

No. 31125

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.  
WEST VIRGINIA CITIZEN ACTION GROUP,  
an incorporated association of State citizens  
and taxpayers,

Appellant,

v.

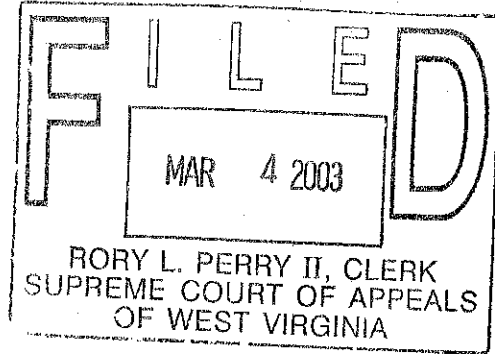
WEST VIRGINIA ECONOMIC DEVELOPMENT  
GRANT COMMITTEE; CITY OF WHEELING,  
a municipal corporation; and CENTURY EQUITIES -  
WHEELING VICTORIAN OUTLET MALL, INC., a  
private corporation,

Appellees,

and,

KANAWHA COUNTY COMMISSION,

Intervenor.



**BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE  
WEST VIRGINIA ECONOMIC DEVELOPMENT GRANT COMMITTEE**

Webster J. Arceneaux, III (State Bar ID No. 155)  
Richard L. Gottlieb (State Bar ID No. 1447)  
LEWIS, GLASSER, CASEY & ROLLINS, PLLC  
Post Office Box 1746  
Charleston, West Virginia 25326  
(304) 345-2000

**COUNSEL FOR *AMICUS CURIAE*  
MARSHALL UNIVERSITY RESEARCH  
CORPORATION; OUR JOBS, OUR CHILDREN, OUR  
FUTURE, INC. d/b/a THE HUNTINGTON AREA  
DEVELOPMENT COUNCIL; TRI-STATE TRANSIT  
AUTHORITY AND METROPOLITAN HUNTINGTON,  
LLC; ADVANTAGE VALLEY PARTNERS, LLC;  
PUTNAM COUNTY DEVELOPMENT AUTHORITY;  
AND, PUTNAM COUNTY COMMISSION**

## INTRODUCTION AND SUMMARY

Your *amici*, **Marshall University Research Corporation; Our Jobs, Our Children, Our Future, Inc. d/b/a the Huntington Area Development Council; The Tri-State Transit Authority and Metropolitan Huntington, LLC; Advantage Valley Partners, LLC; Putnam County Development Authority; and the Putnam County Commission (hereinafter collectively the “Amici”)** hereby submit their brief in support of the respondent/appellee, the West Virginia Economic Development Grant Committee (“hereinafter the “Grant Committee”). Your amici filed a motion for leave to file a brief on February 18, 2003, which identified each of the *amici* and their interest in this matter. As set forth in the motion, your *amici* are all successful sponsors of grant applications filed with, and will directly or indirectly receive funds, from the Grant Committee.

This appeal is from a Memorandum Order of the Circuit Court of Kanawha County issued by Judge Charles E. King on January 21, 2003, which upheld the constitutionality of W.Va. Code § 29-22-18a and the actions of the West Virginia Economic Development Grant Committee (“Grant Committee”) under that section. This Court had directed that the Circuit Court consider the matter and conduct an evidentiary hearing to fully develop the issues raised by Appellant, the West Virginia Citizens Action Group (“CAG”) in their initial applications for a Writ of Mandamus and Prohibition filed with this Court. The Circuit Court conducted an evidentiary hearing and, after fully considering the evidence and legal arguments presented by the parties, issued a 64 page Memorandum Order containing detailed findings of fact and conclusions of law. In his Order, Judge King fully disposed of all constitutional arguments advanced by the Appellants.

CAG filed its Petition for Appeal with this Court on February 10, 2003. CAG's Petition for Appeal raises four separate assignments of error. CAG's Petition utterly fails to acknowledge the Findings of Fact and Conclusions of Law made by the Circuit Court, let alone explain why these findings and conclusions should not be entitled to substantial deference by this Court. Furthermore, CAG's brief is full of inaccurate, if not misleading, statements of the law and should be disregarded by this Court.

