

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 100163

35627

FOSTER FOUNDATION,

Petitioner,

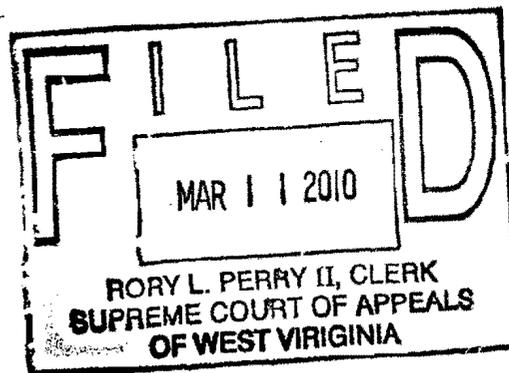
v.

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

And

THE COURT OF CLAIMS OF THE STATE
OF WEST VIRGINIA,

Respondents.



**RESPONSE OF GLEN B. GAINER III,
WEST VIRGINIA STATE AUDITOR,
TO PETITION FOR WRIT OF CERTIORARI**

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NOW COMES the Respondent, Auditor Glen B. Gainer III ("Auditor"), by counsel pursuant to Rule 14(d) of the West Virginia Rules of Appellate Procedure, and files this response in opposition to the Petition for Writ of Certiorari filed on or about February 12, 2010.

PRELIMINARY STATEMENT

The Petition for Writ of Certiorari seeks to review an Order issued August 14, 2009, by the Court of Claims of the State of West Virginia denying Petitioner's claim to recover reimbursement for certification fees and interest

accrued during an eight-year time frame in which Petitioner did not pay taxes on its property.

The Legislature has stated as a matter of law and policy that delinquent land not only constitutes a public liability, but also represents a failure on the part of delinquent private owners to bear a fair share of the costs of government. See, W. Va. Code § 11A-3-1. There is a "paramount necessity" of providing regular tax income for the state, county and municipal governments, and for school purposes. *Id.*

As described below, Petitioner has not and cannot prove that the Court of Claims erred in ruling that the imposition of certification fees and interest was proper. To hold otherwise would have allowed Foster Foundation to have the benefit of its property tax free for eight years without consequence in contradiction of law and public policy.

STATEMENT OF FACTS

The Petitioner, Foster Foundation, is a non-profit organization seeking to recover \$457,386.79 as reimbursement for certification fees as well as interest accrued during an eight-year time period during which it did not pay taxes on its property. Petitioner claims that it followed the procedures for contesting the taxability of property by filing a Complaint against Assessor Adkins in the Circuit Court of Cabell County on March 26, 1998. However, this Court in *Ayers v. Cline*, 176 W. Va. 123 (1985), stated that property owners are required to "pay then protest" to ensure that the government has a recourse to enable it to

operate while taxes are being contested. Petitioners did not pay and then file a complaint against the Assessor. Had they done so, no fees or interest would have accrued. Instead, counsel for Foster Foundation entered into an agreement with the Sheriff of Cabell County and the Tax Commissioner in which they agreed that the property would not be sold.

Foster Foundation did not follow the court's clear legal mandate to pay under protest. Merely filing a complaint against the county assessor in the circuit court in which the property is located is not the proper procedure for contesting taxability of property. Even Petitioner admits in its Petition that it did not pay its taxes until May 25, 2006; a full eight years after the decision from Assessor Adkins that Foster Foundation was no longer exempt from paying property taxes, and well after the dispute arose with Assessor Atkins concerning its taxability. Petitioner simply did not "pay then protest".

This Court stated in *In re Elk Sewell Coal*, 189 W.Va. 3 (1993), that "There is no statutory mechanism in the West Virginia Code which authorizes parties to enter into a settlement agreement under which a taxpayer may withhold full payment of property taxes due pending appeal of an assessment." 189 W.Va. 3 at 8 (1993). It is from this failure to follow proper procedure and clear precedent that all of Petitioner's costs flow.

When Petitioner finally decided to pay its overdue taxes and contacted the Delinquent Land Division in the State Auditor's office to determine the amount necessary to redeem the property, significant statutory fees and interest had accrued. Petitioner now complains and asserts that certification of the land

books, and the imposition of statutory fees and interest by the Auditor was improper; even though such accrual is clearly required by the statutory framework.

