IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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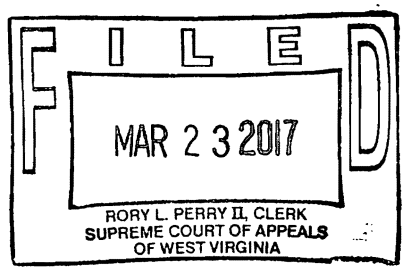

SWVA, INC.,

Petitioner Below, Petitioner,

v.

HUNTINGTON SANITARY BOARD and
CITY COUNCIL OF THE CITY OF
HUNTINGTON,

Respondents Below, Respondents.

BRIEF OF PETITIONER

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I. ASSIGNMENTS OF ERROR

Petitioner SWVA, INC. ("SWVA") appeals the decision of the Cabell County Circuit Court on two grounds:

A. **The Circuit Court erred as a matter of law when it ruled that the relief sought was not available because SWVA had an adequate remedy at law to contest the Ordinance by filing a complaint with the West Virginia Public Service Commission pursuant to W.Va. Code § 24-2-1(b)(6) and (7).**

B. **The Circuit Court erred when it ruled that the construction projects proposed by the Respondents are "in the ordinary course of business" and therefore are not subject to the public notice requirements of W.Va. Code § 24-2-11(l).**

II. STATEMENT OF THE CASE

Prior to 2015, W.Va. Code § 24-2-11 required all public utilities to obtain a certificate of public convenience and necessity from the West Virginia Public Service Commission ("PSC") before beginning construction of any plant, equipment, property, or facility. This general rule was subject to one key exception: projects that were "ordinary extensions of existing systems in the usual course of business" did not require a certificate of public convenience and necessity. In applying this requirement and its exception, the PSC developed a body of administrative law delineating when a project was "outside the ordinary course of business" of the applicant and, therefore, did not require a certificate under W.Va. Code § 24-2-11.

In 2015, the Legislature amended W. Va. Code § 24-2-11 to exempt municipal water and sewer utilities with over 4,500 customers and $3 million in combined gross revenues. In the place of PSC approval, however, the Legislature imposed a robust public notice requirement on these large municipal utilities. Now, under W.Va. Code § 24-2-11(l), large municipal utilities seeking to undertake capital projects that are "outside the ordinary course of business," are required, *inter alia*, to make copies of the proposed project available for inspection by the public

and provide at least thirty (30) days' public notice to their ratepayers by placing a notice of intent to pursue the project in customers' monthly billing statement before the proposal is taken up by the utility's municipal governing body (*i.e.*, city council). *See* W.Va. Code § 24-2-11(l).

On December 5, 2016, the Huntington Sanitary Board ("HSB") convened a special meeting to consider a proposed ordinance to fund a number of proposed capital projects (A.R. 000014). At that meeting, the HSB distributed a spreadsheet titled "Capital Projects Huntington Sanitary Board" that identified fifteen construction projects, described the work for each, their reasons, and their projected costs. (A.R. 000018-20). The total cost of the identified projects was estimated at $74,940,000. (*Id.*)

However, before submitting that proposed ordinance to the City Council of the City of Huntington (the "Council") for consideration, the HSB was informed by its counsel that W.Va. Code § 24-2-11(l) required thirty days' notice to the public prior to the adoption of such an ordinance by the Council.[1] (A.R. 000014-17). Not wishing to postpone the Council's consideration of the ordinance for thirty days, the Chairman of the HSB requested the creation of a new proposal for submission to Council that would purportedly allow the Council to avoid the public notice requirements of W.Va. Code § 24-2-11(l). (*Id.*)

As requested, the HSB, working with counsel and its outside engineers, developed a "new" set of projects, as well as a new ordinance (the "Ordinance") (A.R. 000025), with an accompanying cash flow analysis, to fund them. (A.R. 000025-38). The HSB approved the new proposal and Ordinance on December 7, 2016, sending it on to the Council. To facilitate speedy deliberation of the Ordinance, the Council referred it to the Finance Committee for consideration at a special meeting scheduled for December 14, 2016. (A.R. 000039).

[1] HSB admits that, at all relevant times, it satisfied these customer and revenue thresholds of W.Va. Code § 24-2-11(l). (A.R. 000123).

When the Finance Committee met on December 14, the HSB's Chairman, accountant, outside counsel, and engineers presented the details of the Ordinance and proposed projects to the Committee. A packet of materials to which the presenters referred was provided only to members of the Finance Committee. Within that packet was the revised list of projects, entitled "Capital Improvements and Associated Debt Service," (A.R. 000040), and a revised pro forma cash flow analysis. (A.R. 000035). Notwithstanding the packet's limited distribution, this meeting was the first-time details of the Ordinance were shared with the public.

During the meeting, the presenters repeatedly sought to characterize the projects on the revised list as "capital improvements" involving routine maintenance and repairs, rather than the "capital projects" set forth on the original project list, which required compliance with the public notice requirements of W.Va. Code § 24-2-11(l). (A.R. 000050-53). To that end, outside counsel for the HSB attempted to draw a distinction between "capital improvements" and "capital projects," explaining that "capital *improvements*" require "borrow[ing] funds," but that "capital *projects*" require "raisi[ing] rates for a major project like a treatment plant . . . ." (A.R. 000051). Capital projects, it was explained, are "construction projects"—like those included in the original proposed ordinance entitled "Capital Projects Huntington Sanitary Board" (A.R. 000018) —that cost millions of dollars. (*Id.*) In contrast, counsel for the HSB contended, the projects on the revised list were in the nature of routine repairs necessary for the utility's day-to-day operations and, thus, did not require compliance with the public notice requirements of W.Va. Code § 24-2-11(l). (A.R. 000051-53).

