

STATE OF WEST VIRGINIA

At the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 27<sup>th</sup> day of June, 2013, the following order was made and entered **in vacation**:

Lee Trace LLC, Petitioner

vs.) No. 12-0638

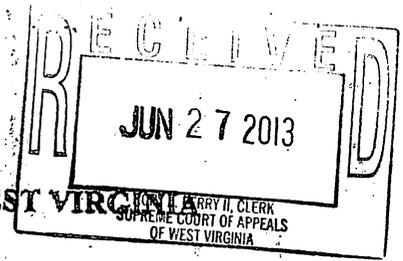
Gearly Raynes, Assessor for Berkeley County;  
Berkeley County Council, sitting as Board of  
Review and Equalization; and Berkeley County  
Council, Respondents

The Court, on its own motion, pursuant to Rule 6(b), Rules of Appellate Procedure, determined that an additional portion of the lower court record, not provided by the parties, is necessary in this matter. The Clerk of the Circuit Court of Berkeley County is hereby directed to provide the Court with the March 23, 2012 *Order Substituting Party, Denying Part of the Petition, and Setting a Hearing* entered in Civil Action No. 11-AA-2.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court





IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA  
Division II

LEE TRACE,

Petitioner,

v.

CIVIL ACTION NO. 11-AA-2  
JUDGE WILKES

PATRICIA KILMER, AS ASSESSOR  
FOR BERKELEY COUNTY, WEST  
VIRGINIA,

and  
BERKELEY COUNTY  
COUNCIL, SITTING AS BOARD OF  
REVIEW AND EQUALIZATION,  
and

BERKELEY COUNTY COUNCIL,

Respondents,

BERKELEY COUNTY  
CIRCUIT CLERK  
2012 MAR 23 PM 3:45  
VIRGINIA H. SIMS, CLERK

Order Substituting Party, Denying Part of the Petition, and Setting a Hearing

This matter came before the Court this 23<sup>rd</sup> day of March 2012, pursuant to several filings by the Parties. Upon the written appearance of Petitioner, Lee Trace, LLC (hereinafter "Petitioner"), by counsel, Thomas Moore Lawson, and Respondent, Berkeley County Assessor, by counsel, Michael D. Thompson, and Respondents Berkeley County Council and Berkeley County Council sitting as Board of Review and Equalization (hereinafter "Board"), by counsel, Norwood Bently, III; and upon the record and the pertinent legal authorities the Court rules as follows.

FINDINGS OF FACT

1. On March 18, 2011, Petitioner filed a Petitioner for appeal of the decision of the Berkeley County Council sitting as Board of Review and Equalization. Therein the Petitioner

cc  
3-23-12  
N Bently  
T Lawson  
M Thompson

challenges his 2010 and 2011 tax assessment, The Petition also alleges that the Berkeley County Assessor and Berkeley County Council violated law.

2. Petitioner filed this Petition naming "Patricia Kilmer, as Assessor for Berkeley County, West Virginia, Berkeley County Council as Board of Review and Equalization, and Berkeley County Council."
3. On May 23, 2011, hearing was held where the Court granted the Parties' request to allow for discovery to supplement the record.
4. After some continuances, on January 5, 2012, Petitioner filed a motion for Summary Judgment. Therein, Petitioner argued his case as laid out in the Petition for the 2010 and 2011 tax appeal. Thereafter, Petitioner also filed several supplemental briefs.
5. On January 25, 2012, Gearl G. Raynes, Assessor of Berkeley County, filed a motion to amend the style of the case and to substitute himself for Patricia Kilmer.
6. On March 13, 2012, Petitioner filed a motion to dismiss Patricia Kilmer and deny Gearl G. Raynes's motion, arguing that the Assessor is not a necessary party.
7. Gearl G. Raynes also filed a motion for Summary Judgment on January 31, 2012
8. On February 7, 2012, Respondent Berkeley County Council and the Board filed a responsive brief to Petitioner's various briefs.
9. It is undisputed that Petitioner received a "Notice of Increase in Assessment" dated January 5, 2010, in a timely manner.<sup>1</sup>
10. This Notice clearly advised Petitioner of the increase, including the 2009 assessment and the 2010 assessment, as well as the exact difference between the two. It also advised, "If

---

<sup>1</sup> This notice can be found at page 10 of the Certified Record of the hearing held below on February 3, 2011, filed with the Circuit Clerk in this case on March 18, 2011.

you believe an adjustment in the assessed value is necessary, you should contact the County Commission sitting as a Board of Review and Equalization." This Notice also contained a reference to the controlling West Virginia Code section and an address and phone number for the Assessor's office.

11. It is undisputed that Petitioner did not contact the Assessor or the Board about the 2010 assessment until March of 2010, at the earliest.

### CONCLUSIONS OF LAW

The Court must initially address the procedural law of this action. This action is an appeal controlled by West Virginia Code § 11-3-1 *et. seq.* (and specifically § 25).<sup>2</sup> "The proper procedures for appeal from a county court [county commission] decision are outlined in West Virginia Code § 58-3-1 *et seq.* The provisions of this article are to be read *in pari materia* with § 11-3-25..." Syl. Pt. 5, *Tax Assessment Against Purple Turtle, LLC v. Gooden*, 223 W.Va. 755 (2009). So, to the extent West Virginia Code § 11-3-25 does not afford procedural mandates, West Virginia Code § 58-3-1 *et seq.* controls. These statutory procedural mandates, which require a review of the record, are mandatory. *Id.* at 760. So, while conclusions of law are reviewed *de novo*, Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995), this appeal and factual questions therein are reviewed on the record. W.Va. Code § 11-3-25.

Also the Court does not find summary judgment appropriate or necessary in this type of action. Neither West Virginia Code § 11-3-25, nor West Virginia Code § 58-3-1 *et seq.*

---

<sup>2</sup> The 2010 changes to this particular section, 25, do not apply to tax years 2010 or 2011. Accordingly, these more specific outlines of for review do not apply to this appeal. *See* § 25(f); Section II, *infra*; and Note 3, *infra*.

provide for summary judgment in this type of action. Further, the Court will not take evidence in this appeal on the record, so summary judgment and the standard therefore is not applicable. See § 25. Further, the Court finds that a summary judgment determination is unnecessary in matter. The Court will, therefore, consider these filings as memoranda in support of or opposition to the Petition for Appeal, upon which the Court will make a final ruling following the hearing scheduled herein,

At this time, the Court finds that several issues argued by the parties in their recent filings are ripe for decision: whether to amend the style of the case to substitute Gearl Raynes, as Assessor for Berkeley County; and whether the Petitioner may now apply for review of the 2010 tax assessment (found at paragraphs 5-25 and 38 of the Petition as well as in several briefs). The Court further finds it would be aided by a hearing on the remaining issues in this appeal. The two issues ripe for decision will be considered, in turn, herein.

#### I. The Motion to Amend Should be Granted

The new Assessor, Gearl Raynes, moves to be substituted as a party for the previous Assessor. Petitioner opposes this stating only that the Assessor is not a necessary party. However, in its Petition for Appeal, the Petitioner named the Assessor in her official capacity. The new assessor now holds the office which was originally named as a Respondent. Considering Leave to Amend should be freely given, see *W.Va. R. Civ. P. 15*, and substitutions that bear some relation of interest to the original party and to the suit where the cause of action is not changed should generally be allowed, see *Rosier v. Garron, Inc.* 156 W.Va. 861, 199 S.E.2d 50 (1973), the Court finds this substitution wholly appropriate.

Petitioner has moved to dismiss the Assessor because he/she is not a necessary party and has no standing. However, this argument is a different and more complex issue from mere substitution. So, the Court will take this standing issue up, if still desired by the Petitioner, at the hearing scheduled, *infra*. So, the Court finds it is most appropriate to grant the Assessor's motion to amend the style of the case and to substitute "Gearl Raynes, as assessor for Berkeley County, West Virginia" for "Patricia Kilmer, as assessor for Berkeley County, West Virginia."

II. The Petition Should be Denied in so Far as it Requests Review of the 2010 Tax Assessment

The Board denied Petitioner's request to alter the 2010 tax assessment. The Court affirms this decision and finds that Petitioner may not now apply for review of the 2010 tax assessment.

Prior to this discussion, the Court notes the recent change in law that has occurred which affects this determination. In 2010, the West Virginia Legislature passed SB 401, which significantly changed W.Va. Code § 11-3-1, *et. seq.* However, this new law did not go into effect until June 14, 2010, ninety days from passage. The issues raised in this Petition regarding the 2010 tax assessment occurred prior to June 14, 2010. Accordingly, these issues must be analyzed based upon the law in effect at the time, and all references made to W.Va. Code § 11-3-1, *et. seq.* in this section of the Order refer to the version in effect prior to June 14, 2010.<sup>3</sup>

As noted above, Petitioner admits the untimeliness of its challenge to the 2010 assessment. However, Petitioner makes two arguments for its position that the 2010 assessment

---

<sup>3</sup> The Court also notes that for the 2011 assessment challenged by this Petition, the 2010 amendments will apply, with the exception of those found in § 25. (See §25(f))

should be reviewed: (1) that the notice sent was inadequate, and (2) that this is a "clerical" error, as opposed to a negligent one, and so the time frame to challenge the assessment is one year pursuant to W.Va. Code § 11-3-27. The Court finds both of these arguments insufficient.

First, the notice sent by the assessor was clearly adequate. Section 2a controls this notice. It requires that notice "advise the person assessed ... of his or her right to appear and seek an adjustment in the assessment." It provides nothing further regarding the contents of the notice. An initial review of the Notice shows that the wording required by the statute was included in it. See Findings of Fact ¶ 9, *infra*.

The Petitioner, however, argues that this notice does not adequately advise him of his "right to appear and seek an adjustment in the assessment" pursuant to W.Va. Code § 11-3-2a. Petitioner states that because the notice did not state the deadline by when the Petitioner must appear, it is inadequate.

Yet, the § 2a does not require that the date be given. Further, the date stated by Petitioner, February 20th, is not necessarily set by § 2a. Rather, § 24 states a range in which board may adjourn *sine die*. So, the exact date would change from year to year and may not be known in January. Further, the Notice actually contained a reference to "Chapter 11, Article 3, Section 2a of the West Virginia Code," which gave the Petitioner the place to look to find out about the process. This reference went beyond what is necessary to inform Petitioner of his right to challenge the assessment.

"All persons are presumed to know the law." *State v. McCoy*, 107 W.Va. 163, 172 (1972). Petitioner is not entitled to legal instruction beyond what is statutorily required by § 2a. The "Notice" sent met the requirements of § 2a, and Petitioner did not challenge the assessment in a timely manner.

Next, the issues raised in the petition do not constitute a "clerical error or a mistake" so the time frame to challenge the assessment is not extended. W.Va. Code § 11-3-27(a)

W.Va. Code § 11-3-27(a) provides in pertinent part,

*Any taxpayer, or the prosecuting attorney or tax commissioner, upon behalf of the state, county and districts, claiming to be aggrieved by any entry in the property books of the county, including entries with respect to classification and taxability of property, resulting from a clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment, may, within one year from the time the property books are delivered to the sheriff or within one year from the time such clerical error or mistake is discovered or reasonably could have been discovered, apply for relief . . . .*

(emphasis added)

By its language, for this section to apply a clerical error or a mistake must be "occasioned by an unintentional or inadvertent act." That is not the case here. Petitioner is challenging the assessment made using a different method. This was clearly an intentional decision and not inadvertent. Accordingly, time frame for challenging the assessment is not extended by § 27 because it does not apply.

Section 24 states that a person failing to apply for relief at the meeting of the Board for that tax year "shall have waived his right to ask for correction in his assessment list for the current year, and shall not thereafter be permitted to question the correctness..." § 24. The Petitioner clearly did not challenge the 2010 tax assessment at the proper time and his arguments are insufficient to alleviate this requirement. So, the Board's conclusion that it could not consider the 2010 Assessment because it had not been timely challenged was correct and should be affirmed.

The remaining issues found in the Petition and/or raised by the parties will be taken up at the hearing scheduled below.

Accordingly, the Court GRANTS Gearl Raynes's Motion to Amend Style of Case; and the Board of Equalization and Review's ruling regarding the 2010 tax assessment is Affirmed. The Court also finds that a hearing on this matter would aid the Court's decision upon the remaining parts of the Petition; and therefore, ORDERS that this matter come on for a hearing on April 6, 2012 at 9:00am, wherein the Court will hear argument on the remaining issues.

The Court notes the objections and exceptions of the parties to any adverse ruling herein.

Therefore, it is hereby ADJUDGED and ORDERED that,

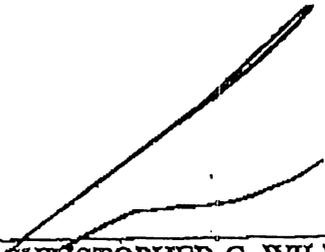
1. The Style of the case is Amended to Substitute Gearl Raynes for Patricia Kilmer, as Assessor for Berkeley County, West Virginia;
2. The Petition for Appeal is DENIED in so far as it challenges the 2010 tax assessment, because the Petitioner has waived his right to this challenge pursuant to W.Va. Code § 11-3-24;
3. This matter shall come on for a hearing on April 6, 2012 at 9:00am.

The Court directs the Circuit Clerk to distribute attested copies of this order to the following counsels of record:

**Counsel for Petitioner:**  
Thomas Moore Lawson, Esq.  
120 Exeter Drive, Suite 200  
P.O. Box 2740  
Winchester, VA 22604

***Counsel for Respondent, Berkeley County Assessor:***  
Michael D. Thompson, Esq.  
119 East Liberty Street  
Charles Town, WV 25414

***Counsel for Respondent, Berkeley County Council:***  
Norwood Bently, III, Esq.  
400 West Stephen Street, Suite 201  
Martinsburg, WV 25401



---

CHRISTOPHER C. WILKES, JUDGE  
TWENTY-THIRD JUDICIAL CIRCUIT  
BERKELEY COUNTY, WEST VIRGINIA