In response to the Petition for Appeal, the Grant Committee submitted an excellent brief on February 19, 2003, setting forth how the Circuit Court properly applied the evidence and the law, as enunciated by this Court, in reaching its conclusion. Your *amici* adopts the legal argument and analysis set forth in the brief filed by the Grant Committee on February 19, 2003. Your *amici* will not replicate herein all of the argument and analysis contained in the Grant Committee's response. Rather, your *amici*'s brief herein will focus on CAG's unsubstantiated claims that the grants awarded will serve no "public purpose", as that term has been defined by the West Virginia legislature and recognized by this Court.

The "public purpose" issue is specifically raised in CAG's fourth assignment of error and thus this brief will address that argument. However, CAG's entire brief is permeated with derisive characterizations of the grant applicants as "antipreneurs" and an argument that these grants constitute an illegal subsidy from which the public will derive no benefit. Essentially, CAG argues that grants which are financed through state authorized bonds are appropriate under West Virginia constitutional and statutory law only if they meet the following criteria: 1) the grant is for the construction of a new industrial plant; 2) which produces goods that will be sold out-of-state, and; 3) that the bonds will be repaid from sales of the goods produced at the plant.

CAG's argument is long on rhetoric and CAG's own "expert opinions" on economic development and short on facts and law. Indeed, this argument: 1) is unsupported by the evidence submitted to the Circuit Court; 2) is unsupported by the findings of fact made by the Circuit Court; 3) is inconsistent with the controlling precedent of this Court; and, 4) at odds with the reality of the projects approved.

Your *amici* are, for the most part, public entities created to benefit the economic development and the well being of the entire region for which they serve. Your *amici* are not "antipreneuers" seeking to aid any individual private corporation. As the Circuit Court found, the grants herein will be made to these public entities, not the private concerns which might incidentally profit from the grant. CAG can point to no evidence to the contrary.

This brief will survey the successful projects sponsored by your *amici* not for the purpose of justifying each project under the applicable case law. Such a showing is unnecessary as the only legal issue presented is whether the statute and the creation of the Grant Committee pass constitutional muster. Rather, your *amici* submit that these projects constitute compelling evidence that the statute at issue properly gave adequate instruction to the Grant Committee in order to ensure that the projects approved further a public purpose-that is the creating jobs, producing tax revenues and otherwise promoting economic development.

As this Court has succinctly noted in *State ex rel. West Virginia Housing Development Fund v. Waterhouse*, 158 W. Va. 196, 212 S.E.2d 724 (1974), the concept of public purpose has evolved and expanded over time. CAG's definition of public purpose as applying only to the building of new industrial plants is rooted someplace in the 1950's and is without support either in law or in fact. The West Virginia legislature in passing this statute and the Grant Committee in

establishing the criteria for awarding the grant recognized the evolving and expanding concept of economic development fostered through these grants.

Your *amici* represents a spectrum of projects designed to create jobs, generated tax dollars and otherwise promote economic development. These projects serve a “public purpose” as recognized by the legislature in enacting §29-22-18(a) and is consistent with this Court’s decisions regarding the proper use of economic development grants in this State. CAG’s antiquated and overly restrictive view of economic development cannot serve as a justification to overturn the Circuit Court below.

## ARGUMENT

### **I. THE PROJECTS APPROVED BY THE GRANT COMMITTEE PROMOTE THE PUBLIC PURPOSE OF ECONOMIC DEVELOPMENT.**

CAG’s fourth assignment of error is that because some of the approved projects are not industrial in nature, they are incapable of overall job creation, economic growth, and increased tax revenue as required by the West Virginia constitution, §29-22-18a (d) 1 and the administrative criteria established by the Grant Committee. In short, CAG argues that the projects do not further the “public purpose” but rather are only unfair subsidies to private corporations. As noted above, CAG cites neither facts nor law which demonstrate how the Circuit Court erred.

The Circuit Court properly cited the decision of this Court, *State ex rel. Appalachian Power Company v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965) and *State ex rel. West Virginia Housing Development Fund v. Waterhouse*, 158 W. Va. 196, 212 S.E.2d 724 (1974) for its finding that “ a legislative determination of what is a public purpose will not be interfered

with by the courts unless the judicial mind conceives it to be without reasonable relation to the public interest". This Court further held in *Waterhouse*:

[w]hat constitutes a public purpose varies with changing conceptions of the scope and function of government. As governmental activities by reason of the growing complexity of various phases of society, the concept of public purpose expands proportionately".

