

No. 31540

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,

Petitioners,

v.

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY,
a public corporation,

Respondent.

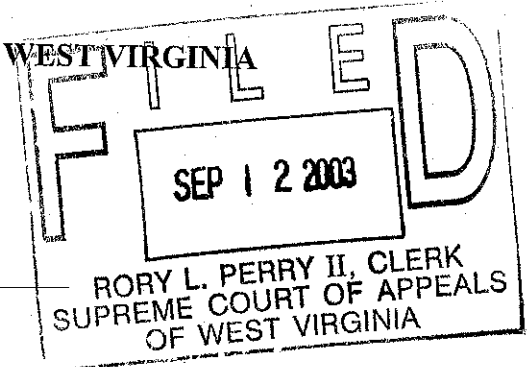
WEST VIRGINIA LOTTERY COMMISSION, and
JOHN C. MUSGRAVE, Director of the West Virginia Lottery,

Applicants.

**APPLICATION TO INTERVENE OF
WEST VIRGINIA LOTTERY COMMISSION AND JOHN C. MUSGRAVE**

Pursuant to W.Va. R. App. P. 22, the West Virginia Lottery Commission and John C. Musgrave, by counsel, Thomas R. Goodwin, Johnny M. Knisely II, and Goodwin and Goodwin LLP, hereby apply to intervene in the above-styled action. As Applicants will show below, their motion should be granted.

1. Applicant the West Virginia Lottery Commission is a division of the Department of Tax and Revenue. Applicant John C. Musgrave is the duly appointed and acting Director of the West Virginia Lottery. Between them, Applicants oversee and manage lottery operations authorized by the Legislature through the Lottery Act, W.Va. Code § 29-22-1 *et seq.*; the Racetrack Video Lottery Act, W.Va. Code § 29-22A-1 *et*



seq.; and the Limited Video Lottery Act, W.Va. Code § 29-22B-101 *et seq.* This application was duly authorized at a public meeting of Applicant Commission held on September 4, 2003. *See* Exhibit A attached.

2. This application is timely made, well in advance of the deadline set by this Court in its order of September 10, 2003. Applicants will comply with the briefing and argument schedule established by the Court in that order, and their intervention at this time will not delay the proceeding or prejudice any party.

3. Applicants are neither the parties entitled to the performance sought nor the party that has refused that performance. Hence, they were not named as petitioners or respondents in this action. Nonetheless, Applicants have as much, if not much more, at stake in this litigation than do the parties.

4. As is shown in the affidavit of Virgil T. Helton submitted herewith as Exhibit B, the Court's disposition of the petition could potentially have a profound impact on Applicants' performance of their legislatively prescribed duties. Among these duties is the collection and remittance to prescribed revenue funds of vast sums of money upon which the State's ability to render necessary and proper public services critically depends. For example, in the fiscal year ending June 30, 2004, Applicants estimate that video lottery operations under the Racetrack Video Lottery Act and Limited Video Lottery Act will produce \$378 million in net revenue, or over \$1 million daily. Exhibit B ¶¶ 18, 19. Any judicial declaration or injunction that would prohibit Applicants from conducting these legislatively authorized video lottery operations would therefore have an immediate and drastic effect on Applicants, the performance of their duties, and the State as a whole.

5. Although Applicants' interests here are generally aligned with Petitioners', those interests differ in their nature and breadth. Petitioners' interest in the legality of video lottery is doubly indirect, as they hope to benefit from economic development grants, which grants will in turn be funded through the sale of bonds, and which bonds will in turn be repaid with revenue from video lottery operations. Moreover, Petitioners' interests are local. By contrast, Applicants' interests in the legality of video lottery operations are direct and statewide. Because of this noncongruence of interests, Applicants are entitled to intervene as of right, even though Petitioners' protection of Applicants' interests may turn out in the end to have been adequate. *See generally State ex rel. Ball v. Cummings*, 208 W.Va. 393, 540 S.E.2d 917, 927 (2000) (discussing intervention under W.Va. R. Civ. P. 24).

