

No. \_\_\_\_\_

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

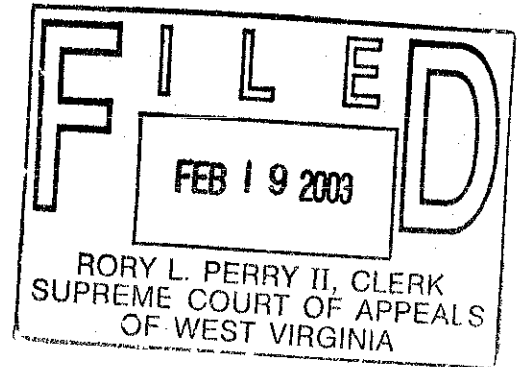
STATE OF WEST VIRGINIA *ex rel.*  
WEST VIRGINIA CITIZEN ACTION GROUP,  
an incorporated association,

Petitioner,

v.

WEST VIRGINIA ECONOMIC DEVELOPMENT  
GRANT COMMITTEE;  
CITY OF WHEELING, a municipal corporation;  
and WVOC ASSOCIATES, L.P.,

Respondents.



**WEST VIRGINIA ECONOMIC DEVELOPMENT GRANT COMMITTEE'S  
RESPONSE TO PETITION**

The West Virginia Economic Development Grant Committee (“Grant Committee”) files this response to the Petition For Appeal previously filed by West Virginia Citizen Action Group (“CAG”).

**INTRODUCTION**

It has been difficult to respond to the Petition For Appeal, which Shakespeare would surely characterize as “full of sound and fury, signifying nothing”<sup>1</sup> and loaded as it is with numerous references to facts and evidence not presented to the Circuit Court, as well as a series of *ad hominem*

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<sup>1</sup>Shakespeare, William, *MacBeth*, Act V, Scene V.

attacks on the West Virginia Legislature and in particular the President of the Senate and the Speaker of the House of Delegates.<sup>2</sup>

The issue before this Court is whether W. Va. Code § 29-22-18a(d) is constitutional, not whether it is perfectly drafted and not whether it represents policy choices with which we agree. West Virginia Citizen Action Group's (hereinafter "CAG") concern for "human needs and social well being" is laudable, but it should not ask this Court to indulge a blanket assumption that economic development is antithetical to those goals. Further, CAG cannot substitute its judgment on policy matters for that of the people's duly elected representatives, and it should not ask this Court to do so.

Every day that this matter remains unresolved diminishes the chances for any of the projects certified by the Grant Committee to attract private funding. Potential investors will surely hesitate to submit themselves to the type of calumny heaped upon them by CAG, *e.g.*, characterization as "antipreneurs . . . without regard for human needs and social well being . . . driving their numerous, unsubsidized competing citizens into economic extinction and personal penury." The number of these attacks, not to mention their intensity level, continues to accelerate, and none of this is doing anyone any good.

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<sup>2</sup>For example, the drafter of the Petition terms the economic development provision in question here, W. Va. Code § 29-22-18a(d), the "Incumbent Legislators Public Campaign Financing Act" (emphasis in original). He further strongly implies that the PROMISE college scholarship fund – which has nothing to do with this case – was set up to aid one or more "powerful legislator[s] [who] may have a favored project applicant with a senior in high school . . . ." In the worst tradition of those who are more publicity hounds than effective advocates, the drafter of the Petition constantly invokes images of "public officials and their grasping cronies . . . personally gorging at the public trough . . . ."

## **KIND OF PROCEEDING AND NATURE OF LOWER COURT'S RULING**

CAG originally attempted to bring this case before the original jurisdiction of the Supreme Court of Appeals *via* a Petition for Writs of Prohibition and Mandamus. The Court sent the Petition to the Circuit Court of Kanawha County for factual development and decision on the merits. The Circuit Court first held a hearing to determine whether CAG was entitled to a preliminary injunction barring further work by the Grant Committee, and determined that CAG was not entitled to such relief. The Circuit Court then held an evidentiary hearing and accepted briefs on the merits. The Circuit Court dismissed the City of Wheeling and WVOC Associates, L.P. as parties to the action, and then the Court issued its decision on the merits on 21 January 2003, holding in favor of the Grant Committee on every point except the approval of the Wheeling Outlet Center Project, which the Court held was incorrectly considered separately from the other grant applicants. With regard to the Wheeling project, the Circuit Court held that the Grant Committee could cure the defect by reconsidering the project in light of all the other applicants. CAG is appealing the Circuit Court's decision on the merits, and is not contesting the dismissal of the City of Wheeling and WVOC Associates, L.P.

## **STATEMENT OF FACTS**

The Petitioner has made numerous legal challenges to W. Va. Code §§ 29-22-18a and 8-3-1 *et seq.*<sup>3</sup> By its enactment of W. Va. Code § 29-22-18a (d) the Legislature found and declared:

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<sup>3</sup> West Virginia Code § 8-3-1 *et seq.* relates to the establishment of downtown redevelopment districts following approval by WVEDGC; however, to date no applications have been filed by any grant applicant. Notwithstanding the foregoing, W. Va. Code § 8-13B-2 states:

The Legislature finds that many downtown business districts within the

that in order to attract new business, commerce and industry to this state, to retain existing business and industry providing the citizens of this state with economic security and to advance the business prosperity of this state and the economic welfare of the citizens of this state, it is necessary to provide public financial support for constructing, equipping, improving and maintaining economic development projects, capital improvement projects and infrastructure which promote economic development in this state.

For the purposes of certifying projects that will receive revenue bond proceeds pursuant to W. Va. Code § 29-22-18a(d)(3), the Legislature established a committee comprised of the Governor, or his or her designee, the Secretary of the Department of Tax and Revenue, the Executive Director of the West Virginia Development Office,<sup>4</sup> three persons appointed by the Governor from a list of five names to be submitted to the Governor by the President of the West Virginia Senate and three persons appointed by the Governor from a list of five names to be submitted to the Governor by the Speaker of the West Virginia House of Delegates.

The Petitioner's first legal challenge centers on whether the appointment of the six citizen members of the West Virginia Economic Development Grant Committee (hereinafter "WVEDGC" and also "Grant Committee") was lawful. In this regard it is important to note that the Governor

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municipalities of this state are economically depressed. This adversely affects the economic and general well-being of the citizens of those municipalities. Establishment of downtown redevelopment districts within municipalities of the state, in accordance with the purpose, and promote the health, safety, prosperity, security and general welfare of all citizens in the state. It will also promote the vitality of retail business areas within municipalities, while serving as an effective means for restoring and promoting retail and other business actively within the downtown redevelopment districts created herein. This will be a special benefit to the tax base of the downtown municipalities within which any downtown redevelopment district is created under this article and will stimulate economic growth and job creation.

<sup>4</sup> Petitioner does not challenge the appointment of the ex officio members.

signed the bill, choosing not to exercise his right to veto. The Governor appointed the citizen members to the Grant Committee thereby choosing to fill the positions as opposed to allowing the citizen members positions to remain vacant. Moreover, the Circuit Court found that after independent investigation and review, the Governor was satisfied with all the recommendations that he received from the Speaker of the House of Delegates and the President of the Senate. (See January 21, 2003 Order of Judge King, Finding of Fact Nos. 3 and 4, (hereinafter "Finding of Fact") Further, the Court found that if the Governor had not been satisfied that he would have requested a new list. (See Finding of Fact No. 5.) The satisfaction of the Governor with the citizen members of the Grant Committee that he appointed is further most tellingly demonstrated by the fact that the Governor voiced no objection to the recommendations of the legislative leaders and is not the Petitioner in this action. <sup>5</sup>

The citizen members of the WVEDGC serve at the will and pleasure of the Governor and can be removed by the Governor without cause. (See Finding of Fact No. 11.) The six citizen members of the WVEDGC serve without compensation or benefits. In fact, the citizen members service on the WVEDGC is on a volunteer basis. (See Finding of Fact No. 9) Further, there is no requirement that the citizen members of the WVEDGC take an oath of office, or that they post a bond to ensure faithful execution of their duties. (See Finding of Fact No. 10.)

At its first meeting on April 8, 2002, the WVEDGC approved and adopted a draft procedural rule. (See Finding of Fact No. 15.) The WVEDGC acted in accordance with the draft rule throughout all of its proceedings. (See Finding of Fact No. 16.) The WVEDGC evaluated grant applications

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<sup>5</sup> In this case, unlike *Legislative Research Committee v. Brown*, 664 S.W.2d 967 (Ky 1984) Governor Wise did not institute litigation to challenge the list provided by members of the Legislature.

using the following criteria: (a) Ability of the project to leverage other sources of funding; (b) Job creation and retention; (c) Promotion of economic development in region; and (d) Whether the project is in the public interest of the State. (See Finding of Fact No. 23.)

