IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CITY OF MARTINSBURG,

Defendant Below, Petitioner,

vs.

No. 21-0579
(Berkeley Co. Case No. 21-C-14)

COUNTY COUNCIL OF BERKELEY COUNTY,

Plaintiff Below, Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

As a leader in addressing the opioid epidemic, the Berkeley County Council ("County") spent millions of dollars renovating a County building on County property for its Community Corrections Department to house the County's Day Report Center, and home confinement office. First, the County attempted to make an old warehouse on County property into a drug abuse treatment center, and the City of Martinsburg ("City") opposed the project arguing it did not comply with the city's zoning ordinance.[1] Because the City's zoning power over County properties had not been clearly decided by this Court in *City of Martinsburg v. Berkeley Cty. Council*, 241 W. Va. 385, 825 S.E.2d 332 (2019), in order to avoid another dispute over land use in the City, the County moved forward in getting private drug treatment facilities into unincorporated areas of the County and chose another site on County owned property within the City to house its Community Corrections Department, and Day Report Center. The new site clearly complies with the City's zoning ordinance as a day report center is a permissible use. So, rather than attempt to stop the new Day Report Center based on land use grounds, the City attempted to delay or stop construction of the project by requiring the County to obtain preapproval from the City first under its building code ordinance and then under its Stormwater Ordinance.

Prior to construction of the Day Report Center, the City sought to require the County to undergo various inspections and obtain various building permits provided for in City ordinances, but initially relented when the County cited W. Va. Code § 8-12-14 which prohibits the City from

[1] See generally *City of Martinsburg v. Berkeley Cty. Council*, 241 W. Va. 385, 825 S.E.2d 332 (2019). The circuit granted the County's declaratory judgment that the City did not have the authority to regulate through zoning or land use planning County owned properties used for public purposes. This Court found there was no justiciable controversy, because the case involved all County property and not a specific property planned for a specific use.

requiring the County to obtain such permits.[2] During reconstruction of the parking lot, the City issued a notice of violation and threatened to shut down the project and assess fines and penalties if the County did not obtain a land disturbance permit from the City, under the 2013 Stormwater Management Ordinance of The City of Martinsburg ("Stormwater Ordinance").[3] The County asked the City to withdraw the notice of violation reminding the City that West Virginia Code § 8-12-14 bars the City from requiring permits from the County for County construction projects.[4]

Because the City remained steadfast in its threat to shut down construction of the new Day Report Center, the County sought a temporary restraining order and injunction to stop the City from entering a stop work order or levying fines against the County.[5] The circuit court granted the temporary restraining order stopping enforcement of the notice of violation and ordering the City to not stop or impede the construction.[6] The circuit court reasoned that:

> [B] ased on [W. Va. Code § 8-12-14] the City does not have the right to require City permitting on the County's projects. The City argues that the existence of an appeal process through the City's administrative process gives the County a legal remedy. Based on the authority available as of this date, the court cannot find any statutory authority for the City to regulate construction projects undertaken by the County. The only statute before the court forbids such regulation.[7]

Accordingly, the circuit court found that:

> [T]he County has shown a clear legal right to conduct its construction free from City permitting processes, that the County will be harmed by the failure to grant it a restraining order from City regulation of its construction project, that the harm to the County from not being granted the relief is greater than the harm to the City from granting it, and that the public interest is best served

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[2] App. at 11, 12.
[3] App. at 13-29. *See also* Stormwater Ordinance App. at 143.
[4] App. at 30-31.
[5] App. at 1.
[6] App. at 66-69.
[7] App. at 67-68.

