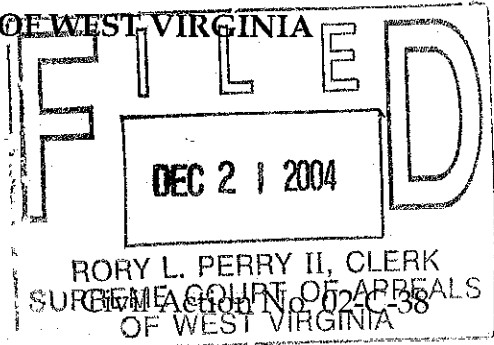


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
APPEAL NO. 32157



CSX HOTELS, INC., d/b/a THE GREENBRIER  
RESORT, a West Virginia corporation,

Plaintiff Below/ Appellee,

vs.

CITY OF WHITE SULPHUR SPRINGS, WEST VIRGINIA,  
DEBRA JO FOGUS, CHRIS HANNA, PAUL HOBBS,  
JAMES HYLTON, DELORES MATTOX, DON MCCOY  
and RICK ROMEO,

Defendants Below/ Appellants.

AND

FREDERICK W. KRETZER, CAROLYN B. KRETZER, and  
THE GREENBRIER SPORTING CLUB DEVELOPMENT  
COMPANY, LLC, a Delaware limited liability company,

Plaintiffs Below/ Appellees,

vs.

Civil Action No. 03-C-19

CITY OF WHITE SULPHUR SPRINGS, WEST VIRGINIA,  
DEBRA JO FOGUS, CHRIS HANNA, PAUL HOBBS,  
JAMES HYLTON, DELORES MATTOX, DON MCCOY  
and RICK ROMEO,

Defendants Below/ Appellants.

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**BRIEF OF APPELLANTS**

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## **I. INTRODUCTION**

While the trial court openly stated on page 2 of its Order that the City's counsel "clearly and accurately limited the issues which the Court presently had before it," the Court went beyond those limitations in its Order dismissing the City of White Sulphur Springs' annexation petition. The court accurately defined a clear legal issue as "what does the term within West Virginia Code §8-6-2(a) mean when said Code section provides that a petition for annexation must be 'accompanied by an accurate survey map'." The court then answered the question by deciding that only a survey map which was created directly from an on-the-ground survey would suffice. Any other map, even from recorded deeds with deed bearings and distances, could not be satisfactory.

The issue on appeal therefrom is simply whether an on-the-ground survey is necessary to prepare a map satisfactory for a municipality to annex property. However, the trial court went further than that in its Order, which the City Attorney refused to sign. The trial court went ahead and found that the map was inaccurate. Order dated February 9, 2004 at p. 2. The City takes exception to this finding since the City understood that it was submitting a simple legal issue and never offered evidence on the accuracy of the map or even cross-examined the plaintiffs' witnesses.

## **II. HISTORY OF PROCEEDINGS**

The City of White Sulphur Springs undertook annexation proceedings on January 15, 2003. It prepared a map in accordance with the requirements of W.Va. Code §8-6-2(a). The map and description followed deed calls and distances from the

deed of the Greenbrier Hotel and other property boundary in the area to be annexed. Clearly, the Greenbrier Hotel property was included in the annexed property and the hotel did not wish to be annexed. Consequently, the following lawsuits were filed against the City of White Sulphur Springs by the Hotel and friends:

1. Frederick W. Kretzer, et al. vs. Richard A. Romeo, Jr., et al., Circuit Court of Greenbrier County, Civil Action No. 03-C-18;
2. Frederick W. Kretzer, et al. vs. City of White Sulphur Springs, West Virginia, et al., Circuit Court of Greenbrier County, Civil Action No: 03-C-19;
3. CSX Hotels, Inc., d/b/a The Greenbrier Resort, vs. City of White Sulphur Springs, West Virginia, et al., Circuit Court Of Greenbrier County, Civil Action No. 02-C-38; and
4. Greenbrier Clinic, Inc., et al. vs. City of White Sulphur Springs, West Virginia, et al., United States District Court for the Southern District of West Virginia, Civil Action No. 5:03-0075.

