *Herold*, in particular, is irrelevant because it says nothing about standing in annexation disputes. (Appellants' Br. 8-10.) As discussed *infra*, however, the law on standing discussed in the cases is applicable to all disputes, whatever the context, and the circuit court properly applied the law, in the context of annexation, to find that the appellants lack standing.

The appellants correctly state the three elements of standing as, first, that the party has suffered an injury in fact; second, that there is a causal connection between its injury and the other party's allegedly wrongful conduct; and third, that it is likely that the injury would be redressed by a favorable decision. (Appellants' Br. 9 (and cases cited).) Importantly, while the appellants emphasize the third element, a party

must satisfy all three essential elements for standing because the standing inquiry is a conjunctive inquiry, not a disjunctive one.

Wyo. Sawmills, Inc. v. U.S. Forest Serv., 179 F. Supp. 2d 1279, 1296 (D. Wyo. 2001); *see also, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). If a party is unable to show any one of the elements, it is without standing. *See, e.g., Coleman v. Sopher*, 194 W. Va. 90, 96, 459 S.E.2d 367, 373 (1995) (cited by appellants) (finding minimum requirement is a showing of injury in fact of interests that are actual or imminent). In the present case, since the appellants cannot satisfy the first element, they clearly cannot satisfy all of them and are without standing, as the circuit court correctly concluded.

As both West Virginia and the federal courts have made clear, the question of standing to bring a particular action rests on whether the person or persons have a personal stake in the outcome of the action sufficient to present the court with a justiciable controversy. *Snyder v. Callaghan*, 168 W. Va. 265, 275, 284 S.E.2d 241, 248 (1981) (citing *Warth v. Seldin*, 422 U.S. 490 (1975); *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

Therefore, in order to have standing, parties

must allege *an injury in fact*, either economic or otherwise, which is the result of the challenged action and show that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit.

Id. (emphasis added). While the appellants have stated that they will suffer irreparable injury as a result of the annexation, they have alleged no facts whatsoever showing what their injury might be or that it would satisfy the requirement for injury in fact. *Cf. Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 97, 576 S.E.2d 807, 824 (2002) (cited by appellants) (concluding that plaintiff did not have standing to bring declaratory judgment action where she could claim no injury pursuant to her motor vehicle insurance policy based on exclusionary language which was not included in her policy), *cert. denied*, 539 U.S. 942 (2003); *City of Middletown v. McGee*, 39 Ohio St. 3d 284, 286-87, 530 N.E.2d 902, 904-05 (1988) (concluding that legal interest of property owner within territory to be annexed would be adversely affected where owner did not want to have his property with the city and noting that adverse effects on contractual rights or on property values might also constitute sufficient legal interests).

The appellants argue, as they did below, that they have an interest in the county roads that are being annexed, as abutters who own the underlying fee. (Appellants' Br. 10-12.) The public highways of the state belong to the state, of course, whether in fee or by right-of-way. W. Va. Code § 17-2A-17. In one of the many so-called "legal fictions" of law, the fee for a public way remains in the owners, except when land is expressly taken in fee, and what is taken for the road is characterized as an easement. *See Herold*, 141 W. Va. at 191, 90 S.E.2d at 456 (and cases cited). That easement includes not only use of the surface, but of the land below and the space above it. *Id.* Importantly, as the court went on to explain:

As early as *Spencer v. Point Pleasant & Ohio R. Co.*, 23 W.Va. 406, this Court said: "Others have held, what seems to us to be a more reasonable view, viz.: That it [*is*] immaterial whether the owners of adjoining lots owned the fee or not. Their reason for this opinion was, that though the fee of the street be in the owners of adjoining lots, yet as the town or city has a right to the use of the ground as a highway, and for various other purposes consistent therewith, such as the making of sewers and the laying of gas or water pipes and other purposes, for which a street may be legitimately used, which right to use the street is practically an exclusion of the owner of the fee in the street, so long as it is used by the town without obstructing the surface of the ground, and as this right of user on the part of the city or town is permanent, and may and in all probability will last forever, *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.["]

Id. at 191-92, 90 S.E.2d at 456-57 (emphasis added).

The appellants attempt to distinguish *Herold* on the basis that it involved condemnation, rather than annexation. (Appellants' Br. 9-10.) It should be noted, however, that property rights exist independently of actions allegedly interfering with them. Property rights are created and defined by state laws. *See, e.g., Bd. of Regents v. Roth*, 408 U.S. 564,

577 (1972). Any given property right may be interfered with in a variety of different ways, covered by a variety of different laws. In any case which alleges an interference with property rights, the analysis must therefore begin with the question of whether there is an underlying property right. Only if such a right exists does the analysis go forward as to whether the right was unlawfully interfered with. The question of whether a protected property right exists is, therefore, independent of whether the cause of action asserted arises out of a condemnation or out of an annexation. Therefore, while *Herold* involved the issue of whether additional compensation was required when a pipeline was added under a road, rather than an issue of annexation, the underlying issue in both contexts is the same—that is, whether or not a reversionary right in a road is sufficient to be regarded as property for purposes of the injury analysis.

The appellants rely on *Fox v. City of Hinton*, 84 W. Va. 239, 99 S.E. 478, 479-81 (1919), to argue that the fee of the land beneath public transportation easements remains with the landowner and point out that *Fox* was cited with approval in *Herold*. (Appellants' Br. 10.) From that, they conclude that they are fee simple owners with a protected property interest. (Appellants' Br. 11.) It should first be noted that in *Fox* the court specifically rejected the notion that activity in and under the road easement which did not materially obstruct the light to the abutting property of the fee owner was an interference with the owner's rights, finding the plaintiff's arguments to be entirely without merit. 99 S.E. at 480.

Herold, obviously, was decided years after *Fox*, such that if there a conflict between the two, *Herold* would govern. What the court held in *Herold* was that the fee interest,

because it was essentially only a reversionary interest, was *not* sufficient to be regarded as property for purposes of the injury analysis, just as the plaintiff's interest in *Fox* had been insufficient. 141 W. Va. at 191-92, 90 S.E.2d at 456-57. The appellants' unsupported statement that their (reversionary) fee interest to land under public roads, should one exist, is entitled to the same legal protection as the full, and currently existing, fee interest of the annexation petitioners to their available-for-private-use land is not only directly contrary to the decision in *Herold*, but contrary to good reason.

While abutters do retain certain rights, even when they have no ownership in fee, those rights are even more remote than the reversionary rights to the fee and even less sufficient with regard to property rights for purposes of annexation. As this Court has explained:

One whose real estate abuts on a public street or highway has two distinct kinds of rights. One is a public right which he enjoys in common with all other citizens. He also has certain private rights which arise from his ownership of property contiguous to the street or highway, and which are not common to the public generally. These include rights of access, view, light, air and lateral support.

