No. 33454 – *State of West Virginia ex rel. City of Charles Town v. The County Commission of Jefferson County, a Public Body Corporate of the State of West Virginia; and Frances B. Morgan, President and Member; Archibald M. S. Morgan, III, Member; C. Dale Manuel, Member; James T. Sutkamp, Member; and Gregory A. Corliss, Member; and Jennifer Maghan, Clerk, County Commission of Jefferson County*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, concurring:

I concur in the result in this case, but write separately to state one qualification to the majority opinion's conclusion that "[t]he county commission is required to enter the annexation order when the municipality certifies that the annexation petition is sufficient." Slip Op. at 8.

The thrust of this statement is that the county commission's duties are wholly and strictly ministerial and are defined by statute. The difficulty with this statement is that it leaves the impression that the county commission must enter an annexation order even when it contains findings that are wrong, and that the county commission has no option in any circumstances to seek correction of an apparent error. I respectfully suggest that the Constitution of West Virginia vests in this Court and in the circuit courts jurisdiction over extraordinary remedies where no adequate remedy of law is available. *See* W.Va. Const. art. VIII, § 3 ("The supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari."); W.Va. Const. art. VIII, § 6 ("Circuit

courts shall have original and general jurisdiction . . . of proceedings in habeas corpus, mandamus, quo warranto, prohibition and certiorari . . . .").

I respectfully submit that a public official charged with the performance of a ministerial duty has the right to challenge whether or not the conditions precedent to the performance of that duty have been met and, failing any other remedy at law, may invoke the constitutional jurisdiction of the circuit courts and this Court by way of a writ of certiorari to cause judicial review of the proceedings wherein the conditions precedent were found to exist but there is doubt they in fact do exist.

In the instant case, the very statute at issue expressly provides one instance in which certiorari may be invoked to review a determination made by a city council which is a condition precedent to the city's adoption of an annexation ordinance. Specifically, the statute provides:

> The determination that the requisite number of petitioners have filed the required petitions shall be reviewable by the circuit court of the county in which the municipality or the major portion of the territory thereof, including the area proposed to be annexed is located, upon certiorari to the governing body in accordance with the provisions of article three [§§ 53-3-1 et seq.], chapter fifty-three of this code.

W.Va. Code § 8-6-4(c). Moreover, in the succeeding section of our municipal code, providing for annexation by minor boundary adjustment by application, the county commission is expressly granted both discretion and the right to seek judicial review.[1]

When there is no alternative judicial remedy prescribed, extraordinary relief through certiorari is clearly a means available to county commissions to seek review of perceived facial errors or legal irregularities in municipal annexation proceedings leading up to adoption of ordinances or applications.[2] *See* Syl. Pt. 1, *Reynolds Taxi Co. v. Hudson*, 103 W.Va. 173, 136 S.E. 833 (1927) ("Certiorari is the appropriate process to review the proceedings of bodies and officers acting in judicial or quasi-judicial capacity, where no other remedy is provided."); 14 Am.Jur.2d *Certiorari* §17 (use of writ of certiorari to correct errors of law appearing on the record of a quasi-judicial proceeding or to inquire into whether the actions of a public body were taken in accord with the essential requirements of the law). *See also Ashworth v. Hatcher*, 98 W.Va. 323, 128 S.E. 93 (1924); *Carroll Hardwood Lumber Co. v. Kentucky River Hardwood Co.*, 94 W.Va. 392, 119 S.E. 162 (1923); *Morgan v. Ohio River R.R.*, 39 W.Va. 17, 19 S.E. 588 (1894); *Long v. Ohio River*

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[1]*See* W.Va. Code § 8-6-5 (d) and (i).

[2]I am mindful of the case of *Garrison v. City of Fairmont*, 150 W.Va. 498, 147 S.E.2d 397 (1966), in which this Court held that certiorari is not available to challenge a municipal ordinance. What is at stake in the instant case is not the substance of the ordinance but the mandatory proceedings and findings stipulated in the statute as conditions precedent to the adoption of the ordinance.

R.R., 35 W.Va. 333, 13 S.E. 1010 (1891); *Beasley v. Town of Beckley*, 28 W.Va. 81 (1886); *Poe v. Marion Mach. Works*, 24 W.Va. 517 (1884); *Meeks v. Windon*, 10 W.Va. 180 (1877) (all finding that certiorari lies when there is an error in justice and no other means of review is prescribed).

I concur with the majority opinion in this case because the responses tendered by the county commission related to the merits of the ordinance and not to errors involving the conditions precedent to the adoption of the subject ordinance.