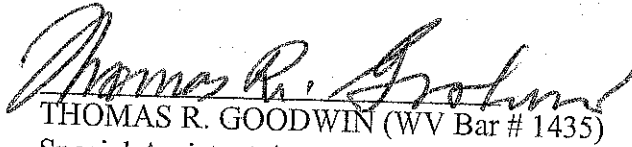
6. In the alternative, should the Court determine that Applicants are not entitled to intervene as of right, Applicants respectfully submit that they should be permitted to intervene in the discretion of the Court, as provided for in the final sentence of W.Va. R. App. P. 22.

WHEREFORE, this application to intervene should be granted.

Respectfully submitted,

THE WEST VIRGINIA LOTTERY COMMISSION, and
JOHN C. MUSGRAVE,

By counsel,

A handwritten signature in cursive script, appearing to read "Thomas R. Goodwin".

THOMAS R. GOODWIN (WV Bar # 1435)

Special Assistant Attorney General

JOHNNY M. KNISELY II (WV Bar # 4968)

GOODWIN & GOODWIN LLP

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ORDER

THE WEST VIRGINIA STATE LOTTERY COMMISSION

Intervention in Charleston et al. v. WVEDA Action

Comes now John C. Musgrave, Director of the State Lottery Office, to present his request that the Commission vote to intervene as a party in the mandamus proceeding before the West Virginia Supreme Court of Appeals styled *City of Charleston et al. v. West Virginia Economic Development Authority*.

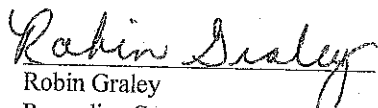
The cities of Charleston and Huntington and the Counties of Kanawha and Ohio seek to force the West Virginia Economic Development Authority (EDA) to issue bonds to pay selected recipients from the Economic Development Project Fund created in section eighteen-a of the State Lottery Act. The EDA refused to issue bonds because of its doubt as to the constitutionality of the Racetrack Video Lottery Act and the Limited Video Lottery Act.

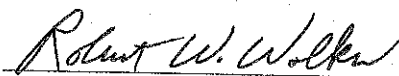
The Director believes that petitioners have argued persuasively in favor of constitutionality of the two acts; nevertheless, the Director believes that because the Lottery Commission maintains extensive information concerning the scope and detail of the operation of video lottery games, the Commission is in the best position to inform the Court in this regard. Further, the Director fears that without intervention the Court may on its own motion include the Commission as a party at a later date that may place the Commission in a reactive position when a proactive stance would best serve the State and its citizens.

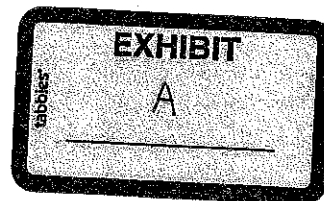
After the issue had been fairly and frankly discussed, the Commission unanimously¹ voted to intervene in the Supreme Court of Appeals case styled *State ex rel. City of Charleston et al. v. West Virginia Economic Development Authority* and to employ the law firm of Goodwin and Goodwin to represent the West Virginia Lottery.²

THEREFORE: It is **ORDERED** that the Director contract with Thomas R. Goodwin and take such other actions as will give effect to this order.

This Order is adopted by the West Virginia State Lottery this fourth day of September, 2003.


Robin Graley
Recording Secretary


Robert W. Walker, Chairman
West Virginia State Lottery Commission



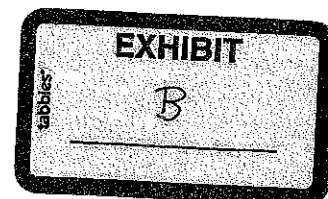
¹ Commissioner John Bowling was absent and not voting.

² Thomas R. Goodwin has been appointed as a special attorney general for this action by Attorney General McGraw.