PROCEDURAL HISTORY

In September 2006, Petitioner instituted a civil action in Cabell County Circuit Court seeking a refund of the \$2,252,477.32 in interest and certification fees it had paid in order to redeem its property. On November 27, 2006, Respondent filed a Motion to Dismiss based on failure to state a claim upon which relief may be granted, immunity, and improper venue. On April 17, 2007, the Circuit Court of Cabell County ordered that the Circuit Court of Kanawha County was the proper venue for the cause of action. On September 11, 2007, the Kanawha County Circuit Court entered an Order granting the State Auditor's Motion to Dismiss, stating that the Court of Claims was the proper avenue for the claimant to seek relief. Petitioner sought relief again in the Court of Claims on December 6, 2007. A hearing was held by the Court of Claims on February 25, 2009, and an Evidentiary Hearing was held on March 27, 2009. Following closing briefs by both parties, on August 14, 2009, the Court of Claims entered an Order denying Petitioner's claim. See, Order attached hereto as Exhibit A. On September 11, 2009, Foster Foundation filed a Petition for Rehearing which was denied by the Court of Claims on October 15, 2009. It is from this ruling that Petitioner brings its Petition.

STANDARD OF REVIEW

Pursuant to West Virginia Code § 53-2-2 certiorari lies to review the judgments or orders of inferior tribunals. This Court has never stated whether certiorari applies to the Court of Claims as an administrative body of the Legislative branch of government. This Court has, however, maintained that certiorari did not lie against a city council relating to enactment of an ordinance as such enactment was legislative in nature and not reviewable by certiorari. *Garrison v. City of Fairmont*, 150 W. Va. 498 (1966). This Court has, however found that mandamus is a proper remedy against the Court. In *State ex rel. McLaughlin v. Court of Claims*, 209 W. Va. 412 (2001), this Court reviewed the nature of the Court of Claims. The Court stated:

The Court of Claims is an administrative arm of the West Virginia Legislature, not a court created within the judicial branch of government. The Legislature has established the Court of Claims by law and delegated to it the Legislature's power to investigate certain claims against the State that may not be prosecuted in the courts because of the State's sovereign immunity...

Because the Court of Claims is a public body created by law, a writ of mandamus may issue against this body, in the same fashion as it issues against any other public officer or body to which the Legislature has delegated its powers. *McLaughlin*, 209 W. Va. at 415.

Because of the Court of Claims' exercise of a legislative power, this Respondent questions the applicability of certiorari to this matter. The exercise of the legislature's delegated power to investigate claims against the State that

are subject to sovereign immunity, arguably does not constitute the decision of an "inferior tribunal," but the action of a separate branch of government.¹

Assuming arguendo that a Writ of Certiorari is an appropriate mechanism to challenge the advisory opinion of the Court of Claims, then the standard of review is *de novo*. *State ex rel. Prosecuting Atty. v. Bayer Corp.*, 223 W. Va. 146 (2008). A *de novo* or independent review of both the law and facts in this matter confirms that the Court of Claims ruling was correct.

ARGUMENT

Petitioner assigns only one error to the Court of Claims ruling. It asserts that the Court of Claims improperly ruled that certification fees apply to land suspended from the sheriff's sale and included thereafter on the certified list sent to the Auditor. Plaintiff asserts that land suspended from the sheriff's sale may not be included on the certified list of the disposition of delinquent land. Despite clear statutory language to the contrary, Petitioner suggests that land should somehow remain in limbo, unclaimed in the sheriff's office, unaccounted for by any land books, until such time that Petitioner would decide to pay its taxes.

Petitioner confuses the several types of certification provided for and cites only certain portions of the West Virginia Code to conjure the illusion that the delinquent property must first be offered for sale by the sheriff *before* the land can be included on the land books certified to the Auditor.² However, upon

¹ This Respondent respectfully suggests that the Petition be denied for this reason as well as the substantive reasons set forth herein.

² In *Mingo Redevelopment Authority v. Green*, 207 W. Va. 486, 534 S.E.2d 40, (2000), the Court correctly quoted the trigger for certification: "...if the sheriff is unable to sell for taxes. The focus being the state's ability to obtain the taxes owed. *Green* 204 W. Va. 486 at footnote 9.

reading all sections of the Code in *pari materia*, it is clear from the statutory language that the delinquent property list contains the disposition of all delinquent land and that this list is certified to the Auditor once it is placed on the delinquent list by the sheriff.

