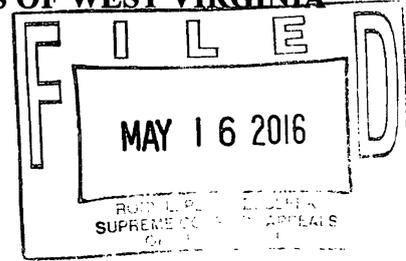


BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

**RESPONDENTS NICHOLAS COUNTY COMMISSION,
DR. YANCY S. SHORT, M.D., JOHN R. MILLER, AND
KENNETH ALTIZER'S BRIEF IN OPPOSITION**

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I. RESPONSE TO ASSIGNMENTS OF ERROR

Petitioners have asserted the following “Assignments of Error”:

1. Did the trial court err in finding the property is contiguous with the city limits?

Response: No. Petitioners’ concede the municipal property directly abuts the annexed property.

2. Did the trial court err in finding the property is subject to annexation via minor boundary adjustment?

Response: No. A plain reading of the statute confirms that annexation via minor boundary adjustment was appropriate in this matter.

3. Did the trial court err in finding the Petition [for Annexation] was in compliance with *West Virginia Code* § 8-6-5(c)?

Response: No. There were no errors in the Petitioner for Annexation.

4. Did the trial court err in finding the [Nicholas County] Commission properly reviewed the evidence presented to it regarding the annexation?

Response: No. There is no evidence that the Nicholas County Commission failed to perform its duties related to the annexation.

5. Did the trial court err in finding the annexation is in the best interest of the County?

*Response: No. The trial court did **not** find that the annexation was in the best interest of the county, but rather found that Petitioners failed to establish that the Nicholas County Commission acted arbitrarily or unreasonably in its conclusion that the annexation was in the best interest of the County.*

6. Did the trial court err in finding the annexation is not a public nuisance?

Response: No. There is no evidence that the annexation process violated any

law and because of such, it cannot be deemed a public nuisance.

7. Did the trial court err in finding that the annexation is not a taking in violation of the State and Federal Constitution?

Response: No. The trial court correctly ruled that Petitioners have no evidence to establish that the annexation was a regulatory taking in violation of the State and United States Constitutions.

II. STATEMENT OF THE CASE

This matter involves an appeal to the granting of summary judgment to Defendants the Nicholas County Commission (hereinafter the “Commission”), then Commissioner Dr. Yancy S. Short, M.D., then and current Commissioner John R. Miller, and then and current Commissioner Kenneth Altizer (hereinafter collectively “Commission Defendants”). However, while this matter is based upon a challenge to an annexation of the “subject property”, in order to fully understand the facts of this matter, it is necessary to understand certain events and background leading up to the annexation of the “subject property.” Petitioners’ Brief failed to provide this Court with the necessary background and therefore, it is set forth below.

A. Annexation of frontage road in 2012.

On August 7, 2012, the City of Summersville sought to annex certain tracts of land through a minor boundary adjustment process. *See App. 157 – 162.* This Petition sought to increase the boundaries of the City of Summersville to include portions of Route 19 up to the intersection of Phillips Run Road and Frontage Road. *See App. 157 – 162.* Additionally, the Petition would include the annexation of Frontage Road. *See “App. 157 – 162”, at description of Tract II and maps thereof; see also App. 163.* This annexation was proposed, in part, to help ensure City of Summersville’s police access to Nicholas County High School. After following the proper

procedures, by Order dated September 4, 2012, this Petition for Annexation was approved and the City of Summersville's municipal boundaries were adjusted to include Frontage Road. *See App.* 164 – 167. This tract of land is not the “subject property.” However, this property is important because it extends the municipal boundary to abut the “subject property”, which was not yet annexed.

B. Checks Auto Parts, LLC's operation of a salvage yard.

On August 21, 2012, Defendant Checks Auto Parts, LLC (hereinafter “Checks”) submitted an application for a county approval permit to the Commission to operate a salvage yard in the County. *See App.* 168 – 196. The application for a county approval permit was made in accordance to the requirements set forth in the Nicholas County Ordinance related to the permitting of a salvage yard and *West Virginia Code* § 17-23-4, which expressly requires the attainment of a county approval permit *before* seeking a State salvage yard permit. *See App.* 168 – 196; *see also App.* 197 – 205. After following the procedures outlined in *West Virginia Code* § 17-23-4 and the applicable County Ordinance, on October 2, 2012, Checks was granted a county approval permit. *See App.* 206. Importantly, prior to the issuance of this permit, at least one public meeting was held wherein lead Petitioner Tony Coffman, who also operates a licensed salvage yard in Nicholas County, voiced no opposition to the granting of this permit, despite being present and speaking at the County Commission meeting related to the permit. *See App.* 93-94. Interestingly enough, prior to the approval of the permit, the County Commission raised certain concerns about the operation of the salvage yard. *See App.* 208- 209. Because of this, the permit was not immediately granted, but was withheld until these concerns were alleviated by additional evidence. *See App.* 210-214. While the Commissioners recognized that the State statute *may* present problems for Checks in getting approval from the State, ultimately the County's ordinance requirements were

satisfied. *See* App. 210-214.