The civil actions 02-C-38 and 03-C-19 pending before the Circuit Court of Greenbrier County were consolidated and assigned to a special judge because of disqualification of the two Circuit Court Judges in Greenbrier County.

The Circuit Court of Greenbrier County entered an injunction on February 9, 2004, finding that the City's map failed to comply with the requirements of W.Va. Code §8-6-2(a). This ruling is the ruling from which the City appeals.

### **III. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL**

This case concerns the issue of whether a City must do an actual on-the-ground survey of property that the City intends to annex pursuant to West Virginia Code §8-6-

2. The City of White Sulphur Springs set about to annex certain properties adjoining

the City of White Sulphur Springs on January 15, 2003. Prior to the election provided for by the West Virginia Code, the Greenbrier Hotel and others on behalf of the Greenbrier Hotel filed numerous civil actions, including the subject action in the Circuit Court of Greenbrier County, to enjoin the annexation. One of the grounds on which the Greenbrier Hotel based its remedy of injunction was that the City of White Sulphur Springs had not performed an actual on-the-ground survey of their Hotel and property such that complied with the West Virginia Code. Clearly, however, the City had undertaken to obtain an accurate survey map of the area to be annexed, which included the property of the Greenbrier Hotel and other properties whose deeds and descriptions were filed and maintained in the Office of the Clerk of the County Commission of Greenbrier County, West Virginia.

A registered professional engineer prepared a map which accurately portrayed the area to be annexed, provided a metes and bounds description of the area which included all of the Greenbrier Hotel area property, and signed and sealed the map utilized by the City in filing its Petition for Annexation. The sole issue that was presented to the Circuit Court of Greenbrier County, acting by Special Judge John Hatcher, was whether the City was required to hire a survey crew to do an on-the-ground survey of the Greenbrier Hotel's property and other properties whose deeds had been recorded in the Clerk's Office. The Hotel contended that the City had to do the on-the-ground survey, but the City took the position that as long as the map was reasonably accurate and one could determine whether they were or were not part of the annexation that the map complied with West Virginia Code §8-6-2.

This issue was squarely presented to the Circuit Court as to whether an on-the-ground survey was required or not. The City agreed to have the court make that legal determination to avoid hours of examination and cross-examination of engineers or surveyors as to the accuracy of the City's map. However, the Court concluded that an actual on-the-ground survey was required and, inasmuch as the City had not had a survey performed by a survey crew on the ground and a map prepared pursuant thereto, its map could not be acceptable and the City, therefore, had not complied with the requirements of West Virginia Code §8-6-2. The court, however, went on to hold that the City's map was not accurate, even though the City had never cross-examined the Hotel's witnesses in regard to the accuracy of the map, and had not put on its own evidence as to the accuracy of its map. The City of White Sulphur Springs, therefore, complains on two grounds:

1. The Circuit Court of Greenbrier County erred in failing to limit its ruling, as it had agreed to do, to the legal determination of the survey requirements of an on-the-ground survey.
2. The Circuit Court of Greenbrier County erred in ruling that the City of White Sulphur Springs and, for that matter, any city doing an annexation had to perform an on-the-ground survey of all the property that it intended to annex, regardless of whether there were deeds of record which accurately described the property.

#### IV. STATEMENT OF FACTS

The City of White Sulphur Springs prepared and filed its Petition for Annexation of the Greenbrier Hotel and other properties extending from the western city limits along Route 60 West (which is included in the City limits) to the I-64 interchange. All of the properties annexed are described by deed bearings and distances by deed or public record. It is certainly easy to determine that the Greenbrier Hotel was included in the area to be annexed. Yet, the Hotel, in order to frustrate the City's election, filed several civil actions against the City, including this one, claiming the City had not done an on-the-ground survey of the Hotel property and therefore could not comply with West Virginia Code §8-6-2.

