

DO NOT REMOVE



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0776

THE CITY OF CHARLESTON,

Defendant Below, Petitioner

v.

ROBERT ROMAINÉ,

Plaintiff Below, Respondent

FILE COPY

**BRIEF ON BEHALF OF AMICUS CURIAE OF THE WEST VIRGINIA MUNICIPAL
LEAGUE IN SUPPORT OF DEFENDANT CITY OF CHARLESTON'S APPEAL OF
THE CIRCUIT COURT OF KANAWHA COUNTY'S ORDER GRANTING
PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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Through undersigned counsel¹, the West Virginia Municipal League hereby submits the following *Amicus Curiae* brief in support of Defendant City of Charleston’s Appeal of the Circuit Court of Kanawha County’s August 3, 2021 *Order Granting Plaintiff’s Cross-Motion for Summary Judgment and Denying Defendant’s Motion for Summary Judgment*.

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The West Virginia Municipal League (“the League”) is a statewide, non-profit, nonpartisan association of cities, towns and villages established in 1968 to assist local governments in West Virginia and advance the interests of the citizens who reside within. The League achieves this directive through legislative advocacy, research, education and other services for municipal elected officials. The membership includes all 230 municipalities’ population in West Virginia. By cooperating through the League, cities benefit from research, programs, and a united legislative voice that would be impossible to maintain individually.

The League takes particular interest in Judge Salango’s August 3, 2021 *Order Granting Plaintiff’s Cross-Motion for Summary Judgment and Denying Defendants Motion for Summary Judgment* in this matter as there are several policy concerns implicated by the decision that have far-sweeping effects on municipalities in West Virginia. Thus, the purpose of this *Amicus Curiae* brief is to address the concerns and issues the League has with the August 3, 2021 *Order* so that

¹ Pursuant to Rule 30(e)(5) *West Virginia Rules of Appellate Procedure*, counsel for the West Virginia Municipal League were the sole authors of this amicus brief and there were no other contributors in any fashion besides the West Virginia Municipal League.

this Court may properly weigh the appropriateness of the Order granting Plaintiff's Motion for Summary Judgment during Defendant's appeal of the same.

II. ARGUMENT

A. THE CIRCUIT COURT'S ORDER TAKES AWAY MUNICIPAL CONTROL REGARDING BOUNDARY DETERMINATIONS AND SERVICES TO BE PROVIDED.

One of the most concerning issues with the August 3, 2021 Order is the precedent it sets in affecting the autonomy of municipalities in exercising control within their respective boundaries. The Circuit Court's decision has now expanded the services a municipality is to provide outside of its jurisdiction, despite the fact that there are specific statutory provisions that grant the municipality the sole discretion in determining whether to provide services in areas outside of its boundaries. This creates an improper precedent insofar as now a court can order to a municipality where to provide services and duties and extending these services to an area outside of its jurisdictional limits even when the municipality has determined it does not wish to do so.

The *West Virginia Code* provides that municipal boundaries are set by the proposed municipality when applying for incorporation, not the Circuit Court. *See W.Va. Code* §§ 8-2-1(a)(5), 8-2-2. Further, while a municipality's boundaries may be expanded via annexation, this process too is dictated by the municipality, not the Circuit Court. *W.Va. Code* § 8-6-1, *et seq.* Specifically, the *West Virginia Code* provides for three separate manners in which a municipality may expand its boundaries: (1) five percent or more of the freeholders of a municipality filing a petition with the governing body of the municipality and an election being held to decide whether to annex an area into the municipality (*W.Va. Code* § 8-6-2); (2) the governing body of a municipality annexing an area into the municipality via ordinance (*W.Va. Code* §§ 8-6-4 and 8-6-4a); and (3) the governing body of a municipality applying to the county commission of the county

wherein the municipality lies for a minor boundary adjustment (*W.Va. Code* § 8-6-5). Finally, the power for decreasing a municipality's borders is held by the municipality, not the Circuit Court. *W.Va. Code* § 8-7-1, *et seq.* In other words, the Judicial Branch legally can play no role in determining whether to expand or decrease a municipality's boundary.

