

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EB DOREV HOLDINGS, INC.,

Petitioner,

v.

No. 13-0886

WEST VIRGINIA DEPARTMENT OF
ADMINISTRATION, REAL ESTATE
DIVISION,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

1. Procedural History

In order to supplement the Procedural History provided by the Petitioner it should be noted that, after the Respondent's summary judgment had been granted, the Defendants below, Vera McCormick and Mike Rutherford, in their capacities as county officials, sought and were granted leave to amend their answers in order to add third-party complaints against each of the entities that owned the property at issue on July 1, 2008, prior to its sale to the State. (Joint Appendix at 112-126). At least two of these entities had filed an answer (J.A. at 194-215), prior to the proceedings below being stayed pending this appeal. (J.A. at 231-33).

2. Statement of Facts

As purchased by the W.Va. Department of Administration, Real Estate Division, the sale price of the 1409 Greenbrier Street property, then owned by CRW Real Estate, L.L.C., was \$1,930,000.00, and the sale price of the Plaza IV property, then owned by South Park, L.L.C., and by Knollwood Investments, L.L.C., was \$3,300,000.00, indicating that the total value of the property at issue was \$5,230,000.00. (J.A. at 101-02). The amount purportedly required to redeem the 1409 Greenbrier Street property was \$25,931.71, and the amount purportedly required to redeem two of the Plaza IV tax parcels was \$31,087.22, yielding a total sum of \$57,018.93 purportedly due for the property at issue. (J.A. at 102-03). The sales agreements required payment of all delinquent property taxes that were due and owed out of the purchase price the State paid for the property. (J.A. at 101-02). The property was and is physically occupied by certain State agencies. (J.A. at 100).

SUMMARY OF ARGUMENT

The Circuit Court was correct to hold that the property at issue was exempt from taxation from the date of its purchase by the State. To the extent that the Circuit Court may have erred by suggesting or holding that 2009 property taxes were not owed by the taxpayers that owned the property at issue on the July 1, 2008, that issue is irrelevant to the ruling that the Petitioner now seeks. To the extent that a taxpayer is properly deemed liable for delinquent taxes, in accordance with the applicable tax statutes, a county sheriff may attempt to recover the delinquent taxes by various means other than the sale of a tax lien. Thus, whether or not a taxpayer is liable for delinquent taxes has no relevance to the issue of whether a valid tax lien survives the purchase of property by the State, when, as occurred here, the State took ownership of the property in August and September, after the July 1 tax assessment date and months before the start of the tax year and before any other necessary steps in the annual taxation process were completed by the county authorities for tax year 2009.

The doctrine of merger has been recognized by the Supreme Court of Appeals and its application here is supported by both the factual circumstances and public policy. Pursuant to the doctrine of merger, when the State acquired the properties at issue in August and September of 2008, the State's lesser right as the holder of the tax lien that had attached on July 1, 2008, was merged in its greater right as the owner, and the lien was extinguished. In addition, or alternatively, the State's lien that attaches to taxable property as of July 1, the first day of each assessment year, is inchoate on that date, i.e., imperfect, partial or unfinished, as certain values essential to the calculation of the lien, i.e., the value of the property and the levy rate, remain undetermined until many months later in the assessment year. As the property was purchased by the State, and thus rendered exempt from taxation, several months prior to the determination of

the lien value or the levying of taxes, the lien remained inchoate, as a matter of law, and did not become a saleable lien. Thus the attempted sale of such a lien was void as a matter of law. To the extent that the Petitioner attempts to distinguish the circumstances at issue from cases where merger or the concept of the inchoate lien was applied, the Petitioner fails to appreciate that these concepts represent general principles of law that are clearly applicable to the case at hand, while the distinctions emphasized by the Petitioner are irrelevant.

To the extent that the Petitioner argues that public policy favors the sale of the State's tax liens under the circumstances at issue, it pits the interests of public agencies against one another, and ignores the fact that each serves the public. By this route Petitioner effectively argues that the risk of a small loss to the public, in the form of one year's delinquent taxes, justifies a much greater loss, the transfer of public property into private hands for a tiny fraction of its value. It must be emphasized that the goal of the Petitioner's argument is a determination that it is consistent with the applicable law and Legislative intent to hold that over Five Million Dollars' worth of State-owned public property, that was and is currently physically occupied by a State agency, should be transferred to a private holding company, as a result of that company paying off the State's own tax lien in the amount of just over Fifty-Seven Thousand Dollars, or approximately one percent (1%) of the value of the property.

