/s/ David Hammer
Circuit Court Judge
Ref. Code: 19GWRLCC

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CC-19-2017-C-282
Jefferson County Circuit Clerk
Laura Storm

In the Circuit Court of Jefferson County, West Virginia

City of Charles Town, Plaintiff,	)	
vs.)	)	Case No. CC-19-2017-C-282
The Jefferson County Commission, Defendant	)	

ORDER GRANTING SUMMARY JUDGMENT TO THE JEFFERSON COUNTY COMMISSION

The City of Charles Town, a municipal corporation within Jefferson County, established an Urban Growth Boundary in 2003. An "Urban growth boundary" is:

> a site-specific line, delineated on a zoning map or a written description in a zoning ordinance identifying an area around and outside the corporate limits of a municipality within which there is a sufficient supply of developable land within the boundary for at least a prospective twenty-year period of municipal growth based on demographic forecasts and the time reasonably required to effectively provide municipal services to the identified area... The boundary shall be established by the county commission in agreement with each individual municipality regarding that municipality's boundary....

W. Va. Code § 8-6-4A(b)(2). Jefferson County affirmed and adopted the Urban Growth Boundary in 2010 by revising its already-adopted zoning map. Jefferson County re-affirmed the Urban Growth Boundary again in 2014 as part of its comprehensive plan as shown on its 2015 Jefferson County Zoning Map.

On March 30, 2017 the City applied to Jefferson County to annex 2,601.83 acres entirely within the Urban Growth Boundary by "minor boundary adjustment." The Jefferson County Commission unanimously denied that application the following week and issued a written order on April 12, 2017 stating that the City did not meet the threshold requirements for consideration under W. Va. Code § 8-6-5(d) and § 8-6-4a(c)(2). Specifically, the Commission asserted that the City had failed to obtain the petition of the voters/freeholders within the area proposed to be annexed and to pass

an ordinance based on such petition, thereby depriving citizens of their due process rights and their right of self-determination. Additionally, the Jefferson County Commission contended that the term "minor" in the phrase "minor boundary adjustment" is not statutorily defined and therefore the determination of whether an annexation is "minor" rests in the Commission's discretion.

On November 22, 2017 the City filed a Complaint for Declaratory Relief. The City seeks clarification of its and the County's rights and responsibilities under W. Va. Code § 8-6-4a and § 8-6-5. The City contends that it has the right to annex property within the approved Urban Growth Boundary and may do so whenever, in the City's estimation, the annexation can be accomplished by minor boundary adjustment. The City further contends that upon the County's receipt of the City's completed application for annexation, the County must approve the annexation.

The parties filed cross-motions for summary judgment. The matter is ripe for decision.

At issue is the application of W. Va. Code § 8-6-4a(c)(2) [2009] titled "Annexation without election for municipalities in counties that have an adopted countywide zoning ordinance which includes urban growth boundaries." It states:

(c) Procedure for a municipality to annex property within an urban growth boundary. –

(1) ...

(2) If the proposed property to be annexed by minor boundary adjustment by a municipality is entirely within the municipality's designated urban growth boundary, **then the municipality may annex without an election the proposed property pursuant to the provisions of section four of this article if the provisions of section five of this article are followed, except that agreement with the county commission is not required.**

The reference to "section 4" is to W. Va. Code 8-6-4 – Annexation without an election. Section 4 authorizes a governing body of a municipality to enact an ordinance to annex additional territory, without a vote upon the question, *when both a majority of the qualified voters and freeholders of the territory to be annexed file a petition with the governing body of the municipality*. W. Va. Code § 8-6-4(a)(1) and (2). Once the governing body has enumerated and verified the total number of eligible petitioners in the manner detailed by W. Va. Code § 8-6-4(e), the governing body "shall enter that fact upon its journal and forward a certificate to that effect to the county commission.... The county commission shall thereupon enter an order... after the date of the order, the corporate limits of the municipality shall be as set forth therein." W. Va. Code § 8-6-4(g) [2001].

