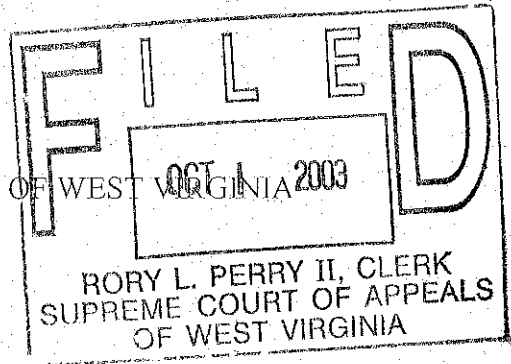


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA EX REL.
ITS CITIES OF CHARLESTON AND
HUNTINGTON AND ITS COUNTIES
OF OHIO AND KANAWHA, WEST VIRGINIA,

Petitioners,

v.

No. 31540

WEST VIRGINIA ECONOMIC
DEVELOPMENT AUTHORITY,
a public corporation,

Respondent,

and

STATE OF WEST VIRGINIA EX REL.
REV. JIM LEWIS AND JOHN COONEY,

Petitioners,

v.

No. 31541

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,

and

GREENBRIER COUNTY COALITION AGAINST
GAMBLING EXPANSION AND CABELL COUNTY
COALITION AGAINST GAMBLING EXPANSION,
UNINCORPORATED ASSOCIATED,

Petitioners,

v.

No. 31564

WEST VIRGINIA LOTTERY COMMISSION AND
JOHN MUSGRAVE, ITS DIRECTOR,

Respondents.

**RESPONSE OF THE CITIES OF CHARLESTON
AND HUNTINGTON AND THE COUNTIES OF OHIO AND
KANAWHA, WEST VIRGINIA, TO RULE TO SHOW CAUSE**

Respectfully submitted,

Stephen B. Farmer, Esq.
(WV State Bar No. 1165)
FARMER, CLINE & ARNOLD, PLLC
Post Office Box 3842
Charleston, West Virginia 25338
(304) 346-5990
*Counsel for State of West Virginia ex rel. its
Cities of Charleston and Huntington and its
Counties of Ohio and Kanawha, West Virginia*

Robert P. Fitzsimmons, Esq.
(WV State Bar No. 1212)
FITZSIMMONS LAW OFFICES
1609 Warwood Avenue
Wheeling, West Virginia 26003
(304) 277-1700
Counsel for Ohio County, West Virginia

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I. INTRODUCTION

The Cities of Charleston and Huntington and the Counties of Kanawha and Ohio (“the Cities and Counties”) are public entities which are the recipients of economic development projects certified by the Economic Development Grant Committee on August 20, 2003. The Cities and Counties have petitioned this Court for a Writ of Mandamus ordering the Economic Development Authority to issue economic development bonds as ordered by the Governor.

As the basis for their Petition, the Cities and Counties state that three statutes: (1) the Excess Lottery Fund statute, W.Va. Code §29-22-18a(d), (2) the Racetrack Video Lottery statute, W.Va. Code § 29-22a-1 et seq., and (3) the Limited Video Lottery statute, W.Va. Code § 29-22b-101, et seq., are constitutional. This Court has consolidated the Cities and Counties’ Petition with Petitions for Mandamus filed by Rev. Jim Lewis and John Cooney (“the Lewis Petition”) and Greenbrier County Coalition Against Gambling Expansion and Cabell County Coalition Against Gambling Expansion (“the Greenbrier Petition.”)

The Cities and Counties are named as Respondents in the Lewis Petition but not the Greenbrier Petition. As such, this Response will address the issues raised in the Lewis Petition. While the Cities and Counties are not parties to the Greenbrier Petition we ask that the arguments set forth in the Cities and Counties' Petition be considered in response to the Greenbrier Petition.¹

The Lewis Petitioners acknowledge that “[t]his case stems directly from State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee, 580 S.E.2d 569 (W.Va. 2003). Thus, the factual and legal background here are evident to the Court.” Petitioners’ Brief at 1.² Remarkably, the Lewis Petitioners then completely ignore this Court’s findings in Grant Committee 1 in asking this Court – based upon a mischaracterization of facts and complete disregard for the law – to invalidate the economic development projects certified pursuant to the Economic Grant Committee’s authority under revised statute, W.Va. Code § 29-22-18a(d)(9) (2003).

