

NO. _____

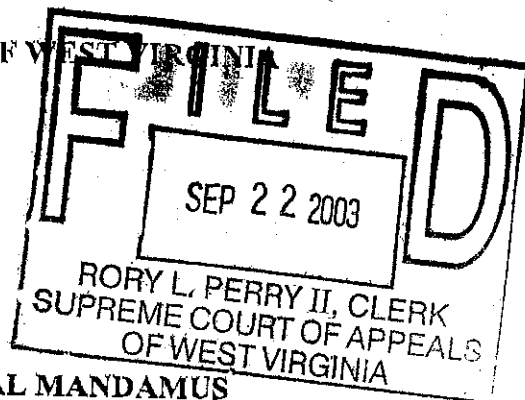
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA
ex rel. REV. JIM LEWIS and
JOHN COONEY,

Petitioners,

vs.

ORIGINAL MANDAMUS



WEST VIRGINIA ECONOMIC
DEVELOPMENT GRANT COMMITTEE;
WEST VIRGINIA ECONOMIC
DEVELOPMENT AUTHORITY;
CITY OF CHARLESTON; KANAWHA
COUNTY COMMISSION; CITY OF
HUNTINGTON; and OHIO COUNTY
COMMISSION,

Respondents.

AMENDED PETITION FOR WRIT OF MANDAMUS

The petitioners state and allege as follows:

A. Jurisdiction and Parties

1. The jurisdiction of this Court is invoked by the *W. Va. Const.*, Art. VIII, § 3; this Court's Rule 14; and the *W. Va. Code* §§ 53-1-1, *et seq.*
2. Petitioner Rev. Jim Lewis sues as a citizen, resident, taxpayer and voter of Charleston, Kanawha County, West Virginia, and of the State of West Virginia
3. Petitioner John Cooney sues as the owner and operator of Club Pet located in downtown Huntington, Cabell County, West Virginia, which is a small retail-service business devoted to the sale, care and attendant services regarding small animals used as domestic pets.

4. Respondent West Virginia Economic Development Grant Committee ("Committee") is a public executive body of the State of West Virginia by the *W. Va. Code* § 29-22-18a(d) (2003), and is located in Charleston, Kanawha County, West Virginia.
5. Respondent West Virginia Economic Development Authority ("Authority") is a public executive body of the State of West Virginia by the *W. Va. Code* §§ 31-15-1, *et seq.*, and is located in Charleston, Kanawha County, West Virginia.
6. Respondent City of Charleston is a public municipal corporation in the State of West Virginia by the *W. Va. Code* § 8-1-1, *et seq.*, and is located in Kanawha County, West Virginia.
7. Respondent Kanawha County Commission is a public county corporation in the State of West Virginia by the *W. Va. Code* § 7-1-1, *et seq.*, and is located in Charleston, Kanawha County, West Virginia.
8. Respondent City of Huntington is a public municipal corporation in the State of West Virginia by the *W. Va. Code* §§ 8-1-1, *et seq.*, and is located in Cabell County, West Virginia.
9. Respondent Ohio County Commission is a public county corporation in the State of West Virginia and is located in Wheeling, Ohio County, West Virginia.

B. Facts and Allegations

10. On August 20, 2003, the respondent Committee approved for funding fifty (50) projects for \$225 million-plus in state monies under the *W. Va. Code* § 29-22-18a(d) (2003).

COUNT IA**(Lack of Requisite Findings)**

10a. The respondent Committee, by having refused and failed to make written or on-record findings in approving and certifying any of these 50 projects to evidence that each such project is in accord with the public purpose objectives and enunciated legislative standards of the *W. Va. Code* § 29-22-18a(d)(8)(A-I⁷) (2003), has deprived this Court of jurisdiction or authority judicially to approve any such projects, with such findings required by the constitutional public purpose doctrine under the *W. Va. Const.*, Art. VI, § 6, and otherwise, and with any such *de novo* findings by this Court to violate the separation-of-powers constraints of the *W. Va. Const.*, Art. V, § 1, and settled rules of mandamus and adjudicative law in this context. The *W. Va. Code* § 29-22-18a(d)(8)(A-I⁷) (2003) as well require that the project requirements based upon any such findings be incorporated into the project certifications and be prospectively enforced by the respondents for the duration of the project.

