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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0886

EB Dorev Holdings, Inc., Defendant Below,

Petitioner,

v.

Civil Action No: 04-C-3163
Circuit Court of Kanawha County

West Virginia Department of Administration,
Real Estate Division, Plaintiff Below,

Respondent.

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This appeal involves the application of West Virginia's statutory tax lien sale procedure to certain parcels of real estate located in Kanawha County, West Virginia (hereinafter "the Properties") which were owned by private entities (hereinafter "the Tax Debtors") on the July 1, 2008 assessment date for the property taxes payable in 2009, but were subsequently purchased by the West Virginia Department of Administration, Real Estate Division (hereinafter "the State") in August and September of 2008.

Petitioner EB Dorev Holdings, Inc. (hereinafter "EB Dorev") submits that when the 2009 taxes on the Properties were not timely paid, the Kanawha County authorities properly sold the tax liens on the Properties to EB Dorev in accordance with the procedure set forth by the West Virginia Legislature. The Kanawha County Sheriff agrees with EB Dorev's positions, as indicated by his filings in the lower court. However, the Circuit Court of Kanawha County, West Virginia ruled in error that (1) the Properties were rendered exempt from 2009 taxes upon the State's purchase of the Properties; (2) the liens for the 2009 property taxes were extinguished through the doctrine of merger upon the State's purchase of the Properties; and (3) that the liens for the 2009 property taxes were inchoate and never matured into saleable liens. EB Dorever filed the instant appeal and submitted its opening brief demonstrating that the Circuit Court erred in making each of these rulings. The State filed its responsive brief, and EB Dorev now respectfully submits this reply.

As set forth more fully below, the Properties were not rendered exempt from 2009 property taxes upon the State's purchase, because ownership for the purpose of determining any tax exemption was determined on the July 1, 2008 assessment date, when the Properties were owned by private, non-exempt entities. In addition, the liens for

the 2009 property taxes were not extinguished through merger, nor were they inchoate liens which never matured. In the context of eminent domain, the Legislature has recognized that tax liens on real estate survive the State's acquisition of title to such real estate, and the money to pay the taxes owed must be collected at the time of the transaction. In other words, in the context of eminent domain, the liens are neither merged nor treated as inchoate. If the State's concepts of "merger" and "inchoate liens" do not apply to provide tax relief to landowners who have their property forcibly taken by the State, then certainly they do not apply to open market transactions with willing sellers. Furthermore, this Court has never adopted the doctrine of merger in the context of the case at bar, and the application of the doctrine of merger in this context would contravene clear West Virginia statutes and the West Virginia Constitution. Finally, the State's argument that the liens were inchoate and never matured is an impermissible attempt to construe clear and unambiguous statutes to mean something which they do not say, or to render portions of them meaningless.

ARGUMENT

I. THE PROPERTIES WERE NOT RENDERED EXEMPT FROM 2009 REAL ESTATE TAXES UPON THE STATE'S PURCHASE OF THE PROPERTIES IN AUGUST AND SEPTEMBER OF 2008.

As set forth more fully in EB Dorev's opening brief, the law is clear in West Virginia that the ownership of a parcel of real estate for property tax purposes is determined on the assessment date for the taxes. *See* W. Va. Code § 11-3-1(c); Syl. Pt. 1, Moore v. Johnson Serv. Co., 158 W. Va. 808, 219 S.E.2d 315 (1975); Cole v. State, 73 W. Va. 410, 80 S.E. 487, 491 (1913). Because it is undisputed that the Tax Debtors, who are private entities

with no claim to immunity from taxation, owned the Properties on the July 1, 2008 assessment date for the 2009 real estate taxes, the Tax Debtors are the owners of the Properties for the purposes of the 2009 real estate taxes. Neither the Legislature nor this Court has made any provision for retroactively applying exemption status. For something as important as a property tax exemption, if the Legislature had intended retroactive application, it surely would have stated its intent somewhere in the tax statutes. Thus, the Circuit Court erred in determining that the State's purchase of the Properties *after* the assessment date for the 2009 real estate taxes provided any immunity from said taxes.

The State has not cited anything in West Virginia's property tax statutes or jurisprudence allowing for any variance from the clear mandate that ownership for tax purposes is determined on the assessment date, or otherwise allowing the State to retroactively apply its tax exempt status to property that it did not own on the assessment date. Instead, the State argues that even if its purchase of the Properties in August and September of 2008 did not render the Properties exempt from 2009 real estate taxes, this has no bearing on the issue of the continuing existence or validity of the tax *liens* on the Properties.[1] The State maintains that even if the Circuit Court erred in holding that the

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[1] The State asserts that a tax lien arising under W.Va. Code § 11A-1-2 is "the State's lien,"and that other levying bodies do not have liens. However, W.Va. Code § 11A-1-2 simply states, in relevant part, that "[t]here shall be a lien on all real property for the taxes assessed thereon . . . ." At no point does W.Va. Code § 11A-1-2 refer to the lien created therein as "the State's lien," nor does the State cite anything in support of the assertion that the lien belongs solely to the State. Given that the vast majority of property taxes go to taxing units other than the State, the State's unsupported characterization of the lien for property taxes as only "the State's lien" lacks merit. Even assuming *arguendo* that the lien is a state-level lien, the Legislature did not by virtue of giving the county the power to enforce this state-level lien give the State the right to cancel, void, or other wise dissolve such lien. This power was most likely given to the county to enhance the county's ability to ensure the collection of property taxes which mostly belong to taxing units at the county and municipal level.

