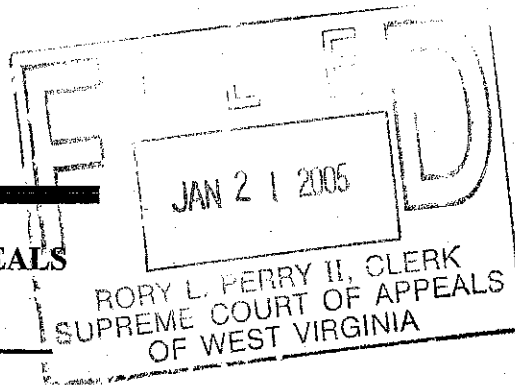


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**IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA**

**APPEAL NO. 32157
CIVIL ACTION NOS. 02-C-38 and 03-C-19**

**FREDERICK W. KRETZER, CAROLYN B. KRETZER; THE GREENBRIER
SPORTING CLUB DEVELOPMENT COMPANY, LLC, A Delaware Limited Liability
Company; And CSX HOTELS, INC., A West Virginia Corporation,**

Plaintiffs/ Respondents,

v.

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

Defendants/ Petitioners.

FROM THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

**RESPONSE BRIEF OF PLAINTIFFS; FREDERICK W. KRETZER,
CAROLYN B. KRETZER; THE GREENBRIER SPORTING CLUB
DEVELOPMENT COMPANY, LLC, A Delaware Limited Liability Company; And
CSX HOTELS, INC., A West Virginia Corporation**

Andrew S. Zettle, Esquire (WVSB #4193)
Daniel J. Konrad (WVSB #2088)
HUDDLESTON BOLEN LLP
611 Third Avenue
Post Office Box 2185
Huntington, WV 25722
304-529-6181
Counsel for Plaintiffs/Respondents

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I. INTRODUCTION

Plaintiffs/Respondents, Frederick W. Kretzer, Carolyn B. Kretzer, The Greenbrier Sporting Club Development Company, LLC, and CSX Hotels, Inc. (hereinafter collectively referred to as "plaintiffs") submit this Response Brief in opposition to the Appeal of the Defendants/Petitioners (hereinafter collectively referred to as "the City"), filed in this case from an Order of the Circuit Court of Greenbrier County by which the Court found and held that a Petition for Annexation was not accompanied by an "accurate survey map", and that the Petition for Annexation was therefore fatally flawed, and that the City of White Sulphur Springs should be permanently enjoined from proceeding with the Petition for Annexation dated January 15, 2003. For the reasons set forth below, the Order of the Circuit Court of Greenbrier County should be affirmed.

II. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER COURT

The Circuit Court had before it an "Amended Complaint and Petition for Writ of Certiorari or Writ of Error" filed on January 31, 2003 by Frederick W. Kretzer, Carolyn B. Kretzer and the Greenbrier Sporting Club, Inc. against the City of White Sulphur Springs, West Virginia, Debra Jo Fogus, Chris Hanna, Paul Hobbs, James Hylton, Delores Mattox, Don McCoy and Rick Romeo"¹, Civil Action No. 03-C-19, and an "Amended Complaint and Petition for Writ of Certiorari" filed by CSX Hotels d/b/a The Greenbrier against the City of White Sulphur Springs, West Virginia, Debra Jo Fogus, Chris Hanna, Paul Hobbs, James Hylton, Delores

¹ Debra Jo Fogus, Chris Hanna, Paul Hobbs, James Hylton, Delores Mattox and Don McCoy constituted the then City Council for White Sulphur Springs. Rick Romeo was the Recorder for the City of White Sulphur Springs.

Mattox, Don McCoy and Rick Romeo”, Civil Action No. 02-C-38. By Order dated September 5, 2003 the two matters were consolidated.

The “Complaint and Petition” in both matters before the Court arose out of the same set of operative facts and involved the City’s acceptance of a Petition for Annexation that proposed to annex land into the boundaries of the City of White Sulphur Springs and the City’s entry of an Order for Annexation Election that scheduled elections with respect to the Petition for Annexation.

The plaintiffs requested that the City’s resolution accepting the Petition for Annexation and the City’s Order for Annexation Election be determined to be null and void, and that the City be enjoined from the holding an annexation election pursuant to a flawed Petition for Annexation.

The Circuit Court held various hearings on the issues before it and, by Final Order Granting Permanent Injunction entered February 9, 2004, found that the Petition for Annexation was not accompanied by an “accurate survey map” as specifically required by statute, and permanently enjoined any further action with respect to the deficient Petition for Annexation. The Circuit Court did not reach any decision on any of the other issues raised in the Complaints and Petitions, *i.e.* mainly (i) did the Order for Annexation Election contain a proper statement of a plan for providing services to the territory sought to be annexed, (ii) did Debra Fogus, as lead petitioner, have a conflict of interest when she voted to accept her own Petition for Annexation and certify it for an election, (iii) did the Chief of Police/Council Member improperly solicit and obtain signatures while in police uniform, and (iv) did the original Order for Annexation Election violate various voting laws.

III. STATEMENT OF FACTS

On January 15, 2003, Debra Jo Fogus, acting in her individual capacity, presented, as lead petitioner, a Petition for Annexation and a purported "map" to the City at the City's regularly scheduled council meeting. Ms. Fogus sought thereby to initiate the procedure for annexation by election specified by West Virginia Code § 8-6-2. The Petition for Annexation was accepted by Resolution 2003-1 of the City by a vote of 3 to 2 in which Debra Jo Fogus, acting in her capacity as Mayor of the City of White Sulphur Springs, cast a vote for the Resolution accepting the Petition for Annexation. Pursuant to Resolution 2003-1, the City, by its Recorder, issued an Order For Annexation Election incorporating therein the metes and bounds description set forth in the Petition For Annexation purporting to describe the territory proposed for annexation.

West Virginia Code § 8-6-2(a) specifies that the petition shall set forth the change proposed in metes and bounds and be accompanied by an accurate survey map showing the territory to be annexed by the proposed change:

(a) 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 limits by the proposed change.**

From the outset of this proceeding it has been obvious to all parties that the "map" presented with the Petition for Annexation did not accurately depict the area separately described by metes and bounds attached to the Petition for Annexation. The "map" that was presented with the Annexation Petition (a reduced copy of which is attached at page 10 for the convenience of the Court) depicts an area enclosed by a continuous boundary. However, a plot of the description set

forth by metes and bounds and attached to the Petition for Annexation had a closure error, *i.e.* the distance between the point of beginning and the point of ending, of 2,204.16 feet, *i.e.* over four tenths of a mile (Record page 347 - October 30, 2003, Transcript at page 17, line 2 to Page 20, line 12, Plaintiffs' Exhibit B). For the Court's convenience, plaintiff's Exhibit B, which plotted the metes and bounds description set forth on the Petition for Annexation is attached hereto in a reduced format on page 11. In paragraph 20 of its Answer To Amended Complaint (Civil Action No. 03-C-19) the City asserted that its so-called "map" was correct and characterized the discrepancy between the map and the metes and bounds description in the Petition for Annexation as arising from "typographical errors."

