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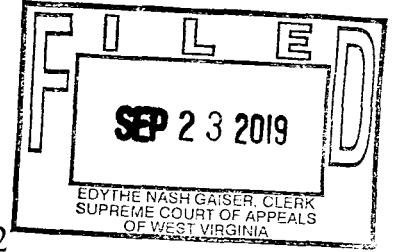
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE CITY OF CHARLES TOWN,

PETITIONER,

v.

CASE NO. 19-0412



THE JEFFERSON COUNTY COMMISSION,

RESPONDENT.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITIONER'S OPENING BRIEF
AND
CROSS ASSIGNMENT OF ERROR**

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I. STATEMENT OF THE CASE

1. On the 30th day of March, 2017, the City of Charles Town, West Virginia (herein “City”) presented to the County Commission of Jefferson County, West Virginia (herein “County Commission” or “Commission”) a document purporting to be an application for a minor boundary adjustment.

2. The purported “minor” boundary adjustment would consist of approximately 2,601.83 acres of land currently within the County but within the City’s Urban Growth Boundary.

3. On April 6, 2017, the City appeared before the Commission to orally present the application.

4. The Commission, on April 6, 2017, unanimously voted to deny the application because the City, as evidenced in the application, failed to follow the statutory requirements for a city to annex property in an urban growth boundary.

5. The statute at issue in this case is West Virginia Code 8-6-4a(c),¹ which states:

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

(1) If the proposed property to be annexed 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. Agreement with the county commission is not required.

(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.

W.Va. Code §8-6-4a(c)

¹ The critical section for purposes of this case is the second paragraph, West Virginia Code 8-6-4a(c)(2).

6. The Commission, on April 12, 2017, issued a written Order affirming² its April 6, 2017 Order denying the Application for annexation.

7. Specifically, the Commission found:

- a. At the Jefferson County Commission meeting on April 6, 2017, the members of the Commission determined that West Virginia Code 8-6-4a(c)(2) required compliance with both West Virginia Code 8-6-4 and West Virginia Code 8-6-5 for the City to proceed with annexation of property by minor boundary adjustment within an urban growth boundary.³
- b. The City of Charles Town has manifested no belief at any time that it was required to comply with West Virginia Code 8-6-4 in any manner with regards to the application, and presented no evidence at any time that it has complied with West Virginia Code 8-6-4.⁴
 - i. The application for annexation contained no evidence that the City had complied with West Virginia Code 8-6-4 at any time with regards to the annexation procedure.⁵
 - ii. At the Jefferson County Commission meeting on April 6, 2017, the City presented no evidence that it had passed an ordinance providing for the annexation of additional territory as required by West Virginia Code 8-6-4.⁶
 - iii. At the Jefferson County Commission meeting on April 6, 2017, the City presented no evidence that it had obtained a petition of a majority of qualified voters of the additional territory as required by West Virginia Code 8-6-4.⁷
 - iv. At the Jefferson County Commission meeting on April 6, 2017, the City presented no evidence that it had obtained a petition of a majority of all freeholders of the additional territory as required by West Virginia Code 8-6-4.⁸

² See the *Order Rejecting Application for Annexation*, Appendix pages 093-100 and incorporated herein by reference, which for purposes of judicial economy, will be referred to as "*Commission's Order*" herein.

³ See *Commission's Order* at Paragraph 11, Appendix page 094.

⁴ See *Commission's Order* at Paragraph 10, Appendix page 094.

⁵ See *Commission's Order* at Paragraph 2, Appendix page 093.

⁶ See *Commission's Order* at Paragraph 7, Appendix page 093.

⁷ See *Commission's Order* at Paragraph 8, Appendix page 094.

⁸ See *Commission's Order* at Paragraph 9, Appendix page 094.

8. Additionally, the Commission found that:

- a. W.Va. Code §8-6-4 requires that a majority of the qualified voters and freeholders in the affected area must petition Charles town to be annexed into the city.⁹
 - (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.
W.Va. Code §8-6-4 (portions omitted)
- b. The City presented no evidence either in the application or the April 6, 2017 meeting that the City complied with West Virginia Code 8-6-4 at any time with regards to the annexation procedure. There was no evidence that the City passed an ordinance for annexation pursuant to West Virginia Code 8-6-4. There was no evidence that the City had obtained a petition to be annexed of a majority of all qualified voters and freeholders of the additional territory. The Commission therefore FINDS that the Application fails on that basis alone for lack of compliance with the facial requirements of W.Va. Code §8-6-4a(c)(2).¹⁰

9. Additionally, the Commission found that:

- a. W.Va. Code §8-6-5(d) states in relevant part:
 - i. (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.¹¹
- b. The Commission FINDS that this §8-6-5(d) gatekeeping function is not abrogated by the statement that “agreement with the County Commission is not required” contained in W.Va. Code §8-6-4a(c)(2).¹²
- c. Under the facts of this application, the intertwining with the requirements of W.Va. Code §8-6-4a(c)(2) due to the location of the territory in an urban growth boundary, and its gatekeeping function, the County Commission FINDS that the threshold requirements for consideration as a minor boundary adjustment include determining whether the City complied with W.Va. Code §8-6-4a(c)(2). Those threshold requirements are:
 - i. Compliance with W.Va. Code §8-6-4, which includes an ordinance by the city based on a petition of a majority of qualified voters of

⁹ See *Commission's Order* at Paragraph 16, Appendix page 095.