The WVEDGC held its meetings and deliberations in public. No evidence was presented to suggest or prove that any of the WVEDGC's actions violated W. Va. Code § 6-9A-3. (See Finding of Fact No. 27.) All 197 projects were reviewed at the Grant Committee meetings and individuals were allocated time to speak to the Committee respecting projects in which they were interested. One project was discussed on April 25; 5 projects were discussed on June 14; 6 projects were discussed on June 28; 32 projects were discussed on July 18; 32 projects were discussed on July 30; and 42 projects were discussed on July 31. (See Finding of Fact No. 28.) The WVEDGC held public hearings in the Martinsburg Holiday Inn, Martinsburg, and the Putnam County Courthouse, Winfield, on September 4, 2002. (See Finding of Fact No. 29.) The WVEDGC held public hearings in the Morgantown Armory, Morgantown, and the Raleigh County Armory and Civic Center, Beckley, on September 5, 2002. (See Finding of Fact No. 30.)

The WVEDGC required the presence of a public entity or non-profit entity as a co-applicant in order to maximize the amount of revenue bond proceeds which could be characterized as tax exempt; thereby maximizing the amount of revenue proceeds available for grants. (See Finding of Fact No. 38.) The City of Wheeling Urban Renewal Authority is the co-applicant along with the Wheeling Victorian Outlet Center (hereinafter sometimes "Wheeling Project") (See Finding of Fact No. 41.) The Wheeling Outlet Center will be a value retail outlet center which will contain national outlets selling at discount prices. (See Finding of Fact No. 44.)

The construction of the Wheeling Project will create over 300 union construction jobs. (See Finding of Fact No. 48.) Following the completion of the Wheeling Project, it is projected that 900-1,100 permanent jobs will be created at the outlet, with approximately one-third of these jobs being in management. (See Finding of Fact No. 49.) With the addition of the outlet to the City of Wheeling, it is projected that other jobs and services will be supported and increased within the City. (See Finding of Fact No. 50.) The Wheeling Outlet Center will not compete with retail shopping in the City because, at present, there are virtually no retail stores located there. (See Finding of Fact No. 51.) There is evidence that the residents of the City of Wheeling currently do the bulk of their retail shopping at St. Clairesville, Ohio; Steubenville, Ohio; Washington, Pennsylvania; or Pittsburgh, Pennsylvania. (See Finding of Fact No. 52.) The City of Wheeling's geographic location, bordering the states of Ohio and Pennsylvania, increases the likelihood that out-of-state residents will shop at the Wheeling Outlet Center. (See Finding of Fact No. 53.) The Wheeling Outlet Center will be readily accessible from two major Interstate Highways (I-470 and I-70). (See Finding of Fact No. 57.) It is projected that a substantial number of shoppers at the Wheeling Outlet Center will be from out-of-state. (See Finding of Fact No. 64.) As part of the Wheeling Project, investments will be made in infrastructure, including the building of parking garages, installation of sidewalks and the erection of necessary signs and lighting. In addition, water and sewage lines will be separated in the project area to insure compliance with federal regulations, which compliance is not a requirement that exists because of new construction. It is projected that this investment in infrastructure will help revitalize and reinvigorate the City of Wheeling. (See Finding of Fact No. 65.) If projections are accurate, the State of West Virginia will benefit from the Wheeling Project as a result of revitalization of the city of Wheeling and substantial job creation. (See Finding of Fact No. 66.) It

is also projected that the State will receive enhanced tax revenues of approximately twenty-three million dollars (\$23,000,000) per year, and that property tax revenue to Ohio County will increase. (See Finding of Fact No. 67.) Sales tax revenues from the sales of merchandise at this project will benefit the State. (See Finding of Fact No. 68.)

If private financing in the amount of 49.9 million dollars (\$49,900,000) is irrevocably committed to the Wheeling Victorian Outlet Project, then the City of Wheeling will be able to access 55 million dollars (\$55,000,000) of its grant to finance construction of the public infrastructure scheduled to occur in Phase I of the project. Milestones will be established for the release of money for construction of a parking garage, separation of water and sewage lines, the building of sidewalks and installation of lighting. (See Finding of Fact No. 72.) Approximately forty-three million dollars (\$43,000,000) will be spent to build infrastructure, including construction of parking garages, separation of water and sewage systems in the project area, installation of streets and sidewalks and the erection of lighting and street signs. (See Finding of Fact No. 74.)

The remainder of the funding provided will be used to acquire land and renovate buildings. (See Finding of Fact No. 77.) David Satterfield, Executive Director of the West Virginia Development Office, as the fiscal agent, will insure that the revenue bond proceeds are expended as contemplated in the applications, as approved. (See Finding of Fact No. 75.)

No portion of the money approved by WVEDGC will be paid to the developer of the Wheeling Outlet Center. (See Finding of Fact No. 78.) No private entity or person will be able to pledge the land or buildings owned by the Wheeling Urban Renewal Authority as collateral. (See Findings of Fact No. 79.) All land and building acquired with grant money will be owned by the Wheeling Urban Renewal Authority. (See Finding of Fact No. 80.) The independent developer will

have no right to mortgage the property belonging to the Urban Renewal Authority. (See Finding of Fact No. 82.)

Additionally, the Court found that "the evidence in the record demonstrates that the proceeds from the sale of the bonds will not be used to bestow a direct benefit on any private person, corporation or entity." (See Judge King's Order at page 39.) The Court further found "that the proceeds are used for capital improvements and infrastructure owned by public entities." (Id. at page 39.) Commenting further on the evidence, Judge King found "there is no evidence to show that the proceeds of the revenue bonds will be used to purchase or improve property, either real or personal, which will be wholly owned by a private person or entity. There is nothing to show that private parties will benefit from sale of the revenue bonds, except incidentally. The only benefit to private persons or entities is incidental to the use of the proceeds as for the stated public purposes." (Id. at page 39, footnote omitted.)

N. Edward Coulson, called as a witness for the WVEDGC, earned his Ph. D. in Economics in 1983 from the University of California, San Diego. (See Finding of Fact No. 96.) During his tenure at Penn State, Professor Coulson has been and continues to be involved in research examining the effects of various economic stimuli on the economy of an area. (See Finding of Fact No. 98.) Professor Coulson was accepted by the Court as an expert in urban and regional economics. (See Finding of Fact No. 100.) Professor Coulson testified that the increase in retail trade will not just create jobs within Wheeling, but it will have a multiplier effect where the money gets spent and re-spent within the metropolitan area and creates jobs in other sectors. (See Finding of Fact No. 103.) As a result of his study, Professor Coulson concluded that retail is at least as potent an economic stimulus in the City of Wheeling as in manufacturing. (See Finding of Fact No. 104.) It was

Professor Coulson's expert opinion that purchases by shoppers at the Wheeling Outlet Center will not merely reallocate purchases already occurring in West Virginia. (See Finding of Fact No. 106.)

Petitioner called John David, who holds a Ph. D., in Economics, as an expert witness. (See Finding of Fact No. 108.) Professor David is a Professor of Economics at the West Virginia University Institute of Technology. (See Finding of Fact No. 109.) Professor David was accepted as an expert in economics. (See Findings of Fact No. 110.) Professor David did not review any material relating to the Wheeling Project, even though it was available to the public. (See Finding of Fact No. 112.) Professor David performed no analysis or examination of data relating to the economic impact of the proposed Wheeling Project on Wheeling's economy. (See Finding of Fact No. 113.)

Professor David's opinion that the Wheeling Project will result in displacement of jobs was not based on a loss of jobs in Wheeling. (See Finding of Fact No. 116.) Professor David had no information to dispute projections in the application that 85% of the shoppers at the Wheeling Project are likely to come from out of state. (See Finding of Fact No. 117.) Professor David's opinion that jobs would be displaced was not based on any study performed by him. He did not quantify the job loss, and admitted that much of the job displacement would result from a movement of jobs from Ohio and Pennsylvania to West Virginia. (See Finding of Fact No. 118.) Professor David admitted that building infrastructure helps economic development in the state by attracting potential business to the area. (See Finding of Fact No. 119.) The Court found that a substantial

number of the shoppers at the Wheeling Outlet Center are expected to come from out of state. <sup>6</sup> (See Finding of Fact No. 127.)

At the time of the Final Hearing, five projects in addition to the Wheeling Project had been conditionally approved as grant recipients. The WVEDGC has approved the Eastern Regional Airport's grant request for its terminal, so as to allow the airport to take advantage of its proximity to Dulles Airport near Washington, D.C. and compete for commercial business. (See Findings of Fact No. 129.)

The WVEDGC has approved a proposed industrial park to be located approximately one mile from the existing Toyota plant. (See Findings of Fact No. 130.) Automobile parts suppliers have expressed some interest in the site, which will likely result in the creation of 181 new jobs and new investment. (See Findings of Fact No. 131.)