Although plaintiffs contended that the area sought to be annexed must be accurately specified in the Petition for Annexation by metes and bounds, and that the map is merely illustrative of the metes and bounds description contained in the Petition for Annexation, the Court directed at the hearing held on September 4, 2003, that the City submit a revised metes and bounds description to "amend, correct or otherwise make right their map and description, metes and bounds description, and provide that information to the plaintiffs, showing the corrections" (Record page 346 - September 4, 2003, Transcript at page 12, line 10 to line 15).

Pursuant to the Court's direction, the City submitted a revised description that expanded 3 acknowledged "typographical errors" to 10 "corrected" calls, and included complex changes of distance and bearing that are not typical of simple "typographical errors." For instance, the City changed the 110th call in the Petition from "north 67 degrees 52 minutes 42 seconds west, 70.00 feet to a point" to "south 56 degrees 37 minutes 39 seconds west, 70.00 feet to a point." Similarly, the City changed the 111th call in the Petition for Annexation from "south 87 degrees

51 minutes 56 seconds east, 5.00 feet to a point” to “south 33 degrees 10 minutes 26 seconds east, 5.00 feet to a point.” Likewise, the City changed the 41st call in the Petition for Annexation from “south 35 degrees 09 minutes 28 seconds west, 240.00 feet to a point,” to “south 35 degrees 09 minutes 28 seconds west, 483.00 feet to a point.”

The changes to the metes and bounds description proposed by the City as a “revised description” caused a change from the original description affecting over 850 acres (October 30, 2003, Transcript at page 23, line 3 to page 25, line 12; Plaintiffs’ Exhibit E), and a net change of more than 130 acres (Record page 347 - October 30, 2003, Transcript at page 39, line 21 to page 40, line 8, and Affidavit of Robert S. Martin - Record pages 300 - 301). Notwithstanding such significant changes in the size and shape of the area proposed for annexation, the “revised description” prepared by the City has never been submitted to or ratified by the freeholder petitioners who had signed the admittedly inaccurate Petition For Annexation.

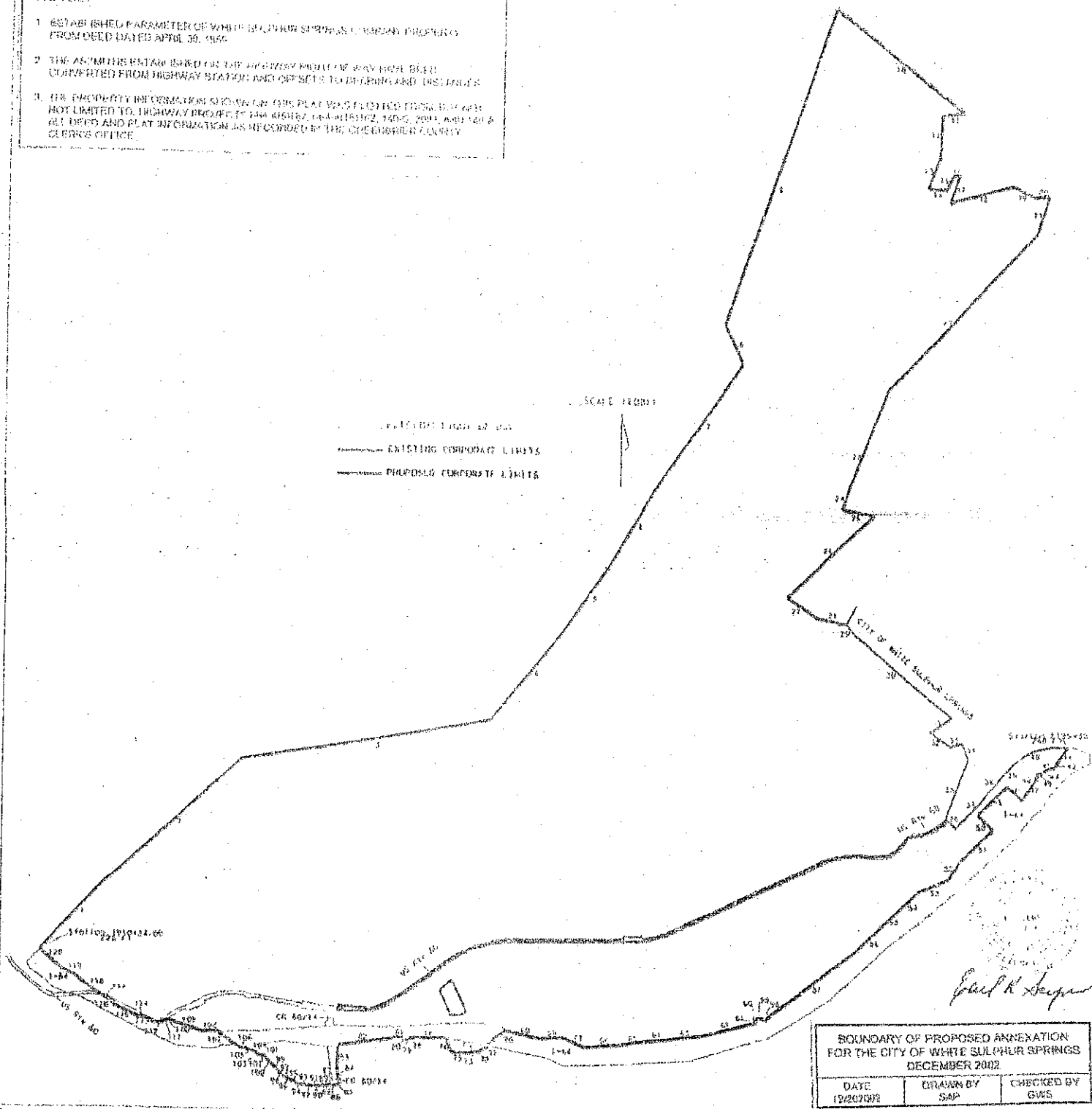
Despite the efforts of the City to improve the metes and bounds description, the plot of the “revised description” still failed to produce a plot that would close. Even after the City’s revisions, the closure error still remained 950.93 feet (Record page 347 - October 30, 2003, Transcript at page 21, line 7 to page 22, line 20). For the Court’s convenience, plaintiff’s Exhibit D, which plotted the revised metes and bounds description is attached hereto in a reduced format on page 12. Additionally, the relative locations of certain segments of the boundary described by the metes and bounds descriptions and which allegedly ran with identifiable landmarks did not accurately correspond to the locations of such identifiable and known landmarks on maps prepared by the United States Geological Survey (Record page 347 - October 30, 2003, Transcript at page 31, line 4 to page 35, line 4; and page 35, line 6 to page 36, line 9).

