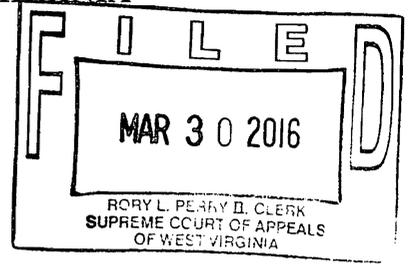


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 15-1223

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**Tony Coffman, Robert Marsh, Mary Marsh,  
James Marsh, and Marilyn Marsh,  
Petitioners,**

vs.

**Nicholas County Commission and Its Members,  
Dr. Yancy S. Short, M.D., John R. Miller, and  
Kenneth Altizer, Individually and In Their Official  
Capacities, and Checks Auto Parts, LLC,  
Respondents.**

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**On Appeal from Honorable Gary L. Johnson, Judge  
Circuit Court of Nicholas County  
Civil Action No. 14-C-122**

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**PETITIONERS' BRIEF**

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### **ASSIGNMENTS OF ERROR**

- I. THE TRIAL COURT ERRED IN FINDING THE PROPERTY IS CONTIGUOUS WITH THE CITY LIMITS.
- II. THE TRIAL COURT ERRED IN FINDING THE PROPERTY IS SUBJECT TO ANNEXATION VIA MINOR BOUNDARY ADJUSTMENT.
- III. THE TRIAL COURT ERRED IN FINDING THE PETITION IN COMPLIANCE WITH W. VA. CODE § 8-6-5(c).
- IV. THE TRIAL COURT ERRED IN FINDING THE COMMISSION PROPERLY REVIEWED THE EVIDENCE PRESENTED TO IT REGARDING THE ANNEXATION.
- V. THE TRIAL COURT ERRED IN FINDING THE ANNEXATION IS IN THE BEST INTEREST OF THE COUNTY.
- VI. THE TRIAL COURT ERRED IN FINDING THE ANNEXATION IS NOT A PUBLIC NUISANCE.
- VII. THE ANNEXATION IS A TAKING IN VIOLATION OF THE STATE CONSTITUTION.

### **STATEMENT OF THE CASE**

In order to lawfully operate an automobile junkyard in Nicholas County (“County”), a business owner is required to obtain a permit from the West Virginia Department of Transportation, Division of Highways (“Division”). APP 34-46; W. Va. Code § 17-23-3 (2015). The business owner is also required by County ordinance to secure a permit from the Nicholas County Commission (“Commission”). APP 34-46. The State of West Virginia (“State”) and the County adopted these laws to protect their citizens from the adverse health effects and diminution in property values associated with automobile junkyards. As the State and County laws recognize, the unregulated proliferation of automobile junkyards not only causes blight and deterioration in property values, but also presents a danger to surrounding neighborhoods and

their residents due, in part, to the fact that automobile junkyards are known breeding grounds for rodents, insects, and other pests. APP 34-49; W. Va. Code § 17-23-1 (2015).

This case places squarely before the Court the question of whether Petitioners and others similarly situated can rely on the protections afforded to them under these State and local laws or whether those protections can be circumvented by automobile junkyard operators, acting in concert with city and county governments. Petitioners submit that the answer to this question is self-evident. The interests protected under State and local laws must prevail over the commercial interests of those seeking to operate automobile junkyards. If such is not the case, these protections and the laws that embody them are without meaning.

Here, Checks Auto Parts, LLC (“Checks”) purchased twenty acres of property (“Property”) in the County for the purpose of establishing an automobile junkyard. APP 50-54. The Property is in immediate proximity to residential and commercial property owned by Petitioners. APP 15 at ¶8; APP 50-55; APP 188; APP 190-194. Consistent with the County ordinance governing automobile junkyards, in September of 2012, Checks requested that the Commission issue it a license to operate an automobile junkyard. APP 168-196. In response, the Commission agreed to issue a provisional license that would become operative if Checks obtained a permit from the Division, as required by West Virginia Code § 8-6-5 (2015). APP 98; APP 207-209. Consistent with the foregoing, on October 17, 2012, Checks applied to the Division for the requisite permit. APP 215. On November 1, 2012, the Division denied that application on the grounds that it failed to include a certified survey or aerial photos showing distance measurements from the Property to various residences in the immediate vicinity, including the property of Petitioners. Id. That information was required in order for the Division to determine whether the proposed automobile junkyard was the required distance from

residences in the vicinity. If the automobile junkyard was not the required distance, the Division would be precluded from issuing the requested permit. *See* W. Va. Code § 17-23-4 (2015).