> by permitting the prompt completion of the building project and observing the clear division of authority to regulate as between the City and the County as envisioned by W. Va. Code § 8-12-14.[8]

While the temporary restraining order was in effect, the County completed construction of the Day Report Center.[9] Thereafter, the circuit court entered a permanent injunction and correctly found that West Virginia Code § 8-12-14 specifically bars the City from requiring such permits "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."[10] The circuit court addressed the City's argument that the preconstruction land disturbance permit was a zoning permit, noting that the land disturbance permit was not a permit for how the land was to be used, but rather a building permit as a condition precedent to construction.[11]

On appeal, the City incorrectly states that the Circuit Court held that the entire Stormwater Ordinance does not apply to the County, and argues that the Stormwater Ordinance is a land use or zoning ordinance, and that the City may enforce its land use and zoning restrictions against County construction activity on County property.

Summary of Argument

First, the County is not required to obtain preconstruction permits from the City notwithstanding any City ordinance, because W. Va. Code § 8-12-14 specifically forbids cities from requiring such permits for county construction activities on county properties. Thus, the circuit court correctly granted the injunction against such requirements.

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[8] App. at 68.
[9] Final Order App. at 341.
[10] Final Order App. at 342 citing W. Va. Code § 8-12-14.
[11] Final Order App. at 342-343.

Second, the County did not contend that all parts of the City's Stormwater Ordinance do not apply to County property or county activities; nor did the Circuit Court find that to be the case. Thus, while the permitting part of the Ordinance does not apply, other parts of the Stormwater Ordinance not addressed in this case may apply to County owned property or County activity.

Third, the Stormwater Ordinance is not a land use or zoning ordinance as the City argues. Zoning ordinances concern whether an area can be used for a particular purpose. On the other hand, building permits deal with how the use is undertaken. The City does not contend that the site of the Day Report Center and its parking lot could not be used as a Day Report Center or a parking lot because such activity is not permitted in the zone. Rather, the City contends that the County must get a permit from the City prior to reconstructing and repaving the already existing parking lot.

Fourth, even if the Stormwater Ordinance is a zoning ordinance, and the proposed permits and plans required for construction are zoning permits and plans, the City has no zoning authority over County properties used for public purposes because the County siting its government operations "is without limitation, and its judgment thereon is not subject to review."[12] Moreover, permitting a city to zone county government operations would upset the balance of powers between cities and counties and make counties subservient to cities.

Lastly, the issues raised on appeal are moot because the County has already finished construction of the Day Report Center. Even if the Court agreed with the City's interpretation of the law, it could not grant the City any relief as there is not an ongoing controversy. Nonetheless, clearing up the division of authority as it pertains to County construction projects within the City will likely prevent additional litigation.

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[12] *Keatley v. Summers Cty. Ct.*, 70 W. Va. 267, 73 S.E. 706, 707–08 (1911).

STATEMENT REGARDING ORAL ARGUMENT

This Court has set this matter for oral argument on September 14, 2022 at 10:00 a.m. Accordingly, the County will make no further comment on the need for oral argument.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing injunctions, the Supreme Court applies "a three-pronged deferential standard of review[:] . . . review[ing] the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, . . . the circuit court's underlying factual findings under a clearly erroneous standard, and . . . questions of law *de novo*." [13] Additionally, when assessing a lower court's grant or refusal of a permanent injunction this Court recognizes that:

> 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.[14]

II. The County is not required to obtain preconstruction permits from the City notwithstanding any City ordinance, because W. Va. Code § 8-12-14 specifically states that cities are barred from requiring such permits for county construction activities on county properties.

The circuit court correctly enjoined the City from taking any further action to stop work, issue fines, etc., in pursuit of requiring the County to obtain permission from the City prior to constructing or redeveloping County property. W. Va. Code § 8-12-14 provides:

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[13] Syl. Pt. 1, *Camden–Clark Memorial Hosp. Corp. v. Turner*, 212 W.Va. 752, 575 S.E.2d 362 (2002) (internal quotations omitted).

[14] Syl. Pt. 4, *State ex rel. Donley v. Baker*, 112 W.Va. 263, 164 S.E. 154 (1932).

> 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.