¹⁰ See *Commission's Order* at Paragraph 17, Appendix page 096.

¹¹ See *Commission's Order* at Paragraph 21, Appendix page 097.

¹² See *Commission's Order* at Paragraph 22, Appendix page 097.

- the additional territory and a petition of a majority of all freeholders of the additional territory filed pursuant W.Va. Code §8-6-4 and
- ii. Compliance with the definition of “minor” boundary adjustment W.Va. Code §8-6-5
 - iii. The efficiency and cost effectiveness of the annexation under W. Va. Code §§8-6-2 and 4.¹³
- d. With regard to compliance with W.Va. Code §8-6-4, the City presented no evidence either in the application or the April 6, 2017 meeting that the City complied with West Virginia Code 8-6-4 at any time with regards to the annexation procedure. The Commission therefore FINDS that the Application fails on that basis alone for lack of compliance with the facial requirements of W.Va. Code §8-6-4a(c)(2).¹⁴
10. The Commission also found that:
- a. At the Jefferson County Commission meeting on April 6, 2017, the members of the Commission determined that the annexation of 2,601.83 acres was not “minor” within the meaning of West Virginia Code 8-6-5 and the provisions of West Virginia Code 8-6-4a(c)(2).¹⁵
11. On November 22, 2017, the Plaintiff/Petitioner, the City of Charles Town filed an appeal to the Circuit Court styled as a Complaint for Declaratory Relief.
12. On November 28, 2017, the Complaint was served on Peter Onoszko, the then President of the Jefferson County Commission.
13. On December 27, 2017, the Commission moved to dismiss the case below.
14. On March 12, 2018, the City filed a Motion for Summary Judgment.
15. On April 20, 2018, the Commission withdrew its Motion to Dismiss.
16. On May 11, 2018, the Commission filed an Objection to the City’s Motion for Summary Judgment and the Commission’s own Cross Motion for Summary Judgment.
17. On March 28, 2019, the Circuit Court granted summary judgment in favor of the County Commission, finding that the City had failed to comply with W.Va. Code §8-6-4, which

¹³ See *Commission’s Order* at Paragraph 23, Appendix pages 097-098.

¹⁴ See *Commission’s Order* at Paragraph 24, Appendix page 098.

¹⁵ See *Commission’s Order* at Paragraph 12, Appendix page 094.

requires that a majority of the qualified voters and freeholders in the affected area must petition Charles Town to be annexed into the city. (*See* Circuit Court’s Order, Appendix pages 061-068, herein “Order” or “Circuit Court’s Order”).

18. On July 29, 2019, the City filed its Opening Brief on Appeal.

19. The County Commission now files its Response.¹⁶

II. SUMMARY OF ARGUMENT

This is a simple case. The Plaintiff/Petitioner, The City of Charles Town, West Virginia, (herein “City”) failed to meet the statutory requirements to annex approximately 2,601.83 acres of land as a minor boundary adjustment and the County Commission of Jefferson County (herein “Commission”) therefore denied the City’s Petition for Annexation.

The operative statute in this case, W.Va. Code §8-6-4a(c)(2), mandates that the City follow BOTH W.Va. Code §8-6-4 and §8-6-5 to annex property as a minor boundary adjustment within the City’s Urban Growth Boundary (also referred to herein as “UGB”).

The City failed to follow W.Va. Code §8-6-4, which requires a majority of the voters and freeholders in the area to be annexed to file a petition requesting to be annexed into the City. The Commission therefore exercised its gatekeeping function under W.Va. Code §8-6-5(d) and denied the City’s application because the City failed to obtain the petition of the voters/freeholders and pass an ordinance based on the petition (and consequently failed to provide the ordinance/petition as part of the Petition for Annexation the City presented to the Commission) thereby depriving the citizens in the proposed annexed area of their due process rights and their right of self-determination.

¹⁶ The County Commission received an extension of time to file its Response due to a health issue of the Commission’s counsel.

Additionally, the Commission did not agree that the annexation of 2,601.83 acres was a “minor” boundary adjustment, within the meaning of the annexation statutes, as the City claimed. The determination of the definition of “minor” is a legislative function, exercised by the Commission, and for that reason the Courts in West Virginia have largely left the definition of “minor” to the Commissions’ discretion.

Taken together or separately, the City failed to meet the statutory requirements for annexation of the property as a minor boundary adjustment within an urban growth boundary and the Commission exercised its gatekeeping function and denied the application for annexation.

Although the Circuit Court did not rule in detail on either the propriety of the Commission’s gatekeeping function or the Commission’s determination of the definition of the minor boundary adjustment, the Circuit Court came to the correct ultimate conclusion as to the central issue of the case – the City’s case must fail, because the City failed to follow the statutory procedure for annexation under the facts of this case contained in W.Va. Code §8-6-4.

III. STATEMENT REGARDING ORAL ARGUMENT

The County Commission respectfully submits that this case is appropriate for Rule 20 argument because it involves issues of fundamental public importance, since future County Commissions interacting with Municipalities within Urban Growth Boundaries may require guidance and certainty in the application of law. Additionally, there appear to be issues of first impression contained in this case.

