

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 Mall Outlet, Inc., a Private Corporation*

FILED

May 16, 2003

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

McGraw, Justice, concurring, in part, and dissenting, in part:

With that portion of the majority's opinion which holds unconstitutional the mechanism by which six members of the Grant Committee are appointed, under *W. Va. Code* §29-22-18a(d)(3), I concur. The separation of powers and appointments provisions of our State Constitution clearly prohibit this type of legislative encroachment on the powers of the executive branch. However, while the appointment mechanism utilized by the Legislature was constitutionally flawed, I believe the Grant Committee's initial approval of the projects should be permitted to stand.

Additionally, without hesitation, I respectfully dissent from the majority's holding that the instant statute violates the delegation of powers provision. Accordingly, I believe the projects approved by the Grant Committee should be allowed to immediately proceed.

It is beyond cavil that those projects which were approved by the Grant Committee in the first instance will be approved again by the reconstituted Committee.

Thus, the majority's hyper-technical resolution of this issue serves no practical purpose other than to unnecessarily delay the commencement of projects sorely needed throughout this State. The majority expressly invites the executive to re-appoint the original Committee members to the new Committee on the ground that the unconstitutional "taint" attaches to the appointment process rather than to the individual Committee members. Simply put, considering the composition and votes of the new Grant Committee will remain exactly the same as the first one, the judicially-imposed requirement that the long and arduous application process be repeated only so that the very same projects will be re-approved, is an exercise in futility. In my view, the more judicious solution would be to allow the votes of the remaining three, lawfully appointed members of the Grant Committee to stand, all of which votes, presumably, were favorable to each of the previously-approved projects.

I further disagree with the majority's holding that the subject legislation violates the delegation of powers provision of our State Constitution because it does not include sufficient statutory guidance to the Grant Committee to assist it in the project application and selection process. Inexplicably, the majority opinion fails to provide any analysis, meaningful or otherwise, of the specific statutory language it finds objectionable and therefore, unconstitutional.

To the contrary, I find the language of *W.Va. Code* §29-22-18a(d)¹ to be more than adequate in providing guidance to the Grant Committee in its decision-making process; indeed, the guidelines included in *W.Va. Code* §29-22-18a(d) are at least equal to the statutory guidance given to the school building authority, which was upheld by this Court in *State ex rel. Marockie v. Wagoner (WagonerII)*, *supra*.

Finally, I am reminded that the genesis of establishing the economic development project fund was to assist in the funding of the Victorian Mall project in Wheeling, West Virginia. The purpose of that project was to stimulate the economy of that city's downtown area, which was once a vital business and retail district that, like many towns in West Virginia and across the nation, has fallen on hard financial times. Were it not for the Victorian Mall project, which has not yet been approved by the Grant Committee, the

¹*W.Va. Code* §29-22-18a(d) provides:

The Legislature finds and declares that in order to attract new business, commerce and industry to this state, to retain existing business and industry and industry providing the citizens of this state with economic security and to advance the business prosperity of this state and the economic welfare of the citizens of this state, it is necessary to provide public financial support for constructing, equipping, improving and maintaining economic development projects, capital improvement projects and infrastructure which promote economic development in this state.

special revenue fund at issue might not have ever been created. I believe that project should have been approved in the first instance.

For these reasons, I respectfully concur in part, and dissent in part from the Court's opinion in this case.