

IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

THE SHEPHERDSTOWN OBSERVER, INC.,

APPELLANT,

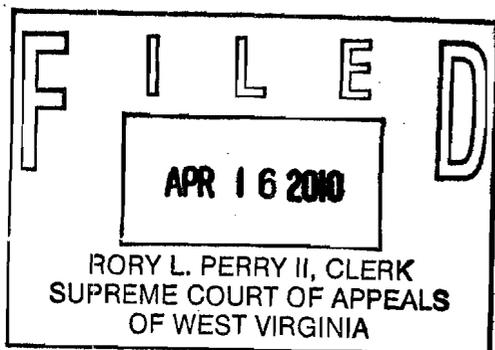
VS.

Docket Number: 35446
Circuit Court of Jefferson County
Civil Action No. 2009-C-169

JENNIFER MAGHAN,

APPELLEE

BRIEF OF THE APPELLANT, SHEPHERDSTOWN OBSERVER, INC.



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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Appellant, The Shepherdstown Observer, Inc. (“Observer”), brought a civil action in the Circuit Court of Jefferson County pursuant to the West Virginia Freedom of Information Act (“WVFOIA”)¹ seeking an order requiring the County Clerk, Appellee Jennifer Maghan, to disclose petitions asking for a zoning referendum. W.Va. Code § 8A-7-8a allows citizens to request a referendum on zoning ordinances within ninety days of their enactment by a County Commission. The Appellee Clerk refused to permit the Observer to review petitions in her possession that requested an election to be held on whether or not a recently enacted zoning ordinance should remain in effect. Appellee Clerk moved to dismiss the Complaint claiming the zoning petitions sought by Appellant newspaper were not “public records” as defined by WVFOIA. The petitions were not public records under WVFOIA, she asserted, because a public body had not prepared them. The Circuit Court agreed with Appellee and granted her Motion to Dismiss. This Appeal followed.

PARTIES

The Observer is a monthly newspaper based in Shepherdstown, West Virginia. It reports on state, local, and national politics, including long-form investigative pieces. It is published in traditional paper format and on the Internet at www.wvobserver.com

Key to the Observer’s mission is its ability to access public information so that it may perform its constitutionally protected function of informing citizens about important public issues consistent with the First Amendment values underlying the guarantee of freedom of the press.

¹ W. Va. Code 29B-1-1, et seq.

Appellee Jennifer Maghan is the Clerk of the County Commission of Jefferson County. She is responsible for holding elections and referenda in Jefferson County, West Virginia. She maintains possession of all voter registration and election records of Jefferson County.

II. STATEMENT OF THE FACTS OF THE CASE

On October 2nd, 2008, the Jefferson County Commission passed a new zoning ordinance to replace a prior zoning ordinance. W. Va. Code §8A-7-7, enacted in 2008, allows a referendum on newly enacted zoning ordinances upon presentation to a County Clerk of signatures of 10 percent of the voters in the “affected” parts of the County. The petition must be submitted within 90 days of enactment of the zoning ordinance. In the case at bar, signatures were collected and presented to the County Clerk for verification. Although the 90 days had not yet expired, the Clerk’s office began examining each name, signature and address comparing them to lists and databases of registered voters.² During this process, the Clerk apparently maintained a running tally of valid and invalid signatures. Eighteen percent of the signatures were found by the Appellee to be invalid.

According to Appellee Clerk, a “citizen group” collected signatures and “presented them.” The Clerk’s deputies, through emails and in person, actively communicated with signature gatherers from the “citizen group” during the 90-day period about the running tally of valid and invalid signatures. Emails in the record show that during the process of certifying the petition signatures, the Clerk’s office regularly revealed the names and signatures to two of the persons behind the petition drive. An example of these emails is attached as Exhibit A.

² See attached email correspondence between the Clerk’s office and third parties, which is all a part of the Record.

After the expiration of the statutory 90-day period, the Appellee Clerk declared that the requisite 10 percent of voters had petitioned for a zoning referendum and that a referendum would be held. The certification of this finding is attached as Exhibit B.

The Observer submitted a WVFOIA letter to the Appellee requesting that she allow the newspaper to review the referendum petition. (See Exhibit C). The Appellee Clerk refused. (See Exhibit D). The Observer filed the instant action pursuant to the WVFOIA asking the Circuit Court to order the requested records be disclosed.

The Clerk moved to dismiss, claiming the information sought by the newspaper fell outside the WVFOIA's definition of a "public record." She asserted that "public records" are narrowly limited to those documents "prepared, owned and retained" by a public body. Because the requested petition signatures were prepared by members of the public and not by a public body, Appellee asserted that the complaint should be dismissed.

The *only* issue briefed and argued by the parties below was whether the suit should be dismissed because a public body did not prepare the records sought, and were therefore not public records as defined by the WVFOIA. The Circuit Court granted the Clerks motion and dismissed the suit. (See the attached Circuit Court's Order, Exhibit E).