II. ARGUMENT

A. This Court has Held that W.Va. Code § 29-22-18a(d) is Constitutional When Analyzed With the “Public Purpose” Doctrine and Article X, Section 6 of the West Virginia Constitution.

Ignoring the law and creating the facts, the Lewis Petitioners make many (if not all) of the same arguments disposed of by this Court in Grant Committee 1 and completely ignore – in fact, do not mention – that the holdings of Grant Committee 1 apply here. In facing the same arguments

¹The Cities and Counties further incorporate the arguments made by the other Respondents in these consolidated actions into this Response.

²For simplicity, State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee will be referred to in this Response as Grant Committee 1.

made by the Lewis Petitioners with regard to the validity of statutes involving commercial development, this Court held:

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 the public in general.

Grant Committee 1 at 892, *citing State ex rel. Ohio County Commission v. Samal*, 165 W.Va. 718, 275 S.E.2d 4 (1980). In Grant Committee 1, this Court also recognized the constitutionality of economic development statutes (including W.Va. Code § 29-22-18a(d)) that enhance the lives of citizens under the Public Purpose Doctrine.

Rather than being static in nature, the public purpose doctrine, because of its inherent responsiveness to societal needs and demands, is ever-changing: 'what constitutes a public purpose varies with changing conceptions of the scope and function of government. As governmental activities increase by reason of the growing complexity of various phases of society, the concept of 'public purpose' expands proportionately. Waterhouse, 158 W.Va. 215, 212 S.E.2d 735.

* * *

'Times change. The wants and necessities of the people change . . . On the one hand, what could not be deemed a public use a century ago may, because of changed economic and industrial conditions, be such today.'

'The consensus of modern legislative and judicial thinking is to broaden the scope of activities which may be classed as involving a public purpose. 37 Am.Jur. *Municipal Corporations* § 132. It reaches perhaps its broadest extent under the view that economic welfare is one of the main concerns of the city, state and the federal governments.' Grant Committee 1 at 892, *citing Nichols v. S.C. Research Authority*, 290 S.C. 415, 351 S.E.2d 155, 161 (1986).

There is no question that W.Va. Code § 29-22-18a(d) is constitutional and appropriate by contemporary standards.³

Here, the Cities and Counties have worked hard to design economic development projects which will benefit the citizens of their communities. The fact that the Lewis Petitioners disagree with the actions of the Committee is of no moment.

The specific projects at issue here have all been determined by the Economic Development Grant Committee to be projects in the best interest of the public pursuant to criteria set forth by the Legislature in W.Va. Code § 29-22-18a, as amended. Particularly, with regard to the City of Charleston, grant money will be used to build, own and operate a baseball stadium in the east end of town, a portion of town in need of urban revitalization. This project will enhance the economic development of the city of the community, as well as providing recreational opportunities to the citizens. Under its plan, the city will lease the ballpark to its Class A minor league baseball team, which team will contribute not only lease payments, but contributions to infrastructure.⁴

With regard to the Fort Henry project in Ohio County, that project is a sweeping economic development initiative in which Ohio County will own and develop significant warehousing properties, as well as retail operations, which it will lease to Cabela's, a national retailer. This project is estimated to provide over one thousand jobs in the warehouse and distribution center, and

³The Grant Committee court cited with approval the Oklahoma court in State ex rel. Brown v. City of Warr Acres, 946 P.2d 1140, 1146 (Okla. 1997) for the proposition that "[w]hether 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."

