

No. _____

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,**

Petitioner,

v.

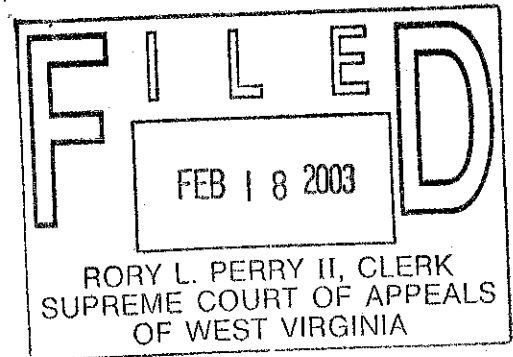
**WEST VIRGINIA ECONOMIC DEVELOPMENT
GRANT COMMITTEE; CITY OF WHEELING,
a municipal corporation; and
CENTURY EQUITIES - WHEELING
VICTORIAN OUTLET MALL, INC.
a private corporation,**

Respondents.

**THE KANAWHA COUNTY COMMISSION'S MOTION TO
INTERVENE AND/OR TO PARTICIPATE AS *AMICUS CURIAE***

Now comes the Kanawha County Commission (hereinafter the "Commission"), by counsel, pursuant to Rule 22, West Virginia Supreme Court Rules of Appellate Procedure, and hereby moves to intervene in support of the Respondent, West Virginia Economic Development Grant Committee (hereinafter the "Grant Committee"). Alternatively, the Commission moves, pursuant to Rule 19, West Virginia Supreme Court Rules of Appellate Procedure, to participate as a matter of right, as *amicus curiae* in this matter.¹ The Commission takes this position to urge this Court to affirm the January 21, 2003 Order of the Circuit Court of Kanawha County and to reject the Petition for

¹ It is noted that the Kanawha County Commission has an automatic right to participate as an *amicus* under Rule 19.



Appeal. Moreover, should this Court accept the Petition for Appeal, the Commission respectfully urges this Court to approve the Grant Committee's motion to expedite the consideration of the Petition for Appeal in this matter. In addition, should this Court accept the Petition for Appeal, the Commission plans to file a brief on the merits of this matter, either as an Intervener or as an *Amicus*.

The Petitioners herein filed for a Writ of Prohibition and Mandamus challenging the formation and the practices of the Grant Committee under W. Va Code §29-22-18a. This Court ordered that this matter be heard by the Circuit Court of Kanawha County. During the pendency of the action before the Circuit Court, and after the evidentiary hearing was conducted by the Circuit Court, the Commission learned that its sponsored application to the Grant Committee for a NASCAR racetrack was approved in the amount of \$7,724,000 on November 12, 2002.

This approval gave the Commission a legal interest as a matter of law, pursuant to Rule 24 (a) and/or (b) of the West Virginia Rules of Civil Procedure to intervene at the Circuit Court. Accordingly, the Commission filed a motion to intervene with the Circuit Court. Attached to the motion was an affidavit of Commissioner, Kent Carper, (attached hereto) which emphasized the projected economic benefits of the racetrack was to create 93 construction jobs and 77 full time jobs, as well as state and county tax revenues of \$2,229,000. This motion had not been acted upon at the time that the Petitioners filed the instant appeal, thus divesting the Circuit Court of its jurisdiction to further consider the Motion. As a successful applicant, the Commission has a vital interest in the outcome and timing of this matter which cannot be adequately represented by any party. Accordingly, the Commission is now moving to intervene before this Court.

The Circuit Court of Kanawha County issued a 64 page order containing detailed Findings of Fact and Conclusions of Law in upholding the constitutionality of the statute at issue and, for the

most part, the actions of the Grant Committee. The Commission submits that this Order was clearly the product of reasoned decision making and is supported by the evidence introduced below. The Circuit Court properly concluded that a Writ of Mandamus and Prohibition were not appropriate in this case. The remedy of a Writ of Mandamus is "a drastic one, to be invoked only in extraordinary situations" and used sparingly. State ex rel. Billings v. City of Point Pleasant, 194 W.Va. 301, 303, 460 S.E.2d 436, 438 (1995), *quoting* Kerr v. United States District Court., 426 U.S. 394 (1976). Further, a Writ of Prohibition should be issue only where there has been an unlawful exercise of *judicial* functions and not where there have been acts of an administrative or executive character. State ex rel. Affiliated Const. Trades Foundation v. Vieweg, 205 W.Va. 687, 520 S.E.2d 854 (1999). The circuit court properly determined that a writ of prohibition has no application to the facts of this case. Finally, it is well-established in this State that there is always a presumption in favor of the constitutionality of an act of the legislature. State ex rel. West Virginia Housing Development Fund v. Copenhagen, 153 W.Va. 636, 171 S.E.2d 545 (1969); State ex rel. Metz v. Bailey, 152 W.Va. 53, 159 S.E.2d 673 (1968). With the exception of minor relief regarding the Wheeling project, the Petitioners did not show that they were entitled to any relief and, therefore, the Circuit Court denied the Petitioners' writs. This Court should similarly reject the Petition for Appeal and refuse to consider the matter further.