State ex rel. Woods v. State Road Comm'n, 148 W. Va. 555, 558, 136 S.E.2d 314, 316-17 (1964). Even those rights are not absolute, however, and are subject to the power of government to control and regulate them reasonably in the public interest. *Id.* Therefore, although

the owner of a fee in an easement existing for public road purposes may *technically have title* to the surface of the way not useful or necessary in the construction or maintenance of the road, he can not utilize it in any manner

that will interfere with the use by the public or with the control of the way by the State.

Herold, 141 W. Va. at 187, 90 S.E.2d at 454 (emphasis added). Even when an abutter also owns the fee, therefore, his only right is to object if there is a violation of the terms of the public way easement. *Butler v. Price*, 212 W. Va. 450, 454-55, 574 S.E.2d 782, 786-87 (2002).

It is perfectly clear that the annexation of the roads in the present case will not result in any violation of the terms of the road easements and will have absolutely no impact whatsoever on the appellants' rights of access, view, light, air, or lateral support. See *Rippetoe v. O'Dell*, 166 W. Va. 639, 642-43, 276 S.E.2d 793, 796-97 (1981) (absolutely no evidence that buried gas line constituted any interference with abutters' right of ingress and egress). Although the appellants attempt to pull themselves up to injury in fact by their bootstraps, by claiming that their alleged disenfranchisement and the allegedly unlawful annexation constitute injury in fact, there is no legally cognizable injury because there is no underlying property right. Because they are not voters of the annexed territory, furthermore, and there is absolutely no requirement for approval of any voter outside the annexed territory in a § 8-6-4 annexation, there is no basis whatsoever for finding that they have been disenfranchised.¹

Certainly, if the parties who abut the roads have no protected property interest, the Ronceverte parties have even less of an interest. The appellants assert that because the latter parties are town voters, they have suffered an injury in fact. Because they are even more

¹This argument is more fully addressed infra.

surely not voters of the annexed territory, however, there is, as with the abutting parties, no basis whatsoever for finding that they have been disenfranchised. The appellants also assert, in the alternative, that the Ronceverte parties have *jus tertii* standing. This argument is patently frivolous. In the case upon which the appellants rely, in which the plaintiff sought to litigate a negligence claim involving the employment status of a third party for purposes of workers' compensation, the court first noted that exceptions to prudential, as opposed to constitutional, standing requirements may be provided by the legislature in order to allow one party to represent the interests of a third party, and then laid out the requirements for such "*jus tertii*" standing:

(1) [T]he litigant must have suffered an injury-in-fact; (2) the litigant must have a close relation to the third party; and (3) there must exist some hindrance to the third party's ability to protect his/her own interests.

State ex rel. Abraham Lincoln Corp. v. Bedell, 216 W. Va. 99, 114, 602 S.E.2d 542, 557 (2004). The court in that case determined that it needed to go no further than the first requirement because

[i]n order for Mr. Edens to litigate the employment status of Mr. Johnson, he must establish an injury-in-fact that flows from Mr. Johnson's employment status as an independent contractor. This he cannot do.

Id. at 115, 602 S.E.2d at 558; *see also Guido v. Guido*, 202 W. Va. 198, 202-03, 503 S.E.2d 511, 515-16 (1998) (cited by appellants) (finding it quite clear that plaintiff lacked standing to raise issues directly involving his parents). The appellants' argument in this case that the Ronceverte parties have suffered an injury in fact, as explained *supra*, is ill conceived and, irregardless of how close they are to the Organ Cave parties, there is no possible showing of

any hindrance to the ability of the latter parties (who are not, in fact, third parties at all but, rather, first parties in the present case) to protect their own interests. Rather, the impediment that they suffer is that they have suffered no cognizable injury at all. Both arguments are, accordingly, clearly without any merit whatsoever.

In summary, the appellants have not shown, and cannot show, any injury in fact and, therefore, they are without standing to bring this action. The circuit court correctly concluded that the asserted rights in the present case do not rise to the level of protected property rights in fee or otherwise and that the appellants, therefore, do not have standing, and this Court should simply affirm that decision.

II. SINCE THE APPELLANTS SEEK TO HAVE THIS COURT UNDO A LEGISLATIVE ACT, THIS COURT SHOULD REJECT THEIR APPEAL BECAUSE THE COURTS ARE WITHOUT JURISDICTION OVER THE MATTER, AS THE REMEDY THEY SEEK WOULD VIOLATE THE CONSTITUTIONAL SEPARATION OF POWERS MANDATE.

Even if this court were to determine that the appellants have standing, which they clearly do not, it should still not find for the appellants, because what the appellants are actually seeking is to have the Court undo a legislative act. The appellants are essentially asking this Court to void the challenged annexation. Annexation, however, is a legislative matter that has been delegated to the governing bodies of West Virginia's municipalities. W. Va. Code §§ 8-6-1 to 8-6-6. Once the ordinance is passed and approved, the boundaries of the municipality are set as changed thereby. *City of Charles Town*, 221 W. Va. at 322, 655

S.E.2d at 68. The reasonableness of an annexation is, therefore, not a question for the courts. *In re Pet. of Beckley to Annex*, 194 W. Va. 423, 430, 460 S.E.2d 669, 676 (1995). Moreover, the courts are without authority to interfere with the municipality's legislative function.

As this Court explained in an analogous declaratory judgment action challenging the vacation of a public way, noting that the governing statute conferred exclusive jurisdiction over the matter upon the city council:

The findings of the council of a municipality in connection with the adoption of an ordinance constitute the basis for the adoption of the ordinance; and such findings are legislative in character and the adoption of such ordinance involves the exercise of a purely legislative function. *La Follette v. City of Fairmont*, 138 W. Va. 517, 76 S.E.2d 572. In the absence of fraud, collusion or other wrongdoing upon the part of the council of a municipality in the adoption of an ordinance, the recitals of the facts which constitute the basis for its enactment are conclusive when the subject matter of the ordinance is within the exclusive jurisdiction of the council.

Brouzas v. City of Morgantown, 144 W. Va. 1, 11-12, 106 S.E.2d 244, 250 (1958) (and other cases cited). The appellants have not alleged fraud, collusion, or other wrongdoing. Rather, they simply disagree with the findings in support of the annexation.