⁴A comprehensive copy of the City of Charleston's submission to the Grant Committee has been provided to the Court's Clerk (2 copies) for the Court's review as "Exhibit A" to this Response.

hundreds of jobs associated with the retail operation, which is expected to attract tourists from as far away as Georgia and Alabama.⁵

The Pullman Square project in Huntington (the "Tri-State Transit Authority" project) will revitalize the decaying downtown area by providing office, commercial and retail space as a centerpiece of the community. Once again, jobs will be provided, in addition to additional business opportunity for local business people.⁶

The Lewis Petitioners make much of the notion that these public projects are somehow improper because they may provide economic benefit to private entities. Once again, the Petitioners in Grant Committee 1 made the same arguments and this Court held:

While legislative action is required to serve the public, rather than private interests, the realization of incidental benefits by private entities as a result of legislative efforts does not render the legislation unconstitutional for lack of a public purpose. As the Oklahoma Supreme Court remarked in Warr Acres: Municipalities today compete on a nationwide level to attract new industry to their locality. A city cannot compete with other cities or even other states if other cities and states are competing with inducement devised under contemporary economic development plans 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.

⁵A comprehensive copy of the Ohio County's submission to the Grant Committee has been provided to the Court's Clerk (2 copies) for the Court's review as "Exhibit B" to this Response.

⁶A comprehensive copy of the Tri-State Transit Authority's submission to the Grant Committee has been provided to the Court's Clerk (2 copies) for the Court's review as "Exhibit C" to this Response.

Grant Committee 1 at 892 (emphasis supplied by the Court).

Finally – and conclusively – this Court upheld the statutory purpose of W. Va. Code § 29-22-18a(d) in Grant Committee 1, stating “. . . we find that the legislatively declared objective of economic development is a valid public purpose, deserving of both judicial respect and occasion for the desired economic development to take place. Accordingly, we find no basis for interfering with the subject legislation on public purpose grounds.” Grant Committee 1 at 893.⁷ Both the Legislature and the Grant Committee have followed this Court’s mandates in Grant Committee 1 and, therefore, the grants certified affecting the Cities and Counties, and all other grants, are constitutional.

B. W.Va. Code § 29-22-18a(d), as Amended, is Constitutional Because the Legislature has Articulated with Sufficient Clarity its Public Policy Objectives to Permit the Executive Department to Effectuate Those Policy Objectives and to Educate the Public as to the Legislature’s Intentions.

In Grant Committee 1, this Court expressed concern that the Legislature had not provided sufficient guidance to the Economic Development Grant Committee in order for the Committee to successfully implement the Legislature’s economic development goals. In response, at a Special Session of the Legislature held in 2003, the Legislature amended W. Va. Code § 29-22-18a. Under the amended statute, § 29-22-18a(8) requires that when determining whether or not to certify a project, the committee shall take into consideration the following:

- (a) The ability of the project to leverage other sources of funding;
- (b) Whether funding for the amount requested in the grant application is or reasonably should be available from commercial sources;

⁷It is somewhat astounding that the Lewis Petitioners can set forth the Counts in their Petition and arguments in their brief without even acknowledging Grant Committee 1 as conflicting authority that is in direct opposition to their position(s).

- (c) The ability of the project to create or retain jobs, considering the number of jobs, the type of jobs, whether benefits are or will be paid, the type of benefits involved and the compensation reasonably anticipated to be paid persons filling new jobs or the compensation currently paid to persons whose jobs would be retained;
- (d) Whether the project will promote economic development in the region and the type of economic development that will be promoted;
- (e) The type of capital investments to be made with bond proceeds and the useful life of capital investments; and
- (f) Whether the project is in the best interest of the public.

