

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-1223

**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.**

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

PETITIONERS' REPLY BRIEF

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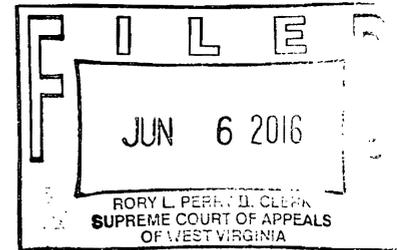


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SUMMARY OF ARGUMENT

The County Commission of Nicholas County, West Virginia (“Commission”) misstates the facts in this case in order to support a myriad of flawed arguments that it took the proper steps to annex the subject property (“Property”) into the City of Summersville (“City”), all of which are designed to obscure one overriding truth—the actions of the Commission were undertaken in a brazen attempt to circumvent West Virginia (“State”) and Nicholas County (“County”) law designed to protect citizens from the ravages associated with the proliferation of automobile junkyards. In filing *Respondents Nicholas County Commission, Dr. Yancy S. Short, M.D., John R. Miller, and Kenneth Altizer’s Brief in Opposition* (“Response Brief”), the Commission provided this Court with misstatements regarding the Commission and Circuit Court of Nicholas County, West Virginia’s (“Trial Court”) actions and findings regarding the annexation. However, at the end of the day, it is clear that the Trial Court erred in granting summary judgment in favor of the Commission for seven distinct reasons.

First, the Trial Court erred in finding the Property is contiguous with the City. The Property is not truly contiguous with the City, and is instead an island in the middle of the County. Second, the Trial Court erred in finding the Property is subject to annexation via minor boundary adjustment, as outlined in West Virginia Code § 8-6-5 (2015). Third, the Trial Court erred in finding the City drafted the *Petition for Annexation* (“Petition”) and, subsequently, the Commission drafted the *Order on Boundary Adjustment* in compliance with West Virginia Code § 8-6-5(c). Fourth, the Trial Court erred in finding the Commission properly reviewed the evidence presented to it prior to voting to approve the annexation. Fifth, the Trial Court erred in upholding the Commission’s finding that the annexation is in the best interests of the County and its citizens when it is abundantly clear that it is not, as Check Auto Parts, LLC (“Checks”) was

not able to obtain a permit from the West Virginia Department of Transportation, Division of Highways (“Division”), among other reasons. Sixth, the Trial Court erred in finding the annexation is not a public nuisance, in violation of Chapter 17, Article 23 of the West Virginia Code. Finally, the Trial Court erred in failing to recognize that the annexation harms the value of Petitioners’ properties, which constitutes a taking in violation of the Article III of the West Virginia Constitution.

ARGUMENT

I. The Property Is Not Contiguous with the City Limits

The Property is not truly contiguous with the City limits. As it does elsewhere, the Commission engages in a game of semantics in arguing to the contrary. The Commission contests that the Property is an island surrounded on all four sides by the County, arguing that it directly abuts the City’s existing boundary. Response Brief, pp. 1, 5, 11. No residential or commercial property lying within the corporate limits of the City shares a common boundary line with the Property. APP 109-110; APP 113; APP 116. Notwithstanding this, the Commission argues that the Property is contiguous because it is connected to the City by three roads—Route 19, Frontage Road, and a narrow private easement—all of which have been annexed by the City since the fall of 2012, which is conveniently the same time period the Commission issued a permit to Checks to operate an automobile junkyard on the Property. Response Brief, p. 9; APP 164-167.

The Commission asserts that the argument that the annexation creates an “outrageous geographical result” is not properly before this Court because Petitioners did not raise the argument before the Trial Court. Response Brief, p. 10. Though Petitioners did not use the phrase “outrageous geographic result” in its pleadings before the Trial Court, Petitioners have

consistently argued that the creation of an island in the middle of the County for the sole purpose of allowing the challenged automobile junkyard was and is a perversion of the annexation process. *See* APP 19-22; APP 76-77; APP 82-83; APP 239. As such, the Commission's efforts to avoid the holding in In re City of Beckley are simply untenable. 194 W. Va. 423, 460 S.E.2d 669 (1995).