The WVEDGC has approved the grant request for the Man Health Care Clinic. (See Finding of Fact No. 132.) It is projected that the Man Health Care Clinic project will leverage ten million dollars of federal financing, will preserve or create health care jobs and will fulfill the need of providing adequate health care to the citizens in the vicinity of the clinic. (See Finding of Fact No. 133.) The Man Clinic will serve the health care needs of the community and is essential to attracting new business. (See Finding of Fact No. 134.)

The WVEDGC has approved a grant for construction of a baseball park to be located in the City of Charleston. (See Finding of Fact No. 136.) The project was approved because it will leverage other sources of financing and serve a public purpose, inasmuch as it will aid in the revitalization

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<sup>6</sup> The Court need not determine whether the Wheeling Outlet Center will or will not displace existing jobs in the State of West Virginia. (See Finding of Fact No. 128.)

of downtown Charleston that is currently underway with the construction of the Clay Center for the Arts and Capital Market. (See Finding of Fact No. 137.)

### **RESPONSES TO ASSIGNMENTS OF ERROR**

- A. THE MAKEUP OF THE GRANT COMMITTEE COMPLIES WITH ALL CONSTITUTIONAL REQUIREMENTS AND DOES NOT VIOLATE THE DOCTRINE OF SEPARATION OF POWERS.
  
- B. THE LEGISLATURE'S CHARGE TO THE GRANT COMMITTEE IS SPECIFIC ENOUGH TO BE VALID UNDER ARTICLE X, SECTIONS 4 AND 6 OF THE WEST VIRGINIA CONSTITUTION.
  
- C. THE ECONOMIC DEVELOPMENT BONDS TO BE ISSUED PURSUANT TO W. VA. CODE § 29-22-18a(d)(3) ARE NOT ONLY FOR A PUBLIC PURPOSE, BUT ARE REPAID FROM AN EXCESS LOTTERY REVENUE FUND WHICH IS NOT PART OF THE GENERAL REVENUE, AND THUS THE BONDS DO NOT VIOLATE SECTION 4 OR SECTION 6 OF ARTICLE X OF THE WEST VIRGINIA CONSTITUTION.
  
- D. LEGITIMATE ECONOMIC DEVELOPMENT IS NOT AS NARROW A CONCEPT AS CAG CLAIMS, AND ALL PROJECTS APPROVED BY THE GRANT COMMITTEE PROMOTE THE PUBLIC PURPOSE OF ECONOMIC DEVELOPMENT.

### **STANDARD OF REVIEW**

"This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo." Syl. Pt. 4, Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 114 (1996).

## ARGUMENT

### A. THE MAKEUP OF THE GRANT COMMITTEE COMPLIES WITH ALL CONSTITUTIONAL REQUIREMENTS AND DOES NOT VIOLATE THE DOCTRINE OF SEPARATION OF POWERS.

Petitioner's threshold claim is that the Grant Committee was improperly constituted because the Governor made the appointments of six of the nine members after receiving recommendations from the President of the Senate and the Speaker of the House of Delegates. Petitioner's claim on this point is completely without legal support. None of the cases cited by Petitioner find a statute to be constitutionally infirm on the sole ground that legislative recommendations have been made to one appointing authority, the Governor.

Among the cases cited by Petitioner, Citizens for Abatement of Aircraft Noise, 501 U.S. 252 (1991), the U.S. Supreme Court does in fact decide that there was a separation of powers violation when Congress exceeded its powers by electing board members from a list provided by the Speaker of the House and by the President of the Senate. The facts in this case are easily distinguishable from those in Citizens, and the differences are controlling. The Court in Citizens found congressional usurpation of an executive function because "appointments *must* be made from the lists, and there is no requirement that the lists contain more recommendations than the number of Board openings." Id. at 268 (emphasis in original). In contrast, the lists of recommended names presented to the Governor in this case each contain five names from which the Governor can choose three, and thus the lists contain "more recommendations than the number of [Committee] openings." Id. Moreover, although not necessary in this instance, there is nothing to suggest that the Governor was bound by the first lists supplied by the President of the Senate and Speaker of the House of Delegates.

The Governor may also remove an appointee at his will and pleasure. West Virginia Code § 6-6-4.<sup>7</sup> This power of the Governor to remove certain public officers has been held to be constitutional. Rice v. Underwood, 517 S.E.2d 751, 205 W.Va. 274 (1998). Petitioner's claim that the Speaker of the House and President of the Senate, in submitting lists of persons to be appointed to the Grant Committee as directed by West Virginia Code § 29-22-18a(d)(3) making the appointments, is ignoring the capability the Governor possesses to use his own judgment to select the Committee members and his unfettered power to remove them.

Importantly, what the vast majority of the cases cited by Petitioner do prohibit is the appointment of members of the Legislature to a governmental instrumentality. In other words, a separation of powers problem exists where, as has happened in the past, members of the Legislature are appointed to serve as members of a governmental instrumentality. Petitioner did not provide any cases which stand for the proposition that the Governor cannot receive a list of possible appointees from the Legislature without violating the separation of powers doctrine. The legislation of W.Va. Code § 29-22-18a(d)(3) is not hijacking the exclusive executive power of the Governor to appoint the members of the Grant Committee. This appointing power remains exclusively in the Governor. Simply granting the Senate President and House Speaker the ability to recommend members for the Grant Committee does not bestow upon them the power to personally name the decisive majority of this executive body in violation of the W.Va. Const., Art. V, § 1 (separation of governmental powers), and Art. VII, § 8 (Governor's right to appoint offices as provided by law). The fact that

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**<sup>7</sup>§6-6-4. Removal by governor of appointee**

Any person who has been, or may hereafter be appointed by the governor to any office or position of trust under the laws of this state, whether his tenure of office is fixed by law or not, may be removed by the governor at his will and pleasure. In removing such officer, appointee, or employee, it shall not be necessary for the governor to assign any cause for such removal.

the Governor made the appointments and can remove the citizen members without the consent of the Legislature clearly demonstrates that the power of appointment ultimately rests with the Governor.

Thus, the flexibility in W. Va. Code § 29-22-18a negates any claim that the Governor's appointment powers were encroached upon by the Legislature. Further and fundamentally, Petitioner's claim lacks factual support because Governor Wise was satisfied with all the WVEDGC recommendations he received from the President of the Senate and the Speaker of the House of Delegates. (*Testimony of Alex Macia.*) Governor Wise and his General Counsel, Alex Macia discussed the list of 10 potential candidates that were submitted and decided that all ten of them were good viable prospects, representing diversity of experience and knowledge of economic development. (*Testimony of Alex Macia.*) If Governor Wise had not been satisfied with either the recommendations from the President of the Senate or the Speaker of the House of Delegates, the Governor would have requested new lists. (*Testimony of Alex Macia.*)

Petitioner also cites Greer v. State of Georgia, 212 SE2d 836, 838 (1975), and, through a disingenuous use of ellipsis, claims that it is precisely on point. CAG claims that Greer states that the Legislature cannot "constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation . . ." (emphasis added in CAG's Petition). CAG's cynical use of the ellipsis indicates that the quote is incomplete. When the excerpt from Greer is given in full, CAG's manipulation is revealed in all its stark duplicity:

The question here is whether the Legislature can constitutionally create a special instrumentality of government to implement specific legislation and then retain some

control over the process of implementation by appointing legislators to the governing body of the instrumentality.

Greer, 212 S.E.2d at 838.

Thus, Greer is yet another case where the Legislature attempted to appoint its own members to a governmental instrumentality, and is clearly distinguishable from the facts of this case.

Other cases relied upon by Petitioner do not change the outcome. In *Alexander v. State*, 441 So.2d 1329 (Miss. 1983)<sup>8</sup>, members of the Legislature were serving on the Commission of Budget and Accounting. The Supreme Court of Mississippi held that this violated separation of powers inasmuch as legislators may not serve on an executive branch Commission. Id. at 1340-41. In Legislative Research Commission v. Brown, 664 S.W.2d 907 (Ky. 1984), the Kentucky statutes authorized the House Speaker and the President Pro Tem. of the Senate to appoint members to particular boards, made the House Speaker and the President Pro Tem. ex officio members of certain boards and commissions, and directed the Governor to make appointments solely from the list submitted to him by the Legislature. Id. at 920-21. The Supreme Court of Kentucky held that these statutes violated the separation of powers doctrine. Id. at 923-24. Significantly, the challenge to the statutes was brought by the Governor, in a political climate so highly charged that the General Assembly (Legislature) sought a judicial declaration that it was the “dominant” branch of government and had all “residual powers.”

Like the other cases cited by CAG, these cases involve Legislatures attempting to appoint themselves to executive functions, or at least to put a stranglehold on the appointment process, and are thus distinguishable from this case. In this case, the Legislature has not appointed anyone to the

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<sup>8</sup> *Alexander* was overruled on the grounds that the court in that case allowed for no exceptions to the separation of powers mandate. See *Kirskey v. Dye*, 564 So.2d 1333 (Miss. 1990).

Grant Committee, nor are members of the Legislature serving on the Grant Committee. The Legislature simply *recommended* ten names to Governor Wise. Governor Wise could then appoint the members from the lists as he saw fit, or he could request a new list of names if he was not satisfied with the recommendations.