As this Court explained even more forcefully in an action which, like the present one, sought to have the Court enjoin a municipal legislative body from exercising its legislative powers:

A municipal council or other governing body of a municipality, when acting or attempting to act in a legislative capacity, upon a subject within the scope of its powers, is entitled to the same immunity from judicial interference with the exercise of legislative discretion as is the state legislature. *See, e.g., Hackney v. City of Guthrie*, 171 Okla. 320, 322, 41 P.2d 705, 707 (1935). A court of equity normally may not, therefore, enjoin a municipal legislative body from exercising legislative powers by enacting a municipal ordinance. *See syl. pt. 4, City of Charleston v. Littlepage*, 73 W. Va. 156, 80 S.E. 131

(1913). See also 5 E. McQuillin, *The Law of Municipal Corporations* § 16.92 (3d ed. rev. vol. 1981); 1 C. Antieau, *Municipal Corporation Law* § 4.28 (1986); annotation, *Injunction against legislative body of state or municipality*, 140 A.L.R. 439 (1942); 42 Am.Jur.2d *Injunctions* § 170 (1969); 43A C.J.S. *Injunctions* § 126 (1978). This principle that an injunction does not lie to restrain enactment of an ordinance applies generally even though the proposed ordinance is alleged to be unconstitutional or otherwise invalid. See *City of Charleston v. Littlepage*, 73 W.Va. 156, 160-62, 80 S.E. 131, 133-34 (1913); *New Orleans Waterworks Co. v. [City of] New Orleans*, 164 U.S. 471, 482, 17 S.Ct. 161, 165, 41 L.Ed. 518, 524 (1896); 5 E. McQuillin, *The Law of Municipal Corporations* § 19.04 (3d ed. rev. vol. 1981). The basis for this general rule is not merely precedence but the constitutional separation of powers among the branches of government. See, e.g., *Smith v. Brock*, 83 R.I. 432, 436, 118 A.2d 336, 338 (1955).⁶

⁶*W.Va. Const.* art. V, § 1 provides in pertinent part: "The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others[.]"

Perdue v. Ferguson, 177 W. Va. 44, 47 & n.6, 350 S.E.2d 555, 559 & n.6 (1986) (emphasis added).

In the present case, the statute specifically provides that after the date of the order which the County Commission is required to enter upon a municipal annexation, the corporate limits of the municipality shall be as set forth in the annexation order. W. Va. Code § 8-6-4(g). That order was entered on July 14, 2009. As there is no statutory provision for protest or appeal before the matter is final, the legislative act has now been completed and the annexation is fully effective. Compare *id.* § 8-13-13 (allowing 15 days to protest ordinance involving taxation or finance as enacted or amended before ordinance becomes effective)² with *id.* § 8-11-4 (providing requirements for passage of all municipal ordinances,

²See *Cooper v. City of Charleston*, 218 W. Va. 279, 288-89, 624 S.E.2d 716, 725-26 (2005) (discussing protest provision under § 8-13-13).

except where different or additional requirements are specified by some other code section, and including no provision for protest period before ordinance becomes effective or for appeal or other challenge).

The appellants are essentially asking this Court, by way of an appeal, to do what the circuit court would not have been empowered to do by way of injunction—that is, to undo the annexation. It should be noted, furthermore, that returning the situation to its preannexation status would be at least as great an interference in the municipality's legislative function as restraining the municipality from taking the legislative action in the first place, and arguably an even greater interference. The courts have no authority to do either. Clearly, in asking this Court to void the annexation and return the situation to the prior status quo, the appellants are asking the Court to interfere in the legislative functions of the City, and, clearly, such interference is disallowed, both by precedent and by the mandate for separation of powers. This Court should, therefore, decline to grant the relief sought by the appellants.

III. SINCE THIS CASE DOES NOT COME WITHIN ANY EXCEPTION TO THE RULE THAT ISSUES NOT DECIDED BELOW ARE NOT TO BE DECIDED ON APPEAL, THIS COURT SHOULD NOT DETERMINE THE MERITS OF THE CASE, EVEN IF NOT OTHERWISE PRECLUDED BY LACK OF STANDING OR THE SEPARATION OF POWERS.

In an early case, this Court established the principle that where the circuit court has not disposed of the questions raised, for whatever reason, this Court is without appellate jurisdiction over them. *Woods v. Campbell*, 45 W. Va. 203, 32 S.E. 208, 209 (1898). As the

appellants acknowledge (Appellants' Br. 13 & n.17), that remains the general rule to this day. See, e.g., *Wang-Yu Lin v. Shin Yi Lin*, 224 W. Va. 620, 624, 687 S.E.2d 403, 407 (2009) (citing Syl. Pt. 1, *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334 (1971)). The appellants argue, however, that this case should be an exception. (Appellants' Br. 13-15.) They rely on *Whitlow v. Bd. of Educ. of Kanawha County*, 190 W. Va. 223, 438 S.E.2d 15 (1993), and *In re Charleston Gazette FOIA Request*, 222 W. Va. 771, 671 S.E.2d 776 (2008). The appellants' position is without merit because the cases they rely upon involved vastly different circumstances, such that they provide no precedent for the present case.

In *Wang-Yu Lin*, after citing the general principle, this Court first noted that the issue raised before it had not been raised below, but then went on to reject essentially the same argument made by the appellants in the present case:

[W]e reject the appellants' reliance on *Whitlow v. Bd. of Educ. of Kanawha Cty.*, 190 W.Va. 223, 438 S.E.2d 15 (1993), in support of their assertion that the facts are sufficiently developed for this Court to decide this issue. In *Whitlow*, this Court considered an issue raised for the first time on appeal where the issue was constitutional in nature and one of substantial public interest that may recur in the future. The instant case is not constitutional in nature.

224 W. Va. at 624, 687 S.E.2d at 407. In *Whitlow*, the controlling issue was the constitutionality of the statute, a determination that was not dependent upon factual determinations. As the Court explained in that case:

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).⁴

⁴In Syllabus Point 1 of *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979), we stated: "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies . . . ; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance."

190 W. Va. at 226-27 & n.4, 438 S.E.2d at 18-19 & n.4 (emphasis added). The present case, like *Wang-Yu Lin*, and unlike *Whitlow*, is *not* constitutional in nature and *does* depend upon the facts.

In *Charleston Gazette FOIA Request*, this Court explained that the *Gazette* had asked the Court not to simply remand the underlying case to the circuit court but, instead, to decide the case on its merits, and had pointed 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. . . .

* * *

The *Gazette* requests that we remand this case to the circuit court to order the City to disclose the payroll records. Given the specific facts of this case, we find the *Gazette's* argument compelling and believe that sending this case back to the circuit court without guidance on the issue of public employee payroll records would create substantial prejudice, would cause further delay,

and would more than likely result in the case returning to this Court again under the same set of facts.

222 W. Va. at 775-76, 778, 671 S.E.2d at 780-81, 783 (emphasis added).

Unlike *Charleston Gazette FOIA Request*, this case involves no time pressures. In fact, as already noted, the annexation has already been passed and is final. Further, as explained *infra*, the annexation has absolutely no effect on the appellants' use of their property or on any interests they retain in the roadway. This case, accordingly, involving neither a constitutional issue nor any time sensitivity, does not present circumstances meriting any exception to the general rule that a matter not decided below will not be considered by this Court.

