

15-1223

11/30/15

IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA

TONY COFFMAN, ROBERT MARSH,
MARY MARSH, JAMES MARSH,
and MARILYN MARSH,

Plaintiffs,

vs.

CIVIL ACTION NO.: 14-C-122

NICHOLAS COUNTY COMMISSION and its
Members, DR. YANCY SHORT, M.D., JOHN
R. MILLER, and KENNETH ALTIZER, individually
and in their official capacities, and
CHECKS AUTO PARTS, LLC,

Defendants.

ORDER GRANTING COUNTY COMMISSION'S
MOTION FOR SUMMARY JUDGMENT;
DISMISSING COUNTY COMMISSION DEFENDANTS;
DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, IN PART; AND
CONTINUING HEARING ON REMAINDER OF PLAINTIFFS' MOTION

This matter came before the Court on the 15th day of October, 2015, for a hearing on *Plaintiffs' Motion for Summary Judgment* (the "Plaintiffs' Motion"), filed on August 4, 2015; the *Response in Opposition to Plaintiffs' Motion for Summary Judgment and Counter-Motion for Summary Judgment with Incorporated Memorandum of Law* (the "County Commission's Motion"), filed on October 6, 2015, by the Nicholas County Commission, Dr. Yancy S. Short, M.D., John R. Miller and Kenneth Altizer (referred to collectively as the "County Commission Defendants"); and the *Plaintiffs' Response to Counter-Motion for Summary Judgment*, filed on October 13, 2015.

At the hearing, the Plaintiffs appeared by counsel, W. Henry Jemigan, Jr. and Mary R. Rowe Litman of Dinsmore & Shohl LLP; the County Commission Defendants appeared by counsel, Charles R. Bailey and Michael W. Taylor of Bailey & Wyant, PLLC; and Defendant

Checks Auto Parts, LLC (hereinafter "Checks") appeared by counsel, William A. McCourt, Jr. of Losch & McCourt PLLC.¹

Having considered the motions; the pleadings in the file; the oral arguments presented at the hearing; and the pertinent legal authorities, the Court makes the findings of fact and conclusions of law set forth below:

I. Findings of Fact

In consideration of all the evidence presented in the record, the Court hereby makes the following findings of fact:

1. On December 5, 1984, the Nicholas County Commission enacted an Ordinance establishing a salvage yard permit system.²
2. The City of Summersville also enacted Ordinance 361.07 addressing Abandoned Motor Vehicles.³
3. By Deed dated March 2, 2012, Rodney L. LeRose and Barbara LeRose conveyed twenty (20) acres, more or less, to Checks. Said Deed was recorded in the office of the Clerk of the County Commission of Nicholas County, on April 17, 2012, in Deed Book 474 at page 600 (referred to herein as the "Property").⁴

¹ This was Mr. McCourt's first appearance in this case on behalf of Checks. However, Mr. McCourt previously represented Checks before the Nicholas County Commission. See, Minutes of The Nicholas County Commission - August 05, 2014, attached to Plaintiffs' Motion as Exhibit F.

² A copy of the salvage yard Ordinance entered by the Nicholas County Commission on December 5, 1984, is attached to Plaintiffs' Motion as Exhibit H and is attached to the County Commission's Motion as Exhibit F.

³ A copy of the City of Summersville's Ordinance 361.07 "Abandoned Motor Vehicles" is attached to Plaintiffs' Motion as Exhibit E and is attached to the County Commission's Motion as Exhibit O.

⁴ A copy of that Deed is attached to Check's Salvage Yard Permit Application, which is attached to the County Commission's Motion as Exhibit E.