Further, the title of the State in these properties cannot be defeated by selling tax liens on property owned by the State. 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. The exclusive process by which property belonging to the State can be sold is set forth in article 11, chapter 5A of the Code.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate pursuant to W. Va. R. App. P. 20(a)(3) as it is a case involving an issue of fundamental public importance.

ARGUMENT

STANDARD OF REVIEW

1. Standard of Review on Appeal

Generally, a motion for summary judgment is reviewed *de novo* by this Court. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 328 (1995).

RESPONSE TO ASSIGNMENTS OF ERROR

A. Contrary to Petitioner's first assignment of error, the Circuit Court was correct to rule that the properties at issue were exempt from taxation from the date they were purchased by the State, while the question of whether 2009 property taxes were due and recoverable from the taxpayers who owned the properties on July 1, 2008, is distinct from and irrelevant to the issue of the existence of valid and saleable tax liens.

The property at issue was exempt from taxation as of the date that it was sold to the State.

The relevant statute plainly and clearly states in pertinent part as follows:

§ 11-3-9. Property exempt from taxation.

(a) **All property, real and personal, described in this subsection, and to the extent limited by this section, is exempt from taxation:**

(1) Property belonging to the United States, other than property permitted by the United States to be taxed under state law;

(2) **Property belonging exclusively to the state;**

(3) Property belonging exclusively to any county, district, city, village or town in this State and used for public purposes;

(4) Property located in this state belonging to any city, town, village, county or any other political subdivision of another state and used for public purposes[.]

W. Va. Code § 11-3-9 (West 2010) (emphasis added). Thus, the properties at issue were exempt from taxation in August and September of 2008, long prior to the 2009 tax levy and long prior to

the date upon which 2009 taxes would be deemed delinquent. The deeds memorializing the State's ownership were recorded on the date of the transfer or on the next day, thus providing record notice of the transactions and of ownership by the State. (J.A. at 101-02). The Petitioner appears to contend that, pursuant to the applicable tax statutes, the tax status of property is determined by reference solely to status of the property on the July 1 assessment date, the first day of the assessment year, regardless of how the condition or status of the property may change prior to the start of the corresponding tax year which begins on January 1 of the calendar year following the assessment date.¹ In this case, therefore, Petitioner contends that recognition of the exempt status of the properties was properly delayed until the 2010 assessment year, beginning with the assessment date of July 1, 2009. However, even if this is presumed correct, and the Circuit Court is presumed to have erred to the extent that the Order at issue indicates otherwise, this presumed error is not relevant to the issue of the existence or validity of the State's tax liens after the State's purchase of the properties at issue.

"Taxpayer" is defined in W. Va. Code § 11-3-1(f)(4) (West Supp. 2013) and means "the owner and any other person in whose name the taxes on the subject property are lawfully assessed." "The taxes upon all property shall be paid by those who are the owners thereof on the assessment date whether it be assessed to them or others." W. Va. Code § 11-3-1(c) (West Supp.

¹ In its attempt to explain this point, Petitioner includes a potentially misleading footnote. (Pet. Brief at 7, n. 6). Contrary to the suggestion made in Petitioner's n. 6, the tax year is not merely a "tax payment year" but the actual time period for which the taxes are assessed. Under the staggered assessment year/tax year system, the assessment year begins six months before the corresponding tax year in order to give the taxing authorities ample time to conclude the taxation process. However, this means that the taxes are calculated based upon the condition of the property on July 1 prior to the tax year, as if a "snapshot" of the property were taken on that date, and the "snapshot" is presumed to remain accurate through the coming tax year. *See, e.g.*, 110 CSR 12D, Appendix A. If the Petitioner actually intended to indicate that a "tax year" is really a "tax [payment] year," it should be noted that the resulting system would be even more Byzantine. As property taxes may be timely paid, i.e., paid without becoming delinquent, in two installments, the second of which may be paid in the calendar year that follows the Petitioner's "tax [payment] year," the property taxes need not actually be paid within the Petitioner's "tax [payment] year."

2013). If it is presumed for the sake of argument that taxes assessed against the parties who owned the properties on July 1, 2008, prior to the sales to the State, were due as a matter of law, and eventually delinquent, this has no necessary impact on the issue of the existence or validity of the State's tax liens that attached on that date. There is an obvious distinction between the taxes and the tax liens, and the sale of tax liens is not the sole means of collecting delinquent taxes but, as set forth in statute, a secondary means.