The Circuit Court found that "[b]ecause the records requested were not prepared by the public body, they do not qualify as public records within the meaning of the Freedom of Information Act, and the Plaintiff has failed to state a claim upon which relief may be granted." Cir. Ct. Order, ¶ 6. The Circuit Court stated:

The West Virginia Supreme Court has stated that it finds the definition of a public record in W.Va. Code 29B-1-2 to be "plain and unambiguous." *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W.VA. 648, 650, 453 S.E.2d 631, 633 (1944) Further, in *Daily Gazette Company Inc. v. Withrow*, 177 W.Va. 110, 350 S.E.2d 738 (1986), the Court ar-

gued that ‘[i]n addition to containing information ‘relating to the conduct of the public’s business,’ a writing must have been ‘prepared, owned and retained by a public body’ in order to be a ‘public record’ under W.Va. Code 19B-1-2(4).” *Id.* At 116. Finally, in another decision addressing the definition of a public record, *State v. Nelson*, 189 W.Va. 778, 434 S.E.2d 697 (1993), the Court found that “[a]ccording to this legislative definition, the nature of a ‘public record’ is not based upon public availability...but rather it is based upon whether a public body prepares, owns and retains the record.” *Id.* at 787.

Cir Ct Order, ¶ 8. The Circuit Court opined that “The West Virginia Supreme Court has plainly interpreted the definition contained in the West Virginia Code, finding that a public record must not only relate to the public’s business, but also must have been a record that was created by the public body in the first instance.” *Id.*

III. ASSIGNMENTS OF ERROR

THE CIRCUIT COURT ERRED IN HOLDING THAT INFORMATION SUBMITTED TO A PUBLIC BODY DOES NOT FALL WITHIN THE WVFOIA DEFINITION OF A "PUBLIC RECORD."

THE CIRCUIT COURT ERRED IN HOLDING THAT THE ACT OF SIGNING A ZONING REFERENDUM PETITION IS ANALOGUS TO CASTING A SECRET BALLOT ALTHOUGH THE ISSUE WAS NOT RAISED, BRIEFED NOR ARGUED BY THE PARTIES.

THE CIRCUIT COURT ERRED IN HOLDING THAT PUBLIC ACCESS TO A ZONING REFERENDUM PETITION WOULD HAVE A CHILLING EFFECT ON THE ABILITY OF CITIZENS TO PETITION THE GOVERNMENT ALTHOUGH THE ISSUE WAS NOT RAISED, BRIEFED NOR ARGUED BY THE PARTIES AND NO PROBATIVE RECORD EVIDENCE SUPPORTS THE HOLDING.

IV. DISCUSSION

A. STANDARD OF REVIEW

A Circuit Court's order granting a motion to dismiss a complaint is reviewed under a *de novo* standard. Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995); see *Richardson v. Kennedy*, 197 W.Va. 326, 331, 475 S.E.2d 418, 423 (1996).

B. THE CIRCUIT COURT ERRED IN HOLDING THAT INFORMATION SUBMITTED TO A PUBLIC BODY DOES NOT FALL WITHIN THE WVFOIA DEFINITION OF A "PUBLIC RECORD"

This is a case of first impression in West Virginia. The circuit court took the unprecedented view that disclosure provisions of the WVFOIA apply *only* to documents literally "prepared" by public bodies. In other words, the issue presented in this appeal is whether documents that relate to the public's business and are owned and retained by a public body fall outside the WVFOIA definition of "public record" and thus may not be considered public records because they were not "prepared" by a public body.

1. THE CIRCUIT COURT FAILED TO LIBERALLY CONSTRUE THE TERM "PUBLIC RECORD" CONSISTENT WITH THE BROAD DISCLOSURE MANDATE OF WVFOIA

The Circuit Court failed to liberally construe the WVFOIA's definition of "public record." The WVFOIA explicitly states:

Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the state of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to

full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created. **To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.**

W. Va. Code § 29B-1-1. (Emphasis added). Instead, the Circuit Court chose an extraordinarily narrow, crabbed, interpretation of “public record” that, if applied statewide, would cripple the public’s ability to obtain full and complete information regarding the affairs of government and the official acts of government officials and employees. Indeed, the Circuit Court’s order does not even acknowledge the policy considerations underlying WVFOIA nor the legislative mandate that the statute be liberally construed.

Recognizing the explicit legislative mandate, this Court has repeatedly held that, “[t]he disclosure provisions of this State's Freedom of Information Act . . . are to be liberally construed, and the exemptions to such Act are to be strictly construed.” Syl. pt. 4, *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799(1985);. *see also In re Charleston Gazette FOIA Request*, 222 W.Va. 771, 671 S.E.2d 776 (2008). In *Hechler v. Casey*, this Court reminded lower courts and public bodies subject to WVFOIA that:

This liberal construction of the State FOIA and the concomitant strict construction of the exemptions thereto are of fundamental importance in deciding any case involving construction of this statute.