Rather than submit additional information to the Division, Checks appears to have concluded that its proposed operations were, in fact, too close to the residences in the neighborhood and, as a result, it could not meet the requirements necessary to secure the Division permit. Absent that permit, Checks' permit from the Commission remained provisional and its ability to operate an automobile junkyard within the County was effectively stymied.

Had matters remained thus, the State and County laws would have accomplished their intended purpose. Because Checks could not establish that its proposed automobile junkyard would not impinge upon the interests of Petitioners protected by those laws, it could not operate on the Property. The interests of Petitioners would have been fully secured.

Matters did not remain thus, however. Rather than abandon its efforts to establish an automobile junkyard on the Property, Checks sought to circumvent both the State and County permitting processes by persuading the City of Summersville ("City") to annex the Property. APP 19 at ¶ 26. As part of this effort, Checks highlighted the fact that the Property neither abutted nor was in close proximity to *any* residential or commercial property within the City and, thus, would have no negative impact upon the property of any City residence or business. Moreover, it would pose no risk from rodents and other pests commonly associated with such operation. This was true because, the Property, if annexed, would be a veritable island, remote from the City proper and surrounded on all four sides by property lying within the County, with only a narrow private easement connecting it to a highway annexed by the City. *See* APP 280. As was the case if no annexation occurred, all of the statutorily recognized negative impacts associated with the operation of an automobile junkyard would fall upon landowners and

residents of the County. APP 19 at ¶ 26-27. The only difference would be that the State and County permitting requirements could be avoided since the City does not regulate automobile junkyards within its limits.

In addition, because of the Property's status as a veritable island, it was clear that a vote by the City approving the proposed annexation would receive little, if any, negative attention from its residents. APP 19 at ¶ 27. Juxtaposed to this was the fact that, by annexing this isolated Property, the City would benefit from additional tax revenues the automobile junkyard would generate. Id. at ¶ 28.

Despite Petitioners' protests, the City approved the annexation of the Property and, as required by statute, then submitted a *Petition for Annexation* ("Petition") to the Commission for approval of the annexation. APP 152-162. The fact that Checks had never obtained a Division permit was not included in the City's Petition or given any consideration by the Commission prior to its approval of the annexation. As a consequence, on August 19, 2014, the Commission erroneously concluded that the City's Petition conformed with the statutory requirements of West Virginia Code § 8-6-5 governing the annexation of property by minor boundary adjustment and approved the Petition. APP 217-218.

Unlike other forms of annexation, an annexation by minor boundary adjustment requires no local election. Instead, it requires that a county commission, acting for the people, to first determine whether the petition meets the threshold requirements of the minor boundary adjustment statute, West Virginia Code § 8-6-5. If a county commission determines that the petition meets the threshold requirements, the county commission holds a public hearing and issues its final decision on the petition. In making that decision, however, the county commission is not permitted to simply rubber stamp the petition. Instead, the county

commission must consider “at a minimum” certain factors including, but not limited to, “[w]hether the proposed annexation is in the best interest of the county as a whole.” W. Va. Code § 8-6-5(f).

Here, despite the obvious adverse impact the annexation and resulting automobile junkyard would have on Petitioners and the surrounding County property, as evidenced by the fact that the automobile junkyard could not obtain a Division permit, the Commission nevertheless concluded that the annexation was in the best interest of the County as a whole. In reaching this conclusion, the Commission did not weigh the negatives of approving the annexation and the establishment of the proposed automobile junkyard against the perceived benefits. It did not explain why it was in the best interest of the County to allow the annexation when the automobile junkyard could not meet the requirements necessary to obtain State permit. While the Commission opined that the annexation and resulting automobile junkyard would somehow promote economic growth, it is clear that this was nothing more than an *ipse dixit*.

