

NO. 31541

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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

Petitioners,

v.

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

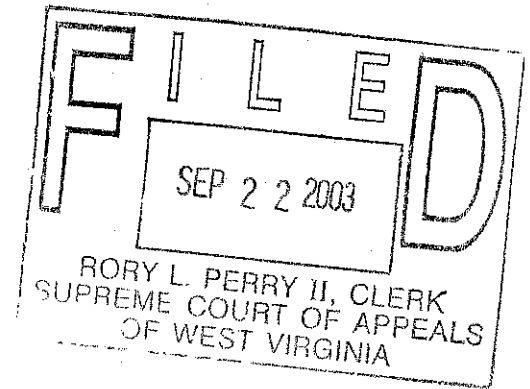
Respondents.

**RESPONSE OF WEST VIRGINIA ECONOMIC  
DEVELOPMENT GRANT COMMITTEE IN OPPOSITION TO  
PETITIONERS' MOTION FOR TAKING EVIDENCE**

Comes now the Respondent, West Virginia Economic Development Grant Committee (hereinafter EDGC), by counsel, and files the within Response to the Petitioners' Motion for Taking Evidence.

Contrary to the assertions of the Petitioners, the issues raised in this case are, with one exception discussed below, wholly legal. For the convenience of the Court, the Respondent will discuss the counts of the Petition *seriatim*.

1. Count I of the Petition, "Private Payback Obligation," is based upon an egregious cut-and-paste misquotation of the applicable statutory provision, W. Va. Code §29-22-18a(d)(9). Once



this Court has reviewed the actual language of §29-22-18a(d)(9), it will be apparent that the issue raised in Count One applies only to economic development projects receiving low-interest loans, as opposed to those projects receiving grants, the funding mechanism for which has already been upheld by the Court in State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee, \_\_ W. Va. \_\_, 580 S.E.2d 869 (2003). This in turn raises the single factual issue necessary for resolution in this case: which projects are loans, and what are the repayment terms? To that end, the Respondent appends the affidavit of Brian M. Kastick, Secretary of the Department of Tax and Revenue and Chair of the EDGC, attesting to the following:

- As of the time this proceeding was filed, only one economic development project was certified by the EDGC to receive a low-interest loan;
  - This was a \$2,500,000.00 loan to the Tri-Cities Power Authority for Project ID #136, a hydroelectric generating facility at Bluestone Dam;
  - Pursuant to W. Va. Code §29-22-18a(d)(9), the terms and conditions of the loan, including the rate of interest to be paid and the period of the repayment, will be determined by the Economic Development Authority after considering all applicable facts and circumstances;
  - Pursuant to W. Va. Code §29-22-18a(d)(9), the loan will be paid from bond proceeds;
- and
- Payment of the loan will be contingent on the parties' execution of a written Memorandum of Understanding memorializing, inter alia, the terms and conditions of the loan, including the rate of interest to be paid and the period of the repayment.

With the submission of Secretary Kastick's affidavit, the Petitioners' attack on the mechanism for repayment of low-interest economic development loans is ripe for resolution as a matter of law.

As noted earlier, to the extent that Count I may be construed as an attack on the constitutionality of the mechanism for funding economic development grants, *to-wit*, the issuance of bonds that will be paid from lottery revenues, that issue has already been resolved by the Court. State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee, \_\_ W. Va. \_\_, 580 S.E.2d 869 (2003).

2. Count II of the Petition, "Statutory Standards Not Met," is also based on snippets of language taken out of context from the applicable statutory provisions, W. Va. Code § 29-22-18a(A)-(D). Again, once this Court has reviewed the actual language of the provisions at issue, it will be apparent that there are three causes of action set forth in Count II, none having merit and none requiring the taking of evidence.

The overarching issue in Count II (and in the rest of the Petition as well) is whether this Court will adopt the economic theories espoused by then-Justice Richard Neely in his concurring opinion in State ex rel. Ohio County Commission v. Samol, 165 W. Va. 714, 720-29, 275 S.E.2d 2, 5-10 (1980), and impose those theories as a matter of constitutional law on all legislative initiatives involving economic development. Assuming *arguendo* that the Court would even consider this to be a proper question for resolution by the judicial branch of government, it is a question that can be resolved as a matter of law.

The second issue in Count II is whether W. Va. Code § 29-22-18a(8)(C) requires the EDGC to specify a particular compensation-and-benefits package for workers, as a condition precedent to

an award of grant funding for any project. Again, this is a question that can be resolved as a matter of law.