175 W.Va. 434, 443, 333 S.E.2d 799, 808 (1985). Moreover, this Court has emphasized that the “purpose of the [WVFOIA] legislation is to open the workings of government to the public so that the electorate may be informed and retain control.” *Ogden Newspapers, Inc. v. City of Williamstown*, 192 W.Va. 648,650, 453 S.E.2d 631, 633 (1994). WVFOIA’s definition demonstrates the public nature of such information: “public record includes any writing containing in-

formation relating to the conduct of the public's business" W. Va. Code § 29B-1-2(4)(emphasis added).

In *Daily Gazette Co., Inc. v. Withrow*, 177 W.Va. 110, 115, 350 S.E.2d 738, 743 (1986), this Court emphasized that the WVFOIA contains:

a liberal definition of a "public record" in that it applies to any record which contains information "relating to the conduct of the public's business," without the additional requirement that the record is kept "as required by law" or "pursuant to law," as provided by the more restrictive freedom of information statutes in some of the other states.

See Braverman and Hepler, *A Practical Review of State Open Records Laws*, 49 Geo. Wash.L.Rev. 720, 733-35 (1981). *Withrow* warned that the term " 'public record' should not be manipulated to expand the exemptions to the State FOIA." *Withrow* at 744 (emphasis added)(citations omitted).

The public's right to be informed concerning the affairs of their government lies at the very core of the principles of democratic governance. In contrast, the Circuit Court's interpretation of "public record" is so narrow and restrictive that it excludes from WVFOIA's disclosure mandate all documents or information not *literally* prepared by a public body. The Circuit Court's narrow, unprecedentedly restrictive interpretation of "public record" is contrary to law and must be rejected.

2. ZONING PETITIONS ARE "PUBLIC RECORDS" UNDER WVFOIA

The Circuit Court, in narrowly defining public records, not only ignored the statute's liberal construction mandate, it also failed to critically analyze the statute. W. Va. Code §29B-1-1 defines terms used in the WVFOIA:

(1) "**Custodian**" means the elected or appointed official charged with administering a public body.

(2) **“Person” includes** any natural person, corporation, partnership, firm or association.

(3) **“Public body” means** every state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof; and any other body which is created by state or local authority or which is primarily funded by the state or local authority.

(4) **“Public record” includes** any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body.

(5) **“Writing” includes** any books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics.

W.Va. Code 29B-1-2. (Emphasis added).

Looking at the definition of “public records” in context demonstrates there are two ways the Legislature ascribed meaning to WVFOIA’s statutory definitions. First, in sections 1 and 3, the Legislature uses the word “means”: “ ‘Custodian’ *means*...” and “ ‘public body’ *means*.” In contrast, the Legislature adopted a different approach in subsections 2, 4 and 5, using the word “includes”: “ ‘person’ includes...” “ ‘public record’ includes...,” and “ ‘writing’ includes...”

“Include” is defined as “to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate.” WEBSTER'S THIRD NEW INT'L DICTIONARY, 1143 (1993). The Supreme Court of the United States has noted the term “including” “is not one of all-embracing definition, but rather, connotes simply an illustrative application of the general principle.” *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100, 62 S.Ct. 1, 86 L.Ed. 65 (1941) (citations omitted). Generally, “the verb ‘includes’ imports a general class, some of whose particular instances are those specified in the definition.” *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 n. 1, 55 S.Ct. 60, 62 n. 1, 79 L.Ed. 232, 235 n. 1 (1934).

Nothing in the WVFOIA indicates the Legislature intended to depart from the normal, accepted use of “include” as introducing an illustrative and non-exclusive list. This interpretation of “includes” has been widely accepted and adopted by federal and state courts. *See e.g., DIRECTV Inc. v. Budden*, 420 F.3d 521, 527-28 (5th Cir.2005) (“the word ‘includes’ is usually a term of enlargement, and not of limitation”) (citation omitted); *Nat’l Satellite Sports, Inc. v. Elisadis, Inc.*, 253 F.3d 900, 913 (6th Cir.2001) (“But this explicit reference to a subset of persons aggrieved was not intended to exclude others ...”).

In *McFadden v. State* 15 So.3d 755, (Fla. App. 4 Dist. 2009) (review granted 24 So.3d 560), a Florida intermediate appellate court recently discussed the use of the word “includes”:

The rule's operative term is *includes* (“term ‘statement’ as used herein *includes* ...”). The State would have us understand that *includes* is here synonymous with *comprise*. We reject this interpretation.

The standard meaning of the word *includes* is not as a term of limitation but only as a partial listing of a larger whole. *See* AMER. HERITAGE DICT. (3d ed.) 913 (“to take in as a part, an element, or a member; to contain as a secondary or subordinate element; to consider with or place into a group, class, or total.”). Indeed, one eminent authority on language has stressed that *includes* should not be employed when *comprises* is intended, as the State would have us do here: “*comprise* is appropriate when what is in question is the content of the whole, and *include* when it is the admission or presence of an item. With *include*, there is no presumption (though it is often the fact) that all or even most of the components are mentioned; with *comprise*, the whole of them are understood to be in the list.” H.W. Fowler, DICT. OF MODERN ENGLISH USAGE (2d ed.), 275.

