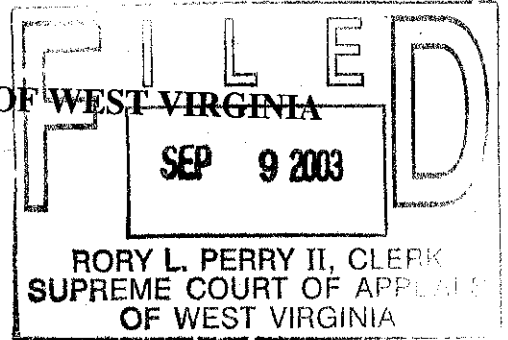


NO. 031847

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA ex rel.  
ITS CITIES OF CHARLESTON AND  
HUNTINGTON AND ITS COUNTIES OF  
OHIO AND KANAWHA, WEST VIRGINIA,

*Petitioners,*

v.

WEST VIRGINIA ECONOMIC DEVELOPMENT  
AUTHORITY, a public corporation,

*Respondent.*

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INITIAL RESPONSE OF THE  
ECONOMIC DEVELOPMENT AUTHORITY

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DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

SILAS B. TAYLOR  
SENIOR DEPUTY ATTORNEY GENERAL  
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STATE CAPITOL, ROOM 26E  
CHARLESTON, WEST VIRGINIA 25305  
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AUTHORITY, a public corporation,

*Respondent.*

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INITIAL RESPONSE OF THE  
ECONOMIC DEVELOPMENT AUTHORITY

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I.

INTRODUCTION

This mandamus action is a vitally important test case to determine whether State-licensed video lottery machines are a legitimate form of a "State lottery" as authorized by West Virginia Constitution, Article VI, Section 36. The statutes authorizing the State Lottery Commission to utilize video lottery machines are the Racetrack Video Lottery Act of 1995 and the Limited Video Lottery Act of 2001 (Articles 22A and 22B of Chapter 29 of the West Virginia Code). Though video lottery has thus operated for years without any

judicial sanction, the issue of its constitutionality has only recently come to a head. This is because the revenues from video lottery have only recently been dedicated, by statute, to provide debt service to support the issuance of economic development bonds to be issued by your Respondent, the Economic Development Authority ("EDA"). W. Va. Code § 29-22-18a(d).

The bonds to be issued by the EDA have received substantial media attention, not so much because of their funding source (video lottery revenues), but because of the various projects to which the bond proceeds will be dedicated. This Court was exposed to the controversy in the recent case of *State ex rel. West Virginia Citizens Action Group v. West Virginia Development Grant Committee*, \_\_\_ W. Va. \_\_\_, 580 S.E.2d 569 (2003), in which the statutory basis for the Grant Committee's project awards was challenged as violating the division of power between the Legislative and Executive branches.<sup>1</sup>

But the wisdom and propriety of these grant awards are not the issues raised by this mandamus action. By statute, the EDA has a nondiscretionary statutory duty to issue up to \$300 Million in economic development bonds to be repaid with dedicated video lottery revenues, the proceeds of which will fund the grant awards. W. Va. Code § 29-22-18a(d)(1) provides:

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<sup>1</sup>A sequel to that lawsuit was filed in this Court on September 9, 2003, alleging, *inter alia*, that the grants newly made by the newly constituted Grant Committee violate the public purpose doctrine because there is no obligation on the part of privately-owned grantees to repay the State. *State ex rel Rev. Jim Lewis, et al, v. West Virginia Economic Development Grant Committee*, No. 031991 (W. Va. S. Ct. filed September 9, 2003).

The West Virginia economic development authority . . . shall, by resolution, and upon direction of the governor, issue revenue bonds . . . to pay for all or a portion of the cost of constructing, equipping, improving or maintaining projects under this section.

Pursuant to said statute, the Governor, on August 21, 2003, issued Executive Order No. 19-03 requiring the EDA to perform its nondiscretionary statutory duty. (Pet. Ex. B.)