IV. SINCE THE CIRCUIT COURT CORRECTLY FOUND THAT THE APPELLANTS HAD NOT SHOWN THE INJURY REQUIRED FOR STANDING, IT CLEARLY DID NOT ERR IN FAILING TO REACH THE MERITS, AND APPELLANTS CANNOT SATISFY THE REQUIREMENTS FOR RELIEF ON THE MERITS, IN ANY CASE.

The appellants argue that the circuit court erred in failing to reach the merits of their action. (Appellants' Br. 7.) Quite to the contrary, once the circuit court determined that the appellants were without standing, it had no authority to determine the merits. As other courts have explained, standing is an essential component of jurisdiction, such that where the complainant is without standing, the court is without jurisdiction. *E.g.*, *Conn. Ass'n of Bds. of Educ. v. Shedd*, 197 Conn. 554, 557, 499 A.2d 797, 799 (1985); *Ryder v. State*, 917 S.W.2d 503, 505 (Tex. App. 1996). Since the circuit court concluded that the appellants did

not have standing, it was jurisdictionally foreclosed from reaching the merits of their action. The circuit court, therefore, did not err in failing to address the substance of the appellants' action.

Even if this Court were to disagree with all of the above arguments and were to determine that the appellants have standing, that their petition does not involve a legislative matter, that the matter comes within the exception to rule against requiring the lower court to decide all issues raised before they can be considered by this Court, and that the circuit court should have addressed the merits, the Court could still not grant the relief they seek because the record clearly shows that appellants have failed to satisfy the standard for obtaining relief, whether injunctive or otherwise, of undoing the annexation.

The appellants brought this action seeking mandamus, a temporary restraining order, and/or a preliminary injunction, based on their claim that the annexation was unlawful. (R. 1-17 (Compl. & Mot., filed 7/15/09).) They base their argument to this Court on their belief that the annexation requirement for contiguity cannot be shown, that the number of freeholders was not properly calculated, and that nonvoters were unlawfully allowed to file the annexation petition.³ (Appellants' Br. 15-22.) Those beliefs are belied by the statutory provisions and the facts.

³These challenges are not identical to those raised below, where the appellants made the following four challenges to the annexation ordinance: (1) an alleged lack of contiguity, (2) an alleged failure to get the required consent of voters and/or freeholders, (3) an alleged inadequate utility capacity, and (4) an allegedly defective legal description of the land being annexed. The first two are the same, but the appellants have substituted a new third challenge for the last two raised below. According to the rule discussed *supra*, this Court, if it were to consider the merits at all, would be limited to the challenges raised below.

As a preliminary matter, as this Court has found, even after an ordinance has been enacted, as it clearly has been in the present case, the courts are reluctant to restrain its enforcement because they disfavor interference with governmental functions through equitable, extraordinary remedies. *Perdue*, 177 W. Va. at 48, 350 S.E.2d at 559-60. As the court explained:

While conceivably a case might arise to justify intervention, it is clear that it will be rare and must allege extraordinary circumstances. In such event, the pleadings must make it manifest that the proposed ordinance is *ultra vires* or clearly invalid, and that the passage thereof *by itself* will occasion immediate, substantial and irreparable injury to a property or civil right of the taxpayer without any reasonably adequate remedy by subsequent proceedings at law.

Id. at 48 n.7, 350 S.E.2d at 559 n.7 (emphasis in original).

The Court, therefore, stated that it will not interfere by injunction except where necessary to protect property or other civil rights against irreparable harm. *Id.* at 48, 350 S.E.2d at 560. In fact, the court went on to explain:

Even if it is shown that a municipal ordinance is invalid, an injunction does not lie to restrain the enforcement of an invalid municipal ordinance merely because the ordinance is unconstitutional, arbitrary or otherwise invalid; other circumstances, such as irreparable injury, inadequacy of remedies at law, etc., bringing the case within one or more of the grounds for equity jurisdiction must also be alleged and shown.

Id. The record in the present case, therefore, would have to show that the appellants had produced evidence that, as a matter of law, satisfied each of the usual grounds for equity jurisdiction, that is, irreparable harm, likelihood of success on the merits, and a balance of hardships favoring them. As explained more fully *infra*, they did not, and cannot, do so.

A. The Appellants Did Not Show That They Will Suffer Irreparable Harm Because Of The Annexation.

As already discussed in the context of standing, supra, the appellants have not shown any injury to their protected rights or interests, let alone irreparable injury. To satisfy the requirements for the relief they seek, the injury must be irreparable within the legal sense of the term. *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990); *R.R. Kitchen & Co. v. Local Union No. 141, IBEW*, 91 W. Va. 65, 112 S.E. 198, 200 (1922). As the court explained the case involving the vacation of a public way, rather than an annexation thereof:

[T]he evidence shows that the portion of Cox Place vacated by *the ordinance produced no substantial change in the physical conditions* of Cox Place as they existed prior to the adoption of the ordinance . . . ; that the property of the plaintiffs did not abut on the vacated portion of the street; that their right of ingress and egress to and from the street in the use of their property has not been restricted or impaired by the ordinance; and that it has not caused any damage to their property. The evidence does not show that the action of the council . . . has resulted or will result in any special or peculiar damage or inconvenience to the plaintiffs beyond that which will affect them in common with the public or the owners of the other lots which abut on that street.

Brouzas, 144 W. Va. at 14-15, 106 S.E.2d at 252 (emphasis added);⁴ *cf. R.R. Kitchen*, 112 S.E. at 200 (picketing of employment agencies, places of work, and lodging and boarding places of employees, and causing employees to break their contracts and refuse performance in some cases and cease it in others through persuasion, inducement, threats, and violence resulted in great injury and damage to the plaintiffs); *Mullens Realty & Ins. Co. v. Klein*, 85

⁴While the court in *Brouzas* relied on the fact that the plaintiffs were not abutters, it should be clear that the status of abutters is different as to a way being vacated and as to a way being annexed. In the former context, rights of access, ingress, and egress are clearly in issue, while in the latter context, they are not.

W. Va. 712, 102 S.E. 677, 679 (1920) (trespass on real estate, particularly if frequent and repetitive, constitutes an injury to a legal right).

In the present case, the annexation ordinance has produced no change whatsoever in the physical condition of the county roads and has absolutely no legal effect whatsoever on either the appellants' parcels abutting those roads or **their** rights and interests in or concerning the roads themselves. The appellants have, therefore, shown no injury to their legal rights.