The court held a status conference and then scheduled a hearing for January 7, 2004. Having already advised the City that the court was of a mind to grant the injunction because the court did not believe a survey map could be made by using court records such as deeds and maps of record, the City decided that a trial would be a waste of time. Therefore, prior to the January 7, 2004 hearing, the City filed its letter effectively narrowing the issue to be decided at the hearing as to whether West Virginia Code §8-6-2(a) requires an on-the-ground survey map for municipal annexation.<sup>1</sup> Therefore, due to the court limiting the issue to whether an on-the-ground survey was required, despite being prepared to do so, the City did not present evidence in support of its position that its survey map was an accurate survey map under West Virginia Code §8-6-2(a).

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<sup>1</sup> See Exhibit A to the Petition for Appeal.

The court entered its "Final Order Granting Permanent Injunction" on February 9, 2004.<sup>2</sup> Despite limiting the issue at the January 7<sup>th</sup> hearing as to whether an on-the-ground survey was required, the court went beyond this issue in its Order and rendered findings regarding the accuracy of the survey map.

The court noted in its Order that Black's Law Dictionary, Sixth Edition, defines "survey" as a "process by which a parcel of land is measured and its boundaries and contents ascertained; also a map, plat, or statement of the result of such survey, with the courses and distances and the quantity of land."

The court noted that Black's Law Dictionary, Sixth Edition, defines "map" as "a representation of the earth's surface, or some portion of it, showing the relative position of the parts represented, usually on a flat surface."

The court further noted that the word "accurate" is defined in the Random House Unabridged Dictionary, Second Edition as "free from error or defect; consistent with a standard rule or model; precise; careful or meticulous."

The court found, among other things, that the City of White Sulphur Springs' survey map was pieced together from a variety of both public and private documents, and, contrary to the City submission, adopted the Greenbrier Hotel's expert's opinion and found that the survey map provided for in the Petition for Annexation did not permit one to tell where the accurate boundaries of the property to be annexed lies. The court then found and held that the Petition for Annexation was not accompanied by an

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<sup>2</sup> See Exhibit B to the Petition for Appeal.

“accurate survey map.” The City never cross-examined the Hotel’s engineer because it believed the matter was being submitted on a pure legal question.

It was, and is, the City’s position that the survey map attached to the Petition for Annexation was an accurate survey map. It was, and is also, the City’s position that West Virginia Code §8-6-2(a) does not require an on-site, or on-the-ground survey if the map is prepared by an engineer or surveyor and accurately depicts the boundary of the area to be annexed such that the property owners of property to be annexed can determine the boundary of the annexation.

Prior to the Court’s entry of its final order, the City provided the court with an Order that the City believed accurately reflected what the City agreed to do and what the Court ruled.<sup>3</sup> In the letter attached to the order counsel for the City explained that it did not agree to submit to the Court the issue of whether the survey map was accurate or not accurate and respectfully requested an opportunity to approach the Court with respect to this matter if there was some misunderstanding with regard to the issue submitted. The court ignored this letter and did not permit the City an opportunity prior to entering its final order.

The Circuit Court erred in two respects. First, the Circuit Court erred in its interpretation of West Virginia Code §8-6-2(a). Second, the Circuit Court erred in denying the City an opportunity to be heard on the issue of whether the survey map attached to the City’s annexation petition was an accurate survey map.

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<sup>3</sup> See Exhibit C to the Petition for Appeal.

V. ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT ERRED IN ITS INTERPRETATION OF WEST VIRGINIA CODE §8-6-2(a).
- B. THE CIRCUIT COURT DENIED DEFENDANTS' DUE PROCESS RIGHTS BY DENYING THEM AN OPPORTUNITY TO BE HEARD ON THE ISSUE OF WHETHER THE SURVEY MAP ATTACHED TO DEFENDANTS' PETITION FOR ANNEXATION WAS AN ACCURATE SURVEY MAP.