Beyond this, the Commission cites In re City of Beckley for the proposition that neither the Trial Court nor this Court may "second guess" the Commission's decision in this matter because there is an element of "reasonableness" that controls the City's decision to annex. Response Brief, pp. 10-11 (citing 194 W. Va. 423, 460 S.E.2d 669). Here, the alleged "reasonableness" of the Commission's decision is predicated upon its unsupported statement that the annexation and resulting automobile junkyard would create unspecified jobs which would, in some unstated manner, benefit the County. Response Brief, p. 17-18. The Commission never addressed how many jobs, for whom, and how the jobs would benefit the County. *See* APP 32-33. Equally absent is any explanation as to why, if this automobile junkyard provides such benefit to the County, it is necessary to cede the Property to the City in order for the automobile junkyard to operate. Id.

The stark truth is that the Commission's rationale is nothing more than a "make weight" argument designed to mask what is truly afoot—a blatant effort to circumvent the State laws regulating automobile junkyards and the protections the West Virginia Legislature designed the laws to afford. The Commission's rationale hardly rises to the level of "reasonableness" contemplated by this Court in In re City of Beckley. 194 W. Va. 423, 460 S.E.2d 669. The failure of the Trial Court to acknowledge the Commission's unsound rationale was erroneous.

II. The Property Is Not Subject to Annexation via Minor Boundary Adjustment

The Property is not subject to annexation via minor boundary adjustment because it does not fit the criteria contemplated by the West Virginia Code. The Property does include a street or highway as defined in West Virginia Code § 17C-1-35 (2015) and one or more freeholders, nor does it include a street or highway which does not include a freeholder but which is necessary for the provision of emergency services in the territory being annexed. *See* W. Va. Code § 8-6-5(c).

However, the Commission asserts that any configuration of property, street or otherwise, can be annexed via minor boundary adjustment. Under the Commission's theory, municipalities could annex property via minor boundary adjustment, regardless of the size and nature of the property. Response Brief, pp. 11-12. Chapter 8, Article 6 of the West Virginia Code contains the requirements for different types of annexations—a petition for annexation, which includes the vote of qualified voters of a municipality; annexation without an election, which provides that a governing body of a municipality may, by ordinance, provide for the annexation of property without a vote of the qualified voters if other requirements are met; and annexation by minor boundary adjustment. W. Va. Code §§ 8-6-1 to 8-6-6 (2015). A review of Chapter 8, Article 6 reveals that annexation by minor boundary adjustment is the simplest form of annexation which does not require the vote or a petition of all of the qualified voters. Under the Commission's theory, there would be no need for the other types of annexation to exist. For this reason, the Commission's theory is flawed, as the Legislature clearly intended for minor boundary adjustments to be limited in nature.

III. The Order on Boundary Adjustment is Not in Compliance with West Virginia Code § 8-6-5(c)

As outlined above, West Virginia Code § 8-6-5 provides that a municipality may incorporate by minor boundary adjustment: (i) territory that consists of a street or highway as defined in West Virginia Code § 17C-1-35 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.

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.”¹ APP 217-218 (emphasis added). The Commission does not dispute this fact. In stating that the annexation does not meet the street or highway requirements outlined in West Virginia Code § 8-6-5, the Commission failed to satisfy the requirements for annexation by minor boundary adjustment, which requires a finding that the annexation consists of a street or highway as defined in West Virginia Code § 17C-1-35. West Virginia Code § 8-6-5(f)(4) provides that in making its decision on the proposed annexation, the Commission shall consider “[w]hether the proposed annexation consists of a street or highway” as defined in West Virginia Code § 17C-1-35. W. Va. Code § 8-6-5(f)(4).

Regardless of the Commission’s interpretation of whether any other annexation configuration may be considered, the Commission is still required, in its *Order on Boundary*

¹ 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. West Virginia Code § 35-1-17c does not exist.

Adjustment, to determine whether the proposed annexation consists of a street or highway, as defined in Chapter 17C. W. Va. Code § 8-6-5(f)(4). The *Order on Boundary Adjustment* does not make that finding because it makes no reference to a street or highway as defined in Chapter 17C. APP 217-18. Plain and simple. Unfortunately, the Trial Court failed to acknowledge that the Commission did not make this finding. APP 1-12.