Exigencies beyond its control required the EDA to refuse to issue the bonds. At its August <sup>2003</sup>~~2001~~ meeting, the EDA Board was informed by bond counsel that uncertainty about the legality of the funding source for repaying the bonds (video lottery revenues) rendered it impossible for bond counsel to certify that an unqualified and legally effective pledge of video lottery revenues had been effected. Despite the mandatory statutory provisions requiring that video lottery revenues be pledged to repayment of the bonds (Code § 29-22-18a), bond counsel would be unable to issue the required certifying opinion absent a judicial resolution of the underlying question of whether video lottery revenues were lawful. (*See* Minutes of the EDA's meeting of August 21, 2003, attached as Exhibit A, at p. 4.) Without such a certifying opinion from bond counsel, the bonds would not be marketable. (*Id.*) Consequently, the EDA refused to issue the bonds despite the Governor's order to do so, thereby precluding 49 certified economic development projects from receiving the \$225 Million awarded to them by the Grant Committee.

The Petitioners herein immediately filed this mandamus action to bring as fast a resolution as possible to the legal issues which prevented the EDA from issuing the bonds

that are to fund the Petitioners' projects. Your Respondent (the EDA) is without authority to pass upon the wisdom or propriety of such projects, but *is* under a duty to provide their funding. This it has been unable to do, and will remain unable to do, absent a decision from this Court.

The EDA has no stake in the outcome of this lawsuit other than its legal duty to perform its statutory function as bond issuer. It did not plan or initiate this lawsuit. But it does agree with Petitioners that, absent a rapid resolution of the issues they raise, the EDA will be unable to fulfill its statutory duty and the intent of the Legislature will be frustrated.

## II.

### **THIS TEST CASE IS NEITHER MANIPULATIVE NOR PREMATURE.**

Absent a decision by this Court that video lottery is constitutionally permissible, the economic development bonds will be unmarketable and \$225 Million in economic development projects, already delayed by prior litigation, will again be without funding. (Resp. Ex. A; Pet. Ex. B.) But much more is at stake.

According to the State Lottery Commission, video lottery is anticipated to produce, in FY 2004 alone, \$378 Million in State revenues, only \$19 Million of which is devoted to the revenue bonds at issue here. W. Va. Code § 29-22-18a(b)(3). The remaining \$359 Million provides funding for the "promise scholarship fund," grants to counties to fund new school buildings, infrastructure improvements, higher education, State parks, and at least

\$65 Million for general appropriation by the Legislature. The State's dependence upon video lottery revenues suggests that it was perhaps remiss in not earlier bringing a test case to determine the constitutionality of this now-essential source of revenue, but that is no reason to reject Petitioners' plea that the issue now be determined. Indeed, this Court has encouraged test cases in similar circumstances.<sup>2</sup>

There are no existing controlling legal authorities upon which bond counsel may reasonably rely. Although Attorney General Palumbo issued an opinion, in 1991, that "video lottery" was a valid form for the State lottery to take, his opinion was based on the *original* State Lottery Act of 1985 (W. Va. Code § 29-22-1 *et seq.*) and was limited to a single game called "Mountaineer Magic," which was essentially a traditional slot machine that dispensed winning lottery tickets in lieu of cash. 64 Op. Att'y Gen. 129 (1991).

However, this opinion was effectively "overruled" in *State ex rel. Mountaineer Park v. Polan*, 190 W. Va. 276, 438 S.E.2d 308 (1993) (hereafter "*Polan*"). While not reaching the constitutional question of whether video lottery constituted a "lottery" within the

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<sup>2</sup>In *Winkler v. State School Bldg. Authority*, 189 W. Va. 748, 766, 434 S.E.2d 420, 438 (1993), this Court decried the State's decision to issue questionable "special revenue" bonds without first obtaining a judicial declaration of their validity:

We are amazed that no attempt was made before the original issue of the SBA bonds to obtain an opinion as to their validity from the Attorney General. Moreover, in view of the amount involved and the purpose of the bonds, prudence would have dictated that a court determination should have been sought as to their legality.

meaning of the Constitution, *Polan* held that video lottery was simply *not authorized* by the State Lottery Act (W. Va. Code § 29-22-1 *et seq.*).