Even if they could show legal injury, however, the appellants cannot show any irreparable injury. As the courts have frequently noted, an injury is not irreparable if there is an adequate remedy at law available. As the court explained in another case in which the gravamen of the petition was a challenge to the validity of an ordinance:

[T]here is nothing in the petition for an injunction in this case to indicate that enactment or enforcement of the ordinance would cause irreparable injury to the injunction petitioners or that there are no adequate remedies at law. *An adequate remedy at law would be a declaratory judgment action*, which could be brought immediately after enactment of the ordinance to challenge its validity.

Perdue, 177 W. Va. at 49-50, 350 S.E.2d at 561 (and cases cited) (emphasis added) (footnote omitted); *see also State ex rel. Battle v. Hereford*, 148 W. Va. 97, 107, 133 S.E.2d 86, 92 (1963) (where there was an adequate legal remedy to defend against forfeiture and confiscation of property, court was without jurisdiction to appoint receiver); *Backus v. Abbot*, 136 W. Va. 891, 900-02, 69 S.E.2d 48, 53-54 (1952) (it is well settled that where a remedy is available by mandamus, a suit for injunction cannot be maintained).

In this very case, the appellants have brought an action for mandamus—and could have brought a declaratory judgment action. Even if they could show legal injury, therefore, they cannot show irreparable harm because they have adequate remedies at law.

B. The Appellants Have Not Shown A Likelihood That They Will Succeed On The Merits.

Even if the appellants could sufficiently allege that they will suffer irreparable harm from the annexation they challenge, they cannot show that they are likely to succeed on the merits. As a preliminary matter, the appellants assert that the appellees cannot possibly prove that at least one of the requirements for annexation was met. (Appellants' Br. 15.)

The appellants attempt to make three challenges to the annexation ordinance to this Court—an alleged lack of contiguity, an alleged failure to get the required consent of voters and/or freeholders, and that nonvoters were unlawfully allowed to file the annexation petition.⁵ As explained *infra*, the record does not show that they can prevail on any of these challenges.

1. Contiguity

The appellants have cited a long list of cases from other jurisdictions in support of their argument on contiguity, as they did before the circuit court and, again, in their Petition to this Court. (*See* Appellants' Br. 15-21.) It is self-evident, however, that it is *the law of West Virginia* that controls in this case. The law provides, in pertinent part, first:

⁵Because the last two involve overlapping issues, they will be discussed together.

Unincorporated territory may be annexed to and become part of a municipality contiguous thereto only in accordance with the provisions of this article.

W. Va. Code § 8-6-1(a). There are, therefore, only two requirements. First, there is an implicit requirement for contiguity and, second, there is an explicit requirement that the relevant provisions for specific annexations must be satisfied.

As to the contiguity requirement, as the West Virginia Supreme Court has recognized, there are different views on the matter in different jurisdictions, some of which have defined the term and some of which have not. *Beckley*, 194 W. Va. at 429, 460 S.E.2d at 675. Unfortunately, the West Virginia annexation provision at issue in this case does not define the term. Of course, the statute does define the term in another section.⁶ (*See* Appellants' Br. 16-17 (arguing that the definition should not apply to the provision governing the annexation in the present case).)

The appellants argue that words which are not specifically defined in a legislative enactment should be given their common, ordinary, and accepted meaning, and they then recite certain definitions of contiguity, all of which involve touching. (Appellants' Br. 17.) Numerous dictionaries, however, also include other definitions, some of which require no more than nearness or proximity. *E.g.*, *Webster's Encyclopedic Unabridged Dictionary* 439 (Random House 1996). More importantly, as this Court directly and specifically explained in *Beckley*:

⁶Under W. Va. Code § 8-6-5(f)(1), contiguous is defined to mean that the territory either abuts directly on the municipal boundary or is separated from it by an unincorporated street, highway, or public transportation right-of-way.

"[c]ontiguous" does not always mean the land must be touching. "Contiguous" is defined in Black's Law Dictionary, Fourth Edition, p. 391, as "In close proximity; near, though not in contact; neighboring; adjoining; near in succession; in actual close contact; touching; bounded or traversed by." . . .

The attempt to identify what is meant by the general term "contiguous" is often semantical at best. We observed in *Cowan v. County Commission of Logan County, supra*, 161 W.Va. at 112 n. 4, 240 S.E.2d at 679 n. 4, where we approved the incorporation of a municipality which consisted of a long narrow strip of land along a valley that "[l]ong, narrow, ribbon-like communities are characteristic features of human settlements in the valleys of the central Appalachian plateau of North America."

194 W. Va. at 429-30, 460 S.E.2d at 675-76 (emphasis added).

In *Beckley*, this Court also noted that in jurisdictions where the term "contiguous" is not defined, the courts look to the purpose of the statute. *Id.* at 429, 460 S.E.2d at 675; *see also State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 533, 336 S.E.2d 171, 180 (1984) (cited by appellants) (effect should be given to purpose and intent of legislation without limiting the meaning of its terms to defeat the purpose). In another case involving an undefined term, this Court explained that in such cases it must examine the entire statute, along with its purpose, in order to determine the intended meaning of the term in its particular context and must reject an interpretation that would be contrary to the legislative purpose. *Cogar v. Faerber*, 179 W. Va. 600, 603, 371 S.E.2d 321, 324 (1988). As the Court explained in an early case, if confining a term would defeat the statutory purpose, the courts should not hesitate to put a broader meaning on the term. *Seabright v. Seabright*, 28 W. Va. 412, 1886 WL 1831 (1886) (interpreting "next of kin" as if statute had used phrase "distributee"). In a more recent case, cited by the appellants, the court applied that principle to reject a narrow interpretation of the term at issue in that case, based on the broad legislative purpose. *Apollo*

Civic Theatre, Inc. v. State Tax Comm'r, 223 W. Va. 79, 85-86, 672 S.E.2d 215, 221-22 (2008) (rejecting narrow definitions of "health and fitness" as contrary to the legislative purpose). In fact, as a sister court explained in another early case, if the language of the statute as a whole shows a particular intent, a term may be given a meaning not even within its dictionary meaning. *Miller v. Seymour*, 156 Ark. 273, 245 S.W. 811, 811 (1922) (construing contiguous to include overlapping territory, based on the purpose of the statute). As in *Apollo*, in the present case, the legislative purpose underlying two of the annexation provisions is broad and salutary, and their requirements should be broadly construed to effectuate that purpose. *Cf. McGee*, 39 Ohio St. 3d at 285, 530 N.E.2d at 903 (it is policy of Ohio to encourage annexation by municipalities of adjacent territory).