Furthermore, West Virginia Code § 8-6-5(f) provides that in making its final decision on an application for annexation by minor boundary adjustment, the Commission shall consider “whether the proposed annexation is in the best interest of the county as a whole.” W. Va. Code § 8-6-5(f). In making a determination of whether the annexation is in the best interest of the County as a whole, the Commission argues 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.” Response Brief, p. 21. This argument is nothing more than *ipse dixit*. The Commission is tasked with determining what is in the best interest of the County and its citizens, so it must take into account its own ordinances which were designed to protect its interests, as well as the interests of its citizens, and which would be circumvented if the annexation were approved. The Commission cannot simply ignore, as it has done here, the fact that Checks could not establish its automobile junkyard given the restrictions of State and County law in the course of approving the City’s *Petition*. The Commission maintains, however, that it previously reviewed the negative effects of the automobile junkyard when the Commission granted Checks a County permit to operate the automobile junkyard. Response Brief, pp. 21-23. This is yet another “make weight” argument that fails even the most cursory review. As the Commission has admitted, at the time the Commission gave Checks a County permit, Checks had not yet

attempted to obtain a permit from the Division.² Response Brief, p. 4. Checks never obtained the Division permit because it was unable to establish that the automobile junkyard was not located within a prohibited distance of certain residents, specifically, Petitioners Robert Marsh, Mary Marsh, James Marsh, and Marilyn Marsh. APP 56.

When later presented with the City's *Petition*—a petition that would have allowed the establishment of the automobile junkyard in violation of the State prohibition—the Commission chose to ignore this fact and the resulting injury it would cause its own residents. Such a failure is nothing short of an outrageous and clear dereliction of the obligation imposed on the Commission under the provisions of West Virginia Code § 8-6-5(f). The Commission contests that Petitioners and others provided evidence to oppose the annexation, including the Division permit issue. Response Brief, pp. 6-7, 14, 18-19. This is simply incorrect. Petitioners, as well as counsel for Petitioners, spoke in opposition to the annexation at the public hearing held on August 5, 2014. Petitioners and their counsel supplied the Commission with multiple exhibits, including the Checks' denial letter from the Division, photographs, and copies of many of the documents used in the parties' motions for summary judgment before the Trial Court. APP 103-107. Petitioners incorporated this evidence into the *Complaint* and *Amended Complaint* filed before the Trial Court, as well as Petitioners' *Motion for Summary Judgment* and *Response to Counter-Motion for Summary Judgment*. APP 13-58; APP 72-130; APP 233-243. While the Commission may have paid no attention to these documents and, more particularly, the

² The Commission argues Petitioner Tony Coffman operates a salvage yard and did not oppose Checks obtaining a County permit. Response Brief, p. 3. These statements are untrue. Petitioner Tony Coffman operates a recycling center, which is subject to a separate set of regulations. *See, e.g.*, W. Va. Code § 22C-3-1 (2015), *et seq.* Furthermore, Petitioner Tony Coffman told the Commission at the September 4, 2012 meeting that he did not object to Checks making an application for a permit. APP 208. Such a statement is completely different from Petitioner Tony Coffman "voic[ing] no opposition to the granting of this permit." Response Brief, p. 3 (emphasis added). Anyone is entitled to make an application for a permit. This is yet another example of the Commission twisting the facts to suit its position in this matter.

Division's denial of Checks' request for a permit, the Commission cannot deny that Petitioners provided such evidence to it. Moreover, the fact that the Commission was apparently unaware of the Division's denial of Checks' request for a permit serves to underscore its failure to fully consider whether its actions were in the best interests of the County and its citizens.

The Commission now appears to contest that Checks was operating the automobile junkyard at the time the *Petition* was filed as a further basis for avoiding its own failures. Response Brief, p. 14. Yet, Checks never denied operating the automobile junkyard at that time. APP 59. At the hearing before the Trial Court on the parties' motions for summary judgment, counsel for Checks did not contest that Checks had been operating an automobile junkyard. APP 244-279. Such an argument by the Commission highlights the lack of knowledge it had regarding the Property at the time of the annexation, furthering Petitioner's position that the Commission did not perform its job.