Should this Court accept the Petition for Appeal, however, the Commission strongly supports the motion filed by the Grant Committee with this Court to expedite consideration of the Petition for Appeal. The Grant Committee's motion appended affidavits from five projects approved by the Grant Committee that would suffer prejudice if this Court did not provide for expeditious resolution of this matter. Similarly, Commissioner Carper's affidavit filed in the Circuit Court, explained the

prejudice that would be suffered if this Grant is tied up in litigation for an extended period. He further stated that any delay in the construction of the motor track will greatly increase the costs attendant to the construction, if not jeopardize the entire project. Moreover, delay in the construction will delay for at least a year, approval of the track by NASCAR. Thus, an expeditious appeal will serve the interest of justice, as well as the parties hereto.

WHEREFORE, the Kanawha County Commission respectfully requests: that 1) it be permitted to intervene in this matter pursuant to Rule 22; 2) alternatively, it be allowed to participate as a matter of right as an *amicus curiae* under Rule 19; 3) that the Court reject the Petition for Appeal and refuse to consider it further; and, 4) alternatively, if the Court accepts the Petition for Appeal, then the Court should resolve it on an expedited basis.

**KANAWHA COUNTY COMMISSION,
By Counsel**

LEWIS, GLASSER CASEY & ROLLINS, PLLC



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A F F I D A V I T

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to wit:

The undersigned, being first duly sworn and disposed, states:

1. That he is an elected Commissioner of Kanawha County, West Virginia and has served in that capacity in excess of six (6) years.
2. That the Kanawha County Commission has sponsored an application to the West Virginia Economic Development Grant Authority for a NASCAR racetrack which would bring jobs and other economic benefits to the upper Kanawha Valley.
3. That the Kanawha County Commission's application for a NASCAR racetrack was approved by the West Virginia Economic Development Authority on the 12th day of November, 2002.
4. That in addition to the NASCAR racetrack the City of Charleston, a municipality located within Kanawha County, West Virginia, sponsored, and was the successful applicant for a grant for baseball stadium which would bring jobs and additional economic benefits to the Kanawha Valley.
5. That the projected economic benefits of the NASCAR racetrack as represented in the application includes:

Jobs:

Construction 93
Operations 77

Economic Activity:

Construction \$9,447,000.00
Operations \$3,781,000.00

Visitor Spending Economic Impact \$4,489,000.00

Tax Revenues: \$2,229,000.00

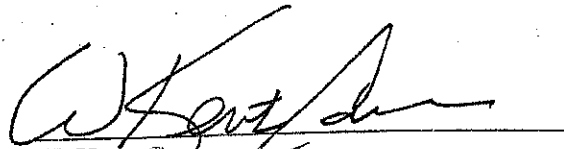
7. That the undersigned has publicly testified before the West Virginia Economic Development Grant Authority that the above projects are time sensitive and the economic opportunity as set out in the applications for Kanawha County will be lost unless the projects start and are completed on the dates and times set forth in the applications.

8. The Economic benefits to Kanawha County will be irrevocably lost if the projects do not start and are not completed within the time lines set forth in the applications

9. Kanawha County will not be able make up the economic losses if the projects are delayed so much as one (1) day.

10. To protect Kanawha County and its citizens from irreparable harm any actions by any parties in litigation which will delay the start of the projects must be bonded in an amount that completely covers the economic benefit which will be lost in the amount of \$19,946,000.00 for the NASCAR Track and on information and belief over \$25 million for the baseball park.

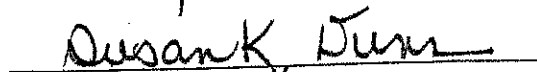
And further the Affiant sayeth not.


W. Kent Carper

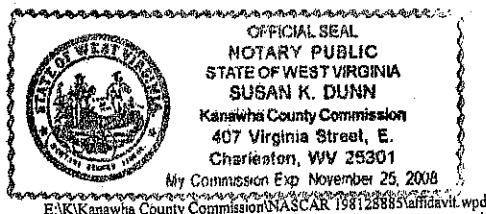
STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, to wit:

Taken, subscribed and sworn to before me this 19th day of December, 2002

My commission expires: November 25, 2008



Notary Public



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 18, 2003, he served the foregoing **KANAWHA COUNTY COMMISSION'S MOTION TO INTERVENE AND/OR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*** 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:

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