

No. 33454 – *State of West Virginia ex rel. City of Charles Town v. The County Commission of Jefferson County, a Public Body Corporate of the State of West Virginia; and Frances B. Morgan, President and Member; Archibald M. S. Morgan, III, Member, C. Dale Manuel, Member James T. Sutkamp, Member; and Gregory A. Corliss, Member; and Jennifer Maghan, Clerk, County Commission of Jefferson County.*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

While I concur with the result in this case, I write separately to call attention to issues raised that I believe require legislative attention.

The Legislature needs to address the confusing statutory role for county commissions and the limited nature of the judicial review provisions in the annexation statutes generally. As the majority opinion acknowledges and discusses, there are three separate procedures which may be employed by municipalities in the annexation process.

First, *W.Va. Code*, 8-6-2(a) [2003] provides for annexation upon election initiated by a petition of “five percent or more of the freeholders of a municipality.”

Second, *W.Va. Code*, 8-6-4(a) [2001] provides for annexation without an election upon a petition of a “majority of the qualified voters . . . and a majority of all freeholders of the additional territory”

Third, *W.Va. Code*, 8-6-5(a) [2001] provides for annexation by “. . . making a minor boundary adjustment”

In the first instance of *annexation by election*, the order of the municipality for the election and the election itself is reviewable by the circuit court pursuant to *W.Va. Code*,

8-6-2(f). Assuming the election is valid, the county commission, upon receiving certification of the election results from the municipality, is required to enter an order approving the annexation. *See W.Va. Code*, 8-6-2(l) and *W.Va. Code*, 8-6-3 [1969]. Under this procedure, no discretion appears to be granted to the county commission in entering an order approving the annexation. Furthermore, the county commission is not authorized under the statute to challenge the election process.

In the second instance of *annexation* without election *by petition*, the circuit court is empowered to review *by certiorari* whether or not “. . . the requisite number of petitioners have filed . . .” *See W.Va. Code*, 8-6-4(c). Upon certification by the municipality that the petition is sufficient in all respects, the county commission is required to enter an order approving the annexation. *See W.Va. Code*, 8-6-3 and *W.Va. Code*, 8-6-4(g). Again, no discretion appears to be granted to the county commission in entering an order approving the annexation. Furthermore, it is unclear under the statute whether the county commission may challenge any aspect of the annexation process.

In the third instance of *annexation by minor boundary adjustment*, the county commission is granted extensive review authority. *W.Va. Code*, 8-6-5(d) provides:

Upon receipt of a complete application for annexation by minor boundary adjustment, the county commission shall determine whether the application meets the threshold requirements for consideration as a minor boundary adjustment including whether the annexation could be efficiently and cost effectively accomplished under section two [annexation by election] or four [annexation by petition] of this article.

W.Va. Code, 8-6-5(f) requires the county commission to examine seven factors in making a decision on whether or not to approve the application for annexation by minor boundary adjustment, including contiguity, inclusion of highways, public support, and the *best interest of the county as a whole*. The municipality may appeal to the circuit court a county commission decision – in which case, according to the language of the statute, the county commission may participate as a party. *W.Va. Code*, 8-6-5(i). However, by this Court’s decision in the *Matter of City of Morgantown*, 159 W.Va. 788, 226 S.E.2d 900 (1976), the county commission’s power to participate in an appeal from a circuit court decision was denied.

The current statutory framework for annexation suggests that the Legislature intended to vest significant power in the voters and freeholders in the territory to be annexed when annexation is undertaken by election or petition. Generally speaking “power to the people” is a concept with which I agree; however, in these instances the statutory framework for annexation is effectively allowing a sub-set of the whole county population to trump zoning ordinances validly enacted by a county commission that was elected by the entire voting population of a county.

Currently, statutes *W.Va. Code*, 8-6-2 (annexation by election) and *W.Va. Code*, 8-6-4 (annexation by petition), as well as our decision in this case, have the practical effect of permitting a small group of people with municipal approval to thwart the will of a county commission which has constitutionally authorized powers to promote the orderly development of the county. Still, when annexation is undertaken by a municipality by minor

boundary adjustment, the Legislature has granted broad discretion to county commissions and, most importantly, the authority to review the matter with respect to “[w]hether the proposed annexation is in the best interest of the county as a whole.” *See W.Va. Code*, 8-6-5(f)(7). This legislative framework is further complicated by the mixed role the Legislature has provided to county commissions in the judicial review process.

The problems with the current statutory language are also exacerbated when considered in light of other legislative powers granted to county commissions for planning and zoning. *See generally W.Va. Code*, 8A-1-1, *et seq.* The county commission briefed but did not argue or emphasize its contention that the annexation statutes may be unconstitutional because of statutory interference with county police powers under *W.Va. Const.* Art IX § 11. In dispelling any notion about whether or not zoning is a police power, this Court stated in *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 709, 398 S.E.2d 532, 535 (1990) that “[a] zoning ordinance, as an exercise of the broad police power of the local governing body, is rebuttably presumed to be valid.”

While currently Jefferson County is the only West Virginia county having comprehensive planning and zoning, there have been other attempts to provide for such. And, several other counties in the State currently have limited planning and zoning activities. Intuitively, I would suggest that as counties in our State experience accelerated growth in population, the pressure to engage in planning and zoning activities will increase. As growth and changes occur, and as more and more land use controls are enacted, our courts will, in turn, be called upon to decide questions revolving around planning and zoning.

While these tensions may be primarily between municipalities and county commissions, the private sector will also be affected.

Many of the court decisions that will be called for over the next several years that involve land use will relate to matters of public policy. Therefore, before even more questions such as these arise, I believe that the Legislature should step in and establish the public-policy framework for resolving the disputes, rather than placing the judicial system in the role of establishing the framework for resolution.

The inconsistency of roles for the county commission in the three annexation procedures is apparent, and in my judgment should be refined and clarified. It is totally inconsistent to, on the one hand, grant to the county commission the authority to approve or deny annexation by minor boundary adjustment based primarily on “[w]hether the proposed annexation is in the best interest of the county as a whole,” *W.Va. Code*, 8-6-5(f)(7), and yet, on the other hand, reduce the county commission’s role to that of a simple ministerial function when the process is by election or petition. The interest of the county commission, particularly if the county has enacted county-wide zoning, is the same regardless of the method of annexation. It is hard to understand why the county commission should be relegated to the role of “rubber stamping” the activity of another agency or collection of citizens – not even having the authority to review the validity of the process – when the annexation is either by election or petition. The Legislature should review these provisions and clearly state a consistent policy-role for the county commission to exercise in all three approaches.

The Legislature also needs to address the need for a clearly-defined procedure for county commissions, municipalities, and other interested parties to seek judicial review regardless of the annexation procedure employed. I would suggest that the county commission be provided with specific statutory authority to seek judicial review when a county commission perceives insufficiencies, deficiencies, or conflicts with ordinances, rules, statutes, or constitutional provisions. Justice Albright ably addressed this aspect of the case in his concurring opinion with which I agree. I also agree with Justice Albright that the majority opinion does not foreclose the possibility of a county commission seeking a remedy through extraordinary relief. I would, however, urge that the more prudent course would be for the Legislature to enact comprehensive reform of the annexation statutes.

Accordingly, I concur.