Since Legislative Research Commission, in a similar situation, the Supreme Court of Kentucky has held the “[l]egislature has not attempted to appoint administrative officers, nor has it completely denied the appointive function of the Executive.” Prater v. Commonwealth of Kentucky, 82 S.W.3d 898, 909 (Ky. 2002). The Kentucky Supreme Court has also upheld the constitutionality of a statute which limited the power of the Governor to appoint two names on a list provided by the Kentucky Association of Realtors. Kentucky Association of Realtors, Inc. v. Musselman, et al, 817 S.W.2d 213 (Ky. 1991). In Musselman, the Court stated that the statute neither limited appointees to members of the Association nor did it compel the Governor to appoint someone on the list. In fact, the Court stated that “the Governor may reject all the names on the list . . . and forego making an appointment until provided with a list that includes a person whom the Governor deems suitable for appointment to the office.” Id. at 214. This is precisely what Governor Wise could have done in this case, although it was not necessary because the Governor made an independent determination that all five of the candidates on each of the lists submitted were actually credible and viable candidates.

CAG also argues that the makeup of the Grant Committee produces an “appearance of impropriety” because many of the approved projects are in the home counties of certain legislators or aides to the Governor. CAG argues that the standard for whether there exists an “appearance of impropriety” is that of a “reasonable person” and implicitly argues that CAG represents a reasonable

person while Judge King apparently does not. The standard for whether an “appearance of impropriety” exists is indeed a “reasonable person”, which is not the same thing as the viewpoint of the most paranoid conspiracy theorist that CAG can dredge up. One can always perceive impropriety when one is predisposed to see it.

Cases relied upon by CAG are clearly distinguishable. In the case of Graf v. Frame, 177 W.Va. 282, 352 S.E.2d 31, the West Virginia Supreme Court enjoined Charles Frame, a lawyer and member of the West Virginia Board of Regents, and his law firm from instituting litigation against the State’s public institutions of higher learning and their employees. Mr. Frame and his firm were enjoined from such representation because his position as a member of the Board of Regents presented a conflict of interest. Simply put, on the one hand Mr. Frame, as a member of the Board of Regents, was charged with the responsibility of overseeing and supervising the conduct of the employees at West Virginia’s public institutions of higher learning, while on the other hand he was attempting to sue them for negligence. Thus, a conflict occurred when he, or his firm in the course of his private practice, instituted litigation against the colleges and universities or their employees. Any alleged “appearance of impropriety” in this case falls far short of the clear conflict of interest present in Frame.

CAG’s allegation that a substantial portion of the approved projects went to areas in the State that are represented by influential legislators ignores the fact that the evidence in the record establishes that the projects were approved because they met the Grant Committee’s criteria: (1) Ability of the project to leverage other sources of funding (2) Job creation and retention (3) Promotion of economic growth and (4) Is the project in the public interest of the State?

In State of West Virginia ex rel. The League of Women Voters of West Virginia v. Tomblin, 209 W. Va. 565, 550 S.E.2d 355, the Court disapproved of the practice of allowing legislators to add projects to the budget digest after the conference committee for both houses of the Legislature had approved the budget digest. This practice was disapproved because it was a late addition by one member of the Legislature that was not approved by the conference committee and was not open to public scrutiny.

This case presents a situation dramatically different from the practice disapproved of in The League of Women Voters of West Virginia v. Tomblin because the grant applications as well as the actions of the Grant Committee were public. The first meeting of the Grant Committee was held on April 8, 2002. A public hearing was held in Wheeling on April 25, 2002. All 197 projects were reviewed in public meetings where a representative was allocated a time to speak to the Committee regarding their projects. One project was the subject of a public hearing on April 25, and discussed on May 2nd, 5 projects were discussed on June 14, 6 applicants were discussed on June 28, 32 projects were discussed on July 18, 32 projects were discussed on July 19, 34 projects were discussed on July 22, 43 projects were discussed on July 30, and 42 projects were discussed on July 31. The Grant Committee held public hearings in the Martinsburg Holiday Inn, Martinsburg and the Putnam County Court House, Winfield on September 4, 2002.

Further, public hearings in the Morgantown Armory, Morgantown and the Raleigh County Armory and Civic Center, Beckley were held on September 5, 2002. Notice of the public meetings and hearings were posted to the state register. Public notice of the April 25, 2002 meeting and public hearing was advertised in the Charleston Gazette and Daily Mail, Beckley Newspaper and Wheeling Intelligence Daily on April 10 and 11. The September 4<sup>th</sup> and 5<sup>th</sup> public hearings were advertised as

required by W. Va. Code § 29-22-18a(d). All hearings and meetings were public and there was always an opportunity for the general public to address the committee. The Grant Committee discussed and voted on all projects in public. A quorum of the members was needed to approve a project as opposed to the action of one legislator allocating the State's revenue which was struck in League of Women Voters. These hearings and meetings of the Grant Committee were transcribed and have been maintained by the committee for review by the public. Thus, CAG's reliance on the League of Woman Voters case is completely misplaced.

**B. THE LEGISLATURE'S CHARGE TO THE GRANT COMMITTEE IS SPECIFIC ENOUGH TO BE VALID UNDER ARTICLE X, SECTIONS 4 AND 6 OF THE WEST VIRGINIA CONSTITUTION.**

CAG claims that the Legislature's set forth an insufficient standard in W. Va. Code § 29-22-18a(d), and thus the delegation was impermissibly broad. The Legislature found economic development to be "necessary". It strains credulity that CAG could disagree with such a statement. The Legislature further found that economic development would be furthered by providing "public support for constructing, equipping, improving and maintaining economic development projects, capital improvement projects and infrastructure which promote economic development in this state." W. Va. Code § 29-22-18a(d). What the Legislature did in W. Va. Code § 29-22-18a(d) was to provide a sum of money to be used for economic development, and then create a commission to decide what projects would get the funds. This falls well short of the kind of wholesale delegation of authority to enact laws addressed by CAG.

This then leaves the question of whether W. Va. Code § 29-22-18a is constitutional. The Court's analysis in this regard must be guided by the recognition that a statute is presumed constitutional. The Supreme Court has consistently held:

“In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond a reasonable doubt.” Syllabus Point 1, State ex rel. Appalachian Power Co. v. Gainer, 149 W. Va. 740, 143 S. E. 2d 351 (1965).

Syllabus Point 10, State of West Virginia ex rel. West Virginia Regional Jail and Correctional Facility Authority v. West Virginia Investment Management Board, 203 W. Va. 413, 508 S. E. 2d 130 (1998).

CAG asserts that the statute does not contain sufficiently definite, certain and /or specific standards or criteria to direct or guide the WVEDGC. In challenging the adequacy of the standards provided, CAG relies, in part, on cases from other jurisdictions which are clearly distinguishable and which are at least thirteen years old.<sup>9</sup> The only West Virginia case CAG references with regard to the issue of adequacy of standards is Mountaineer Park v. Polan, 438 S.E.2d 308 (W. Va. 1993). However, CAG's reliance on *Mountaineer Park* is misplaced. Prior to discussing how the enactment

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<sup>9</sup> A case in the Supreme Court of Oklahoma, *In re Initiative Petition No. 332*, 776 P.2d 556 (Okla. 1989), involved giving the Oklahoma Lottery Commission broad power to disperse its proceeds to other state agencies while allowing the Lottery Commission to retain an unidentified amount of the proceeds. Further, the statute declared that money could be spent for far broader purposes than those allowed under W. Va. Code § 29-22-18a. Specifically, the Oklahoma statute allowed disbursement for education, economic development and job creation as well as programs for the elderly, the handicapped and the needy. *Douglas v. Judge*, 568 P. 2d 530, (Mont.1977) involves the incursion of state debt by pledging the full faith and credit of the state and its tax powers to the repayment of loans provided to individuals.

of W. Va. Code § 29-22-18a is different from the legislative delegations discussed in Mountaineer Park, it is important to examine several other West Virginia cases. The legislative delegation of authority in W. Va. Code § 29-22-18a is in line with the delegation approved in State ex rel. West Virginia Housing Development Fund v. Copenhaver, *supra*, State ex rel. West Virginia Housing Development Fund v. Waterhouse, 158 W. Va. 196, 212 S.E.2d 724 (1974), and Marockie v. Wagoner, *supra*, and does not contain the infirmities of the statute examined in Mountaineer Park.

In examining the adequacy of legislative standards, or in the alternative, whether the amount of discretion is constitutional, this Court has uniformly applied a strong presumption in favor of constitutionality. The Copenhaver Court, in examining a claim of improper legislative delegation due to an alleged lack of sufficient standards, started its examination recognizing the limitations of the Court when examining the constitutionality of a legislative enactment, as set forth in Appalachian Power v. Gainer at Syllabus Point 1 discussed, *supra*.