Quite simply, the "map" that was submitted with the Petition for Annexation does not accurately show the area proposed for annexation in the Petition for Annexation since, when plotted, neither the original metes and bounds description from the Petition for Annexation, nor the plot of the "revised description," close; while the "map" purports to describe an area enclosed by a continuous boundary. Not only does the metes and bounds descriptions (original and revised) not close, they do not accurately correspond to fixed landmarks located on maps prepared by the United States Geological Survey.

The Circuit Court found in its Final Order Granting Permanent Injunction that the metes and bounds description attached to the Annexation Petition "does not close and had certain overlaps, and that the survey map provided in the Petition for Annexation did not permit one to tell where the accurate boundaries of the property to be annexed lies." Judge Hatcher further found "both the metes and bounds description and the survey map to be grossly inaccurate and admittedly done as a piecemeal document."

NOTES:

1. ESTABLISHED PARAMETER OF WHITE SULPHUR SPRINGS COMPANY PROPERTY FROM DEED DATED APRIL 30, 1966.
2. THE ANTIMONITE BARRIER ON THE HIGHWAY FRONT OF RAY HIGH BUILT CONVEYED FROM HIGHWAY STATION AND OFFSETS TO DEEDS AND INSTANCES.
3. THE PROPERTY INFORMATION SHOWN ON THIS PLAT WAS OBTAINED FROM THE CITY NOT LIMITED TO HIGHWAY PROJECT LAW RIGHTS AND RIGHTS 150-2, 2001 AND 2002 & ALL DEED AND PLAT INFORMATION AS RECORDED BY THE CLERK'S OFFICE.

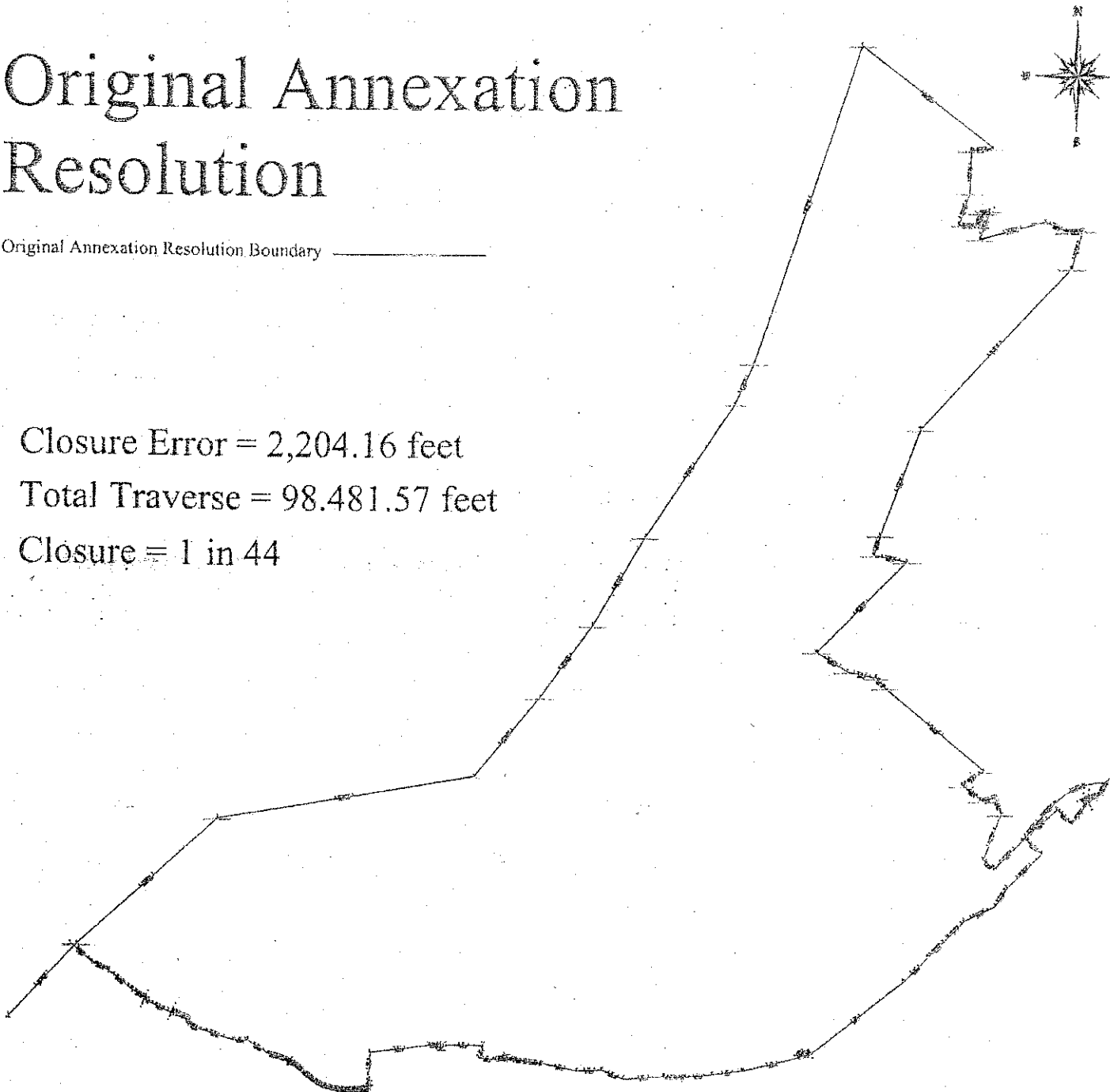


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Original Annexation Resolution