Properties were rendered exempt from 2009 taxes upon purchase by the State, the tax liens on the Properties were nonetheless extinguished through the doctrine of merger and/or were inchoate liens that never matured into saleable liens.[2]

In other words, instead of substantively contesting EB Dorev's first assignment of error, the State has chosen to base its case on EB Dorev's second and third assignments of error. For the reasons set forth below, as well as in EB Dorev's opening brief, the tax liens at issue were not extinguished through the doctrine of merger, nor were they "inchoate" liens that never matured into liens suitable for sale.[3]

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[2] The State points out that the sale of tax liens is not the sole means of collecting delinquent taxes, and therefore if the Tax Debtors remain liable for the 2009 taxes in the wake of the State's purchase, they would not escape liability if the liens could not be enforced. However, as EB Dorev argued in its opening brief, the sale of tax liens is the most effective method of collecting the taxes, and in some cases is the *only* method available. For example, if the Tax Debtors, which are limited liability companies, have distributed the proceeds from the sale and do not have sufficient assets to cover the amount of taxes, penalties, and interest owed, then the alternative means of collecting delinquent taxes identified by the State (a civil action by the sheriff) would not be effective because the Tax Debtors would be judgment-proof.

[3] The State argues that W.Va. Code § 11A-3-7 provides the county sheriff with the discretion to determine that a tax lien should not be sold. While, in this case, the Kanawha County Sheriff chose not to suspend the sale, the State asserts that the suspension of the sale was "the only possible reasonable conclusion," and that no responsible public official would conclude that five million dollars worth of the State's property should be transferred into private hands in order to obtain $57,000 for other public agencies. Perhaps the Sheriff concluded that the State (or the closing attorney or the sellers) had ample opportunity to avoid the sale by securing payment of the outstanding taxes, and that local government bodies in need of funding should not be deprived thereof because the State neglected to make the slightest effort to ensure that its actions did not harm other units of government. The State could have made provision in the closing documents requiring the Tax Debtors to pay the outstanding taxes with a portion of the proceeds from the sale, as is customary in transactions in which a property's tax status might be changing. Instead, the State simply chose to proceed without any consideration of whether or not the taxes were ultimately paid. The Sheriff could have reasonably concluded that the State should not be protected from the consequences of a tax lien sale under the circumstances. In any event, the State is not in a position to retroactively substitute its own judgment for the discretion that W.Va. Code § 11A-3-7 affords to the Sheriff.

II. THE PROPERTY TAX LIENS AT ISSUE WERE NOT EXTINGUISHED THROUGH THE DOCTRINE OF MERGER.

The State advances numerous arguments in support of the incorrect proposition that the doctrine of merger, as articulated by the Supreme Court of New Mexico in State v. Locke, 29 N.M. 148, 219 P. 790 (1923), extinguishes the tax liens at issue in this case. First, the State falsely asserts that this Court has adopted the doctrine of merger articulated in Locke. Second, the State attempts to distinguish foreign authority that Eb Dorev cited to demonstrate that Locke has not been universally adopted, and attempts to use foreign authority to override clear West Virginia Statutes. Lastly, the State incorrectly argues that consideration of public policy and Legislative intent do not support EB Dorev's position. For the reasons set forth below, the State's arguments are without merit.

A. The Legislature has recognized that tax liens on real estate survive the State's acquisition of title.

W.Va. Code §§ 54-2-12 and 54-2-14a provide that an applicant seeking to take property through eminent domain, including the State of West Virginia, is vested with title to the property sought to be taken upon payment of the appropriate compensation into court. *See* W.Va. Code § 54-2-12; W.Va. Code § 54-2-14a. After the State pays this money into court, and therefore *after title to the subject property is vested with the State*, the court proceeds to distribute the compensation. *See* W.Va. Code § 54-2-18. Critically, W.Va. Code § 54-2-18 provides, in relevant part, that "the court or judge may direct that the money paid into court, *after withholding therefrom any sum necessary for payment of any taxes which are a lien upon the property*, interest, or right, be disbursed and distributed in accordance with the statement in the petition, among the persons entitled thereto." *Id.*

(emphasis added).[4] The lien is enforced *after* the State has taken title.