The question in Copenhaver was whether the Legislature provided adequate guidance for the granting of Housing Development Fund loans to be made to persons of low or moderate income.<sup>10</sup> While at first blush the statute examined in Copenhaver may appear to provide more

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<sup>10</sup>The statute addressed in Copenhaver provides:

Persons and families of low and moderate income means persons and families, irrespective of race, creed, national origin or sex, **determined by the housing development fund to require such assistance** as is made available by this article on account of personal or family income not sufficient to afford sanitary, decent, and safe housing, and to be eligible or potentially eligible to occupy residential housing constructed and financed, wholly or in part, with federally insured construction loans, federally insured mortgages, federal mortgages or with other public or private assistance, and in making such determination the fund shall take into account the following: (a) the amount of the total income of such persons and families available for housing needs, (b) the size of the family, (c) the cost and condition of housing facilities available, (d) the eligibility of such persons and families for federal housing [153 W. Va. 651] assistance of any type predicted upon a low or moderate income

guidance, it does not. Rather, the statute considered in Copenhaver, provides general factors for the housing fund to consider, but in the end no standard for determining who receives a loan was provided. Thus, Copenhaver approved the Housing Development Fund's broad discretion to determine who should receive funding. W. Va. Code § 29-22-18a broadly provides that public financial support is to be given for "constructing, equipping, improving and maintaining economic development projects, capital improvement projects and infrastructure which promote economic development in this State." In Copenhaver, who received the funding was left largely to the discretion of the Housing Development Fund. In this case who will receive grants pursuant to W. Va. Code § 29-22-18a is left largely to the discretion of the Grant Committee. In neither the Copenhaver case, nor the present case, does the Legislature provide standards on the ultimate question of who will receive funding.

In Waterhouse, the Court examined amendments to the statutes that had been found constitutional in Copenhaver. Specifically, the Court addressed the amended statute's provision of funding for additional classes of individuals: the elderly, higher income groups, manpower for industrial development, and the physically disabled. The amendments were challenged on the grounds of lack of specificity. In Waterhouse, as in Copenhaver, it appears that the pivotal terms elderly, physical disability higher income individuals and manpower individuals were not defined. In spite of the lack of definitions of those terms, the Court upheld the statute's validity. In

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basis, and (e) the ability of such persons and families to compete successfully in the normal housing market and to pay the amounts at which private enterprise is providing sanitary, decent and safe housing." *Copenhaver*, 153 W.Va. at 650-51, 171 S.E.2d 553-54.

determining that the statute was valid, the Waterhouse Court recognized that the trend throughout the country is to allow greater leeway to the Legislature in setting forth guidance and standards.<sup>11</sup>

In Marockie v. Wagoner, the petitioner challenged the constitutionality of W. Va. Code § 18-9D-15, alleging that this statute failed to provide adequate guidance to the School Building Authority. W. Va. Code § 18-9D-15 states in pertinent part:

(a) It is the intent of the Legislature to empower the school building authority to facilitate and provide state funds for the construction and maintenance of school facilities so as to meet the educational needs of the people of this state in an **efficient** and **economical** manner. **The authority shall make funding determinations in accordance with the provisions of this article and shall assess existing school facilities and each facilities plan in relation to the needs of the individual student, the general school population, the communities served by the facilities and facility needs statewide.**  
[Emphasis added]

Thus, W. Va. Code § 18-9D-15, like W. Va. Code § 29-22-18a, paints with a broad brush, leaving wide discretion to the government instrumentalities to whom the power is delegated. In commenting on the discretion conveyed to the SBA pursuant to W. Va. Code § 18-9D-15, the Court

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<sup>11</sup> In Waterhouse, the Court stated:

Concerning the adequacy of the standards it has been held that great leeway is allowed the legislature in setting forth guidelines or standards. State of Iowa v. Steenhoek, Iowa, 182 N. W. 2d 377 (1971). That Court, citing Film v. Zoning Board of Adjustment, 260 Iowa 787, 150 N. W. 2d 606, said: 'the trend of modern decisions is toward greater liberality in the setting of standards and to require less exactness in them in legislative enactments.' In Gilman v. City of Newark, 73 N. J. Super. 562, 180 A. 2d 365 (1962), the following succinct language is found: The mere fact that the standards set forth are general rather than specific does not militate against their acceptance and validity. The exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards. ...' See Dicker son v. Commonwealth, 181 Va. 313, 24 S. E. 2d 550 (1943). Waterhouse, 158 W.Va. at 213-14, 212 S.E.2d 734.

analyzed the discretionary authority given the SBA by analogizing the SBA statute to the statute upheld in Copenhaver:

This Court explained that the legislature did give the Fund the power “to exercise a degree of discretion or judgment in determining who are persons and families of low and moderate income. Id. However, that power was given out of necessity and given with sufficient guidelines to guide the Fund in its exercise of discretion.

The situation before us today is similar to the situation in Copenhaver. The legislature did not give the SBA purely legislative functions; however, the legislature out of necessity gave the SBA certain discretionary powers and provided sufficient guidelines to guide the SBA in its exercise of discretion. Accordingly, we hold that W. Va. Code § 18-9D-1, *et seq.* as amended in S. B. 1008, does not violate W. Va. Const. art. VI, § 1.

Marockie, 191 W.Va. at 469, 446 S.E.2d at 691.

While it might be argued that the remainder of Art. 9D supplements the guidance provided the SBA, the provisions in the remainder of the article do not provide any guidance as to the ultimate decision to be reached, which is the identity of the recipients of bond proceeds. The remaining provisions only provide guidance with regard to what the SBA must consider. Thus, the SBA statutes, like the statutes considered in Copenhaver and Waterhouse, leave to the administrative body or governmental instrumentality wide discretion with regard to the identity of the loan or grant recipients. Consistent with the Court’s holding in Copenhaver, Waterhouse, and Marockie, the broad discretion conveyed to the WVEDGC does not render the statute unconstitutional.

The broad discretion provided to the WVEDGC in W. Va. Code § 29-22-18a does not violate any constitutional provision. The practical benefits of the flexibility accorded by the statute were explained by Secretary Kastick in response to Mr. Harless’s cross-examination regarding the general nature of the standards:

By Mr. Harless:

- Q. But that is pretty untight, one would say, just to use the rather generic terms, wouldn't you say? Pretty general, right?

Secretary Kastick:

- A. They're general terms, but I think that it's good that they're general terms. It allows [us] to look at a number of project types and try to fit in what is right for a region. The high tech (... rapid and indiscernible...), funding...project fits in very well with what is going on between Morgantown and Clarksburg. If you have a very tight definition, a project such as a proposed industrial park wouldn't fit in Putnam County. So I think the legislature was wise to do what they did. ( *October 30, 2002 Evidentiary Hearing Transcript at page 231* )

Finally, the Court's holding in Mountaineer Park does not cause a different result. In Mountaineer Park, the Court examined whether W. Va. Code § 29-22-9(b)(2) [1990] was an improper delegation of authority to the Lottery Commission. This statutory enactment authorized the Lottery Commission to promulgate rules and regulations with regard to "electronic video lottery systems." This provision was struck as being overly broad because it gave the Lottery Commission unbridled authority when the Legislature had not enacted appropriate laws establishing video lottery games as state-run lottery. That case, however, differs from W. Va. Code § 29-22-18a in several respects. The Lottery Commission, unlike the Grant Committee in this case, had no guidance as to how to make its determinations. Moreover, the delegation to the Lottery Commission, as described above, suffered from several substantial infirmities which do not affect the propriety of W. Va. Code § 29-22-18a.

Fundamentally, the Legislature's delegation of rule making authority to the Lottery Commission expanded the Lottery's statutory authority in contravention of the West Virginia Constitution.

[A]rticle VI, section 36 of the West Virginia Constitution provides an exception to the prohibition against lotteries to allow the operation of a lottery which is regulated, controlled, owned and operated by the State of West Virginia in the manner provided by general law. Only those lottery operations which are regulated, controlled, owned and operated in the **manner provided by general laws enacted by the West Virginia Legislature** can be properly conducted in accordance with the exception created under article VI, section 36 of our Constitution. [Emphasis added.]

Mountaineer Park, 190 W.Va. at 286, 438 S.E.2d at 318.

In commenting on the above-referenced constitutional enactment the Mountaineer Park Court found that "The plain language of this constitutional provision authorizes the legislature not simply to establish a state-run lottery, but also to prescribe the 'general law' pursuant to which the lotteries will be 'regulated, controlled, owned and operated [.]' 190 W.Va. at 283, 438 S.E.2d at 315. Additionally, the statute at issue in Mountaineer Park was problematic because it authorizes the implementation of "games utilizing electronic computers and electronic computer terminal devices and systems." 190 W.Va. at 285, 438 S.E.2d at 317. The Court found that such authorization appeared contradictory with W. Va. Code § 29-22-9(b)(5) which provided that 'no lottery utilizing a machine may use machines which dispense coins or currency [.]' and W. Va. Code § 29-22-9(b)(5) [1990], which states that '[s]election of a winner must be predicted totally on chance.' Id. (emphasis added). Thus, this case is clearly distinguishable from Mountaineer Park.