(Emphasis in the original). *See also McLaughlin v. State*, 698 So.2d 296, 298 (Fla. 3d DCA 1997) (“includes” is term of enlargement not of limitation), *Miami Country Day School v. Bakst*, 641 So.2d 467 (Fla. 3d DCA 1994) (holding that legislature meant “includes” to enlarge definition); *Yon v. Fleming*, 595 So.2d 573, 577 (Fla. 4th DCA), rev. denied, 599 So.2d 1281

(Fla.1992) (holding that within meaning of Uniform Jurisdiction Child Custody Act, “includes” is term of enlargement not of limitation).

If “includes” is ambiguous, then the WVFOIA mandates that it be liberally construed in favor of disclosure.

3. THE WVFOIA AND THIS COURT RECOGNIZE THAT DOCUMENTS PREPARED BY THIRD PARTIES FALL WITHIN THE DEFINITION OF “PUBLIC RECORDS”

The WVFOIA contains eight narrowly construed exemptions to its broad disclosure mandate. W. Va. Code § 29B-1-4.³ Within these exemptions, reference is made to public records prepared by third parties. For instance, exemption 8 exempts “Internal memoranda or letters *received* or prepared by any public body.” (Emphasis added). *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W.Va. 563, 482 S.E.2d 180 (1996). In *West Virginia Development Office*, this Court examined exemption 8, holding that information in the possession of a public body, but not prepared by it, falls within the definition of “public records” that must be disclosed under WVFOIA.

The Court held that the statute “does not exempt from disclosure written communications *between* a public body and private persons or entities . . .” *Id.* at 575, 192 (Emphasis added). The documents ordered released in that case included documents prepared by a private entity – a pulp mill company – that were sent to a public body. Thus, in that case this Court explicitly recognized that non-deliberative materials prepared by private persons and submitted to a public body

³ WVFOIA also includes other exemptions enacted after the tragic events of September 11, 2001, which address concerns about terrorist access to public records that are not relevant to the case at bar. *See* W.Va. Code §29B-1-4 (9)–(19).

---- like the petitions at issue in the instant case---- fall within the definition of “public records” that must be disclosed under WVFOIA.

4. THE TRIAL COURT’S EXTRAORDINARILY RESTRICTIVE INTERPRETATION OF “PUBLIC RECORD” LEADS TO AN ABSURD RESULT TOTALLY AT ODDS WITH THE BROAD PUBLIC DISCLOSURE GOALS OF THE WVFOIA

A well-established rule of statutory interpretation requires rejection of the construction of a statute that produces an absurd result. Syl. Pt. 2, *Conseco Finance Servicing Corp. v. Myers*, 211 W.Va. 631, 567 S.E.2d 641 (2002). Interpreting the WVFOIA definition of “public record” as limiting public access to only those documents *prepared* by a public body would have the absurd result of excluding from public scrutiny hundreds of thousands, if not millions, of documents that have long been open to public examination. Were the circuit court’s interpretation of “public record” to prevail, documents such as deeds, wills, estate records, applications for environmental permits, business, corporate, voting, election campaign contributions and numerous other records of state agencies and commissions as well as local government bodies, would fall outside the definition of “public record.” The Ninth Circuit recently upheld the disclosure of petitions in a different legal and factual context in *Doe v. Reed*, 586 F.3d 671 (9th Cir. (Wash.) 2009) (certiorari granted, 130 S. Ct. 1133). The Circuit Court erred in construing WVFOIA to limit public access only to those documents prepared by public bodies.

It is simply preposterous to assume the legislature intended for the WVFOIA’s definition of “public record” to drastically curtail the scope of public access to important records in government files because they were not “prepared” by a public body. Such a construction of the statute would have a devastating impact upon the public’s right to information about the conduct of the public’s business. Importantly this interpretation would reject more than a century and a

half of actual practice of State and local governments. Ever since West Virginia became a State, its public bodies have recognized as public records a wide variety of documents they retain in their files although prepared by private persons and entities.

5. PUBLIC ACCESS TO PETITION RECORDS PROVIDES A MUCH-NEEDED PROCEDURAL CHECK ON THE REFERENDA PROCESS AND PREVENTS FRAUD.

The very idea that a petition asking for a referendum on a lawfully enacted zoning ordinance that fulfills a legislatively directed function may be concealed from the public is antithetical to the important policies underlying both the WVFOIA and the First Amendment. A petition to the county government seeking a zoning referendum is a quintessential public document. Moreover, state laws like the WVFOIA allow for the detection and prevention of fraud in qualifying referenda for the ballot in the first place. They also provide opponents of referenda with an opportunity to lobby the persons who are, in effect, acting in a legislative capacity. Disclosure of public petitions requesting a referendum on a zoning ordinance furthers the citizens' rights to be informed about a process leading to the possible repeal of a lawfully enacted ordinance.