Subsequently, unbeknownst at the time to the Commission Defendants, Checks was denied a State permit due to an incomplete application. *See* App. 215 (denying permit because DOH “did not receive a Certified Survey.”). It is unclear whether a certified survey was ever submitted or whether the State application was ever re-submitted. Further, it is unclear from the record whether Checks operated on the subject property from 2012 until 2014. However, after the approval of the annexation of the subject property, upon representations by Checks, Checks began operating a salvage yard in Nicholas County. *See* App. 216.

C. Annexation of the subject property.

On or around March 20, 2014, the Commission received from the City of Summersville a Petition for Annexation by Minor Boundary Adjustment. *See* App. 152 – 156. This Petition sought, through the minor boundary adjustment process, to annex three tracts of land, two of which directly abut Frontage Road and/or Route 19. Both Frontage Road and this portion of Rt. 19 were within the then existing municipal boundary of the City of Summersville. *See* App. 152 – 156. The third tract contained Checks’ property. These tracts are collectively referred to as the “subject property”. After going through the posting process, as well as holding numerous public meetings, the Commission approved the annexation because all requirements of *West Virginia Code* § 8-6-5 were satisfied and the Commission found that the annexation was in the best interest of the County. *See* App. 217 – 218.

Throughout the entirety of the annexation process, concern was expressed by the Petitioners, not over the annexation, but rather whether Checks would be permitted to operate a salvage yard in the area due to the annexation. Because Checks had previously met the requirements of the County Ordinance regarding the operation of the salvage yard and was given

a permit by the County, this issue was essentially moot.

Based upon the granting of this annexation petition, Petitioners sued the Commission, as well as then Commissioner Dr. Short, Commissioner Miller and Commissioner Altizer asserting various claims and seeking monetary damages. After conducting limited written discovery, and after amending their Complaint to make Checks a party, Petitioners' moved for summary judgment on the issue of the validity of the annexation of the subject property. In response the Commission Defendants counter-moved for summary judgment. The trial court granted the Commission Defendants' motion for summary judgment. App. 1 - 12. Subsequent to this Order, it was discovered that, while the City of Summersville voted to annex the "subject property" and to consider it zoned industrial, no formal process to zone this area as industrial was ever conducted by the City of Summersville. Being out of compliance with *West Virginia Code* § 17-23-7, Checks voluntarily agreed to cease operations of a salvage yard pending compliance with *West Virginia Code* § 12-23-1, *et seq.* Petitioners then appealed the trial court's Order granting the Commission Defendants summary judgment.

III. SUMMARY OF ARGUMENT

Petitioners' first assignment of error is an argument that the trial court erred when it ruled that the annexed property is not contiguous, as defined by *West Virginia Code* § 8-6-5(f)(1) with any existing municipal boundary. However, Petitioners' admit that the annexed subject property directly abuts an existing municipal boundary. This is the very definition of contiguous under the statute. To the extent Petitioners' raise additional policy related arguments, these arguments are insufficient to overcome a plain reading of the statute and prior precedent of this Court as applied to the facts here. As a result, Petitioners' first assignment of error fails.

Petitioners' second assignment of error is an argument that the trial court erred when it ruled that the subject property was subject to annexation via the minor boundary adjustment procedure set forth in *West Virginia Code* § 8-6-5. However, again, Petitioners' argument relies on disputing a plain reading of the statute by arguing that the statute is limited to only two scenarios which are not present here. However, in order to reach this conclusion, this Court would need to ignore the first seven words of the statute, which provide, "[i]n addition to any other annexation configuration". *West Virginia Code* § 8-6-5(b). Because this Court simply cannot ignore the plain language of the statute, Petitioners' second assignment of error fails.

Petitioners' third assignment of error is an argument that the trial court erred in finding that the Petition submitted by the City of Summersville met the requirements of *West Virginia Code* § 8-6-5(c). However, this argument fails, as nothing in the Petition is "vague" or "misleading". More importantly, Petitioners have no evidence that the Commission would have known at the filing of this Petition that the alleged statements are "vague" or "misleading." Petitioners remaining arguments related to this assignment of error attempt to place requirements upon the Commission that are not found in the relevant *West Virginia Code* sections. As a result, Petitioners' third assignment of error fails.

Petitioners' fourth assignment of error is an argument that the trial court erred in finding that the Commission properly reviewed the evidence submitted to it regarding the annexation. Before discussing the Commission's review of the evidence, as a matter of law, the Commission's actions are presumptively valid and may only be overturned if the Commission acted unreasonably or arbitrarily. Here, while Petitioners state that certain evidence was ignored by the Commissioner, Petitioners do not cite to what evidence was *actually* submitted to the Commission. This is crucial, as this Court cannot determine whether the Commission's actions were unreasonable or arbitrary

if it does not know what evidence was actually submitted to the Commission. Therefore, Petitioners cannot establish unreasonableness and/or arbitrary conduct on the part of the Commission. As a result, Petitioners' fourth assignment of error fails.