This is a clear legislative recognition that a tax lien on a piece of real estate *survives* the State's purchase of that real estate, and is not extinguished by the doctrine of merger or otherwise. While it is true that under W.Va. Code § 54-2-14a the lien is transfered from the property to the fund paid into court, this is still a legislative pronouncement that in order for the State to acquire title property for a public purpose, the State has to comply with a procedure to ensure that the taxing authorities are paid. If the State cannot take title to property without ensuring the satisfaction of existing tax liens when exercising powers unique to government, then surely it cannot do so when it stands in the same position as any other buyer on the open market. Because in an open market transaction there is no court fund to which the lien can be transferred, the lien must remain on the property to ensure payment of the outstanding taxes. Thus any title taken is taken subject to any unsatisfied tax liens. Like other buyers on the open market, if the State does not make provision to ensure the payment of the taxes owed on the subject property, then the State does so at its peril and risks losing the property through the tax lien sale procedure.

B. This Court has never adopted the doctrine of merger articulated in Locke.

The only published decision of this Court that even mentions the doctrine of merger is Armstrong Products Corp. v. Martin, 119 W.Va. 50, 192 S.E. 125 (1937). However, Armstrong was a case about what happens when the State acquires title to property *as a*

[4] It is significant that the Legislature uses the phrase "taxes which are a lien upon the property," as opposed to "taxes which have been levied against the property." The chosen language indicates that the lien is valid and fully enforceable when it attaches on the assessment date, and not inchoate as the State has asserted.

result of the statutory tax sale procedure under the law then in effect. *See* 119 W.Va. at 50, 192 S.E. at 126. The facts of Armstrong, as recounted by the Court, were that when the 1930 taxes on the subject property were not paid,

> in December, 1931, the tract was *sold for the delinquency by the sheriff*, and was *purchased by the state*. The taxes for 1931 were also not paid and the tract was purportedly sold to the state *at the* tax sale therefor in December, 1932.

Id. (emphasis added). The central holding of the case was that "by its purchase *at the tax sale* in 1931, the state acquired the complete title of the manufacturing corporation, subject only to the right of redemption." Id., 192 S.E. at 127 (emphasis added). Thus, Armstrong merely stands for the proposition that when the State acquires title to property through the tax sale procedure, the property cannot thereafter again be sold again to collect the taxes owed by the previous owner. Were it any other way, the tax sale procedure would have no finality.[5] Conversely, the instant case involves the State's purchase of property on the open market after tax liens had already attached. As a purchaser on the open market, the State stood in the same position as any other purchaser on the open market: it had to ensure the payment of the assessed taxes out of the transaction or risk the property being

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[5] It should be noted that the tax sale in Armstrong took place under a different statutory framework than is in place today. When Armstrong was decided, the relevant West Virginia statutes provided for a sheriff's sale of the actual property, rather than a sale of the tax liens on the property. *See* W.Va. Code § 11-10-5 (1931); W.Va. Code § 11-10-6 (1931). Moreover, the law then in effect provided that ""[w]hen any real estate is offered for sale as aforesaid and no person present bids the amount of the taxes, interest and costs due thereon, the sheriff or collector shall purchase the same on behalf of the State for the taxes thereon, and the interest on the same..." W.Va. Code § 11-10-28 (1931). Though not explicitly stated, this was likely the situation in Armstrong: no one bid the requisite amount for the subject property, and so the sheriff purchased it on behalf of the State. Accordingly, the ruling in Armstrong merely reinforces the finality of the purchase on behalf of the State in this scenario. It avoids the process of cycling unwanted properties through the tax sale process, which would only incur more costs to the State for properties that it already owns and would get again through a subsequent sale.

sold to collect those taxes. It was the State's acquisition team's responsibility to ensure that it acquired the property with no taxes due.

Nevertheless, the State argues that "the facts of Armstrong are irrelevant," and that Armstrong should be read as adopting the doctrine of merger as a general legal principal applicable any time the State purchases property, whether it is at a tax sale or on the open market. However, this Court has recognized on multiple occasions that the West Virginia Constitution requires the Court to announce new points of law in syllabus points. *See* Syl. pt. 2, Walker v. Doe, 210 W. Va. 490, 558 S.E.2d 290 (2001)("[n]ew points of law ... will be articulated through syllabus points as required by our state constitution"); *see also* State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003); W.Va. Const. Art. VIII, § 4. The relevant syllabus point in Armstrong states as follows: "*At a tax sale*, when land is purchased by the state, its tax lien is merged in its purchased title." Syl. pt. 1, Armstrong, 119 W.Va. 50, 192 S.E. 125 (emphasis added). Thus, the point of law announced in Armstrong plainly applies only when the state purchases land "at a tax sale." The State's reading of Armstrong as a general adoption of the doctrine of merger as articulated by the Supreme Court of New Mexico in Locke contravenes the West Virginia Constitution.

C. The State cannot rely on foreign authority to contravene the clear mandate of West Virginia statutes and the West Virginia Constitution.

The State argues that State v. Salt Lake County, 96 Utah 464, 85 P.2d 851 (1938), which EB Dorev cited to demonstrate that Locke has not been uniformly adopted by all states, is distinguishable from the case at bar and actually supports the State's case. The relevant distinction, as argued by the State, is that in Salt Lake County, the State of Utah

took title to the property at issue "after every step in the tax and lien sale process was complete except for the conveyance of the tax deed," whereas in the instant case "the only step in the taxation and lien sale process that took place prior to the State's purchase of the property was the attachment of the State's tax lien on July 1, 2008."