In the context of a minor border adjustment annexation, which is an annexation initiated by a municipality, this Court cited with seeming approval the statement that the purpose of such annexation generally is that the delivery of services, including police, fire, water, sewer, and such, be convenient for the city and its new residents. *Beckley*, 194 W. Va. at 429-30, 460 S.E.2d at 675-76 (citing *In re Pet. to Annex Certain Territory*, 144 Ill. 2d 353, 365-67, 579 N.E.2d 880, 886 (1991)). The determination of convenience is, of course, a legislative one, whether by the state or by the locality. As the court implied, common sense would dictate that a municipality would not voluntarily undertake an overly burdensome obligation to supply services. *Id.* (concluding that circuit court erred in determining that municipality had acted unreasonably and exceeded its jurisdiction in determining boundaries of the minor border adjustment). In the context of an annexation without an election, by

contrast, the annexation is initiated by a majority of the qualified voters and freeholders in the additional territory sought to be annexed. W. Va. Code § 8-6-4(a). Since the municipality appears to have discretion whether to provide for the annexation by ordinance, the purpose would be, as with an annexation initiated by the municipality, the convenience for the city and its new residents and, as with a municipality-initiated annexation, common sense would dictate that the municipality would not undertake an overly burdensome obligation. By contrast with these provisions, the provision governing annexation by election, which is initiated by residents of the existing municipal territory who desire that the territory be enlarged, requires extensive measures, including verification, surveys, a surety bond, and an election by the resident voters, as well as one by those in the additional territory. W. Va. Code § 8-6-2.

It should be noted that the definition of contiguity for minor border adjustment annexations should be, if anything, more stringent than that for annexations without election, given the recurrent theme that the requirements imposed are intended, in part, to prevent raw "gobbling up of territory" by municipalities. *See, e.g., In re Smith, Becker & McCormick Props.*, 2003 WI App 247, ¶¶ 26-27. 30, 268 Wis. 2d 253, 276, 278, 673 N.W.2d 696, 707, 708 (under the rule-of-reason standard, there would be no violation of the need component where the petitioners are property owners and the municipality has not been a controlling influence). Clearly, that concern disappears when the annexation is initiated by persons in the territory to be annexed, rather than by the municipality. There is, further, nothing anywhere in the annexation without election procedures which indicates any purpose that

involves the desires of anyone other than the qualified voters and freeholders of the additional territory. *See id.* ¶ 34, 268 Wis.2d at 280, 673 N.W.2d at 709 (whether annexation is in interest of public is not one of the factors in the rule of reason and is not for the courts to decide). The clear purpose of the annexation without an election provision is to broadly allow annexation with minimal requirements, in order to allow those in additional territories to enjoy the services of the municipality.

A number of cases from other jurisdictions have approved annexations with similar configurations and contiguities as those in the present case. *See, e.g., City of Prattville v. City of Millbrook*, 621 So. 2d 267, 271-73 (Ala. 1993) (corridor consisting of railroad bed provided sufficient contiguity; noting cases in which similar corridors of up to even 11 miles were sufficient); *People ex rel. Forde v. Town of Corte Madera*, 115 Cal. App. 2d 32, 44-47, 251 P.2d 988, 995-96 (1952) (citing similar cases in which 16-mile strip and horseshoe provided sufficient contiguity); *Vill. of Saranac Lake v. Gillispie*, 261 A.D. 854, 24 N.Y.S.2d 403, 403-04 (1941) (per curiam) (10-foot-wide strip extending to six-acre plot provided sufficient contiguity). The Alabama court noted that where the issue of contiguity was fairly debatable, the courts are required to defer to the legislative judgment. It could not be clearer that under West Virginia law, the issue of contiguity in the present case is at least fairly debatable and, therefore, this Court must give deference to the legislative judgment on the annexation.

In rejecting certain out-of-state cases, the California court noted that procedures for annexation can be radically different under different state laws and that the cases had not

involved the question of whether courts have the power to inquire into the extent of contiguity, where some physical contiguity exists, and explained:

The Illinois case, however, does not represent the law of this state. The leading case is People ex rel. Peck v. City of Los Angeles, 154 Cal. 220, 97 P. 311. There our somewhat aggressive neighbor to the south, the City of Los Angeles, then situated some 16 miles from the sea, sought to annex a strip of land one-half mile wide and 16 miles long, leading from its then corporate limits to San Pedro Bay. The effect of this march to the sea by Los Angeles was to cut off the cities of Wilmington and San Pedro from further expansion in the direction of the annexed strip. It was contended that this was a fraud upon the statute and should be prohibited. The court, unanimously, held that the shape and extent of the territory to be annexed were political and not judicial questions. At page 223 of 154 Cal., at page 312 of 97 P. the court stated: "We make no comment on them [the claimed improper object and purposes of the annexation proceeding] because we are satisfied that whether the territory in question, and of the shape, extent, and character fixed, should be annexed to the city of Los Angeles, was purely a political question, which, under the act [Annexation of Inhabited Territory Act], was left to the exclusive determination of the voters of the municipality and the territory sought to be annexed."

....

The city of Burlingame annexed a hundred-foot strip 2.8 miles long completely surrounding the Mills Estate on three sides so as to cut it off from all contact with Millbrae, and to enclose the Mills Estate as unincorporated territory free from any possibility of being annexed to any other city but Burlingame. Certainly the factual situation thus disclosed shows, on its face, far clearer than do the facts of the instant case the purpose and intent of the annexing city. The court refused to consider the charge that the motives of the annexing city were improper, or that there was not substantial contiguity, holding those to be political and not judicial questions.

At page 709 of 90 Cal.App.2d, at page 810 of 203 P.2d the court stated: "Contiguity does not depend on the extent of the property annexed and the question whether a municipal corporation should annex certain territory is political rather than judicial." After quoting extensively from the *Los Angeles* case, supra, the court stated, 90 Cal.App.2d at page 710, 203 P.2d at page 811: "The only limitation imposed by the statute in our case is that the annexed property must be contiguous to Burlingame."

Forde, 115 Cal. App. 2d at 45, 251 P.2d at 995 (emphasis added).

Likewise, in the present case, the cases from other jurisdictions have been decided under different laws and do not govern this case. Nevertheless, the cases that have approved similar annexation configurations have relied on principles in common with those of West Virginia: first, that where the term "contiguity" is not defined by the statute, it does not require any particular amount of contiguity—rather, the fact of contiguity is sufficient, in and of itself; and second, that the extent of contiguity is a legislative matter concerning which the courts are without jurisdiction. Although the appellants argue that these cases are distinguishable (Appellants' Br. 20-21), that does not make them inapplicable. Further, although there are, indeed, other cases from the same jurisdictions that are less favorable (*see* Appellants' Br. 20), those cases are, in both states, earlier cases.