The third issue in Count II is whether the provisions of W. Va. Code § 29-22-18a(d)(8)(A) and (B), which set forth particular matters that "... the committee shall take into consideration ...," establish requirements for project funding, as the Petitioners claim; and if so, what are those requirements? Again, this is a question that can be resolved as a matter of law.

3. Count III of the Petition, "Minor v. Major Private Benefits," is again based on a misquotation of the applicable statute, W. Va. Code § 29-22-18a(d)(9). As was the case with Count I, the challenge here is a challenge to the one project that was approved for a low-interest loan as opposed to a grant. See affidavit attached hereto as Exhibit A. Again, this issue is now ripe for resolution as a matter of law: do the terms and conditions of the low-interest loan to Tri Cities Power Authority violate either W. Va. Code § 29-22-18a(d)(9) or the public purpose doctrine embodied in W. Va. Const., art. X, § 6?

To the extent that Count I may be liberally construed as an attack on the constitutionality of economic development grants, despite the Petitioners' references to statutory language that deals solely with low-interest loans, the public purpose issue has already been resolved by this Court. State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee, \_\_ W. Va. \_\_, 580 S.E.2d 869 (2003).

4. Count IV of the Petition, "Violations of Substantive Due Process, Equal Protection and Uncompensated 'Takings' Bar," presents a bare issue of law: whether this Court will adopt the economic theories espoused by then-Justice Richard Neely in his concurring opinion in State ex rel. Ohio County Commission v. Samol, 165 W. Va. 714, 720-29, 275 S.E.2d 2, 5-10 (1980), and impose

those theories as a matter of constitutional law on all legislative initiatives involving economic development. If, and only if, the Court answers this question in the affirmative, would the taking of evidence be required to determine whether the projects certified by the EDGC are “zero-sum” projects and/or whether the projects are unfairly benefitting from their economies of scale.

Additionally, Count IV re-presents the issues in Counts II and III (public purpose doctrine, bona fide economic development, and adequate compensation for workers) reconfigured as a substantive due process challenge to the provisions of W. Va. Code § 29-22-18a(d)(8) and W. Va. Code § 29-22-18a(d)(11). This is a wholly legal issue; again, the Petitioners’ claims rise or fall with the Court’s willingness to adopt the economic theories of then-Justice Neely, together with the so-called “strong maxims” of someone named Professor Sutherland, as a matter of constitutional law

5. Count V of the Petition, “Anti-Women-Sexist Discrimination,” should be dismissed on the ground that these Petitioners have no standing to bring a gender-based discrimination case based on alleged discrimination against women.

Additionally, it is impossible to take evidence that would establish unconstitutional pay disparity between male and female employees who have not yet been hired, to perform jobs that have not yet been created, in workplaces that have not yet been built.

Finally, the gist of the allegations in Count V appears to be that the EDGC has approved economic development projects that will create low paying jobs for women, rather than projects that will create high paying jobs for men. There is simply no cause of action here.

6. Count VI of the Petition, “Counties and Cities Barred From Private Giveaways,” does not involve the Respondent EDGC.

7. Count VII of the Petition, "Substance and Appearance of Impropriety," presents an issue of law: whether any appearance of favoritism in the EGDC's selection of projects for certification violates W. Va. Const., art. III, § 2, where the EGDC's members were neither nominated nor appointed by the Legislature, and projects were selected in meetings subject to the Open Governmental Proceedings Act, W. Va. Code § 6-9A-1 *et seq.* In this regard, this Court has previously upheld the Legislature's Budget Digest against similar attack, State ex rel. The League of Women Voters of West Virginia v. Tomlin, 209 W. Va. 565, 577, 550 S.E.2d 355, 367 (2001), finding that "... indications of favoritism expressly validate [the Court's requirement of] discussion, debate, and decision prior to final legislative enactment of the budget bill. . . ."

#### **Conclusion**

Time is of the essence, as the Petitioners well know. If the Petitioners' motion is granted and this case is assigned to a special commissioner or remanded to the circuit court for the taking of evidence, the Petitioners will win by default; bonds will not be issued, projects will not go forward, jobs will not be created, and this case will never end.

The Respondent West Virginia Economic Development Grant Committee respectfully requests that the Court deny the Petitioners' motion for taking of evidence.