Original Annexation Resolution Boundary _____

Closure Error = 2,204.16 feet
Total Traverse = 98,481.57 feet
Closure = 1 in 44



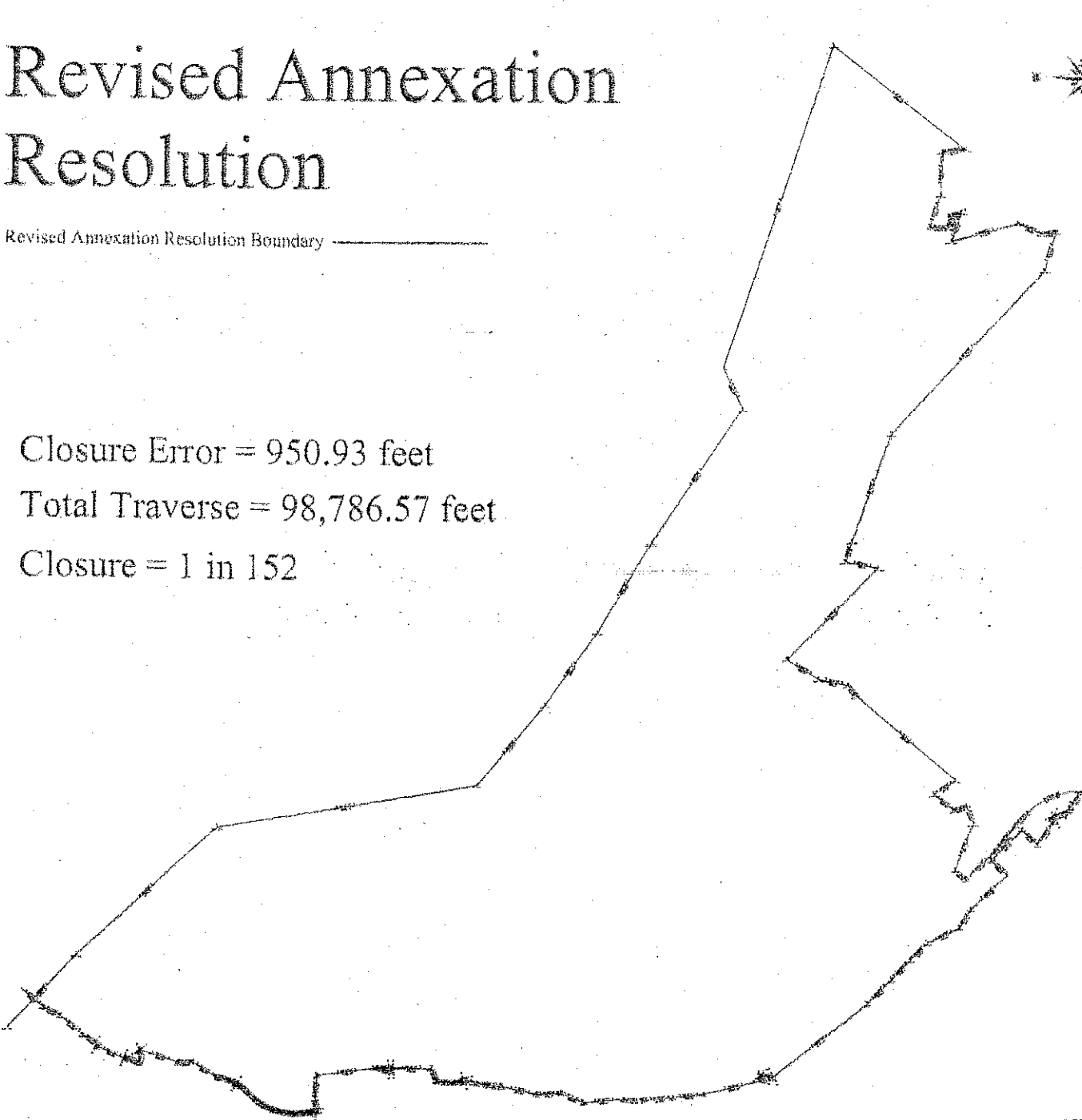
Scale: 1" = 400'



Revised Annexation Resolution

Revised Annexation Resolution Boundary

Closure Error = 950.93 feet
Total Traverse = 98,786.57 feet
Closure = 1 in 152



Scale : 1" = 800'



IV. DISCUSSION OF THE LAW

A. The Court Correctly Determined That The Petition For Annexation Was Not Accompanied By An “Accurate Survey Map” Showing The Territory Proposed To Be Annexed, As Required By West Virginia Code § 8-6-2(a).

(1). The purported “map” accepted by the City did not accurately show the territory proposed to be annexed

The statutory procedure prescribed by West Virginia Code §8-6-2 for annexation by election may be initiated by a petition of freeholders of the city. As noted above, West Virginia Code §8-6-2(a) requires that a Petition for Annexation set forth “the change proposed in the metes and bounds of the municipality” and directs that the Petition “shall be accompanied by an accurate survey map showing the territory to be annexed to the corporate limits by the proposed change.” By requiring that the Petition for Annexation describe the area by “metes and bounds,” the Legislature made clear that the area to be annexed must be defined with specificity. Such specificity in defining the boundary of the property proposed for annexation is necessary, first, to define those persons who will be entitled to vote in the annexation election. Secondly, such specificity is necessary to define the jurisdiction of the city, so that clear notice is given to affected persons of the extent of the city’s police jurisdiction, and the extent of the property that would be subject to the powers of the city, such as zoning and taxation. Without such specificity, the exercise of the city’s police powers would raise issues of due process and inevitably embroil the City and affected persons in litigation and disputes regarding the extent of the City’s jurisdiction.

Thus, while the Legislature provided a procedure that allows the petitioners to define the area proposed for annexation, the Legislature required that such petitioners describe the area by “metes

and bounds” so that the City and other persons affected by annexation petition will not be burdened by the uncertainty and expense that would follow from an ambiguous and ill-defined boundary description.

Since even an accurate metes and bounds description is likely to be unintelligible to persons without training in survey measurements, the Legislature also required that the petitioners accompany the petition with “an accurate survey map showing the territory to be annexed to the corporate limits by the proposed change,” so that persons unfamiliar with metes and bounds descriptions could ascertain the extent of the property proposed for annexation.

It is important to note that West Virginia Code §8-6-2(a) provides that the Petition for Annexation shall set forth, i.e. define, the extent of the proposed boundary change; and directs that the survey map show, i.e. depict, the “proposed change” set forth in the Petition. The Legislature further made clear that a generalized sketch of the area proposed to be taken was insufficient, by specifically requiring that the territory proposed to be taken be shown by an “accurate survey map.” The Legislature thus required that the metes and bounds description in the Petition for Annexation and the survey map must accurately describe and depict the same boundary line. Without such agreement, ambiguity regarding the intended extent of the proposed boundary change would be inevitable.

The City makes the unsubstantiated assertion at page 3 of its memorandum that:

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.

Contrary to such assertion, Judge Hatcher found in the Final Order Granting Permanent Injunction that the metes and bounds description attached to the Annexation Petition “does not close and had certain overlaps, and that the survey map provided in the Petition for Annexation did not permit one to tell where the accurate boundaries of the property to be annexed lies.” Judge Hatcher further found “both the metes and bounds description and the survey map to be grossly inaccurate and admittedly done as a piecemeal document” (Record pages 329-331).

The City admitted from the outset that the Petition for Annexation lacked an accurate description and survey map. In paragraph 20 of its Answer To Amended Complaint (Civil Action No. 03-C-19), the City initially admitted errors that it sought to characterize as “typographical errors.” However, the City’s subsequent attempt to revise the description dramatically revealed that the defects in the description and map were substantial and material. The revised description tendered by the City contained 10 calls that differed from the calls set forth in the description in the Petition For Annexation. The changes proposed by the City were sufficient to cause a discrepancy affecting over 850 acres and produced a net change of more than 130 acres. While the City’s attempted revisions reduced the closure error (*i.e.* the distance between the point of beginning and the point of ending) of the description from 2,204.16 feet to 950.93 feet, neither description was accurately depicted by the purported “map” that was submitted with the Petition For Annexation. The “map” depicted a closed and continuous boundary, while neither the original nor the revised description described a boundary that closed, or produced a plat that was consistent with known landmarks described in the various calls.