The decision of the Commission was, in fact, utterly devoid of any factual basis derived from the record before it and was, as a consequence, arbitrary and capricious, and contrary to the requirements of West Virginia Code § 8-6-5. Petitioners filed their *Complaint* with the Circuit Court of Nicholas County, West Virginia (“Trial Court”) challenging the validity of the Commission’s decision. On March 24, 2015, Petitioners filed an *Amended Complaint*. In the *Amended Complaint*, Petitioners alleged that the actions of the Commission are void. They further alleged that, by allowing the annexation and effectively permitting Checks to operate an automobile junkyard on the Property without a Division permit, the Commission has, as a matter of law, authorized the creation of a public nuisance, and by so doing, has breached its fiduciary and statutory obligations to the citizens of the County, including Petitioners. Additionally,

Petitioners alleged that in approving the proposed annexation, the Commission breached its statutory obligation to weigh any perceived benefits to the County and its residents against the harm caused by the automobile junkyard. Finally, Petitioners alleged that Checks had violated State, County, and City law by operating the automobile junkyard without the requisite permits. They sought a preliminary and permanent injunction to prevent Checks from continuing to operate the illegal automobile junkyard. APP 14-58.

On April 15, 2015, Checks submitted a responsive letter to the Trial Court admitting that it operates an automobile junkyard on the Property. Critically, in that letter, Checks did not deny that it never obtained a Division permit to operate an automobile junkyard. APP 59. Equally critical, in its responses to *Plaintiffs' First Set of Discovery*, the Commission stated that when it voted to approve the annexation, it "had no idea of the status of any application for a permit from the Division[.]" APP 112; APP 115. If nothing else, the Commission's professed ignorance reflects how utterly lacking the Commission's review of the evidence before it was since the record clearly shows that the Division letter denying the permit was submitted to the Commission and referenced by Petitioners in their arguments opposing the annexation.

After discovery was conducted by the parties, cross motions for summary judgment were filed by Petitioners and the Commission. APP 72-243. On October 15, 2015, the Trial Court heard arguments on the motions and ruled in favor of the Commission. APP 1-12; APP 244-279. On November 30, 2015, the Trial Court entered an *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* (“Trial Court Order”).<sup>1</sup> APP 1-12. Petitioners seek the reversal of the Trial Court Order, based upon West Virginia law which provides that the annexation is void.

### SUMMARY OF ARGUMENT

The Trial Court erred in granting summary judgment in favor of the Commission for seven reasons. First, the Trial Court erred in finding the Property is contiguous with the City limits. It is clear from a review of the map of the City that the Property is not contiguous with the City limits, as required by West Virginia Code §§ 8-6-1 and 8-6-5 (2015). Instead, the Property is connected to the City via a private right of way that connects to Frontage Road, which connects to Route 19, which is connected to the heart of the City. APP 129; APP 186-187.

Second, the Trial Court erred in finding the Property is subject to annexation by minor boundary adjustment. Pursuant to West Virginia Code § 8-6-5(b), only two types of territory can be annexed via minor boundary adjustment: (i) territory that consists of a street or highway as defined in West Virginia Code § 17C-1-35 (2015) and one or more freeholders; or (ii) territory that consists of a street or highway as defined in West Virginia Code § 17C-1-35 which does not include a freeholder but which is necessary for the provision of emergency services in the territory being annexed. W. Va. Code § 8-6-5(b). The Property does not fit the criteria for either type of territory.

Third, the Trial Court erred in finding the Petition is in compliance with West Virginia Code § 8-6-5(c), which requires the Petition to include various information about the proposed annexation, including a statement setting forth the City’s plan for providing the additional territory with all applicable public services and a statement of how the proposed annexation will

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<sup>1</sup>On January 13, 2016, the Trial Court entered an *Agreed Order* regarding Petitioners’ motion for summary judgment against Checks. Pursuant to the *Agreed Order*, Checks is not currently operating an automobile junkyard on the Property.

affect the City's finances and services. W. Va. Code § 8-6-5(c). The Petition failed to meet the requirements of the statute.

Fourth, the Trial Court erred in finding the Commission properly reviewed the evidence presented to it prior to voting to approve the annexation. It is obvious the Commission did not take into consideration the evidence presented to by Petitioners prior to approving the annexation. If the Commission had done its due diligence, it could not have approved the annexation.