COUNT I**(Private Payback Obligation)**

11. The *W. Va. Code* § 29-22-18a(d) (9) (2003) imposes a mandatory duty upon the respondent Committee and Authority to require all private entities and persons who economically benefit, directly or indirectly, in whatever forms or kinds, from these state monies to repay over time the financial equivalent of such economic benefit at low-interest as set by the respondent Authority. Neither the respondent Committee nor the respondent Authority has imposed any such requirement upon any private person or entity which will receive such economic benefit.

COUNT II**(Statutory Standards Not Met)**

12. Most of these approved projects by fundamental and inalterable economic laws are unable "to create or retain jobs," or "to promote economic development in (their) region," as required by the *W. Va. Code* § 29-22-18a(8)(C) and (D), and those in control of such projects, including the respondents, have declined to ensure that the prospective employees of these projects shall have adequate "compensation" and "benefits" as required by the *W. Va. Code* § 29-22-18a(8)(C). As well, some of the approved projects do not meet the "other ... funding requirements of the *W. Va. Code* § 29-22-18a(8)(A) and (B) (2003).

13. The respondent Committee by approving such projects unable "to create or retain jobs," "promote economic development in (their) region," and meet the "other ... funding" requirements has violated the *W. Va. Code* § 29-22-18a(8)(A), (B), (C) and (D) (2003).

14. The respondent Committee, by approving projects which do not provide adequate employee "compensation" and "benefits" has violated the *W. Va. Code* § 29-22-18a(8)(C) (2003).

COUNT III**(Minor v. Major Private Benefit)**

15. The foregoing paragraphs 12 through 14 are hereby incorporated by reference.

16. The refusal and failure of the Committee to approve projects in conformance with such statutory standards, and the refusal and failure of the Committee and Authority to require entities and persons who economically benefit from such state grant funding to repay the financial equivalent of such economic benefit at low-interest over time, as required by the *W.*

Va. Code § 29-22-18a(d)(9) (2003), results in most of these approved projects conferring their major economic benefit upon private entities and persons, with only a minor, ancillary or incidental benefit for the State and its citizens contrary to and violation of the constitutional public purpose doctrine as secured by the *W. Va. Const.*, Art. X, § 6 and otherwise.

COUNT IV

(Violations Of Substantive Due Process, Equal Protection And Uncompensated "Takings" Bar)

17. Most of these approved projects involve new or renovated facilities for retail sales, provision of private and public services and/or provision of entertainment. Since all such projects and enterprises operate in a fixed, essentially "inelastic" local or regional market where already existing wealth is merely reallocated, relocated or shifted around in "zero-sum" fashion; since the large firms which mainly will be benefitting from this state funding already have "economies of scale" superior to petitioner Cooney and similar persons with small retail, service and/or entertainment firms, such smaller unsubsidized firms are helpless to prevent the siphoning off, reallocation and relocation of their "business," employment and tax revenues to such larger, state-subsidized firms.

18. The inevitable results are that such smaller, state-unsubsidized firms face the sure and immediate perils of economic extinction or ruination and personal squalor due to this discriminatory state action.

19. This fundamentally unfair, arbitrary and discriminatory state action violates the constitutional rights of the publicly unsubsidized petitioner Cooney at his Pet Club and similarly situated persons to substantive due process and equal protection of the law under the *U. S. Const.*, Amend. 14, and under the *W. Va. Const.*, Art. III, § 10. Substantive due process of law is also violated because most of these projects, and the examples of "public purpose"

projects listed in the *W. Va. Code* § 29-22-18a(d)(11)(A)-(K) (2003), since they cannot create or promote bona fide economic development, have no rational relation or connection to that legitimate State objective. It is further violated because the Committee's approval of such projects denies the State's citizens the enacted statutory benefit of "job creation," adequate "compensation" and "economic development in the region as promised by the *W. Va. Code* § 29-22-18a(d)(8) (2003).

20. Such state action as well comprises unconstitutional takings of the smaller, state-unsubsidized persons' and firms' properties and monies under the *U. S. Const.*, Amend. 14, and under the *W. Va. Const.*, Art. III, §§ 9 and 10.