*Polan* held that any legislation purporting to authorize video lottery would have to be very specific given the State's historic aversion to gambling and because the constitution required that State lotteries be specifically authorized by enabling legislation. *Polan* at 284, 438 S.E.2d at 316; W. Va. Const. art. VI, § 36. The Legislature consequently enacted the Racetrack Video Lottery Act of 1995 and the Limited Video Lottery Act of 2001 (Articles 22A and 22B of Chapter 29 of the West Virginia Code), but the games thereby authorized have never been determined to be a "lottery" authorized by the Constitution, nor have they been determined to meet the constitutional State-ownership requirement. Further, it has never been determined whether these enactments were sufficiently specific, as required by *Polan*, to authorize the games subsequently implemented.

In its 1993 opinion in *Polan*, this Court had insufficient information to decide whether video lottery was truly a "lottery" within the meaning of the Constitution, although it expressed considerable doubt on that issue.<sup>3</sup> In light of *Polan*, Mario Palumbo's 1991 opinion is insufficient legal authority to allow Jackson Kelly to opine, as bond counsel, that video lottery revenues are a constitutionally valid source of funding to repay purchasers of

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<sup>3</sup>"We are not convinced that *W. Va. Const.* art. VI, § 36 contemplated a form of lottery which in some states has included gambling activities such as slot machines and keno." *Polan* at 284, 438 S.E.2d at 316.

the economic development bonds at issue herein. Consequently, an opinion is needed from this Court.

This Court has, on occasion, expressed concern over legislation or executive tactics designed to foist upon it the function of determining the constitutionality of legislation before it becomes effective. *See State ex rel. West Virginia Deputy Sheriff's Ass'n v. Sims*, 204 W. Va. 442, 513 S.E.2d 669 (1998). For the Legislature to require such test cases is an abdication of the Legislature's duty to determine the constitutionality of its own enactments, and an encroachment on the entirely judicial function of deciding when an "advisory opinion" is necessary. *Id.* For instance, when the Legislature purported to authorize Pension Obligation Bonds, but required that this Court determine their legality prior to any further action thereon, this Court refused a "friendly" test case as nonjusticiable where none of the other predicate acts had yet taken place. *Wise, Governor v. Burton, Secretary of Administration*, No. 010822 (Order issued May 7, 2001). For the executive branch to "arrange" a test case for the sole purpose of avoiding the responsibility of saying "no" to a bond issue is equally offensive.

In this case, however, your Respondent, the Economic Development Authority (hereafter the "EDA"), has been required by statute and by Executive Order to issue revenue bonds to be repaid from video lottery proceeds pursuant to legislation that has no "test case" clause. It is not the legislation that prevented the EDA from performing its statutory duty, but the knowledge that a resolution authorizing issuance of the bonds would be futile.

There is nothing in the challenged legislation requiring that this Court resolve its constitutionality. Indeed, the Race Track Video Lottery Act has been generating revenue for over eight years with no test case whatsoever.

Rather, the failure of the EDA to issue revenue bonds and the need for this test case are both the necessary result of legitimate doubts fostered by this Court's opinion in *Polan*; doubts that prevent bond counsel from issuing a favorable opinion. In this case, unlike the premature test case requesting this Court to sanction the proposed Pension Obligation Bonds, all the predicate acts for issuance of the bonds have taken place, and all that stands in the way is the legal issue of their validity. This is precisely the scenario in which this Court has recognized the necessity for "advisory opinions" rendered in a nonadversial context:

Experience dictates that there are occasions on which courts must undertake something in the nature of advisory opinions. . . . [W]e have rendered essentially advisory opinions when it was necessary to permit bond counsel to authorize the marketing of bonds for public authorities. *State ex. rel. City of Charleston v. Coghill*, 156 W.Va. 877, 207 S.E.2d 113 (1973). The need for certainty before the investment of enormous amounts of human effort and before the investment of vast sums of money has led us to an ad hoc reappraisal of the common law requirement of a true adversary "case or controversy" as a condition precedent to court review.

*State ex rel. Alsop v. McCartney*, 159 W. Va. 829, 834-35, 228 S.E.2d 278, 281 (1976).