In the absence of other meaningful checks on the legitimacy of referenda procedures, public disclosure of petitions gives citizens (and journalists who act as their proxy) having an interest in a referendum a means to scrutinize the process to ensure referenda-qualifying requirements are met. The current petition qualification process is based solely on whatever a Clerk believes a private party should submit.

Public access to zoning referenda petitions also allows citizens an opportunity to, *inter alia*, detect fraud where petition signatures are attributed to voters who did not sign or intend to

sign such a petition. Here, the Clerk admits that over eighteen percent of the petitions were, in effect, fraudulent.

Fraud can be a significant problem in signature gathering for ballot measures. One study found, “citizens are often purposely approached at inconvenient times, when they will often sign the petition just to get on with their business,” and “[c]irculators often also misrepresent the substance of the measure.” Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall* 63 (1989). “Most of the time people do not ask to read [a] petition,” and “[p]etition circulators seldom offer to read it.” *Id.* Another study reveals “[p]etitioners report that they can gather several thousand signatures and have not one signer read the petition language when she signs. Instead signers choose to sign or not to sign based entirely on an abbreviated oral representation made by the solicitor.” Richard B. Collins & Dale Oesterle, *Governing by Initiative: Structuring the Ballot Initiative: Procedures That Do and Don’t Work*, 66 U. Colo. L. Rev. 47, 101 (1995).

In fact, many cases of fraud have been documented throughout the history of signature gathering in the United States. Forgery of names extracted from phonebooks, for example, is an all too common occurrence in the referenda petitioning process. Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall* 63 (1989).

In 2006, more than 64,000 petition signatures were challenged in Montana. *Montanans for Justice v. Montana*, 146 P.3d 759 (Mont. 2006). Even though Montana’s Secretary of State had already validated the signatures and certified three ballot initiatives, the Montana Supreme Court was able to confirm wide-spread fraud in the signature-gathering process. *Id.* That Court actually invalidated the challenged signatures and the initiatives then failed to make it to the bal-

lot. The importance of the *Montanans for Justice* case may be seen in that State's recognition of the right to public access to examine petitions leading to the discovery of fraudulent signatures. In contrast, in the case at bar, the Clerk only allowed access to the signature-gatherers themselves, who supported the referendum. No other public access was permitted.

This Court should compare the process used in Jefferson County to the candidate ballot election process used in West Virginia wherein the secret ballot guarantee is fully embraced. West Virginia Code § 3-1-34 actually requires that someone voting in an election declare their name publicly. While the actual ballot may be secret, the act of showing up at a poll and casting a ballot is not at all secret. The fact that a person has voted in a given election is actually observed and recorded by poll workers. There is no anonymity in our elections. This ensures that no one votes more than once. Moreover, anyone can pull a "voter file" and see every citizen's party registration and how often that person voted.

Public access to referenda petitions prevents fraud and other improper petition activity. The Appellee Clerk has acknowledged that in the instant petition process 18% of the signers were ineligible to do so. Unlike other states like Washington, there is no statute or regulation outlining the procedure for signature-gathering or certifying petitions. The process adopted unilaterally by the Appellee kept the entire process in her hands and in the hands of the petition-gatherers.

Public disclosure of zoning referenda is mandated by the WVFOIA. No WVFOIA exemption permits the withholding of such a public record. The secrecy of the ballot allows one to conceal the identity of the recipient of her vote but the act of showing up at the polls and casting a ballot is a public act. Moreover, a voter's party allegiance and how often one votes is a matter

of public record that can be determined by any interested person reviewing courthouse records. If one chooses to make election campaign contributions to candidates, both the recipients of the money and the amount of each contribution must be disclosed to any person upon request.

C. THE CIRCUIT COURT ERRED IN HOLDING THAT SIGNING A ZONING REFERENDUM PETITION IS ANALOGUS TO CASTING A SECRET BALLOT ALTHOUGH THE ISSUE WAS NOT RAISED, BRIEFED NOR ARGUED BY THE PARTIES.

The Circuit Court acted *sua sponte*, without the issue having been raised, briefed or argued by Appellant or Appellee, holding that “making public the names of those individuals who signed the petitions would have a chilling effect on the ability of citizens to petition the government.” Cir. Ct. Ord. of Dismissal, at ¶15. In so doing, the Circuit Court analogized a citizen signing a petition asking for a zoning referendum to a registered voter casting a secret ballot in an election. The analogy is unsupportable in fact or logic. The trial court observed that the “United States Supreme Court has recognized that the secret ballot is of paramount importance to our system of voting” *citing Burson v. Freeman*, 504 U.S. 191, 206 (1992). This is a proposition with which no one would disagree. However, this axiomatic principle of constitutional law in no way supports the circuit court’s holding that public disclosure of the instant zoning petitions would chill petition signers’ First Amendment rights. The cases relied on by the court below are inapposite to the case at bar.