Certainly, a court could nullify the expansion or contraction of a municipality's borders if the mechanism for doing so was in violation of the *West Virginia Code*. For example, the *West Virginia Code* holds that, depending on the mechanism being utilized to perform an annexation, the circuit court of the county in which the municipality or the major portion thereof is located, including the area proposed to be annexed, can review the election, can review the determination that the requisite number of petitioners have filed the required petition, or hear an appeal on a county commission's final order approving or denying a minor boundary adjustment. *See W.Va. Code* §§ 8-6-2(f), 8-6-4(c), 8-6-4a(b)(2), 8-6-5(i), (j). However, this power is to review the process, not necessarily control the decision making on expansion of a boundary.

Similarly, the Circuit Court has no specific control as it relates to the services a municipality provides. *West Virginia Code* specifically provides that "cities" have the:

plenary power and authority by charter provision not inconsistent or in conflict with such constitution, other provisions of this chapter or other general law, or by ordinance not inconsistent or in conflict with such constitution, other provisions of this chapter, other general law or any existing charter, to provide for the government, regulation and control of the city's municipal affairs, including, but not limited to, the following:

(1) The creation or discontinuance of departments of the city's government and the prescription, modification or repeal of their powers and duties;

...

(5) The acquisition, care, management and use of the city's streets, avenues, roads, alleys, ways and property;

...

(7) The operation and maintenance of passenger transportation services and facilities, if authorized by the public service commission, and if so

authorized, such transportation system may be operated without the corporate limits of such city, but may not be operated within the corporate limits of another municipality without the consent of the governing body thereof;

(8) The furnishing of all local public services;

(9) The government, protection, order, conduct, safety and health of persons or property therein;

(10) The adoption and enforcement of local police, sanitary and other similar regulations”

W.Va. Code § 8-12-2. With respect to all municipalities, the *West Virginia Code* provides that “every municipality and the governing body thereof shall have plenary power and authority therein by ordinance or resolution, as the case may require, and by appropriate action based thereon” to engage fifty-nine (59) different expressly stated powers given to municipalities. *W.Va. Code § 8-12-5.* Nowhere within the *West Virginia Code* does any entity other than a municipality have the authority to determine when, how and where the municipality will engage in these fifty-nine (59) different expressly stated powers.

Based upon the above, cities and all other municipalities have the sole plenary power and authority to establish these services and where to exercise these powers. Unquestionably, the August 3, 2021 Order is contrary to the provisions of the *West Virginia Code* as it has ordered that City of Charleston provide services outside of its boundaries although the City has exercised its plenary power and authority not to do so. The Order does not only conflict with the provisions of the *West Virginia Code*, but it also expands the Judicial Branch to exercise its discretion over municipal policy, not the duly elected members of the municipality.

As for why the Order is legally flawed, these statutory provisions cited above are clear that the plenary power and authority to set boundaries, provide services, and levy and collect taxes are held by the respective municipalities throughout the State. To find that courts can enjoy the same

authority would be reading into law provisions not explicitly stated in the *West Virginia Code*. This violates a well-known and widely recognized canon of statutory interpretation.

It is well-established that a statute's plain language should not be construed but should be applied as it is written. See Syl. pt. 3, *West Virginia Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 472 S.E.2d 411 (1996) ("If the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery."). This syllabus point essentially applies the "omitted-case canon" of statutory interpretation (the Latin phrase *casus omissus pro omisso habendus est*).