However, because the annexation at issue here is not just any annexation, but rather is proposed to be a "minor boundary adjustment" entirely within an Urban Growth Boundary, then, as stated by W. Va. Code § 8-6-4a(c)(2), in addition to the requirements of section 4, the requirements of " section 5" [W. Va. Code § 8-6-5 – Annexation by minor boundary adjustment], must also be met, "except that agreement with the county commission is not required." As highlighted below, this elimination of any requirement to obtain a county commission's agreement for annexation by minor boundary adjustment eviscerates much of section 5. Section 5 states in part:

> (a) In the event a municipality desires to increase its corporate limits by making a minor boundary adjustment, the governing body of the municipality may apply to the county commission of the county wherein the municipality or the major portion of the territory thereof, including the territory to be annexed, is located **for permission** to effect annexation by minor boundary adjustment. The municipality shall pay the costs of all proceedings before the commission.
>
> (b) ...
>
> (c) A county commission may develop a form application for annexation for minor

boundary adjustment. An application for annexation by minor boundary adjustment shall include, but not be limited to:

(1) The number of businesses located in and persons residing in the additional territory;

(2) An accurate map showing the metes and bounds of the additional territory;

(3) A statement setting forth the municipality's plan for providing the additional territory with all applicable public services such as police and fire protection, solid waste collection, public water and sewer services and street maintenance services, including to what extent the public services are or will be provided by a private solid waste collection service or a public service district;

(4) A statement of the impact of the annexation on any private solid waste collection service or public service district currently doing business in the territory proposed for annexation in the event the municipality should choose not to utilize the current service providers;

(5) A statement of the impact of the annexation on fire protection and fire insurance rates in the territory proposed for annexation;

(6) A statement of how the proposed annexation will affect the municipality's finances and services; and

(7) A statement that the proposed annexation meets the requirements of this section.

(d) 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 or four of this article.**

(e) If the application meets the threshold requirements, the county commission shall order publication of a notice of the proposed annexation to the corporate limits and of the date and time set by the commission for a hearing on the proposal. Publication shall be as in the case of an order calling for an election, as set forth in section two of this article. A like notice shall be prominently posted at not less than five public places within the area proposed to be annexed.

(f) **In making its final decision on an application for annexation by minor boundary adjustment, the county commission shall**, at a minimum, consider the following factors:

(1) Whether the territory proposed for annexation is contiguous to the corporate limits of the municipality. For purposes of this section, "contiguous" means that at the time the application for annexation is submitted, the territory proposed for annexation either abuts directly on the municipal boundary or is separated from the municipal boundary by an unincorporated street or highway, or street or highway right-of-way, a creek or river, or the right-of-way of a railroad or other public service corporation, or lands owned by the state or the federal government;

(2) Whether the proposed annexation is limited solely to a Division of Highways

right-of-way or whether the Division of Highways holds title to the property in fee;

(3) **Whether affected parties of the territory to be annexed oppose or support the proposed annexation**. For purposes of this section, "affected parties" means freeholders, firms, corporations and qualified voters in the territory proposed for annexation and in the municipality and a freeholder whose property abuts a street or highway, as defined in section thirty-five, article one, chapter seventeen-c of this code, when: (i) The street or highway is being annexed to provide emergency services; or (ii) the annexation includes one or more freeholders at the end of the street or highway proposed for annexation;

(4) Whether the proposed annexation consists of a street or highway as defined in section thirty-five, article one, chapter seventeen-c of this code and one or more freeholders;

(5) Whether the proposed annexation consists of a street or highway as defined in section thirty-five, article one, chapter seventeen-c of this code which does not include a freeholder but which is necessary for the provision of emergency services in the territory being annexed;

(6) Whether another municipality has made application to annex the same or substantially the same territory; and

(7) **Whether the proposed annexation is in the best interest of the county as a whole**.

(g) If the county commission denies the application for annexation by minor boundary adjustment, the commission may allow the municipality to modify the proposed annexation to meet the commissions objections. The commission must order another public hearing if significant modifications are proposed.

(h) **The final order of the commission shall include the reasons for the grant or denial of the application**.

(i) ....

Each of the bold faced clauses in section 5, *supra*, requires *the agreement* of the county commission and thus, conflicts with the "*no agreement* necessary" clause of section 4a(c)(2) and is the origin of the parties' dispute in this case.