This distinction would only be relevant if West Virginia's statutory tax lien procedure provided that the lien attached "after every step in the tax and lien sale process was complete except for the conveyance of the tax deed," or perhaps if the Legislature had not spoken on the issue of when the lien attached at all. However, the West Virginia Legislature has clearly spoken on this issue and stated that the lien attaches on the assessment date. *See* W.Va. Code § 11A-1-2. In Salt Lake County, the court reasoned that the State could acquire only such title as its grantor had at the time of the deed, which in that case was "title encumbered by taxes theretofore assessed and levied[.]" *See* 96 Utah 464, 85 P.2d at 854. Under West Virginia law, the title to the Properties was encumbered as of the July 1, 2008 assessment date for the taxes at issue, as opposed to the date when such taxes were billed. Thus, in keeping with the reasoning applied in Salt Lake County, when the State purchased the Properties from the Tax Debtors after July 1, 2008, the State could only acquire such title as the Tax Debtors possessed at the time: title encumbered by the tax lien that had already attached by virtue of W.Va. Code § 11A-1-2.

In any event, EB Dorev cited Salt Lake County to show that not every jurisdiction has adopted the doctrine of merger as articulated in Locke.[6] Neither of these cases is

[6] To the extent the State attempts to argue that Salt Lake County does not disagree with Locke, it must be noted that Locke held when property is purchased by the state, it is absolved from any further liability for taxes previously assessed against it. *See* 29 N.M. 148, 219 P. at 792. By contrast, the Salt Lake County court held that when property is purchased by the

controlling in the instant case, because the controlling law is set forth in the statutes passed by the West Virginia Legislature, and in the West Virginia Constitution. This Court has long recognized that "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." *See* Syl. Pt. 2, State v. Epperly, 135 W. Va. 877, 65 S.E.2d 488 (1951). Similarly, this Court has recognized that

> [i]t is not for this Court arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.

Syl. Pt. 11, Brooke B. v. Ray, 230 W. Va. 355, 738 S.E.2d 21 (2013).

In the instant case, W. Va. Code § 11A-1-2 plainly states that a lien for property taxes attaches on the July 1 assessment date. There is no mention in any West Virginia tax statute of any mechanism whereby the lien that attaches on the assessment date can be merged or otherwise cancelled, except by the payment of the taxes owed.

Furthermore, controlling statutes plainly indicate that a parcel of property is either exempt or not exempt for a given tax year, and ownership for the purposes of determining an exemption is determined on the assessment date. *See* W. Va. Code § 11-3-1(c); W. Va. Code § 11-3-9. Section 11-3-9 provides that certain categories of property are exempt from taxation, including property owned exclusively by the State. Section 11-3-1(c) provides that ownership for property tax purposes is determined on the assessment date. There is no provision in any West Virginia tax statute allowing property to be both taxable

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state, the property cannot be retroactively exempted from a tax lien lawfully imposed thereon prior to the state's purchase. *See* 96 Utah 464, 85 P.2d at 856. Thus, the holding in Salt Lake County is directly contrary to the holding in Locke.

and exempt for a given tax year, or for it to change status mid-year. In other words, if a property is taxable on the assessment date for a given tax year, it cannot later become exempt from that year's taxes.[7] Property is either taxable on the assessment date or it is exempt; it cannot be neither, both, or change in any part of the year.

However, the doctrine of merger articulated in Locke stands in direct contrast to the West Virginia statutes discussed above, because Locke holds that "when property is acquired by the state in its sovereign capacity, it thereupon becomes absolved, freed, and relieved from any further liability for taxes previously assessed against it . . . The claim of the state for such taxes becomes merged in its ownership of the fee." *See* 29 N.M. 148, 219 P. at 792.[8] The application of Locke would not only cancel, without payment of the outstanding taxes, a tax lien which had already attached by virtue of West Virginia statute, but would also result in properties that were taxable on the assessment date for the subject taxes later becoming exempt from said taxes. The State cannot rely on foreign authority

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[7] To illustrate, see the chart attached hereto as Exhibit 1. The "assessment year gap" on said chart demonstrates the time period between the July 1, 2008 assessment date and the State's purchase of one of the Properties. During this period, the Properties were owned by the non-exempt Tax Debtors (and thus clearly taxable), but as Exhibit 1 illustrates, if the doctrine of merger is applied, then the Properties will later become exempt from taxation. This directly violates West Virginia law, which does not provide for a property to be both taxable and exempt at different points after the assessment date for a given tax year, or to change its status after the assessment date. This chart also illustrates how, if the State's argument is accepted, the former property owner gets the benefit of the State's exemption for the former property owner's pro-rata share of the assessment year. There is no West Virginia statute that allows the State to share its tax exempt status with other property owners.

