

NO. 33457

COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA EX REL. NEW VISION
PROPERTIES, II, INC. a West Virginia corporation;
MICHAEL C. GOODE, husband and wife; and
JOHN J. GERVASI and LINDA S. GERVASI,
Husband and wife,**

Petitioners,

v.

**THE COUNTY COMMISSION OF JEFFERSON COUNTY,
A public 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. SURKAMP, Member;
GREGORY A. CORLISS, Member; and
JENNIFER MAGHAN, Clerk of the County Commission
Of Jefferson County,**

Respondents.

**AMICUS CURIAE ON BEHALF OF CONTRACT PURCHASERS OF LOTS
IN THE WINDMILL CROSSING SUBDIVISION OWNED BY
NEW VISION PROPERTIES, INC.**

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INTRODUCTION AND INTEREST IN THE CASE

Dr. Gagan Singh, Dr. Sharon Peake, Dr. Alfret Shakesprere, Peter S. Grasso, Jr., Chris Gormley, and Joe Camarda, the amicus, as contract purchasers of lots in the Windmill Crossing subdivision, owned by New Vision Properties, II, Inc., assert their interest in this case and the necessity to file an amicus curiae brief pursuant to the accompanying Motion for Leave to File an amicus curiae brief, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure.

The contract purchasers will at some point be the ultimate owners of certain parcels and lots in the Windmill Crossing subdivision upon completion of the annexation. Their interests are directly affected by the actions of the County Commission of Jefferson County¹ in refusing to fulfill their statutory obligation pursuant to West Virginia Code §8-6-4 to approve the petition for annexation filed by the City of Charles Town for New Vision Properties, II, Inc., *et al.*

FACTUAL BACKGROUND

The amicus curiae adopt the Petitioner, New Vision Properties, II, Inc., *et al.*'s procedural history, statement of facts, standard of review and exhibits.

ARGUMENT

1. *The County Commission has no standing to challenge a certificate of annexation issued by a municipality under W. Va. Code §8-6-4 because the County Commission has no interest in any of the proceedings for annexation except as provided by statute.*

The Jefferson County Commission lacks standing in the case. West Virginia Code §8-6-4 identifies who has an interest in the annexation, being West Virginia Code §8-6-4(a)² as: (1) the

¹ Herein "County Commission."

² West Virginia Code §8-6-4(a) states:

governing body, (i.e., the municipality); (2) a majority of the qualified voters; and (3) a majority of all freeholders.

In *The City of Morgantown*, 159 W. Va. 788, 226 S.E.2d 900 (1976), this Court held:

“Finally, we hold that the County Commission has no interest, personal or official, in municipal annexation matters which come before it other than to administer the law. Article six sufficiently identifies those who have an interest in annexations as including the governing body of the municipality and the qualified voters and freeholders of the municipality and of the territory to be annexed.”

Likewise, West Virginia Code § 8-6-4(a) specifically identifies those who have an interest in the annexation and the County Commission is not among those present on that list. Consequently, the County Commission lacks standing to challenge the annexation.

2. Failure of the County Commission to appeal the municipal annexation legislation by Writ of Certiorari under W. Va. Code §8-6-4(c) precludes a challenge to the enacted annexation ordinance.

The County Commission failed to appeal the annexation ordinance, (adopted by the City of Charles Town on February 5, 2007), by Petition for Writ of Certiorari within four months as required by West Virginia Code §8-6-4(c). The action of the municipality in adopting the annexation ordinance is therefore final. The ordinance cannot be further challenged.

West Virginia Code §8-6-4(c) states:

“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, chapter fifty-three of this code.”

W. Va. Code §8-6-4(c)

“(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.”

West Virginia Code §53-3-1, et seq. determines the manner in which the writ of certiorari must be filed. West Virginia Code §53-3-1 states:

“Jurisdiction of writs of certiorari (except such as may be issued from the supreme court of appeals, or a judge thereof in vacation) shall be in the circuit court of the county in which the record or proceeding is, to which the writ relates. Any such writ may be awarded either by the circuit court or by the judge thereof in vacation.”