The City’s determination to accept the Petition for Annexation and to order the scheduling of elections was thus clearly a violation of the City’s statutory duty to reject the defective Petition

For Annexation, and the Circuit Court was correct in permanently enjoining any further action relative to the defective Petition for Annexation.

- (2). A “survey map” requires a “survey” and must be prepared in accordance with the requirements of West Virginia Code § 30-13A-1 *et seq.* regarding the performance of surveys and the preparation of survey maps.

The West Virginia Legislature, in West Virginia Code § 8-6-2, requires that an accurate “survey map” accompany every Petition for Annexation filed in West Virginia. In using the phrase “accurate survey map”, the legislature intended that the documents attached to the Petition for Annexation as a “survey map” be (i) accurate and be (ii) prepared from an actual survey performed by one qualified to perform surveys. In the matter presently before this Court, Judge Hatcher correctly held that the purported “map” attached to the Petition for Annexation was neither accurate, nor a “survey map,” as required by statute, and therefore enjoined the City from proceeding on the Petition for Annexation.

West Virginia Code §8-6-2(a) requires that the Petition for Annexation set forth “the change proposed in the metes and bounds of the municipality,” and directs that the Petition “shall be accompanied by an **accurate survey map** showing the territory to be annexed to the corporate limits by the proposed change.”

The City admits that the description and purported “survey map” attached to the Petition for Annexation were **not** prepared by a licensed surveyor and were **not** prepared from “an actual on-the-ground survey.” The Circuit Court found “that the City of White Sulphur Springs admitted the survey map, as well as their metes and bounds description, attached to the Petition for Annexation was pieced together from a variety of documents, including both public and

private documents” (Final Order Granting Permanent Injunction, entered February 9, 2004 – Record pages 328 - 331).

The City argues that the purported “map” which accompanied the Petition was sufficient because it was prepared by a registered engineer from a compilation of deed descriptions. The City’s argument, however, is flawed. West Virginia Code §8-6-2(a) must be read *in para materia* with West Virginia Code § 30-13A-1 *et seq.*, in which the West Virginia Legislature directed that all “survey” maps must be prepared by a Licensed Land Surveyor in a manner conforming to specified technical standards.

In the instant case, it is not necessary to look beyond the face of the purported “map” to conclude, as a matter of law², that it is not a “survey map,” because it does not bear the seal of a Licensed Land Surveyor. West Virginia Code § 30-13A-1 provides that, except for specific circumstances that are not relevant to this proceeding, persons may not engage in the practice of land surveying in West Virginia unless they have obtained a license as a Licensed Land Surveyor from the State Board of Examiners of Land Surveyors. West Virginia Code §30-13A-2(d) defines the preparation of survey maps and drawings as the practice of land surveying that may only lawfully be performed by Licensed Land Surveyors who have satisfactorily met the requirements of the State Board of Examiners of Land Surveyors. West Virginia Code § 30-13A-11 requires that each Licensed Land Surveyor obtain a seal or stamp bearing his name and the legend, “Licensed Land Surveyor,” and requires that all plans, plats, maps, drawings, and reports issued by the Licensed Land Surveyor shall be stamped with his seal or stamp. West Virginia Code §

² Although the Circuit Court could have granted the plaintiffs injunctive relief on this ground alone, the Circuit Court did not base its decision on this failure.

30-13A-12, in turn, directs that public officials of this State not accept maps without the appropriate seal of a Licensed Land Surveyor.

Contrary to such statutory directive, the City accepted a purported "map" that did not bear the seal of a Licensed Land Surveyor. Instead, it bears only the seal of a registered professional engineer. A registered professional engineer is not the same as a Licensed Land Surveyor, and West Virginia Code § 30-13A-7 does not exempt professional engineers from the land surveyor-licensing requirement. West Virginia Code § 30-13A-7 only provided a limited window for professional engineers to obtain a license as a Licensed Land Surveyor without examination, and then only upon the submission of specified "proof of surveying experience." The preparation of the purported "map" by a person other than a Licensed Land Surveyor was thus by itself a sufficient basis to conclude the purported "map" accepted by the City was not an "accurate survey map."

Additionally and most importantly, in requiring a "survey map," the Legislature not only specified by whom such map must be prepared, but also required that the survey map be prepared in accordance with the minimum technical criteria specified in West Virginia Code § 30-13A-18.

West Virginia Code § 30-13A-18 provides that:

The purpose of these standards is to establish minimum technical criteria to govern the performance of surveyors when more stringent specifications are not required by other agencies, contract, etc. Further, the purpose is to protect the inhabitants of this state from dishonest or incompetent surveying, and generally to protect the public welfare.

* * *

(d) Distance will be **measured** in feet or meters, or fractions thereof, and angles will be **measured** in degrees or parts thereof. These will be **measured** to a precision that will produce the desired

level of accuracy. Areas will be **measured** to a precision consistent with the purpose of the survey. All **measuring devices** will be checked periodically for accuracy and condition.

The West Virginia Legislature thus specified that, in order to assure that the survey is prepared in a manner sufficient to protect the public from incompetent surveying, all calls of distance and angle must be determined by a Licensed Land Surveyor by the taking of measurements.

In its Order, the Court noted that, “the word ‘survey’ from Black’s Law Dictionary, Sixth Edition, is defined as ‘the process by which a parcel of land is **measured** and its boundaries ascertained’” (emphasis added). The dictionary definition of “survey” relied upon by the Circuit Court was wholly consistent with the legislative directive in West Virginia Code § 30-13A-18 that a survey shall be derived from actual measurements.

Thus, both the common meaning of the word “survey” and the statutorily established criteria for a “survey” focus on the requirement that a “survey” involve the taking of actual “measurements.” However, in the instant case, the City admits that the purported “map” was prepared from an assemblage of calls derived from various documents without any effort to directly “measure” the distances or angles set forth or to ascertain by a field survey the accuracy of the documents from which the assembled calls were taken. Such an assemblage of data from documents of varying and unknown accuracy is inherently unreliable and does not conform to the minimum criteria established by the Legislature for a valid survey or the common meaning of the term “survey map.”

The City’s argument that the preparation of an “accurate survey map” does not require an actual “survey,” as that term is generally defined and statutorily described, ignores the basic tenet

of statutory construction that each word of a statute should be given meaning. See Syllabus Points 3 and 4 of *Osborne v. United States*, 211 W. Va. 667, 567 S.E.2d 677 (W.Va. 2002):

3. "It is presumed the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause thereof no function to perform, or makes it, in effect, a mere repetition of another word, phrase or clause thereof, must be rejected as being unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective." Syllabus point 7, *Ex parte Watson*, 82 W.Va. 201, 95 S.E.2d 648 (1918).