*Id.* 212 SE 2d at 735. The Circuit Court concluded that the testimony supported the finding that these projects will create jobs, increase tax revenue, foster economic development and thus serve a public purpose. The Circuit Court further found that CAG failed to meet its burden to show that the statutory scheme in question bears no relation to a public purpose. (Memorandum Opinion at page 37).

CAG's brief does not address how the Circuit Court misapplied *Waterhouse*. Nor does it cite any controlling legal authorities to support its view. CAG relies most on *dicta* in Justice Neely's concurrence in *State ex rel. Ohio County Commission v. Samol*, 165, W. Va., 714, 275 S.E.2d 2 (1980). CAG's brief conveniently omits the fact that the majority opinion in *Samol* expressly sanctioned bond issuance to develop a retail downtown mall in Wheeling.

With respect to factual findings on this issue, CAG fails to refer to the findings of fact made by the Circuit Court and the expert and lay testimony introduced in that regard. . With respect to the Wheeling project which CAG dismisses as a complete subsidy to a private developer, the state produced expert testimony, Dr. Edward Coulson, who testified regarding the significant economic development created by this retail project and that the economic impact of retail will be as great an economic stimulus to the City of Wheeling as would a manufacturing plant.

This same economic stimulus is at least equally true with respect to the Pullman Square project sponsored by your *amici*, **Tri-State Transit Authority ("TTA")** and **Metropolitan Huntington LLC**, to build a major new urban redevelopment project in the heart of downtown Huntington. Downtown Huntington, like Wheeling, has experienced a great migration of its downtown businesses. As a result, this has created severe financial problems for the City of Huntington, which has in turn put a restraint on funding for public services and building infrastructure in Huntington.

The grant of \$10,600,000 for the Pullman Square project constitutes only a percentage of the \$53,000,000 costs of this project, which will come from various public and private sources, including Metropolitan and a grant from the Federal Transit Administration to FTA in the amount of approximately \$26,000,000 (the FTA Grant). The FTA Grant has already been awarded to TTA and will be used to pay for the development of public and transit related portions of the project including parking structures and transit services that will serve the Pullman Square development and other downtown destinations. The money awarded by the Grant Committee will be used to develop the public elements and infrastructure of the Pullman Square project. Thus, the grant will benefit all of the long depressed downtown Huntington area through much needed public infrastructure. Moreover, the projected economic forecasts is to create 620 to 705 construction jobs and ultimately 621 permanent jobs in retail, restaurants, offices and entertainment businesses, along with the associated tax revenue.

A survey of the other approved projects sponsored by your *amici* reflect the expanding and evolving nature of economic development in the 21<sup>st</sup> Century. It is undisputed that heavy industry has been replaced by technology as the prime component of job creation in this country.

Unfortunately, West Virginia has lagged behind the nation in technology jobs, due, in part, to lack of "seed money". One of the projects approved by the Grant Committee is **Marshall University Research Corporation's** application to build a biotechnology development center in part with grant proceeds. The biotechnology centers transform basic and applied science research into commercially viable products, processes and services. Forty One other states have biotechnology centers based within research universities such as Marshall, which have created the technology infrastructure necessary to attract private industry and jobs. Indeed, for every public dollar spent on creating these biotechnology centers, private enterprise has invested seven dollars. The economic "multiplier" to such a project is obvious. The biotechnology center, by itself, will create 110 sustainable, highly skilled and highly compensated jobs. The private industry that will grow around the center will serve to provide even more jobs, greater tax revenues and foster further economic development.

CAG complains that there has been no showing that the projects will create new jobs in West Virginia, but simply relocate jobs from one West Virginia location to another. CAG's short sighted criteria fails to recognize that these grants can also serve to prevent jobs from leaving the state. For example, the **Putnam County Development Authority and the Putnam County Commission** sponsored a grant to assist build a new office facility for the West Virginia Steel Company at the current West Virginia Steel Fabrication Steel Fabrication plant in Poca, West Virginia. The grant application was submitted after the company's president announced that he was considering moving its headquarters to Bluefield, Virginia because Virginia had offered lucrative economic incentives. Not only will this grant help retain 38 jobs in West

Virginia but will create 20 more within two years. This grant recognizes the intense competition currently existing between and among the states.