IV. ARGUMENT

A. Standard of Review

“A circuit court's entry of summary judgment is reviewed de novo.” Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 191, 451 S.E.2d 755, 757 (1994).

“A circuit court's entry of a declaratory judgment is reviewed de novo.” Syl. Pt. 3, *Cox v. Amick*, 195 W. Va. 608, 611, 466 S.E.2d 459, 462 (1995).

B. The Circuit Court Correctly Determined that the Petition for Annexation was Fatally Flawed Because the City Did not obtain a Petition of the Citizens as Mandated by W. Va. Code §8-6-4

The central question in this case is this: Do citizens who reside within a municipal urban growth boundary have the same rights of self-determination as citizens who live outside of an urban growth boundary? Said another way, can a municipality, through annexation of a citizen's property, foist its jurisdiction on citizens living inside an UGB without the affected citizens having any say in the city's expansion? Even though all other instances of annexation require a majority vote or petition of the citizens/freeholders who live in the affected area?

The Statute at issue in the case is fairly clear on this issue. W.Va. Code §8-6-4a(c)(2) states:

(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 [§8-6-5] of this article are followed, except that agreement with the county commission is not required. W.Va. Code §8-6-4a(c)(2)

A plain reading of the statute requires adherence to both W.Va. Code §§8-6-4 and 5.

Breaking the statute down into its elements, W.Va. Code §8-6-4a(c)(2) says:

In a minor boundary adjustment within an UGB, 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.¹⁷

¹⁷ Except, unlike the requirements of §5 outside of a UGB, the County does not have to agree that the property should be annexed. The County does, however, perform a gatekeeping function to be certain that the application for annexation has complied with the statutory requirements. This one aspect of the statute is more fully explained in this brief below.

Consequently, the operative statute in this case, W.Va. Code §8-6-4a(c)(2) mandates that the City follow the procedures stated in BOTH sections four and section five. (i.e., W.Va. Code §8-6-4 and §8-6-5).

The Circuit Court correctly found that the statute contained a clear and unambiguous answer to the central question of this case. The Court found in part that:

.... 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....¹⁸

The Circuit Court found¹⁹ that the statute provides for different methods of annexation, including:

- An election under §8-6-2
- A Petition under §8-6-4
- A Minor Boundary Adjustment under 8-6-5

In each of these methods of annexation, the Circuit Court's analysis reveals, through the plain reading of the statute, that citizens living in any areas who are affected by annexation have a provision built into the statute that protects the citizen's interests, either through election, petition, or, in the case of minor boundary adjustment outside of an UGB, by taking the opinions of those in the affected area into consideration.

Yet, despite the clear preservation of citizen's rights in all other instances of annexation, (that is, outside an UGB) the City argues that citizens whose property is being annexed within an urban growth boundary do not have any right to be heard or considered in the annexation, and

¹⁸ See *Circuit Court Order*, Appendix page 066.

¹⁹ See *Circuit Court Order*, Appendix pages 066-067.

argues that the Circuit Court was wrong in determining that the State's statutory scheme contains the same statutory and constitutional protections that exist in every other method of annexation.

This analysis does not make sense. Why would the legislature go to great lengths to protect the rights of citizens in the other statutory sections, but in the case of citizens within an UGB (W.Va. Code §8-6-4a(c)(2)) deny the citizens any voice in the annexation process?

The answer is simple. The City's analysis is wrong, and the Circuit Court's analysis is correct.

A plain reading of W.Va. Code §8-6-4a(c)(2) gives the exact same protection to citizens within an urban growth boundary as it does to citizens outside of an urban growth boundary. In fact, any other interpretation would likely be unconstitutional on its face simply because it would fail to provide due process/equal protection to citizens within and without an urban growth boundary.

And the equal protection is easy to find. One merely has to look at §8-6-4a(c)(2) to find, in very simple language, that the statute does provide citizens within an urban growth boundary the right to self-determination, by requiring that the City follow the procedures stated in both sections four and section five. (i.e., W.Va. Code §8-6-4 and §8-6-5).

The Circuit Court correctly found as much, holding that:

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 principle of majority rule by the freeholders and voters of the territory proposed to be annexed.²⁰

²⁰ See *Circuit Court Order*, Appendix page 067.

But the City has totally disregarded, overlooked, or ignored §8-6-4.

W.Va. Code 8-6-4 states in relevant part:

(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.

W. Va. Code §8-6-4

The importance of the City not following W.Va. Code §8-6-4 cannot be overstated. The failure of the City to follow W.Va. Code §8-6-4 – by failing to obtain a petition requesting annexation by the voters/freeholders²¹ in the area to be annexed and passing an ordinance based on that petition – means that the citizens have no say in whether they will be annexed. The citizens are therefore totally deprived of self-determination and due process in the annexation process. The City has abrogated the procedural guarantee in the statute that citizens will not be annexed against their will, or at least not without a majority vote on the issue.

The City studiously avoids giving §8-6-4 its full meaning. The City excuses its failure to follow 8-6-4 by claiming that the Circuit Court’s “interpretation” of the statute “ignores the fact that the legislature created a unique process of annexation in areas within an urban growth boundary.”²²

The City’s statement is true enough, as far as it goes – but the City avoids discussing the provisions of §8-6-4 – provisions directly incorporated into §8-6-4a(c)(2) - that require the annexation process to be initiated by a petition of the citizens in the affected area.