4. " 'Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language. Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.' Syllabus point 6, in part, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984)." Syllabus point 2, *State v. Snodgrass*, 207 W.Va. 631, 535 S.E.2d 475 (2000).

The Legislature did not merely specify that the Petition be accompanied by an "accurate map," but inserted the word "survey" to require that the map be prepared in compliance with the statutorily mandated requirements of West Virginia Code § 30-13A-1 *et seq.* regarding the performance of surveys and the preparation of survey maps.

The City also argues that an actual survey would be too expensive and that West Virginia Code § 8-6-2 should not be construed in a manner that makes its use impractical. The City's argument fails to acknowledge that West Virginia Code § 30-13A-1 *et seq.* (which specifies standards for surveys) authorizes the use of GPS, i.e. global positioning system technology, which can be used to minimize the cost of the survey. With GPS technology, an area can be described with as few as three points. Of course, as more points are added to the description, the cost of the survey increases, but so does the difficulty in identifying those persons entitled to vote in the

annexation election and in identifying the new boundary and the extent of the city's jurisdiction, if the annexation is approved. The Legislature has balanced these competing interests and has determined that the area proposed for annexation must be described by "metes and bounds" and must be shown by and "accurate survey map" prepared in accordance with the statutorily established procedures and standards that the Legislature has specified for the surveys to assure the accuracy of boundaries. It is entirely appropriate for the Legislature to specify as a condition of annexation that the petitioners describe the area proposed for annexation with the degree of specificity that the Legislature deems appropriate to facilitate governmental functions.

The failure of the Petition for Annexation to properly set forth the "metes and bounds" of the area proposed to be annexed and to provide an "accurate survey map" justified the Circuit Court's entry of a permanent injunction prohibiting the City from taking further action pursuant to the defective Petition for Annexation.

- (3). **The City was without authority to unilaterally attempt to amend or correct the metes and bounds description or purported survey map presented to the City.**

The City's sole statutory function with regard to the boundary of the proposed annexation was to act as the gatekeeper to determine whether the description in the Petition For Annexation and accompanying survey map satisfied the statutory requirements. The City had no statutory role under West Virginia Code §8-6-2 to specify the boundary of the territory proposed for annexation, and the City had no right or authority to alter or amend the description stated in the Petition For Annexation.

Under the procedure for annexation by election established by West Virginia Code §8-6-2, which is herein at issue, the City cannot initiate the process or change the boundary of the

proposed territory. The sole role of the municipal government relating to the description of the territory proposed for annexation is to act as a gatekeeper to make an initial determination whether the Petition for Annexation contains a sufficient metes and bounds description of the territory proposed for annexation, and whether an "accurate survey map" accompanies the Petition.

In construing the predecessor of West Virginia Code §8-6-2 in *Shank v. Town of Ravenswood*, 43 W. Va. 242, 27 S.E. 223 (W.Va. 1897), the West Virginia Supreme Court of Appeals succinctly delineated the restricted gatekeeper role of the municipality.

The statute (section 48, c. 47, Code) is not directory, but mandatory. When a petition such as it prescribes comes before a council, **it has the right, as a preliminary or jurisdictional question, to see that five persons who are freeholders have signed it, and that they are freeholders, and that it sets forth with sufficient definiteness the proposed change;** but if it is such a petition as the law demands, then, as the law says "the council shall thereupon order a vote," it must do so (emphasis added).

Id., 27 S.E. 223 at 224

The City was required to accept or reject the Petition For Annexation, as presented by petitioners; and the City was not empowered to amend or modify a flawed Petition For Annexation.

Where, as in the instant case, the Petition was admittedly defective and was accompanied by a map that is not a "survey map" and that did not accurately "show" the area described by the metes and bounds description, the City's statutory duty and sole function was to reject the Petition. Where the City fails to perform that duty, the reviewing Court must set aside the Order of Election and enjoin further action relative to the defective Petition for Annexation.

Only after the defective Petition is rejected, and a Petition with a new description is presented to the City, may the City authorize an election for a revised territory. In *Shank v. Town*

of *Ravenswood, supra*. a municipality was presented with two petitions with similar, but slightly differing descriptions of the territory proposed for annexation. The Supreme Court of Appeals rejected the contention that the municipality could choose the petition with the description preferred by the municipal government. The Court required that the municipality fully resolve the first petition, as submitted, before the second petition could be considered:

The petition of Shanks was presented to the council first, and at the same meeting a petition of Leonard and others, asking a vote on a change of boundary; covering all the territory included in the Shanks petition, and some additional territory. It was therefore a different proposition. The Shanks petition was disallowed, and afterwards, at the same meeting, the Leonard petition entertained, and a vote ordered upon it. It is argued that the council had the right to select which petition it would entertain. The Shanks petition was first in time. What was the duty of council? To order a vote upon it.

* * * *

But it is said there were two competing propositions, and the council could delay this until the other should be put. But it was absolutely rejected, and as it had come first, and had presented the subject-matter of a change of boundary, the second should be delayed, rather than the first. In fact, as this Shanks petition first set the powers of the council in motion, I think the council had the power, and was under the duty, to delay the other, because the matter of another change was pending.

Id., 27 S.E. 223 at 224

Thus, in the instant case, the City was required to reject the Petition for Annexation as it was presented to the City, and can order an annexation election only after a new and distinct petition in proper form is presented to the City.

B. For Tactical Reasons, The City Chose Not To Cross-Examine The Licensed Land Surveyor Called To Testify By Plaintiffs Or To Present Evidence Regarding The Accuracy Of The Map And Description, And Cannot Now Claim A Lack Of Due Process.

The City contends that it was denied "due process" because it was not provided an opportunity to present evidence regarding the adequacy of the map and description, or to cross-examine the Licensed Land Surveyor who was called by plaintiffs to testify at the hearing held on October 30, 2003. However, due process was fully afforded to the City by notice of the subject of such hearing to be held on October 30, 2003, and the opportunity to present evidence and cross examine the witness presented at the noticed hearing.

At a hearing held on June 26, 2003 (Record page 345 – Transcript page 28, lines 2 – 3), the Court pointed out to Counsel for the City that, "You do have admitted problems with your description, that you call clerical errors, at least three in number." The City was given thirty days to analyze and review the acknowledged flaws in the Petition for Annexation and to then advise the Court whether it wanted to proceed with the litigation. Having been subsequently advised that the City wanted to proceed, a hearing was held on September 4, 2003, at which the Court directed that the City submit a revised description correcting the purported "clerical errors." The Court advised that it would then specifically consider whether the changes were "substantial," or whether they were "inconsequential, minor typographical changes."

By Order entered October 15, 2003, the Court "ORDERED that a hearing concerning the description of the proposed territory sought to be annexed" be conducted on October 30, 2003 (Record page 287). Although thus specifically advised that the hearing would focus on the description of the territory proposed for annexation, the City offered no witnesses to explain the

preparation of the metes and bounds description or map. Such notice and opportunity to offer evidence is in itself sufficient to put to rest any issues regarding whether the City was afforded "due process."