### III.

**THIS TEST CASE CAN BE DECIDED INDEPENDENTLY  
OF OTHER PENDING RELATED LAWSUITS, WHICH  
OTHER LAWSUITS RAISE ISSUES IMMATERIAL TO  
THE VIABILITY OF THE BONDS.**

This Court may be concerned that a decision favorable to Petitioners herein would be futile given the threat of other litigation challenging video lottery revenues or grant projects. On behalf of the Greenbrier County Coalition Against Gambling Expansion (hereafter "the Coalition"), attorney Larry Harless has given notice of his intent to sue the West Virginia Lottery Commission in order to challenge its administration of video lottery. The issues raised by the Coalition include two issues raised here – whether video lottery is truly a "lottery" within the meaning of *W. Va. Const.* art. VI, § 36, and whether it is owned by the State as required by the same constitutional provision. There the similarity ends. The remainder of the Coalition's anticipated lawsuit concerns the manner in which the Lottery Commission administers video lottery. The Coalition's suit thereby raises statutory, not constitutional, issues. (*See* Pet. Ex. A.) These issues are fact-intensive and are not of the sort amenable to resolution using this Court's original jurisdiction.<sup>4</sup>

Nor are the statutory issues raised by the Coalition critical to bond counsel's opinion because, if meritorious, they can be remedied by administrative changes or, at worst, by

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<sup>4</sup>"This Court is not engineered to be as efficient a finder of fact as a trial court because of the cumbersome procedures for taking depositions." *Hinkle v. Black*, 164 W. Va. 112, 121, 262 S.E.2d 744, 749 (1979).

minor curative amendments. Other than the common issue – the constitutionality of the legislation authorizing video lottery – the remaining issues in the Coalition’s planned lawsuit are immaterial to the validity of the revenue bonds.<sup>5</sup>

Another issue that has received media attention, and which is the subject of another mandamus Petition, is whether the projects approved for funding with bond proceeds meet the “public purpose” doctrine, which requires that public funds not be expended solely to benefit private interests. *See State ex rel. Ohio County Commission v. Samol*, 165 W. Va. 714, 275 S.E.2d 2 (1980). In discussing the very bonds at issue here, this Court has already stated, in a general way, that the contemplated economic development projects satisfy the public purpose doctrine. *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee*, 580 S.E.2d at 892-894. But that general statement has been challenged by the Petition recently filed before this Court on behalf of the Reverend Jim Lewis and John Cooney. (*See* fn. 1 above.)

The legitimacy of individual projects need not be resolved prior to issuance of the bonds because the debt service on the bonds is *not* funded by revenues from the various

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<sup>5</sup>The aforesaid representations are made after interviewing bond counsel. It is worth noting that should the Coalition’s lawsuit cause a temporary interruption of the video lottery revenue stream, such would not likely have a material impact on the bondholders. Pursuant to West Virginia Code § 29-22-18a(e), debt service on the bonds has first priority over all other functions funded with video lottery proceeds. In addition, should video lottery proceeds be inadequate, from time to time, to fund debt-service on the bonds, revenues from the traditional “scratch-off” lottery may be diverted to pay this debt service, which diversion (when needed) takes priority over several functions to which said revenues would otherwise be dedicated. W. Va. Code § 29-22-18(f).

projects, but by lottery proceeds. Consequently, their legality is immaterial to the validity of the bond issue itself. Should a project or projects be deemed beyond the constitutional authority of the Legislature, or beyond the scope of the legislation governing the expenditure of bond proceeds, the project(s) will have to be abandoned, but this will not impact the bondholders.

Thus, this Court need not be concerned that resolution of this case will be futile.

#### IV.

**THIS COURT HAS A RIGHT TO EXPECT  
ZEALOUS ADVOCACY, AND MAY INVITE  
OR REQUIRE THE PARTICIPATION OF  
OTHER PARTIES NOT NAMED IN THE PETITION.**

Clearly, the EDA ultimately desires a swift ruling in favor of Petitioners because that is the only way it can perform its statutory duty to issue the bonds. However, the EDA has been advised of, and is respectful of, the following admonition from this Court regarding its expectations of counsel litigating test cases on behalf of nonadversarial clients:

Nonetheless, before this Court will undertake to adjudicate any matter directly affecting the public in general or groups, classes, and interests both unknown and unknowable, it must appear conclusively that every issue which could be raised in a proceeding to settle rights was raised and that those undertaking to perform the role of devil's advocate in a proceeding of this nature, which is in no way 'adversary' in the conventional sense of a case or controversy, have pursued their task with greater than average diligence and in the utmost good faith. In addition, in cases which are primarily concerned with a declaration of rights, the Court retains the prerogative to raise related issues on its own initiative and to demand as a condition precedent to a formal decision that the issues which it has raised be briefed and argued.

