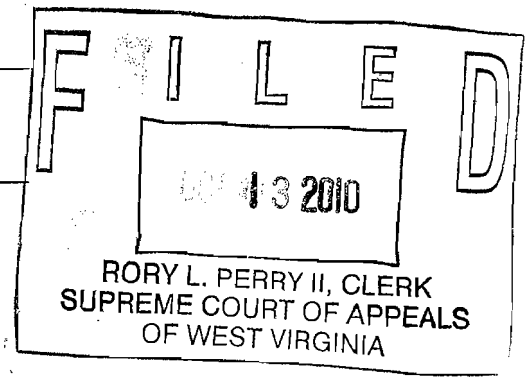
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



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WILLIAM R. WHITE, LINDA S. WILSON,
ROBERT WILSON, ROBERTA WILSON, SANDRA WILSON,
EARNEST WYANT, VICKI WYANT,

Appellants,

v. No. 35553

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

Appellees.

FROM THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i

I. INTRODUCTION.....1

II. LEGAL ARGUMENT.....2

A. BOTH THE ORGAN CAVE AND RONCEVERTE APPELLANTS HAVE STANDING TO CHALLENGE RONCEVERTE'S LASSO ANNEXATION OF STONEY GLEN SUBDIVISION.....2

B. APPELLEES CANNOT POSSIBLY PROVE THAT STONEY GLEN SUBDIVISION IS "CONTIGUOUS," AS REQUIRED BY W.VA. CODE § 8-6-1.....8

C. APPELLEE CITY OF RONCEVERTE FAILED TO CALCULATE A MAJORITY OF FREEHOLDERS PROPERLY AND ALLOWED A NON-QUALIFIED VOTER TO PETITION FOR ANNEXATION 12

D. THIS COURT SHOULD REACH THE MERITS OF THIS CASE BECAUSE THE DISPOSITIVE FACTS ARE UNDISPUTED.....16

E. APPELLEES' REMAINING ARGUMENTS ARE UNMERITORIOUS.....18

III. CONCLUSION.....19

TABLE OF AUTHORITIES
Cases

Bender v. Glendenning,
219 W.Va. 174, 190, 632 S.E.2d 330, 346 (2006).....8

Blackwelder Furniture Co. v. Seilig Mfg. Co.,
550 F.2d 189, 193-96 (4th Cir. 1977).....18

Board of County Commissioners of Douglas County v. City of Aurora,
62 P.3d 1049, 1055 (Colo.App. 2002).....15

Brouzas v. City of Morgantown,
144 W.Va. 1, 106 S.E.2d 244 (1958).....11

City of Fultondale v. City of Birmingham,
507 S.2d 489, 491 (Ala. 1987).....9, 10, 12

City of Lemoore,
37 Cal. App. 79, 84, 174 P. 93, (1918).....9, 10

City of Middletown v. McGee,
39 Ohio St.3d 284, 285, 530 N.E.2d 902, 903 (1988).....4, 5, 10, 12

City of Rapid City, S.D. v. Anderson,
2000 SD 77, 612 N.W.2d 289, 294 (2000).....10, 12

Clark v. Holt,
218 Ark. 504, 237 S.W.2d 483, 485 (1951).....10, 12

Coleman v. Sopher,
194 W.Va. 90, 95, n. 6 459 S.E.2d 367, 372, n. 6 (1995).....2, 7, 8

Findley v. State Farm Mutual Automobile Insurance Co.,
213 W.Va. 80, 94-95, 576 S.E.2d 807, 821-22 (2002).....2, 7, 8

Fox v. City of Hinton,
84 W.Va. 239, 99 S.E. 478, 479-480 (1919).....3, 13, 14

Guido v. Guido,
202 W.Va. 198, 202, 503 S.E.2d 511, 515 (1998).....2, 7, 8

Herold v. Hughes,
141 W.Va. 182, 90 S.E.2d 451 (1955).....3

In re City of Beckley,
194 W.Va. 423, 460 S.E.2d 669 (1995).....3, 8, 9, 10

In re City of Morgantown,
159 W.Va. 788, 226 S.E.2d 900 (1976).....3, 6

In re Charleston Gazette FOIA Request,
222 W.Va. 771, 671 S.E.2d 776 (2008).....17

Johnson v. City of Hastings,
241 Neb. 291, 488 N.W.2d 20, 24 (1992).....10, 12

Mid-County Future Alternatives Comm. v. Metro. Area Local Gov't Boundary Commission,
82 Or.App. 193, 728 P.2d 63 (1986), *modified on other grounds*, 83
Or.App. 552, 733 P.2d 451 (1987).....14, 15, 18

Morris v. Consolidation Coal Co.,
191 W.Va. 426, 433, 446 S.E.2d 648, 655 (1994).....8

Multi-Channel TV v. Charlottesville,
22 F.3d 546 (4th Cir. 1994).....8

Oglesby v. City of Coralville,
778 N.W.2d 66, 2009 WL 4120403.....5

People ex rel. Lemoore Land & Fruit Growing Co. v. City of Lemoore,
37 Cal. App. 79, 84, 174 P. 93, (1918).....10, 12

People of City of Charleston v. Witmer,
304 Ill.App.3d 386, 709 N.E.2d 998 (1999).....10, 12