Notwithstanding that the Court had provided specific notice that the description of the proposed territory was to be the subject matter of the hearing, and that plaintiffs had from the outset contested the accuracy of the descriptions and map, counsel for the City expressed surprise that plaintiffs would actually call a Licensed Land Surveyor to testify regarding the accuracy of the descriptions and map. Judge Hatcher noted that such testimony was precisely the type of evidence that he had anticipated:

I, quite frankly, wasn't surprised at their taking it on in this depth to show -- try -- attempt to show me why the -- they think the map and the metes and bounds should not be and cannot be amended and they are technically deficient to the point that you should start all over. (Record page 347 - October 30, 2003, Transcript at page 8, line 7 to line 12)

Nevertheless, the Court granted the request of the City's counsel to allow the City to defer its cross-examination of plaintiffs' witness, and to present any rebuttal testimony that the City wished to offer (Record page 347 - October 30, 2003, Transcript at pages 11 - 12).

THE COURT: All right. So we'll proceed in that fashion.

And, Mr. Burnette, do you want to make a presentation now, or do you want to just wait and -- and I'll let you reserve your right to cross-examine this fellow additionally after today, after you get further prepared.

MR. BURNETTE: Your Honor, what I would like to do, if it pleases the Court, is like them to do their presentation. I'll reserve my right to cross, and reserve my right to present direct testimony.

THE COURT: All right. Let's go ahead, then, and have Mr. Konrad and Mr. Zettle make your presentation, and I'm ready to hear it.

And under the -- the procedure will be, you make your presentation. If Mr. Burnette chooses to cross-examine your witness today, he may do so.

After today, after he gets the transcript and discusses with his expert or experts, he will then decide what he chooses to do.

If he chooses to seek another hearing and present live testimony, he can certainly do that. If you want to take that testimony by way of deposition and submit it, you may do that.

You folks will certainly have an opportunity, if his witness offers testimony, to cross-examine. He also has the opportunity to ask that this witness come back for further cross-examination.

And you can file any memoranda or exhibits, whatever you wish to file, to supplement today's hearing, on both sides.

At the conclusion of testimony, Counsel for the City requested a further hearing to present evidence. The Court directed counsel for the City to schedule such hearing and directed the plaintiffs to produce their expert at such hearing for cross-examination.

THE COURT: All right. Mr. Burnette, anything you want to do today, other than request a transcript?

MR. BURNETTE: No, Your Honor. I'd like to request the transcript, and if it pleases the Court, I would like to schedule a further hearing after today.

I'd like to talk with Marvin. Marvin is --

THE COURT: Masters?

MR. BURNETTE: Marvin Masters. He's a civil engineer, and he's the one who has met with our engineers, and I think he would

like to do the cross-examination and present the evidence. I'd like to check his schedule before we schedule another hearing.

THE COURT: All right. The City of White Sulphur Springs officially requests a transcript of today's proceedings, and the original of that transcript, of course, will be filed in the clerk's office in Greenbrier County, a copy to the requester, the City, a copy to the defendants, and, of course, the court reporter will keep a copy here for my work.

And as expeditiously as possible, Mr. Burnette, schedule through -- do it by a conference call so that we don't have to schedule, reschedule, et cetera. Get with my administrative assistant, Karen Martin, by conference call. She'll do that.

Give her a reasonable estimate of about much time you'll need, and then we'll -- and let them -- "them" being Mr. Konrad and Mr. Zettle -- I think it goes without saying, **at the next hearing you're going to have to bring Mr. Martin back**, so you know that up front. (Record page 347 - October 30, 2003, Transcript at page 44, line 5 to page 45, line 14)

The Court thus made it abundantly clear that the issue regarding the accuracy of the purported "map" was before the Court for decision and that if the City wanted to present evidence with respect to that issue, it should do so at the next hearing.

By letter dated December 17, 2003, Judge Hatcher directed that counsel "take appropriate steps necessary to schedule the hearing spoken of at our last hearing in order that I may require of both sides a submission of proposed findings of fact and conclusions of law, and any supporting memoranda of law in order that I may make a ruling." Judge Hatcher thus notified counsel that he contemplated a single hearing to conclude the matter and should be prepared to present any necessary evidence.

Pursuant to agreement of counsel a date was set for hearing and a Confirmatory Notice of Hearing was filed by plaintiffs' counsel and served on the City's counsel confirming that on

January 7, 2004, Judge Hatcher "will conduct a hearing (as requested by the Court's letter of December 17, 2003 - a copy being attached hereto)."

However on January 6, 2004, only one day before the hearing, counsel for the City sought to unilaterally limit the scope of the hearing by making certain admissions regarding the manner in which the descriptions and map were prepared, and proposing that the focus of the hearing be shifted from whether the Petition For Annexation was accompanied by an "accurate survey map" to the more limited issue of whether West Virginia Code § 8-6-2 requires that the "survey map" be prepared from an actual survey. Such letter was dated only a single day before the hearing. No order was issued by the Court to limit the scope of the scheduled hearing, nor did counsel for plaintiffs consent to such a limitation. In fact, when such proposal had been made during earlier discussions, counsel for plaintiffs specifically declined to so limit the issues.

The Court began the hearing on January 7, 2004, by noting that the City had been granted time to evaluate the prior testimony and prepare its response.

THE COURT: We were here on an earlier day and took a significant amount of testimony in regard to the findings and opinions of the plaintiffs' expert, and I gave then a break of time so that Mr. Burnette could evaluate that testimony and confer with his cocounsel, Mr. Masters, who has not appeared here, but he works with Mr. Burnette. (Record page 348 - January 7, 2004, Transcript at page 2, line 21 to page 3, line 3)

Counsel for the City specifically acknowledged that he would evaluate the Court's rulings and determine whether to put forth additional evidence.

THE COURT: . . . I agree, Mr. Burnette, with your analysis that, what does the term within Chapter 8, Article 6, Section 2A of the code mean when it says "accompanied by an accurate

survey map.”

And I take it from your letter that what you choose to do or not do depends on how I rule in regard to that issue. Is that right?

MR. BURNETTE: That’s what I would like, Your Honor.

THE COURT: All right. (Record 348 – January 7, 2004, Transcript at page 3, lines 10 – 19).

The City erroneously asserts at page 12 of its memorandum that, “During the January 7th 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.” However, what the Court actually stated it intended to determine was “what does the term within Chapter 8, Article 6, Section 2A of the Code mean when it says “accompanied by an accurate survey map.”

While the Court acknowledged that an on-the-ground survey may be contemplated by the statute, Judge Hatcher did not limit his ruling to what constitutes a “survey.” Judge Hatcher addressed each word of the phrase “accurate survey map,” including the requirement that the survey map must be “accurate”; and specifically ruled from the bench that what had been provided as a survey map was “grossly inaccurate” and that there was no way to tell from such “map” where the accurate boundaries would be.