Under the omitted-case canon of statutory interpretation, "[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered." *State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, ¶18, 387 Wis. 2d 50, 70, 928 N.W.2d 480, 490 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012)).² The principle at the core of the omitted-case canon of statutory interpretation has been recognized by the United States Supreme Court. See *Iselin v. United States*, 270 U.S. 245, 251, 46 S. Ct. 248, 250 (1926) ("To supply omissions transcends the judicial function").³ Although West Virginia has not specifically

² See also *State v. Schultz*, 2020 WI 24, ¶52, 390 Wis. 2d 570, 608-09, 939 N.W.2d 519, 537-38; *Mich. Ambulatory Surgical Ctr. v. Farm Bureau Gen. Ins. Co.*, 2020 Mich. App. LEXIS 7790, *10, 334 Mich. App. 622, 965 N.W.2d 650, 2020 WL 6811671; *Villanueva v. State*, 200 So. 3d 47, 52 (Fla. 2016); *Woodford v. Commonwealth Ins. Dep't*, 243 A.3d 60, 85 (Pa. 2020); *People v. Pinkney*, 501 Mich. 259, 286 n.67, 912 N.W.2d 535, 549 (2018); *State v. I.C.S.*, 2013-1023 (La. 07/01/14), 145 So. 3d 350, 355; *Wilson Funeral Dirs., Inc. v. N.C. Bd. of Funeral Serv.*, 244 N.C. App. 768, 774, 781 S.E.2d 507, 511 (2016); *Williams v. Lakeview Loan Servicing LLC*, 509 F. Supp. 3d 676, 680 (S.D. Tex. 2020); *Env'tl. Integrity Project v. United States EPA*, 969 F.3d 529, 541 (5th Cir. 2020).

³ *Lamie v. United States Tr.*, 540 U.S. 526, 538, 124 S. Ct. 1023, 1032 (2004) (rejecting construction that "would have us read an absent word into the statute" because it "would result not in a construction of the statute, but, in effect, an enlargement of it by the court" (citing *Iselin v. United States*)); *Hobbs v. McLean*, 117 U.S. 567, 579, 6 S. Ct. 870, 876 (1886) ("When a provision is left out of a statute, either by design or

adopted the omitted-case canon of statutory interpretation *casus omissus pro omisso habendus est*, the application of the principles of the doctrine were adopted in Syl. Pt. 3 of *Boone Mem'l Hosp.*

Based upon this doctrine, a court could not expand a municipality's boundaries outside the express provisions of the statutory scheme regarding the same. Similarly, a court could not demand a municipality provide services to a specific area outside the statutory scheme regarding the same. As the Legislature has clearly vested the municipalities with the sole authority regarding boundary adjustments and/or the services to provide, as well as where to provide the services, the Circuit Court's Order determining these issues violates the omitted-case canon doctrine. Therefore, by ignoring the clear and unambiguous statutory provisions governing the expansion of a municipality's boundaries and the authority to control and provide services, the August 3, 2021 Order cannot stand.

The result of this Order, however, is that it permits the Judicial Branch to now decide a municipality's boundary outside the statutorily legislative process. In other words, the Judicial Branch can now expand the boundaries of a municipality and enjoy in the same authority of municipalities to create and control services contemplated by the *West Virginia Code* outside the jurisdictional limits of a municipality even if the municipality declines to do so. Thus, the ruling of the lower court in the immediate matter should be vacated.

B. THE CIRCUIT COURT'S ORDER VIOLATES THE PRINCIPLES OF SEPARATION OF POWERS.

The Circuit Court's Order is a clear violation of the separation of powers recognized by this state's Constitution. *See W.Va. Const. Art. V, § 1.* Article V, Section 1 of the *West Virginia Constitution* provides that "[t]he legislative, executive and judicial departments shall be separate

mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe").

and distinct, so that neither shall exercise the powers properly belonging to either of the others....” Article V, Section 1 is a fundamental part of State law and must be strictly construed and closely followed. *See State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622, 1981 W. Va. LEXIS 625 (W. Va. 1981); *State ex rel. Steele v. Kopp*, 172 W. Va. 329, 305 S.E.2d 285, 1983 W. Va. LEXIS 548 (W. Va. 1983); *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 306 S.E.2d 233, 1983 W. Va. LEXIS 583 (W. Va. 1983). The expansion of a municipality’s boundaries is undoubtedly a legislative function, not a judicial one. This is well-established law in West Virginia.