Although the overall cost of the construction projects was reduced to approximately $7.5 million, the revised list of projects was remarkably like the original list. The "new" list still contained nine of the fifteen original projects. (*Compare* A.R. 000040-41 *with* A.R. 000018-20).

While the revised list of projects for the Ordinance had been retitled "Capital Improvements and Associated Debt Service," many still required new construction and would cost millions of dollars. (A.R. 000040). Many were complex construction projects, including one calling for the modeling of the entire sewage collection system and a study of flow patterns within the system. (*Id. at* Item No. 4). Several others called, not merely for the repair of existing equipment or infrastructure, but for the creation and installation of entirely new systems, pumps, and equipment. (*Id.* at Item Nos. 1, 3, 4, and 9). The revised Ordinance also called for an approximate 58% increase in the average rates paid by the HSB's customers, and debt financing to support the cost of the projects. (A.R. 000036; *see also* A.R. 000025).

Critically, the Ordinance itself acknowledged that at least some of the capital projects fell outside of its day-to-day operations. Specifically, it stated that the rate increases were necessary to "provide revenues sufficient for the [HSB] to pay the daily expenses associated with the operation of its sewer system, to provide working capital reserves as required by Chapter 24 of the *West Virginia Code*, **and** to provide sufficient revenues to cover the costs associated with capital improvements and associated debt service." (A.R. 000025) (emphasis supplied). The Finance Committee unanimously voted to send the Ordinance of nine construction projects to the full Council, without amendment and with a positive recommendation. (A.R. 000085-87).

As the operator of a carbon steel mill, SWVA utilizes a large amount of water and, in turn, wastewater services, in its operations. SWVA's profitability and long-term viability are significantly affected by the cost of these utility services. As a result, SWVA was concerned about the effect the proposed rates increases would have on its operations and sought more information about the projects and associated financing. Unable, however, to obtain, never mind digest, specifics about the Ordinance within the compressed timeframe being advanced by the

Respondents, SWVA filed its Complaint and Petition for Writ of Mandamus and Injunctive Relief (the "Petition") in the Circuit Court of Cabell County on the morning of December 27, 2016. (A.R. 000001). The Petition sought a declaration that the projects to be funded by the Ordinance were "not in the ordinary course of business" for HSB and, therefore, HSB and the Council were required to comply with the public notice provisions of W.Va. Code § 24-2-11(l), to mandate Respondents to comply with the mandatory duty set forth in W.Va. Code § 24-2-11(l), and to prevent the Council from voting on the Ordinance unless and until Respondents complied with the public notice requirements. (A.R. 000011). At that time, SWVA also filed its Motion for Preliminary Injunction and Temporary Restraining Order (the "Motion"). (A.R. 000088). The Motion sought to compel compliance or enjoin noncompliance with the public notice requirements of W.Va. Code § 24-2-11(l) with respect to the proposed Ordinance, prohibit any further consideration by the Council of the Ordinance, and void any decision made by the Council in violation of W.Va. Code § 24-2-11(l). (A.R. 000088, 000090).

With SWVA unable to obtain a hearing on its Motion prior to the Council's meeting, the Council convened on the evening of December 27, 2016 to consider the Ordinance. At the meeting, counsel for HSB once again attempted to explain why the revised list of projects did not trigger the heightened notice requirements of W.Va. Code § 24-2-11(l). However, rather than try to distinguish the new projects as "capital improvement projects" that were routine and, therefore, within the ordinary course of business, counsel for the HSB offered that "[t]he term 'capital project' or 'capital improvement' is basically interchangeable. It's an item of capital expense that an entity has to ***undertake on occasion.***" (A.R. 000213). Then, counsel for the HSB further stated that capital improvements could be "in the ordinary course of business," or they could be "not in the ordinary course of business," as in the case of "*major* capital

improvements like a new wastewater treatment plant." (*Id.*) (emphasis supplied). After debate and public comment, the Council voted to approve the Ordinance. (A.R. 000229, 000039). One member of the Council objected to the vote on the Ordinance as "illegal." (*Id.*)

On January 5, 2017, the HSB filed its Response in Opposition to SWVA's still pending Motion. (A.R. 000113). The Council did not file a response to the Motion. The Circuit Court held a hearing on the Motion on January 10, 2017, at which time the merits of the Petition were also taken up. The Court accepted the supplemental authorities that SWVA tendered at the hearing and that were later submitted to the clerk for entry into the record. (A.R. 000185). The Circuit Court issued its decision that day at the hearing, denying the Motion and dismissing the Petition. (A.R. 000317-18). On February 9, 2017, SWVA filed its Notice of Appeal from the Circuit Court's order upholding the Ordinance. SWVA filed a Motion for Expedited Consideration of Appeal on February 9, 2017, to which Respondents replied on February 13, 2017. Since enactment, Phase I of the Ordinance, by its terms, went into effect on February 10, 2017, with a concomitant increase in service rates for the HSB's customers. (A.R. 000339).