*State ex rel. Alsop v. McCartney*, 159 W. Va. at 834-835, 228 S.E.2d at 281. This admonition, as well as the litigation policy of the Attorney General in such cases, serve to prevent counsel's nominal client from dictating the issues or arguments raised in opposition to the issuance of the revenue bonds at issue. The EDA understands and has made no effort to undermine these important policies.

However, to insure an appropriately adversary setting, this Court may order that other interested parties be named as respondents and require them to brief the merits of the issues raised, as this Court has done in several cases, including *State ex. rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99 (2002).

V.

CONCLUSION

Wherefore, the Economic Development Authority prays that this Court grant the Petition and set an expedited briefing and argument schedule so that the issues raised, and such additional issues as this Court may deem necessary, may be addressed and decided as quickly as reasonably possible, all without prejudice to other litigants to raise other issues, in such forums as they see fit, concerning the operation of video lottery games.


Respectfully submitted,

WEST VIRGINIA ECONOMIC  
DEVELOPMENT AUTHORITY,

*Respondent,*

*By counsel*

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL



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*Counsel for Respondent*

**BOARD OF DIRECTORS MEETING**  
**OF THE**  
**WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY**  
**August 21, 2003**  
**Water Development Authority**  
**Conference Room**  
**180 Association Drive**  
**Charleston, West Virginia**

The Board of Directors Meeting of the West Virginia Economic Development Authority ("WVEDA") was held at 1:00 p.m., August 21, 2003, at the Water Development Authority Conference Room, 180 Association Drive, Charleston, West Virginia.

The following members were present or participated by telephone conference:

David Satterfield	Chairman
J. Nicholas Barth	Barth, Thompson & Associates
William G. Carper, Jr.	Norfolk Southern Corp.
Rebecca Melton Craig	Department of Tax and Revenue
Patrick R. Esposito II (by phone)	Augusta Systems, Inc.
Debra K. Flanigan (by phone)	The Huntington National Bank
Paul W. Hill	Treasurer's Office
David W. Mullins	IUOE Local 132 Joint Apprenticeship & Training
Greg Smith	Mountain State Blue Cross Blue Shield

Others present:

David Warner	Executive Director
Robin Greathouse	Director of Financial Services
Tony Benedetto	Loan Officer
Joey Browning	Loan Officer
Jackie Browning	Accountant
Erin Taylor	Accountant
Beverly Dolin	Administrative Aide
Debbie Orcutt	Secretary
William M. Herlihy	Spilman, Thomas & Battle, PLLC
Marie Prezioso	Ferris, Baker, Watts, Inc.
Leonard Coleman	Goodwin & Goodwin LLP
Tom Loehr	WV Technology Advancement Corp.
Greg Isaacs	Crews & Associates, Inc.
Jim Balow	Charleston Gazette
George Hohmann	Charleston Daily Mail
Samme Gee	Jackson Kelly PLLC
Matt Lundy	WV Media
Benjamin Miles	WOWK-TV
Rod Blackstone	City of Charleston
Gavin McCormick	Associated Press
Paul Creedon (by phone)	Citigroup Global Markets, Inc.

The meeting was called to order by Mr. Satterfield, Chairman. Mr. Satterfield noted that a quorum was present and that the meeting could lawfully conduct business.

### MINUTES

A motion was made by Mr. Smith to approve and dispense with the reading of the July 17, 2003 board of directors meeting minutes. The motion was seconded by Mr. Carper and unanimously carried.

### TREASURER'S REPORT

Mr. Warner presented the Treasurer's Report to the board for their review. A motion was made by Mr. Carper to accept the report as presented. The motion was seconded by Mr. Craig and unanimously carried.

### FINAL APPROVALS

- |    |   |                  |
|----|---|------------------|
| 1) | <b>Bull Dog Rack Company</b>            | <b>\$315,000</b> |
|    | Term: 10 Years                          |                  |
|    | Rate: Wall Street Journal Prime less 4% |                  |
|    | (floor of 4%)                           |                  |

Upon recommendation of staff, a motion was made by Mr. Carper to grant final approval to the above captioned loan subject to all terms and conditions set out in the commitment letter. The motion was seconded by Mr. Hill and unanimously carried.