**WEST VIRGINIA ECONOMIC DEVELOPMENT  
GRANT COMMITTEE**

By Counsel

**DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL**

  
KATHERINE A. SCHULTZ (State Bar ID 3302)

**SENIOR DEPUTY ATTORNEY GENERAL**

Office of the Attorney General

State Capitol Complex

Building 1, Room 435

Charleston, WV 25305

(304) 558-2522

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

---

No. 31541

---

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

Petitioners,

v.

WEST VIRGINIA ECONOMIC DEVELOPMENT  
GRANT COMMITTEE, et al.,

Respondents.

**AFFIDAVIT**

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

Brian M. Kastick, being duly sworn upon his oath, deposes and says:

1. That he is the Secretary of the West Virginia Department of Tax and Revenue, and Chair and Member of the West Virginia Economic Development Grant Committee;
2. That on August 20, 2003, the Committee met to consider a variety of economic development project applications for grant funding or low-interest loans pursuant to the provisions of W. Va. Code §29-22-18a(d) and its subparts;
3. That following the Committee's consideration of these applications, forty-nine (49) projects were certified to receive economic development grants and one (1) project was certified to receive a low-interest loan;

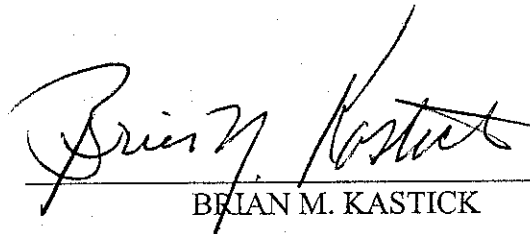
4. That the sole loan project was a \$2,500,000.00 loan to the Tri-Cities Power Authority for Project ID #136, a hydroelectric generating facility at Bluestone Dam in Summers County, West Virginia;

5. That pursuant to the provisions of W. Va. Code §29-22-18a(d)(9), the terms and conditions of the loan, including the rate of interest to be paid and the period of the repayment, will be determined by the West Virginia Economic Development Authority after considering all applicable facts and circumstances;

6. That pursuant to the provisions of W. Va. Code §29-22-18a(d)(9), the loan will be paid to Tri-Cities Power Authority from bond proceeds; and

7. That payment of the loan to Tri-Cities Power Authority will be contingent on the parties' execution of a written Memorandum of Understanding memorializing, *inter alia*, the terms and conditions of the loan, including the rate of interest to be paid and the period of the repayment.

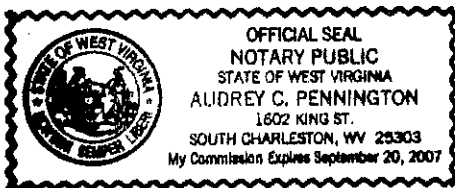
And further Affiant says not.

  
BRIAN M. KASTICK

Taken, subscribed and sworn to before me  
This 18th day of September.

My commission expires 9/20/07

  
Notary Public



**CERTIFICATE OF SERVICE**

I, KATHERINE A. SCHULTZ, Senior Deputy Attorney General, hereby certify that I have served true copies of the within "Response of West Virginia Economic Development Grant Committee in Opposition to Petitioner's Motion for Taking Evidence" upon the following this 22nd day of September, 2003, by United States mail, first class postage prepaid, to:

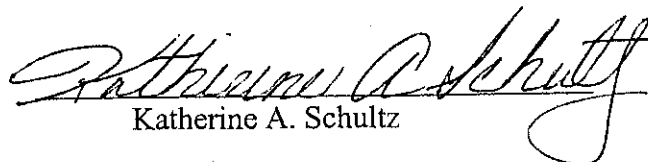
Larry A. Harless, Esq.  
Route 2, Box 186C  
Cottageville, WV 25239  
Counsel for Petitioners

Thomas R. Goodwin, Esq.  
Goodwin & Goodwin, LLP  
P.O. Box 2107  
Charleston, WV 25328-2107  
Counsel for West Virginia Lottery Commission

Stephen B. Farmer, Esq.  
Farmer, Cline & Arnold, PLLC  
P.O. Box 2842  
Charleston, WV 25338  
Counsel for City and County Defendants

and by hand delivery to:

Silas B. Taylor, Esq.  
Senior Deputy Attorney General  
Office of the Attorney General  
State Capitol, Room 26-E  
Charleston, WV 25305  
Counsel for Economic Development Authority

  
Katherine A. Schultz