[8] As argued in EB Dorev's opening brief, this concept that "the state's claim for such taxes becomes merged in its ownership of the fee" only makes sense if it is truly the state's claim for taxes. The idea of "merger" is based on a unity of ownership interests: both the tax claim and the fee ownership belong to the state. Where, as here, the bulk of the taxes are owed to taxing units *other than the state*, there is no unity of ownership. Thus, there can be no merger of the *state's* ownership of the fee and these *other entities'* claims for taxes.

from 1923 to create a remedy that directly violates clear West Virginia statutes.

In addition, the application of the doctrine of merger violates the West Virginia Constitution. The Constitution provides, in relevant part, that "taxation *shall be equal and uniform* throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law." W. Va. Const. Art. X, § 1 (emphasis added).[9] As set forth in greater detail in EB Dorev's opening brief, the State's attempt to retroactively exempt the Properties from the 2009 taxes owed by the non-exempt Tax Debtors, and to destroy the liens on the Properties without any statutory authority for doing so, solely because the State happened to succeed to the title of the Properties, directly violates this constitutional requirement of equal and uniform taxation.

D. Considerations of public policy and Legislative intent do not support the application of the doctrine of merger.

The State's arguments with respect to public policy and Legislative intent primarily relate to the specific numbers at issue in this case. The State essentially argues that the Legislature cannot have intended for the State to lose five million dollars worth of property over a tax debt of approximately $57,000. This argument ignores the fact that the State, and only the State, was in a position to ensure that *nobody* lost *anything*. The State seeks a ruling that absolves the State of any responsibility whatsoever for ensuring the collection of property taxes owing to other units of government when the State purchases property.

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[9]The State argues that due to the purported distinctions between Salt Lake County and the case at bar, EB Dorev's reliance on the constitutional analysis employed in Salt Lake County is misplaced. However, regardless of any distinctions which may exist between Salt Lake County and the case at bar, the West Virginia Constitution requires equality and uniformity in the taxation of real property, and the application of the doctrine of merger would flout this requirement.

If this Court adopts the doctrine of merger as the State advocates, then whenever the State purchases property that was owned by a non-exempt party on the assessment date, the other taxing units will lose the revenue that they otherwise would have derived from that property. By contrast, if the State is held to the same standard as everybody else when it purchases property (i.e. if the State is required to ensure that the taxes are paid from the sale proceeds or risk losing the property in a tax lien sale), then all units of government get the tax revenue they are owed and nobody loses anything.

There is no provision in the statutory framework that absolves the State of the consequences of a tax lien sale if the State does not ensure the payment of the taxes owed on the property it purchases. On the contrary, the Legislature made its intent plain when adopted the statutory tax lien procedure; it was concerned with "the paramount necessity of providing regular tax income for the state, county and municipal governments," and with the fact that delinquent land "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. The rule advocated by the State would protect the regular tax income of the State, but would jeopardize the regular tax income of other units of government, and would make it easier for delinquent private owners to avoid bearing their fair share of the costs of government. On the other hand, the application of the statutory tax lien sale procedure, without any of the unsupported modifications urged by the State, ensures that the state, *county, and municipal* governments receive their regular tax income, and that delinquent private owners cannot shirk their responsibilities by selling their property to the State or some other tax-exempt entity. Moreover, it requires no greater burden on the part of the State; it merely

needs to require the closing attorney to comply with the relevant statutes by ensuring that the property taxes are paid out of the transaction.

Again, when the State purchases property, the State is the only entity with the power to safeguard the taxes owing to other units of government. The State, in the course of closing its transactions with the Tax Debtors, could have taken the simple, customary step of requiring the closing attorney to collect, withhold, and/or escrow the amounts necessary to pay the outstanding taxes. By contrast, the other taxing units had no control over these transactions and thus no power to protect their interests from the results thereof. Simply stated, if the State is the only entity with the power to avoid the loss of tax revenue, the State should not be absolved from any and all responsibility for doing so. When the Legislature adopted the statutory tax lien procedure "[i]n view of the paramount necessity of providing regular tax income for the state, county, and municipal governments," surely it did not intend to issue the State a license to disregard the taxes owing to county and municipal governments, and to thwart the tax lien created to ensure the collection of such taxes. If the goal is to ensure the payment of taxes, then the better rule is that when the State or any other tax-exempt entity[10] purchases property after the assessment date for a given year's taxes, the lien for that year's taxes remains in place and may be enforced by

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[10]To the extent the State critiques EB Dorev's motives, it should be noted that the State itself is not a disinterested party with only the public's best interest in mind. It is highly unlikely that if the shoe were on the other foot, and Kanawha County or some other government entity had purchased property without providing for the payment of a significant sum of taxes owing to the State, the State would be arguing that its lien for said taxes was merged and extinguished. Moreover, EB Dorev did not initiate this action; it was filed by the State. EV Dorev purchased these liens as assessed under the former owners' names with the full expectation that they would be redeemed. Only the State allowed this to become a property issue instead of a redemption issue.

sale if the taxes remain unpaid.[11]

In response to EB Dorev's assertions regarding the steps the State could have taken to ensure the collection of the outstanding taxes, the State argues that "where the existence of a saleable lien is a matter of dispute, and believed by the State agency to have been extinguished, the conclusion that the State agency should have simply chosen to expend State money to purchase the State's own lien, this simply presuming the lien to exist as a valid lien, and taking the risk of making an unjustifiable donation of State funds to various local government entities, is not compelling."