This Court issued a scheduling order on February 27, 2017, and set the case for submission after April 25, 2017.

III. SUMMARY OF ARGUMENT

The trial court erred as a matter of law in dismissing SWVA's Petition for Mandamus Relief, which sought to compel the Respondents to comply with the mandatory public notice requirements of W. Va. Code § 24-2-11(l). In so doing, the Court determined that the Ordinance passed by the Council was for construction projects that are in the HSB's "ordinary course of business" and, therefore, are not subject to the notice requirements. This determination, however, was simply wrong. The Circuit Court's decision disregarded decades of law

interpreting the term "in the ordinary course of business." Instead, providing no rationale and citing no authority, the Court impliedly granted the Council a heretofore non-existent unilateral authority to determine what projects are in "the ordinary course of business."

Similarly, the Circuit Court incorrectly denied SWVA's Motion for Preliminary Injunction and dismissed SWVA's Petition, in part, because it held that SWVA had not exhausted its administrative remedies to challenge the Ordinance before the PSC. However, the express language of W.Va. Code § 24-2-1 limits the PSC's jurisdiction over large municipal utilities like the HSB to eight specific areas, none of which include supervisory authority over the utility's rates. Lacking any administrative remedies to exhaust, SWVA's request for relief was properly before the Circuit Court.

For all these reasons, SWVA requests that this Court (1) reverse the Circuit Court's order denying SWVA's motion for injunctive relief and dismissing its Petition, and (2) declare the Ordinance invalid because the projects funded by the Ordinance are "not in the ordinary course of business" and, therefore, Respondents failed to provide the requisite statutory notice to the HSB's customers and affected citizens.

IV. STATEMENT REGARDING ORAL ARGUMENT

This case is appropriate for oral argument under Rule 20(a) because it involves: (1) issues of first impression as to the PSC's jurisdiction under the 2015 amendments to W.Va. Code § 24-2-1 and the meaning of "ordinary course of business" under § 24-2-11(l); (2) an issue of fundamental public importance, insofar as the Circuit Court denied HSB's ratepayers and the City's residents the procedural rights guaranteed by W.Va. Code § 24-2-11; and (3) the validity of a municipal ordinance. R.A.P. 20(a)(1)-(3).

V. ARGUMENT

A. Statement of Jurisdiction and Standard of Review

1. This Court Has Jurisdiction over This Appeal.

Appeal to this Court is proper when the Circuit Court has entered a final judgment and the case has ended there. W.Va. Code § 58-5-1; *C & O Motors, Inc. v. W. Virginia Paving, Inc.*, 223 W.Va. 469, 473, 677 S.E.2d 905, 909 (2009). In this case, the Cabell County Circuit Court not only denied SWVA's motion for a preliminary injunction and temporary restraining order, but also dismissed the entire Complaint and Petition for Mandamus. (A.R. 000335). Thus, the Circuit Court's entry and order constitute a final judgment properly before this Court.

2. This Court Reviews *De Novo* the Circuit Court's Decision and Order.

This Court possesses plenary review over a trial court's decisions with respect to conclusions of law. *Nationstar Mortg., LLC v. West*, 237 W.Va. 84, 785 S.E.2d 634, 638 (2016). The interpretation of a statute constitutes a pure question of law. *Berkeley Cty. Pub. Serv. Sewer Dist. v. W. Virginia Pub. Serv. Com'n*, 204 W.Va. 279, 287, 512 S.E.2d 201, 209 (1998). Further, although this Court reviews a circuit court's factual findings for clear error, "'[a] de novo standard of review applies to a circuit court's decision to grant or deny a writ of mandamus.'" Syl. Pt. 2, *Wiseman Const. Co. v. Maynard C. Smith Const. Co.*, 236 W.Va. 351, 779 S.E.2d 893 (2015) (quoting Syl. Pt. 1, *Harrison Cty. Comm'n v. Harrison Cty. Assessor*, 222 W.Va. 25, 658 S.E.2d 555 (2008)).

This appeal presents purely legal issues for review by this Court: (1) the jurisdiction of the PSC under W.Va. Code § 24-2-1 and consequent availability of mandamus relief for SWVA, and (2) the interpretation of W.Va. Code § 24-2-11. On these two crucial points, the Circuit Court is owed no deference. Because the Circuit Court incorrectly interpreted the PSC's

jurisdiction under W.Va. Code § 24-2-1 and denied SWVA mandamus relief on that basis, the decision below should be reversed. Further, the Circuit Court erroneously concluded that W.Va. Code § 24-2-11(l)'s public notice requirements did not apply, thereby denying Huntington's citizens their statutory right to participate in municipal government. For these reasons, this honorable Court should reverse the Circuit Court's order and declare the Ordinance invalid.

B. The Circuit Court Erred as Matter of Law in Failing to Issue a Writ of Mandamus Invalidating and Enjoining the Ordinance.

"Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies.'" Syl. Pt. 1, *State ex rel. Biafore v. Tomblin*, 236 W.Va. 528, 782 S.E.2d 223 (2016) (citation omitted). When a governmental body fails to heed its statutory obligations, "mandamus may be used to attack the constitutionality or validity of a statute or ordinance" passed in violation thereof. *Myers v. Barte*, 167 W.Va. 194, 198, 279 S.E.2d 406, 408 (1981) A writ of mandamus is proper when three elements are present: "(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 1, *State ex rel. Rist v. Underwood*, 206 W.Va. 258, 524 S.E.2d 179 (1999) (quoting Syl. Pt. 3, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969)).

Because SWVA seeks to invalidate the Ordinance as statutorily unsound due to Respondents' failure to comply with W.Va. Code § 24-2-11(l), but has no extra-judicial means to do so, mandamus is appropriate to challenge and invalidate the Ordinance here. Since the Council has approved the Ordinance and it has gone into effect, SWVA now seeks to invalidate the Ordinance on those same grounds. Importantly, because SWVA has no other remedy to compel the Council to comply with the notice provisions of the West Virginia Code, SWVA's

petition was both properly before the Circuit Court and this Court and the requested writ of mandamus should issue.

1. SWVA Lacks an Adequate Remedy at Law to Challenge the Ordinance and to Compel Respondents' Compliance with W.Va. Code § 24-2-11.

Relying on the third prong of this Court's test for the issuance of a writ of mandamus, the Circuit Court incorrectly held that SWVA could challenge the Ordinance before the West Virginia PSC, and so mandamus relief was not available. (A.R. 000334). This was simply wrong. Indeed, the statute relied upon by the court in making its determination, W.Va. Code § 24-2-1, does not confer jurisdiction on the PSC to review ordinances like the one at issue here. Lacking any other means to compel the Council to follow the law, mandamus relief is proper here.

As this Court has long held, "where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act." Syl. Pt. 1, *Hicks v. Mani*, 230 W.Va. 9, 736 S.E.2d 9 (2012) (quoting Syl. Pt. 1, *Daurelle v. Traders Federal Savings & Loan Association*, 143 W.Va. 674, 104 S.E.2d 320 (1958)). Importantly, however, "[t]he rule which requires the exhaustion of administrative remedies is inapplicable where no administrative remedy is provided by law." *Hicks*, 230 W.Va. at 13-14, 736 S.E.2d at 13-14 (quoting Syl. Pt. 2, *Daurelle v. Traders Fed. Sav. & Loan Ass'n*, 143 W.Va. 674, 104 S.E.2d 320)). Likewise, where pursuit of an administrative remedy would be futile, one need not pursue the remedy prior to seeking judicial relief. Syl. Pt. 6, *Wiggins v. E. Associated Coal Corp.*, 178 W.Va. 63, 357 S.E.2d 745 (1987). Thus, where an administrative body lacks the authority to accord relief or lacks jurisdiction to hear a claim, a petitioner need not "exhaust"

non-existent administrative remedies prior to seeking judicial intervention through mandamus. *State ex rel. Arnold v. Egnor*, 166 W.Va. 411, 421, 275 S.E.2d 15, 22 (1981).

Here, the Circuit Court incorrectly interpreted W.Va. Code § 24-2-1(b)(6) and (7) to find that SWVA had available to it "an adequate remedy at law . . . to contest the Ordinance" (A.R. 000334), presumably by filing a complaint with the PSC. Respondents argued, and the Circuit Court effectively agreed, that SWVA's Petition was a challenge to the rates set forth in the Ordinance and that W.Va. Code § 24-2-1(b)(6) empowers the PSC with general investigatory authority over *all* "rates, fees and charges" of a large municipal sanitary board. (A.R. 000121 and 134; A.R. 000334 at ¶ 15). This, however, is simply wrong in several respects.

Unfortunately, this determination conflicts with plain language of the statute (and mischaracterizes the relief that SWVA seeks). Irrespective of the impetus for its opposition, SWVA's challenge to the Ordinance is not based on the "rates, fees and charges" set forth in the Ordinance. Rather, SWVA disputes the Council's interpretation of W.Va. Code § 24-2-11(l) and the Council's resulting failure to comply with its mandatory, non-discretionary duty under the statute to give proper public notice of the Ordinance and projects. By failing to give the required public notice, Respondents deprived SWVA of its right to fully familiarize itself with the projects and the Ordinance, and register any objections thereto. Just as importantly, the lack of proper notice also limited other ratepayers' and interested citizens' involvement in the process, thereby depriving SWVA and the community of the robust public examination of the utility's proposal that was intended by the Legislature to replace PSC oversight. It is the lack of this required notice, and not the rate increase, that forms the basis for SWVA's challenge. Indeed, the public notice requirements of W.Va. Code § 24-2-11(l) are only triggered under the statute when a utility seeks to construct a project—not a rate increase. Accordingly, while Respondents'

characterization of SWVA's Petition as a challenge to the Ordinance's rates is understandable, it is nonetheless inaccurate and the Circuit Court's acceptance of that assertion contributed to its erroneous conclusion that the PSC offered a forum for relief here.

Indeed, a plain reading of W.Va. Code § 24-2-1(b)(6) and (7) does not support the holding made by the Circuit Court. Subdivision (b)(6) of Section 24-2-1, upon which the Circuit Court relied in reaching its decision, grants the PSC jurisdiction with respect to:

> Investigation and resolution of disputes involving political subdivisions of the state regarding *inter-utility* agreements, rates, fees and charges, service areas and contested utility combinations.