Why doesn’t the City discuss this requirement? The answer is simple – the City cannot discuss the §8-6-4 petition requirement, because the City did not meet that requirement, and the

²¹ For ease of reading, the voters/freeholders in 8-6-4 are sometimes referred to as “citizens” herein.

²² See *Opening Brief of Petitioner City of Charles Town, West Virginia* at page 7.

annexation therefore fails. Simply stated, §8-6-4 mandates that the majority of citizens must desire to be annexed, they cannot have annexation thrust upon them without majority approval.²³

Said another way, the citizens' rights are protected by requiring them to petition the City if they desire annexation. Here, the City has ignored the rights of those citizens in the affected area, in total disregard of the statutory requirements, because the City failed to obtain a petition of the citizens requesting the annexation in the area to be annexed, and failed to pass an ordinance based on that petition as required by §8-6-4.

This Court has recognized that the citizens must initiate an annexation petition to pursue annexation under the provisions of §8-6-4. In analyzing the four methods of annexation, this Court stated:

A second method provides for annexation without an election whereby a municipality may annex territory by ordinance *if* a majority of qualified voters in the area proposed to be annexed file a petition, and a majority of all freeholders of the additional territory file a petition.

Coffman v. Nicholas Cty. Comm'n, 238 W.Va. 482, 487, 796 S.E.2d 591, 596 (2017) (emphasis added)

The Court should not disregard the plain meaning of §8-6-4, and thereby nullify the self-determination of the citizens in the territory, and deprive them of their due process rights.

In reviewing any statute, it is well-established in West Virginia 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.'" Syllabus Point 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908)....

Syl. Pt. 3, *Joslin v. Mitchell*, 213 W. Va. 771, 777, 584 S.E.2d 913, 919 (2003).

In deciding the meaning of a statutory provision, "[w]e look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must

²³ The statutory tradeoff for not requiring an election is having the majority of the citizens in the affected area to request the annexation – thereby accomplishing the same outcome as having an election in a different format.

prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). See also Syl. pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970) ("[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."); Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) ("[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.").

Charleston Area Med. Ctr., Inc. v. State Tax Dep't of W. Va., 224 W. Va. 591, 597, 687 S.E.2d 374, 380 (2009), citing *Davis Mem'l Hosp. v. West Virginia State Tax Comm'r*, 222 W. Va. 677, 682, 671 S.E.2d 682, 687 (2008).

In this case, the language of W.Va. Code §8-6-4a(c), while not a model of wordsmithing, has a plain meaning that does not require judicial interpretation. Since there is no judicial interpretation needed, the Circuit Court's duty was to apply the statute and reject the outcome requested in the City's declaratory judgment action, which the Circuit Court correctly did.

When we examine the terms of W.Va. Code §8-6-4a(c), which controls all annexations within an urban growth boundary, it is worthwhile to note that the first section of W.Va. Code §8-6-4a(c), (while not operative here), specifically requires a petition of the voters/freeholders under W.Va. Code §8-6-4 to annex property:

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

(1) If the proposed property to be annexed 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. Agreement with the county commission is not required.

W.Va. Code §8-6-4a(c)(1)

Consequently, the legislature clearly contemplated that the annexation of property within an urban growth boundary, (*other than* a minor boundary adjustment) requires a petition of the voters/freeholders as stated in W.Va. Code §8-6-4.

The next section of the statute (the section at issue in this case), W.Va. Code §8-6-4a(c)(2), then deals with annexation of property within an UGB, but this time as a minor boundary adjustment. Like the preceding section, (c)(1), dealing with annexation of property *other than* a

minor boundary adjustment, the companion section, (c)(2), in dealing with annexation by minor boundary adjustment, states in relevant part that the municipality “may annex without an election the proposed property pursuant to the provisions of section four of this article...”

The clear meaning of the annexation statute and the legislative intent was therefore to require a petition of the voters/freeholders as stated in W.Va. Code §8-6-4 for any annexation within an urban growth boundary, whether it be a standard annexation or, like in this case, an annexation as a minor boundary adjustment, otherwise §8-6-4 would not have been referenced in the statute applicable to both types of annexation.

Disregarding this obvious statutory reference, the City has studiously ignored the requirement to follow §8-6-4, both in its petition for annexation before the Commission and in its documents filed before the Circuit Court and this Court.

Even if the Court looks beyond the plain meaning of the statute, the legislative intent can be ascertained by a perusal of all of the annexation methods contained in the annexation statutes. Specifically, (for purposes of discerning legislative intent) all four methods of annexation provide means of public input, and none allow annexation to be foisted on citizens without the citizens having a voice:

Municipal boundaries may be extended only when and as prescribed by law. Municipal corporations in West Virginia have been empowered by the Legislature to annex unincorporated territory in accordance with several statutory mechanisms. The first, annexation by election, is initiated by a petition signed by five percent or more of a city's freeholders and must be approved by a majority voting in both the city and the additional territory to be annexed. W.Va. Code §8-6-2 (2003) (Repl. Vol. 2012). A second method provides for annexation without an election whereby a municipality may annex territory by ordinance if a majority of qualified voters in the area proposed to be annexed file a petition, and a majority of all freeholders of the additional territory file a petition. The municipality's determination regarding the sufficiency of the petitions is reviewable by the courts. W.Va. Code §8-6-4 (2001) (Repl. Vol. 2012). A third method, only in place since 2009, provides a statutory scheme for annexation without election for municipalities in counties that have adopted countywide zoning including site-specific properly identified urban growth boundaries. W.Va. Code §8-6-4a (2009) (Repl. Vol. 2012). HN3 The fourth

statutory scheme,, allows for annexation by minor boundary adjustment. W.Va. Code §8-6-5. This process does not require a petition by qualified voters or freeholders or an election. Instead, the municipality must petition the county commission for permission to annex. In the event the petition meets certain statutory requirements, a notice regarding the proposed annexation must be published, and a special public hearing must be held before the county commission, which considers certain minimum statutory factors in making a decision whether to grant or deny the petition for annexation. W.Va. Code §8-6-5.

Coffman v. Nicholas Cty. Comm'n, 238 W. Va. 482, 487, 796 S.E.2d 591, 596 (2017) (portions omitted)

The participants in the revision of the statute to address urban growth boundaries (8-6-4a) likewise did not contemplate the abrogation of citizens' rights in an annexation. The current Jefferson County Administrator, Stephanie Grove, submitted an affidavit explaining the understanding of the Commission at the time of the statutory amendment, which states in part:

However, at no point in time did the County Commission, or the proposed legislation that was presented to it and eventually passed into law, contemplate that county residents would lose their rights under W.Va. Code 8-6-4 and be forcibly annexed without an election or petition. Both the County Commission and I understood that the proposed legislation still required the municipality to present a petition from the landowners and freeholders if the annexation was conducted without an election, even if the proposed annexation was within the urban growth boundary.

See Affidavit of Stephanie Grove, Appendix pages 111-112.

Contrary to the Petitioner's first point in its brief, the County did not "prevent" the City from annexing the property within its urban growth boundary. Instead, the County required that the City follow the law in its annexation process, which the City had failed to do by ignoring the specific requirement of §8-6-4a(c)(2) to follow both the provisions of §4 and §5 in the minor boundary adjustment process.

Contrary to the City's argument, the Circuit Court did not exceed... " its authority in substituting its opinion for the clear legislative intent concerning the annexation within an urban growth boundary" by finding that the statute provided the right of citizens to have a voice in the

process – instead, the Court upheld the legislative intent and ruled, just like the statute directs, that the City must follow both 8-6-4 and 8-6-5 in the annexation process.

Contrary to the City’s argument, (and as more fully stated in the next section of this brief), the County Commission has a gatekeeping function to perform when presented with a petition for annexation by a municipality, even for property within an urban growth boundary, and the Circuit Court was correct in upholding the Commission’s decision.

Consequently, the Circuit Court correctly decided the case below and upheld the legislative intent of the statute – a legislative intent that permits self-determination through either an election or a petition by the residents / freeholders of the affected property.

C. The County Commission Correctly Exercised its Gatekeeping Function and the Circuit Court was Correct in allowing the County’s analysis to stand

In a typical minor boundary adjustment annexation for property that does not lie within an urban growth boundary, the Commission has some discretion to accept or reject a petition based on the merit of the petition, as provided for in W.Va. Code §8-6-5(c) and, especially, (f).^{24 25}

²⁴ 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.

W. Va. Code §8-6-5(c)

²⁵ In a typical minor boundary adjustment case, the County Commission must consider several criteria to determine whether to agree to an annexation by minor boundary adjustment:

In West Virginia Code §8-6-5, the Legislature required county commissions to address an exhaustive list of considerations when resolving annexation questions. For example, the county commission must consider the number of businesses and people in the territory to be annexed; a map of the territory; the impact on police and fire protection, solid waste collection, water sewer and street services; information about fire protection and insurance rates; and the impact of the annexation on the municipality's finances and services. W.Va. Code §8-6-5(c). A county commission must also consider the contiguous nature of the territory, whether

Unlike those typical annexations, the annexation in this case involves territory that lies totally within the City's Urban Growth Boundary, and the Commission agrees that it does not apply the normal criteria contained in W.Va. Code 8-6-5(c) or (f) to approve a minor boundary adjustment. W.Va. Code 8-6-5(f), especially, requires "agreement" between the City and the County, which "agreement" is abrogated by W.Va. Code §8-6-4a(c)(2).

While the County accepts the statutory provision that the County does not have to agree that the property should be annexed, W.Va. Code §8-6-5(d) still provides a gatekeeping function for the County Commission to determine whether a Petition for Annexation is complete and meets the requirements of the statute.

In its Order, the Commission found:

- a. However, the Commission FINDS that, W.Va. Code §8-6-5(d) creates a duty on the part of the Commission to exercise a gatekeeping function to determine if an application for annexation meets the threshold statutory requirements to proceed as an application. The Commission's gatekeeping function must occur before the Commission engages in an analysis of an application on the merits under W.Va. Code §8-6-5(f) and is a separate and distinct duty from a decision on the merits. The Commission is mandated by W.Va. Code §8-6-5(d) to engage in this duty before the application for annexation may be accepted and before the application can proceed.²⁶

affected parties support or oppose the annexation, and whether the annexation is in the best interest of the county as a whole. W.Va. Code §8-6-5(f).