4. On or about August 21, 2012, Checks submitted to the Nicholas County Commission a Salvage Yard Permit Application,⁵ seeking authority to operate a salvage yard on the Property.
5. On September 4, 2012, the Nicholas County Commission conducted a public hearing to address Check's Salvage Yard Permit Application, which hearing was duly noticed in the Nicholas Chronicle. Plaintiff Tony Coffman was present for that hearing.⁶
6. On October 2, 2012, Checks again appeared before the Nicholas County Commission on its Salvage Yard Permit Application, seeking a permit to operate a junkyard on the Property. At that meeting, the County Commission found that Checks met the requirements of the County's Ordinance and that Checks should be permitted to move forward in obtaining a State salvage yard permit.⁷
7. Therefore, on October 2, 2012, the Nicholas County Commission entered a Permit for Checks "to operate a salvage yard within the boundaries of Nicholas County . . . in conformity with the laws and regulations of the State of West Virginia."⁸
8. On October 17, 2012, Checks applied to the West Virginia Department of Transportation Division of Highways (the "DOH") for a State permit to operate a

⁵ A copy of Check's Salvage Yard Permit Application is attached to the County Commission's Motion as Exhibit E. Although the application does not have a date, the Court accepts the representation in the County Commission's Motion that the application was submitted on or before August 21, 2012.

⁶ Minutes of the Nicholas County Commission – September 04, 2012, are attached to the County Commission's Motion as Exhibit H.

⁷ The Minutes of the Nicholas County Commission – October 02, 2012 are attached to Plaintiffs' Motion as Exhibit B.

⁸ A copy of the Permit issued to Checks by the Nicholas County Commission is attached to Plaintiffs' Motion as Exhibit C and is attached to the County Commission's Motion as Exhibit G.

salvage yard. That application was denied by the DOH on November 1, 2012, due to the fact that they did not receive a certified survey.⁹

9. On January 13, 2014, Checks, by Carl Graybeal, appeared before the Summersville City Council, and a motion was made to consider the annexation of the Property by the City of Summersville. After a lengthy discussion, a vote was called and carried with five (5) votes for the motion and three (3) votes against the motion.¹⁰
10. On March 20, 2014, the City of Summersville filed its Petition for Annexation with the Nicholas County Commission,¹¹ seeking to annex the Property (as Tract I) and two easements (Tracts II and III) under the provisions of West Virginia Code Section 8-6-5, which authorizes annexation to effect "a minor boundary adjustment."
11. On August 5, 2014, a hearing was held before the Nicholas County Commission to consider the Petition for Annexation filed by the City of Summersville.¹²
12. Following that hearing, on or about August 19, 2014, the Nicholas County Commission entered its "Order on Boundary Adjustment", granting the City of Summersville's Petition for Annexation by minor boundary adjustment, which allowed the City of Summersville to annex the Property and two easement tracts.¹³
13. Plaintiffs initiated this case by the Complaint filed on October 2, 2014. An Amended Complaint was filed on March 24, 2015, which added Checks as a Defendant.

⁹ A copy of the letter from the DOH, dated November 1, 2012, is attached to Plaintiffs' Motion as Exhibit D and is attached to the County Commission's Motion as Exhibit J.

¹⁰ A copy of the minutes of the Regular Meeting of Summersville City Council held on January 13, 2014, is attached to the County Commission's Motion as Exhibit P.

¹¹ A copy of the Petition for Annexation filed on March 20, 2014, is attached to the County Commission's Motion as Exhibit A.

¹² Minutes of the Nicholas County Commission – August 05, 2014 are attached to Plaintiffs' Motion as Exhibit F and are attached to the County Commission's Motion as Exhibit N.

¹³ A copy of the Order on Boundary Adjustment is attached to Plaintiffs' Motion as Exhibit A and is attached to the County Commission's Motion as Exhibit L.

II. Discussion and Conclusions of Law

Both parties have moved for summary judgment. The Court finds that two issues are presented in the parties' motions: (1) whether Checks should be enjoined from operating an automobile junkyard on the Property; and (2) whether the County Commission Defendants properly entered their "Order on Boundary Adjustment", granting the City of Summersville's Petition for Annexation of the Property. It is necessary to address these issues separately in considering whether either party is entitled to summary judgment.

Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment

... shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment pursuant to Rule 56 "is 'designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,' if there essentially 'is no real dispute as to salient facts' or if it only involves a question of law." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995), citing *Painter v. Peavy*, 192 W. Va. 189, 192 n. 5, 451 S.E.2d 755, 758 n. 5 (1994). A well-established principle of law is that:

A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.

Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995), quoting Syl. Pt. 3, *Aetna-Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

First, Plaintiffs move for an order granting summary judgment against Checks, enjoining Checks from operating an automobile junkyard on the Property in violation of West Virginia, Nicholas County and City laws and ordinances. With respect to this portion of the

Plaintiffs' Motion, the Court finds that there exist genuine issues of material fact that preclude summary judgment at this time. For instance, as set forth more fully on the record, questions of fact remain as to the zoning of the Property and whether or not statutory exceptions to the State licensing requirements apply. Therefore, the Court **DENIES** Plaintiffs' Motion in so far as it moves for injunctive relief against Defendant Checks. At the hearing on October 15, 2015, the Court directed the parties to brief the issues regarding whether Checks is operating properly and whether a State permit is required. Further proceedings on those issues will be held on **Monday, December 7, 2015, at 11:30 a.m.**

Second, the parties both move for summary judgment regarding the validity of the County Commission's "Order on Boundary Adjustment," which granted the City of Summersville's Petition for Annexation by minor boundary adjustment and authorized the City of Summersville to annex the Property and two (2) easement parcels. Plaintiffs contend that the annexation is void. The Defendants argue that the annexation is valid. Having reviewed the parties' pleadings and heard their arguments, the Court finds that there are no genuine issues of material fact to be tried and that the issue only involves a question of law to be determined by the Court.

The City of Summersville's Petition for Annexation was filed pursuant to West Virginia Code Section 8-6-5 (2015), which authorizes annexation to effect "a minor boundary adjustment."¹⁴ Plaintiffs argue that the County Commission Defendants failed to meet the

¹⁴ West Virginia Code Section 8-6-5 provides in its entirety:

§ 8-6-5. Annexation by minor boundary adjustment

(a) In the event a municipality desires to increase its corporate limits by making a minor boundary adjustment, the governing body of the municipality may apply to the county commission of the county wherein the municipality or the major portion of the territory thereof, including the territory to be annexed, is located for permission to effect annexation by minor boundary adjustment. The municipality shall pay the costs of all proceedings before the commission.

(b) In addition to any other annexation configuration, a municipality may incorporate by minor boundary adjustment: (i) Territory that consists of a street or highway as defined in section thirty-five, article one, chapter seventeen-c of this code and one or more freeholders; or (ii) territory that consists of a street or highway as defined in section thirty-five, article one, chapter seventeen-c of this code which does not include a freeholder but which is necessary for the provision of emergency services in the territory being annexed.

(c) A county commission may develop a form application for annexation for minor boundary adjustment. An application for annexation by minor boundary adjustment shall include, but not be limited to:

(1) The number of businesses located in and persons residing in the additional territory;

(2) An accurate map showing the metes and bounds of the additional territory;

(3) A statement setting forth the municipality's plan for providing the additional territory with all applicable public services such as police and fire protection, solid waste collection, public water and sewer services and street maintenance services, including to what extent the public services are or will be provided by a private solid waste collection service or a public service district;

(4) A statement of the impact of the annexation on any private solid waste collection service or public service district currently doing business in the territory proposed for annexation in the event the municipality should choose not to utilize the current service providers;

(5) A statement of the impact of the annexation on fire protection and fire insurance rates in the territory proposed for annexation;

(6) A statement of how the proposed annexation will affect the municipality's finances and services; and

(7) A statement that the proposed annexation meets the requirements of this section.

(d) Upon receipt of a complete application for annexation by minor boundary adjustment, the county commission shall determine whether the application meets the threshold requirements for consideration as a minor boundary adjustment including whether the annexation could be efficiently and cost effectively accomplished under section two or four of this article.

(e) If the application meets the threshold requirements, the county commission shall order publication of a notice of the proposed annexation to the corporate limits and of the date and time set by the commission for a hearing on the proposal. Publication shall be as in the case of an order calling for an election, as set forth in section two of this article. A like notice shall be prominently posted at not less than five public places within the area proposed to be annexed.