The statute was further amended to provide specific guidance to the Committee as to projects considered to be in the public interest:

W.Va. Code § 29-22-18a(11) states:

The committee may not certify a project unless the committee finds that the project is in the public interest and the grant will be used for a public purpose. For purposes of this subsection, projects in the public interest and for a public purpose include, but are not limited to:

- (A) Sports arenas, fields, parks, stadiums and other sports and sports-related facilities;
- (B) Health clinics and other health facilities;
- (C) Traditional infrastructure, such as water and waste water treatment facilities, pumping facilities and transmission lines;
- (D) State-of-the-art telecommunications infrastructure;
- (E) Biotechnical incubators, development centers and facilities;
- (F) Industrial parks, including construction of roads, sewer, water, lighting and other facilities;

- (G) Improvements at state parks, such as construction, expansion or extensive renovation of lodges, cabins, conference facilities and restaurants;
- (H) Railroad bridges, switches and track extension or spurs on public or private land necessary to retain existing businesses or attract new businesses;
- (I) Recreational facilities, such as amphitheatres, walking and hiking trails, bike trails, picnic facilities, restrooms, boat docking and fishing piers, basketball and tennis courts, and baseball, football and soccer fields;
- (J) State-owned buildings that are registered on the National Register of Historic Places;
- (K) Retail facilities, including related service, parking and transportation facilities, appropriate lighting, landscaping and security systems to revitalize decaying downtown areas; and
- (L) Other facilities that promote or enhance economic development, educational opportunities or tourism opportunities, thereby promoting the general welfare of this state and its residents.

The guidelines stated in the statute set forth with particularity the economic development considerations to be undertaken when considering grant proposals. A review of the official record of the Grant Committee's work will demonstrate that they honored the statute's purpose and followed the mandates of the statute in considering each project that was submitted for their consideration. The statutes are constitutional, the funding mechanism is constitutional, the grants are constitutional and the Lewis Petitioners' objections are misplaced.

C. The Economic Grant Committee Made a Complete Public Record of its Meetings and Public Hearings.

The Lewis Petitioners, in Count 1A of their Petition attempt to rewrite W.Va. Code § 29-22-18a(d) to require the Committee to: (1) Make written or on-record findings adequate for Court

review; (2) Incorporate those findings into project certifications; and (3) That it assume the duty of enforcement of legislative standards during the projects. Once again, this is an example of Petitioners' advocacy – misstate a legal premise, apply inaccurate facts and claim the absurd result as a given.

A plain reading of W.Va. Code § 29-22-18a(d) shows that there is no such requirement(s) in the statute. In fact, once again the Lewis Petitioners ignore this Court's findings in Grant Committee 1 which set forth the option of the Committee to "make a full record of its proceedings and decisions for the purpose of evidencing that its actions are in accord with the public purpose objections of the subject legislation and the enunciated legislative standards." Grant Committee 1 at 894.

The Committee has done just that. These transcripts have been submitted to the Court by counsel to the Committee as Exhibits A through E to the Affidavit of Committee Chairman Brian M. Kastick. This record of the Committee's actions demonstrate the inordinate amount of preparation and consideration undertaken by the Committee in considering the projects submitted not only by the Cities and Counties' Petitioners, but all projects. Moreover, it is clear from a review of the transcripts that the Committee's decisions are consistent with the public purpose objectives of the statute and the enunciated legislative standards – the test set forth in Grant Committee 1.

D. The Remaining Arguments Advanced by the Lewis Petitioners Have No Basis in Law or Fact and Should be Disregarded by the Court.

The remainder of the issues raised by the Lewis Petitioners consist of nothing more than social commentary built upon assumptions, conclusions and opinions designed to reach an implausible conclusion. Succinctly stated, the remainder of the Lewis Petitioners' allegations can

be described as “they don’t like all of the projects that were approved and, therefore, the ones they don’t like constitute bad social policy.”

This Court has long recognized that the judiciary is not permitted to sit as a super legislature to judge the wisdom or desirability of legislative policy determinations, especially in regard to economic legislation. Robinson v. Charleston Area Medical Center, 186 W.Va. 720, 414 S.E. 2d 877, 883 (1991).