### OLD BUSINESS

#### Loan Commitment Extensions

Upon recommendation of staff, a motion was made by Mr. Carper to approve the following extensions. The motion was seconded by Ms. Craig and unanimously carried.

	<u>Date Approved</u>	<u>Amount Committed</u>
1) <b>P &amp; R Development Company, LLC</b> <b>InfoCision Management Corp.</b> three month extension – new expiration date – 11/30/03	05/16/02	\$ 900,000
2) <b>New Castle Refractories Co., Inc.</b> two month extension – new expiration date – 10/31/03	09/19/02	520,000
3) <b>Laurel Creek Hardwoods, Inc.</b> three month extension – new expiration date – 11/30/03	02/20/03	111,177
4) <b>Central Supply Company of WV</b> six month extension – new expiration date – 02/29/04	02/30/03	429,750

- 5) **Smith Services, Inc.** 02/20/03 1,500,000  
one month extension – new expiration date – 09/30/03

### Legal Contract

Legal contracts for fiscal year 2003/2004 were presented to the board at the June meeting. At that time, board members suggested that Mr. Warner propose to Bowles, Rice, McDavid, Graff & Love to charge a flat hourly rate for its venture capital legal contract or use the same rates charged by Bowles, Rice, McDavid, Graff & Love under its other legal contract as secondary counsel to WVEDA. At that time, the board also voted to give a two month extension to Bowles, Rice, McDavid, Graff & Love on the venture capital legal contract until Mr. Warner could discuss the rates with Mr. Siegrist.

Mr. Warner presented a legal contract from Bowles, Rice, McDavid, Graff & Love for venture capital for the period of September 1, 2003 until June 30, 2004 as follows: A uniform rate of \$200.00 per hour for members, \$125.00 per hour for Associates and \$75.00 per hour for Paralegals.

A motion was made by Mr. Carper to approve the legal contract as presented. The motion was seconded by Ms. Craig and unanimously carried.

### NEW BUSINESS

#### Lottery Revenue Bonds

Mr. Warner distributed to the board a letter dated August 20, 2003, from Secretary of Tax and Revenue Brian M. Kastick, the Chairman of the West Virginia Economic Development Grant Committee, that contained the list of certified projects approved by the Grant Committee pursuant to W. Va. Code § 29-22-18a. Mr. Warner stated there are 49 projects totaling approximately \$225,000,000 in grants. The Chairman asked that the certified project list received from Mr. Kastick be attached to these minutes and made part of the official record of WVEDA.

Mr. Warner also distributed to the board Executive Order #19-03 signed by Governor Wise ordering WVEDA to issue the revenue bonds authorized in W. Va. Code § 29-2-18a to fund grants for the projects certified by the West Virginia Economic Development Grant Committee. Attached to this Executive Order as Exhibit A is a copy of Resolution No. 03-1 of the Grant Committee urging the Governor to direct WVEDA to issue these revenue bonds to fund the grants for the certified projects. The Chairman asked that Executive Order #19-03 and its exhibit be attached to these minutes and made part of the official record of WVEDA.

Mr. Warner stated that due to the complexity of the legal issues surrounding the issuance of lottery revenue bonds he had asked Mr. Herlihy with Spilman, Thomas & Battle, PLLC, WVEDA counsel, to prepare a memorandum summarizing issues that impact the ability of WVEDA to issue these revenue bonds as directed in the Executive Order. Mr. Warner then distributed Mr. Herlihy's memorandum dated August 21, 2003, to the board. The Chairman asked that the memorandum be attached to these minutes and made part of the official record of WVEDA.

Mr. Warner then presented to the board a Resolution Authorizing and Directing the Issuance of Not to Exceed \$300,000,000 Aggregate Principal Amount of the West Virginia Economic Development Authority's Excess Lottery Revenue Bonds. Ms. Samme Gee with Jackson Kelly PLLC, bond counsel, described to the board the minor changes that had been made to the resolution from the time it had been distributed to the board members as part of WVEDA's normal monthly mailing. Those changes included removing the language "Subject to Project Certifications by the Economic Development Grant Committee and Direction of the Governor" and the insertion of the Governor's Executive Order Number on page 2.