VI. POINTS AND AUTHORITIES AND ARGUMENT

- A. THE CIRCUIT COURT ERRED IN ITS INTERPRETATION OF WEST VIRGINIA CODE §8-6-2(a) BECAUSE IT FAILED TO ADHERE TO THE RULES OF STATUTORY CONSTRUCTION.

Where there is some ambiguity in a statute or some uncertainty as to the meaning intended, courts may resort to the rules of construction of statutes. 17 M.J., Statutes, §31; see also Soto v. Hope Natural Gas Co., 142 W.Va. 373, 95 S.E.2d 769(1956); Eggleton v. State Workmen's Comp. Comm'r, 158 W.Va. 973, 214 S.E.2d 864 (1975); State v. Riley, 158 W.Va. 823, 215 S.E.2d 460 (1975); Medical Care Inc. v. Chiropody Assoc., 141 W.Va. 741, 93 S.E.2d 38 (1956); Linger v. Jennings, 143 W.Va. 57, 99 S.E.2d 740 (1957).

While courts may resort to the rules of statutory construction to interpret ambiguous language within a statute, courts must be careful not to read into a statute something that is not within the manifest intention of the legislature, as gathered from the statute itself. 17 M.J., Statutes, §65. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. Id; see also Faulkner v.

South Boston, 127 S.E. 380 (1925). Courts cannot, by construction, interpolate into statutes words that do not appear there when such interpolation is not plainly deducible from the context or other portions of the statute. 17 M.J., Statutes, § 51; see also Lewis v. Musgrove, 80 W.Va. 714, 93 S.E. 820 (1917). Courts should never attempt to read into a provision a meaning not intended. 17 M.J., Statutes, §34; see also State v. Conley, 118 W.Va. 508, 190 S.E. 908 (1937); State v. Trent, 138 W.Va. 737, 77 S.E.2d 608(1953); Lane v. Bd. Of Trustees of Employees' Retirement and Benefit Fund, 139 W.Va. 878, 82 S.E.2d 179 (1954).

A trial court's interpretation of a statute is subject to de novo review. 17 M.J., Statutes, § 31; See also Brown & Co. Sec. Corp. v. Balbus, 933 F.2d 246 (4<sup>th</sup> Cir. 1991).

Pursuant to the rules of statutory construction, there are four traditional methods of judicial interpretation of words used in statutes and not specifically defined in them: (1) Dictionary definitions; (2) pronouncements by courts; (3) reliable extrajudicial commentary; and (4) definitions set or inferable from debates and proceedings of the bodies that drew the documents. 17 M.J., Statutes, §60; Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979).

The rules of statutory construction further provide that in the absence of the intended definition of the intended meaning of the words or terms used in a statute, the words or terms shall, in the interpretation of the statute, be given their common, ordinary and accepted meaning in the context in which they are used. 17 M.J., Statutes, § 60; see also Davis v. Hix, 140 W.Va. 398, 84 S.E.2d 404 (1954); State v. General Daniel Morgan Post No. 548, V.F.W., 144 W.Va. 137, 107 S.E.2d 353 (1959); Wooddell v. Dailey,

160 W.Va. 65, 230 S.E.2d 466 (1976); Ye Olde Apothecary v. McClellan, 163 W.Va. 19, 253 S.E.2d 545 (1979).

Due to lack of legislative history, the court below used the first method of interpretation above - dictionary definitions - to interpret ambiguous language within West Virginia Code §8-6-2(a). This statute provides:

Five percent or more of the freeholders of a municipality desiring to have territory annexed thereto may file a petition in writing with the governing body thereof setting forth the change proposed in the metes and bounds of the municipality and asking that a vote be taken upon the proposed change. The petition shall be verified and shall be accompanied by an *accurate survey map* showing the territory to be annexed to the corporate limit by the proposed change.