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[11] In a throwaway argument at the end of its brief, the State argues that "nowhere in chapter 11A of the Code has the Legislature authorized title to property owned by the State to be transferred to third parties who purchase delinquent property tax liens under article three, chapter eleven-a of the Code." However, Chapter 11A makes no distinction as to the ownership of properties that may be transferred under said chapter. For example, W.Va. Code § 11A-1-2 provides, in relevant part, that "there shall be a lien on *all real property* for the taxes assessed thereon . . . ." (Emphasis added). W.Va. Code § 11A-3-19 provides, in relevant part, that a party who purchases a tax lien at a sheriff's sale must take certain actions "in order to secure a deed for the real estate subject to the tax lien or liens purchased," including the preparation of a list of those to be served with notice to redeem. W.Va. Code § 11A-3-27 provides, in relevant part, that "[i]f the real estate described in the notice is not redeemed within the time specified in the notice, then from April 1 of the second year following the sheriff's sale until the expiration of the lien evidenced by a tax certificate of sale as provided in section eighteen of this article, the State Auditor or his or her deputy shall upon request of the purchaser make and deliver to the clerk of the county commission, a quitclaim deed for the real estate." Nowhere in these statutes is there any indication that a deed cannot be issued if the real estate was purchased by the State after the assessment date on which the lien attached. Chapter 11A simply provides that the property shall be deeded to the tax lien sale purchaser if it is not redeemed, regardless of who or what owns the subject property at the time the deed is to be issued.

The State also asserts that the "exclusive process by which property belonging to the State can be sold" is set forth in Chapter 5A, Article 11 of the Code. Chapter 5A, Article 11 of the Code relates to the Public Land Corporation, which is authorized to sell public lands in certain enumerated circumstances. *See* W.Va. Code § 5A-11-3. Nowhere in Chapter 5A, Article 11 does it state that the process set forth therein is the exclusive process by which property belonging to the State can be sold. Likewise, nowhere in Chapter 5A, Article 11 is there any indication that said Article in any way limits the tax lien sale procedure codified in Chapter 11A, or otherwise protects the State from the consequences of a tax lien sale when the State purchases property encumbered by a tax lien without providing for the payment of the outstanding taxes.

First, this argument ignores the fact that the customary steps would not require the State to "expend State money" or "tak[e] the risk of making an unjustifiable donation of State funds to various government entities." As discussed in EB Dorev's opening brief, it is usual and customary for lawyers closing transactions in which a property's tax status might be changing to collect, withhold, or escrow amounts which may be required to pay the outstanding taxes for the calendar year following the closing. *See* App. at pp. 131-133. This does not require any additional expenditure of State funds. Instead, it simply requires an allocation of a portion of the funds that the State was paying to the Tax Debtors for the Properties. Rather than handing the entire purchase price over to the Tax Debtors, the State could have simply withheld or placed in escrow the amounts necessary to pay the estimated tax bill. This costs the State nothing, and involves no risk.

Second, even if the State believed that the liens at issue were extinguished, the State still knew that the Tax Debtors owed taxes to other taxing units. If the State believed that these taxing units could no longer resort to the tax lien sale procedure to collect said taxes, then the State's responsibility to withhold or escrow a portion of the purchase money to ensure payment of the taxes becomes all the more imperative. The State's purported belief that its transaction robbed the other units of government of their most effective method of enforcing property taxes is certainly not an excuse for the State's failure to take simple, cost-free steps to ensure that the transaction did not deprive these other units of government of their tax revenue.[12]

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[12]Moreover, the State had the option of simply paying the outstanding taxes itself, and seeking reimbursement from the Tax Debtors. The State has chosen to put title to property valued at five million dollars at risk instead, when it could have merely risked approximately $70 thousand in redemption funds. The State is the party that had all the power and all the options,

III. THE PROPERTY TAX LIENS AT ISSUE WERE NOT INCHOATE, AND EVEN IF THEY WERE, THEY MATURED INTO LIENS SUITABLE FOR SALE UPON THE FAILURE TO PAY THE TAXES WITHIN THE PRESCRIBED PERIOD.

As with the State's other arguments, the State's argument that the tax liens on the Properties were inchoate ignores the plain mandate of the controlling statutes. West Virginia Code § 11A-1-2 plainly states that:

> [t]here *shall be a lien* on all real property for the taxes assessed thereon, and for the interest and other charges upon such taxes, at the rate and for the period provided by law, *which lien shall attach on the first day of July*, one thousand nine hundred sixty-one, *and each July first thereafter for the taxes payable for the ensuing fiscal year.*

W. Va. Code § 11A-1-2 (emphasis added). Thus, for the taxes at issue, the liens attached on July 1, 2008 (i.e on the assessment date). The State does not dispute that the liens attached on this date, but instead argues that the liens that attached were inchoate, and that the State's purchase of the Properties prevented the liens from maturing. In other words, despite the clear, unambiguous mandate that the lien attaches on the July 1 assessment date, the State urges a tortured construction under which (1) "the lien" that attaches by virtue of of W. Va. Code § 11A-1-2 is something other than a true and valid lien, or (2) the phrase "shall attach" actually means "shall conditionally attach," and the lien does not *really* attach until some unspecified later date.