With respect to Petitioners' assignment of error five, Petitioners assert that the trial court erred in finding the annexation was in the best interest of the County. However, the trial court did not find that the annexation was in the best interest of the county, but rather found that Petitioners failed to establish that the Commission acted arbitrarily or unreasonably in its conclusion that the annexation was in the best interest of the County. On appeal, Petitioners still have not produced any evidence that the Commission acted unreasonably or in an arbitrary manner with respect to its finding that the annexation is in the best interest of the County. As a result, Petitioners' fifth assignment of error fails.

With respect to Petitioners' assignments of error six and seven, Petitioners did not dispute and/or counter the request for summary judgment by the Commission Defendants before the trial court related to the public nuisance and taking claims. However, even now any attempt to dispute the fact that these claims fail is without merit. Specifically, because the Commission Defendants did not cause a public nuisance or violate any law in granting the City of Summersville's request to extend its municipal boundaries, Petitioners cannot establish a public nuisance. Finally, because Petitioners' only claim related to a taking as a result of the annexation is allegations of diminution in property value, this alone is insufficient to establish a regulatory taking. As a result, Petitioners' sixth and seventh assignments of error fail.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISIONS

Pursuant to Rule 18 of the *West Virginia Rules of Appellate Procedure*, Respondents assert that this matter does not meet the criteria for oral argument because the issues have been

authoritatively decided and the issues have been adequately presented in the briefs and record on appeal. As such, oral argument will not significantly aid in the decisional process.

V. ARGUMENT

A. Standard of Review

On appeal, the standard of review for a trial court's decision on a motion for summary judgment is *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (W.Va. 1994).

B. The Subject Property is contiguous as defined under West Virginia Code § 8-6-5(f)(1).

Petitioners' first assignment of error asserts that the trial court improperly ruled that the annexed property was "contiguous" as defined under *West Virginia Code* § 8-6-5(f)(1). In making this argument, Petitioners' concede that the property is "contiguous" by acknowledging that the property is "technically linked to the City limits" *See* Pts.' Brf. at 10. However, Petitioners' request this Court ignore this undeniable fact and the statutory definition of contiguous simply because Petitioners do not agree with an annexation decision made by the Commission. In requesting this Court ignore the facts and statutory definition of contiguous, Petitioners cite to three responses to Requests for Admissions wherein these Defendants admitted that no residential or commercial property within the corporate limits of the City of Summersville share a common boundary with the proposed annexed property. *See* Pts.' Brf. at 11. Petitioners' take these admission to assert that the annexed property is not contiguous to *any* property within the city limits of Summersville. This argument is an invalid because it ignores the facts and imposes a burden that the annexed property must be contiguous to only residential or commercial property, as opposed to what the actual law requires, which is property that abuts a municipal boundary. Because Petitioners' concede this fact, and as explained further below, because there is direct

abutment to the then existing municipal boundary, the annexed property squarely falls within the definition of “contiguous” property under *West Virginia Code* § 8-6-5(f)(1).

West Virginia Code § 8-6-5(f)(1), which is the relevant definition of “contiguous” for minor boundary adjustments, defines “contiguous” as “at the time of the application for annexation is submitted, the territory proposed for annexation either abuts directly on municipal boundary” Here, this definition was met. In 2012, two years prior to the annexation of the subject property, the City of Summersville sought, via the minor boundary adjustment process, to annex a portion of property that includes “Frontage Road.” *See* App. 157-162; *see also* App. 163. The purpose of the annexation was to ensure City of Summersville police access to assist the patrol and protection of Nicholas County High School. To ensure full access for the police, the boundary line was extended past the High School up to the Phillips Run Road and Frontage Road intersections with Route 19. *See* App. 157-162; *see also* App. 163. Frontage Road was included to ensure complete City of Summersville access to the area. The annexation process was complete with the Commission approving the proposed annexation in full. As a result, the City of Summersville municipal boundary was adjusted to include “Frontage Road.” *See* App. 164-167; *see also* App. 163.

With respect to the subject property, the proposed annexation included two tracts of land that connect directly to Frontage Road/Rt. 19, which is also the municipal boundary of Summersville. *See* App. 217-218. The tracts of land are right-of-ways that consist of existing private roads. *See* App. 217-218. Because these right-of-ways connect to Frontage Road, there can be no dispute that the proposed area for annexation abuts directly to the then existing boundary line of the City of Summersville at Frontage Road/Rt. 19. Again, this fact is conceded by

Petitioners. *See* Pts.’ Brief at 10. In other words, the requirements of *West Virginia Code* § 8-6-5(f)(1), which defines “contiguous”, have been met.

To the extent Petitioners’ have argued that the property does not abut any residential or commercial property within the city limits of Summersville, this argument is inapposite. Under the definition of “contiguous”, it is irrelevant whether the proposed annexed property abuts residential or commercial property within the city limits. The only relevant inquiry under the facts here is whether the proposed territory abuts directly an existing municipal boundary. As there is no dispute that it does, and Petitioners’ concede the same by directly stating that the private road “technically links” the municipal boundary to the annexed property, *see* Pts.’ Brf. at 10, there can be no dispute that the statutory definition of “contiguous” is met.