Mr. Satterfield asked for a motion to approve the resolution as presented. A motion was made by Mr. Carper and seconded by Mr. Hill. Mr. Satterfield asked for discussion of the proposed resolution. Mr. Carper asked what impact the issues raised in Mr. Herlihy's memorandum would have on the issuance of the lottery revenue bonds. Mr. Satterfield asked Ms. Gee, bond counsel, to respond. Ms. Gee stated that the proposed lawsuit by the Greenbrier County Citizens Against Gambling and Cabell County Citizens Against Gambling against the West Virginia Lottery Commission prevents the unqualified pledge of video lottery revenues for the repayment of the revenue bonds and renders them unmarketable. Due to the uncertainty about the source of repayment for the bonds, Ms. Gee further stated that Jackson Kelly PLLC would not be able to render an opinion.

Mr. Creedon with Citigroup Global Markets, Inc., an underwriter for the bonds, also stated that it is impossible for the bonds to be marketed and closed with the uncertainty about their funding source. He also stated that it is impossible to close this bond transaction without an opinion of bond counsel.

Mr. Coleman with Goodwin & Goodwin PLLC, underwriters' counsel, further stated that the proposed legal actions prevented the lottery revenue bonds from being marketed and sold.

Mr. Herlihy also stated that certain provisions of W.Va. Code § 29-22-18a were previously found to be unconstitutional by the Supreme Court of Appeals in State of West Virginia ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee et al., Decision No. 31125, and there was no guarantee that the Supreme Court will concur with the West Virginia Legislature's attempt to correct that statute in Senate Bill No. 2007 in response to the previous decision by the West Virginia Supreme Court.

With no further discussion, Mr. Satterfield asked for a roll call vote by the members of the board on the pending motion to approve the resolution authorizing WVEDA to issue up to \$300,000 of lottery revenue bonds.

Mr. Barth - no	Mr. Hill - no
Mr. Carper - no	Mr. Mullins - no
Ms. Craig - no	Mr. Smith - no
Mr. Esposito - no	Mr. Satterfield - yes
Ms. Flanigan - no	

The motion to approve the resolution did not pass.

Rod Blackstone and Matt Lundy left the meeting. Mr. Creedon disconnected from the conference call.

**Summary of Economic Development and Technology Advancement Centers**

Mr. Warner presented a brief summary of proposed agency approved rules for economic development and technology advancement centers to the board for their review.

**Qualification of Center – West Virginia Technology Advancement Corporation**

Tom Loehr spoke to the board concerning the West Virginia Technology Advancement Corporation. Mr. Loehr stated that they are trying to accelerate the commercialization process for existing research through Marshall University.

A motion was made by Mr. Carper to qualify the West Virginia Technology Advancement Corporation as a technology advancement center. The motion was seconded by Mr. Hill and unanimously carried.

**Application for Tax Credits – West Virginia Technology Advancement Corporation**

A motion was made by Mr. Carper to approve the application from West Virginia Technology Advancement Corporation requesting \$1,000,000.00 in tax credits. The motion was seconded by Mr. Hill and unanimously carried.

**Public Comment Session**

Mr. Hohmann asked Mr. Herlihy to explain his comment concerning WVEDA being uncertain as to whether the statute as amended by Senate Bill No. 2007 conforms with the Supreme Court's Decision No. 31125. Mr. Herlihy replied that the concern is whether the statute, as amended, is constitutionally valid.

**EXECUTIVE DIRECTOR'S REPORT**

Mr. Warner stated that Gibbons & Kawash will begin WVEDA's audit on Monday, August 25, 2003.

Mr. Smith moved that pursuant to the provision of the West Virginia Governmental Proceeding Act, which allows governmental agencies to meet in Executive Session to consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds, privileged communications with WVEDA's counsel or other matters involving information, which if made public, might adversely affect the financial or other interest of the state or political subdivision, the meeting would go into Executive Session. The motion was seconded by Mr. Carper and unanimously carried.