W. Va. Code §53-3-1

The County failed to challenge the validity of the ordinance by certiorari in the Circuit Court of Jefferson County. The County Commission's failure to challenge the petition within four months means the ordinance is valid. In *Lipscomb v. Tucker County Commission*, 197 W. Va. 84, 475 S.E.2d 84 (1996) the Court held:

“On the issue of the timeliness of an application for a writ of certiorari, we first note that West Virginia Code §53-3-1, et seq., does not provide a period of limitations, ordinarily, in the absence of a statute providing a period of limitations for applying for a writ of certiorari, this Court has utilized the doctrine of laches; however, in determining the time for the application of the doctrine of laches, this Court has applied, by way of analogy, the statutory period for filing an appeal, absent some showing of hardship or other good cause to warrant an extension. See *Bee v. Seaman*, 36 W. Va. 381, 15 S.E. 173 (1892); and *State ex rel. Gibson v. Pizzino*, 164 W. Va. 749, 266 S.E.2d 122 (1979). As noted from appellant's argument, the time allowed for statutory appeals to the circuit court from orders of the County Commission is four months. W. Va. Code §58-3-4 (1966).

Lipscomb v. Tucker County Commission, 197 W. Va. 84, 475 S.E.2d 84 (1996)

Because of the failure to challenge the validity of the municipal annexation ordinance in the manner provided for by West Virginia Code §8-6-4(c), the annexation legislation cannot now be challenged by the County Commission.

3. The County Commission's role in approving an annexation petition is statutory and mandatory.

The County Commission has no discretion in approving the annexation since the County

Commission did not challenge the underlying annexation ordinance.

West Virginia Code §8-6-4(g) states:

“If satisfied that the petition is sufficient in every respect, the governing body [i.e., the municipality] shall enter that fact upon its journal and forward a certificate to that effect to the county commission of the county wherein the municipality or the major portion of the territory thereof, including the additional territory, is located. The county commission shall thereupon enter an order as described in the immediately preceding section of this article. After the date of the order, the corporate limits of the municipality shall be as set forth therein.”

West Virginia Code §8-6-4(g) [Bracketed material added.]

Once the order of annexation adopted by a municipality has been certified to the county under §8-6-4(g) (certifying that the municipality is satisfied that the petition is sufficient in every respect), the requirements of the County Commission are mandatory and not discretionary.

Again, referring to the *City of Morgantown* case, supra, the court has held that:

“[t]he powers exercised by the county commission with regard to municipal annexation are wholly statutory and it can exercise no other powers except those implicit in the specific grant. The nature and character of the function of the commission with regard to annexation by minor boundary adjustment precludes the hypothesis that the Legislature intended it should have the power to appear and defend the legality of its own decisions or to prosecute an appeal from a reversal of its decision.” *Miles v. McKinney*, 174 Md. 551, 199 A. 540 (1938).

City of Morgantown, 159 W. Va. 788, 226 S.E. 2d 900 (1976).

While the *City of Morgantown* case dealt with West Virginia Code §8-6-5, (Annexation by Minor Boundary Adjustment), the same specific statutory procedures as to who has standing to challenge the annexation legislation and the administrative function of the County Commission as set forth at West Virginia Code §8-6-4 apply, including the word “shall,” which is mandatory.

The word "shall" means:

" 'It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation.' Syllabus Point 1, *Nelson v. West Virginia Public Employees Insurance Board*, 171 W.Va. 445, 300 S.E.2d 86 (1982)."

Evans v. Evans, 219 W.Va. 736, 639 S.E.2d 828, 833 (2006)

"This Court has long recognized that '[i]t is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.' Syl. pt. 1, *E.H. v. Matin*, 201 W.Va. 463, 498 S.E.2d 35 (1997) (internal citation omitted). See also *State v. Allen*, 208 W.Va. 144, 153, 539 S.E.2d 87, 96 (1999) ('Generally, shall commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary.' (citations omitted))."

Ryan v. Clonch Industries, Inc., 219 W.Va. 664, 639 S.E.2d 756, 764 (2006)

"[t]he crux of the issue is whether the words mean what they say or something else, in this case specifically whether 'shall' means 'shall' or whether it means 'may.' Also, as usual, we hold that words mean what they say and that 'shall' means 'shall;' therefore, we award the writ."