Fifth, the Trial Court erred in upholding the Commission's finding that the annexation is in the best interest of the County and its citizens. The Commission failed to recognize Checks had not obtained a Division permit and, therefore, would operate an automobile junkyard in violation of the City ordinance governing such an operation.

Sixth, the Trial Court erred in finding the Property is not a public nuisance. The establishment, operation, or maintenance of an automobile junkyard in violation of Chapter 17, Article 23 of the West Virginia Code constitutes a public nuisance. The Commission effectively authorized Checks to maintain a public nuisance by allowing the business to operate on the Property without a permit from the Division.

Finally, in approving the annexation, the Commission stripped Petitioners of any meaningful ability to protect their property because Petitioners are not residents of the City. Because they are not residents, they cannot vote or have any say in the City's regulation of the automobile junkyard, despite the fact their properties are the most affected by the automobile junkyard. The Commission's decision harmed the value of Petitioners' properties, which constitutes a taking in violation of the West Virginia Constitution.

## STATEMENT REGARDING ORAL ARGUMENT

Petitioners respectfully request oral argument under Rules 19 and 20 of the West Virginia Rules of Appellate Procedure because this case involves assignments of error in the application of settled law and issues of fundamental public importance in the discretion given to county commissions to approve annexations.

### ARGUMENT

#### **I. Standard of Review**

Generally, different standards of review are applicable to the decisions of a trial court. “This Court reviews the circuit court’s final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.” Syl. Pt. 4, Burgess v. Porterfield, 196 W. Va. 178, 469 S.E.2d 114 (1996). “Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, [the Court] appl[ies] a *de novo* standard of review.” Syl. Pt. 1, In re City of Beckley, 194 W. Va. 423, 460 S.E.2d 669 (1995) (citing Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995)). In the instant case, a *de novo* standard is appropriate.

#### **II. The Property Is Not Contiguous with the City Limits**

Unincorporated property, such as the Property owned by Checks, may be annexed to and become part of a municipality only in accordance with the provisions of Chapter 8, Article 6 of the West Virginia Code. The City Council petitioned to annex the Property under the provisions of West Virginia Code § 8-6-5 which authorize annexation to effect a “minor boundary adjustment,” thereby avoiding a vote of the electorate.

Under the provisions of West Virginia Code § 8-6-5, the proposed property must be contiguous with the municipality. W. Va. Code § 8-6-5. However, in this case, the Property is not truly contiguous with the City limits. APP 50-55; APP 187-189; APP 280. In order to remedy this problem, the City's Petition included two tracts of land—the Property and a narrow private easement connecting the Property to Frontage Road. APP 152-162. Conveniently, the City petitioned the County to annex Frontage Road in August of 2012, which is the same time period Checks filed its application with the County for an automobile junkyard permit. APP 164-167.

While the Property is technically linked to the City limits because the private easement connected to the Property touches Frontage Road, the Property is surrounded on all four sides by the County. APP 50-55; APP 187-189; APP 280. In effect, the Property is an island in the County. Common sense tells us the Property is not actually contiguous to the City, as contemplated by Chapter 8, Article 6 of the West Virginia Code. However, it appears the City, County, and Trial Court have loosely interpreted the term “contiguous,” which has created an “outrageous geographical result.” In re City of Beckley, 194 W. Va. at 430, 460 S.E.2d at 676. Such an interpretation is inappropriate. *See* Syl. Pt. 2, State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968) (“Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.”). This Court has held that “[c]ommon sense would dictate that the municipality would not undertake a burdensome obligation to supply services to the annexed area by extending them at great length along a narrow strip of land.” In re City of Beckley, 194 W. Va. at 430, 460 S.E.2d at 676. However, the City, County, and Trial Court have done just that. In its discovery responses, the Commission admitted as follows:

10. Please admit that, at the time you voted on the annexation of the Property, you were aware that no residential property lying within the corporate limits of the City . . . shared a common boundary line with the Property.

RESPONSE: Admit.

11. Please admit that, at the time you voted on the annexation of the Property, you were aware that no commercial property lying within the corporate limits of the City . . . shared a common boundary line with the Property.

