



RECORD NO. 21-0579

**IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

CITY OF MARTINSBURG,

Defendant below,

Petitioner,

vs.

COUNTY COUNCIL OF BERKELEY COUNTY,

a West Virginia public corporation,

Plaintiff below,

Respondents.

**ON APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY
(CIVIL ACTION NO. 21-C-14)**

**BRIEF OF PETITIONER, CITY OF MARTINSBURG,
WEST VIRGINIA**

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court was clearly wrong in exempting the County from complying with the City of Martinsburg's stormwater management ordinance.

II. STATEMENT OF THE CASE

The Berkeley County Council, by and through its Building Commission (hereinafter referred to as the "County Council" or "County"), is the owner of a parcel of land located in the City of Martinsburg. The City of Martinsburg (hereinafter referred to as the "City") became aware of the project on or before July 23, 2020, and requested the County Council to meet and discuss the scope of the project and necessary permits, including those imposed by the MS4 standards. App. at p. 201. The County Council refused to meet concerning the project. The City issued a notice of violation because the County Council did not have a Land Disturbance Permit, Stormwater Management Plan or an Erosion or Sediment Control Plan. App. at pp. 206-208.

The County Council filed a request for a Temporary Restraining Order and Injunction Relief exempting the Berkeley County Council from the requirements under the City of Martinsburg Stormwater Management Ordinance (2013-17). App. at pp. 1-10. The City is a municipal corporation located in Berkeley County, West Virginia. The County Council is a public corporation located in Berkeley County, West Virginia.

The Stormwater Management Ordinance was enacted under the authority of Chapter 8, Municipal Corporations; Article 20, Combined Systems; Chapter 8A, Land Use Planning; Article 4, Subdivision and Land Development Ordinance; Chapter 16, Public Health; Article 13, Sewage Works and Stormwater Works; Chapter 22, Environmental Resources; Article 11, Water Pollution Control Act of the Code of the State of West Virginia; and the Chesapeake Bay Restoration Act of 2000.

The purpose of the Ordinance is to comply with the EPA's Total Maximum Daily Loads (TMDLs) Water Quality Standards established for the Potomac River Basin, to comply with the West Virginia Water Pollution Control Act, West Virginia Code, Chapter 22, Article 11, and to exercise the powers granted to the City in West Virginia Code § 8-12-5 and West Virginia Code § 8-20-1a, which provide, among other powers that municipal corporations have with respect to stormwater systems and stormwater management programs, the power, by ordinance, to exercise general regulation over the planning, location, construction, operation, and maintenance of stormwater facilities in the City, whether or not owned and operated by the City.

On July 23, 2020, Martinsburg City Engineer Kimberly Petrucci emailed Berkeley County Administrator Alan Davis, informing the County that it needed to comply with the City Ordinances, including its stormwater requirements. App. at p. 198.

On January 12, 2021, the City issued a notice of violation for the renovation and construction of the new Day Report Center at 520 South Raleigh Street for 1) beginning construction without a City land disturbance permit, and 2) beginning construction without a City stormwater management plan and erosion and control plan. App. at pp. 13-29.

On January 22, 2021, the County filed a Petition for Temporary Restraining Order and Injunction Relief.

The Circuit Court granted the Temporary Restraining Order on January 26, 2021.

The Circuit Court held a hearing on February 3, 2021 on the County's Motion for a Permanent Injunction. The Circuit Court granted the Permanent Injunction by order dated June 23, 2021.

III. SUMMARY OF ARGUMENT

The Circuit Court was clearly wrong in exempting the County from complying with the City's stormwater management ordinance.