For the first time, Petitioners’ on appeal now assert that this has created an “outrageous geographical result.” While this argument was not raised before the trial court and is now improperly before this Court, *see Whitlow v. Bd. of Educ.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993)¹, the argument is easily extinguished. In *City of Beckley*, this Court directly rejected overturning an annexation approval due to an alleged “outrageous geographical result” because the process contains sufficient “checks” that will avoid an unreasonable result. Specifically this Court stated, “when we deal as here, with an annexation by way of a minor boundary adjustment the process itself carries sufficient built in protection to avoid any truly outrageous geographical result. . . . Common 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

¹ “Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal. *See, e.g., Shrewsbury v. Humphrey*, 183 W. Va. 291, 395 S.E.2d 535 (1990); *Cline v. Roark*, 179 W. Va. 482, 370 S.E.2d 138 (1988); *Crain v. Lightner*, 178 W. Va. 765, 364 S.E.2d 778 (1987); *Trumka v. Clerk of the Circuit Court*, 175 W. Va. 371, 332 S.E.2d 826 (1985).”

strip of land. Thus, there is an element of reasonableness that will control the city's decision to annex.” *In re City of Beckley*, 194 W. Va. 423, 430, 460 S.E.2d 669, 676 (1995). Because of this, this Court refused to second guess a Commission’s decision regarding what land to annex into a municipal boundary. The Court should follow this guidance and decline to second guess the shape or “result” of this boundary adjustment, especially when the statutory definition of “contiguous” has been met.

In sum, a portion of the subject property for annexation directly abuts the then existing boundary of Summersville, thereby clearly satisfying the statutory definition of “contiguous” contained in *West Virginia Code* § 8-6-5(f)(1).

C. The Subject Property is subject to annexation via *West Virginia Code* § 8-6-5, the minor boundary adjustment statute.

Petitioners’ next assigns error to trial court’s ruling that the minor boundary annexation process was an appropriate annexation process in this matter. The assignment of error is based upon an invalid and improper reading of the relevant statute. Prior to reviewing the statute, it is important to note that courts must effectuate the plain and unambiguous meaning of a statute. *Syl. Pt. 2, State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).

Here, the minor boundary adjustment annexation statute, *West Virginia Code* § 8-6-5(b), states:

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. (emphasis added).

The unambiguous language of the statute regarding the minor boundary adjustment annexation process makes plain that the minor boundary annexation process is not exclusive to only annexing

properties that involve a street or highway. Rather, “[i]n addition to any other annexation configuration”, the minor boundary adjustment annexation process may also be used to annex a street or highway, as outlined in the statute. To argue or assert that the process excludes annexation configurations that do not contain a street or a highway simply ignores the first seven words of the statute. Additionally, as there is no ambiguity in the statute, ignoring the first seven words violates the mandatory duty of this Court to give the statute its plain and unambiguous meaning. *Elder*, 152 W.Va. at Syl. Pt. 2, 165 S.E.2d at Syl. Pt. 2. There can be no other reading of the first seven words but for a reading that the Legislature intended to allow for “any other annexation configuration” to be conducted by this process.

Despite the plain and unambiguous nature of the first seven words of *West Virginia Code* § 8-6-5(b), Petitioners argue here that the “[i]n addition to” language is meant to notify municipalities that any other annexation process may be used to annex 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 [] 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. However, this argument defies common sense. If the West Virginia Legislature intended to limit the minor boundary adjustment annexation process to only be utilized as referenced in *West Virginia Code* § 8-6-5(b), it would not include the phrase “[i]n addition to any other annexation configuration”. Under Petitioners’ argument, the “[i]n addition to” language is superfluous because the statute goes on to state that the municipality “*may* incorporate by minor boundary adjustment” (emphasis added). The use of the word “may” is significant because “may” is sufficient, in and of itself, to notify a municipality that it “may” use this annexation process or

another annexation process. It is well-established that the word “may” denotes permissive, not mandatory conduct. *See State v. Hedrick*, 204 W. Va. 547, 552, 514 S.E.2d 397, 402 (1999) (“The word ‘may’ generally signifies permission and connotes discretion.” (citations omitted)). The fact that the Legislature included the “in addition to” language, as well as the word “may” makes plain that the appropriate reading is how the trial court interpreted the statute, which allows for the use of the minor boundary adjustment annexation in this matter.

In sum, if they intended for the process to only be limited in the manner suggested by Petitioners, the statute would read in that manner. It simply does not. As a result, the trial court’s ruling on this issue is correct and must be held.

D. The Annexation Petition is in compliance with *West Virginia Code* § 8-6-5(c).

Petitioners essentially raises three arguments for why the Annexation Petition is not in compliance with *West Virginia Code* § 8-6-5(c). First, Petitioner asserts that the statements in the application by the City of Summersville are “vague” and misleading.” *See* Pts’ Brf. at 14. Second, Petitioners assert that the *Notice* published by the Commission “did not provide” certain explanations regarding the impact of the annexation. Finally, Petitioners challenge findings made by the Commission related to the annexation. These arguments fails

With respect to the “vague” and “misleading” statement argument, first these statements were made by the City of Summersville, not the Commission. It is unclear how the City of Summersville allegedly making “vague” and “misleading” statements in an application is a failure on the part of the Commission. The failure, if any, would come in determining whether there is evidence to support the statements. At this point in the process, the Commission is charged only with determining whether the application meets the threshold requirements. *See West Virginia Code* § 8-6-5(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.”). Only after this determination is made would the Commission notice and hold a public hearing to consider the evidence related to the petition, which would include evidence related to any “vague” or “misleading” statements. Because Petitioners’ do not dispute that the threshold requirements have been met, there is nothing improper by the Commissioner setting this matter for a public hearing at this juncture.