West Virginia Code Section 11A-3-9 states:

As soon as the sale provided for in section five of this article has been completed, the sheriff shall prepare a list of all tax liens on delinquent real estate purchased at the sale, or **suspended** from sale, or redeemed before sale, or certified to the auditor...

The sheriff shall, at the foot of such list, subscribe an oath, which shall be subscribed before and **certified...**(*emphasis added*).

Thus, the Sheriff prepares the list of the disposition of all delinquent land after the sale, including land suspended from the sale. The list is then certified and transmitted through the Clerk to the Auditor.

West Virginia Code Section 11A-3-11 states:

(a) Within one month after completion of the sale, the sheriff shall deliver the original list of sales, suspensions and redemptions described in section nine of this article, with a copy thereof, to the clerk of the county commission. **The clerk shall bind the original of such list** in a permanent book to be kept for the purpose in his office, and shall note each sale and suspension, each redemption not previously noted, and each certification on his record of delinquent lands. The clerk, within ten days after delivery of the list to him, **shall transmit the copy to the auditor**, who shall note each sale, suspension, redemption and certification on the record of delinquent lands kept in his office. (*emphasis added*).

These sections clearly require that the list of the disposition of properties be certified by the Sheriff and sent to the Auditor.

Petitioner suggests that certification to the Auditor was improper, however, sections nine and eleven clearly require that property suspended from sale be

included on the land books sent to the Auditor. There is no discretion in this process.

During the Evidentiary Hearing held on March 27, 2009, Mr. Rollyson, the Deputy Land Commission for the State Auditor, also confirmed that the inclusion of property suspended from sale on the certified list was proper and, in fact, mandatory:

“... The sheriff is required to certify to the county clerk a list of properties which includes everything that was on that delinquent list which includes those properties that receive no bid, those properties were suspended, redeemed, sold to individuals, certified to the state, or erroneous assessment.

That list is then in turn sent to the county clerk. The county clerk in turn certifies to the auditor the entire list of properties....” See, Evidentiary Hearing Transcript dated March 27th, 2009, Pages 8-9 attached hereto as Exhibit B.

Ironically, Petitioner argues that the Auditor has no legal authority to charge a certification fee in the absence of a sheriff's tax sale; however, it was due to the illegal agreement entered into by Petitioner that the land wasn't offered for sale. Petitioner seeks to profit from its own illegal act.

The agreement not to sell Petitioner's land did not and could not have addressed the statutory imposition of fees and interest on the property during the eight year time frame that Foster Foundation elected not to pay its taxes, nor did the agreement include or even notify the State Auditor who is charged with the collection of those amounts and administration of the delinquent land statutes.

Because no actual “certification” of the subject property occurred, Petitioner attempts to conjure the illusion, by citing inapplicable sections of the land sale statutes while ignoring the sections that require inclusion of suspended

land on the certified list sent to the auditor that the statutorily required fees somehow do not apply.

A careful review of the statutes, however, proves the contrary. The payment of taxes on delinquent land is called the redemption of such land and is provided for by W. Va. Code §11A-3-38. Upon receipt of the certified list, the Auditor assesses the interest and penalties for the delinquent properties on the list and receives a statutory certification fee at the time of redemption. Section thirty-eight allows any individual entitled to pay the taxes on land to redeem it from the Auditor upon payment of the necessary taxes and fees.

Section thirty-eight provides:

...**any other person who was entitled to pay the taxes** thereon, may redeem such real estate from the auditor...

(b) In order to redeem **the person seeking redemption must pay** to the auditor such of the following amounts as may be due: (1) The taxes, interest and charges due on the real estate on the date of certification to the auditor or the discovery of the nonentry, with interest at the rate of twelve percent per annum from the date of such certification...*(emphasis added)*.

Pursuant to West Virginia Code § 11A-3-38(a)(b)-39(a), once property becomes delinquent and is placed on the delinquent list certified to the Auditor, the Auditor must collect the taxes, interest and fees. When the taxes are paid to the Auditor, the certification fee is also collected. West Virginia Code Section thirty-nine (a) states:

a) Upon payment of the sum necessary to redeem, the auditor **shall** execute a certificate of redemption in triplicate...

The fee for issuing the certificate of redemption **shall** be ten dollars or seven and one-half percent of the total taxes, interest and charges due, whichever is greater. *(emphasis added)*.

The Court will note that the language and therefore, the certification fees, are mandatory.