(f) In making its final decision on an application for annexation by minor boundary adjustment, the county commission shall, at a minimum, consider the following factors:

(1) Whether the territory proposed for annexation is contiguous to the corporate limits of the municipality. For purposes of this section, "contiguous" means that at the time the application for annexation is submitted, the territory proposed for annexation either abuts directly on the municipal boundary or is separated from the municipal boundary by an unincorporated street or highway, or street or highway right-of-way, a creek or river, or the right-of-way of a railroad or other public service corporation, or lands owned by the state or the federal government;

requirements of this statute when they entered the "Order on Boundary Adjustment," which granted the City of Summersville's Petition for Annexation of the Property and two (2) easement parcels. Specifically, Plaintiffs contend that where annexation is by minor boundary adjustment, the County Commission had an enhanced duty and was required to create a record and prove why annexation is in the best interests of the County. In support of this argument, Plaintiffs cite two cases: *In re City of Morgantown*, 159 W. Va. 788, 226 S.E.2d 900 (1976)

(2) Whether the proposed annexation is limited solely to a division of highways right-of-way or whether the division of highways holds title to the property in fee;

(3) Whether affected parties of the territory to be annexed oppose or support the proposed annexation. For purposes of this section, "affected parties" means freeholders, firms, corporations and qualified voters in the territory proposed for annexation and in the municipality and a freeholder whose property abuts a street or highway, as defined in section thirty-five, article one, chapter seventeen-c of this code, when: (i) The street or highway is being annexed to provide emergency services; or (ii) the annexation includes one or more freeholders at the end of the street or highway proposed for annexation;

(4) Whether the proposed annexation consists of a street or highway as defined in section thirty-five, article one, chapter seventeen-c of this code and one or more freeholders;

(5) Whether the proposed annexation consists of a street or highway as defined in section thirty-five, article one, chapter seventeen-c of this code which does not include a freeholder but which is necessary for the provision of emergency services in the territory being annexed;

(6) Whether another municipality has made application to annex the same or substantially the same territory; and

(7) Whether the proposed annexation is in the best interest of the county as a whole.

(g) If the county commission denies the application for annexation by minor boundary adjustment, the commission may allow the municipality to modify the proposed annexation to meet the commissions objections. The commission must order another public hearing if significant modifications are proposed.

(h) The final order of the commission shall include the reasons for the grant or denial of the application.

(i) The municipality applying for annexation or any affected party may appeal the commission's final order to the circuit court of the county in which the municipality or the major portion thereof, including the area proposed to be annexed, is located. The county commission may participate in any appeal taken from its order in the same manner and to the same extent as a party to the appeal. The order may be reviewed by the circuit court as an order of a county commission ordering an election may be reviewed under section sixteen, article five of this chapter.

and *State ex rel. City of Charles Town v. County Com'n of Jefferson County*, 221 W. Va. 317, 655 S.E.2d 63 (2007).

In *In re Morgantown*, the Court did find that the powers delegated to a county commission under West Virginia Code Section 8-6-5 "are broader in scope and encompass more than the performance of a ministerial duty," as in Sections 8-6-2 and 8-6-4. *In re Morgantown*, 159 W. Va. at 792, 226 S.E.2d at 903. However, the Court went on to explain that the broader powers to which it refers mean "a responsibility of administering the law according to specific statutory standards." *Id.*, 159 W. Va. at 793, 226 S.E.2d at 903. "The commission, like the numerous administrative bodies which populate government, must apply the law to the facts." *Id.* These holdings were more recently quoted in *City of Charles Town*, which dealt with annexation under Section 8-6-4. *City of Charles Town*, 221 W. Va. at 322, 655 S.E.2d at 68.

In the present case, the Court finds that the County Commission properly administered the law according to the specific statutory standards. *See, Morgantown*, 159 W. Va. at 793, 226 S.E.2d at 903. As in *In re Morgantown*, the City of Summersville filed a Petition for Annexation that met the statutory requirements set forth in West Virginia Code Section 8-6-5(c). Upon receipt of that petition, the County Commission determined that the application met the threshold requirements, as required by Section 8-6-5(d), and then published notice in accordance with Section 8-6-5(e). Following the hearing, the County Commission entered its "Order on Boundary Adjustment," which included the reasons for the grant (pursuant to Section 8-6-5(h)), specifically tracking the items for consideration set forth in Section 8-6-5(f).