However, in reviewing the “vague” and “misleading” statements alleged, which is only one statement that there are no businesses located in the proposed area to be annexed, at the time of the filing of the Petition, this statement was true. There is no evidence that Checks was operating an automobile junkyard at the time of the Petition. There is only evidence that Checks sought certain permitting related to the operation of a junkyard at that time, not that a junkyard was in operation at the time of the Petition. *See e.g.* Pts’ Brf. at 15 (explaining that Checks had a County permit, but citing to no evidence of actual operation by Checks in the timeframe). Because of such, there is nothing vague or misleading about this statement. Even if this statement was vague or misleading, whether there was a business located in the proposed annexation area does not prohibit the process from going forward. The application merely requires a “statement” and does not provide that the annexation process may not go forward if a business is located in the proposed area. It is simply information to be provided to the Commission. As a result, this argument makes “much ado about nothing.”

To the extent Petitioners now, for the first time ever, assert a failure to provide an accurate map showing the metes and bounds of the territory, this was not asserted before the trial court. Because this argument was not asserted before the trial court, it must not be asserted now for the first time. *Whitlow*, 190 W. Va. at 226, 438 S.E.2d at 18. However, obviously a map was included

with the Petition, as a map was provided with the *Notice* setting the matter for a public hearing. *See* App. 57. Therefore, while this argument is improperly before the Court, it is easily discredited.

With respect to Petitioners' argument regarding the failure of the *Notice* to explain the "impact on the City's finances and services", this argument imposes burdens upon the Commission not required by law. *West Virginia Code* § 8-6-5(e) provides, in full:

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.

Nowhere in the statute does it require the Commission to publish a *Notice* that sets forth a full evidentiary explanation of the assertions made by a city in a petition for annexation. As a result, any "failure" to explain the impact on the City's finances and services in a notice of public hearing, is not a failure at all, as there is no requirement to do the same. In fact, the statute does not even require a city to provide a full evidentiary explanation of the impact, but merely requires a "statement" as to what effect the annexation will have on the City's finances and services. *See West Virginia Code* § 8-6-5(c)(6). Further, the *Notice* simply reproduces the Petition submitted by the City. *Compare* App 57 to App 152-156. Again, Petitioners are making "much ado about nothing" in trying to impose burdens not otherwise required by the statute. As a result, this argument fails to establish any procedural defects in the publication of the *Notice*.

To the extent that Petitioners make arguments regarding the veracity of statements in the Amended Petition, *see* Pts' Brf. at 15, Petitioners fail to recognize that the Amended Petition involves an annexation process separate and distinct from the "subject annexation." As explained in the factual background section, the Amended Petition attached as App 157 to 162 involves the annexation of property related to Nicholas County High School, not the "subject property" as

defined herein. These are two separate and distinct annexation processes that occurred prior to the permitting of Checks by the County and almost two full years prior to the annexation of the “subject property.” As a result, making arguments regarding what the Amended Petition states as it relates to the “subject property” is misguided, irrelevant and simply a failure to recognize that the Petition attached as App. 152 to 156 relates to the “subject property”, while the Amended Petition, App 157 to 162, involves separate and distinct property. Therefore, these arguments should be disregarded as irrelevant.

To the extent, under this assignment of error, Petitioners assert that the “order on Boundary Adjustment is completely insufficient”, this argument will be fully addressed in Section E below.

In sum, Petitioners are wrong to assert that the Petition did not meet the threshold requirements, as it did. The Petition merely requires a statement. Further, Petitioners have not asserted any valid argument for the proposition that the Commission did not follow the annexation procedures set forth in *West Virginia Code* § 8-6-5(c), (d) and/or (e). As a result, because the trial court properly found that the requirements were followed, App. 10, this assignment of error fails. Therefore, the trial court’s Order must be affirmed.

E. The County Commission properly reviewed the evidence presented to it regarding the annexation of the Subject Property.

Petitioners next assert that the Commission did not explain certain findings in its Order approving the annexation and failed to adopt Petitioners’ position in opposition to the annexation. Before discussing why these arguments fail, it is important to note that the function in approving the annexation by a minor boundary adjustment has been deemed to be a “legislative function” performed by the County Commission. Syl. Pt. 6, *In re City of Beckley*, 194 W.Va. 423, 460 S.E.2d 669 (1995) (“In general, a county commission enjoys a broad discretion in exercising its legislative powers in determining the geographic extent of a minor boundary adjustment sought

by a municipality”). In instances when the task completed is a “legislative function”, the legislative body’s decision is entitled to all reasonable presumptions in its validity. *See e.g. Stonewood v. Bell*, 165 W. Va. 653, 659, 270 S.E.2d 787, 791 (1980) (“We must also remember that it is the duty of the appellants in these cases to overcome the presumption of validity which attaches to legislative acts.”). Finally, if the legislative function is properly performed and is not arbitrary or unreasonable, it must be upheld. *See e.g. Par Mar v. City of Parkersburg*, 183 W. Va. 706, 709, 398 S.E.2d 532, 535 (1990); *see also Philippi v. Tygarts Valley Water Co.*, 99 W. Va. 473, 481, 129 S.E. 465, 468 (1925) ([W]e will not assume that the city government in the exercise of its legislative power acted capriciously or without sufficient reason. The presumption of law is that it did not so act.”).