Perdue v. Ferguson,
177 W.Va. 44, 350 S.E.2d 555 (1986).....11, 18

Potvin v. Village of Chubbuck,
76 Idaho, 453, 284 P.2d 414 (1955).....10, 12

Ridings v. City of Owensboro,
383 S.W.2d 510 (Ky. 1964).....10, 12

Town of Lyons v. City of Lake Geneva,
56 Wis.2d 331, 335-37, 202 N.W.2d 228, 231 (1972).....8

Town of Mt. Pleasant v. City of Racine,
24 Wis.2d 41, 45 127 N.W.2d 757, 759 (1964).....10, 12

Township of Owosso v. City of Owosso,
385 Mich. 587, 588 189 N.W.2d 421, 421 (1971).....10, 12, 15

SER Abraham Linc Corp. v. Bedell,
216 W.Va. 99, 602 S.E.2d 542 (2004).....7

SER Butler Township Board of Trustees v. Montgomery County Board of County Commissioners,
112 Ohio St.3d 262, 858 N.E.2d 1193 (2006).....4, 5, 13, 14

SER City of Charles Town v. County Commission of Jefferson County,
221 W.Va. 317, 323 655 S.E.2d 63, 69 (2007).....4, 6

SER Delaware Department of Transportation v. City of Milford,
576 A.2d 618, 624 (1989).....10, 12

SER Shifflet v. Rudloff,
213 W.Va. 404, 411, 582 S.E.2d 851, 858 (2003).....8

Village of Saranac Lake v. Gillispie,
261 A.D. 854, 24 N.Y.S.2d 403 (1941).....9

Wescom, Inc. v. Woodridge Park District,
49 Ill.App.3d 903, 364 N.E.2d 721 (1977).....10, 12

Worley v. Peachtree City,
2010 WL 2698494.....6

Statutes

W.Va. Code § 8-6-1 ..... 2, 18

W.Va. Code § 8-6-4 ..... 3, 11, 12, 13, 14, 15, 16, 18

W.Va. Code § 8-6-5 ..... 9, 16

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Appellees.

REPLY BRIEF OF APPELLANTS

I. INTRODUCTION

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. As the following discussion will demonstrate, the Circuit Court erred by, sua sponte, constraining the hearing below to the issue of standing, and concluding that both the Organ Cave and Ronceverte Appellants lack standing to challenge Ronceverte's lasso annexation of Stoney Glen subdivision. In this case where the controlling facts cannot be changed by further

development, 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 and unlawfully allowed non-qualified voters (the Baylesses) to petition for annexation. Accordingly, Appellants respectfully pray that this Court reverse the decision below, and remand this case with instructions to enter judgment for Appellants.

II. LEGAL ARGUMENT

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

Appellees concur with Appellants that the three-part test for standing from Findley v. State Farm Mutual Automobile Insurance Co., 213 W.Va. 80, 576 S.E.2d 807 (2002), Guido v. Guido, 202 W.Va. 198, 503 S.E.2d 511 (1998), and Coleman v. Sopher, 194 W.Va. 90, 459 S.E.2d 367 (1995), applies to this case. Appellees' Brief, p. 4. Appellees suggest that the Circuit Court unequivocally found as fact that Appellants are not the fee simple owners of the land beneath and along U.S. 219 and the county road being annexed. Id. However, the Circuit Court's order was not definitive in its "finding.[1]" Concerning various of Appellants' deeds that were offered into evidence, the Circuit Court commented: "this Court can only find language in

[1]In reviewing the Circuit Court's "finding," this Court should bear in mind that Appellants came to the August 18, 2009 hearing having noticed it on a motion for a preliminary injunction. The Circuit Court announced, sua sponte at the outset of the hearing, that the entire hearing would be confined to the issue of standing. Having heard some evidence on that issue, the Circuit Court precipitously dismissed the entire action without ever having conducted a trial on the merits. So precipitous was the Circuit Court's dismissal (Appellants had a motion to join additional petitioners and amend to add additional legal claims pending at the time) that the case had to be reinstated to the active docket of the court for ruling on Appellants' pending motion to join and amend before it was again dismissed in the same order granting Appellants' motion.

two of those deeds, the deed of Billy and Betsy Falls and one of the deeds belonging to Jesse and Kathleen Hylton, that would seem to suggest that the property owner owned land under the public road that is at issue in this case."[2] 8/24/09 Order, p. 7. The Circuit Court went to assert, "[e]ven assuming arguendo that the Petitioners would be considered freeholders of property under one of the State roads that are at issue in this matter, this does not guarantee standing to file suit." 8/24/09 Order, p. 8. The Circuit Court went to engage in an erroneous legal analysis, following Herold v. Hughes, 141 W.Va. 182, 90 S.E.2d 451 (1955), and essentially disregarding the teachings of Fox v. City of Hinton, 84 W.Va. 239, 99 S.E. 478, 479-80 (1919).[3] In addition to Fox, the flaw in the Circuit Court's analysis is exposed by an Ohio case, discussed infra.