Petitioner cites the Court's decision in State v. Grinstead, 206 S.E.2d 912 (W.Va. 1974) to support his contention that W. Va. Code § 2-22-18a is improper legislative delegation. The executive body in that particular case had overextended its power as delegated by the legislative body by attempting to adopt future laws, rules or regulations of other states, or of the federal government, or of its agencies, to redefine which substances fall within the legislatively enacted Dangerous Drugs

Act. However, this is completely different from what the Grant Committee is authorized to do. In this case, WVEDGC is carrying out the law, not enacting it as was done in Grinstead.

Additionally, Petitioner claims that W.Va. Code § 22-22-18a has inadequate standards because the Grant Committee will expire once its task is completed and therefore it is alleged that there will be no one to ensure that the grant proceeds are spent as authorized. This argument ignores the uncontroverted testimony of David Satterfield, Executive Director of the West Virginia Development Office, that grant proceeds will be tied to a Memorandum Of Understanding executed by the grant recipient and Secretary Kastick and David Satterfield prior to the release of grant proceeds. Moreover, it ignores the fact that the ex officio officers of the committee, the Governor<sup>12</sup>, the Secretary of Tax and Revenue, the Executive Director of the West Virginia Development Office are all public offices of a permanent nature. Further, as David Satterfield testified he will ensure that grant proceeds are spent for a public purpose and for work done in a professional manner. Moreover, the accounts of any unit of local government within the state, including a county, municipality or public board, are supervised under W.Va. Code §§ 6-9-6 and 6-9-7.<sup>13</sup> Thus, Petitioner's attempt to

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<sup>12</sup>Once the Committee's work is completed the Governor will no longer have a designee on the Committee but the Governor's accountability for lawful expenditures can hardly be questioned.

<sup>13</sup>W.Va. Code § 6-9-6

"All local governing officers, departments, boards and commissions shall keep their financial accounts in records and forms approved or prescribed by the chief inspector of public offices and shall furnish promptly to the chief inspector of public offices such information and reports as may be requested".

W.Va. Code § 6-9-7(a)

"The chief inspector has the power by himself or herself, or by any person appointed, designated or approved by the chief inspector to perform the service, to examine into all financial affairs of every local governmental office or political subdivision and all boards, commissions, authorities, agencies or other offices created under authority thereof."

substitute its judgment for that of the Legislature is unwarranted and is nothing more than a continued attempt to second guess the policy prerogative of the West Virginia Legislature.

**C. THE ECONOMIC DEVELOPMENT BONDS TO BE ISSUED PURSUANT TO W. VA. CODE § 29-22-18a(d)(3) ARE NOT ONLY FOR A PUBLIC PURPOSE, BUT ARE REPAID FROM AN EXCESS LOTTERY REVENUE FUND WHICH IS NOT PART OF GENERAL REVENUE, AND THUS THE BONDS DO NOT VIOLATE SECTION 4 OR SECTION 6 OF ARTICLE X OF THE WEST VIRGINIA CONSTITUTION.**

The revenue bond proceeds at issue in this case will be provided to public entities for public purposes. The revenue bonds do not extend the State's credit because they are secured by excess video lottery proceeds which do not create an obligation of the State. See Winkler v. State School Bldg. Authority, 189 W.Va. 748, 434 S.E.2d 420 (1993). Syl. pt. 1, State ex rel. Marockie v. Wagoner, 191 W.Va. 458, 446 S.E.2d 680 (1994).

CAG relies upon cases like State ex rel. County Court of Marion County v. Demus, 148 W.Va. 398, 135 S.E.2d 352 (1964) to support its claim that the State is barred under W.Va. Const., Art. X, § 6 from granting unrepaid aid to counties or municipalities. The Act in Demus was determined constitutional because the bonds at issue would "never constitute an indebtedness of the county, within the meaning of any constitutional provision or statutory limitation; and [would] never constitute or give rise to a pecuniary liability nor be a charge against the general credit or taxing powers of the issuing body." *Id.*, 148 W.Va. at 409, 135 S.E.2d at 359. The Court found this provision and language to apply equally to counties and municipalities. *Id.* For strategies unknown, CAG has cited cases with analogous factual backgrounds that decide for the constitutionality of statutes, in support of the Grant Committee's position.

This Court has held that “[t]he purpose of Section 6 of Article X was to guard against the granting of the credit of the State in aid of any county, city, township, corporation or person.... It was not, we think, intended to inhibit the use of the State’s funds in carrying out public purposes.” State ex rel. Dyer v. Sims, 134 W.Va. 278, 290, 58 S.E.2d 766, 773 (1950), reversed on other grounds in 341 U.S. 22, 71 S.Ct. 557, 95 L.Ed. 713 (1951). Since the Legislature declared the subject act in Waterhouse to be designed to fulfill a public purpose, this Court found “that it [did] not authorize the pledging of the credit of the state as proscribed by our constitution.” Waterhouse, 158 W.Va. at 209, 212 S.E.2d at 732.

CAG alleges that the funding of economic development, capital improvement and the building of infrastructure which promotes economic development provided for and by W. Va. Code § 29-22-18(a) violates Article X, §§ 4 and 6 of the West Virginia Constitution. An examination of these constitutional provisions along with the controlling precedent of the West Virginia Supreme Court of Appeals refutes Petitioner’s contentions.

Article X, § 4 of the West Virginia Constitution serves to protect the financial integrity of the State.<sup>14</sup> Thus, this Court must examine whether W.Va. Code § 29-22-18(a) creates debt for the State. The statute established a special revenue fund within the State lottery fund in the State treasury. The revenue bonds that will be issued pursuant to W.Va. Code § 29-22-18(a) will be paid for exclusively from excess video lottery proceeds.

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**<sup>14</sup>§4. Limitation on Contracting of State Debt**

No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

In State ex rel. Marockie v. Wagoner, 191 W.Va. 458, 446 S.E. 2d 680 (1994), the Court examined whether use of lottery proceeds to liquidate SBA revenue bonds violated Article X, § 4. The use of lottery proceeds to fund the SBA bond was permitted. The Court found no violation of Article X, § 4 because lottery funds constitute a special revenue source and are not the result of compulsory tax payments. In this instance, excess video lottery proceeds will be used to liquidate the bonds. Thus, like the lottery proceeds used in Marockie, the excess video lottery proceeds do not jeopardize the financial integrity of the State because there is no depletion of general revenue. As in Marockie, the excess video lottery proceeds here do not derive from the compulsory tax revenue. Additionally, as in Marockie the excess video lottery funds are placed in a special revenue fund. W. Va. Code § 29-22-18(a) makes plain that money contained in the state excess lottery revenue fund “shall be disbursed in the manner provided in this section for the purposes stated in this section and shall not be treated by the auditor and the state treasurer as part of the general revenue of the state.” (emphasis added.)

As further demonstration that the revenue bonds at issue here are not an obligation of the State, a short-fall in excess video lottery proceeds to pay the debt service on the revenue bonds to be issued must await adequate funding from video lottery proceeds. Thus, even though a short-fall is not anticipated, the Legislature limited the bondholder’s remedy to future proceeds of the video lottery. Moreover, the statute emphatically states that the bonds will not be satisfied out of a general revenue appropriation.<sup>15</sup>

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<sup>15</sup>W.Va. Code § 29-22-18(a) states, “The provisions of this subsection may not be construed by any court to require any appropriation or any specific appropriation or level of funding for the purposes set forth in this subsection.

Article X, § 6 prohibits the extension of the State's credit to municipalities, counties, political subdivisions or private parties.<sup>16</sup> The bond proceeds do not extend the State's credit to the public non-private entities because the bonds do not create a debt or obligation of the State. As discussed, *infra*, the bonds will be paid as mandated by W. Va. Code § 29-22-18(a) from excess video lottery funds.

The protection of the fiscal integrity of the State is the common thread shared by both §§ 4 and 6 of Article X of the West Virginia Constitution. See Winkler v. State Bldg Authority, 189 W. Va. 748, 434 S.E. 2d. 420 (1993). Both Winkler and Marockie examined the circumstances under which revenue bonds could be issued for a public purpose without running afoul of the constitutional prohibitions against the State's incursion of state debt. Article X § 6 was raised as an obstacle to the bond issuance in Winkler and Marockie but was not found relevant by either Court and thus was not addressed.