Petitioners assert that the Commission did not explain in its Order Approving Annexation how the expansion will promote economic growth, Pts’ Brf. at 15, how any developer will address the lead issues in the ground, Pts’ Brf. at 15, and how additional public services of the City will become available, Pts’ Brf. at 15. With respect to the promotion of economic growth, evidence was presented to the County Commission that a business will open on the subject property if it is annexed. App. 104. Being that there was no business there, if a business would open due to the annexation, then there is little doubt that the annexation would promote economic growth. A business, regardless of how many people are employed, will “promote” economic growth by creating a new tax base. While Petitioners’ have demanded an exacting study regarding the potential for economic growth, there is no such exacting requirement in the annexation statute. The Commission believed that a new business would be created due to the annexation based upon the assertion of the person wanting to place a business there and it is not unreasonable or arbitrary for the Commission to believe that a potential for a new business based upon an annexation would

“promote economic growth.” The finding by the Commission was supported by evidence in the record before it, was not unreasonable, and not arbitrary. Petitioners have failed to overcome the presumptive validity of this action related to this finding.

Again, for the first time on appeal, Petitioners now apparently assert a new argument related to a lack of specificity regarding a requirement that the lead contamination on the subject property would need to be addressed, as well as a finding that the City would now provide that area with public services. This is improper and should not be considered by this Court. *Whitlow*, 190 W. Va. at 226, 438 S.E.2d at 18. Even if this was considered by the Court, it is without merit. There is nothing in *West Virginia Code* § 8-6-5 that requires the Commission to Order a specific remediation procedure for ground contamination in a newly annexed area. With respect to the providing of public services, there is evidence in the record that the City would provide police coverage, as well as provide water services to the area, upon application may be extended. App. 155 at ¶¶ 6-7. As a result, this finding is not unreasonable and not arbitrary. Because of such, Petitioners did not present this argument before the trial court and have not met their burden to overcome the presumption that this was a presumptively valid act by the Commission before this Court. As a result, the trial court’s Order regarding the same must be affirmed.

With respect to the argument that the Commission did not properly consider evidence presented to it, while Petitioners assert the Commission was presented with evidence of the “negative environmental impact of the annexation” and evidence of the “impact the annexation would have on the property values of surrounding homes and businesses”, Petitioners fail to cite to anywhere in the record that supports the contention that the Commission was actually presented with this evidence and what was the actual evidence presented to the Commission. Without citation to what was actually presented, Petitioners cannot overcome their burden to show that the

rejection of this “evidence” was arbitrary and/or unreasonable. In other words, if the evidence was simply a community member expressing concern over the environmental impact and/or property values, this is not evidence of the same but merely an expression of a concern. Because Petitioners did not present any evidence of the “negative environmental impact of the annexation” and evidence of the “impact the annexation would have on the property values of surrounding homes and businesses” before the trial court and did not cite to any evidence here, Petitioners cannot overcome their burden to void these presumptively valid acts by the Commission.

To the extent Petitioners’ assert that community members signed a petition against the annexation, there is evidence that the owners of the property to be annexed were “for” the annexation. App. 106; *see also* App. 91. This is significant, as their opinions are to be considered by statute, not necessarily the opinions of other community members. *See West Virginia Code* § 8-6-5(f)(3) (defining “affected parties”). Should the unaffected community members that signed the petition opposing annexation disagree, their recourse is not the courthouse, but rather the ballot box. There is simply nothing unreasonable or arbitrary in given deference to the property owners whose property is to be annexed, as mandated by the controlling statute. Therefore, this Court must affirm the trial court’s decision.

F. The County Commission’s determination that the annexation of the Subject Property is in the best interest of the County is entitled to deference.

Petitioners’ argue that the annexation of the subject property is invalid because the annexation was not in the best interest of the County. This argument is premised on the contentions that granting the annexation would “sanctioned a circumvention of State and City law” and did not consider the negative impacts of a salvage yard. First, this annexation did not allow for any unlawful circumvention of State and/or City law. *West Virginia Code* § 17-23-7 expressly provides that “the provisions of this article shall not apply to salvage yards or any parts thereof

within municipalities situated in areas zoned industrial” As a result, if the municipality would zone the area industrial, then Check could legally operate a salvage yard without a State permit. In other words, if there would be any “circumvention” of the laws, it would be lawful and would be because of the City’s actions, not the County’s. In fact, through this litigation, it was discovered that the area was not zoned industrial and Checks ceased operations of the salvage yard. This is *clear* evidence that the annexation process did not allow for the circumvention of any law. As a result, any argument that the County allowed for a circumvention is not supported by law or fact.