The legislation in question has been considered, in all pertinent respects, by this Court in Grant Committee 1. What is important is that the statute is constitutional, not whether the Lewis Petitioners like the projects that received grants. The Lewis Petitioners have no factual or legal basis to support any of the remaining contentions in their Petition. This Court should follow the tenets of Grant Committee 1 to dispose of the Lewis Petitioners’ positions.

III. CONCLUSION

The economic development grants under this Court’s consideration represent an incredible economic development initiative undertaken by state government, as well as the counties and municipalities of West Virginia in an effort to improve the quality of life for West Virginia citizens. The Legislature has followed the mandates of this Court in amending W.Va. Code § 29-22-18a, and the Grant Committee has honored the mandates of the Legislature. The grants are constitutional. As Chief Justice Starcher stated in his concurring opinion in Grant Committee 1:

In this vein, I feel the need to clearly state (I believe that no one would quarrel with this statement) that this Court applauds the energy, imagination, and courage of those within and without the Legislature and Executive Branch who seek to advance the welfare of West Virginia and institute a public support of commerce, education, and recreation – and that this Court supports the working women and men who construct and service the infrastructure of our economy. . .

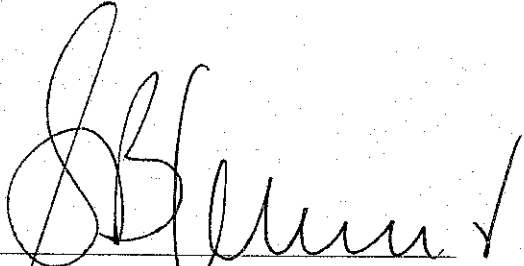
Grant Committee 1 at 897.

W.Va. Code § 29-22-18a is constitutional on its face, it has been constitutionally applied by the Grant Committee in certifying the economic development grants. The Cities of Charleston and Huntington and its Counties of Ohio and Kanawha respectfully request this Court to deny the Petition for Writ of Mandamus presented by the Rev. Jim Lewis and John Cooney and to grant the Writ of Mandamus filed by the Cities and Counties.

STATE OF WEST VIRGINIA EX REL. ITS
CITIES OF CHARLESTON AND HUNTINGTON
AND ITS COUNTIES OF OHIO AND
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Respondents;

By Counsel:



STEPHEN B. FARMER (State Bar No. 1165)
FARMER, CLINE & ARNOLD, PLLC
Second Floor, 7 Players Club Drive
Post Office Box 3842
Charleston, West Virginia 25338
(304) 346-5990
*Counsel for State of West Virginia ex rel. its
Cities of Charleston and Huntington and its
Counties of Ohio and Kanawha, West Virginia*

Robert P. Fitzsimmons (State Bar No. 1212)
FITZSIMMONS LAW OFFICES
1609 Warwood Avenue
Wheeling, West Virginia 26003
(304) 277-1700
Counsel for Ohio County, West Virginia

CERTIFICATE OF SERVICE

I, Stephen B. Farmer, counsel for Respondents, Cities of Charleston and Huntington and the Counties of Ohio and Kanawha, West Virginia, do hereby certify that I have this 1st day of October, 2003, served the within "Response of the Cities of Charleston and Huntington and the Counties of Ohio and Kanawha, West Virginia, to Rule to Show Cause" upon counsel of record, by depositing same in the U.S. Mail, in envelope properly stamped and addressed as follows, to-wit:

Vincent Trivelli, Esq.
The Calwell Practice, PLLC
178 Chancery Row
Morgantown, WV 26505
*Counsel for The Affiliated Construction
Trades Foundation, a Division of West
Virginia State Building and Construction
Trades Council, AFL-CIO*

Thomas P. Maroney, Esq.
608 Virginia Street, East
Charleston, WV 25301
*General Counsel for the West Virginia
Labor Federation, AFL-CIO*