W.Va. Code § 24-2-1(b)(6) (emphasis added). Subdivision (b)(7) authorizes utility customers to bring formal or informal complaints regarding the PSC's exercise of its powers under subdivision (b)(6) and the other powers enumerated in subsection (b).

By its plain language, W.Va. Code § 24-2-1(b)(6) grants the PSC jurisdiction to hear "disputes involving political subdivisions of the state" when those disputes involve *inter-utility* activities, i.e., disputes between multiple utilities not wholly internal to one political subdivision. The "rates, fees and charges" the PSC has the power to adjudicate are those involving inter-utility arrangements, *not* every large municipal utility's rates. Here, because the Ordinance lacks any involvement with another utility—let alone an inter-utility agreement, rate, or service area—the PSC lacks the authority to adjudicate the rates and any other matters governed by the Ordinance.

The PSC has no inherent powers and can exercise only the powers conferred on it by statute. *Eureka Pipe Line Co. v. Pub. Serv. Commission*, 148 W.Va. 674, 137 S.E.2d 200 (1964). As noted, and as HSB explained in detail to the Court below (A.R. 000125-126), in 2015, the Legislature significantly reduced the Public Service Commission's jurisdiction over large

municipal utilities (*i.e.*, municipal utilities, like HSB, with at least 4,500 customers and combined gross revenues of $3 million or more). Included among these changes, was the elimination of the PSC's authority to approve a utility's rates and the construction of new facilities. *See* 2015 W.Va. Acts c. 196 (Senate Bill 234). Specifically, the Legislature's 2015 amendments to Chapter 24 restricted the PSC's jurisdiction over large municipal utilities to eight precise areas enumerated in subsection (b) of W.Va. Code § 24-2-1. Indeed, the statute explicitly declares: "The jurisdiction of the commission [PSC] over political subdivisions [like the HSB] . . . ***is limited to*** . . . ." W.Va. Code § 24-2-1(b) (emphasis added). The HSB even agrees that the plain language of the statute limits the PSC's jurisdiction. (A.R. 000117 and 000125, "SB 234 removed substantial regulatory oversight by the [PSC] of large municipal utilities."). Thus, subsections (b)(1) through (b)(8) provide the only instances in which the PSC may exercise jurisdiction over large municipal utilities like the HSB. Under the Circuit Court's order, only subsections (b)(6) and (b)(7) are relevant here, but neither provides the PSC with jurisdiction to hear the present dispute.

The PSC itself has addressed these new jurisdictional limitations, determinations that are afforded considerable deference by West Virginia courts. First, in *Hardy Cty. Pub. Serv. Dist. v. Town of Moorefield*, W.Va. Pub. Serv. Com'n No. 15-1957-W-C, 2016 WL 3457888, *3 (Commission Order June 17, 2016), a case involving a contract dispute between two municipal utilities, the PSC held that W.Va. Code §§ 24-2-1(b)(6) and (7) confer jurisdiction on it "to adjudicate *contract disputes* with or *between* utilities." (A.R. 000271). (Emphasis added.) With its order in *Hardy County*, the PSC thus acknowledged both the limitations of W.Va. Code § 24-2-1(b) and that the statute confers jurisdiction on the PSC to review inter-utility agreements.

Next, in another PSC case, *Cooper v. S. Charleston Sanitary Bd.*, W.Va. Pub. Serv. Com'n No. 16-0261-S-C, the PSC's Staff similarly concluded that W.Va. Code § 24-2-1(b) does *not* confer general jurisdiction on the PSC to review the rates of large municipal utilities. In *Cooper*, the complainant asked the PSC to review a utility's rates to determine if they were just, reasonable, and non-discriminatory, and to declare a portion of SB 234 unconstitutional. Noting that neither of these powers were explicitly conferred under W.Va. Code § 24-2-1(b), the PSC Staff's Initial and Final Staff Memorandum recommended dismissal of the complaint. *Cooper v. S. Charleston Sanitary Bd.*, Initial and Final Joint Staff Memorandum (A.R. 000238 and 243-244).

Most critically, with respect to this very case, the PSC informally acknowledged that it lacks jurisdiction over SWVA's current complaint about the Ordinance, stating to the press that SWVA would not qualify as an entity that could appeal to the PSC.[2] The PSC's public assertion, irrespective of the setting, was consistent with the PSC's recent holdings and indicative that any administrative appeal of this case to the PSC would be useless and summarily dismissed. With the PSC itself having determined that it lacks jurisdiction to review rates, fees, and charges imposed by large municipal utilities, SWVA need not "exhaust" this non-existent administrative remedy prior to seeking judicial review. *See Arnold*, 166 W.Va. at 421, 275 S.E.2d at 22. (explaining that "exceptions to [the] general rule of exhaustion of administrative remedies" include "lack of agency jurisdiction").

[2] Josephine Mendez, *The Herald-Dispatch*, "Judge upholds Sanitary Board rate increases," Jan. 11, 2017, *available at* http://www.herald-dispatch.com/news/judge-upholds-sanitary-board-rate-increases/article_2bb37fee-b164-59ea-91d6-de60db7e1750.html. *See Rider v. Braxton Cty. Court*, 74 W.Va. 712, 82 S.E. 1083, 1084 (1914) (finding Court may take judicial notice of matters of common knowledge or recent history).