To the extent that Petitioners assert the annexation would allow for a circumvention of the City Ordinance, this is also wrong. The City Ordinance does not require a state permit. Rather, the City Ordinance merely states that no one shall operate auto salvaging operations, “unless it is a licensed salvage yard”, with a “licensed salvage yard” being defined as a “salvage yard licensed under West Virginia Code Article 17-23.” See “App. 226 – 228. In order to read the City Ordinance to require a state permit, the Court would have to ignore the definition of a “licensed salvage yard” under the City Ordinance. The City Ordinance defines “licensed salvage yard” as “a salvage yard licensed under *West Virginia Code* Article 17-23.” This definition would obviously include *West Virginia Code* § 17-23-7, which permits a salvage yard to operate without obtaining a state license. Stated simply, if a salvage yard is in compliance with *West Virginia Code* § 17-23-7, then the salvage yard also meets the definition of “licensed salvage yard” under the City Ordinance. Finally, if the City Ordinance required a license, as opposed to mere compliance with *West Virginia Code* § 17-23, the City Ordinance would define a “licensed salvage yard” as a salvage yard licensed under *West Virginia Code* § 17-23-4, which is the state licensing process. However, it does not read as such.

More importantly, reading this Ordinance as unequivocally requiring a state permit creates a legal impossibility. Specifically, the state statute expressly disclaims applicability of the state permit requirement under certain circumstances. *See e.g.* W. Va. Code § 17-23-7. If the Court were to read into this Ordinance an unequivocal requirement for a state permit, which the State statute expressly disclaims, this Court would be allowing a city ordinance to directly contradict a state statute. This is not proper. *See* Syl. Pt. 1, *State ex rel. Wells v. City of Charleston*, 92 W.Va. 611, 115 S.E.576 (1922); *see also Robinson v. City of Bluefield*, 234 W.Va. 209, 211-212, 764 S.E.2d 740, 742 (2014).

Furthermore, this Ordinance would be a gross expansion of municipal authority. There is simply no state statutory or constitutional authority that allows the City to contradict the state statute regarding the applicability of the state permitting process. Because a municipality may only act in accordance with the powers granted unto them, *see* Syl. Pt. 2, *Sharon Steel Corp. v. Fairmont*, 175 W. Va. 479, 481, 334 S.E.2d 616, 618 (1985), reading this Ordinance in the manner suggested by Petitioners is invalid. Because of such, Petitioners' assertion that the annexation is not in the best interest of the County because it allowed for a circumvention of both State statute and City Ordinance is both factually and legally wrong.

Moving to Petitioners' second argument, that the County failed to consider the negative impacts of the salvage yard, there is no dispute that the 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. Petitioners, however, disagree and assert that these considerations are a requirement for the County to consider when reviewing a municipal application for annexation. This disagreement is flawed. First, legally, there is nothing within the minor boundary adjustment statute that requires

a County to review salvage yard operations in order to approve a municipal application for annexation. As a result, as there is no requirement to do what Petitioners' are requesting the Commission to do, it simply cannot be unreasonable or arbitrary. Because of that, Petitioners cannot meet their burden to overcome the presumptive validity of this action.

Further, Petitioners' argument *completely* discounts the undisputed fact that Commission had already reviewed the "negative effects" of the proposed salvage yard when the County Commission approved the operation of the salvage yard in 2012. *See* App. 206; *see also* App. 210 - 211 (discussing how Checks has met the requirements under the Ordinance. Also noting that Petitioner Tony Coffman had no objection to the issuance of the County permit.). In other words, the Commission had previously considered those negative impacts, were satisfied that they were insufficient to preclude the operation of a salvage yard and issued a permit to allow for the operation of a salvage yard in the County. Because of such, it misstates the facts to assert that the Commission did not consider the negative impacts of the operation of this specific salvage yard on this specific property. The Commission previously considered those negative impacts in a separate proceeding and found those negative impacts insufficient to preclude the operation of a salvage yard on this specific property by this specific operator in Nicholas County. To the extent Petitioners now argue that it was not in County's best interest to allow Checks to violate the law, there is no evidence that, prior to the annexation, Checks was in violation of the law, meaning that it was operating a salvage yard in contradiction to *West Virginia Code* § 17-23-1, *et seq.* prior to the approval of the annexation process. More importantly, Petitioners' cite to no evidence in the record to support this assertion. Because this is an unsupported assertion, it cannot be a valid argument before this Court to overturn the trial court's ruling.

Finally, while Petitioners would have liked for the Commission to reconsider the negative impacts of a salvage yard on this specific property by this specific operator when reviewing the annexation application for the City of Summersville, being that the Commission had already done so in 2012, the refusal to reconsider the same during an annexation process is not unreasonable or arbitrary. *See e.g. Stephens v. Wayne County Bd. Of Educ.*, 2011 W.Va. LEXIS 497, *27-28 (W.Va. Nov. 15, 2011) (memorandum decision) (“Generally, 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, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion.”) (citing *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir.1985)). In other words, Petitioners mere disagreement with the County’s discretionary refusal to review an already settled issued during an unrelated annexation petition constitutes a difference of opinion that is not arbitrary or unreasonable. Because of such, Petitioners’ have failed to meet their burden to overturn this presumptively valid action. This is what the trial court held and this holding must be affirmed.