The West Virginia Supreme Court of Appeals has previously held that “[i]t is well-settled that the determination as to geographic boundaries is essentially a legislative function into which the courts generally should not intrude unless the process is unconstitutional or invalid.” *Coffman v. Nicholas Cty. Comm’n*, 238 W. Va. 482, 490, 796 S.E.2d 591, 599 (2017) (citing *In re the Petition of the City of Beckley to Annex*, 194 W. Va. at 430, 460 S.E.2d 669 (1995)). In arriving to its holding, the Court in *In re the Petition of the City of Beckley to Annex* cited to the following:

The extension of the boundaries of a city or town is viewed as purely a political matter, entirely within the power of the state legislature to regulate. It is, in other words, a legislative function. This power is sometimes said to be inherent in the legislature, while in other instances it has been said to be power incidental to the power to create and abolish municipal corporations.

* * *

[The] enactment [of annexation statutes] is regarded as a discretionary legislative prerogative, and unless the obligations of contracts or vested rights of third persons are impaired by such action, in accordance with the well-established rule, the judiciary cannot interfere. [Footnotes omitted].”

In re City of Beckley, 194 W. Va. 423, 428, 460 S.E.2d 669, 674 (1995) (quoting 2 Eugene McQuillin, *The Law of Municipal Corporations* § 7.10 (3d ed. 1988)).

The act of requiring municipalities to offer services outside of their jurisdictional limits, essentially, is a de facto expansion of a municipality’s boundaries. As argued throughout this Brief, the Circuit Court’s Order in this matter has effectively expanded the City of Charleston’s

boundaries without its consent. This Order creates a pathway for the Judicial Branch to require any municipal service be provided outside of a municipality's jurisdictional limits. This undoubtedly is bad policy, as explained throughout this Brief, and further entangles the Judicial Branch in otherwise legislative functions. The Judicial Branch performing legislative functions clearly violates the doctrine of separation of powers. *See W. Va. Const. Art. V, § 1* ("The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others....").

There is no support in the law, nor any valid policy consideration, that courts may exercise any control whatsoever over a municipality's boundaries except hearing appeals from annexation decisions "under limited circumstances where the action is void or impairs vested rights." *In re City of Beckley*, 194 W. Va. 428, 460 S.E.2d 674. Likewise, there is no support in the law, nor any valid policy considerations, that courts may exercise authority in determining what services that municipalities offer, particularly outside of their respective boundaries. The authority to do these things rests solely to each respective municipality and the people residing therein.

Thus, the August 3, 2021 Order unnecessarily blurs the lines between legislative and judicial functions. The power to expand a municipality's borders is solely a political and legislative function. There are no grounds for courts in the State of West Virginia to require an unwilling municipality to expand its services and boundaries past its jurisdictional limits. Accordingly, this Court must reverse the decision of lower court.

C. THE CIRCUIT COURT'S ORDER OVERRULES MUNICIPAL CONTROL OVER FISCAL AFFAIRS.

In addition to permitting the Judicial Branch to extend boundaries and services without municipality consent, should the Order be sustained, the Judicial Branch will be able to exercise authority over funding and budgeting of municipalities. By virtue of requiring municipalities to

provide services it has not consented to provide, especially to areas outside of its jurisdictional limits, the Judicial Branch would implicitly alter the municipalities' powers to tax and otherwise control their financial expenditures.

As discussed above, cities and all other municipalities are given plenary power and authority to exercise their powers and provide services. See W.Va. Code §§ 8-12-2, 8-12-5. Inherent in these powers is the decision as to where to focus and expend financial resources. This decision lies within the prerogative of the elected officials of the municipality. Should the taxpayers disagree with these expenditures, the elected official is subject to re-election

However, here, the August 3, 2021 Order has held that specific services must be provided to an area outside the municipal boundaries. Per the Circuit Court's Order, even if the City now wishes to stop, it would otherwise be equitably estopped from doing the same. If the taxpayers disagree with this municipal expenditure decision, the City's taxpayers simply have no recourse to overturn this decision. In essence, the Circuit Court has directed the expenditure of funds into perpetuity for an area outside the municipal boundaries and the taxpayers otherwise have no recourse to disagree with this decision.