Again, this Court has held that "[w]hen a statute is clear and unambiguous, . . . the duty of the courts is not to construe but to apply the statute, and in so doing, its words should be given their ordinary acceptance and significance and the meaning commonly attributed to them." Epperly, 135 W. Va. at 884, 65 S.E.2d at 492. Similarly, this Court has

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and it chose the greater risk.

held that "[i]t is not for this Court arbitrarily to read into a statute that which it does not say." Syl. Pt. 11, Brooke B., 230 W. Va. 355, 738 S.E.2d 21.

There is no ambiguity in W. Va. Code § 11A-1-2.[13] It plainly states that the lien attaches on July 1 for the taxes payable for the ensuing fiscal year (i.e. on the assessment date). Nowhere in Chapter 11A does the Legislature mention anything about the lien that attaches on the assessment date being "inchoate." Furthermore, even assuming *arguendo* that the lien fits into the abstract Black's Law Dictionary of "inchoate" cited by the State, nowhere in Chapter 11A does the Legislature mention anything about the maturation of the lien being arrested if the subject property is purchased by a tax-exempt entity after the lien has attached.[14] As set forth in EB Dorev's opening brief, the only method that the

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[13] Even if there were an ambiguity in W.Va. Code § 11A-1-2 rendering it subject to construction (which there is not), the statute could not be given the construction urged by the State. The State asks this Court to construe W. Va. Code § 11A-1-2 to mean something directly contrary to what it plainly says, and to read into the statute terms and conditions which do not appear. Furthermore, this Court has long held that "[n]o part of a statute is to be treated as meaningless and we must give significance and effect to every section, clause, word or part of a statute...." *See* T. Weston, Inc. v. Mineral Cnty., 219 W. Va. 564, 568, 638 S.E.2d 167, 171 (2006). To accept the State's construction of W.Va. Code § 11A-1-2 would be to render large portions of it meaningless. The statute provides that the lien attaches on the assessment date. If the lien is invalid and ineffective until some unspecified later date, and thus does not really attach until such later date, then the statute is effectively meaningless.

[14] The State cites City of Laurel v. Weems, 100 Miss. 335, 56 So. 451 (1911) and State v. Snohomish Cnty., 71 Wash. 320, 128 P. 667 (1912) in support of its argument that the lien should be considered inchoate, and that the maturation of the lien was arrested by the State's purchase. The State cannot rely on early 20th century cases from foreign jurisdictions to alter the plain mandate of unambiguous West Virginia statutes. Furthermore, in attempting to distinguish the Supreme Court of Utah's decision in Salt Lake County, the State argued that "there is no way to be certain that the statutes at issue in the mid-1930s were not distinguishable from the current West Virginia tax statutes in some relevant way." To the extent the State relies on Weems and Snohomish, the same argument applies: there is no way to know that the statutory property taxation scheme in these jurisdictions in the 1910s did not differ from the current West Virginia statutes in some material way.

Legislature has provided for extinguishing a tax lien after it has attached is *the payment of the taxes owed. See e.g.* W.Va. Code § 11A-3-5 ("The tax lien on each *unredeemed* tract or lot . . . shall be sold by the sheriff . . .")(emphasis added); W. Va. Code § 11A-3-27 ("If the real estate described in the notice *is not redeemed* within the time specified in the notice, then...the State Auditor or his or her deputy shall upon request of the purchaser make and deliver to the clerk of the county commission, a quitclaim deed for the real estate.")(emphasis added).

In summary, the Legislature could have easily provided that the lien attaches on the assessment date, but is inchoate and ineffective until some later point in the taxation process. The Legislature could have easily provided that the lien attaches on the assessment date, but is cancelled if the State or another tax-exempt entity purchases the subject property before a tax deed is issued. However, the Legislature did not do this. Instead, it set forth a clear mandate that ownership is determined on the assessment date, that the lien attaches on the assessment date, and that the lien shall be sold by the sheriff unless the taxes are paid. *See* W.Va. Code §§ 11-3-1(c); 11A-1-2, and 11A-3-5. Accordingly, the State's arguments that the subject liens were "inchoate" and/or that the State's purchase of the Properties prevented the liens from maturing are contrary to the law and must be rejected.

CONCLUSION

For the reasons set forth above, EB Dorev respectfully requests that this Court reverse the circuit court's order, uphold the validity of the tax lien sale to EB Dorev, compel the issuance of tax deeds to the Properties to EB Dorev, and remand the case to the circuit

court for consideration of EB Dorev's remaining counterclaims and cross-claims.