However, both Marockie and Winkler are instructive here because of the common aim of Article X, §§ 4 and 6. In Marockie and Winkler the cases turned on whether the revenue was appropriated from general revenue. The sole source for funding in Winkler was appropriation by the Legislature. In Winkler, the proponents of the bond issuance pointed to the fact that on the face of the bonds there was a disclaimer that the Legislature was not required to fund the bond. The Court did not find the disclaimer to be dispositive because, unlike the present case, the source for funding

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<sup>16</sup> The credit of the state shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the state ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person. The investment of state or public funds shall be subject to procedures and guidelines heretofore or hereafter established by the Legislature for the prudent investment of such funds.

in Winkler was the general revenue fund. Here, as in Marockie, bond debt service is payable from a special revenue fund. Thus, W. Va. Code § 29-22-18a does not create a lien against the general revenue as was possible in Winkler. It was the possible creation of a lien against general revenue in Winkler that caused invalidation of those bonds. Nothing in Article X, § 6 suggests that the prohibition against the extension of State credit to municipalities is of greater importance than the prohibition in § 4 preventing the State from incurring debt. The common aim of Article X, §§ 4 and 6 supports the common measuring stick suggested here. The common factor to be utilized in evaluating both provisions is whether general revenue funds will be used to satisfy the bonds. Satisfaction of the bonds out of special revenue funds as will occur here offends neither § 4 nor § 6 of Article X.

**D. LEGITIMATE ECONOMIC DEVELOPMENT IS NOT AS NARROW A CONCEPT AS CAG CLAIMS, AND ALL PROJECTS APPROVED BY THE GRANT COMMITTEE PROMOTE THE PUBLIC PURPOSE OF ECONOMIC DEVELOPMENT.**

CAG argues that economic development funds may not be used for projects that are not industrial in nature, and that several of the projects, in addition to the Wheeling outlet center, are therefore not proper recipients of such funds. CAG has neither legal nor factual support for their position. CAG's challenge to the specific work of the Grant Committee must be judged against the high burden which the Petitioner has undertaken. In State ex rel West Virginia Housing Development Fund v. Waterhouse, 158 W. Va. 196, 212 S. E. 2d 724 (1974), the Court examined the discretion to be afforded to an administrative body created by the Legislature to carry out a public purpose. In Waterhouse, as in this case, the Legislature had created a governmental instrumentality,

the Housing Development Fund, to oversee the granting of low-interest loans for the construction of housing in West Virginia. The Housing Development Fund's authority to issue mortgages for the elderly, high income housing, and industrial development housing was challenged as being action that was not in fulfillment of a public purpose.

The Waterhouse Court's analysis of what constitutes public purpose is instructive in this matter because the Grant Committee's actions are facing a similar challenge. Specifically, CAG has challenged the Grant Committee's actions as being without a sufficient public purpose. In analyzing whether a public purpose existed in Waterhouse, the Court found that the doctrine of public purpose has evolved and expanded over time. Further, the Court found that in order to defeat a Legislative declaration of public purpose the party challenging a statute must demonstrate that the Legislative purpose announced is without reasonable relation to the public interest. In Waterhouse, the Court deferred to the Legislative declaration that provision of housing for higher income individuals as well as the provision of industrial housing would benefit the people of the State of West Virginia. Specifically, the Legislature found that housing shortages made it difficult for the State to attract qualified manpower resources needed for industrial and commercial development.

Thus, this Court must examine CAG's challenge that the actions of the Grant Committee does not serve a public purpose in the context of whether "... the judicial mind conceives it to be without reasonable relation to the public interest." Syl. pt. 7, State ex rel West Virginia Housing Development Fund v. Waterhouse, *supra*. By its enactment of W. Va. Code § 29-22-18a (d) the Legislature found and declared:

that in order to attract new business, commerce and industry to this state, to retain existing business and industry providing the citizens of this state with economic security and to advance the business

prosperity of this state, it is necessary to provide public financial support for constructing, equipping, improving and maintaining economic development projects, capital improvement projects and infrastructure which promote economic development in this state.

Providing financial support for economic development, capital improvement and infrastructure which promotes economic development cannot be found to be a purpose that is without reasonable relation to the public interest. This is especially true in light of the fact that the controlling precedent in Samol, discussed supra, sanctions bond issuance for the construction of a retail shopping plaza in Wheeling. The retail expansion proposed was specifically undertaken to return retail jobs lost to the state of Ohio back to West Virginia. Additionally, Dr. Coulson's testimony regarding his study of the economic impact of retail on the City of Wheeling demonstrates that financial support of retail projects is as great an economic stimulus to the City of Wheeling as manufacturing.

Against this legal and factual framework, the arguments put forth by CAG in support of this proposition are exceedingly weak. How else to describe arguments that start with reliance on *dicta* in a concurrence while ignoring the holding of both the majority and the concurrence, followed by reliance on a case that has been overruled on the point relied on, and considering that CAG has chosen not to even refer to the testimony of its own expert witness, Dr. John David, who performed no study and reviewed none of the more than 1,000 public documents available to the public.

CAG cites to certain *dicta* in the concurrence to State ex rel. Ohio County Commission v. Samol, 165 W. Va. 714, 275 S.E.2d 2 (1980). By definition, a concurrence is not the majority opinion, and thus is not precedent;<sup>17</sup> and by definition, *dicta* is language that is not necessary to the

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<sup>17</sup>“**Concurring opinion.** A separate opinion delivered by one or more judges which agrees with the decision of the majority of the court but offering own reasons for reaching that decision.”

opinion and not binding in subsequent cases.<sup>18</sup> The majority opinion, on the other hand, authored by Justice Miller, clearly states:

It does not require any lengthy discussion to realize that the renovation, expansion or creation of existing or new commercial projects gives much the same economic benefit to a community as would comparable activities in the industrial area. Each serves to create or maintain employment and enhance tax revenues, and thereby operates to benefit the community and public in general.<sup>19</sup>

Samol at 275 S.E.2d 4.

Even the concurrence, notwithstanding its gratuitous protestations regarding the outdated preference for industrial projects over commercial, recognized that cross border economic warfare is a legitimate public purpose. Id. at 7. Furthermore, the rationale of the Samol concurrence's *dicta* is as outdated as the authorities it cites, as more fully argued *infra*. The language Petitioner cites from Burford v. Kroger, Civil Action No. 97-C-1027, Circuit Court of Kanawha County (Judge Mac Queen, 10 December 1997), relies on the same outdated authorities as the Samol concurrence, and is subject to the same criticisms.

Reliance on outdated *dicta* in a concurrence is bad enough, but nothing compared to CAG's obstinate continuing reliance on an opinion that has been expressly overruled by the Court that issued it. CAG relies on State ex rel. McLeod v. Riley, 278 S.E.2d 612 (S.C. 1981), in which the

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Black's Law Dictionary 291 (6th ed. 1990) (emphases added).

<sup>18</sup>**Dicta.** Opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in court's opinion which go beyond the facts before the court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent." Black's Law Dictionary 454 (6th Ed. 1990).

<sup>19</sup>Justice Miller's conclusion that renovation of commercial projects, like the Wheeling Plaza in Samol, are valid as economic development projects was confirmed by Dr. Edward Coulson's study.

Supreme Court of South Carolina invalidated the use of bond funds to finance a retail shopping center. CAG disingenuously never bothers to inform the Court that McLeod was later overruled on precisely the issue championed by CAG, although that point has been pointed out to CAG several times. In WDW Properties v. City of Sumter, 535 S.E.2d 631, 636 (S.C. 2000), the unanimous Supreme Court of South Carolina stated:

We conclude that our opinion in Nichols implicitly overruled McLeod's holding that revenue bonds may not be issued on behalf of retail or commercial businesses. We now take a broader view of the public purpose doctrine and give substantial weight to legislative determinations of the issue.

The facts in WDW Properties bear a striking resemblance to the proposed Wheeling Outlet Center project so vilified by Petitioner. In WDW Properties, the proposed project consisted of interior and exterior renovations of three adjoining historic buildings located in an area of Sumter, South Carolina, which had been designated a "slum and blight area". WDW Properties at 632. The buildings would be leased for commercial office and retail space, and the project was expected to create twenty full-time jobs and "serve as the cornerstone for the revitalization of downtown Sumter and the surrounding communities." Id. Issuance of economic development revenue bonds to finance the project in WDW Properties was challenged by an owner of commercial office and retail space outside of the slum and blight area, who believed that government-sponsored financing for the project gave the project developer an unfair economic advantage in the competition for tenants and patrons. Id. Applying a four-part test, the South Carolina Court rejected the arguments against issuance of the bonds.

First, the ultimate benefits to the public are to increase the number of available jobs, improve the appearance of rundown buildings in Sumter's downtown, attract new businesses, and reinvigorate a downtown area that has been classified by the local and federal governments as economically distressed. Second – deferring to the

legislature's determination in establishing the JEDA program – the public will be the primary beneficiary, although the developers certainly will benefit from a more favorable loan rate. Third, the project is speculative, as is any redevelopment effort, but it is not so speculative that it violates the public purpose doctrine. And fourth, the public interest is likely to be served to a substantial degree through the creation of jobs, the reinvigoration of the downtown area, and benefits, both tangible and intangible, that should result from that reinvigoration.

Id. at 635-36.