Plaintiffs contend that the County Commission failed to properly consider the seven (7) factors set forth in Section 8-6-5(f) and to make appropriate findings in the "Order on Boundary Adjustment". The Plaintiffs disagree with the findings that the County Commission did include in the order. Primarily, the Plaintiffs state that the County Commission erred in

finding that the annexation would be in the County's best interest, and they argue the reasons that they believe the annexation would not benefit the County. Additionally, Plaintiffs indicate that they do not believe the "contiguous" requirement is satisfied.¹⁵

Although the Plaintiffs disagree with the County Commission's findings set forth in the "Order on Boundary Adjustment," this Court is not in a position to make new findings or to go back and second-guess the County Commission's findings. As the West Virginia Supreme Court of Appeals held in Syl. Pt. 6 of *In re City of Beckley*, 194 W. Va. 423, 460 S.E.2d 669 (1995), "a county commission enjoys broad discretion in exercising its legislative powers" under West Virginia Code Section 8-6-5, where a municipality seeks a minor boundary adjustment. The Court further explained that:

annexation is essentially a legislative matter that has been delegated to the [county] commission, then the courts may not intrude unless the process is either unconstitutional or invalid. . . 'the legislature has left to the city council and the electors, rather than to the court, the question of the reasonableness of a petition for annexation' *In re Village of North Barrington*, . . . 579 N.E.2d at 888.

City of Beckley, 194 W. Va. at 430-431, 460 S.E.2d at 676-677. Accordingly, the County Commission's findings regarding the annexation are entitled to deference and presumed valid, unless they are unreasonable or arbitrary. This Court may not substitute its judgment for that of the County Commission's.

Therefore, in the present case, this Court has reviewed the County Commission's "Order on Boundary Adjustment" and finds that it complies with the statutory requirements of West Virginia Code Section 8-6-5. Although not particularly specific, the County Commission's findings do meet the minimum requirements of the statute. Additionally, the Court finds that the County Commission did not act unreasonably, unconstitutionally or outside

¹⁵ Although not argued at length and not necessary to the Court's ruling in this case, the Court does find that the "contiguous" requirement of West Virginia Code Section 8-6-5 is satisfied because the property annexed directly abuts the Frontage Road, which was properly annexed in 2012.

of its jurisdiction. For all of the foregoing reasons, the Court concludes, as a matter of law, that the County Commission Defendants complied with the requirements of West Virginia Code Section 8-6-5 and properly entered the "Order on Boundary Adjustment," which authorized the City of Summersville's annexation of the Property and the two (2) easement parcels.

Accordingly, based upon the above facts and conclusions of law, the Court does hereby

ORDER:

1. That the County Commission Defendants' counter motion for summary judgment, included in their *Response in Opposition to Plaintiffs' Motion for Summary Judgment and Counter-Motion for Summary Judgment with Incorporated Memorandum of Law*, filed on October 6, 2015, is hereby **GRANTED**; and
2. It is further **ORDERED** that the Nicholas County Commission and its Members, Dr. Yancy S. Short, M.D., John R. Miller and Kenneth Altizer, individually and in their official capacities, are hereby **DISMISSED** from this case, with prejudice; and
3. With respect to the County Commission Defendants, this is a final order, and should any party wish to appeal this order, a written petition for appeal must be filed within four (4) months of the entry of this order and in accordance with the West Virginia Rules of Appellate Procedure.
4. It is further **ORDERED** that the *Plaintiffs' Motion for Summary Judgment* is hereby **DENIED**, in part, with respect to the County Commission Defendants; and
5. It is further **ORDERED** that a ruling upon the remaining portion of the *Plaintiffs' Motion for Summary Judgment*, regarding the Defendant Checks, shall be held in abeyance pending further briefing and hearing to be held on **Monday, December 7, 2015, at 11:30 a.m.** This order shall constitute good and sufficient notice of said hearing, and no further notice shall be required.

6. It is further **ORDERED** that the Clerk forward a certified copy of this Order to each of the following:

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ENTERED 11-30-15
Gary L. Johnson
HONORABLE GARY L. JOHNSON, JUDGE

A true copy, certified this
7 day of Dec, 20 15
Debbie Face
DEBBIE FACEMIRE CIRCUIT CLERK
Nicholas County Circuit Court
Summersville, WV 26651
By: act, Deputy