RESPONSE: Admit.

12. Please admit that, at the time you voted on the annexation of the Property, you were aware that the only residential property that shared a common boundary line with the Property was property lying within Nicholas County.

RESPONSE: Admit.

APP 109-110; APP 113; APP 116. In approving the annexation, the Commission fully understood that the Property did not share a common boundary line with any residential or commercial property lying within the City but moved forward with the position that the Property was contiguous with the City limits. The Trial Court ratified this error when it incorrectly found that the Property was contiguous with the City limits. APP 1-12.

### **III. The Property Is Not Subject to Annexation via Minor Boundary Adjustment**

When making a decision on an application for annexation by minor boundary adjustment, a county commission is required to determine if the proposed annexation consists of a street or highway as defined in West Virginia Code § 17C-1-35 and one or more freeholders, or if the proposed annexation consists of a street or highway as defined in West Virginia Code § 17C-1-35 which does not include a freeholder but which is necessary for the provision of emergency

services in the territory being annexed.<sup>2</sup> W. Va. Code § 8-6-5(f)(4) and (f)(5). The reason county commissions are required to make this determination is because these are the only two types of territory that can be annexed via a minor boundary adjustment. W. Va. Code § 8-6-5(b).

West Virginia Code § 8-6-5 contains introductory language which says that “[i]n addition to any other annexation configuration, a municipality may incorporate by minor boundary adjustment” the two types of territory that consist of a street or highway as defined in West Virginia Code § 17C-1-35. W. Va. Code § 8-6-5. The Trial Court found that this introductory language meant that any annexation configuration could be used for a minor boundary adjustment. APP 1-12; APP 274-276. The Trial Court erred in making this conclusion. When read in context, it is clear that this introductory phrase references the idea that a municipality may use annexation configurations other than a minor boundary adjustment, i.e. annexation by election or without an election pursuant to West Virginia Code §§ 8-6-2 and 8-6-4 (2015), to incorporate new territory. If the West Virginia Legislature (“Legislature”) intended to allow any sort of annexation configuration whatsoever, the Legislature would not have included the language about a street or highway. It would not have been necessary to include anything except language which provides for any annexation configuration. The fact that an annexation occurs by “minor boundary adjustment” suggests a limit on the ability to annex property into a municipality. Otherwise, the Code section would have been named “annexation by boundary adjustment”.

West Virginia Code 8-6-5(b) specifically states that there are only two types of territory that “a municipality may incorporate by minor boundary adjustment”—the two types identified

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<sup>2</sup> West Virginia Code § 17C-1-35 defines a street or highway as “the entire width between the boundary lines of every way publically maintained where any part thereof is open to the use of the public for purposes of vehicular travel.”

in the Code section. W. Va. Code § 8-6-5(b). That is why a county commission, when determining whether or not to approve an annexation via minor boundary adjustment, is required to determine whether the territory to be annexed is one of the two types of territory identified in the Code.

In its 2014 *Order on Boundary Adjustment*, the Commission stated that “[t]he proposed annexation does *not* consist of a street or highway as defined in West Virginia Code § 35-1-17c and one or more freeholders” and “the proposed annexation does *not* consist of a street or highway as defined in West Virginia Code § 35-1-17c which does not include a freeholder, but which is necessary for the provision of emergency services in the territory being annexed.”<sup>3</sup> APP 217-218 (emphasis added). In stating that the annexation does *not* meet the street or highway requirements outlined in West Virginia Code §§ 8-6-5 and 17C-1-35, the Commission failed to satisfy the requirements for annexation by minor boundary adjustment. It is clear that the Commission misread or misapplied the Code. The Trial Court upheld this error when it found the annexation met the requirements of West Virginia Code § 8-6-5(b).

#### **IV. The Petition Is Not in Compliance with W. Va. Code § 8-6-5(c)**

Pursuant to Article 8, Chapter 6 of the West Virginia Code, the City’s Petition for annexation was required to 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

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<sup>3</sup>Upon information and belief, the Commission misstated the Code provision and meant to refer to West Virginia Code § 17C-1-35, as referenced in West Virginia Code § 8-6-5.

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.