In comparison, the Wheeling Outlet Center project is much more ambitious, projected to bring around a thousand permanent jobs, on top of around 300-400 union construction jobs before completion. The size of the proposed project actually increases the likelihood of its success, since it will rehabilitate a larger portion of the downtown than was contemplated in Sumter, and will not be a mere drop in the bucket.

In addition to having benefits far in excess of those which were found to establish a public purpose in WDW Properties, the Wheeling project will not take business away from retailers in West Virginia. The unrebutted evidence established that the citizens of Wheeling do their retail shopping in Ohio and Pennsylvania because there are virtually no retail shops in Wheeling. Further, it is telling that a) Wheeling merchants support the project, b) no retail competitor has instituted or intervened in this action and c) CAG's own expert acknowledged that the reallocation of shoppers would result in job loss in Ohio and Pennsylvania. CAG's own expert, Dr. John David, testified that perhaps several years after the Wheeling project's completion the states of Pennsylvania and Ohio would retaliate. There would be no incentive for Ohio or Pennsylvania to "retaliate" if the Wheeling project did not take jobs and sales from these states. Furthermore, Dr. David's testimony indicates that, unlike the biblical David, CAG has no stomach for taking on Goliath. CAG's defeatist attitude in this regard would result in West Virginia forever accepting the position of regional doormat, never

daring to try and improve its circumstances lest it be subject to "retaliation" from its betters. Moreover, the developer in the Wheeling project will not receive any of the grant money and, unlike WDW Properties, the Wheeling developer will not receive a more favorable business deal than its local competitors, but rather will be put on a level playing field with other value outlet centers which are normally located in rural areas as opposed to the middle of a deteriorating downtown.

CAG also cites McDonald's Corp. v. Devenney, 415 So.2d 1075 (Ala. 1982) for the proposition that a statute that does not include the word "retail" cannot be construed to support development of retail properties. However, the Supreme Court of Virginia, considering use of bonds issued by an Industrial Development Authority to fund development of a retail sales facility, held that "a retail facility is a commercial enterprise within the meaning of Code § 15.1-1375." Mayor and Members of City Council of City of Lexington v. Industrial Development Authority of Rockbridge County, 275 S.E.2d 888, 890 (Va. 1981). In reaching this holding, the Virginia Court quoted a case from West Virginia:

In Weatherford v. Arter, 135 W. Va. 391, 395, 63 S.E.2d 572, 574 (1951), it was said that "the term 'industry', in its common or ordinary sense, means any . . . business conducted for a livelihood or for profit and it applies especially to a distinct branch of trade in which labor and capital are extensively employed." Id.

Thus, it would appear that the commonly understood meaning of the term "industry", in West Virginia as well as elsewhere, includes retail businesses. Furthermore, W. Va. Code § 8-13B-2, previously identified by CAG as the "companion" to W. Va. Code § 29-22-18a, specifically mentions that a purpose of the legislation is to "promote the vitality of retail business areas within municipalities, while serving as an effective means for restoring and promoting retail and other

business activity". Retail businesses are clearly contemplated as potential primary beneficiaries of the financing provided by the statutes at issue in this case.

What constitutes a public purpose "is a fluid concept which changes with time, place, population, economy and countless other circumstances. It is a reflection of the changing needs of society." WDW Properties v. City of Sumter, *supra* at 634, *quoting* Carll v. South Carolina Jobs – Economic Development Authority, 327 S.E.2d 331, 334 (S.C. 1985). As the Supreme Court of Oklahoma noted in State ex rel. Brown v. City of Warr Acres, 946 P.2d 1140, 1144 (Okla. 1997), "[t]he term 'public purpose' should not be construed 'in a narrow or restrictive sense.'" The majority opinion in that case went on to state:

The general welfare, economic stability, and prosperity of the City of Warr Acres and its citizens have been served and will continue to be served by the relocation of a large retail facility to within the corporate limits where it has generated approximately \$650,000.00 annually in sales tax revenues. These revenues have allowed the City to expand the type and scope of services allowed to all citizens of the community, including enhanced public improvements, police protection, recreational facilities and the like.

Id. at 1145.

That's \$650,000.00 worth of what CAG would refer to as "utter impotence" from relocation of a Wal-Mart. The concurrence in Warr Acres expounded further on the evolution of "public purpose":

Whether a sufficient public purpose exists behind a city's expenditure of a public money for an economic development plan should be measured by contemporary economic challenges faced by municipalities. Today's competitive economic environment may require that a city facilitate public and private cooperation to stimulate and stabilize the locality's economy.

\* \* \*

Although the term public purpose is incapable of exact definition, it is a fluid concept which should be broadly construed to comport with new developments and with changing conditions of the time.

\* \* \*

Municipalities today compete on a nation-wide level to attract new industry into their locality. A city cannot compete with other cities or even other states if other cities and states are competing with inducements devised under contemporary economic development plans like Warr Acres'. This has been recognized in other states, as courts have construed public purpose requirements for the expenditure of public funds to encompass ever changing public needs and adapt to the ever increasing competition for industry development. Economic development plans devised to provide gainful employment, improve living conditions, attract industry and advance the economy, like the plan at issue here, in which the public benefits greatly outweigh the incidental benefit to a private person or corporation have been upheld.

Warr Acres at 1146-1148 (multiple footnotes and citations omitted).

The progression of thought among state Legislatures is also illustrated by the evolution of regulations addressing what types of projects are allowed under the Jobs-Economic Development Authority at issue in WDW Properties v. City of Sumter, *supra*. The regulations as first promulgated in 1984 stated that “[n]o loans will be made to . . . [r]etail establishments”. WDW Properties, *supra* at 633 n.3. In 1985, the regulations were amended to provide that “[n]o loans will be made to . . . [r]etail establishments except where downtown redevelopment is involved”. *Id.* (emphasis added). Finally, in 1987, the regulation was amended to bar loans to “[c]ommercial establishments, including hotels, shopping malls, office buildings, and mercantile establishments, except where downtown redevelopment is involved or where located in an economically distressed area or where it will result in increased employment”. *Id.* (emphases added).

In an era of globalization, when manufacturing jobs are fleeing overseas and downtown areas are being abandoned in favor of lower cost strip malls in the outlying suburbs, refusal to employ government funding to renovate downtowns would be short-sighted in the extreme. According to unrebutted testimony, in the case of the Wheeling Outlet Center project, the bond proceeds are targeted to bring the downtown Wheeling site into a competitive position with an empty field, where

outlet stores are more often located. Furthermore, the city will be revitalized and the project brings with it infrastructure improvements which will benefit the entire city inasmuch as water and sewage lines need to be installed in compliance with federal regulations. Add approximately twenty three million dollars (\$23,000,000) a year in increased tax revenue and five hundred thousand (\$500,000) a year under the lease following completion, and the potential of the Wheeling project is clear. CAG's objection to this strategy would seem to indicate that CAG is all in favor of the continued deterioration of downtown Wheeling, unless the city consents to tear down existing historic buildings to clear land for a smokestack industry of some kind in the middle of downtown.

CAG's unsubstantiated conclusion that retail jobs do not promote economic growth and merely result in a "zero sum game" is completely shattered by the testimony of Edward Coulson, Ph. D., who performed a study examining the Wheeling economy from 1958 to 2000 and found that, contrary to Petitioner's assumption, retail jobs are as potent an economic stimulus for the City of Wheeling as manufacturing jobs would be. Simply stated, Professor Coulson found that retail jobs in Wheeling have a potential multiplier at least equal to that associated with manufacturing jobs. Further, Professor Coulson testified that a substantial number of shoppers that will come to the Wheeling Outlet Center will be from out of state, which is contrary to CAG's unsubstantial assumption that West Virginia sales will merely be reallocated.

The bottom line on this argument is that, while generally higher-paid manufacturing jobs may be preferable, they come with their own set of problems (such as pollution), and do nothing to slow the deterioration of downtowns across the State. In the current economic climate, unlike the climate twenty, thirty or forty years ago when CAG's theories were current, the creation of retail jobs downtown is a legitimate public purpose, and has been recognized as such by multiple courts and

Legislatures. As a matter of law, CAG's "vivid demarcation line" between industrial development and commercial or retail development is illusory. The Circuit Court correctly held that the determination of whether a particular project meets the criteria is a question for the Grant Committee, through legislative empowerment, and is not subject to second-guessing by CAG.

### CONCLUSION

The respondent West Virginia Economic Development Grant Committee commends to the Court's careful review the well-reasoned opinion of the Circuit Court. The Circuit Court's findings of fact, including its determinations of credibility, are well grounded in the evidence, and the Circuit Court's conclusions of law are well grounded in the relevant constitutional, statutory and case law precedents.

This Court should deny the Petition For Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Katherine A. Schultz, Senior Deputy Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing *West Virginia Economic Development Grant Committee's Response to Petition* was served via United States mail, this 19<sup>th</sup> day of February, 2003, addressed as follows:

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