The same can be said about a number of the cases cited by the appellants—except that the cases which are less favorable to them are more recent cases. The appellants have cited *City of Fultondale v. City of Birmingham*, 507 So. 2d 489, 490-91 (Ala. 1987), for example, in which the court rejected proposed annexations consisting of "strips of roadways running in all directions from each city, creating a spider-web effect and leaving areas of unincorporated territory surrounded by the roadways," but otherwise unconnected with the municipalities. In 1993, however, the Alabama court concluded that, under the law in that state, as long as a legitimate municipal interest exists and the annexation is not a subterfuge, corridor annexation should be upheld. *City of Prattville*, 621 So. 2d at 272-73 (citing cases which had approved corridors of two miles and of over 10 miles).

The appellants have also cited *People ex rel. Lemoore Land & Fruit Growing Co. v. City of Lemoore*, 37 Cal. App. 79, 84, 174 P. 93, 95 (1918), in which the court rejected an annexation of nine separate parcels, some inhabited and some not, on the basis that the law disallowed annexation of separate bodies, without separate elections. In the more recent case relied on by the appellees, however, the court noted that the *Lemoore* case stands alone and is no longer followed. *Forde*, 115 Cal. App. 2d at 44-46, 251 P.2d at 995-96. In *Forde*, the court noted that, since *Lemoore*, California courts have held that where some physical contiguity exists, the courts are without authority to inquire into the *extent* of contiguity because the shape and extent of territory to be annexed are political—not judicial—questions, which the municipality is best suited to determine. *Id.*

The appellants also rely on *Town of Mt. Pleasant v. City of Racine*, 24 Wis. 2d 41, 43-47, 127 N.W.2d 757, 758-60 (1964), in which the court invalidated a corridor annexation based on its conclusion that the annexation did not meet the statutory requirement of the rule of reason. In a more recent case, the state court found that the *Mt. Pleasant* case was difficult to harmonize with subsequent decisions, which have recognized the right of petitioning property owners to include only their own properties, so long as the municipality has not exerted a controlling influence. *In re Smith, Becker*, 2003 WI App 247, ¶ 27, 268 Wis. 2d at 276, 673 N.W.2d at 706-07. The court went on to engage in the required rule-of-reason analysis, the primary component of which focuses on the needs of the municipality for the territory and/or the needs of the additional territory for municipal services. Clearly, West Virginia law imposes a very different analysis, under which annexations may occur without

election and under which municipalities have broad authority to annex territory when requested to do so, so long as the minimal statutory requirements imposed have been satisfied.

Since the cases cited by the appellants, to the extent that they are still followed, can be distinguished on the law, the fact, or both,⁷ the Court's task in this case is determine what interpretation is most consistent with the language and purpose of West Virginia's annexation provisions. Without question, it is the cases cited by the appellees that are more consistent with the law that exists on the subject in this State. This Court has specifically stated, for example, that in West Virginia, contiguity does not necessarily even require actual touching.

⁷For example, in *City of Rapid City v. Anderson*, 2000 SD 77, 612 N.W.2d 289, 293-94; *Johnson v. City of Hastings*, 241 Neb. 291, 295-97, 488 N.W.2d 20, 23-24 (1992); *State ex rel. Dep't of Transp. v. City of Milford*, 576 A.2d 618, 623-25 (Del. Ch. 1989); *Owosso Twp. v. City of Owosso*, 385 Mich. 587, 590-91, 189 N.W.2d 421, 422-23 (1971); *Town of Mt. Pleasant*, 24 Wis. 2d at 43-47, 127 N.W.2d at 758-60; and *Clark v. Holt*, 218 Ark. 504, 508-09, 237 S.W.2d 483, 485 (1951), the rejection of the corridor annexation was based on the state's concept of a municipality as a unified, compact area. By contrast, West Virginia's concept of municipalities includes long narrow strips of land, given that "[l]ong, narrow, ribbon-like communities are characteristic features of human settlements in the valleys of the central Appalachian plateau of North America." *Beckley*, 194 W. Va. at 429-30, 460 S.E.2d at 675-76 (quoting *Cowan v. County Comm'n of Logan County*, 161 W. Va. 106, 112 n.4, 240 S.E.2d 675, 679 n.4 (1977)).

In *City of Charleston v. Witmer*, 304 Ill. App. 3d 386, 389, 709 N.E.2d 998, 1000-02 (1999), and *Wescom, Inc. v. Woodridge Park Dist.*, 49 Ill. App. 3d 903, 906, 364 N.E.2d 721, 723-24 (1977), the court relied on a long line of cases which had clearly held that, under Illinois law, contiguity required that the annexed land be *both adjacent and parallel* to existing municipal boundaries. There is no such requirement under West Virginia law under *Beckley*, or otherwise.

In *Ridings v. City of Owensboro*, 383 S.W.2d 510, 512 (Ky. 1964), the court actually held that corridor annexations are not necessarily void and that the propriety of such annexations depends on whether they serve a municipal purpose, a question that involves elements of judgment and discretion, to be reviewed only for abuse of discretion.

Beckley, 194 W. Va. at 429, 460 S.E.2d at 675 (noting approvingly the existence of long, ribbon-like communities). The court has also made it clear that it is without authority to interfere with a municipality's legislative acts. Accordingly, since annexation is a quintessentially legislative act, the appellants have not shown that, *under West Virginia law*, they must prevail on the merits on the issue of contiguity—at most they may have shown that the question may be fairly debatable. The legislative action of the municipality should, therefore, be upheld.

2. Calculations

The appellants also argue that they should have been included in the calculations of persons whose consent was required for the challenged annexation and that nonvoters were unlawfully allowed to file the annexation petition. (Appellants' Br. 21.) They misapprehend, however, both the governing terms and the governing law.

In order to enact an annexation ordinance without an election, the statute requires the signatures of a majority of "the qualified voters of the additional territory" and a majority of the "freeholders of the additional territory." W. Va. Code § 8-6-4(a). The statute makes it the responsibility of the governing body to "enumerate and verify the total number of eligible petitioners in each category" from the additional territory and allows only one signature for each "parcel of property." *Id.* § 8-6-4(e).

In enumerating the eligible petitioners, the governing body must adhere to the requirements of the statute. In the category of voters, the statute generally defines "qualified

voter" as one who "is a resident within the . . . boundaries of a territory referred to," has been a resident of the state and the territory referred to for requisite periods of one year and 60 days, respectively, and is duly registered. *Id.* § 8-1-2(10). The statute further defines "resident" as any individual who "maintains a usual and bona fide place of abode . . . within the boundaries of a territory referred." *Id.* § 8-1-2(13). Of course, in the annexation context, the territory referred to is that, and only that, which is to be annexed. Since it is clear that the appellants cannot possibly maintain a place of abode within the county roads being annexed, they do not come within the definition of residents of the territory referred to and, consequently, neither do they come within the definition of "qualified voters" to be enumerated in determining whether a majority of eligible persons have signed an annexation petition under the general definition. The statute also more specifically defines "qualified voter of the additional territory," for purposes of annexation without an election, to include firms and corporations, regardless of whether they are freeholders. *Id.* § 8-6-4(b). Clearly, none of the appellants fits within that definition.