Respectfully Submitted,

EB DOREV HOLDINGS, INC.

By Counsel,

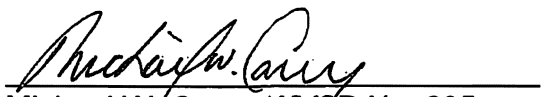

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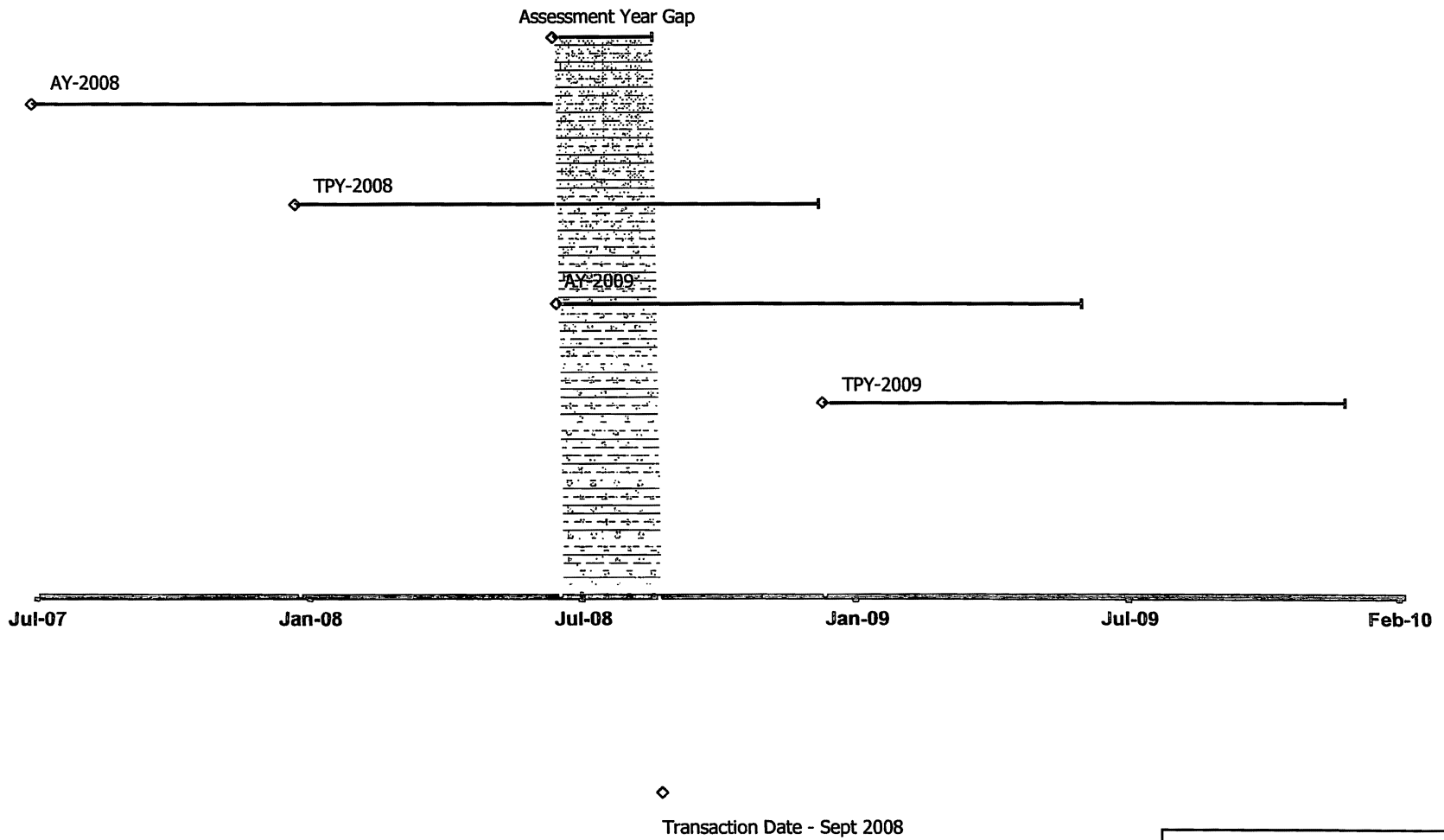
EXHIBIT 1

Timeline of Normal Property Transaction



TPY - Tay Payment Year
AY - Assessment Year

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0886

EB Dorev Holdings, Inc., Defendant Below,

Petitioner,

v.

Civil Action No: 04-C-3163
Circuit Court of Kanawha County

West Virginia Department of Administration,
Real Estate Division, Plaintiff Below,

Respondent.

CERTIFICATE OF SERVICE

I, Michael W. Carey, do hereby certify that on the 16th day of January, 2014, I have served the foregoing **"Reply Brief of Petitioner"** upon the parties to this action, via United States Mail, postage pre-paid, addressed as follows:

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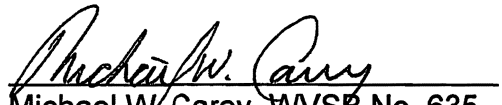

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