§11A-2-1. Duty of sheriff to enforce payment of delinquent taxes.

Whenever any taxes become delinquent, it shall be the duty of the sheriff to take immediate steps to enforce payment by use of the methods prescribed in sections two, three and seven of this article.²

...

§11A-2-2. Collection by civil action; fees and costs not required of sheriff.

(a) Taxes are hereby declared to be debts owing by the taxpayer, for which he or she shall be personally liable. After delinquency, the sheriff may enforce this liability by appropriate action in any court of competent jurisdiction. No such action shall be brought after five years from the time the action accrued.

W. Va. § 11A-2-1 to -2 (WestLaw 2013).

§11A-2-10. Sale of tax liens on real estate.

In addition to the methods for the collection of taxes provided for in this article, tax liens on real estate may be sold for the taxes assessed thereon in the manner prescribed in article three of this chapter.

W. Va. Code §11A-2-10 (West 2010) (emphasis added).

Further, a county sheriff is authorized by statute to determine that a tax lien should not be sold.

§ 11A-3-7. Suspension from sale; amended delinquent lists; subsequent sale.

²As the taxes at issue were for tax year 2009, the first half taxes became delinquent on October 1, 2009, and the second half taxes became delinquent on April 1, 2010.

(a) **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 therefor to the county commission and to the Auditor.** If the commission finds that the tax lien on the real estate ought not to be sold, it shall so order; but if the commission finds that the tax lien on the real estate ought to be sold for the amount stated, or for a greater or less amount, it shall order the sheriff to include such real estate in his next September list, unless sooner redeemed.

W. Va. Code § 11A-3-7 (West 2010) (emphasis added).³

Arguably, as demonstrated by the Third-Party Complaints eventually filed in the action below after the Order now at issue was entered, the Kanawha County Sheriff believes that taxes on the properties at issue were due and became delinquent, and that the taxpayers who owned the properties on July 1, 2008 were, and still are, the persons who are liable for payment of delinquent 2009 real estate taxes, if any. The Petitioner essentially argues that the taxpayers, to whom the Petitioner refers as the “Tax Debtors,” remain liable for delinquent taxes and that the sale of the properties to the State prior to the beginning of the 2009 tax year and the end of the 2009 assessment year had no effect on the taxpayers’ liability for delinquent taxes.

Thus, consistent with Petitioner’s argument in support of its first assignment of error, pursuant to statute, the State’s lien for assessed property taxes attached on July 1, 2008, at which time the properties at issue were owned by private entities and were subject to taxation. W. Va.

³ Although the Petitioner argues that this Code section did not require that the County Sheriff suspend a sale, consideration of the circumstances actually at issue raises questions that the Petitioner simply ignores. It is impossible to understand how a responsible public official could conclude that Five Million Dollars’ worth of public property, in use by a public agency, should be transferred into private hands in order to obtain Fifty Seven Thousand Dollars for another public agency. Thus, the County Sheriff should reasonably have concluded “that the tax lien[s] [at issue] ought not to be sold for the amount[s] stated[.]” assuming he believed the liens to be valid existing liens. If it is presumed that the County Sheriff should have reached the only possible reasonable conclusion, the statute imposes an obligation, stating that the County Sheriff “shall suspend the sale[.]” To the extent that the Petitioner states that it is significant that the County Sheriff stands by his decision not to suspend the sales, it is an open question as to just what that signifies.

Code § 11A-1-2 (West 2010). The only lien for real property taxes is the State's lien created in W. Va. Code § 11A-1-2. Other levying bodies, such as a board of education, a county commission, or a municipality, do not have liens. Although the Code refers to taxes levied by various taxing units other than the State, *see, e.g.*, W. Va. Code § 11-8-4 (taxing units of State include State, county, school districts, and municipalities), the Code does not refer to multiple tax liens held by various taxing units, but to a single tax lien. As noted above, a county sheriff has the authority to proceed against the taxpayers in order to collect any property taxes the county believes are delinquent. Ultimately, however, even if each of these points is found to be correct, the relief that the Petitioner seeks is not warranted.