While this Court apparently has no precedents addressing standing in annexation disputes involving West Virginia Code § 8-6-4 (annexation without an election)[4], Ohio has addressed

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[2]Insofar as the Circuit Court made any finding that the Organ Cave Appellants do not own beneath the public roads, its finding is clearly erroneous and should be reversed by this Court. If a certified copy of a deed is insufficient to prove ownership, citizens objecting to an annexation will have to hire, as expert witnesses, professional engineers to do surveys and lawyers to do title searches, etc. This is an absurd burden to place on ordinary citizens in such cases.

[3]The Circuit Court observed:

> [t]he Petitioners argue that the *Fox* case clearly demonstrates that when a public street is acquired by a city, the fee of the land remains in the landowner. However, this Court is persuaded by the *Herold* decision, because there is only a minute possibility that the State would ever discontinue its use of the roadway in question. If and until that ever happens, the owners of the property under the roadway are merely entitled to the same enjoyment of that roadway as the rest of the public.

8/24/09 Order, p. 8.

[4]In re City of Beckley, 194 W.Va. 423, 460 S.E.2d 669 (1995), and In re City of Morgantown, 159 W.Va. 788, 226 S.E.2d 900 (1976), both concerned minor boundary adjustment annexations under West Virginia Code § 8-6-5. As noted in Appellants' Brief, it may

standing in an analogous annexation case. Ohio has a more elaborate statutory annexation framework[5] than does West Virginia, and its Supreme Court has issued a decision which is entirely supportive of Appellants here.[6] In SER Butler Township Board of Trustees v. Montgomery County Board of County Commissioners, 112 Ohio St.3d 262, 858 N.E.2d 1193 (2006), the Ohio Supreme Court was faced with the question whether its General Assembly intended that "...a landholder who owns in fee simple the property underlying a roadway over which a political subdivision holds an easement must be counted as an owner for purposes of determining the percentage of owners who have signed an annexation petition?"

Just as do Appellees here, the parties seeking annexation in SER Butler Township Board of Trustees v. Montgomery County Board of County Commissioners, supra, strenuously argued that:

> ...because the excluded landowners exercise virtually no dominion and control over the roadway because of the easement, the excluded landowners are not, for all practical purposes, suffering a significant loss if they are not counted as owners.

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be defensible to take a more restrictive view of standing in minor boundary adjustments than in annexations by petition because the former, by definition, typically involve less drastic and controversial changes to a municipality's boundaries. By contrast, far-reaching lasso annexations without an election understandably are quite contentious.

[5]Ohio's annexation code was revised comprehensively by Senate Bill 5 in 2001. SER Butler Township Board of Trustees v. Montgomery County Board of County Commissioners, 112 Ohio St.3d 262, 262, 858 N.E.2d 1193, 1195 (2006). The need for similar comprehensive reform in West Virginia has been noted by at least one Justice of this Court in SER City of Charles Town v. County Commission of Jefferson County, 221 W.Va. 317, 655 S.E.2d 63 (2007) (Starcher, J., concurring).

[6]The Ohio ruling is significant because Ohio statutes and caselaw affirmatively favor and encourage annexation by cities. City of Middletown v. McGee, 39 Ohio St.3d 284, 285, 530 N.E.2d 902, 903 (1988). In favoring and encouraging annexations, Ohio certainly is distinguishable from West Virginia and appears to stand alone among jurisdictions.

112 Ohio St.3d at 270, 858 N.E.2d 1201. The Ohio Supreme Court rejected this theory, holding that, regardless of the roadway easement, the abutting (excluded) landowners nevertheless owned a fee simple interest:

> the balance [of arguments] must fall on the side of the [excluded landowners] in this case. Even though the excluded landholders have little say over the use of the roadway itself, **it cannot be questioned that they own the property underlying the roadway and will be affected if the road that runs directly in front of their property is annexed into the municipality.**
>
> We hold that the excluded landholders must be counted as "owners" under current R.C. 709.02(E) because **not to count them would deprive them of one of the property rights that they would normally have as the holders of an undeniable and definite property ownership interest.**

112 Ohio St.3d at 271, 858 N.E.2d 1202 [bold added for emphasis]. So too in this case, the Organ Cave Appellants' fee simple ownership confers standing upon them and the Circuit Court's contrary conclusion that their interest is unworthy of legal protection impermissibly "...deprive[s] them of one of the property rights that they would normally have as the holders of an undeniable and definite property ownership interest."[7] Id. Iowa's Court of Appeals also has issued a decision that is favorable to Appellants, although not couched expressly in the law of standing. In Oglesby v. City of Coralville, 778 N.W.2d 66, 2009 WL 4120403 (Iowa App. 2009), the court held that landowners owning property sought to be annexed and/or *property adjoining the proposed annexed territory* could challenge an unlawful annexation.

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[7]Interestingly in SER Butler Township Board of Trustees v. Montgomery County Board of County Commissioners, the challenged annexation was described as a "balloon-on-a-string" annexation of the type disapproved of by the Ohio Supreme Court in City of Middletown v. McGee, 39 Ohio St.3d 284, 287, 530 N.E.2d 902, 905 (1988), and at issue here.