W.Va. Code §8-6-2(a) (emphasis added).

As noted by the court below, Black's Law Dictionary, Sixth Edition, defines "survey" as a "process by which a parcel of land is measured and its boundaries and contents ascertained; also a map, plat, or statement of the result of such survey, with the courses and distances and the quantity of land."

Black's Law Dictionary, Sixth Edition, defines "map" as "a representation of the earth's surface, or some portion of it, showing the relative position of the parts represented, usually on a flat surface."

Nowhere in the definition of "survey" does it say that a survey is a process by which land is measured "on the ground." The definition does not define survey as a process that must be conducted on the ground. It is simply a process by which land is measured and its boundaries and contents ascertained. Consistent with this definition, land can be measured and its boundaries and contents ascertained by reference to deeds

and surveys already of record with sufficient description of the property to be annexed, such that the annexed property can be easily identified.

The Circuit Court erred by reading into West Virginia Code §8-6-2(a) words and a meaning that simply were not intended by the legislature. Nothing within this statute, or within the context of this statute, requires there to be an on-the-ground survey map. The court below should have given the word "survey" its ordinary and accepted meaning within the context of the statute. The court interposed words within the statute to narrow the definition of "survey," when the court should have interpreted "survey" in a common, broad sense. If the legislature intended to narrow the definition of survey to an on-the-ground survey, it could have done so. The court cannot.

Defendants' position is clearer when examined in the context of the statute. The statute at issue provides a method by which a city can annex property for purposes of taxation and to provide services to the property holders within the boundaries of the property to be annexed. This statute does not govern boundary disputes between property owners. It simply provides that a reasonably accurate map must be prepared to permit one to determine whether they were or were not a part of the annexation. Thus, the Circuit Court clearly erred in its interpretation of West Virginia Code §8-6-2(a).

**B. THE CIRCUIT COURT DENIED DEFENDANTS' DUE PROCESS RIGHTS BY DENYING THEM AN OPPORTUNITY TO BE HEARD ON THE ISSUE OF WHETHER THE SURVEY MAP ATTACHED TO DEFENDANTS' PETITION FOR ANNEXATION WAS AN ACCURATE SURVEY MAP.**

The opportunity to be heard is a fundamental requirement of the due process clause of the federal and state constitutions. **Article XIV, Section 1, Federal Constitution and Article III, Section 10, State Constitution;** Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287(1970); Simpson v. Stanton, 119 W.Va. 235, 193 S.E. 64 (1937); State ex rel. Bowen v. Flowers, 155 W.Va. 389, 184 S.E.2d 611 (1971). One of the basic constitutional guarantees of due process is that no one shall be deprived of a substantial right without notice and opportunity to be heard in a meaningful manner. In re Willis, 157 W.Va. 225, 239, 207 S.E.2d 129, 138 (1973).

During the January 7<sup>th</sup> hearing, the court narrowed the issue to be decided in this case to whether West Virginia Code §8-6-2(a) requires an on-the-ground survey map. Therefore, due to the court limiting the issue to whether an on-the-ground survey was required, despite being prepared to do so, Defendants did not present evidence in support of their position that their survey map was an accurate survey map under West Virginia Code §8-6-2(a).

The court entered its "Final Order Granting Permanent Injunction" on February 9, 2004. Despite limiting the issue at the January 7<sup>th</sup> hearing to whether an on-the-ground survey was required, the court went beyond this issue in its Order and rendered findings regarding the accuracy of the survey map.

The court noted that the word "accurate" is defined in the Random House Unabridged Dictionary, Second Edition as "free from error or defect; consistent with a standard rule or model; precise; careful or meticulous." The court then found, among other things, that the City of White Sulphur Springs' survey map was pieced together from a variety of both public and private documents, and adopted Plaintiff's expert's opinion and found that the survey map provided for in the Petition for Annexation did not permit one to tell where the accurate boundaries of the property to be annexed lies. The court then found and held that the Petition for Annexation was not accompanied by an "accurate survey map."