The Martinsburg's Stormwater Management Ordinance was enacted pursuant to West Virginia Water Pollution Control Act, West Virginia Code, Chapter 22, Article 11, to comply with EPA's Total Maximum Daily Loads (TMDLs) Water Quality Standards established for the Potomac River Basin and, therefore, the Court incorrectly determined that West Virginia Code § 8-12-14 prohibited the City from requiring the County Council from complying with the requirements.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The City believes this case is suitable for Rule 20 argument because it involves issues of first impression and fundamental public importance. The Circuit Court ignored the plain and unambiguous language of the Land Use Act, West Virginia Code Chapter 8A, which authorizes the City to enact a land use ordinance that "shall cover a municipality's entire jurisdiction," W. Va. Code § 8A-7-1, and which also explicitly authorizes the City to enforce its ordinance against "a person or unit of government," West Virginia Code § 8A-10-3 (emphasis added), including "any ... county ... government or governmental agency." W. Va. Code § 8A-1-2(dd). The Court should review this case because the Circuit Court's ruling exempts the County Council from complying with the requirements under the City's Stormwater Management Ordinance, and therefore exempted it from complying with West Virginia Department of Environmental Protection Permit WV0116025 as authorized by 47 CSR 10. This continued violation for the Ordinance and MS4 permit will result in the City being subject to fines from the Environmental Protection Agency.

V. ARGUMENT

A. THE CIRCUIT COURT'S JUDGMENT IS REVIEWED - THREE-PRONGED DEFERENTIAL STANDARD OF REVIEW

Orders granting injunctions are reviewed under a standard of review with regard to permanent injunctions: "In reviewing the exceptions to the findings of fact and conclusions of

law supporting the granting of a temporary or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, *West v. National Mines Corp.*, 168 W. Va. 578, 590, 285 S.E.2d 670, 678 (1981), we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law de novo. Syllabus Point 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996)." Syl. Pt. 1, *Camden-Clark Memorial Hosp. Corp. v. Turner*, 212 W. Va. 752, 575 S.E.2d 362 (2002).

"The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ." Syl. pt. 4, *State ex rel. Donley v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932). Syl. Pt. 2, *Camden-Clark Memorial Hosp. Corp. v. Turner*, 212 W. Va. 752, 575 S.E.2d 362 (2002).

B. THE CIRCUIT COURT WAS CLEARLY WRONG IN EXEMPTING THE COUNTY FROM COMPLYING WITH THE CITY OF MARTINSBURG'S STORMWATER MANAGEMENT ORDINANCE.

The Court incorrectly classifies the compliance with the Stormwater Management Ordinance as a permit that is required under West Virginia Code § 8-12-14. The Court found "that the Petitioner has properly shown that the excavation and construction of the parking lot at issue falls within the definition of a structure as found in West Virginia Code § 8-12-14 and that the County has shown a clear legal right to complete this project free from the City's permitting process." The authority to enact the Stormwater Management Ordinance (Ordinance 2013-17) is under Chapter 8, Municipal Corporations; Article 20, Combined Systems; Chapter 8A, Land Use Planning; Article 4, Subdivision and Land Disturbance Ordinance; Chapter 16, Public Health;

Article 13, Sewage Works and Stormwater Works; Chapter 22, Environmental Resources; Article 11, Water Pollution Control Act of the Code of the State of West Virginia; and the Chesapeake Bay Restoration Act of 2000, which provide, among other powers that municipal corporations have with respect to stormwater systems and stormwater management programs, the power, by ordinance, to exercise general regulation over the planning, location, construction, operation, and maintenance of stormwater facilities in the City whether or not owned and operated by the City.

The Stormwater Management Ordinance was submitted to the West Virginia DEP and United States EPA to make sure it is compliant with the applicable State and Federal laws.

The stated purpose of the Ordinance is:

This Ordinance has the following purpose:

(1) Protect, maintain, and enhance the environment of the City of Martinsburg and the public health, safety, and general welfare of the citizens of the City of Martinsburg by:

(a) Controlling non-stormwater discharges to storm drain systems

(b) Reduce pollutants in stormwater discharges

(c) Control stormwater runoff by providing design, construction and maintenance criteria for permanent and temporary stormwater facilities

(d) Maintaining and improving stormwater collection systems in order to protect and improve water quality in the receiving streams