Although there was essentially no factual development[8] of the issue because of the artificially truncated proceedings below, the Ronceverte Appellants also have standing. See generally, Worley v. Peachtree City, 2010 WL 2698494 (Ga. App. 2010) (noting trial court's and court of appeals' conclusion that city resident had standing to enjoin ultra vires annexation; city obviously would expend municipal funds on newly incorporated area). In the case at bar, the Ronceverte Appellants challenge an ungainly and irrational lasso annexation which obviously dilutes Ronceverte's[9] ability to provide crucial emergency services to existing residents. Ronceverte obviously has and will continue to spend municipal funds on the newly incorporated area, which (among other factors discussed herein) confers standing upon the Ronceverte Appellants. Worley v. Peachtree City, supra.

Additional support for concluding the Ronceverte Appellants have standing also may be gleaned from this Court's decisions in SER City of Charles Town v. County Commission of Jefferson County, 221 W.Va. 317, 323 655 S.E.2d 63, 69 (2007), and In re City of Morgantown, 159 W.Va. 788, 794, 226 S.E.2d 900, 904 (1976). In those cases, this Court explained: "Article six [of Chapter 8] sufficiently *identifies those who have an interest in annexations* as including the governing body of the municipality and the *qualified voters and freeholders of the municipality* and the territory to be annexed." [italics added for emphasis]. Id. Thus, this Court already has

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[8]Because the Circuit Court granted leave to amend to add the Ronceverte Appellants simultaneously with its final order dismissing the case, there was no factual development below relating to the Ronceverte Appellants. As for factual development relating to the Organ Cave Appellants, it was incomplete because the only hearing held for them was a preliminary injunction hearing and not a final trial on the merits. The Circuit Court, sua sponte, limited the hearing regarding the Organ Cave Appellants to the issue of standing only.

[9]In the face of this problem, Appellees less-than-reassuringly assert that "...common sense would dictate that a municipality would not voluntarily undertake an overly burdensome obligation to supply services." Appellees' Brief at p. 25 (also at p. 26). On the contrary, exactly that has happened here and the Ronceverte Appellants are proper parties with standing.

recognized that "the qualified voters and freeholders of the municipality" are interested parties under Chapter 8, Article 6 who may challenge an annexation. Id. In summary, the Ronceverte Appellants as residents and taxpayers *must have standing* to challenge an unlawful annexation by their municipality; if they do not (and the Organ Cave Appellants also lack standing), then no person or entity has standing to contest an annexation, even if, as here, it is void ab initio.

Appellees continue to maintain that Appellants have not alleged the first element, i.e., injury in fact, from 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). Appellees' Brief, pp. 4-5. Both sets of Appellants, however, have identified multiple injuries in fact. The Organ Cave Appellants' property has been annexed unlawfully; they have been disenfranchised in counting a "majority" of freeholders; the Baylesses were not "qualified voters" but were allowed to file the petition; and Appellees Ronceverte and Greenbrier County Commission have approved an unlawful lasso annexation. For the Ronceverte Appellants, the municipality in which they live, own property, pay taxes, and vote, has approved an unlawful lasso annexation which, by reaching out four miles from an otherwise compact and rational community, will stretch vital municipal services beyond the limits of public safety. Although the Ronceverte Appellants vote in and are directly impacted by their city's unlawful annexation, the Baylesses were not "qualified voters" from the annexed area and were allowed to file the petition.[10] Any or all of these injuries are sufficient

[10]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 Linc 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 Circuit Court is affirmed) there would exist a hindrance to the Organ Cave

injury in fact. Findley v. State Farm Mutual Automobile Insurance Co., supra; Guido v. Guido, supra; Coleman v. Sopher, supra.

Finally, the Circuit Court's and Appellees' theory that *both* the Organ Cave Appellants and the Ronceverte Appellants lack standing must be rejected based on the simple and familiar maxim that the law abhors a wrong without a remedy. Bender v. Glendenning, 219 W.Va. 174, 190, 632 S.E.2d 330, 346 (2006) (Starcher, J., concurring); SER Shifflet v. Rudloff, 213 W.Va. 404, 411, 582 S.E.2d 851, 858 (2003) (Davis & Maynard, JJ., dissenting); Morris v. Consolidation Coal Co., 191 W.Va. 426, 433, 446 S.E.2d 648, 655 (1994). Under the Circuit Court's and Appellees' flawed approach, literally no one has standing to challenge what is obviously, for all the reasons detailed herein, an unlawful annexation.

B. APPELLEES CANNOT POSSIBLY PROVE THAT STONEY GLEN SUBDIVISION IS "CONTIGUOUS," AS REQUIRED BY W.VA. CODE § 8-6-1.

Appellees rely on a distorted reading of In re City of Beckley, 194 W.Va. 423, 460 S.E.2d 669 (1995), to argue that this Court already has ruled that contiguity "...does not always mean the land must be touching." Appellee's Brief, p. 24. Upon careful reading of In re City of Beckley, the quote relied on by Appellees actually is a definition given by the Wisconsin Supreme Court in another case[11] and not a holding by this Court. Immediately after the Wisconsin quote, this Court went on to state, "[i]n this case, the issue is not that the annexed portion does not abut the municipality's boundary. Rather, the issue involves the question of how much of the boundary of the annexed area must be contiguous to the city limits." In re City of Beckley, 194 W.Va. at 430,

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Appellants' ability to protect their own interests. 216 W.Va. at 113, 602 S.E.2d at 556.