In *Daily Gazette Company v. Bailey*, 152 W.Va. 521, 164 S.E. 2d 414 (1968), on which the Circuit Court also relied, this Court held that signing a certificate of nomination for a “third party candidate” is analogous to casting a secret ballot:

A qualified voter who signs a certificate in accordance with the provisions of West Virginia Code . . . effectively casts his vote for the nomination of the candidate named therein and his vote, except where necessarily revealed, is entitled to the same secrecy as one

one cast in a primary election.

In the instant case the records on file in the office of the Secretary of State are records of the manner in which the signers of the certificates voted and nominated a candidate for public office. This is a record of a vote; it is not a public record.

Id., 164 S.E. 2d at 415, 419, 152 W.Va. at 521, 529. (Emphasis added).

The petition process involved in this appeal, however, bears no resemblance to that involved in *Daily Gazette Company v. Bailey*. On the contrary, the petition in the instant case was explicitly framed as *a request that a referendum be held* --- citizens signing the petition clearly did not indicate how they might vote if the requisite number of signatures were gathered to initiate a zoning referendum.

At the top of each petition used to gather signatures appeared the words "PETITION FOR AN ELECTION ON JEFFERSON COUNTY ZONING ORDINANCE." (See Exhibit E).

Above the signature lines on each petition form appeared the following statement:

The undersigned files this petition under West Virginia Code 8A-7-13 (or in the alternative, 8A-7-7c or 8A-7-8a, if applicable) which states that the Jefferson County Commission must hold an election on an amendment to a zoning ordinance if a petition, signed by at least 10% of the eligible voters in the area to which the zoning applies, is filed with the Jefferson County Commission.

Accordingly, we the undersigned residents of Jefferson County request an election are scheduled, concerning the zoning change from non-traditional zoning, adopted by the action of the Jefferson County Commission on October 2, 2008.

Id. (Emphasis added).

Citizens who signed the zoning referendum petition did not express any opinion on how they would vote if a zoning referendum were held. The only opinion the petition signers expressed was that voters should have an opportunity to vote on the zoning ordinance previously enacted by the County Commission on October 2, 2008.

In contrast, *Daily Gazette Company v. Bailey*,⁵ turned upon the fact that citizen's action in signing a nominating petition for a third party candidate was tantamount to casting a secret ballot for that candidate in a primary election. 152 W.Va. 521, 528, 164 S.E. 2d 414, 418 (1968). *Bailey* held that public access to the nominating certificates would, in essence, reveal how individual petition signers had voted for a particular candidate in a primary election. Therefore, just as primary voters cast their ballot in secret, nominating certificate petition signatories are also entitled to keep secret their "vote" secret.

Most important is that the *Bailey* Court distinguished the nomination process from a typical petition:

At the outset of the discussion of this point it is pertinent to note that the Appellants obviously erred by their use of the word 'petitions' in referring to the paper signed by those desiring to place George C. Wallace on the ballot in the general election. These signers placed their signatures on a certificate of nomination, not a petition. This is evidenced beyond question by the language ... entitled, 'Filing of nomination certificates' [which] reads, in part, 'All certificates nominating candidates for officer under the preceding section ...'

These signers were not making a supplication or request to a superior or to a group in authority, as in the connotation of a petition. They were affirmatively making a nomination, which, if done in accordance with the appropriate statute, would succeed in placing their candidate on the ballot in the general election.

In other words, this Court explicitly recognized the difference between a nomination certificate—which is equivalent to a secret ballot—and an actual petition such as a zoning petition—which is not in any way the equivalent of a secret ballot. Accordingly, *Bailey* does not apply to petitions such as the zoning petition at issue in the case at bar. To the contrary, *Bailey* draws a very clear distinction between casting a primary vote that to which constitutional secrecy attaches and signing a "real" petition as to which no right of secrecy is recognized by statute or

⁵ *Bailey*, a 1968 opinion, preceded the WVFOIA.

constitution. *Bailey*, therefore, fully supports the position of Appellant newspaper. Those who signed the Jefferson County zoning petition were not voting for or against a zoning ordinance, and affixing their signatures gave no indication as to how they would vote should a zoning referendum be held. The Circuit Court's reliance on *Bailey* and *Burson v. Freeman* is entirely misplaced.

In addition to relying on *Bailey* and *Burson*, the Circuit Court also relied on two other inapposite federal court opinions. In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), the Supreme Court of the United States held that prohibition of distribution of anonymous campaign literature abridges the First Amendment. *McIntyre* undertook to "decide whether and to what extent the First Amendment's protection of anonymity encompasses documents *intended to influence the electoral process*." 514 U.S. at 1517 -1518 (emphasis added).