COUNT V

(Anti-Women Sexist Discrimination)

21. The anti-discrimination mandates and constraints of the *W. Va. Code* § 5-11-1, *et seq.*, the equal protection guarantee of the *W. Va. Const.*, Art. III, § 10, and the high state public policy emanating from such (and other) fundamental State requirements for human equality and dignity preclude the sovereign State itself from such violations or derelictions.

22. However, this State "grant" program systematically discriminates against women. For its negative disparate impacts, whatever the intent, in the vital employment sphere fall mainly upon women who currently receive average incomes of no more than 70% of their male counterparts, with a majority of retail-services-entertainment employees being women. Such sexist discrimination violates the West Virginia Human Rights Act, *W. Va. Code* § 5-11-1, *et seq.*, the equal protection guarantees of the *W. Va. Const.*, Art. III, § 10; and other legal sources from which this substantial anti-discriminatory state policy emanates.

COUNT VI**(Counties And Cities Barred From Private Giveaways)**

23. Respondents City of Charleston, Kanawha County Commission, City of Huntington, and Ohio County Commission either are or are planning to give monies from their respective general revenues for the aid and benefit of private persons or private entities in their respective municipalities and counties which are due to receive economic benefit from the proceeds of these state bonds, including those private corporate entities involved in the minor league ball park in Charleston, the Pullman Square retail mall in Huntington, and the Cabela retail project in Ohio County.

24. Such financial or economic aid by these cities and counties is barred by the *W. Va. Const.*, Art. X, § 6, and by the public purpose doctrine.

COUNT VII**(Substance and Appearance of Impropriety)**

25. The marked concentration of these projects in the distinct minority of counties home to Committee members and top legislators and/or in the election districts of the latter violates the *W. Va. Const.*, Art. III, § 2, and otherwise impermissibly creates the substance and appearance of impropriety.

(Mandamus Allegations)

26. The respondents have clear legal duties to conform their conduct to the constitutional and legal requirements alleged and described above, and the petitioners have clear legal rights for them to do so.

27. The petitioners have no adequate or equally expeditious or convenient remedy in this matter other than in mandamus.

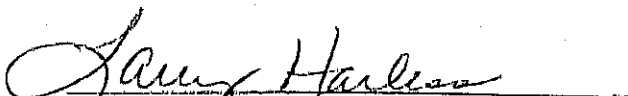
28. The granting of the requested writ of mandamus would be in the public interest.

C. Prayer For Relief

WHEREFORE, the petitioners pray that this Court:

1. Issue a rule directing the respondents to show cause, if any they can, why a writ of mandamus should not be awarded to petitioners;
2. Refer this matter to a Special Commissioner under this Court's Rule 14, to a circuit judge or otherwise, for the taking of evidence;
3. Allow the parties to file additional briefs after the taking of evidence;
4. Award petitioners a writ of mandamus in accordance with the allegations of their petition; and
5. Grant such other and further relief as is proper and just.

STATE OF WEST VIRGINIA
ex rel. REV. JIM LEWIS and
JOHN COONEY,
By Counsel


LARRY HARLESS (WVSB #1528)
Route #2, Box 186C
Cottageville, West Virginia 25239
Telephone: (304) 372-6878

VERIFICATION OF PETITION

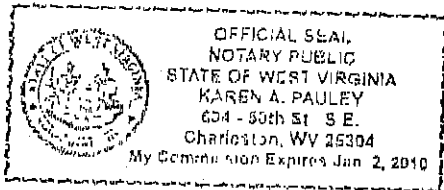
LARRY HARLESS, being first duly sworn, hereby says that the facts, allegations and exhibits contained in the foregoing Amended Petition for Writ of Mandamus are true to the extent of his personal knowledge and, so far as they are based on information, he believes them to be true.

Larry Harless

LARRY HARLESS

Taken, subscribed and sworn to before me this 22nd day of September, 2003.

My commission expires *Jan 2, 2010*



Karen A. Pauley

NOTARY PUBLIC

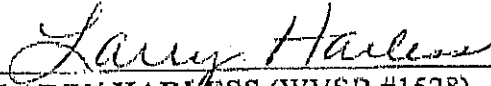
CERTIFICATE OF SERVICE

I, Larry Harless, counsel for the Petitioners, do hereby certify that on this 22nd day of September, 2003, a copy of the foregoing Amended Petition for Writ of Mandamus was served upon the following by faxing the same as follows:

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