[11]Town of Lyons v. City of Lake Geneva, 56 Wis.2d 331, 335-37, 202 N.W.2d 228, 231 (1972).

460 S.E.2d at 676. Contrary to Appellees' theory, merely reciting a test or quote from another state does not, by itself, amount to its adoption as a holding by this Court. In any event, even if there were a holding defining contiguity from In re City of Beckley, supra, such would not be instructive here because it was a minor boundary adjustment annexation, which carries its own specific definition of "contiguous" applicable solely to § 8-6-5 of the Code. See e.g., West Virginia Code § 8-6-5(f)(1).

Similarly, any suggestion by Appellees (Brief, p. 24) that Ronceverte's annexation here is consistent with "long, narrow, ribbon-like communities...characteristic...of human settlements in the valleys" of central Appalachia is ludicrous. While Appellants agree the annexation involves a "ribbon," (or shoestring, lasso, or lariat), it most certainly traverses *out of Ronceverte's valley setting* along the Greenbrier River, *four miles over hill and dale,* to connect irrationally with an *outlying subdivision* with *no logical nexus to Ronceverte.* Contrary to Appellees' implication, this annexation is a hornbook-worthy case of an unlawful lasso annexation.

Appellees boldly proclaim that a "number of cases from other jurisdictions have approved annexations with similar configurations and contiguities as those in the present case." Appellees' Brief, p. 27. By Appellants' count, that "number of cases" adds up to exactly three (3) decisions from Alabama, California, and New York. In two of the three jurisdictions, Alabama and California, there is additional, contrary authority which actually supports Appellants. See, e.g., 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). Appellees' reliance on Village of Saranac Lake v. Gillispie, 261 A.D. 854, 24 N.Y.S.2d 403 (1941) (per curiam) is misplaced. That case 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. More importantly, the better-reasoned and overwhelming majority rule is illustrated by Appellants' far more substantial line of authorities requiring more contiguity than the mere artifice of a connecting road. See, e.g., City of Rapid City, S.D. v. Anderson, 2000 S.D. 77, 612 N.W.2d 289, 294 (2000); People of City of Charleston v. Witmer, 304 Ill.App.3d 386, 709 N.E.2d 998 (1999) ; Johnson v. City of Hastings, 241 Neb. 291, 488 N.W.2d 20, 24 (1992); SER Delaware Department of Transportation v. City of Milford, 576 A.2d 618, 624 (1989); City of Middletown v. McGee, 39 Ohio St.3d 284, 287, 530 N.E.2d 902, 905 (1988); City of Fultondale v. City of Birmingham, 507 S.2d 489, 491 (Ala. 1987); Wescom, Inc. v. Woodridge Park District, 49 Ill.App.3d 903, 364 N.E.2d 721 (1977); Town of Mt. Pleasant v. City of Racine, 24 Wis.2d 41, 45 127 N.W.2d 757, 759 (1964); Potvin v. Village of Chubbuck, 76 Idaho, 453, 284 P.2d 414 (1955); Clark v. Holt, 218 Ark. 504, 237 S.W.2d 483, 485 (1951); People ex rel. Lemoore Land & Fruit Growing Co. v. City of Lemoore, 37 Cal. App. 79, 84, 174 P. 93, (1918). See also, Township of Owosso v. City of Owosso, 385 Mich. 587, 189 N.W.2d 421 (1971); Ridings v. City of Owensboro, 383 S.W.2d 510 (Ky. 1964).

Whatever Appellees may lack in legal authorities they more than make up for with chutzpah by proclaiming that their cases "...are more consistent with the law that exists on the subject in this State." Appellees' Brief, p. 31. Appellees restate (as if it were a holding) from In re City of Beckley, 194 W.Va. 423, 460 S.E.2d 669 (1995), that "[t]his Court has specifically stated...that in West Virginia, contiguity does not necessarily even require actual touching." Appellees' Brief, p. 31. However, as discussed supra, this statement was merely a quote from a Wisconsin case in a West

Virginia minor boundary adjustment dispute, which is subject to a specific statutory definition of contiguity. Compounding their error, Appellees repeatedly caution and/or admonish this Court not to interfere with and/or defer to a "municipality's legislative acts," Appellees' Brief, p. 32, even going so far as to suggest that for this Court to rein in Ronceverte's patently unlawful annexation would violate the "separation of powers." Appellees' Brief, pp. 11-14. The short answer to this theory is this Court has not hesitated to review proper annexation challenges previously, nor have courts throughout the country (including those in the three jurisdictions cited by Appellees) been deterred by separation of powers concerns. See e.g., W.Va. Code §§ 8-6-4©, 8-6-1 & 53-1-2.

The West Virginia authorities relied on by Appellees in support of their "separation of powers" theory are no bar to relief here. Appellees place great reliance on Brouzas v. City of Morgantown, 144 W.Va. 1, 106 S.E.2d 244 (1958). However, Brouzas did not concern an annexation dispute, where certiorari and/or mandamus obviously lies in West Virginia. Moreover, Brouzas does not foreclose certiorari or injunctive relief where the requisite direct, particular harm has been shown as is the case here. 144 W.Va. at 15, 106 S.E.2d at 252.

