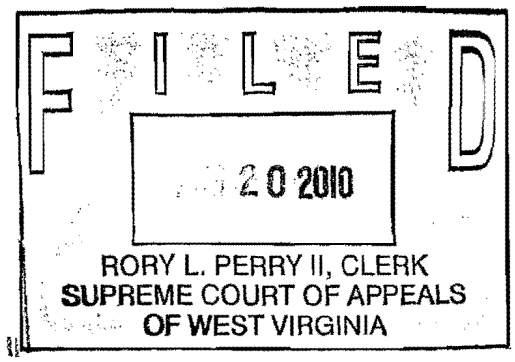
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35627



FOSTER FOUNDATION,

Petitioner,

v.

GLEN B. GAINER III, in his capacity as
West Virginia State Auditor,

and

THE COURT OF CLAIMS OF THE STATE
OF WEST VIRGINIA,

Respondents.

REPLY BRIEF OF PETITIONER

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FROM THE COURT OF CLAIMS OF THE STATE OF WEST VIRGINIA

REPLY BRIEF OF PETITIONER

The Foster Foundation hereby files its Reply Brief pursuant to this Court's Order dated June 2, 2010 granting Petitioner's Petition for Writ of Certiorari. *Official Record* provided by the Court of Claims of the State of West Virginia (hereinafter "OR") at pp. 359-360. Petitioner replies to the *Brief of the Court of Claims of the State of West Virginia* ("Court of Claims' Brief") and the *Brief of Respondent Glen B. Gainer III, West Virginia State Auditor* ("State Auditor's Brief"), as follows:

ARGUMENT

I. REPLY TO THE COURT OF CLAIMS OF THE STATE OF WEST VIRGINIA.

In its Brief, the Court of Claims asserts that this Court's review of a judgment rendered by the Court of Claims is limited to procedural errors, and excludes errors of substantive law that arise in this case. The Court of Claims relies heavily upon *Lower Donnally Association v.*

Charleston Municipal Planning Commission, 212 W.Va. 623 (2002). However, the Court of Claims' Brief attempts to impose an overly narrow interpretation of this Court's authority and an overly broad interpretation of the *Lower Donnally* case.

This Court has previously indicated that certiorari is the appropriate method for obtaining this Court's review of a decision by the Court of Claims. As this Court declared in *G.M. McCrossin, Inc. v. The West Virginia Board of Regents*, 177 W.Va. 539 (1987):

> "[T]his Court obviously may review the decisions of the court of claims under the original jurisdiction granted by article VIII, section 2[3] of our Constitution, through proceedings in mandamus, prohibition or certiorari. Review in this fashion is necessary because the court of claims is not a judicial body, but an entity created by and otherwise accountable only to the Legislature, and judicial recourse must be available to protect basic principles of separation of powers."

Id., 177 W.Va. at 541, fn.3 (citation omitted). The concepts of *Lower Donnally*, which dealt solely with a municipal planning commission, should not be applicable to the Court of Claims, which is an entirely different entity in scope, procedure and purpose.[1]

In *Lower Donnally*, the Petitioner sought review, via writ of certiorari to the Circuit Court of Kanawha County, of the city planning commission's support of a zoning application. The Circuit Court dismissed the petition for writ due to lack of jurisdiction, and the Petitioner appealed to this Court.

After examining the relevant statutory scheme in *Lower Donnally*, this Court held that:

> "[T]he final actions of a planning commission adopting a comprehensive plan or amendments to it, approving or rejecting plats or plans of

[1] This Court has previously stated "[T]hough the court of claims is not a judicial body, it clearly operates in a judicial capacity. Its judges are lawyers, who serve as neutral and detached decision-makers. Longstanding due process protections such as notice and an opportunity to be heard are scrupulously applied. The court has adopted the West Virginia Rules of Civil Procedure where they are not inconsistent with its own procedures. Moreover, the judges make legal and factual findings from which they render a final and binding decision. Thus, the question of whether the court acts as a judicial body must be answered in the affirmative." *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 300 (1987).