William Herlihy, Esq.
SPILMAN THOMAS & BATTLE
300 Kanawha Boulevard, E.
Charleston, WV 25301
*Counsel for West Virginia Economic
Development Authority*

Katherine A. Schultz, Esq.
Senior Deputy Attorney General
Office of the Attorney General
State Capitol Complex
Building 1, Room 435
Charleston, WV 25305
*Counsel for West Virginia Economic
Development Grant Committee*

Stuart Calwell, Esq.
The Calwell Practice, PLLC
405 Capitol Street, Suite 607
P. O. Box 113
Charleston, WV 25321
*Counsel for The Affiliated Construction
Trades Foundation, a Division of West
Virginia State Building and Construction
Trades Council, AFL-CIO*

Thomas R. Goodwin, Esq.
Johnny M. Knisely II, Esq.
GOODWIN & GOODWIN LLP
300 Summers Street, Suite 1500
P. O. Box 2107
Charleston, WV 25328-2107
*Counsel for The West Virginia Lottery
Commission and John C. Musgrave*

Roger D. Hunter, Esq.
NEELY & HUNTER
159 Summers Street
Charleston, WV 25301-2134
*Counsel for School Building Authority of West
Virginia*

Thomas A. Heywood, Esq.
BOWLES RICE McDAVID GRAFF & LOVE
600 Quarrier Street
Charleston, WV 25301
*Counsel for The West Virginia Hospitality and
Travel Association, Inc.; The West Virginia
Business Roundtable; and the West Virginia
Business and Industry Council*

Michael E. Caryl, Esq.
BOWLES RICE McDAVID GRAFF &
LOVE
101 South Queen Street
Martinsburg, WV 25401
*Counsel for Eastern West Virginia Regional
Airport Authority*

Rudolph L. DiTrapano, Esq.
Sean P. McGinley, Esq.
Richard S. Han, Esq.
DiTRAPANO, BARRETT & DiPIERO
604 Virginia Street, East
Charleston, WV 25301
*Counsel for The West Virginia, Racing
Association*

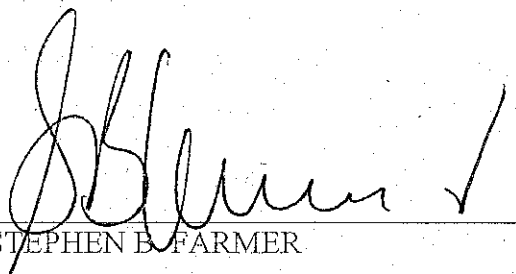
Nancy E. Turdel, Esq.
WV High Technology Consortium Foundation
1000 Technology Drive, Suite 1000
Fairmont, WV 26554

Robert P. Fitzsimmons, Esq.
FITZSIMMONS LAW OFFICES
1609 Warwood Avenue
Wheeling, West Virginia 26003
Counsel for Ohio County, West Virginia

Larry Harless, Esq.
Route 2, Box 186 C
Cottageville, WV 25239
*Counsel for Greenbrier County Coalition
Against Gambling Expansion; and Cabell
County Coalition Against Gambling
Expansion*

Richard E. Boyle, Jr., Esq.
KAY, CASTY & CHANEY, PLLC
1600 Bank One Center
Charleston, WV 25301
*Counsel for The West Virginia Amusement
and Video Lottery Operators Association, Inc.*

Louis S. Southworth, II, Esq.
Wendel B. Turner, Esq.
JACKSON KELLY PLLC
1600 Laidley Tower
Charleston, WV 25301
*Counsel for The West Virginia Hospitality and
Travel Association, Inc.; The West Virginia
Business Roundtable; and the West Virginia
Business and Industry Council*



STEPHEN B. FARMER

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APPENDIX

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KANAWHA, WEST VIRGINIA, TO RULE TO SHOW CAUSE**

APPENDIX

- A. City of Charleston's Submission to the Grant Committee
- B. Ohio County's Submission to the Grant Committee
- C. Tri-State Transit Authority's Submission to the Grant Committee