Appellees also rely heavily on Perdue v. Ferguson, 177 W.Va. 44, 350 S.E.2d 555 (1986); however it involved an appeal of a Circuit Court order issuing a preliminary injunction preventing a city council from enacting an ordinance (in a non-annexation context). Under such circumstances, it is understandable this Court would use strong cautionary language about the separation of powers. Obviously, Perdue v. Ferguson is not applicable here; the annexation ordinance already has been enacted and Petitioners merely seek review thereof, as allowed by both statute and caselaw. Moreover, as was true of Brouzas, Perdue v. Ferguson does not bar injunctive relief against an enacted ordinance if justified by the facts and circumstances of the case; such facts simply did not

exist there. 177 W.Va. at 48-50, 350 S.E.2d at 560-61. Boiled down to its essence, Appellees' position here is that no one has standing to challenge Ronceverte's blatantly unlawful "legislative action" and the city's conduct is insulated from any judicial review by the mere incantation of "separation of powers." However, such a blindly deferential approach to lawless annexation lawmaking by a city council is not the law of this State, nor any other[12] for that matter. See, e.g., W.Va. Code §§ 8-6-4©, 8-6-1 & 53-1-2. Appellees' view that the courts of this State are barred from intervening by "separation of powers" effectively and impermissibly reads the foregoing statutory provisions out of existence. Id.

C. APPELLEE CITY OF RONCEVERTE FAILED TO CALCULATE A MAJORITY OF FREEHOLDERS PROPERLY AND ALLOWED A NON-QUALIFIED VOTER TO PETITION FOR ANNEXATION.

Appellees' arguments concerning calculation of annexation petitioners and/or qualified voters are unmeritorious. In this case, 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

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[12]See, e.g., City of Rapid City, S.D. v. Anderson, 2000 S.D. 77, 612 N.W.2d 289, 294 (2000); People of City of Charleston v. Witmer, 304 Ill.App.3d 386, 709 N.E.2d 998 (1999) ; Johnson v. City of Hastings, 241 Neb. 291, 488 N.W.2d 20, 24 (1992); SER Delaware Department of Transportation v. City of Milford, 576 A.2d 618, 624 (1989); City of Middletown v. McGee, 39 Ohio St.3d 284, 287, 530 N.E.2d 902, 905 (1988); City of Fultondale v. City of Birmingham, 507 S.2d 489, 491 (Ala. 1987); Wescom, Inc. v. Woodridge Park District, 49 Ill.App.3d 903, 364 N.E.2d 721 (1977); Town of Mt. Pleasant v. City of Racine, 24 Wis.2d 41, 45 127 N.W.2d 757, 759 (1964); Potvin v. Village of Chubbuck, 76 Idaho, 453, 284 P.2d 414 (1955); Clark v. Holt, 218 Ark. 504, 237 S.W.2d 483, 485 (1951); People ex rel. Lemoore Land & Fruit Growing Co. v. City of Lemoore, 37 Cal. App. 79, 84, 174 P. 93, (1918). See also, Township of Owosso v. City of Owosso, 385 Mich. 587, 189 N.W.2d 421 (1971); Ridings v. City of Owensboro, 383 S.W.2d 510 (Ky. 1964).

freeholders along Morgan Hollow and Hokes Mill Roads whose sentiments never were counted or considered 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.[13] Additional support for Appellants' position comes from SER Butler Township Board of Trustees v. Montgomery County Board of County Commissioners, 112 Ohio St.3d 262, 858 N.E.2d 1193 (2006), discussed supra, wherein the Ohio Supreme Court squarely held that notwithstanding a roadway easement, the abutting landowners nevertheless owned the fee simple interest and had to be counted as "owners" under Ohio annexation law.[14]

Appellees contend that Appellants were not entitled to be included in calculating a majority of freeholders[15] for the annexation petition because they "cannot possibly maintain a place of abode

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[13]These individuals alone outweigh those counted by Ronceverte for purposes of W.Va. Code § 8-6-4(a).

[14]Appellees dismiss Appellants' property interest as a mere "legal fiction." Appellees' Brief, p. 6. However, as Fox v. City of Hinton and SER Butler Township Board of Trustees v. Montgomery County Board of County Commissioners demonstrate, Appellants' fee ownership is a legal reality which must be protected in any annexation process.

[15]W.Va. Code §8-6-4(e) provides:

> It shall be the responsibility of the governing body to enumerate and verify the total number of eligible petitioners, in each category, from the additional territory. In determining the total number of eligible petitioners, in each category, a freeholder or any other entity that is a freeholder shall be limited to one signature on a petition as provided in this section. There shall be allowed only one signature on a petition per parcel of property and any freehold interest that is held by more than one individual or entity shall be allowed to sign a petition only upon the approval by the majority of the individuals or entities that have an interest in the parcel of property.

within the county roads being annexed." Appellees' Brief, p. 33. This theory simply is wrong; the plain language of W.Va. Code §8-6-4(a), the statute concerning annexations without an election, provides:

> (a) The governing body of a municipality may, by ordinance, provide for the annexation of additional territory without ordering a vote on the question if: (1) A majority of the qualified voters of the additional territory file with the governing body a petition to be annexed; and (2) a majority of all freeholders of the additional territory, **whether they reside** or have a place of business therein **or not**, file with the governing body a petition to be annexed.