(2) Enable the City of Martinsburg to comply with the West Virginia DEP-administered National Pollutant Discharge Elimination System (NPDES) stormwater permit program and applicable regulations (40 CFR §122.26) for stormwater discharges

(3) Enable the City of Martinsburg to comply with the EPA's Total Maximum Daily Loads (TMDLs) Water Quality Standards established for the Potomac River Basin

(4) Enable the City of Martinsburg to comply with the West Virginia Water Pollution Control Act, West Virginia Code, Chapter 22, Article 11

(5) Allow the City of Martinsburg to exercise the powers granted in West Virginia Code §8-12-5 and § 8-20-1a, which provide, among other powers municipal corporations have with respect to stormwater systems and stormwater management programs, the power by ordinance or resolution, as the case may require, and by appropriate action based thereon to do the following:

(a) Exercise general regulation over the planning, location, construction, operation, and maintenance of stormwater facilities in the City of Martinsburg whether or not owned and operated by the City of Martinsburg

(b) Adopt any rules and regulations deemed necessary to accomplish the purposes of this Ordinance, including the adoption of a system of fees for services and permits

(c) Establish standards to regulate the quantity of stormwater discharged and to regulate stormwater contaminants as may be necessary to protect water quality

(d) Review and approve plans and plats for stormwater management in proposed residential and nonresidential subdivisions as applicable under Subsection D below

(e) Issue permits for stormwater discharges, or for the construction, alteration, extension, or repair of stormwater facilities

(f) Suspend or revoke permits when it is determined that the permittee has violated any applicable ordinance, resolution, or condition of the permit

(g) Regulate and prohibit discharges into stormwater facilities of sanitary, industrial, or commercial sewage or waters that have otherwise been contaminated

(h) Expend funds to remediate or mitigate the detrimental effects of contaminated land or other sources of stormwater contamination, whether public or private

The Ordinance further sets for the administrative authority of the City to enforce

the provisions:

(1) Pursuant to West Virginia Code §16-13-1, any municipal corporation and/or sanitary district in the State of West Virginia is hereby authorized and empowered to own, acquire, construct, equip, operate, and maintain within and/or without the corporate limits of such municipal corporation a stormwater system, stormwater works, and stormwater management program as defined herein.

(2) The City of Martinsburg is the entity responsible for administering the provisions of this Ordinance.

West Virginia Code § 8-12-14 applies only to when a building permit is required for the erection of a structure; however, the statute is silent when it deals with land use and zoning regulations. The administration and enforcement of the Stormwater Management Ordinance is under authority granted by the State under other authority.

The County wanted the Court to give it carte blanche when it comes to the property that it or its building commission owns within City limits by exempting it from the City's zoning ordinance, including the Stormwater Management. The County wants to ignore the requirements to have an Erosion & Sediment Control Plan, Stormwater Management Plan and Maintenance, all to the detriment of the public.

The Court ignored the plain and unambiguous language of the Land Use Act, West Virginia Code Chapter 8A, which authorizes the City to enact a zoning ordinance that "shall cover a municipality's entire jurisdiction," W. Va. Code § 8A-7-1, and which also explicitly authorizes the City to enforce its ordinance against "a person or unit of government," W. Va. Code § 8A-10-3 (emphasis added), including "any ... county ... government or governmental agency." W. Va. Code § 8A-1-2(dd).

The Land Use Act, West Virginia Code Chapter 8A (the "Act"), sets forth the authority of both counties and municipalities to enact and enforce land use regulations. "The governing body of a municipality or a county may regulate land use within its jurisdiction by ... [e]nacting a zoning ordinance." W. Va. Code § 8A-7-1. The Act authorizes the City to enact a

zoning ordinance that “shall cover a municipality’s entire jurisdiction,” and makes no exception for properties owned by another unit of government. In fact, the Act specifically authorizes the City to enforce its zoning ordinance against a “unit of government” such as the County:

(a) ... any designated enforcement official may seek an injunction ... to restrain a person or unit of government from violating the provisions of this chapter or of any ordinance or rule and regulation adopted pursuant hereto;

(b) ... any designated enforcement official may also seek a mandatory injunction ... directing a person or unit of government to remove a structure erected in violation of the provisions of this chapter or of any ordinance or rule and regulation adopted pursuant hereto.