AFFIDAVIT OF VIRGIL T. HELTON

Virgil T. Helton, CPA, first being duly sworn, states as follows:

1. I am over the age of twenty-one years and am competent to testify as to all matters related to this affidavit.
2. I am the deputy Director for Finance and Administration of the State Lottery Office and its Chief Financial Officer; the State Lottery Office is an agency of the Department of Tax and Revenue. I have served in this capacity for six years. Prior to my service with the Lottery Office, I was the Chief Financial Officer of CDI Engineering in St. Albans, West Virginia. Prior to that I have been employed in the banking industry, primarily in West Virginia in different management positions. In addition, I was employed by two of the large international (Big Four) CPA firms for a period of seven years. I hold a Bachelor of Science degree in Accounting from Concord College. The West Virginia Board of Accountancy licenses me to practice public accounting as a Certified Public Accountant. I am familiar with the operations of the West Virginia Lottery Commission, and I have experience in making and analyzing revenue projections for lottery games. As part of my duties, I have access to the papers and records of the West Virginia Lottery Commission kept in the ordinary course of its affairs and in furtherance of its duties imposed by law.
3. The State Lottery Commission raises state revenues from three major sources: instant (scratch-off) lottery games; traditional on-line numbers games such as PowerBall; racetrack lottery games; and limited video lottery games. Instant and on-line traditional games are authorized by West Virginia Code article 29-22; racetrack video lottery games are authorized by West Virginia Code article 29-22A; and limited video lottery games are authorized by West Virginia Code article 29-22B.
4. The State Lottery Commission deposits lotteries into two major funds: the State Lottery Fund and the State Excess Lottery Fund.
5. In the fiscal year that ended June 30, 2003, instant and on-line traditional lotteries produced \$44 million in net revenue for the State Lottery Fund.
6. In the fiscal year that will end June 30, 2004, instant and on-line traditional lotteries will produce approximately \$41 million in net revenue for the State Lottery Fund.
7. In the fiscal year that ended June 30, 2003, racetrack video lottery games produced \$130.1 million in net revenue for the State Lottery Fund.



8. In the fiscal year that will end June 30, 2004, racetrack video lottery games will again produce \$130.1 million in net revenue for the State Lottery Fund.
9. In the fiscal year that ended June 30, 2003, racetrack video lottery games produced \$131.4 million in net revenue for the State Excess Lottery Fund.
10. In the year that will end June 30, 2004, racetrack video lottery games will produce \$150 million in net revenue for the State Excess Lottery Fund.
11. In the year that ended June 30, 2003, limited video lottery games produced \$82.1 million in net revenue for the State Excess Lottery Fund. This amount includes \$11.1 million in various fees as prescribed in the Limited Video Lottery Act from manufacturers, operators, retailers and service technicians.
12. In the fiscal year that will end June 30, 2004, limited video lottery games will produce \$97.9 million in net revenue for the State Excess Lottery Fund. This amount includes \$9.7 million in various fees as prescribed in the Limited Video Lottery Act from manufacturers, operators, retailers and service technicians.
13. Revenues from the State Lottery Fund were \$170 million in fiscal year 2003. In addition to the \$170 million, supplemental appropriations increased the total appropriated amount to \$213.7 million for the fiscal year that ended June 30, 2003. State Lottery Fund revenues are appropriated each year for many purposes as outlined in West Virginia Code §29-22-18. Eighteen million dollars were appropriated for School Building Authority debt services. Ten million dollars were appropriated for the EAST Fund debt service. Fifty-six million dollars were appropriated to the Bureau of Senior Services. Forty million four hundred thousand dollars were appropriated to the Department of Education. Four million one hundred thousand dollars were appropriated to the Educational Broadcasting Authority. Nine million six hundred thousand dollars were appropriated to the Library Commission. Forty-three million dollars were appropriated to Higher Education. Nineteen million dollars were appropriated to Tourism. Three million six hundred thousand dollars were appropriated to Natural Resources. Five million nine hundred thousand dollars were appropriated to the Division of Culture and History. And, four million one hundred thousand were appropriated to the Department of Education and Arts.
14. Revenues from the State Lottery Fund are estimated to be \$171 million in fiscal year 2004. State Lottery Fund revenues are appropriated each year for many purposes as outlined in West Virginia Code §29-22-18. Eighteen million dollars is appropriated for School Building Authority