Your *amici* also represent a substantial investment in the creation of much needed “business and industrials” parks. The **Putnam County Development Authority** sponsored an application to construct the Putnam Business Park, the site of much needed property in Putnam County for manufacturing and distribution facilities. While the construction of the park creates jobs, the greater economic development will be realized when it attracts warehouse and manufacturing facilities. In other words, the fact that the industrial park itself does not by itself manufacture goods or provide services does not mean that it does not promote economic development. Similarly, **Advantage Valley Partners, LLC**, has sponsored an application to build a new business park for several office buildings in Putnam County on a forty five acre track. The development of this office park will provide the infrastructures, from which hundreds of construction jobs and many more full time jobs will be created.

There are other projects sponsored by your *amici* which would appear to meet the restrictive definition of CAG’s attorney as what would an “appropriate use” of the Grant Committee’s funds. For example, **Our Jobs, Our Children, Our Future, Inc. d/b/a Huntington Area Development Council** sponsored an application to build a new plant in Wayne County for the manufacturing of automobile part and components to complement the money invested by the manufacturer, SOFEGI, S.p.A. Similarly, the **Putnam County Development Authority** sponsored an application for the construction of a new building and rail spur for Green Metals, Inc, an international company which is an environmental leader in recycling of industrial scrap metal commodities. An important consideration of the projects is

that both will further promote the area as an automobile corridor and assist in recruitment of yet more automotive related industrial plants.

The Circuit Court recognized that it was the Legislature and the Grant Committee, not CAG or the Courts, which are the appropriate bodies to determine what projects will promote economic development. CAG is requesting that this Court substitute CAG's judgment for that of the Legislature and the Grant Committee. This Court's decision in *Waterhouse* properly articulates why this Court should decline CAG's request.

### CONCLUSION

Based upon the foregoing discussion, this Court should review the arguments of the parties and the Circuit Court's Memorandum Order and uphold that decision as a matter of law. Judge Charles E. King wrote a well-reasoned decision, containing detailed findings of fact and conclusions of law. This Court should determine that the Circuit Court's decision is without error and this Court should affirm that decision.

**MARSHALL UNIVERSITY RESEARCH  
CORPORATION; OUR JOBS, OUR CHILDREN, OUR  
FUTURE, INC. d/b/a THE HUNTINGTON AREA  
DEVELOPMENT COUNCIL; TRI-STATE TRANSIT  
AUTHORITY AND METROPOLITAN HUNTINGTON,  
LLC; ADVANTAGE VALLEY PARTNERS, LLC;  
PUTNAM COUNTY DEVELOPMENT AUTHORITY;  
AND, PUTNAM COUNTY COMMISSION  
By Counsel**

**LEWIS, GLASSER CASEY & ROLLINS, PLLC**



Webster J. Arceneaux, III (State Bar ID No. 155)

Richard L. Gottlieb (State Bar ID No. 1447)

Post Office Box 1746 - Charleston, West Virginia 25326 - (304) 345-2000

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 4, 2003, he served the foregoing **BRIEF OF AMICUS CURIAE IN SUPPORT OF THE WEST VIRGINIA ECONOMIC DEVELOPMENT GRANT COMMITTEE** upon the following by enclosing a true and accurate copy thereof in an envelope addressed to their last known address via the United States Mail:

Larry Harless  
Route #2, Box 186C  
Cottageville, WV 25239

Katherine A. Schultz  
Senior Deputy Attorney General  
Office of the Attorney General  
State Capitol Complex  
Building 1, Room W435  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

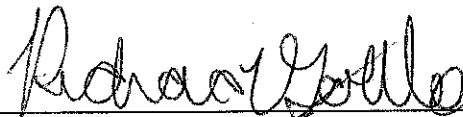
Joanna I. Tabit, Esq.  
Steptoe & Johnson  
7th Floor Bank One Center  
Post Office Box 1588  
Charleston, WV 25326-1588

Denise D. Klug, Esq.  
Thorp Reed & Armstrong, LLP  
1233 Main Street, Suite 2001  
Wheeling, WV 26003

Rose Humway Rasmuth, Esq.  
1500 Chaplin Street  
Wheeling, West Virginia 26003

Vincent Trivelli, Esq.  
Law Office of Stuart Calwell  
178 Chancery Row  
Morgantown, WV 26505

Robert M. Bastress, Esq.  
Post Office Box 1295  
Morgantown, WV 26507



Richard L. Gottlieb