Marie Prezioso, Leonard Coleman, Tom Loehr, Greg Isaacs, Jim Balow, Samme Gee, Benjamin Miles and Gavin McCormick left the meeting.

**GENERAL SESSION**

**Bob's Market and Greenhouse**

The following motion was made by Mr. Carper, seconded by Mr. Hill and unanimously carried.

WHEREAS, The board has determined that the public purpose of the West Virginia Economic Development Authority Act would be met by a loan in the amount of \$290,000 to Bob's Market and Greenhouse.

NOW, THEREFORE, BE IT RESOLVED: That a total of \$290,000 to Bob's Market and Greenhouse is hereby given conditional approval.

**M & S Lumber**  
**(a Division of M & S Coal Associates, Inc.)**

The following motion was made by Mr. Carper, seconded by Ms. Craig and unanimously carried.

WHEREAS, The board has determined that the public purpose of the West Virginia Economic Development Authority Act would be met by a loan in the amount of \$500,000 to M & S Lumber.

An amended motion was made by Ms. Flanigan stating that a subordinate loan from a family member cannot be paid in part or in whole unless all debts of borrower including taxes are current. The amended motion was seconded by Ms. Craig and unanimously carried.

NOW, THEREFORE, BE IT RESOLVED: That a total of \$500,000 to M & S Lumber is hereby given conditional approval.

**Logan County Development Authority**

The following motion was made by Mr. Smith, seconded by Mr. Carper and carried. Mr. Barth abstained.

WHEREAS, The board has determined that the public purpose of the West Virginia Economic Development Authority Act would be met by a loan in the amount of \$360,000 to Logan County Development Authority.

NOW, THEREFORE, BE IT RESOLVED: That a total of \$360,000 to Logan County Development Authority is hereby given conditional approval.

**Precision Coil, Inc.**

A motion was made by Mr. Carper to approve the request from Precision Coil, Inc. to increase their loan to \$5.2 million and reduce their interest rate from 5.87% to 5%. The motion was seconded by Mr. Smith and unanimously carried.

**Loan Insurance**

**Tele-Response Center, Inc.**

A motion was made by Mr. Hill to approve the (80%) loan insurance request in the amount of \$99,480 to Citizens Bank for the benefit of Tele-Response Center, Inc. The motion was seconded by Mr. Smith and carried. Ms. Flanigan voted no.

**Hartley Oil Company, Inc.**

A motion was made by Mr. Carper to approve the (80%) loan insurance request in the amount of \$60,800 to Ohio Valley Bank Company for the benefit of Hartley Oil Company, Inc. The motion was seconded by Ms. Craig and carried. Ms. Flanigan voted no.

**Resolution – Allevard Springs U.S.A., Inc.**

A motion was made by Mr. Carper to approve the resolution presented to the board concerning the purchase and lease by WVEDA of manufacturing equipment for the benefit of Allevard Springs U.S.A., Inc. The motion was seconded by Mr. Hill and unanimously carried.

**Resolution – Three Springs Business Park**

A motion was made by Ms. Craig to approve the resolution presented to the board concerning an economic development project to construct a manufacturing, distribution and office facility in either Brooke or Hancock county. The motion was seconded by Mr. Carper and unanimously carried.

There being no further business, Ms. Craig moved that the meeting be adjourned. The motion was seconded by Mr. Carper and unanimously carried.

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David Satterfield  
Chairman

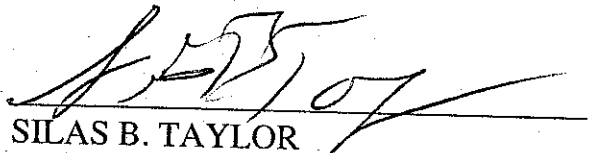
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Rebecca Melton Craig  
Secretary

**CERTIFICATE OF SERVICE**

I, SILAS B. TAYLOR, do hereby certify that I have served a true copy of the foregoing "Initial Response of the Economic Development Authority" upon counsel for the Petitioners by depositing said copy in the United States mail, with first-class postage prepaid, on this 9<sup>th</sup> day of September, 2003, addressed to him as follows:

To: Stephen B. Farmer, Esq.  
Farmer, Cline & Arnold, PLLC  
Post Office Box 3842  
Charleston, WV 25338

  
SILAS B. TAYLOR