As the code unambiguously provides, the property must either be redeemed from the Auditor or placed on the certified list of lands to be sold by the Deputy Land Commissioner pursuant to section forty-two. There is no mechanism by law for the disposition of delinquent lands after completion of the certified list other than the state level redemption or sale.

Mr. Rollyson also confirmed in his testimony that the imposition of fees and interest applies to suspended properties such as Petitioner's property:

By Ms. Hopkins:

"Q. Mr. Rollyson, those code sections that you just mentioned regarding the interest and certification fees, do they apply only to property offered for sale?

A. No.

Q. Do they apply to land that was suspended as well?

A. Yes.

Q. If the redemption provision only applied to offers for sale of property, would suspended property owners be able to ever redeem their land?

A. No.

Q. In your 27 years involved in administering this statute, have you ever had those statutes interpreted to only apply to land offered for sale?

A. Absolutely not."

See, Evidentiary Hearing Transcript dated March 27th, 2009, Pages 20-21 attached hereto as Exhibit B.

To summarize, if property becomes delinquent it is placed on the delinquent list. Pursuant to the Code sections cited above, all delinquent lists are then certified to the Auditor, and the Auditor collects the required certification fee for these properties at redemption. See, W. Va. Code §§ 11A-3-38(a)(b)-39(a). The fact that Petitioner's property was not sold and was instead suspended, does

not change the fact that it was properly placed on the delinquent list and therefore certified to the Auditor. After the Auditor receives the certified list redemption can only issue upon the payment of the taxes, interest, and fees.

Petitioner seeks the windfall of redemption without payment of the interest and certification fees. The statute does not permit property placed on the certified list sent to the Auditor to be redeemed without interest and certification fees, nor does it say that the certification fees, interest, and costs assessed by the Auditor are discretionary. By assessing the interest and certification fees, the Auditor was simply performing his nondiscretionary statutory duties as described in Chapter 11A of the West Virginia Code.

Further, Petitioner had actual notice that these fees and interest were accruing and increasing during the eight year suspension because its counsel requested copies of the charges due on several occasions over the years.³

During the Evidentiary Hearing, Mr. Rollyson testified that Petitioner knew the fees were accruing because counsel contacted his office several times over the years regarding the Foster Foundation property.⁴ See, Hearing Transcript dated March 27th, 2009 attached hereto as Exhibit B. For this reason, Petitioner should not have been surprised that the interest and certification fees on its delinquent property were imposed and increasing as time passed, irrespective of the fact that the property was not offered for sale at a Sheriff's tax sale.

³ At the Evidentiary Hearing before the Court of Claims, summary documents were introduced into evidence proving that Foster Foundation had received notice on at least four or five different dates of the interest and certification fees accruing and increasing throughout the years beginning in 2001. The list of those requests is Exhibit A to his testimony, attached hereto.

⁴ Mr. Rollyson stated, "It's, the standard operating procedure of our office is that when an individual or a corporation calls that we will mail out statements to them based upon the request of the individual or the request of a county official." When asked by counsel if the only way the auditor's office would send out a statement is if in fact it had been contacted by someone, Mr. Rollyson replied, "Yes."

Petitioner suggests that the Auditor was unjustly enriched by collecting such fees.⁵ However, Petitioner fails to note the unjust enrichment that would result if it was allowed to maintain the benefit of land ownership tax free for eight years without interest, fee or penalty.

As Exhibit A to Mr. Rollyson's testimony shows, the list of the amounts owed was specifically prepared at the request of Foster Foundation's counsel and showed ever increasing amounts. However, petitioner failed to take any steps to limit those fees.⁶

Finally, Petitioner claims that in the absence of a sheriff's tax sale, the Auditor should have returned the property to the Cabell County Sheriff for a tax sale. Petitioner claims that the property owner could then redeem the property from the sheriff prior to the next sale, and therefore no certification fee should be imposed upon redemption from the sheriff. Petitioner cites W.Va. Code § 11A-3-7 for this argument.

Section seven has no applicability to this matter. Its citation does not apply. Section 11A-3-7 states that:

“... whenever it shall appear to the sheriff that any real estate included in the list has been previously **conveyed by deed** and no tax thereon is currently delinquent, or **that the tax lien thereon has been sold previously** and not redeemed, or that the tax lien thereon **ought not to be sold for the amount stated therein**, he shall suspend the sale thereof and report his reasons therefore to the county commission and to the auditor...” (*emphasis added*).

⁵ As Mr. Rollyson testified, pursuant to W. Va. Code §11A-3-36, a significant portion of the certification fee was transferred to the General School Fund. See, Evidentiary Hearing Transcript dated March 27, 2009, Pages 29-30, attached hereto as Exhibit B.

⁶ Mr. Rollyson stated, “Where there could have been savings is if they could have paid early on they could have stopped, they could have paid early on, interest would have quit accumulating on everything, certificate fee would have decreased and therefore they could have saved that way, but in terms of once it reached our office, publication expense and certificate fee had to be paid.”

Section seven applies to liens that have been deeded, sold or sold for an incorrect amount. It does not apply to properties that have been suspended from a sale which is the issue herein.

Additionally, no where in the statute does it say that once property has been placed on the certified list the Auditor should *return* property to the county sheriff for a tax sale.

CONCLUSION

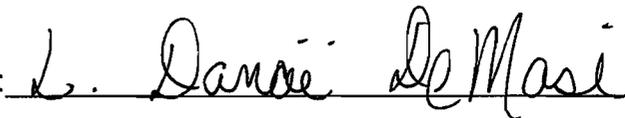
In this case, (although the appropriate procedure under law was to pay under protest) when Petitioner's property became delinquent, rather than selling the property to obtain the taxes due, Petitioner, the Assessor of Cabell County, and the Tax Commissioner entered into an agreement not to sell the delinquent property in the sheriff's sale. The Sheriff of Cabell County suspended the sale of the property and then placed the property on the delinquent list while Petitioner maintained and controlled its property without paying taxes. When Petitioner eventually sought redemption, the Auditor assessed "the taxes, interest and charges due on the real estate on the date of certification to the auditor...with interest at the rate of twelve percent per annum from the date of certification." W. Va. Code § 11A-3-38(b). The Auditor then assessed "the fee for issuing the certificate of redemption" which is "ten dollars or seven and one-half percent of the total taxes, interest and charges due, whichever is greater." W.Va. Code § 11A-3-39(a). Therefore, the Auditor properly assessed and collected the taxes, interest, and fees for Petitioner's delinquent property.

Petitioner was never relieved of the duty to pay taxes, a duty that is clearly defined in the statutory language supporting the public policy reasons set out by the Legislature for the creation of the land sale statutes. See, W.Va. Code § 11A-3-1. No *ex parte* agreement could negate the fact that taxes, interest, and fees were accruing on Petitioner's delinquent land; nor would the parties to the agreement have maintained the authority to waive those amounts. Therefore, it is contrary to law and public policy for Petitioner to be relieved of paying interest and certification fees for delinquent property as there is no local, state, or federal taxing scheme which allows owners of property to benefit from maintaining their property without paying the appropriate property taxes assessed thereon.

WHEREFORE, for reasons set forth herein, the imposition of fees and interest upon Foster Foundation was proper and an independent review of the Court of Claims ruling based upon the facts, evidence and law before it confirms that it was proper and should be affirmed. For reasons set forth herein, Glen B. Gainer III, West Virginia State Auditor, respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari and refuse to issue a rule to show cause.

Glen B. Gainer III, West Virginia State Auditor

By: 

By: 

By: _____



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CERTIFICATE OF SERVICE

I, Lisa A. Hopkins, Senior Deputy Commissioner of Securities and General Counsel of the West Virginia State Auditor's Office, do hereby certify that a true copy of the foregoing **"RESPONSE OF GLEN B. GAINER III, WEST VIRGINIA STATE AUDITOR, TO PETITION FOR WRIT OF CERTIORARI"** was served upon the following, by United States mail, a true copy thereof on the 11th day of March 2010, addressed as follows:

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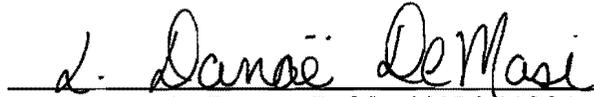
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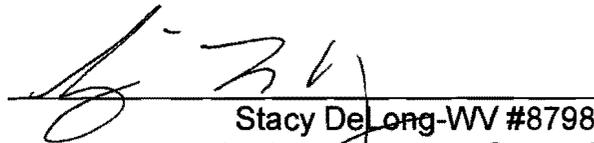
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EXHIBITS

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