G. The trial court did not err in finding that the Commission did not create a public nuisance.

Count V of Petitioners’ Amended Complaint asserts that the Commissions actions were contrary to law and therefore, these actions created a public nuisance. App. 26 at ¶¶ 64-66. Again, these arguments were not asserted at any point before the trial court and are now, therefore, improperly before this Court. *Whitlow*, 190 W. Va. at 226, 438 S.E.2d at 18. However, in addressing the merits, as explained throughout, the actions of the Commission were not contrary to law. Further, as explained above, the annexation did not permit, in and of itself, Checks to operate a salvage yard. Only the City could allow Checks to operate a salvage yard by zoning the

newly annexed property as “industrial.” Only this action could permit Checks to operate lawfully pursuant to *West Virginia Code* § 17-23-7. The annexation process neither granted nor denied any rights to Checks related to the operation of a salvage yard. As a result, as a matter of law, the actions of the Commission did not create a public nuisance.

Further, Petitioners’ argument for why this is a public nuisance is an issue to be taken up with the Legislature, not this Court or the Commission. The State statute permits a salvage yard to operate in a municipal city limit that is zoned industrial. If Petitioners object to this statute, then go to the Legislature to change it. Further, Petitioners argue that this Court should become the Legislature and create a city “vested interest” exception to the statute to support their position that the annexation allowed Checks to operate a salvage yard. This exception is not written anywhere in the statute. The arguments by Petitioners for the creation of this exception is based upon supposition and unsupported statements regarding the Legislative intent of *West Virginia Code* § 17-23-7. The Court should decline to create such an exception.

Finally, Petitioners argument that the annexation created a public nuisance ignores reality and requires this Court to accept a flawed notion. In order to “buy in” to Petitioners’ argument, this Court must accept the notion that the only law in this State that can regulate a salvage yard is *West Virginia Code* § 17-23-1, *et seq.* and because the Commission granted a municipal application for annexation, Checks could “circumvent” this one statute, which would allow Checks to pollute and/or destroy its neighboring property, thereby creating a public nuisance. This notion is flawed. There are a myriad of statues and regulations that apply to salvage yards that are specifically designed to protect the environment. *See e.g.* 40 C.F.R. § 122.26 (storm water permitting requirements for auto salvage yards). Further, the annexation itself did not allow for a “circumvention” of *West Virginia Code* § 17-23-1, *et seq.*, but rather only municipal action could

allow for such alleged “circumvention.” Because this Court cannot accept this notion, the Court cannot reach the conclusion that the actions of the Commission created a public nuisance.

In sum, the only way this Court can overturn the trial court’s ruling that this salvage yard was not a public nuisance created by the County is to: 1. ignore the fact that Petitioners did not assert any of these arguments before the trial court and/or challenge summary judgment with respect to this claim; 2. find that the annexation, itself, was the sole reason that the salvage yard could operate, which is not true under *West Virginia Code* § 17-23-7; 3. ignore *West Virginia Code* § 17-23-7; and 4. re-write *West Virginia Code* § 17-23-7 to include a “vested interest” exception. In sum, there is simply no legitimate basis to conclude the trial court erred in finding that the actions of the Commission did not create a public nuisance. Therefore, this Court must affirm the trial court’s Order.

H. The trial court did not err in granting the Commission summary judgment on Petitioners’ regulatory taking cause of action.

Count VII of Petitioners’ Amended Complaint seeks monetary damages in the amount equal to the monetary devaluation of their property on the premise that the actions in approving the annexation constitutes a taking in violation of the United States Constitution and the West Virginia Constitution. App. 27. In other words, Petitioners are asserting a “regulatory taking” claim against the Commission. In order for Petitioners to prevail in a regulatory taking claim, Petitioners’ must establish that the regulatory nature of the action has gone “too far”. *See e.g. Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). However, prior Supreme Court “. . . decisions sustaining other land-use regulations, which . . . are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a ‘taking,’ . . .” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978). Finally, a “land use regulation does not effect a taking if it “substantially advances

legitimate state interests' and does not 'deny an owner economically viable use of his land.'" *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

Petitioners' only alleged damage is diminution in property value. *See* App. 27 at ¶¶ 71-74. Further, Plaintiffs' have not been denied the use of the land as residential properties and business properties. *See* App. 2 at ¶ 8; *see also* App. 27 at ¶ 71. When this argument was advanced by the Commission on summary judgment, App. 149 - 150, Petitioners filed no response in opposition. In fact, on appeal, Petitioners continue to maintain that their regulatory taking claim is based upon diminution of value. Because this is not a valid claim for monetary damages as a regulatory taking and Petitioners offered no evidence to rebut this contention, the trial court properly granted summary judgment. As a result, this holding must be affirmed by this Court.

VI. CONCLUSION

Based upon the foregoing, Respondents request this Court **affirm** the trial court's grant of summary judgment in favor of the Commission Defendants.

Submitted this 16th day of May, 2016.

**NICHOLAS COUNTY COMMISSION,
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing **“RESPONDENTS NICHOLAS COUNTY COMMISSION, DR. YANCY S. SHORT, M.D., JOHN R. MILLER, AND KENNETH ALTIZER’S BRIEF IN OPPOSITION”** has been served this day via U.S. Mail upon the following:

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