W. Va. Code § 8-6-5(c). The Legislature listed what factors must be considered in determining whether an annexation should be approved for good reason—to ensure the annexation is in the best interest of a city and county. The burden is on the proponents of the annexation to prove the statutory requirements have been met. *See Cowan v. County Comm'n*, 161 W. Va. 106, 112, 240 S.E.2d 675, 679 (1977) (regarding the incorporation of a municipality, this Court found that “[t]he burden of proving that the statutory prerequisites have been met must logically fall upon those who seek to establish the municipality”). Unfortunately, the City’s Petition was vague and misleading. In the Petition, the City falsely stated that no businesses were located in the territory to be annexed even though the City knew Checks was operating an automobile junkyard on the Property. APP 154 at ¶ 4; APP 160 at ¶ 4. Additionally, the Petition did not include an accurate map showing the metes and bounds of the territory to be annexed. APP 152-163.

Furthermore, the *Notice* published by the Commission in the local paper simply provided that “the proposed annexation [would] have a positive impact on the City’s finances and services. APP 57. The Notice provided absolutely no explanation of the alleged impact. Simply stating that the annexation will improve the City’s finances and services is not sufficient. Instead, an explanation of *how* the City’s finances and services will be affected is warranted. *See* W. Va. Code § 8-6-5(c). Conversely, the *Amended Petition for Annexation by Minor Boundary Adjustment* (“Amended Petition”) filed by the City provided that the annexation would “have no impact on the City’s finances and services.” APP 161 at ¶ 10. The Amended Petition also stated that because “there [were] no businesses...within the proposed area of annexation, there [would] be no impact on fire insurance rates.” *Id.* at ¶ 9. Such a statement is untrue, as the Commission issued Checks a permit to operate the automobile junkyard on the Property in October of 2012. APP 98. The Commission’s October 2, 2012 meeting minutes reflect the public meeting which discussed the permit, including relevant information about the location of the planned business. APP 93-97. It has been clear to both the City and the Commission since the fall of 2012 that Checks planned to operate an automobile junkyard on the Property.

In approving the annexation, the Commission found that the annexation “will promote economic growth” in the County, “will require the developer to address and contain lead in the ground,” and “additional public services maintained by the City . . . will become available[.]”<sup>4</sup> APP 91-92 at ¶ 7. It is unclear what Checks is required to do to “address and contain the lead in the ground” or what “additional public services” will become available. *Id.* The Commission failed to provide any specifics regarding the impact of the City’s finances and services, including fire protection, solid waste collection, public water and sewer services, or anything of the like.

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<sup>4</sup> The Property is the site of a former shooting range. As a result, the ground is contaminated with lead. APP 105; APP 256.

The Order on Boundary Adjustment is completely insufficient, likely because the Petition from the City was ambiguous, incomplete, and contradictory.

Because the City's Petition did not meet the threshold requirements of West Virginia Code § 8-6-5(c), the Commission should not have proceeded to evaluate whether to approve the annexation, as outlined in West Virginia Code § 8-6-5(d) and (e). *See Cowan v. County Comm'n*, 161 W. Va. at 111, 240 S.E.2d at 678 ("The county commission . . . acts as an agency of the legislature performing a ministerial act. . . . If the requirements have not been met, the petition will be dismissed."). Since the Commission failed to follow the requirements of West Virginia Code § 8-6-5(c), (d), and (e), the process that the Commission used to approve the annexation is invalid.

Petitioners explained all of these deficiencies to the Trial Court, yet the Trial Court found the annexation met the requirements of West Virginia Code § 8-6-5.

**V. The Commission Did Not Properly Review the Evidence Presented to It Regarding the Annexation**

Pursuant to West Virginia Code § 8-6-5(f)(7), a county commission is required to weigh all of the evidence presented to it and then assess whether a proposed annexation is in the best interests of the county. W. Va. Code § 8-6-5(f)(7); *see also In re Morgantown*, 159 W. Va. 788, 793, 226 S.E.2d 900, 903 (1976) ("The commission, like the numerous administrative bodies which populate government, must apply the law to the facts,"); Syl. Pt. 1, *Cowan v. County Comm'n*, 161 W. Va. 106, 240 S.E.2d 675 ("The county commission, when considering a petition for the incorporation of a city, town or village, is a fact-finding agency of the legislature charged with the performance of a ministerial act.").