In the category of freeholders, the statute defines freeholder to mean any person "owning a 'freehold interest in real property.'" *Id.* § 8-1-2(14). The statute further defines freehold interest in property to mean any of certain enumerated interests in real property, *but not* certain others, including "an interest in a right-of-way or easement." *Id.* § 8-1-2(15). As already explained *supra*, the circuit court found, based on West Virginia law, that the appellants had not shown that any of them owned any of the property being annexed in fee and that whatever "fee" interest the appellants might retain in the county roads is merely a

reversionary right in the right of way, which is contingent and so remote as to have no appreciable value, and is not even to be regarded as property. *See Herold*, 141 W. Va. at 191-92, 90 S.E.2d at 456-57. As such, the appellants did not, and cannot, show that they can reasonably be considered to be freeholders of the additional territory. *See also Bd. of Douglas County Comm'rs v. City of Aurora*, 62 P.3d 1049, 1055-56 (Colo. App. 2002) (concluding under Colorado law that owners of streets and alleys are not required to sign annexation petitions and are not to be included in calculating the number of owners); *Mid-County Future Alternatives Comm. v. Metro. Area Local Gov't Boundary Comm'n*, 82 Or. App. 193, 196, 728 P.2d 63, 64 (1986) (under Oregon statute, consent need not be obtained for any land in a public way included in the annexation), *modified on other grounds*, 83 Or. App. 552, 733 P.2d 451 (1987).

The appellants' assertion that nonvoters were allowed to file the petition is equally without merit since, as noted supra, the statute specifically defines "qualified voter of the additional territory," for purposes of annexation without an election, to include firms and corporations, regardless of whether they are freeholders. W. Va. Code § 8-6-4(b). Accordingly, since the appellants cannot show that they come within the persons to be enumerated for purposes of annexation by petition under West Virginia law, or that any of the persons who filed the petition were not qualified to do so, they have failed to show that they can, let alone that they must, prevail on the merits on the issue of annexation calculations.

**C. The Appellants Have Not, And Cannot, Show That
The Balance Of Hardships Weighs In Their Favor.**

In addition to the other requirements for injunctive relief, the court must compare the relative hardships to the respective parties. *Jefferson County Bd. of Educ.*, 183 W. Va. at 24, 393 S.E.2d at 662. Even if a party satisfies all other requirements, if the balance of hardships does not weigh in its favor, injunctive relief should not be granted. *See, e.g., City of Prattville*, 621 So. 2d at 273 (ruling in favor of defendant since if court ruled in favor of defendant, no one would be injured, whereas, if it ruled in favor of plaintiff, every citizen of the defendant city, as well as the property owners who had petitioned for annexation, would suffer a loss).

In the present case, as already noted, allowing the annexation to stand would change absolutely nothing for the worse for the appellants—they will continue to vote at the same place; taxes and revenues will not be altered; their property interests will remain the same; they will have the same rights of access, ingress, and egress; and, indeed, their reversionary rights, whatever they are worth, will remain exactly the same. On the other hand, the property owners who requested the annexation will be severely harmed should the annexation be voided. Loans which they have already gotten approved will not be released, they will be unable to complete roads and water and sewer pipes, and they will be sufficiently damaged by the accumulation of interest as to risk losing the property—injuries for which there can be no compensation to them from either the City, the County, or the appellants. It is undoubtedly for exactly this kind of reason that the statute provides that once the annexation ordinance is passed, the corporate limits therein are set. *City of Charles Town*, 221 W. Va.

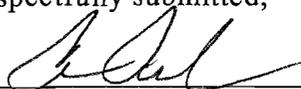
at 322-23, 655 S.E.2d at 68-69. It is essential that property owners be able to order their affairs in reliance on legislative acts.

Since the record clearly shows that the appellants have not made the necessary showing for even one of the requirements for the relief they seek, they clearly cannot, as a matter of law, prevail. This Court, accordingly, should not grant their Petition for Appeal.

CONCLUSION

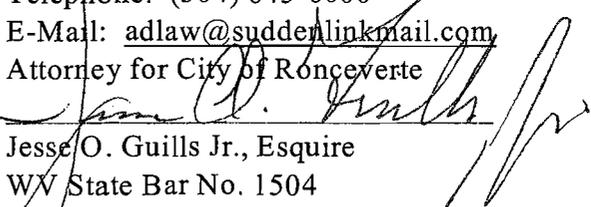
In summary, since the appellants are without standing because they cannot show any legal injury, since the courts are without jurisdiction over this legislative matter or over the case on its merits, and since the appellants have not satisfied, and clearly cannot satisfy, the requirements for relief, their Petition for Appeal should be summarily denied.

Respectfully submitted,



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NO. 35553

IN THE SUPREME COURT OF WEST VIRGINIA

**ROBERT A. DOERING, JEWELL DOERING, DENNY R. CANTERBURY SR.,
BILLY R. FALLS, BETSY FALLS, JESSE HYLTON, KATHLEEN HYLTON,
LAYOLA J. SARVER, WILLIAM R. WHITE, LINDA S. WILSON,
ROBERT WILSON, ROBERTA WILSON, SANDRA WILSON,
EARNEST WYANT, and VICKI WYANT,**

Appellants,

v.

**CITY OF RONCEVERTE and COUNTY COMMISSION
OF GREENBRIER COUNTY, WEST VIRGINIA,**

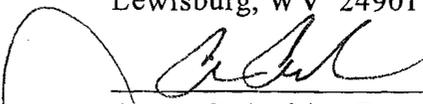
Appellees.

CERTIFICATE OF SERVICE

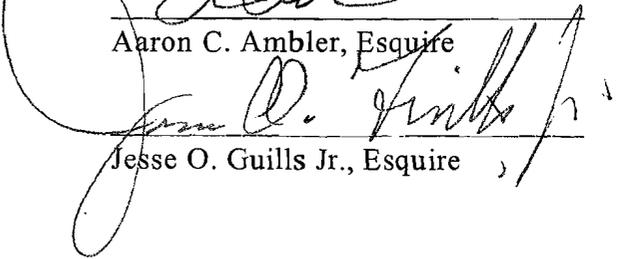
We, Aaron C. Amber, counsel of record for the City of Ronceverte, and Jesse O. Guills Jr., counsel of record for West Virginia Farm Properties, LLC, do hereby certify that we have served the foregoing Brief on Behalf of Appellee City of Ronceverte and Intervenor West Virginia Farm Properties on all parties by hand delivery this 16th day of Sept. and addressed as follows:

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