debt services. Ten million dollars is appropriated for the EAST Fund debt service. Thirty-eight million three hundred thousand dollars is appropriated to the Bureau of Senior Services. Thirty-five million eight hundred thousand dollars is appropriated to the Department of Education. Four hundred thousand dollars is appropriated to the Educational Broadcasting Authority. Nine million four hundred thousand dollars is appropriated to the Library Commission. Thirty-six million eight hundred thousand dollars is appropriated to Higher Education. Eleven million seven hundred thousand dollars is appropriated to Tourism. Three million two hundred thousand dollars is appropriated to Natural Resources. Four million seven hundred thousand dollars is appropriated to the Division of Culture and History. And, two million seven hundred thousand is appropriated to the Department of Education and Arts.

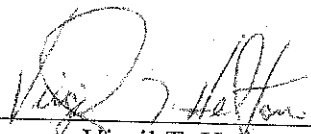
15. Racetrack video lottery revenues come from the four licensed racetracks' video lottery operations. The four tracks are: PNGI Charles Town Gaming, Mountaineer Racetrack and Gaming Resort, Tri State Racetrack and Gaming Center and Wheeling Island Gaming.
16. Revenues from the State Excess Lottery Fund were \$213.5 million in fiscal year 2003. Of this total, \$131.4 came from racetrack video lottery and \$82.1 million came from limited video lottery.
17. Racetrack video lottery revenues in the State Lottery Fund were \$130.1 million in fiscal year 2003.
18. Revenues from the State Excess Lottery Fund are estimated to be \$247.9 million in fiscal year 2004. Of this total, \$150 will come from racetrack video lottery and \$97.8 million will come from limited video lottery.
19. Racetrack video lottery revenues in the State Lottery Fund are estimated to be \$130.1 million in fiscal year 2004.
20. During fiscal year 2003, municipalities and county governments received \$13.3 million from racetrack video lottery and \$3.4 million from limited video lottery.
21. During fiscal year 2004, municipalities and county governments are projected to receive \$14.4 million from racetrack video lottery and \$4.3 million from limited video lottery.
22. Currently the State's four pari-mutuel racetracks employ nearly 4,800 persons. The approximate breakdown is: Charles Town Races - 1,272; Mountaineer Racetrack and Gaming Resort - 1,700; Wheeling Island Gaming - 1,000; and Tri State Racetrack and Gaming Center - 800. Prior to video lottery gaming, each track employed approximately 300 persons.

23. The Limited Video Lottery Act, specifically §29-22B-501(a)(1)through(4), provides for four different types of licenses. The employees of two of the four such license holders (operator's and retailer's) would be adversely impacted if limited video lottery were deemed unconstitutional.

There are currently thirty-four licensed limited video lottery operators. In total these thirty-four video operators have 238 employees on their payroll that would become unemployed.

There are currently 1,314 licensed limited video lottery retailers. Those retailers currently employ 5,018 individuals. Information provided from a number of independent sources indicates that 70% of this number, or over 3,500 individuals would lose their current employment.


Further the affiant sayeth naught.

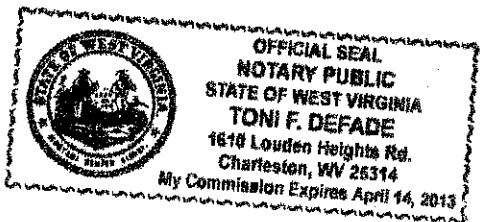

Virgil T. Helton

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO WIT:

The foregoing was sworn to and acknowledged before me by VIRGIL T. HELTON this twelfth day of September, 2003.

My commission expires: April 14th 2013


Notary Public



CERTIFICATE OF SERVICE

I, Thomas R. Goodwin, counsel for the Applicants, certify that service of the foregoing "Application to Intervene of West Virginia Lottery Commission and John C. Musgrave was made this 12th day of September, 2003, by placing true and correct copies thereof in the United States Mail, addressed as follows:

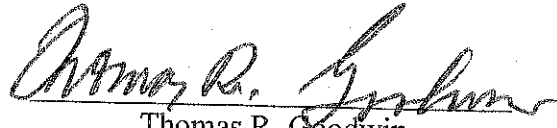
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