Although plenary power is given to the City to require permitting under state law or municipal ordinance prior to the erection, construction, repair, or alteration of any structure or equipment within the municipal boundaries, the legislature clearly and unequivocally exempted such permitting requirements for all government entities for structures to be used by government entities. Here, it is not disputed that the Day Report Center is on County owned property and is to be used by the County. It is also not in dispute that the Stormwater Ordinance imposes some conditions precedent to qualifying construction projects including land disturbance permits and approved plans by the City. Because the City attempted to halt construction of the Day Report Center absent a permit and plan approval in violation of W. Va. Code § 8-12-14, the circuit court correctly enjoined the City from any further enforcement action against the County for constructing the Day Report Center.

This statute seems clear enough. However, the City insists that the County is required to obtain a land disturbance permit which it now differentiates from all other pre-construction permits. A land disturbance permit is required prior to performing any "Land Disturbance Activity" under the Ordinance. The activity in question would meet the definition of land disturbance activity in the City's Stormwater Management Ordinance. A land disturbance permit requires submission of an erosion & sediment control plan; a stormwater management plan; and

maintenance requirements, which include entering into an inspection and maintenance agreement that is binding on all subsequent owners of the land.

The Notice of Violation and the Stormwater Ordinance state "No owner or developer shall receive a Land Disturbance Permit without first meeting the requirements of this Ordinance prior to commencing the proposed activity."[15] Therefore, based on the express language regarding a land disturbance permit, it is a permit required as a condition precedent to the erection, construction, repair or alteration of any structure or of any equipment or part of a structure. It is exactly what the West Virginia Code prohibits a municipality from imposing on another government entity.

The City states that this permit is not a "building permit" such as those contemplated by the statute (which cannot withstand scrutiny as shown above), and frames its position as one where it is merely reacting to the requirements of the West Virginia Department of Environmental Protection ("DEP"). However, that is also untrue.

In the DEP General National Pollution Discharge Elimination System Water Pollution Control Permit, the "Requirements of SWMP" section states, in subsection 6, "In instances where this permit specifies that the MS4 regulate public projects and facilities, the MS4 is expected to only regulate those entities where they have jurisdiction and/or authority."[16] This statement demonstrates that the DEP realizes there will be situations where an MS4 permit holder will be unable to enforce all requirements against another public entity, as is the case here.[17] Moreover,

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[15] App. at 16 and 154.
[16] App. at 84.
[17] Berkeley County also has a county wide municipal separate storm sewer system ("MS4") called the Berkeley County Public Service Stormwater District. Under the County's Stormwater Ordinance, the Stormwater District regulates construction activities outside the City, but it does not require land disturbance permits for other public construction projects such as those of the Board of Education or the Division of Highways. The DOH also holds an MS4 permit.

even if the City was enforcing a state law, W. Va. Code § 8-12-14, bars a city from requiring permitting even if it is enforcing a state law, and not just a local ordinance. The City's MS4 Permit from the DEP and stormwater management plan do not specify that the City's MS4 regulate public projects, but even if it did state that it regulated public projects, the City does not have the authority to require the County to obtain a land disturbance permit as West Virginia Code § 8-12-14 explicitly precludes such authority.

III. The city incorrectly states that the Court found that the entire Stormwater Ordinance does not apply to the County. Rather the Order simply stated that the County does not require preclearance from the City prior to building the Day Report Center including repairing the parking lot.

The County has never argued and the Court below did not find that the Stormwater Ordinance in total does not apply to the County, County activity, or County properties. Rather, the Order simply addressed the need to get permission from the City prior to developing or redeveloping County properties. For instance, the Stormwater Ordinance "prohibits non-stormwater illegal discharges or dumping into the municipal storm sewer system."[18] The County is not arguing that it has free reign to dump pollutants into the storm drain without permission and without consequence. Rather, the County, and the court below recognize that the City may not require permitting prior to development or redevelopment of County buildings or structures.