A rule of statutory construction to ascertain the intent of the legislature is that

> [a] statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

State ex rel. Water Dev. Auth. v. N. Wayne Cty. Pub. Serv. Dist., 195 W. Va. 135, 140, 464 S.E.2d 777, 782 (1995) [internal citations omitted]. "The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." Syllabus Point 8, *Vest v. Cobb,* 138 W.Va. 660, 76 S.E.2d 885 (1953). Phillips v. Larry's Drive-In Pharmacy, Inc., 220 W. Va. 484, 491, 647 S.E.2d 920, 927 (2007).

It is obvious from section 4a(c)(2) that the legislature intended that sections 4, 4a and 5 be read together and indeed, section 4a was "shoe-horned" between sections 4 and 5 some eight years after their enactment to address the special case of municipal annexation within approved urban growth boundaries, without the necessity of an election, in counties that had adopted countywide zoning and impact fees before the enactment of section 4a. *See* W. Va. Code § 8-6-4a(a).

In the view of this Court, this case turns upon the question of who the legislature intended to ultimately decide whether property currently outside of a municipal boundary should be subject to annexation into a municipality: the voters/freeholders or a municipality? Reading Article 6 – Annexation as a whole, the legislative intent is clear: the decision belongs to the voters and freeholders, not a municipality.

One process to approve annexation is an election. *See* W. Va. Code 8-6-2. Section 2 requires an election that serves to protect freeholders and voters of both the municipality and the territory to be annexed by requiring a petition and election. W. Va. Code § 8-6-2(a) - (d).

Article 6, section 4 creates an exception to the requirement of an election when a majority of freeholders and voters in the area to be annexed petition for annexation. In both cases, whether under section 2 or section 4, the ultimate decision belongs to the people, not to a municipality.

In section 5, when dealing with "minor boundary adjustment," whatever the term "minor" might mean, a determination must still be made as to "[w]hether the affected parties of the territory to be annexed oppose or support the proposed annexation." W. Va. Code § 8-6-5(f)(3). Thus, while neither a vote or petition is required for minor boundary adjustments, the opinions of those presumably few voters and freeholders affected by a minor boundary adjustment still matters.

While the legislature did not define the size of an urban growth boundary, given that by definition it is intended to include "a sufficient supply of developable land within the boundary for at least a prospective twenty-year period of municipal growth" it could be sizeable - in this case, 2,601.83 acres – and encompass many voters and freeholders. Thus, in the case of annexation of territory within an urban growth boundary, even if the application is made pursuant to a minor boundary adjustment as permitted by section 4a(c)(2), the legislature still requires compliance with section 4. The essence of section 4 is adherence to the principal of majority rule by the freeholders and voters of the territory proposed to be annexed.

In this case, the City purports to have the nearly unfettered authority to annex 2,601.83 acres without either an election or a petition by a majority of the voters and freeholders to ascertain whether they consent to annexation. This Court does not agree. It is clear that in comparing the two types of annexation permitted within an urban growth boundary, annexation under section 4a(c)(1) [not a minor boundary adjustment] and section 4a(c)(2) [minor boundary adjustment], in both cases, consistent with annexation under sections 2 and 4, there must be a manifestation of agreement by the freeholders and voters of the territory to be annexed. The legislature specified, however imperfectly, that when a proposed annexation is by minor boundary adjustment

under section 4a(c)(2), a municipality must still comply with section 4 – which this Court interprets to mean a petition signed by a majority of voters and freeholders within the territory to be annexed followed by enactment of an ordinance. Any other interpretation of the requirements of section 4a(c)(2) would not be consistent with the spirit, purposes and objects of the general system of law of annexation set forth in Article 6, Chapter 8 of the West Virginia Code.

The City of Charles Town's motion for summary judgment is DENIED; summary judgment is GRANTED to the Jefferson County Commission. Each party shall bear their own costs and fees. This matter is dismissed and shall be placed amongst causes ended.

It is so ORDERED and ADJUDGED.

/s/ David Hammer
Circuit Court Judge
23rd Judicial Circuit

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