THE COURT: . . . There’s no way to tell, based on what the city has provided for a survey map, where the accurate boundaries would be.

And then the question is, based on all of those flaws and inaccuracies, a survey map done without complying with the professional standards established by the West Virginia Board of Examiners for Land Surveyors, then does it comport with Chapter 8, Article 6, Section 2A of the West Virginia Code which says that the territory annexed, desiring to have it annexed, they “must file a petition in writing with the governing body setting forth the change proposed and 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 limits.”

What has been attached is grossly inaccurate, and it is, admittedly by the defendants, a piecemeal document.

* * *

I believe that I must read them just as they are written, and I looked up these three words. The word “accurate,” which I looked up in the Random House Unabridged Dictionary, Second Edition, says, “free from error or defect; consistent with a standard rule or model; precise; exact; careful or meticulous.”

“Survey” from Black’s Law Dictionary, Sixth Edition, the noun, “the 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.

And “map,” again from Black’s Sixth Edition, “a representation of the earth’s surface or of some portion of it, showing the relative position of the parts represented.”

Those three words with those three definitions clearly, this Court concludes as a matter of law that the defendants failed to accompany their verified petition with an accurate survey map, and because of that, their effort is fatally flawed, and under the -- all of the documents filed in support of the proposed annexation to this point, the city in these cases is permanently enjoined from proceeding with the annexation. . . . (Record page 348 – January 7, 2004, Transcript at page 8, line 1 to line 21, and page 9, line 8 to page 10, line 9).

Notwithstanding clear rulings from the bench regarding the inaccuracy of the purported survey map, counsel for the City made no request during the hearing on January 7, 2003, to cross-examine plaintiffs’ available expert or present contradictory evidence. It is readily apparent from

the statements of the City's counsel that the City's decision not to present rebuttal testimony at the January hearing was a deliberate waiver of the opportunity to present rebuttal evidence, and reflected a tactical decision to attempt to avoid an issue upon which the City was unlikely to prevail:

MR. BURNETTE: Your Honor, in response to Andy's comments, after that last hearing, immediately I drove to Charleston and met with Marvin. And although Marvin Masters has not appeared here, he has spent an incredible amount of time on this. He's a civil engineer. He has hired these people who were our experts.

Now, we anticipated the Court's ruling today, and we don't necessarily disagree with it. I'm not saying that we won't -- the city won't appeal, but --

THE COURT: Sure.

MR. BURNETTE: -- it's a terrible statute, and we've known that all along. And the reason we didn't -- and we **didn't want to waste the Court's time with all that expert testimony**, because we believe what you just ruled was the issue, and we anticipated that ruling. (Record page 348 - January 7, 2004, Transcript at page 11, line 10 to page 12, line 3)

The City's counsel thus explicitly admitted that the City had intentionally determined not to present rebuttal testimony, but to seek an appeal on the existing record.

Following the hearing, the City attempted to sidestep the Court's ruling that the description and "map" were inaccurate by submitting a proposed order that ignored the issue and did not reflect the full substance of the Court's rulings. However, Judge Hatcher confirmed that the basis of his ruling was not limited to whether the map had been prepared from an on-the-ground survey, and accordingly rejected the City's proposed order. Having thus failed in its strategy to narrow the scope of the Court's ruling, the City now asserts that it should be granted a further hearing regarding the accuracy of the purported "survey map."

However, the City may not unilaterally hold a matter open and demand yet another hearing because the City chose not to present rebuttal evidence regarding an issue that was squarely before the Court for disposition. The Court, and not the litigants, sets the scope of a hearing. Testimony regarding the accuracy of the map had been presented at the October hearing and the Court made it clear that the issue regarding the map's accuracy was ripe for decision. The Court accommodated the City's request to continue the hearing to a future date to allow the City a chance to prepare its rebuttal testimony, but made it clear that it intended to rule upon the matter at the conclusion of the rescheduled hearing. The City's decision not to present such evidence when the hearing was reconvened in January was simply a tactical waiver of the requested opportunity to present evidence. The Court was under no duty to refrain from ruling upon the matter before it, or to schedule further hearings because the City decided to waive its opportunity to present evidence or cross-examine plaintiffs' expert surveyor who was produced by plaintiffs at the hearing on January 7, 2004, pursuant to the direction of the Court, so that the City could complete its cross examination.

The City was provided with multiple opportunities to offer rebuttal evidence and was clearly afforded due process.

V. CONCLUSION

For the foregoing reasons, as well as those reasons set forth in the Circuit Court's Final Order Granting Permanent Injunction and in the Plaintiffs' Memoranda to the Circuit Court, the Circuit Court's Order should be affirmed and the appeal denied.

**FREDERICK W. KRETZER,
CAROLYN B. KRETZER,
THE GREENBRIER SPORTING CLUB
DEVELOPMENT COMPANY, LLC, and
CSX HOTELS, INC.**

By: Andrew S. Zettle
Of Counsel

Andrew S. Zettle
West Virginia Bar Id. #4193
Daniel J. Konrad
West Virginia Bar Identification No. 2088
Huddleston Bolen LLP
611 Third Avenue
Post Office Box 2185
Huntington, West Virginia 25722-2185
(304) 529-86181
Counsel for Plaintiff/Respondents

**IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA**

**APPEAL NO. 32157
CIVIL ACTION NOS. 02-C-38 and 03-C-19**

**FREDERICK W. KRETZER, CAROLYN B. KRETZER; THE GREENBRIER
SPORTING CLUB DEVELOPMENT COMPANY, LLC, A Delaware Limited Liability
Company; And CSX HOTELS, INC., A West Virginia Corporation,**

Plaintiffs/ Respondents,

v.

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

Defendants/ Petitioners.

FROM THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing **Reply Brief of Plaintiffs, Frederick W. Kretzer; Carolyn B. Kretzer; The Greenbrier Sporting Club Development Company, LLC, A Delaware Limited Liability Company; and CSX Hotels, Inc., A West Virginia Corporation** this 21st day of January, 2005, by mailing a true copy thereof, postage prepaid, at Huntington, West Virginia, to:

Marvin W. Masters, Esq.
Masters & Taylor, L.C.
181 Summers Street
Charleston, WV 25301

W. Mark Burnette, Esq.
Burnette & Burnette, P.L.L.C.
P.O. Box 1668
Route 2, Box 375E
Lewisburg, WV 24901

Andrew S. Zettle

Andrew S. Zettle

West Virginia Bar Identification Number 4193

Daniel J. Konrad

West Virginia Bar Identification Number 2088

Huddleston Bolen LLP

611 Third Avenue

Post Office Box 2185

Huntington, West Virginia 25722-2185

(304) 691-8424