(underlining & bold added for emphasis). Simply put, whether Appellants "reside" in or have homes on a right of way is irrelevant; it is sufficient that they own fee simple property within the additional territory annexed, which obviously is the case here because they own the land beneath and along the highway and county roads being annexed. Fox v. City of Hinton, 84 W.Va. 239, 99 S.E. 478, 479-80 (1919); SER Butler Township Board of Trustees v. Montgomery County Board of County Commissioners, supra.

Ironically, one of the two "freeholders" counted[16] by Ronceverte actually lives in Japan and has only a lot in Stoney Glen "subdivision" (the only lot sold to date) and the other is an out-of-state developer who cannot vote[17] in West Virginia. It would be a perverse, and arguably unconstitutional[18], result to count an absentee landowner living in Japan and an out-of-state

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[16]WVFP was counted twice by Ronceverte for each of two tracts it owns for a total of three annexation petitioners. As discussed herein, double-counting is not allowed in calculating "qualified voters."

[17]While WVFP may be a "qualifed voter of the additional territory" for annexation purposes by virtue of W.Va. Code §8-6-4(b), it certainly cannot participate in the elections process at any level in West Virginia.

[18]See generally, Mid-County Future Alternatives Committee v. Metropolitan Area Government Boundary Commission, 82 Or.App. 193, 728 P.2d 63 (1987).

developer as entitled to petition for annexation, while at the same time excluding 98-104 West Virginians, several of whom who have lived on the land being annexed for generations. Such calculated disenfranchisement as befell Appellants here has been condemned by the Michigan Supreme Court in similar circumstances:

> The area to be annexed is substantially vacant and owned by four promoters. Two qualified electors, parents of one of the promoters, reside on the area to be annexed. Approximately 160 qualified electors were excluded by the irregularly drawn boundaries from the area which was sought to be annexed. It is clear that the area to be annexed was designed in such a manner as to guarantee a vote in favor of annexation among the qualified electors in the area to be annexed.

Township of Owosso v. City of Owosso, 385 Mich. 587, 588 189 N.W.2d 421, 421 (1971). Appellees continue to cite a Colorado case, arguing that owners of streets or alleys are "not required to sign annexation petitions." Appellees Brief, p. 34. As that case makes clear, however, Colorado's State Constitution, Art. II, §30(1)(b) expressly excludes "public streets, and alleys" from being counted in annexations when calculating both the area and number of signatures requirements therein. Board of County Commissioners of Douglas County v. City of Aurora, 62 P.3d 1049, 1055 (Colo.App. 2002).

Appellees' reliance on Mid-County Future Alternatives Comm. v. Metro. Area Local Gov't Boundary Commission, 82 Or.App. 193, 728 P.2d 63 (1986), *modified on other grounds*, 83 Or.App. 552, 733 P.2d 451 (1987), similarly is uninstructive because Oregon's annexation statute expressly excludes "any real property that is publicly owned." Actually, the Oregon case is supportive of Appellants' disenfranchisement claim here by striking down a statute foreclosing an election in some circumstances. In sum, West Virginia's annexation provision, W.Va. Code §8-6-4(a), contains no express exclusion(s) comparable to Colorado or Oregon; its language controls here.

Appellants contended in their initial Brief that Ronceverte unlawfully allowed non-qualified voters of the additional territory to file the annexation petition. Appellees have responded that the term "qualified voter of the additional territory" is defined specifically as including a "firm" (such as West Virginia Farm Properties, LLC), under W.Va. Code §8-6-4(b). Appellees' Brief, p. 34. Appellants now accept Appellees' position as to WVFP, but maintain their argument as to the Baylesses, who are not "qualified voters" under W.Va. Code §8-6-4(a).[19] Contrary to Appellees' suggestion, this claim is properly before this Court because the Circuit Court allowed Appellants to amend their pleadings to assert this additional legal claim in its Order entered on October 16, 2009.[20] Accordingly, this is another basis on which the annexation petition should be invalidated; instead of having a "majority" of the qualified voters, Ronceverte approved a petition in which only *half* of the putative "qualified voters" (WVFP but not the Baylesses) could petition lawfully as such for annexation.[21]

D. THIS COURT SHOULD REACH THE MERITS OF THIS CASE BECAUSE THE DISPOSITIVE FACTS ARE UNDISPUTED.

Appellees argue that this Court should decline to reach the merits of this case. Appellees' Brief, pp. 14-17. According to Appellees, this case "*does* depend upon the facts." Id. at p. 16. Precisely what those facts might be, and how any further evidentiary development could or would change or elucidate them, has not been explained by Appellees. Appellants disagree with Appellees'

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[19]Nowhere does W.Va. Code §8-6-4 define how individuals, as distinguished from corporations or firms, qualify as "qualified voters of the additional territory."

[20]In the same Order, the Circuit Court dismissed this case for the second time.