Morgantown Mall Assocs. Ltd. P'ship v. City of Westover, No. 16-0835, 2017 W. Va. LEXIS 631, at *16-17 (Sep. 1, 2017).

In its Order, the Commission found:

- a. The Jefferson County Commission acknowledges that W. Va. Code §8-6-4a(c)(2) states that ... "agreement of the county commission is not required" under W. Va. Code §8-6-5.
- b. The Commission FINDS that the statement "agreement of the county commission is not required" in W. Va. Code §8-6-4a(c)(2) refers to the Commission's decision to grant or deny a petition for annexation on the merits based on the seven factors stated in the test contained in W. Va. Code §8-6-5(f). If W. Va. Code §8-6-4a(c)(2) did not apply, those seven factors, at a minimum, are the matters that the Commission would have to consider to determine whether to grant or deny an application for minor boundary adjustment. If the annexation lies within an Urban Growth Boundary, W. Va. Code §8-6-4a(c)(2) abrogates the Commission's capacity to deny the application on its merits based on the seven factors in W. Va. Code §8-6-5(f).

²⁶ See *Commission's Order*, Appendix pages 096-097.

The gatekeeping function is described in W.Va. Code §8-6-5(d), which states in relevant part:

(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.

W.Va. Code §8-6-5(d) (emphasis added).

In this case, the *threshold requirements* include those contained in W.Va. Code §8-6-4a(c)(2). Those requirements mandate the City follow *both* W.Va. Code §8-6-4 (the City passing an ordinance to annex based on the petition of a majority of voters/freeholders in the affected area) and W.Va. Code §8-6-5 including §8-6-5(d). If the City fails to follow those requirements, and fails to demonstrate to the Commission that it has followed the law, the application fails to meet the threshold requirements and is not complete.

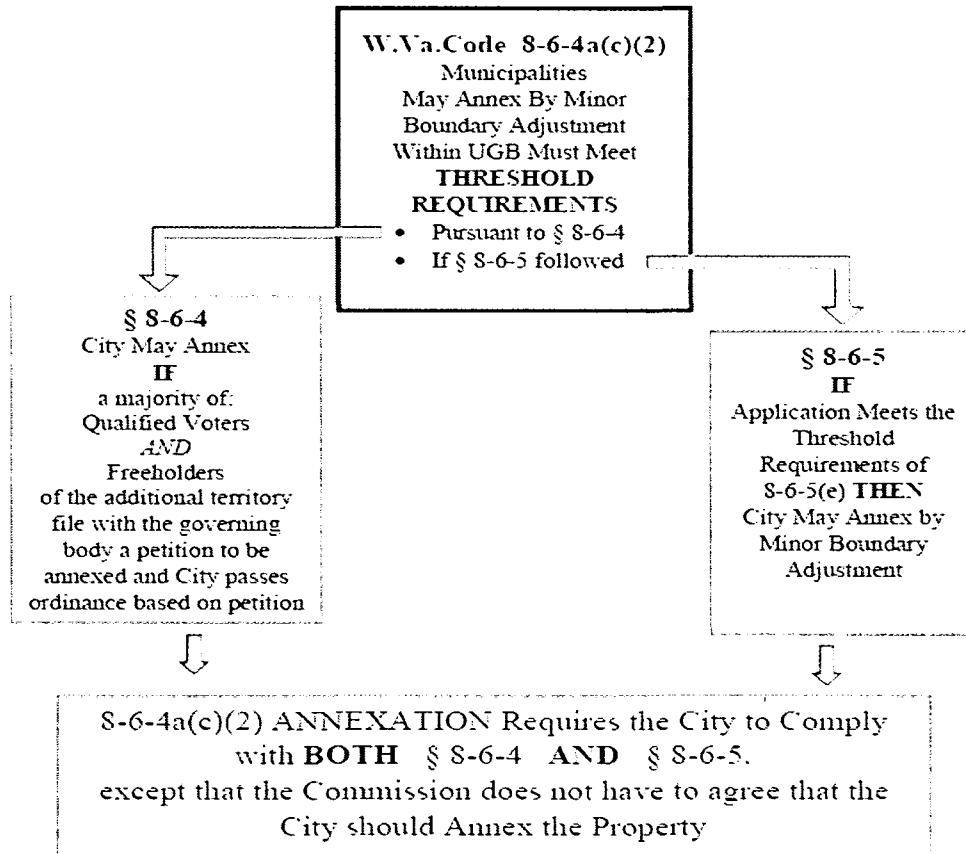
Said another way, since the County does not have to find “agreement” with the City as to the City’s decision to annex, the plain and reasonable meaning for the County to determine whether the City met the threshold requirements are the form of the application, which should have included evidence that the City fulfilled the statutory requirements contained in W.Va. Code §8-6-4a(c)(2).

W.Va. Code §8-6-5(d) therefore creates a duty on the part of the Commission to exercise a gatekeeping function to determine if an application for annexation is complete and meets the threshold statutory requirements to proceed as an application.²⁷ The Commission is therefore mandated by W.Va. Code §8-6-5(d) to engage in this gatekeeping function before the application for annexation may be accepted and before the application can proceed.