> subdivisions, and adopting a final report with respect to a zoning ordinance, regardless of whether that report is an initial report or a revised and resubmitted report, **are subject to review by writ of certiorari regardless of whether the final action of the planning commission is dispositive of the matter or is followed by legislative action of the governing body.**"

Id., 212 W.Va. at 631 (emphasis added). The Court qualified the holding by explaining that "judicial review of planning commission final actions that require further action by a governing body is limited to consideration of whether the record discloses that procedures required by law have been followed." *Id.* (emphasis added). The Court's qualification of its authority to review only applied to certain final actions of a planning commission[2] and is inapplicable to the present case wherein the Court of Claims misconstrued the applicable law.

II. REPLY TO THE WEST VIRGINIA STATE AUDITOR.

The State Auditor's Brief fails to address the sole issue underlying the Petition: In the absence of a Sheriff's tax sale, the State Auditor simply had no legal authority to collect the $457,386.79 in certificate fees that it collected from the Petitioner.

The State Auditor's Brief attempts to redefine "certification" in a manner contrary to the applicable statutes. West Virginia Code §11A-3-39(a) authorizes the State Auditor to collect a certificate fee after receiving "payment of the sum necessary to redeem" the delinquent property. The preceding section, 11A-3-38, is entitled "Redemption of nonentered or certified lands" and it describes the method for redeeming "certified lands." However, that section clearly applies to

[2] Assuming *arguendo* that this Court applies the rationale of *Lower Donnally* in the present case, the limitation of review to procedural errors only applies when further action is required by a governing body. By the Respondent's admission, no further action is required by the governing body (i.e. the Legislature) in the present case because the court of claims declined to recommend compensation. *See Court of Claims' Brief* at p.6. Consequently, the limitation on certiorari set forth in *Lower Donnally* is entirely inapplicable to this case.

"real estate certified to the auditor pursuant to section eight of this article[.]" Since "section eight of this article" (i.e. § 11A-3-8) only authorizes certification "[i]f no person present bids the amount of taxes, interest and charges due on any real estate offered for sale," then the State Auditor has no authority to collect certification fees for tax liens being administered by the State Auditor by some *other* method (such as placement on the delinquent land list after being suspended from sale). Only after the certification called for in § 11A-3-8, following an unsuccessful Sheriff's sale, can the Auditor lawfully collect the certificate fee authorized by § 11A-3-39.

The State Auditor's Brief raises a number of other issues that are wholly irrelevant to the sole issue herein. In this case, the Foster Foundation's tax liens were never the subject of a Sheriff's sale. Unless a tax lien is the subject of an unsuccessful Sheriff's tax sale, the State Auditor has no authority to collect a certificate fee at redemption.

PRAYER FOR RELIEF

The statutory mechanism established by the West Virginia Legislature exists to protect the important rights at stake when the State acts to divest title to real property from its citizens. The statutory language at issue in this case clearly requires that a real property tax lien be included in an unsuccessful Sheriff's tax sale before the delinquent land can be certified to the State Auditor. In the absence of proper certification of the tax lien, the State Auditor is not authorized to collect the corresponding "certificate" fee. Therefore, the State Auditor should not have collected the $457,386.79 in certificate fees from Foster Foundation.

WHEREFORE, the Foster Foundation respectfully requests that this Court FIND that a real property tax lien must be included, but unsuccessfully sold, at a Sheriff's tax sale, and certified by the Sheriff to the State Auditor prior to the Auditor's imposition of a certificate fee upon redemption, REVERSE the West Virginia Court of Claims, and ORDER that Court to enter

judgment in favor of Foster Foundation; recommending to the West Virginia Legislature an appropriation in the amount of $457,386.79 to reimburse Foster Foundation for the certificate fee that was wrongfully collected by the State Auditor; and such other relief that this Court may deem just and proper.

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CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that on the 20th day of August, 2010, a true copy of the foregoing ***"Reply Brief of Petitioner"*** was served upon the following by depositing the same, postage prepaid, in the United States Mail:

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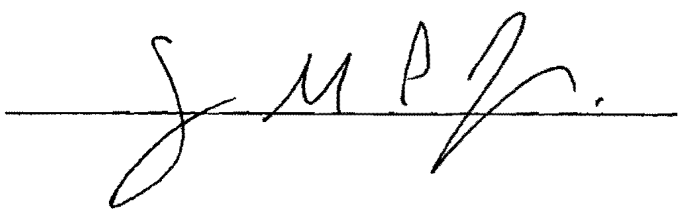
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