[21]Although WVFP owned two tracts of land at the time of the petition, it should not be double-counted as two "qualified voters."

effort to distinguish this case from In re Charleston Gazette FOIA Request, 222 W.Va. 771, 671 S.E.2d 776 (2008). In that case, 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. Similarly, here the Circuit Court sua sponte (and without advance notice) limited its hearing to the issue of standing. Having decided that issue against Appellants, the Circuit Court proceeded to dismiss the case, only to have to reinstate it to the active docket for the purpose of granting Appellants' motions to join the Ronceverte Appellants and add an additional legal claim. In the same order granting Appellants' motions to join the Ronceverte Appellants and add an additional legal claim, the Circuit Court again dismissed the case (for the second time).

As in In re Charleston Gazette FOIA Request, it has been well over a year since the annexation was passed by Ronceverte and ratified by Greenbrier County. If remanded, by the time this case is remanded, decided on the merits by the Circuit Court, and appealed again to this Court, it will be years more before it is finally resolved. Although all the issues in this appeal are important, the issue of lasso annexations in particular is one of public importance, has not been addressed by this Court previously, and certainly is likely to recur. No amount of evidentiary development can change the immutable facts that Stoney Glen subdivision is four miles from Ronceverte, far outside its river valley[22] footprint, and has no rational nexus with the city. When the dispositive facts are not and cannot be disputed, there is no rational purpose in a remand; it will only consume the litigants' time and resources unnecessarily. Appellants respectfully disagree with Appellees' assertion that "this case involves no time pressures," Appellees' Brief, p. 17, and submit

[22]Indeed, Ronceverte proudly bills itself as the "River City." However, its footprint after the Stoney Glen annexation bears little resemblance to a traditional West Virginia river valley community.

that the tone of this assertion by Appellees is, at best, inconsistent with the posture they took in the Circuit Court and the "parade of horribles" arguments unleashed at p. 35 of Appellees' Brief, which militate strongly in favor of expeditious resolution of this dispute.

E. APPELLEES' REMAINING ARGUMENTS ARE UNMERITORIOUS.

Appellees at p. 18 of their Brief characterize Appellants' claims but omit to say that this matter also was filed as a petition for a writ of certiorari and review, pursuant to West Virginia Code §§ 8-6-4 & 53-3-1. Again citing Perdue v. Ferguson, 177 W.Va. 44, 350 S.E.2d 555 (1986), wherein a city council passed an ordinance in violation of an unlawful prohibitory injunction barring it from doing so, Appellees conflate injunction jurisprudence principles with mandamus and certiorari concepts, erroneously arguing that Appellants must show "irreparable harm" to obtain any relief here. Appellees' Brief, pp. 19-22 However, nothing in §§ 8-6-4©, 53-3-1, nor 53-1-2, nor the caselaw applying such provisions, *requires* a showing of "irreparable harm" to obtain mandamus or certiorari relief. Simply stated, a court could conclude that Appellants were or are not entitled to injunctive relief, and still rule for them on the merits, invalidating the annexation ordinance as allowed by the applicable statutes, §§ 8-6-4©, 53-3-1, or 53-1-2. Even assuming, arguendo, that "irreparable harm" is required, Appellants submit they have shown such here, for no money damages can remedy the wrongdoing perpetrated by the City of Ronceverte.[23]

Appellees' discussion of their theories of contiguity in the guise of an alleged lack of probability of success on the merits, Appellees' Brief, pp. 22-32, already has been addressed in Part II.B of this Brief, supra and will not be restated here. Appellees' discussion of the balance of

[23]See e.g., Multi-Channel TV v. Charlottesville, 22 F.3d 546 (4th Cir. 1994); Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 193-96 (4th Cir. 1977).

hardships, Brief, pp. 35-36, requires only a short response. Contrary to Appellees' assertion, Brief at pp. 17 & 35, the Stoney Glen annexation does have a very real and deleterious effect upon Appellants upon which no price tag can be placed. Their rural / agricultural way of life will be changed forever, both substantively and aesthetically, if Ronceverte is allowed to annex a now-vacant and financially troubled subdivision in their midst. This is in addition to all of the specific injuries-in-fact discussed supra. In sum, given its historic rate of growth (or lack thereof), it is doubtful that Ronceverte's boundaries, in the natural course of things, would reach the vicinity of Stoney Glen within the next 75 - 100 years, if even by then.

III. CONCLUSION

In conclusion, the Circuit Court erred by, sua sponte, constraining the proceedings below to the issue of standing and concluding that both the Organ Cave and Ronceverte Appellants lack standing to challenge Ronceverte's lasso annexation of Stoney Glen subdivision. In this case where the controlling facts cannot be changed by further development, 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 and unlawfully allowed non-qualified voters (the Baylesses) to petition for annexation. Under these circumstances, Appellants respectfully pray that this Court reverse the decision below, and remand this case with instructions to enter judgment for Appellants.

Respectfully submitted,
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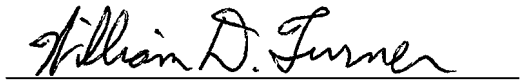
By Counsel



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CERTIFICATE OF SERVICE

I, William D. Turner, counsel for Appellants, do hereby certify that I have served the foregoing *Reply Brief on Behalf of Appellants, Robert A. Doering, et al.*, upon all parties in this matter, by mailing a true and exact copy thereof via United States First Class mail, postage paid, on this the 12th day of October, 2010, and addressed as follows:

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