Perry v. Miller, 166 W.Va. 138, 139, 272 S.E.2d 678, 679 (1980)

"We have consistently held that legislative use of 'shall,' means that that to which the word applies must be done, absent a showing of contrary intent."

State ex rel. Gillespie v. Kendrick, 164 W.Va. 599, 265 S.E.2d 537 (1980)

"The use of the word 'shall' is usually considered to be a mandatory word in enactments such as Rule 18(b) and has generally been construed as depriving a party required to do something of discretion to do that act. *Ruble v. Office of Secretary of State*, 192 W.Va. 134, 451 S.E.2d 435 (1994); *Rogers v. Hechler*, 176 W.Va. 713, 348 S.E.2d 299 (1986); and *Terry v. Sencindiver*, 153 W.Va.651, 171 S.E.2d 480 (1969)."

State ex rel. Kern v. Santucci, 201 W.Va. 144, 146, 494 S.E.2d 911, 913 (1997)

Since West Virginia Code §8-6-4(g) uses the word "shall," the County Commission is

required to enter the order approving the annexation. The County Commission has no discretion to exercise, and this Court should issue the Writ of Mandamus directing the entry of the order by the County Commission.

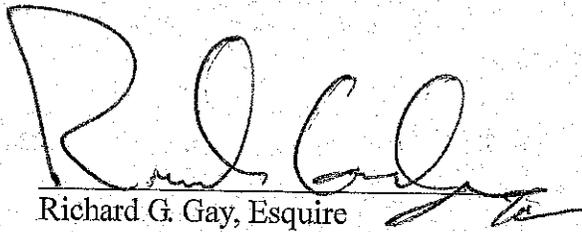
CONCLUSION

Since the County Commission has no standing to challenge the certified ordinance adopted by the municipality and its only interest in the annexation proceeding is statutory, the County Commission has no right to challenge the validity of a municipal annexation ordinance under West Virginia Code §8-6-4, - except the theoretical right to file a Writ of Certiorari as provided in §8-6-4(c) of the West Virginia Code within four months of the adoption of the municipal ordinance. Since the County Commission failed to file a Writ of Certiorari to the Circuit Court of Jefferson County raising any challenge to the validity of the annexation ordinance within the four months as required by West Virginia Code Chapter 53 Article 3, and by §8-6-4(c), their role is ministerial and mandatory, that is, they must enter an order approving the annexation pursuant to West Virginia Code §8-4-6(g), in the manner prescribed by West Virginia Code §8-6-3.

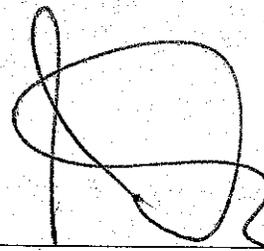
For the foregoing reasons, the Writ of Mandamus should issue directing the entry of such order as required by statute.

Respectfully submitted,

Dr. Gagan Singh, Dr. Sharon Peake,
Dr. Alfred Shakesprere, Peter Grasso,
Chris Gormley and Joe Camarda,
By counsel.



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JENNIFER MAGHAN, Clerk of the County Commission
Of Jefferson County,

Respondents.

CERTIFICATE OF SERVICE

I, Richard G. Gay, Esquire and/or Nathan P. Cochran, Esquire, counsel for the Amicus Curiae, and hereby certify that a true and correct copy of the foregoing **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AMICUS CURIAE BRIEF ON BEHALF OF CONTRACT PURCHASERS OF LOTS IN WINDMILL CROSSING SUBDIVISION OWNED BY NEW VISION PROPERTIES, II, INC. and CERTIFICATE OF SERVICE** was served by United States mail, first-class, postage prepaid, this 9th day of August, 2007 upon the following parties:

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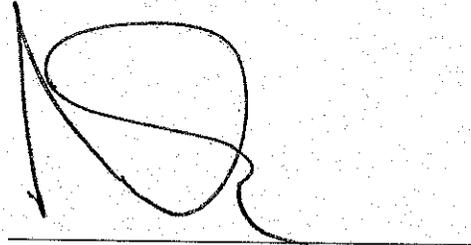
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A handwritten signature in black ink, appearing to read "R. G. Gay", written over a horizontal line.

Richard G. Gay, Esquire
Nathan P. Cochran, Esquire