"[T]he speech in which Mrs. *McIntyre* engaged [was] handing out leaflets in the advocacy of a politically controversial viewpoint." 514 U.S. at 1519. [Anonymity], said the Court, . . . "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation-and their ideas from suppression-at the hand of an intolerant society." *Id.* at 1524. Appellant's position does not conflict in any way with *McIntyre*.

In contrast, in the case at bar, those who signed the zoning referendum petition did not advocate "a politically controversial viewpoint." In fact, the zoning petition signers simply expressed the opinion that a recently-enacted county zoning ordinance should be subject to the vote of the electorate. Moreover, there is not a scintilla of evidence in the record that the more than four thousand people who signed the Jefferson County zoning referendum petition faced or

would face any form of retaliation for merely advocating that a referendum be held. Taking the position that a referendum should be held under a process provided for by law is hardly a “politically controversial viewpoint.” It is worth noting that the Supreme Court of the United States has expressed approval of a requirement that entailed public identification of the names of election campaign contributors as well as the amount and use of money they have contributed on behalf of political candidates. See *Buckley v. Valeo*, 424 U.S. 1, at 157-159, 160 (1976). Reflecting on its decision in *Buckley* upholding a federal statutory requirement that names of political campaign contributors be publically revealed, the *McIntyre* Court observed:

A written election-related document---particularly a leaflet---is often a personally crafted statement of a political viewpoint. Mrs. McIntyre's handbills surely fit that description. As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. *Disclosure of an expenditure and its use . . . reveals far less information . . .* It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, *even though money may “talk,” its speech is less specific, less personal, and less provocative than a handbill*-and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.

514 U.S. 334, at 355. (Emphasis added).

It is obvious that the signers of a Jefferson County zoning referendum petitions did not “disclose [their] thoughts on a controversial issue.” It can scarcely be denied that public disclosure of the zoning petition would be much “less likely to precipitate retaliation” than if signers were financially supporting a political candidate because signing the petition is far “less specific, less personal, and less provocative” than contributing money to support an unpopular viewpoint. Surely, if public identification of those making financial contributions in support of an unpopular viewpoint is consistent with the First Amendment, public disclosure of a non-partisan zoning referendum petition is in harmony with the important values underlying the First Amendment.

The lower court also relied on an Eighth Circuit opinion, *Campaign for Family Farms v. Glickman*, 200 F.3D 1180 (2000) in concluding that release of the instant zoning referendum petitions would reveal the “secret votes” of petition signers and chill their right to petition the government. Unlike either *Burson* or *McIntire*, *Campaign for Family Farms* actually involved a referendum petition. It must be reemphasized that the record is devoid of any evidence remotely suggesting the possibility of threats or intimidation faced by the signers of the zoning petition. *Campaign for Family Farms* is readily distinguishable from the case at bar. In that case, a group of pork producers sued to prevent the Department of Agriculture from releasing names and addresses of persons signing petitions seeking a referendum abolishing a mandatory check-off program. A percentage of revenue from sale of pork products would fund marketing and advertising of pork. The sole similarity of the instant case and *Campaign for Family Farms* is that, in each, citizens signed a petition. As the Court of Appeals for the Eighth Circuit emphasized in *Campaign*:

[b]esides calling for a referendum on the mandatory check-off program, *those signing the petition all declared their position on the ultimate issue*: “We support a voluntary check-off program.” In so doing, *Appellants all unequivocally declared that they would vote to end the mandatory program* and thus return to the voluntary program.

200 F.3d 1180, at 1187 (2000) (emphasis supplied). It was in the context of the pork products petition that signers unequivocally declared how they would vote. The Eighth Circuit observed “[t]o make public such an unequivocal statement of their position on the referendum effectively *would vitiate Appellants’ privacy interest in a secret ballot.*” *Id.* (emphasis supplied).

Because the petition signers had expressed how they would vote in a subsequent referendum, the *Campaign for Family Farms* Court held “. . . *in the circumstances of this case* the privacy interest in a secret ballot is severely threatened. Releasing this petition, which contains a

clear declaration of how the Appellants intend to vote in the referendum, would substantially invade that privacy interest.” *Id.* at 1187- 1188 (emphasis added). As explained above, in the case at bar, signers of the Jefferson County zoning petition indicated only that they believed the issue of zoning should be put to the electorate; in no way did they indicate the position they would take if a zoning referendum were held. Therefore, *Campaign for Family Farms v. Glickman* does not support the trial court’s conclusion that Jefferson County zoning referendum petitions must be held in secret because the zoning referenda petitioners did not “declare their position on the ultimate issue” --- that is, their signing the petition did not indicate how they would vote on the zoning ordinance.

In sum, the Circuit Court erred when it held that signing a zoning referendum petition was the equivalent of the situations in *Bailey* and *Burson*, *McIntire* and *Campaign for Family Farms* where courts held that anonymity is crucial to protecting the right to vote and to express one’s opinion on controversial public issues.