IV. The Stormwater Ordinance is not a zoning ordinance.

The City's Stormwater Ordinance is not a land use or zoning ordinance as the City contends. This Court has explained that "[z]oning is concerned with whether a certain area of a community may be used for a particular purpose while planning involves how that use is

[18] App. at 144.

undertaken."[19] The reconstruction of the parking lot at issue clearly involves the question of how the use of the land is "undertaken", and not whether the area may be used for a particular purpose. The City does not contend that the site of the Day Report Center and its parking lot could not be used as a Day Report Center or a parking lot under its ordinances. Rather, the City contends that County must get a permit and review from the City prior to reconstructing the already existing parking lot for a permitted use under the City's Zoning Ordinance.

Lastly, the Notice of Violation issued by the city states that the NOV may be appealed to the City Council itself, not to the City of Martinsburg Board of Zoning Appeals.[20] However, the Stormwater Ordinance provides for neither an appeal to the City Council as the NOV states, or to the Board of Zoning Appeals as the city's Zoning Ordinance does for zoning appeals. Instead the Stormwater Ordinance permits appeals to "the City of Martinsburg Planning Department . . . [and] If, upon Planning Department review, the issue remains unresolved the appeal will be presented to the Berkley [sic] County Circuit Court." Nowhere does the Stormwater Ordinance contemplate zoning or land use decisions. The simple reason for that is because the Stormwater Ordinance does not have anything to do with whether certain areas of the city are used for a particular purpose, but it concerns the regulation of Stormwater and implementation of best management practices for stormwater across all zones of the City, regardless of how zoned.

V. The City has no zoning authority over County properties used for public purposes.

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[19] Syl . Pt. 1. *Kaufman v. Plan. & Zoning Comm'n of City of Fairmont,* 171 W. Va. 174, 298 S.E.2d 148 (1982); *Bittinger v. Corporation of Bolivar*, 183 W. Va. 310, 314, 395 S.E.2d 554, 558 (1990).

[20] Notice of Violation App. at 15;

Much like the power to tax is the power to destroy, the unfettered power to zone is the power to destroy.[21] W. Va. Code § 7-3-2 mandates that every county "shall provide at the county seat thereof a suitable courthouse and jail, together with suitable offices for the judge of the circuit court and judges of courts of limited jurisdiction, clerks of circuit courts, courts of limited jurisdiction and of the county commission, assessor, sheriff, prosecuting attorney, county superintendent of schools, and surveyor . . ." Moreover, counties are explicitly "authorized and empowered to acquire real estate . . for the erection, construction, equipment, leasing and renting of a courthouse, hospital, other public buildings, or jail."[22] Nonetheless, the City contends that it has the authority to zone out of the City any sort of County government use that it wishes, because of the Land Use Act, which authorizes cities "to enact a zoning ordinance that 'shall cover a municipality's entire jurisdiction,' . . . and enforce its Ordinance against "a person or unit of government.'"[23]

This Court has long recognized that the seat of county governments is designated to a municipality within the county and that the county may choose where in the county seat to conduct its affairs:

> . . . it is settled by the fact that under our statutes the county court may at its pleasure change the location of the court-house, jail or other public buildings at the county-seat to any point, that they may think proper, at any time, so that the same be at the county-seat, purchasing or providing at their pleasure new and other buildings whenever they may think proper, provided only such buildings be

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[21] "An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation." *M'Culloch v. State of Maryland*, 17 U.S. 316, 327, 4 L. Ed. 579 (1819).

[22] W. Va. Code § 7-3-5.

[23] Petitioner's brief at 4 citing W. Va. Code § 8A-7-1 and § 8A-10-3. W. Va. Code § 8A-1-2 defines unit of government as "any federal, state, regional, county or municipal government or governmental agency." It is unclear from the City's argument if it is arguing that the City's zoning ordinance applies to state and federal government properties as well the County's.