The Commission was presented with ample evidence which questioned the appropriateness of the annexation. For example, the Commission was presented with evidence

regarding the negative environmental impact of the annexation and evidence regarding the impact the annexation would have on the property values of surrounding homes and businesses. The Commission was also presented with a petition signed by many County residents opposing the annexation. APP 103-107. The Commission never took any of this evidence into account when it decided that the annexation was in the best interests of County. APP 91-92.

Instead, the Commission only considered three broad concepts—that, generally, the proposed annexation will promote economic growth; that the development will address and contain the lead on the Property; and that additional public services will become available. APP 91-92 at ¶ 7.

Because the Commission failed to take into account all of the evidence that was presented to it concerning the annexation, the Commission failed to apply the law to the facts, which is a violation of West Virginia Code § 8-6-5(f)(7). As such, the Commission’s decision was arbitrary, capricious, an abuse of discretion, and contrary to law. As the Court stated in Stephens v. Wayne County Board of Education, “[g]enerally an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it[.]” 2011 W. Va. LEXIS 497 at \* 21-22 (W. Va. Nov. 15, 2011) (internal citation omitted).

The Trial Court, therefore, erred when it found that the Commission’s decision was lawful and appropriate.

#### **VI. The Annexation Is Not in the Best Interest of the County**

The Commission approved the annexation with the idea that the annexation was in the best interest of the County because it would promote economic growth in the County. APP 91-92 at ¶ 7. However, in so doing, the Commission failed to recognize that Checks had not

obtained a Division permit and therefore would operate an automobile junkyard in violation of the City ordinance governing such an operation. APP 56; APP 100-102. The City ordinance provides that no one shall, within the City, place or deposit any junked vehicle or major vehicle part on private property unless it is at an automobile junkyard licensed pursuant to West Virginia Code § 17-23-1, *et seq.* (2015). APP 100-102. West Virginia Code § 17-23-3 provides that “[n]o salvage yard or any part thereof shall be established . . . without a state license.” W. Va. Code § 17-23-3. Thus, in approving the annexation, the Commission effectively sanctioned a circumvention of State and City law and permitted Checks to engage in the unregulated operation of an automobile junkyard which is bordered on all sides by County land.

Nowhere in its Order on Boundary Adjustment does the Commission consider the negative impact of an automobile junkyard, which is outlined in its own ordinance. APP 91-92. There is no explanation for how the automobile junkyard is in the best interest of the County or how it will promote economic growth. There is no mention of how many jobs the junkyard will purportedly create for the citizens of the City or County or how much money these jobs will generate. Importantly, there is no explanation as to why, if the annexation is in the best interest of the County, the Commission did not take steps to allow the automobile junkyard to operate in the County instead of the City. Id.

The Commission argued before the Trial Court that “[t]he County’s salvage yard permit is a separate and distinct Ordinance and the consideration of the operation of the negative impacts of a salvage yard is not a relevant inquiry related to a municipal application for annexation of a specific property.” APP 143. If the Commission is tasked with determining what is in the best interest of the County and its citizens, how can it not take into account the County’s own ordinance and the fact that Checks previously failed to “pay all licenses and fees

due to the State of West Virginia” to operate the salvage yard, as required by the County permit? APP 98. The Commission cannot ignore that Checks violated a County ordinance and instead approve an annexation which will further allow Checks to avoid State and County salvage yard regulations. More importantly, the Trial Court cannot uphold such an action.

### **VII. The Annexation Is a Public Nuisance**

West Virginia Code § 17-23-7 (2015) allows an automobile junkyard located on municipal property that is zoned industrial to be exempt from the Division permitting process. W. Va. Code § 17-23-7. However, the intent of this provision was not to authorize a party who could not obtain a Division permit an avenue to circumvent the permitting process. Rather, the exception exists because an automobile junkyard that is located within a city is typically subject to strict city ordinances because a city has a vested interest in making sure that an automobile junkyard does not harm adjacent city property.