Lastly, Petitioners highlight the conflicting statements found in the *Petition, Amended Petition for Annexation by Minor Boundary Adjustment*, and *Notice* as an example of the manner in which the Commission considered both annexations and conveyed information to the citizens of the County about the annexations. Response Brief, pp. 15-16. Contrary to the Commission's assertions, the annexation of Route 19 and Frontage Road is directly related to the instant case. The Commission conveniently approved the annexation during the same time period Checks sought a County permit. APP 164-167. That annexation was the first step made by Checks, the City, and the County to get the Property within the City limits, as the annexation concerned property abutting the Property at issue in this case. Id.

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

Pursuant to West Virginia Code § 8-6-5(f)(7), the Commission is required to weigh all of the evidence presented to it and then assess whether a proposed annexation is in the best interest 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 numerous administrative bodies which populate government, must apply the law to the facts.”). In its *Response Brief*, the Commission maintains that when the City submitted the *Petition*, the Commission’s only job was to determine whether the *Petition* met the threshold requirements. *Response Brief*, p. 13. However, the Commission also argues that it enjoys a broad discretion in exercising its legislative powers to make a determination about a minor boundary adjustment. *Response Brief*, p. 16-17. The Commission cannot have it both ways. It cannot argue that its hands were tied with respect to the *Petition*, but excuse its behavior on its ability to exercise broad discretion. As this Court stated in *In re Morgantown*, the Commission has “a responsibility of administering the law according to specific statutory standards.” 159 W. Va. at 793, 226 S.E.2d at 903. The Commission’s authority is not without limitation. *Id.* at 793, 226 S.E.2d at 903.

In making a determination on the annexation, the Commission only took into account three concepts—that the annexation will promote economic growth; that the development will address and contain the lead in the Property; and that additional public services will become available.³ *APP 91-92* at ¶ 7. Unfortunately, these broad statements have no real meaning, and therefore, the Commission did not perform its job, as contemplated by the Chapter 8, Article 6 of the West Virginia Code.

³ In its *Response Brief*, the Commission states that Petitioners have created a new argument regarding the lead contamination issue. *Response Brief*, p. 18. Petitioners have done no such thing. Petitioners simply highlight the lead contamination issue as an example of the Commission’s inability to review the evidence and prepare an order with actual evidence on the pertinent issues.

V. The Commission Sanctioned a Circumvention of State and City Law

In approving the annexation, the Commission sanctioned a circumvention of State and City law and permitted Checks to engage in the unregulated operation of an automobile junkyard. As admitted by the Commission, when the Commission approved the annexation, the City had not formally zoned the Property industrial. Response Brief, p. 20. Therefore, at the time the Commission entered the *Order on Boundary Adjustment*, Checks was operating in violation of State and City law.

While West Virginia Code § 17-23-7 (2015) exempts automobile junkyards located within industrial zones in municipalities from the provisions of Chapter 17, Article 23, it is not otherwise contradictory to the City Ordinance which provides that no one can deposit a junked vehicle or any major vehicle part on private property unless it is at a licensed automobile junkyard, which the Ordinance defines as “a salvage yard licensed under West Virginia Code Article 17-23.” APP 47-49. It is possible for the City to enforce an obligation to obtain a Division permit as long as the property is not in an industrial zone. Currently, the Property is not located in an industrial zone. The Ordinance does not “directly contradict a state statute” or create a “legal impossibility” as the Commission has argued. Response Brief, p. 21. The Commission created this argument in order to avoid blame for Checks’ circumvention of the City Ordinance.

VI. The Annexation is a Public Nuisance

The City has not put in place any ordinances pertaining to the regulation of automobile junkyards and the Property is not currently zoned industrial. Response Brief, p. 5. As a result, the operation of an automobile junkyard on the Property is a violation of West Virginia Code § 17-23-1, *et seq.* (2015), which constitutes 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 [.]”).