²⁷ The Commission’s gatekeeping function must occur before the Commission engages in an analysis of an application on the merits under W. Va. Code §8-6-5(f) and is a separate and distinct duty from a decision on the merits.

The process could be graphically illustrated like this:

**ANNEXATION BY MINOR BOUNDARY ADJUSTMENT
WITHIN URBAN GROWTH BOUNDARY**



In essence, the function of annexation of a minor boundary adjustment within an UGB is largely a ministerial act - IF, and only if, - the City meets the threshold requirements of W.Va. Code §8-6-5(d). This is no different than a trip to the DMV to obtain a license plate for a car. The act of giving an applicant a license plate is ministerial – but only IF the applicant provides the DMV clerk with the appropriate paperwork prior to requesting that the license plate be issued. It is the same in this case, since the City must present the County Commission with a complete application that reflects that the City has met the threshold requirements of the statute.

It is worth noting that, during the pendency of this action, the Corporation of Shepherdstown properly followed the law and annexed 8.276 acres into Shepherdstown's Urban

Growth Boundary (called by Shepherdstown its Growth Management Boundary). In that annexation, Shepherdstown, as part of the annexation, presented to the Commission a petition by the property owner requesting annexation pursuant to W.Va. Code 8-6-4 and an ordinance passed by Shepherdstown. The Commission accepted that annexation and approved the annexation as a ministerial act because it met the requirements of the statute.²⁸

Contrary to the correct procedure followed by the Corporation of Shepherdstown, in this case, the City of Charles Town did present the County with an application, but the application did not show that the City had followed W.Va. Code §8-6-4 – and in fact the application not only did not, but could not make that showing, since the City did not follow the statute in its annexation application.²⁹ Consequently the annexation petition was properly rejected by the County Commission as failing to meet the threshold requirements of the Statute.

Because of the City's failure to follow the law, the County performed its gatekeeping function that is provided under the statute and rejected the City's application for annexation. The gatekeeping function is not a matter of "agreement" by the County Commission and is not abrogated by the last sentence of §8-6-4a(c)(2).

²⁸ See the Certificate of the Corporation of Shepherdstown and the landowner's Petition for Annexation, Appendix pages 102-109.

²⁹ It is only after the Commission has performed its gatekeeping function and determined that the application has met the threshold requirements that the Application moves forward to notice, publication and hearing. W. Va. Code §8-6-5(e) states:

(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.

W. Va. Code §8-6-5(e)

V. CROSS ASSIGNMENT OF ERROR

A. Assignments of Error

1. The Circuit Court should have clearly recognized that the County Commission retains a gatekeeping function in this case.

2. The Circuit Court should have clearly recognized the Commission's determination that the proposed annexation was not a minor boundary adjustment.

B. Statement of the Case

1. The Circuit Court committed error to the extent the court did not recognize the County Commission's gatekeeping function.

2. The Circuit Court committed error to the extent the Court did not defer to the County Commission's legislative authority to determine the definition of "minor" in a boundary adjustment.

C. Argument

1. **The Circuit Court should have clearly recognized that the County Commission Retains a Gatekeeping Function in this Case**

Although the Circuit Court ultimately reached the correct conclusion in the case below, the Court seems to incorrectly assume that W.Va. Code §8-6-5(d) was an area of "agreement" within the meaning of the final section of W.Va. Code §8-6-4a(c)(2) that states "except that agreement with the county commission is not required."³⁰

The County respectfully submits that the portion of W.Va. Code §8-6-4a(c)(2) that states that "...except that agreement with the county commission is not required" refers instead to the Commission not being required to agree to the numerous criteria that the Commission may

³⁰ See Circuit Court's Order, Appendix pages 061-068.

ordinarily consider in deciding to accept or reject a typical annexation over territory that lies outside an urban growth boundary, especially those criteria contained in W.Va. Code 8-6-5(f)³¹.

Because of the City's failure to follow the law, the County performed its gatekeeping function that is provided under the statute and rejected the City's application for annexation. The gatekeeping function is not a matter of "agreement" by the County Commission and is not a portion of §8-6-5 that was abrogated by the last sentence of §8-6-4a(c)(2), for the reasons stated above.

Although this ruling is unclear in the Circuit Court's Order, it would be error if (and to the extent) the Court viewed the County's gatekeeping function as an "agreement" prohibited by W.Va. Code §8-6-4a(c)(2). Consequently, although there seems to be no specific ruling as to the extent of the gatekeeping function in the Circuit Court's Order, to the extent that the Circuit Court did not determine that the County properly performed its gatekeeping function pursuant to W.Va. Code §8-6-5(d), the Commission respectfully assigns that determination as error.³²

2. The Circuit Court should have Clearly Recognized the Commission's determination that the proposed annexation was not a Minor Boundary Adjustment

Under the facts of this case and the annexation as presented to the County Commission, the Commission also determined that the requested boundary adjustment was not "minor" and, for that reason as well, did not meet the threshold requirements for annexation as a minor boundary adjustment. This determination is within the Commission's legislative function:

Finally, it must be remembered that this case involves an annexation through a minor boundary adjustment where the commission is authorized to act without any specific guidelines in *W. Va. Code*, 8-6-5 (1989) as to what shall be deemed a minor boundary adjustment.