The above highlights the fundamental flaw in the Circuit Court's decision. Whenever a municipality decides when and where to expend funds in a specific manner or otherwise discontinue a service, a person can simply go to the Judicial Branch to force the expenditure of the municipality's money and the other taxpayers have no other manner to express their displeasure. There is no other way to view this as the Judicial Branch now being able to exercise control over municipalities' financial affairs without any recourse from taxpayers. This is contrary to the plenary powers and authority that municipalities hold as prescribed by the *West Virginia Code*.

This Court should not allow such control by any Circuit Court over a municipality's financial resources to stand.

**D. THE CIRCUIT COURT'S ORDER VIOLATES THIS COURT'S
PRECEDENT REGARDING EQUITABLE ESTOPPEL.**

As discussed above, the Circuit Court's ruling improperly exercises control over the financial affairs of the City of Charleston. Setting aside the practical flaws in such a ruling, the legal foundation for such an intrusion by the Circuit Court is equally flawed. Specifically, the Circuit Court based its ruling, in part, on the fact that there was a history of providing some services to Shannon Place, despite there being uncontradicted evidence in the record that these services were unauthorized. This cannot be a sufficient reasoning for finding that a municipality must now provide for services outside of the jurisdictional limits.

While not expressly stated, the Circuit Court's decision is based upon the doctrine of equitable estoppel. Specifically, the Circuit Court determined that even if the services provided to Shannon Place were indeed unauthorized, the City of Charleston had done so for so long now that it could not stop at this point. This is clearly an application of the equitable estoppel doctrine. However, it was improper for the lower court to do so as the West Virginia Supreme Court of Appeals has repeatedly held that equitable estoppel cannot be applied to municipalities when acting in a governmental function. *See H.R.D.E., Inc. v. Zoning Officer*, 189 W. Va. 283, 289 n.6, 430 S.E.2d 341, 347 (1993); *McFillan v. Berkeley Cty. Planning Comm'n*, 190 W. Va. 458, 465-66, 438 S.E.2d 801, 808-09 (1993); *Martin v. Pugh*, 175 W. Va. 495, 503, 334 S.E.2d 633, 641 (1985); *Cawley v. Bd. of Trs.*, 138 W. Va. 571, 583, 76 S.E.2d 683, 690 (1953). This Court recognized in *Cawley*, a municipality should not be subject to equitable estoppel because "to permit such estoppel on the basis of mistake or ill-advised action by a former municipal authority

would hinder and hamper governmental functions; and may be contrary to the public interest.” By equitably estopping the City of Charleston from ceasing performance of these unauthorized functions, the Circuit Court violated this Court’s precedent on the use of equitable estoppel against a municipality.

III. CONCLUSION

The Order entered by the lower court creates a precedent that could have improper legal and policy ramifications for municipalities in West Virginia. Taking all the above arguments together, the August 3, 2021 ruling chisels away at municipalities’ ability to govern themselves. Now, a judge, who may not even be a member of the municipality in which that judge is deciding whether said municipality must provide services outside of their jurisdictional limits, may act as a super-mayor of sorts, making unilateral decisions regarding municipal policy. This is contrary to the plenary power and authority municipalities hold as a matter of law and is contrary to the constitutionally enshrined policy that there needs to be a clear separation of powers between the branches of government. Accordingly, this Court must act to preserve the autonomy of municipalities to self-govern and reverse the lower court’s August 3, 2021 Order granting summary judgment for the plaintiff.



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CERTIFICATE OF SERVICE

The undersigned, counsel of record for West Virginia Municipal League, does hereby certify on this 3rd day of January, 2022, that an original and ten copies of the foregoing "*Brief of Amicus Curiae*" was filed with the Clerk of the West Virginia Supreme Court of Appeals and was served on the following:

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