It was Defendants' position that the survey map attached to the Petition for Annexation was an accurate survey map and Defendants were prepared to support their position with direct evidence and by cross examination of Plaintiffs' expert.

Prior to the Court's entry of its final order, Defendants provided the court with an Order that Defendants believed accurately reflected what the Defendants agreed to do at the January 7<sup>th</sup> hearing and what the Court ruled at that hearing. Counsel for Defendants explained that Defendants did not agree to submit to the Court the issue of whether the survey map was accurate or not accurate and respectfully requested an opportunity to approach the Court with respect to this matter if there was some misunderstanding with regard to the issue submitted. The Court did not approve Defendants proposed Order and refused the Defendants the opportunity to be heard on the accuracy issue prior to entering its final order.

The Circuit Court's actions clearly denied Defendants the opportunity to be heard and defend themselves. First, the court permitted the Plaintiffs to offer evidence regarding the accuracy of the survey map and the Defendants reserved their right to present direct evidence and cross examine Plaintiffs' expert. Then, the court narrowed the issue to whether West Virginia Code §8-6-2(a) required an on-the-ground survey alleviating the need for Defendants to present evidence in support of their position that the survey map was accurate. Then, despite narrowing the issue, the court adopted Plaintiffs' expert's opinions regarding the accuracy of the survey map in its final order and then refused Defendants request to be heard on the issue of accuracy. Thus, the court denied the Defendants the opportunity to be heard and defend themselves as required by the due process clause of the federal and state constitutions.

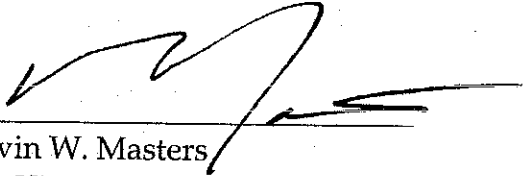
#### **VII. RELIEF**

In conclusion, the City respectfully requests that this Honorable Court reverse the Circuit Court's ruling which permanently enjoined it from taking any action pursuant to the Petition for Annexation dated January 15, 2003. The City requests that the case be remanded based on the court's denial of its due process rights. Further, the City requests that it be awarded the costs and expenses incurred in prosecuting this appeal, including reasonable attorney fees, as well as any other relief deemed appropriate by the Court.

Respectfully submitted,

CITY OF WHITE SULPHUR SPRINGS,

By Counsel



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS  
APPEAL NO. 32157

CSX HOTELS, INC., d/b/a THE GREENBRIER  
RESORT, a West Virginia corporation,

Plaintiff Below/ Appellee,

vs.

Civil Action No. 02-C-38

CITY OF WHITE SULPHUR SPRINGS, WEST VIRGINIA,  
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JAMES HYLTON, DELORES MATTOX, DON MCCOY  
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Defendants Below/ Appellants.

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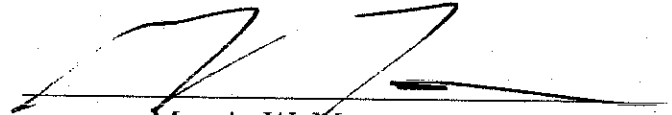
Defendants Below/ Appellants.

CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for Defendants Below/ Appellants, do hereby  
certify that a true and exact copy of the foregoing "Brief of Appellants" was served  
upon:

Andrew S. Zettle  
Huddleston, Bolen, Beatty, Porter & Copen, LLP  
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*Counsel for Plaintiffs Below/Appellees*

in an envelope properly stamped, addressed and deposited in the regular course of the  
United States Mail, this 21 day of December, 2004.



Marvin W. Masters  
W. Va. State Bar No. 2539

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