Because the PSC provides neither an alternative nor adequate remedy, SWVA lacks a remedy at law to contest the Ordinance and SWVA's mandamus petition was properly before the Circuit Court and is now properly before this honorable Court.

2. The Circuit Court Erred in Finding That the Projects Approved by the Ordinance Are in Respondents' "Ordinary Course of Business."

The Circuit Court summarily accepted the Respondents' erroneous assertion that the projects associated with the Ordinance were in the HSB's "ordinary course of business." (A.R. 000333 at ¶ 11). The Court made this decision without any explanation as to what the phrase means or how it is to be applied, effectively granting the Respondents a heretofore nonexistent authority to determine what projects are in the ordinary course of business. However, in so doing, the Court actually ignored, and hence failed to apply, a well-established body of administrative case law defining and interpreting that term, including a decision by the PSC regarding two very similar projects that were previously proposed by the HSB and found to be outside of its ordinary course of business. And, while the PSC now lacks the jurisdiction to hear the present dispute, the 2015 statutory changes do not erase the agency's prior guidance interpreting an otherwise undefined statutory term. Accordingly, because at least some, if not all, of the projects are *not* in Respondents' ordinary course of business, the order below should be reversed and the Ordinance invalidated.

As discussed above, W.Va. Code § 24-2-11(l) provides that large municipal utilities "desiring to pursue construction projects that are not in the ordinary course of business" must comply with the heightened public notice set forth therein. Thus, the operative legal question is, whether any of the proposed construction projects are "not in the ordinary course of business." Indeed, if even one of the nine proposed projects is not in HSB's ordinary course of business, the notice requirements of W.Va. Code § 24-2-11(l) apply and the Ordinance, by which said project

is to be financed, must be invalidated. To date, this Court has yet to be confronted with having to discern the meaning of this statutory phrase. For their part, neither the Respondents nor the Court offered any type of explanation as to its meaning. The PSC, however, has long grappled with the contours of this statutory language. As a result, with no legislative definition of the phrase "ordinary course of business," the PSC's longstanding historical interpretation is not only relevant, but also owed deference. *Capitol Radiotelephone Co. v. Pub. Serv. Com'n of W. Virginia*, 185 W.Va. 39, 42, 404 S.E.2d 528, 531 (1991).

The PSC has set out eight factors used to determine whether projects are in the ordinary course of business[3]: "(a) the estimated cost of the project as compared with the annual revenues of the applicant; (b) the level of complexity (engineering or otherwise) of the proposed project; (c) the type of funding proposed for the project; (d) the factors driving the project; (e) the urgency of the project; (f) the experience and competency of the applicant's staff and/or professional consultants; (g) the regulatory history of the applicant; and (h) the potential benefits and risks of the project." *Town of West Hamlin*, W.Va. Pub. Serv. Com'n No. 05-0282-W-PW, at 2-3 (Commission Order April 25, 2005) (quoting *South Putnam Pub. Serv. Dist.*, W.Va. Pub. Serv. Com'n No. 04-0034-PWD-PC, at 4 (Commission Order March 17, 2004)).

Applying these factors, at least some, if not all, of the proposed projects clearly fall outside the ordinary course of business. The cost of the projects is high, especially as a percentage of revenues. The proposed projects are complex and involve an outside engineering firm. Additionally, much of these projects constitute new plant, not simply improvements to old

[3] While these factors were developed in cases determining whether projects were "ordinary extensions in the usual course of business" for which a certificate of public convenience was not required under the previous version of W.Va. Code § 24-2-11, the PSC and its staff have repeatedly used and interpreted the terms "ordinary course of business" and "ordinary extension in the usual course of business" interchangeably. *See City of Huntington Sanitary Board*, W.Va. Pub. Serv. Com'n No. 09-0880-S-SCN (Commission Order August 31, 2009) (cited by Respondents below) (A.R. 000155-167); *Mt. Hope Water Assn.*, W.Va. Pub. Serv. Com'n No. 06-0869-W-P (Initial and Final Joint Staff Memorandum Aug. 4, 2006) (A.R. 000233-234).

systems. The projects contemplate installing a new scrubber system (Item No. 1), new pumps, a new pipe system (Item No. 3), new heaters (Item No. 5), new concrete curbing to mitigate storm water runoff (Item No. 9), and performing a never-before-conducted modeling of the entire sewage collection program (Item No. 4). (A.R. 000040-41 and A.R. 000053-58). The Ordinance also requires the HSB to take on significant debt (factor (c)). In the first year of the Ordinance alone, the HSB's total debt service requirements will increase from nearly $1.64 million to $2.6 million, an increase of approximately 60%, due to the additional cost of the projects undertaken in the Ordinance. (A.R. 000035-38). This is a clear deviation from the HSB's ordinary operating system and financial support, amply demonstrating that the proposal triggered the notice requirements.