> located at the county-seat, that is, the town chosen as the county-seat.[24]

This Court has gone on to find that the authority to locate county government buildings within the county seat as set forth in W. Va. Code § 7-3-2 is "without limitation":

> [Counties are] authorized to acquire, by purchase or otherwise, so much land as may be requisite or desirable for county purposes. The statute does not prescribe the quantity which a county court may so acquire; what tribunal, then, is to be the judge of how much is "requisite or desirable"? The county court, of course. Its discretion in this matter is without limitation, and its judgment thereon is not subject to review.[25]

Although the issue of a city limiting the location of county governmental activities through zoning has not directly been addressed by this Court, this Court has found that other public buildings are not subject to a city's zoning ordinance. In *City of Charleston v. Se. Const. Co.,* this Court found that a state office building "is a public building, and is not subject to the zoning ordinance or the building code of The City of Charleston."[26] The Court reasoned that permitting the City of Charleston to regulate state office buildings through zoning:

> . . .would make the Legislature subservient to every future action of the Council of the City of Charleston, and thus reside in the authorities of that city future indefinite powers without any standards whatsoever to guide or control them, in which event the Council of the City of Charleston could act arbitrarily and capriciously.[27]

When looking at the balance of powers between municipalities and county boards of education, the West Virginia Attorney General has opined that a board of education constructing

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[24] *Doolittle v. Cabell Cty. Ct.,* 28 W. Va. 158, 183–84 (1886)
[25] *Keatley v. Summers Cty. Ct.*, 70 W. Va. 267, 73 S.E. 706, 707–08 (1911).
[26] *City of Charleston v. Se. Const. Co.*, 134 W. Va. 666, 64 S.E.2d 676 (1950).
[27] *Id.* 134 W. Va. at 677, 64 S.E.2d at 682.

a school need not obtain from a municipality building permits[28] or zoning use permits.[29] Other jurisdictions that have reviewed similar city versus county disputes have come to the conclusion that local municipal restrictions may not restrict a county, as counties are an administrative arm of the state. For instance, in *Los Angeles Cnty. v. City of Los Angeles,*[30] a California appellate court found that the City of Los Angeles, cannot restrict Los Angeles County construction projects on county land through the city's building or zoning ordinances. In Missouri, the state Supreme Court found that the Village of Bel-Ridge could not through its zoning ordinance restrict St. Louis County from constructing an incinerator and landfill.[31] Similarly, when the Borough of Beaver Pennsylvania's Board of Zoning Adjustment sought to impose certain requirements on Beaver County public facilities, a Pennsylvania court found that the Borough had no authority to do so.[32]

A similar issue arose in Maryland when the Town of Poolesville asked the Maryland Attorney General whether it could restrict the use of Montgomery County properties through the Town's zoning ordinance, and the Maryland Attorney General opined that "the Town may not require the County to obtain the Town's approval as a prerequisite to establishing County facilities needed in carrying out the County's governmental functions."[33]

Similar to when cities attempt to restrict the use of county property, a county's ability to restrict a municipalities property through zoning has been limited. In Anderson County, South Carolina the County sought to stop the construction of a wastewater treatment facility in an unincorporated part Anderson County by the City of Easley. Even though the City of Easley is

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[28] 45 W. Va. Op. Att'y Gen. 66 (1952).
[29] 51 W. Va. Op. Att'y Gen. 150 (1964).
[30] *Los Angeles Cnty. v. City of Los Angeles*, 212 Cal. App. 2d 160, 28 Cal. Rptr. 32 (Ct. App. 1963).
[31] *Appelbaum v. St. Louis Cnty.*, 451 S.W.2d 107, 108 (Mo. 1970).
[32] *Beaver Cnty. v. Beaver Zoning Bd.*, 50 Pa. D. & C.2d 579 (Pa. Com. Pl. 1970).
[33] 73 Md. Op. Att'y Gen. 238 (1988).

not in Anderson County, but in nearby Pickens County, the Supreme Court of South Carolina held that the County could not restrict the City of Easley from building the plant.[34]

Not every state that has looked at municipal regulation of county property has decided to adopt a strict rule that there is no city zoning regulation over county property. But, this does not give a city plenary authority to restrict the use of County property for zoning purposes. The Supreme Court of Ohio found that, when the City of East Cleveland attempted to stop the Board of County Commissioners of Cuyahoga County from permitting the Cuyahoga Board of Mental Retardation from building a school on County property, courts must weigh the general public purposes served by each political subdivision.[35]