Contrary to the Commission’s assertions, Petitioners do not contest West Virginia Code § 17-23-1, *et seq.*, nor do they take the position that only the State can regulate automobile junkyards. A city can properly regulate an automobile junkyard with suitable zoning and ordinances in place. Unfortunately, the City has not done that in this case. *See Response Brief*, p. 5 (“[N]o formal process to zone [the Property] as industrial was ever conducted by the City of Summersville.”).

In its *Response Brief*, the Commission takes the position that Petitioners did not assert any argument before the Trial Court that the annexation is a public nuisance and that Petitioners did not oppose the Commission’s request for summary judgment on that issue. *Response Brief*, pp. 7, 23-24. Again, the Commission has misstated the facts to support its flawed arguments. Count V of Petitioners’ *Amended Complaint* provided that by permitting Checks and the City to circumvent the law, the Commission authorized a public nuisance. APP 13. Petitioners’ *Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment* provided that Checks should be enjoined from operating the automobile junkyard until it obtains a Division permit, citing Chapter 17, Article 23 of the West Virginia Code pertaining to public nuisances. APP 74-88; *see also* W. Va. Code § 17-23-9. Petitioners have argued throughout this case that Checks’ operation of the automobile junkyard is a public nuisance.

VII. The Annexation is a Taking in Violation of the West Virginia Constitution

In approving the annexation, the Commission stripped Petitioners of any meaningful ability to protect their property because Petitioners are not residents of the City. APP 104-106. Because they are not residents of the City, Petitioners cannot vote nor have any say in the City’s

regulation of the automobile junkyard, despite the fact their properties are most affected by the automobile junkyard. Such a taking is a violation of Article III of the West Virginia Constitution.

Petitioners Robert Marsh, Mary Marsh, James Marsh, and Marilyn Marsh own homes and Petitioner Tony Coffman owns commercial property adjacent to the Property. APP 104-106. The presence of the automobile junkyard not only decreases the value of Petitioners' properties, but prevents Petitioners from economically viable use of their properties. *See Agins v. Tiburon*, 447 U.S. 255, 261, 100 S. Ct. 2138, 2141 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land[.]") (internal citation omitted). For example, Petitioner Robert Marsh's home is less than 1,000 feet from the Property. His daughter suffers from stage four kidney disease. Petitioner Robert Marsh is not only damaged by the decrease in property value, but by the impact the annexation has on his family's health. APP 103-107.

The Commission has cited Dolan v. City of Tigard to argue that a land use regulation does not affect a taking if it substantially advances legitimate state interests. 512 U.S. 374, 114 S. Ct. 2309 (1994); Response Brief, p. 25-26. In Dolan, the owner of a city lot applied to the city for a building permit for a bigger retail store. The city's planning commission granted the application, subject to the owner dedicating a portion of her lot as a greenway and as a pedestrian/bicycle pathway, which provided for the creation of a safe pathway system for the area. *See generally* 512 U.S. 374, 114 S. Ct. 2309. In that case, the planning commission's "taking" of the owner's property benefitted the general public. In the instant case, the annexation of the automobile junkyard will not "substantially advance[] legitimate state interests." Dolan, 512 U.S. at 385, 114 S. Ct. at 2316. As the Commission has recognized, it

received no specific evidence about the number of jobs the automobile junkyard will generate or the funds it will bring to the County. Response Brief, p. 17-18. Because the Commission has annexed the Property in order to avoid the Division permitting process, the annexation actually hinders legitimate State interests.

CONCLUSION

A review of the law and facts of this case reveals that the Trial Court erred in finding that the Property is subject to annexation via minor boundary adjustment. It is clear that the Property is not contiguous with the City limits; the Property is not subject to annexation via minor boundary adjustment; the *Petition* and *Order on Boundary Adjustment* are not in compliance with West Virginia Code § 8-6-5(c); the Commission did not properly review the evidence presented to it regarding the annexation; the annexation is not in the best interests of the County and its citizens; the annexation is a public nuisance; and the annexation is taking in violation of Article III of the West Virginia Constitution. For these reasons, Petitioners respectfully request the Court reverse the *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* as it pertains to the granting of summary judgment in favor of Respondents.

Respectfully submitted,

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Submitted this 6th day of June, 2016.

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

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' Reply 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 6th day of June, 2016.



Mary R. Rowe Litman