In *Town of West Hamlin*, the PSC also endorsed the idea that although "ordinary extensions" are not defined by statute, they refer to "construction activities which deal with the in-kind replacement of existing facilities." *Town of West Hamlin* at 3. As the PSC summarized in *Town of West Hamlin*, projects are considered in the "ordinary course of business" when "the cost of a project is low compared to annual utility revenues, grant funds result in no rate impact, and engineering design is not required." *Id.* Conversely, projects will be found to be *not* in the utility's ordinary course of business when, among other factors, "the proposed project require[s] a significant amount of engineering work"; "the cost of the project [was] approximately 60% of the Town's annual revenue"; and "the Town [] presented no evidence that the new customers are willing to pay for water service in the form of user agreements, customer deposits, or service applications." *Id.* at 2.

Here, the projects at issue are far from the "in-kind replacement of existing facilities." Instead, they involve extensive new equipment and construction. The total cost of the projects

under the Ordinance is $7.5 million, (A.R. 00040-41), and HSB's current annual revenues are roughly $12.3 million. (A.R. 000036). Thus, the cost of the Ordinance represents nearly two-thirds—61%—of the HSB's current annual revenues, precisely the type of revenue increase determined to be outside the ordinary course of business in *Town of West Hamlin.* Moreover, the HSB's projects have required extensive design and input from an outside engineering firm, just as with the projects in *Town of West Hamlin.* (A.R. 00053-54). Consequently, the projects approved and funded by the Ordinance are far outside the HSB's "ordinary course of business."

Finally, a prior PSC decision directly involving HSB, which the utility relied upon below, demonstrates that at least portions of the instant projects are "outside the ordinary course of business," and, therefore, Respondents were required to comply with the public notice requirements of W.Va. Code § 24-2-11(l). In a 2009 application to the PSC (when the PSC still had direct authority over the HSB's projects) the HSB sought a determination that several proposed projects were in the "ordinary course of business" and thus exempt from certificates of convenience and necessity from the PSC. *City of Huntington Sanitary Board,* W.Va. Pub. Serv. Com'n No. 09-0880-S-SCN (Commission Order August 31, 2009) (A.R. 000155). As an initial matter, the HSB conceded that one component of the total project—the replacement of ejector pumps with submersible pumps at a pump station—were *not* in the ordinary course of business, choosing to not even request a determination that the projects were in the ordinary course of business. *Id.* at 4, 9. In addition, while finding some of the projects were routine and did not require a certificate of convenience, the PSC determined that one project—the construction of a bio-retention swale in a parking area to mitigate storm runoff (Part 5) was not in the ordinary course of the HSB's business. *Id.* at 2, 11.

Significantly, the pump project that the HSB and PSC agreed was outside the ordinary course of business in that 2009 case is nearly identical to HSB's proposal at issue here to replace dry pumps with submersible pumps at another of its pumping stations. (*c.f.*, A.R. 000040, Item No. 3). Likewise, the parking area bio-retention swale project in that 2009 case is substantially the same as HSB's current proposal to install concrete and curbing to prevent storm water from carrying sludge into a local creek. (*c.f.*, A.R. 000041, Item No. 9). Clearly, the submersible pump and storm water management projects in the 2009 case are direct analogs to the submersible pump and storm water management projects in the proposal at issue here. Therefore, at a minimum, the submersible pump and storm water management projects at issue here are not "in the ordinary course of business" and Respondents had a non-discretionary duty to give notice of them, and their financing, consistent with the requirements of W. Va. Code § 24-2-11(l). Indeed, since the heightened notice requirements are triggered even if a single project, or component thereof, is outside the ordinary course of business, the PSC's treatment of the HSB's 2009 application readily resolves this case in SWVA's favor.

Thus, applying the clearly established factors the Circuit Court failed to employ, rather than the HSB's own malleable and shifting definitions, the Ordinance and the projects it funds fall squarely outside of the HSB's "ordinary course of business." For this reason alone, the trial court's order should be reversed.

3. Because the Respondents Failed to Provide Notice of the Ordinance Required by W.Va. Code § 24-2-11(l), the Ordinance Should Be Invalidated.

Because the Ordinance and its projects were outside the "ordinary course of business," the Respondents were required to comply with the mandatory notice requirements of W. Va. Code § 24-2-11(l). Having admittedly failed to do so, mandamus was appropriate.

The fundamental "purpose of mandamus is to enforce 'an established right' and a 'corresponding imperative duty created or imposed by law.'" *State ex rel. W. Virginia Citizen Action Group v. Tomblin*, 227 W.Va. 687, 692, 715 S.E.2d 36, 41 (2011) (quoting *State ex rel. Ball v. Cummings*, 208 W.Va. 393, 398, 540 S.E.2d 917, 922 (1999)). Further, "[w]hen the Legislature enacts a law giving a group of individuals a clear and explicit right, there is also created an implicit corresponding duty on the part of the State to grant or enforce that right." *W. Virginia Dept. of Health & Human Resources, Bur. for Behavioral Health & Health Facilities v. E.H.*, 236 W.Va. 194, 212, 778 S.E.2d 643, 661 (2015) (quoting *E.H. v. Matin*, 168 W.Va. 248, 257, 284 S.E.2d 232, 237 (1981)). Mandamus is appropriate to compel the performance of "ministerial acts" under a supervisory authority. *See State ex rel. Marockie v. Wagoner*, 191 W.Va. 458, 469, 446 S.E.2d 680, 691 (1994); *see also* Syl., *State ex rel. Graham v. City of Hinton*, 77 W.Va. 266, 87 S.E. 358 (1915) ("[a] city council may be compelled by mandamus to perform a [non-discretionary] duty.").