W. Va. Code § 8A-10-3 (emphasis added). The Act defines “unit of government” to include “any ... county or municipal government or governmental agency.” W. Va. Code § 8A-1-2(dd) (emphasis added).

The Legislature delegated express power to the City “to regulate land use within its jurisdiction” by enacting a zoning ordinance that “shall cover a municipality’s entire jurisdiction.” W. Va. Code § 8A-7-1. The Legislature also delegated express power to the City to seek injunctive relief against a unit of government, such as the County, that violates its ordinance. *See* W. Va. Code § 8A-10-3. If it was the intent of the legislature to exempt the County Council from the City’s zoning and land use regulations, then they would not have allowed the City to seek injunctive relief against a unit of government that violates the ordinance.

West Virginia Department of Environmental Protection under general permit WV030017, as authorized by 47 CSR 10, the City of Martinsburg, has been designated an MS4 community and is required to comply with the MS4 permitted requirements, including the requirement that it enact and enforce a Stormwater Management Ordinance. Failure to have compliance with its Stormwater Management Ordinance and its MS4 permit can result in sanctions

to the City. Since the matter has been pending, the City was subject to an Administrative Order of Consent, US EPA Docket Number CWA-03-2021-0054DN, United States Environmental Protection Agency Region III which requires the City to control runoff from new and redevelopment projects. Neither the US EPA nor the West Virginia Department of Environmental Protection exempt the County Council from the requirements of MS4 requirements, nor does it protect the City if the County Council's developments or redevelopment do not comply with the MS4 requirements.

The Court failed to recognize that the governing body of every municipality has plenary power and authority to require a permit as a condition precedent to the erection, construction, repair or alteration of any structure or of any equipment or part of a structure which is regulated by state law or municipal ordinance: Provided, That no such permits may be required of the state, a county or other governmental entity, its contractors, agents or employees for the erection, construction, repair or alteration of any structure or of any equipment or part of a structure designated for use by the state, a county or other governmental entity.

The City agrees with the County that they do not have the authority to require the County to get a building permit as contemplated under West Virginia Code § 8-12-14; however, this statute does not exempt the County from the municipal zoning and land use regulations, nor does it allow for the County Council to disregard MS4 requirements which the City is ordered under MS4 Permit WV0116025, as authorized by 47 CSR 10.

VI. CONCLUSION

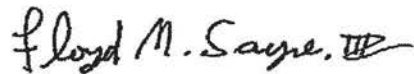
The Circuit Court clearly erred by disregarding the plain and unambiguous language of West Virginia Code § 8A-7-1. The Stormwater Management Ordinance is authorized by authority granted the City of Martinsburg, pursuant to West Virginia Code § 8A-7-1, et seq. and MS4 permit WV030017 issued by the WV DEP, pursuant under the authority of 47 CSR 10. The requirement

that the County comply with the Stormwater Management Ordinance is not prohibited by West Virginia Code § 8-12-14.

The Court should dissolve the permanent injunction and require that the County comply with the requirements of the Stormwater Management Ordinance, and failure to do so will result in the City's issuance of a Stop Work Order.

Further, this Court should find that the County comply with the Stormwater Management Ordinance.

Respectfully submitted,



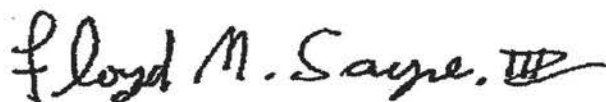
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CERTIFICATE OF SERVICE

I certify that I served this *Brief of Petitioner City of Martinsburg* upon the below-named individual on the date indicated by email this 5th day of July, 2022.

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A handwritten signature in black ink that reads "Floyd M. Sayre, III". The signature is written in a cursive style with a horizontal line underneath the name.

Floyd M. Sayre, III