Here, the City is asking this Court to find that the County is subservient to every future action of the City, and that the County may only place public buildings in locations the City approves, and for the City to have the final authority whether a County public building can be used for a particular purpose. Because the County is not subservient to the City, no city zoning ordinances can restrict the type of use of County owned public property. Even, if the Court were to rule that the Stormwater Ordinance is a zoning ordinance and that city permitting may apply to county property, then a balancing test should apply. In such case, the County's interest in reconstructing the parking lot to provide recovery and community correction services to Berkeley County residents outweighs any interest the city has in a land disturbance permitting process.

VI. The claim for relief raised by the City is moot because the reconstruction of the Day Report Center parking lot is already complete.

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[34] *Anderson Cnty. v. Combined Util. Comm'n of City of Easley*, 290 S.C. 85, 88, 348 S.E.2d 359, 360 (1986)

[35] *City of E. Cleveland v. Bd. of Cnty. Comm'rs of Cuyahoga Cnty.*, 69 Ohio St. 2d 23, 430 N.E.2d 456 (1982).*See also County of Venango v. Borough of Sugarcreek, Zoning Hearing Bd.*, 534 Pa. 1, 626 A.2d 489 (1993).

The City asks this court to "dissolve the permanent injunction and require that the County comply with the requirements of the Stormwarer Management Ordinance, and failure to do so will result in the City's issuance of a Stop Work Order."[36] Because the construction is already complete and the parking lot already repaved, issues of site plan approval, permitting, and stop work orders are moot. Mootness occurs when there is a "lack of any actual controversy between litigants, as a result of which any judicial ruling would have no practical effect."[37] A moot case generally cannot properly be considered on its merits. In fact "[m]oot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court."[38]

Here, the City claims that it intends to reissue a stop worker order for work that is already complete. There are no controverted rights to determine, but rather abstract questions of what authority the City may have in future development of County land for public purposes. Without a controversy before the Court as to the permitting of the parking lot repair, as it has already been repaired, there is no actual relief requested by the City other than it wants to enforce a stop work order and require permitting for the next County construction project within the city. Because the claim for relief in this appeal is moot, this Court lacks subject matter jurisdiction.

That being said, a ruling on the merits would clarify the rights of political subdivisions and prevent future litigation. The County sought an injunction to prevent the city from interfering with the construction of the Day Report Center. The Day Report Center was completed prior to the issuance of the injunction, while a temporary restraining order was in place. It is unclear what

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[36] City's Amended Brief at p. 10.
[37] MOOTNESS, Black's Law Dictionary (11th ed. 2019).
[38] Syl. pt. 1, *State ex rel. Lilly v. Carter,* 63 W.Va. 684, 60 S.E. 873 (1908).

actual relief the City is seeking for the Day Report Center Project on appeal as the reason for the injunction has lapsed. Nonetheless, the County understands that future litigation may be prevented with a ruling from the Court on whether the City can require the County to obtain permits under the Stormwater Ordinance for construction of County projects, and a ruling on whether the City may through its zoning ordinance decide whether or where County government operations occur within the City. Absent clear guidance the County may be hesitant to pursue construction projects aimed at combatting the opioid epidemic, or other County government functions within the City of Martinsburg.

CONCLUSION

The circuit court correctly applied W. Va. Code § 8-12-14 and enjoined the City from taking any further action to halt progress of the Day Report Center. This Court should affirm the circuit court based on the clear language of W. Va. Code § 8-12-14, and further find that the Stormwater Ordinance is not a zoning ordinance, and that the City has no authority to apply its zoning restrictions to County property's used for public purposes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anthony J. Delligatti, do hereby certify that on this 3rd day of August, 2022, I have served the foregoing "Respondent's Brief" by electronic mail (with permission from counsel) to opposing counsel:

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