In this case, W.Va. Code § 24-2-11(l) lists seven steps of public notice that a covered municipal utility *must* take when it pursues a project not in the ordinary course of business, and the first four of these steps must occur prior to approval of the proposed projects. Syl. Pt. 5, *Rogers v. Hechler*, 176 W.Va. 713, 348 S.E.2d 299 (1986) ("'The word "shall" . . . should be afforded a mandatory connotation.'") (quoting Syl. Pt. 2, *Terry v. Sencindiver*, 153 W.Va. 651, 171 S.E.2d 480 (1969)). Those steps are: (1) inclusion of notice of the proposed projects in the monthly billing statement of the utility's customers for a month preceding the first reading of the projects or ordinance before the governing body; (2) publication of notice of the projects as a Class I legal advertisement under W.Va. Code § 59-3-1 *et seq.*; (3) inclusion in all public notice of the projects information about the scope of the construction, the current rates and fees, the

proposed new rates and fees, the details about a public hearing and final vote on the projects, and the place where the proposed construction and rates may be inspected; and (4) two readings of the proposed construction and rates before the governing body at least two weeks apart. It is undisputed that Respondents failed to comply with these notice requirements.

Because the projects approved and funded by the Ordinance are outside the ordinary course of business, SWVA had a clear legal right to the notice outlined in subsections (l)(1) through (4), Respondents had a clear legal duty to give that notice, and their failure to do so violated the statute. *W. Va. Dept. of Health & Human Resources*, 236 W.Va. at 212, 778 S.E.2d at 661. Respondents failed to include a notice of the Ordinance or its content in the monthly statements of the HSB's customers prior to the first reading of the Ordinance on December 12, 2016,[4] and thus failed to comply with W.Va. Code. § 24-2-11(l)(1). (A.R. 000331-32 at ¶¶ 4-7). Respondents attempted to justify, but did not contest this failure. (A.R. 000333 at ¶ 13).

Finally, because the Council enacted an Ordinance that approved "construction projects not in the ordinary course of business" without the statutorily-required notice of W.Va. Code § 24-2-11(l)(1) through (4), it enacted an invalid ordinance contradictory to the State's law. Crucially, this Court has held, "[w]hen a provision of a municipal ordinance is inconsistent or in conflict with a statute enacted by the Legislature the statute prevails and the municipal ordinance is of no force and effect." Syl. Pt. 1, *Robinson v. City of Bluefield*, 234 W.Va. 209, 764 S.E.2d 740 (2014) (quoting Syl. Pt. 1, *Vector Co. v. Bd. of Zoning Appeals of Martinsburg*, 155 W.Va. 362, 184 S.E.2d 301 (1971)). *See also* W.Va. Code § 8-12-2 ("any city shall have plenary power and authority . . . by ordinance not inconsistent or in conflict with . . . other general law . . ., to provide for the government, regulation and control of the city's municipal affairs"). Having

[4] Under the statute, because the Ordinance was first read on December 12, 2016, this notice should have been included on at least one customer billing statement in November 2016.

failed to comply with W.Va. Code § 24-2-11(l), Respondents exceeded their authority under W.Va. Code § 8-12-2, rendering the Ordinance contrary to West Virginia law, and therefore void. The only remedy in this instance is to invalidate the Ordinance.

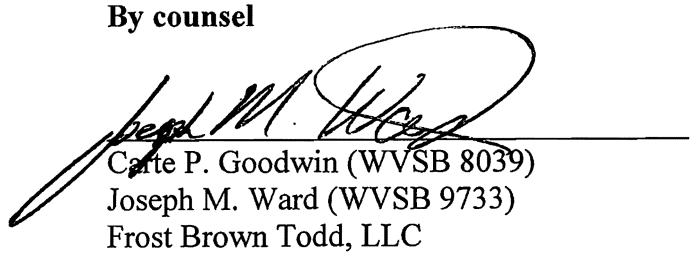
VI. CONCLUSION

For all the foregoing reasons, Petitioner SWVA, INC. respectfully requests that this Court reverse the order of the Circuit Court, uphold SWVA's right to challenge the Ordinance in mandamus, declare the Ordinance void *ab initio*, and enjoin any further actions pursuant to the Ordinance.

Respectfully submitted,

SWVA, INC.

By counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 17-0120

SWVA, INC.,

Petitioner Below, Petitioner,

v.

HUNTINGTON SANITARY BOARD and CITY COUNCIL OF THE CITY OF HUNTINGTON,

Respondents Below, Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2017, I caused the foregoing "Brief of Petitioner" to be served on counsel of record via email and U.S. Mail in a postage-paid envelope addressed to:

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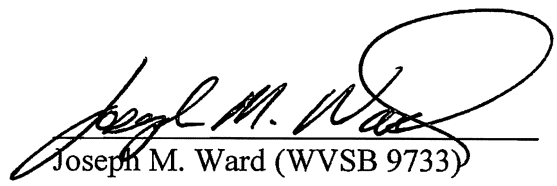

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