

No. 31125 *State of West Virginia ex rel. West Virginia Citizens Action Group, an incorporated association of State citizens and taxpayers v. West Virginia Economic Development Grant Committee; City of Wheeling, a municipal corporation; and Century Equities - Wheeling Victorian Outlet Mall, Inc., a private corporation; Kanawha County Commission, Intervenor*

Starcher, C. J., concurring:

FILED

May 16, 2003

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

I concur in the majority opinion and write separately to make several points.

First, this Court is constitutionally charged with determining the constitutionality of a statute when challenged. In this case a majority of the Court determined that the statutory scheme in question is constitutionally defective. But this is not the end of the world. Little time should be lost for any proposed public projects, provided that the Legislature and the Executive act promptly to remedy the constitutional defect.

Second, the petitioner CAG was aware in March of 2002 of the statutory procedure for appointing the Grant Committee and the language establishing its duties. CAG could have brought this lawsuit at that time, yet they waited until September of 2002 — until the Committee had essentially completed its work — to file this lawsuit. Therefore, the delay in the legal resolution of this case must first and foremost be laid squarely at the feet of CAG.

Third, this Court first properly sent the case for factual development to the circuit court; it would have been a mistake to jump in without giving the parties a full chance to develop the record. And although this Court disagrees with *some* of the legal conclusions

reached by the circuit court, it is clear that Judge King proceeded deliberately and carefully, and produced a legally creditable result that deserves appreciation.

Fourth, the constitutional defects of the legislation creating the Grant Committee can be summarized in two statements.

A. The Legislature cannot just give a Grant Committee a pot of money and tell them to “go do good stuff.” That is constitutionally impermissible — there must be some real standards set by law, not just by the Committee itself on an *ad hoc* basis.

B. Additionally, the Legislature cannot “pick the jury pool” from whom the Governor selects appointees — this violates elementary principles of the separation of powers. As Justice Maynard aptly questioned at the oral argument of this case: “Don’t we have lawyers [at the Legislature] who look at this, for God’s sake?”

Fifth, whether any or all of the proposed projects will survive standards established by the Legislature will be up to the Grant Committee. Nevertheless, I will personally state my belief that CAG’s explicit argument that helping to build projects like baseball parks and to refurbish downtown shopping areas with public funds is unconstitutional — because those are not “public purposes” — is hogwash. I can think of few more public purposes than bringing people together for the convivial recreation of live local sporting events. And to suggest that preserving an extraordinary Victorian-era city center for future generations is not a public purpose defies rational explanation. CAG is way off base here.

Sixth, the majority opinion offers some suggestion as to how the essentially procedural defects in the Grant Committee’s appointment and standardless delegation of duties might be remedied. I will add one remark to that discussion, although as the majority opinion clearly notes, it is not a court’s job to write legislation.

My addition, which I admittedly have given little thought to, is that now that the majority of this Court has ruled for the Grant Committee on the “debt” and “public purpose” issues, I do not presently perceive any legal obstacle to the Legislature passing a bill that appropriates bond money based on future lottery revenues for as many of the projects selected by the Grant Committee as the Legislature wishes. And the timing of such action would be determined by the Legislature and the Executive. It could be done right away.

Perhaps such legislation would face a challenge raising other legal issues, and I explicitly don’t prejudge any issues raised in such a challenge. But, without the benefit of argument to the contrary, I don’t see why the Legislature could not theoretically perform such a “fix” — if it wishes to go that route. Regardless of the route selected, a constitutional remedy can be done posthaste.

Seventh, I recognize that this Court *could* have acknowledged the constitutional defects in the Grant Committee legislation, and still approved of the results of the work of the Committee. In *State ex rel. Holmes v. Gainer*, 191 W.Va. 686, 447 S.E.2d 887 (1994), this Court, this Court found that a legislative pay raise had been put in

place in violation of a constitutional timing requirement -- but because it was a “technical” mistake in an area where the law was unclear, this Court approved the legislative pay raise – and said, in effect, “Go and sin no more.”

Could and should we have said – “go and sin no more” -- in this case?

I judge “no” — not with more than \$200 million of public dollars at stake. That would send a message that a statute could violate basic constitutional principles, but this Court would nevertheless approve the results of the statute for political expediency or because — quite frankly — there were “thousands of jobs at stake.”

Jobs are important, and if I had thought the majority opinion as a matter of law would essentially prohibit the creation of most of the thousands of jobs anticipated in the Grant Committee results, I would have weighed that factor into my judgment, as well as the seriousness of the constitutional flaws in the statute creating the Committee. But my judgment – of course, I could be wrong – is that many or even most of the jobs that would be created by the projects approved by the Grant Committee could be soon forthcoming, if the Legislature and the Executive act in a timely fashion.

In this vein, I feel the need to clearly state (I believe that no one would quarrel with this statement) that this Court applauds the energy, imagination, and courage of those within and without the Legislature and executive branch who seek to advance the welfare of West Virginians through public support of commerce, education, and recreation – and that this Court supports the working women and men who construct and service the infrastructure

of our economy. And I repeat — this is not the end of the world. Timely action by the Legislature and the Executive can cure the constitutional defects in the statutes in question, and the various proposed projects may promptly move forward.

Finally, this case was extremely well-developed, briefed, and argued — on both sides. The thorough, high-quality legal work of the advocates who presented their clients' positions made it possible for the Court's opinion to be well-grounded in precedent and logic.