Such a vested interest does not exist in this case. The Property upon which the automobile junkyard is located is surrounded by County property, mainly Petitioners’ property. APP 15 at ¶8; APP 50-55; APP 188; APP 190-194; APP 280. The Property does not abut, nor is it in close proximity to, any residential or commercial property within the City. Id. While the City’s limits may technically “touch” the Property, the City touches the Property via a right of way that connects to Frontage Road that connects to Route 19 which is connected to the heart of the City. Id. It is obvious that only the County is negatively impacted by the automobile junkyard. The City, therefore, does not have a vested interest in regulating the automobile junkyard to make sure that it does not cause harm to City property. As such, the rationale for the West Virginia Code § 17-23-7 exception to the Division permitting process is not applicable to the facts of this case.

By approving the annexation, the Commission allowed Checks to circumvent the Division process when it knew that Checks could not meet the Division permitting requirements. APP 103-107. The Commission, therefore, authorized Checks to operate an automobile junkyard that does not comply with West Virginia Code § 17-23-1 *et. seq.* As such, the Commission authorized a public nuisance. *See* W. Va. Code § 17-23-9 (2015) (“The establishment, operation, or maintenance of a salvage yard or any part thereof in violation of any provision of this article is hereby declared to be a public nuisance[.]”). The Trial Court, therefore, erred when it failed to find that the Commission authorized a public nuisance.

### **VIII. The Annexation Is a Taking in Violation of the State Constitution**

Article III § 9 of the West Virginia Constitution states:

Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

W. Va. Const. Art. III, § 9. In addition to the actual taking of property, this Court has held that a taking can constitute damage to property. *See generally* State ex rel. Cutlip v. Sawyers, 147 W. Va. 687, 130 S.E.2d 345 (1963). West Virginia law recognizes that automobile junkyards depress the value of adjacent property. *See* W. Va. Code § 17-23-1 (“the . . . operation . . . of salvage yards . . . depresses the value of the public investment of such roads, detracts from the safety and recreational value of travel thereon and destroys natural beauty[.]”). Additionally, City Ordinance 361.07 recognizes that the accumulation and storage of abandoned vehicles and junked vehicles “create a condition tending to reduce the value of private property” and

“promote blight and deterioration which . . . will . . . destroy the natural beauty of [the] City and have adverse economic and social effects[.]”. APP 100-102.

When the Property was within the County, Petitioners were protected by the Division permitting process. They were also protected by the County as citizens. The Commission’s decision to permit the annexation of the Property stripped Petitioners of these protections. Petitioners are not residents of the City and, therefore, have no ability to vote or influence the City’s decisions concerning how to, or even whether to, regulate the automobile junkyard.

By approving the annexation, the Commission effectively damaged the value of the Petitioners’ properties, which constitutes a taking in violation of Article III § 9 of the West Virginia Constitution.

### **CONCLUSION**

The Trial Court erred in finding the Property is subject to annexation via minor boundary adjustment. The Trial Court Order effectively authorized a public nuisance and a taking in violation of the West Virginia Constitution. For all of the reasons stated above, Petitioners respectfully request the Court reverse the Trial Court Order.

Respectfully submitted,

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

By Counsel

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Submitted this 30th day of March, 2016.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 15-1223

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**Tony Coffman, Robert Marsh, Mary Marsh,  
James Marsh, and Marilyn Marsh,  
Petitioners,**

vs.

**Nicholas County Commission and its Members,  
Dr. Yancy S. Short, M.D., John R. Miller, and  
Kenneth Altizer, individually and in their official  
capacities, and Checks Auto Parts, LLC,  
Respondents.**

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**On Appeal from Honorable Gary L. Johnson, Judge  
Circuit Court of Nicholas County  
Civil Action No. 14-C-122**

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**CERTIFICATE OF SERVICE**

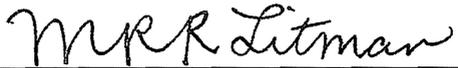
The undersigned, of counsel for Petitioners Tony Coffman, Robert Marsh, Mary Marsh, James Marsh, and Marilyn Marsh, does hereby certify that **Petitioners' Brief** has been served upon the following by this day mailing to them, by first class mail, postage prepaid, a true copy thereof:

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This 30th day of March, 2016.

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Mary R. Rowe Litman