³¹ W.Va. Code 8-6-5(f) contains seven factors that the County Commission must consider, at a minimum, in its decision to grant or deny annexation. The County Commission respectfully submits that these 7 factors are the primary items in Section 5 to which the Commission must agree with the City in a standard annexation case and that these 7 factors are the primary factors that W.Va. Code 4A(c)(2) abrogates by the phrase "except that agreement with the county commission is not required."

³² For purposes of Judicial economy, the County incorporates the arguments concerning the appropriateness of the County's gatekeeping function contained in the immediately preceding section of this brief as if fully set forth herein.

If we are to be faithful to the underlying concept that annexation is essentially a legislative matter that has delegated to the commission, then the courts may not intrude unless the process is either unconstitutional or invalid. We agree with this statement of the Illinois Supreme court in *In re Village of North Barrington*, that "the legislature has left to the city council and the electors, rather than to the court, the question of the reasonableness of a petition for annexation." 144 Ill. 2d at ___, 162 Ill. Dec. at ___, 579 N.E.2d at 888.

In re City of Beckley, 194 W. Va. 423, 430-31, 460 S.E.2d 669, 676-77 (1995)

The Commission, in exercising its legislative function determined that:

At the Jefferson County Commission meeting on April 6, 2017, the members of the Commission determined that the annexation of 2,601.83 acres was not "minor" within the meaning of West Virginia Code 8-6-5 and the provisions of West Virginia Code 8-6-4a(c)(2).³³

Although the Commission realizes that the *Beckley* case is proceeding under a different annexation scheme, the key separation of powers concept in the case is unaffected, specifically, that the Court, a member of the judicial branch, must give deference to the determination of the Commission, a legislative branch of government, in keeping with the separation of powers doctrine of the Constitution.

The separation of powers doctrine ensures that the three branches of government are distinct unto themselves and that they, exclusively, exercise the rights and responsibilities reserved unto them. Specifically, the separation of powers clause of the West Virginia Constitution directs that

[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

W. Va. Const. art. V, §1. We have construed this provision as meaning that "Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." Syl. pt. 1, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981). *Accord* Syl. pt. 1, *State v. Buchanan*, 24 W. Va. 362 (1884) ("The legislative, executive and judicial departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected."). *See also State ex rel. State Bldg. Comm'n v. Bailey*, 151 W. Va. 79, 89, 150 S.E.2d 449, 455 (1966) ("The legislative,

³³ See *Commission's Order* at Paragraph 12, Appendix page 094.

executive and judicial powers, under the Constitution, are each in its own sphere of duty, independent of and exclusive of the other[.]” (quoting *Danielley v. City of Princeton*, 113 W. Va. 252, 255, 167 S.E. 620, 622 (1933)); *Bailey*, 151 W. Va. at 88, 150 S.E.2d at 454-55 (“The separation of these powers; the independence of the one from the other; the requirement that one department shall not exercise or encroach upon the powers of the other two, is fundamental in our system of Government, State and Federal. Each acts, and is intended to act, as a check upon the others, and thus a balanced system is maintained.” (quoting *State v. Huber*, 129 W. Va. 198, 209, 40 S.E.2d 11, 18 (1946))).

Simpson v. W. Va. Office of the Ins. Comm'r, 223 W. Va. 495, 505, 678 S.E.2d 1, 11 (2009)

Consequently, the Circuit Court should have given deference to the determination of the Commission that the annexation of approximately 2,601.83 acres of land currently within the County but within the City’s Urban Growth Boundary is not “minor” within the meaning of the statute.³⁴ The Circuit Court did not clearly address this issue in its Order but should have ruled in favor of the County Commission on this issue. To the extent the Court did not grant deference to the Commission on this issue, the Commission respectfully assigns error.

VI. RELIEF REQUESTED

Consequently, the Commission requests that this Court (1) DENY the Petition and the relief requested therein filed by the City, (2) AFFIRM the decision of the Circuit Court granting the Summary Judgment Motion filed by the Commission, and HOLD that the application for annexation filed by the City was incomplete and therefore failed to meet the statutory requirements, because it did not contain a petition of the majority of the voters/freeholders in the proposed area to be annexed, and an ordinance based on the petition, as found by the Jefferson County Commission in its April 12, 2017, Order denying the Application for annexation, (3) FIND

³⁴ The Commission recognizes that in some cases, for example, *Coffman v. Nicholas Cty. Comm’n*, 238 W. Va. 482, 490, 796 S.E.2d 591, 599 (2017) a given County Commission has viewed the annexation of large parcels as “minor.” While the area to be annexed in *Coffman* was very large, the Commission in that case made the legislative determination that it fell within the definition of “Minor.” In this case, the Jefferson County Commission has made a specific finding that the property the City seeks to annex is not Minor – and that is a legislative determination under the facts of this case in which the Court should not intrude.

that the Circuit Court should have ruled that the County Commission's gatekeeping function in W.Va. Code §8-6-5(d) is NOT an area of "agreement" that the County Commission must reach with the City and therefore is NOT nullified by W.Va. Code §8-6-4a(c)(2) and (4) FIND that the determination of the meaning and extent of a minor boundary adjustment in W.Va. Code §8-6-5 is within the Commission's discretion as a legislative function of government.

Oral argument respectfully requested.

Respectfully Submitted,

JEFFERSON COUNTY COMMISSION
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