D. THE CIRCUIT COURT ERRED IN HOLDING THAT PUBLIC ACCESS TO A ZONING REFERENDUM PETITION WOULD HAVE A CHILLING EFFECT ON THE ABILITY OF CITIZENS TO PETITION THE GOVERNMENT ALTHOUGH THE ISSUE WAS NOT RAISED, BRIEFED NOR ARGUED BY THE PARTIES AND NO PROBATIVE RECORD EVIDENCE SUPPORTS THE HOLDING.

The Circuit Court concluded as a matter of law that “making the names of those individuals who signed the petitions would have a chilling effect on the ability of citizens to petition the government.” Cir. Ct. Ord. of Dismissal at ¶¶ 15, 23, 25 *citing, Daily Gazette Company v.*

Bailey, 152 W.Va. 521, 528, 164 S.E. 2d 414, 418 (1968).⁶ Paragraphs 26 and 27 of the Circuit Court's opinion state that "[p]rotecting the integrity of the secret ballot is more than just a personal privacy issue, it is a matter of great and vital public interest that our electoral process be free from the possibility of voter intimidation or fear of retribution." Thus, the Circuit Court concluded as a matter of law that public disclosure of zoning referendum petitions:

- A. would have a "chilling effect on the right to petition the government;"
- B. create a "possibility of voter intimidation or fear of retribution;"
- C. severely threaten citizen's "privacy interest in a secret ballot;"
- D. jeopardize "the hard-won right to vote one's conscience without fear of retaliation."

Id.

As indicated above, these conclusions of law were arrived at by the lower court, *sua sponte*. The Appellee Clerk had asserted only that the zoning petitions were withheld from the Appellant because they were not "prepared" by a public body and thus did not satisfy WVFOIA's definition of a "public record."

Neither Appellee nor Appellant herein raised or briefed the "secret ballot" and First Amendment issues that formed the basis for the Circuit Court's opinion. Moreover, the Circuit Court made no findings of fact that those who signed the zoning referendum petition had been or

⁶The Circuit Court never explained how the disclosure of names by the Clerk to third parties (signature gatherers) and not newspapers can be squared with the concept of a secret ballot. Moreover, the Court did not explore how the petitions could be secret when names on the petitions were visible to other signers of the petition. Most importantly, as explained above, petitioning for a zoning election to be held bears no resemblance to casting of a secret ballot representing a voter's decision on an ultimate issue or to choose a specific candidate for office.

could reasonably be expected to face retaliation, intimidation, or retribution. Nor did the court make findings of fact supporting its assertion that public access to zoning petitions would “chill” citizens’ rights to petition their government. The Circuit Court did not make such findings because there are no facts in the record showing a chilling effect, retribution, intimidation, or retaliation. Of course no such fact could have been offered as evidence because the issue was never litigated. The suggestion of a chilling effect, retribution, intimidation, or retaliation appeared first and only in the circuit court’s opinion. It is axiomatic that a trial court may not rest a conclusion of law and, indeed decide a case based upon pure speculation about claims and facts never raised or litigated. Because the record is devoid of evidence supporting the Circuit Court’s conclusions of law, the Court’s conclusions of law set forth in paragraphs 15, 23, 25, 26 and 27 of its Order cannot be sustained. A trial court may not base its legal conclusions on issues not litigated or even argued.

V. REQUEST FOR RELIEF

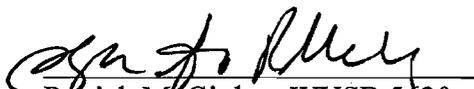
For these reasons, the Appellant respectfully requests that this Court reverse the Circuit Court and provide the following relief:

1. Declare that the records are public records as defined by WVFOIA and that Appellee was not justified in withholding such records.
2. Direct by injunction that the Appellee immediately disclose to Appellant and the public the requested records;
3. Grant the Appellant its costs of litigation, including reasonable attorney fees as provided by W. Va. Code §29b-1-7 ; and
4. Provide such other relief as the Court deems just and proper.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

THE SHEPHERDSTOWN OBSERVER, INC.,

APPELLANT,

vs.

**Circuit Court of Jefferson County
Civil Action No. 09-C-169
Docket No. 35446**

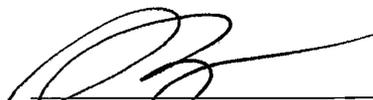
JENNIFER MAGHAN,

APPELLEE

CERTIFICATE OF SERVICE

I, Stephen G. Skinner, counsel for the Appellant, do hereby certify that I have mailed a true copy of the foregoing **Brief of Appellant Shepherdstown Observer, Inc.** upon the following persons, by mailing the same by U.S. Mail, postage prepaid, this 16th day of April, 2010.

Stephanie Grove, Esquire
Jefferson County Assistant Prosecuting Attorney
P. O. Box 729
Charles Town, WV 25414



Stephen G. Skinner

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE