

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0638

LEE TRACE LLC

Petitioner,

v.

Appeal from a final order  
Of the Circuit Court of  
Berkeley County (11-AA-2)

GEARL RAYNES, AS ASSESSOR  
FOR BERKELEY COUNTY, WEST  
VIRGINIA,

BERKELEY COUNTY COUNCIL SITTING AS  
BOARD OF REVIEW AND EQUALIZATION,

and

BERKELEY COUNTY COUNCIL,

Respondents.

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**Petitioner's Brief**

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**Counsel for Petitioner Lee Trace LLC**  
Thomas Moore Lawson, Esquire  
West Virginia Bar No. 6468  
Lawson and Silek, P.L.C.  
P.O. Box 2740  
Winchester, VA 22604  
Phone: (540) 665-0050  
Fax: (540) 722-4051  
tlawson@lspc.com

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## **ASSIGNMENTS OF ERROR**

1. THE CIRCUIT COURT ERRED IN DENYING THE PETITION FOR APPEAL AS TO THE 2010 TAX ASSESSMENT
2. THE CIRCUIT COURT ERRED IN FINDING PETITIONER WAIVED ITS RIGHT TO CHALLENGE THE 2010 TAX ASSESSMENT PURSUANT TO W.VA. CODE §11-3-24
3. THE CIRCUIT COURT ERRED IN FINDING THAT THE NOTICE SENT BY THE ASSESSOR WITH RESPECT TO THE 2010 TAX ASSESSMENT WAS ADEQUATE AND WAS IN CONFORMANCE WITH STATE LAW
4. THE CIRCUIT COURT ERRED IN DENYING THE PETITION FOR APPEAL AS TO THE 2010 TAX ASSESSMENT BECAUSE THE NOTICE PROVIDED WITH RESPECT TO THAT ASSESSMENT FAILED TO COMPLY WITH DUE PROCESS

## **STATEMENT OF THE CASE**

This is an appeal of the Order of the Circuit Court of Berkeley County, West Virginia dated March 23, 2012, as amended by Order dated April 16, 2012. (A.R. 467, 476).<sup>1</sup> By the amended Order, the Court stated that the prior Order, as it related to the 2010 tax assessment, was a final Order and immediately appealable. (A.R. 476).

Petitioner Lee Trace LLC (“Petitioner”) owns real property at 15000 Hood Circle, Martinsburg, West Virginia 25403, consisting of approximately 17.02 acres (the “Property”). (A.R. 5). This appeal involves the 2010 real estate tax assessment of the Property. In 2009 an apartment complex was constructed on the Property which is similar in characteristics to many other apartment properties in Berkeley County. For the 2009 tax year, the Assessor of Berkeley County, West Virginia (the “Assessor”) assessed the Property at a value of \$677,050.00. For the

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<sup>1</sup> References to the Appendix Record are set forth as “A.R. \_\_\_.”

2010 tax year, the Assessor assessed the Property at a value of \$7,895,530.00 (the “2010 Assessment”). (A.R. 5).

The West Virginia Code of State Rules relating to the assessment of commercial properties requires that similar properties be assessed in a uniform manner and requires that the income approach to valuation be used as part of the assessment of commercial properties, such as the Property. See West Virginia Code of State Rules §110-1P-2.

For the 2010 tax year, the Assessor admitted that she did not consider the income of the Property but instead claimed she only used a cost approach to value the Property. For properties comparable to the Property, however, the Assessor admitted that she did not use the cost approach but instead used an income approach to value. (A.R. 196-99, citing 214, 218, 222, 230, 233). The Assessor has admitted that using the income approach instead of the cost approach to assess these other properties resulted in lower assessment values for those properties. (A.R. 230). By not using the income approach as part of the assessment of the Property, the Assessor violated the West Virginia Code of State Rules. (A.R. 196-99, citing 214, 218, 222, 230, 233). If the 2010 Assessment had been conducted using an income approach, the amount of the 2010 Assessment would have been \$3,676,726.00 total (Land: \$612,730.00; Improvements: \$3,063,996.00).

Pursuant to West Virginia Code §11-3-2a, the Assessor was required to advise Petitioner of its “right to appear and seek an adjustment in the assessment” by January 15, 2010. Such appeals were required to be made before the Berkeley County Council sitting as the Board of Review and Equalization (the “Board”) adjourned *sine die* for that year, which occurred on February 25. West Virginia Code §11-3-24. The notice sent to Petitioner by the Assessor (the “2010 Notice”) failed to meet the requirements of §11-3-2a. (A.R. 5). Instead, it simply stated

“If you believe an adjustment in the assessed value is necessary, you should contact the County Commission sitting as a Board of Review and Equalization.” (A.R. 5). The 2010 Notice failed to advise Petitioner of its right to appear by the February 25 deadline. Petitioner was, thus, unaware that the 2010 Notice triggered any deadlines and did not contact the Assessor or the Board about the 2010 Assessment until March 2010. (A.R. 5).

Thereafter, Petitioner appealed the 2010 Assessment to the Berkeley County Council (the “Council”). (A.R. 6) The Council refused to consider the appeal of the 2010 Assessment, finding that it lacked jurisdiction because the appeal had not been timely filed, even though no notice had been given to Petitioner of its rights to appeal. (A.R. 32). Petitioner appealed the Council’s decision to the Berkeley County Circuit Court (“Circuit Court”). (A.R. 34). In spite of the plain wording of the notice, the Circuit Court ruled that the Notice satisfied the requirements of §11-3-2a. (A.R. 467-75).

In spite of being informed about the errors discussed above, the Assessor made the same errors in its assessments of the Property in 2011 and 2012. These continued errors and the failure of the Assessor to equalize the assessments of the Property make it difficult, if not impossible, for Petitioner to compete with comparable properties and businesses.

Petitioner appealed the 2011 Assessment to the Council and then the Circuit Court simultaneously with its appeal of the 2010 Assessment. Even though the Assessor admitted that she had made errors in the 2011 Assessment, the Circuit Court ignored those errors and based on its own clerical error actually increased the 2011 Assessment. Petitioner is in the process of appealing that determination by the Circuit Court and that appeal is currently pending before this Court. Petitioner respectfully requests that both appeals be heard at the same time.

Petitioner also appealed the 2012 Assessment to the Council and then the Circuit Court and that appeal is pending before the Circuit Court.

### **SUMMARY OF ARGUMENT**

The Assessor has admitted she erred in performing the 2010 Assessment. Nevertheless, the Council refused to consider an appeal of the 2010 Assessment because it claimed that Petitioner failed to file a timely appeal. Petitioner filed a petition appealing the decision of the Council pursuant to West Virginia Code §11-3-25<sup>2</sup>. The Circuit Court denied the petition with respect to the 2010 Assessment, stating that Petitioner had waived its right to this challenge pursuant to W. Va. Code §11-3-24. This argument is without merit because Petitioner was never given the required notice under West Virginia Code §11-3-2a. Even assuming, *arguendo*, that the 2010 Notice complied with West Virginia Code §11-3-2a, it failed to comply with the requirements of due process in that it did not advise Petitioner of any deadline for an appeal of the decision contained in the 2010 Notice.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This case presents issues of first impression in West Virginia, involves issues of fundamental public importance that will affect all property owners in West Virginia and involves constitutional questions. The West Virginia courts have never decided whether notice of the type provided in the 2010 Notice was sufficient to satisfy the requirements of West Virginia Code §11-3-2a. Further, the West Virginia courts have never decided, and the Circuit Court in this case did not address, Petitioner's argument that the notice required by West Virginia Code §11-3-2a is insufficient to comply with constitutional due process requirements and/or that the

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<sup>2</sup> Petitioner also appealed pursuant to §11-3-27 but does not herein appeal based on that provision.

2010 Notice was insufficient to comply with constitutional due process requirements. For these reasons, this case is appropriate for a Rule 20 oral argument and decision.

## **ARGUMENT**

### **I. STANDARD OF REVIEW AND EVIDENCE**

As set forth above, Petitioner filed a petition pursuant to West Virginia Code §11-3-25 appealing the decision of the Council. (A.R. 34). The Circuit Court denied the petition with respect to the 2010 Assessment, stating that Petitioner had waived its right to such challenge pursuant to W. Va. Code §11-3-24. (A.R. 467-75).

This Court reviews challenges to a circuit court's findings of fact under a "clearly erroneous" standard, but conclusions of law are reviewed *de novo*." In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, 223 W.Va. 14, 18-19, 672 S.E.2d 150, 154-155 (2008); Walker v. West Virginia Ethics Com'n, 201 W.Va. 108, 492 S.E.2d 167 (1997). The interpretation of a statute, or the constitutionality of a statute, as written or as applied, as in this case, presents a purely legal question subject to *de novo* review. In re Foster Foundation's, 223 W.Va. at 18-19, 672 S.E.2d at 154-155, *citing* Appalachian Power Co. v. State Tax Dept. of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995) and Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995).

### **II. THE 2010 NOTICE WAS INADEQUATE**

The Assessor has admitted she erred in performing the 2010 Assessment. (A.R. 196-99, citing 214, 218, 222, 230, 233). Nevertheless, the Circuit Court denied Petitioner's appeal of the 2010 Assessment because it claimed Petitioner waived its rights by failing to timely appeal the

2010 Assessment. (A.R. 467-475). This argument is without merit because Petitioner was never given the notice required under West Virginia Code §11-3-2a and constitutional due process.

West Virginia Code §11-3-2a requires that the Assessor provide notice to property owners whose assessment has increased by more than 10% from the prior year. Pursuant to that code section, the notice of the assessment shall be given on or before January 15 and “advise the person assessed or the person controlling the property of his or her right to appear and seek an adjustment in the assessment.” This notice was vital given the fact that for 2010 the property owner would have been required to take advantage of this right to appear and seek an adjustment by February 25 of that year. West Virginia Code §11-3-24.

The only communication which could be a notice under §11-3-2a is the January 5, 2010 letter to Petitioner from the Assessor. (A.R. 5). The 2010 Notice failed to meet the requirements of §11-3-2a or procedural due process. Instead, it simply stated that “If you believe an adjustment in the assessed value is necessary, you should contact the County Commission sitting as a Board of Review and Equalization.”<sup>3</sup> (A.R. 5). The 2010 Notice failed to advise Petitioner of its right to appear or of the February 25 deadline. Petitioner was, thus, unaware that this notice triggered any deadlines and did not contact the Assessor or the Board about the 2010 Assessment until March 2010.

The Circuit Court found that the 2010 Notice was in conformance with W. Va. Code §11-3-2a and, further found that such statute did not require that the deadline for filing an appeal be provided in a notice. (A.R. 472). The Circuit Court found that the 2010 Notice was adequate

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<sup>3</sup> The fact that the 2010 Notice was based on a form provided by the Tax Commissioner, as argued by Respondent in the Circuit Court action, is irrelevant. The requirements of the West Virginia Code control over any forms provided by the Tax Commissioner. Moreover, the Tax Commissioner has provided the Assessor with forms for many different situations (many of which the Assessor chose not to use). The fact that a form is provided by the Tax Commissioner does not mean that it is appropriate to use for all situations and specifically that it is appropriate to use when the taxpayer must be provided notice under W. Va. Code §11-3-2a.

because it 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.” (A.R. 472). Further, the Circuit Court stated that W. Va. Code §11-3-24 “states a range in which the board may adjourn *sine die*. So, the exact date would change from year to year and may not be known in January.” (A.R. 472). Finally, the Court stated “all persons are presumed to know the law” and that Petitioner was not “entitled to legal instruction beyond what is statutorily required by §2a.” (A.R. 472).

A plain reading of the 2010 Notice shows that it certainly did not conform to the statute. Moreover, due process requires that such notices advise the recipient of any filing deadlines, regardless of whether such requirement is provided by statute. The Circuit Court’s stated basis for its decision, that all persons are presumed to know the law, is erroneous given the statutory notice requirement and the requirements of due process. The Circuit Court relies on only one case for this proposition – State v. McCoy, 107 W. Va. 163, 172, 148 S.E. 127, 130 (1929) - but that case is wholly inapplicable. McCoy involved a criminal prosecution under a law forbidding transportation of liquor. The court stated:

[A]n individual who knowingly carries on his person from one place to another liquor of high alcoholic content, usable as a beverage, is presumed to know that it is intoxicating. It is a matter of common knowledge that alcohol intoxicates.

Id. This case provides no basis whatsoever to support a finding that a government body may dispense with statutorily and constitutionally required notice of appeal rights.

Further, the Circuit Court’s argument that the date of the meetings of the Board would not be known in January when the notices of assessment increases are sent is belied by the statutory scheme itself. Based on that scheme, such date must be known in January. W. Va. Code §11-3-24 requires that the clerk of a County Council “publish notice of the time, place and

general purpose” of the meeting of a Board of Review and Equalization. Such publication must be by “class II legal advertisement” in compliance with W. Va. Code §59-3-1, *et. seq.* Thus, pursuant to W. Va. Code §59-3-2, such advertisement must be published once a week for two consecutive weeks. Under W. Va. Code §11-3-24 a County Council is required to begin the meetings as the Board of Review and Equalization “not later than the first day of February.” Thus, given the requirement for two weeks of published notice, the Council must know the date of the meetings by January 15 when it sends out notices of assessment increases. In fact, the new notices being used by the County for tax year 2012 do provide the deadline for filing appeals. (A.R. 465) Therefore there can be no argument that such date is not known at the time the notices are sent. It is not disputed, and this Court can take judicial notice of the fact that the dates for the meeting of the Board are set prior to the sending of the assessment notices.

Finally, the Circuit Court’s assumption that taxpayers are, or should be, sufficiently versed in the law to research specific chapters and articles of West Virginia statutes in order to find the information that the government should have given them in the first place is belied by numerous cases from West Virginia and other jurisdictions regarding due process notice requirements. In Toyama v. Merit Systems Protection Bd., 481 F.3d 1361, 1365-67 (C.A.Fed. 2007) the court clearly rejected the argument that petitioner “should have known enough to ignore [the defective] notice.”

Administrative agencies “must observe the basic rules of fairness as to parties appearing before them.” Mizell v. Rutledge, 174 W.Va. 639, 641, 328 S.E.2d 514, 516 (1985), *quoting Ottenheimer Publishers, Inc. v. Employment Sec. Administration*, 275 Md. 514, 520, 340 A.2d 701, 704-5 (1975). This right is deemed so basic that the Supreme Court of Appeals of West Virginia has said that:

Even if there were no specific statutory requirements of notice, this principle would seem to require that adequate notice and opportunity to be heard be afforded.

Id.

In a case directly on point involving social security appeals, the government attempted to argue that a notice similar to that given in the instant case was adequate. The court held that the notice was deficient, because the government did not specifically provide information about appeal rights, including the timing for filing an appeal, but simply informed plaintiff that if she had any questions, she could contact the phone number and/or write or visit the local social security office provided to plaintiff in the notice. Stevens v. Astrue, 2010 WL 148363, \*3-4 (D.Kan. 2010), included in Appendix Record at page 450. (A.R. 450).

The requirement for the government to properly advise persons of their appeal rights is founded in principles of statutory and constitutional due process. Mizell, 174 W.Va. at 643, 328 S.E.2d at 518. “[C]onstitutional due process includes being informed of the possible consequences of governmental action.” Id., *citing* Schulte v. Transportation Unlimited, Inc., 354 N.W.2d 830, 933 (Minn. 1984). See also Chavis v. Heckler, 577 F.Supp. 201, 205 (D.C.D.C. 1983) (social security administration case – failure to advise of right to appeal violates procedural due process); Brooks v. Secretary, 1997 WL 790728, \*4 (N.D.Ill. 1997) (defective notice of appeal rights creates Fifth Amendment due process claim).

In addition to these constitutional principles, statutory notice provisions, such as in the instant case, require that a taxpayer be informed of the specific consequences of an assessor’s determination in order to make an informed decision concerning appeal. Id., *citing* In re Tax Assessments Against Pocahontas Land Corp., 158 W.Va. 229, 210 S.E.2d 641 (1974); State ex rel. Hinkle v. Skeen, 138 W.Va. 116, 124, 75 S.E.2d 223, 227 (1953), *cert. denied*, 345 U.S. 967,

73 S.Ct. 954, 97 L.Ed. 1385 (1953). In another *ad valorem* tax case involving, like the instant case, an increase in assessment, the court held that an assessor could not ignore the requirements for giving information on the appeal process of its assessment and then seek to bar an appeal for not complying with the procedures. Oconee County Bd. of Tax Assessors v. Thomas, 282 Ga. 422, 424-25, 651 S.E.2d 45, 47 (2007). The U.S. District Court for the District of Columbia has held that failure to properly notify a landowner of appeal rights regarding assessments would be enough to overcome the Anti-Injunction Act and give jurisdiction to the federal courts based on violation of due process rights. District of Columbia v. Craig, 930 A.2d 946, 958-61 (D.C. 2007). See also Berne Corp. v. Government of The Virgin Islands, 570 F.3d 130, 135-38 (C.A.3 (Virgin Islands) 2009) (procedural due process in *ad valorem* tax case requires, *inter alia*, adequate notice to taxpayers of the appeals procedures).

This right to notice is so basic that courts have determined that failure to properly inform a party of appeal rights deprives a locality of jurisdiction to impose an assessment. Countryside Village v. City of North Branch, 430 N.W.2d 206, 207-09 (Minn.App. 1988), *affirmed, en banc*, Countryside Village v. City of North Branch, 442 N.W.2d 304, 308 (Minn. 1989), *citing* Klapmeier v. Town Center of Crow Wing County, 346 N.W.2d 133 (Minn. 1984). “Because of the importance of property ownership to individuals” there must be strict compliance with such notice requirements. Id.

Although there is no specific authority in West Virginia as to the consequences of the failure of the government to provide proper notice of appeal rights, the requirement that notice be given for any increase in the assessed value greater than 10% strongly indicates that the failure to provide such notice deprives the government of the ability to enact such an increase. Moreover, there is strong authority from other jurisdictions, including the cases from Minnesota cited

above, that under such circumstances, the increase in assessment for that year is void. See also AT&T Wireless Services of Oregon, Inc. v. Jackson County Assessor, 2003 WL 21254247 (Or.Tax Magistrate Div. 2003) (in *ad valorem* tax case, failure to give proper notice of appeal rights does not merely toll filing deadline – it invalidates the assessment). (A.R. 461) Thus, because Petitioner was not advised of its appeal rights or deadlines, this Court should, as a matter of law, find the 2010 Assessment void and find that the assessment for that year remains the same as the 2009 assessment or \$677,050.00.

Alternatively, and at a minimum, the time period for filing an appeal is not triggered when the government fails to give proper notice of appeal rights, including notice of the timing for filing an appeal. Bidstrup v. Wisconsin Dept. of Health and Family Services, 247 Wis.2d 27, 632 N.W.2d 866 (Wis.App. 2001); Walker v. Merit Systems Protection Bd., 194 F.3d 1337 (Table), 1999 WL 379097 (C.A.Fed. 1999), *citing* Loui v. Merit Systems Protection Bd., 25 F.3d 1011, 1013-14 (C.A.Fed. 1994) (government's failure to allow the filing of an untimely appeal when there was defective notice of appeal rights is reversible error -- limitations period for filing an appeal is tolled until proper notice of appeal rights is given – six year delay in filing appeal under such circumstances is not fatal); Pathman Const. Co., Inc. v. U.S., 817 F.2d 1573, 1578 (C.A.Fed. 1987) (government contracting officer's final decision that does not give the contractor adequate notice of its appeal rights is defective and therefore does not trigger the running of the limitations period).

The fact that the 2010 Notice failed to advise Petitioner of its appeal rights is further evidenced by the new form the County is using to inform landowners about increases in their assessments. (A.R. 465) This new form contains a number of paragraphs which were not included in the prior forms, including the following:

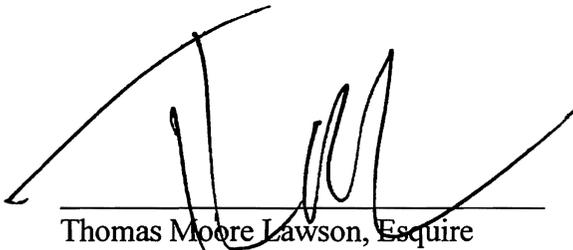
If you are in disagreement with the current market value, please feel free to contact my appraisal personnel at 304-267-5072 within five (5) days of receipt of this notice for a petition for review. After meeting with me or my staff, if you remain unsatisfied, you may appeal through the County Board of Equalization which convenes in February of 2012.

The fact that this language, which was not present in the 2010 assessment forms, has been added by the County for the 2012 form is an admission by the County that its 2010 forms were inadequate and failed to inform Petitioner of its appeal rights.

### CONCLUSION

The Circuit Court's order denying the Petition for Appeal in so far as it challenges the 2010 tax assessment should be reversed, and Petitioner's 2010 Assessment should be reduced to its 2009 tax assessment (\$677,050.00), or alternatively, this matter should be remanded for further proceedings.

Respectfully submitted,  
LEE TRACE LLC  
By Counsel



Thomas Moore Lawson, Esquire  
West Virginia Bar No. 6468  
Lawson and Silek, P.L.C.  
P.O. Box 2740  
Winchester, VA 22604  
Phone: (540) 665-0050  
Fax: (540) 722-4051

Counsel for Lee Trace LLC

**CERTIFICATE OF SERVICE**

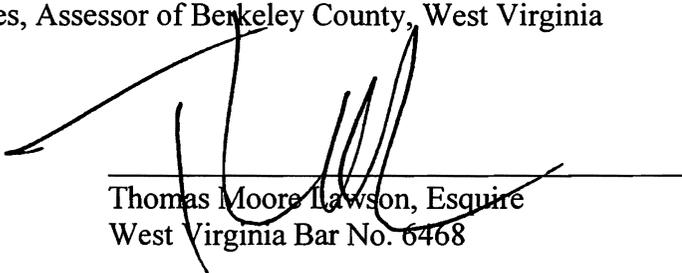
I hereby certify that on this 15th day of August, 2012, true and accurate copies of the foregoing Petitioner's Brief were deposited in the U.S. Mail contained in postage-paid envelopes address to counsel for all other parties to this appeal as follows:

Norwood Bentley, Legal Director  
Berkeley County Council  
400 West Stephen Street, Suite 201  
Martinsburg, WV 25401

Counsel for Respondents Berkeley County Council and Berkeley County Council as Board of Review and Equalization

Michael D. Thompson, Esquire  
Thompson & Pardo, PLLC  
119 East Liberty Street  
Charles Town, WV 25414

Council for Respondent Gearl Raynes, Assessor of Berkeley County, West Virginia



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Thomas Moore Lawson, Esquire  
West Virginia Bar No. 6468

Counsel for Petitioner Lee Trace LLC