At most, this means that if the owners of record on July 1, 2008, owed taxes, they did not escape liability simply because the State's tax lien was extinguished or invalid. Nevertheless, the sale of the property to the State after July 1, 2008, but before the 2009 taxes were levied or the value of the tax liens determined, did extinguish the State's liens through merger when the State acquired title to the real property in the fall of 2008, or, alternatively, the State's liens were inchoate and the State's purchase of the properties, as a matter of law, prevented the inchoate liens from becoming valid saleable liens.

B. Contrary to Petitioner's second and third assignments of error, the doctrine of merger and the inchoate status of a lien where its value is undetermined and no tax has been levied are recognized legal principles that the Circuit Court was correct to apply to the circumstances at issue.

Pursuant to the doctrine of merger, when the State purchases title to property on which it holds a lien, the State's lesser right as a lienholder merges in its greater right as landowner. *Armstrong Products Corp. v. Martin*, 119 W.Va. 50, 51-52, 192 S.E. 125, 127 (1937). The doctrine of merger, in the context of a purported sale of State property for taxes, is discussed at

greater length in *State v. Locke*, 219 P. 790 (N.M. 1923), a case that is cited and relied upon as supporting authority in the *Armstrong* decision.

The object of taxing property is to produce the revenues with which to conduct the business of the state; **it is entirely inconsistent with our theory of government for the property of the state to be taxed, or sold for taxes**, in order to produce the money to be expended by the state. Such a procedure is but taking the money out of one pocket and putting it in the other. **Another consideration, which should not be overlooked, is that if public property, that is to say, property owned by the state, is to be burdened with a tax lien, the public might lose it entirely through oversight or carelessness of its agents in failing to pay the taxes when due, and allowing the same to be sold and the title pass to third parties.**

...

[W]hen 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, and which are unpaid at the time it becomes so acquired that from the moment of its acquisition the power to enforce the lien is arrested or abated. **The claim of the state for such taxes becomes merged in its ownership of the fee.** To consider it further burdened with such lien, and to permit it to be subsequently sold for the payment thereof, results in the state selling its own property to pay itself. The claim of the state for unpaid taxes initiates the proceedings which subsequently, by complying with the required procedure, ripens into ownership by the purchaser of the tax title. Such a claim for unpaid taxes is therefore indispensable to acquiring such a title. In this instance, there was no claim for any taxes after the state acquired the property, so that the defendant purchased without the existence of such a claim.

Locke, 219 P. at 792 (emphasis added).

The property in question was freed and absolved from further liability for the taxes previously assessed against it, the moment it was acquired by the state. Prior to that time, the state merely held a lien against such property to secure the unpaid taxes so previously assessed, and this lien was merged into the ownership of the title in fee. That a lien, whether it be created by mortgage or otherwise, is merged into the title of the holder thereof the moment he acquires the fee to the property covered by such lien, is a proposition of law too well settled to merit the citation of authority.

Locke, 219 P. at 794 (emphasis added).

The Petitioner attempts to distinguish *Armstrong*, and in doing so simply fails to appreciate that the facts of *Armstrong* are irrelevant. Petitioner's contention that the adoption of the doctrine of merger in *Armstrong* is to be understood in a much narrower fact specific sense is unavailing. When the State acquires the title to a parcel of property, however that acquisition may occur is irrelevant. The State's lesser right as lienholder is merged with its greater right as the outright owner. Merger is a recognized general legal principle and reference to *Armstrong* shows that this Court has recognized and applied that general principle where appropriate. "It is a general principle of law that where a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or in the law phrase is said to be *merged*; that is, sunk or drowned, in the greater." Black's Law Dictionary 989 (6th ed. 1990) (emphasis in original). The *Locke* decision discusses merger at greater length and discusses a rationale for applying the doctrine of merger that applies equally well to the circumstances at issue. Contrary to the Petitioner's argument, the legal principles and rationale discussed in *Locke* are clearly applicable to the circumstances at issue. Alternatively, the legal concept of an inchoate lien is, as the Circuit Court held, equally applicable to the circumstances at issue.

The term "inchoate" is defined as "[i]mperfect; partial; unfinished; begun, but not completed[.]" Black's Law Dictionary 761 (6th ed. 1990). There is no question that the State's tax liens that attached on July 1, 2008, were inchoate when the State acquired title to the properties in the fall of 2008. While both the owners of the properties and the identity of the properties subject to the liens were known on July 1, 2008, the values of the properties were not known and were not fixed until the Kanawha County Commission, sitting as a board of equalization and review, completed its work and adjourned sine die in February of 2009. *See W.*

Va. Code § 11-3-24 (West 2010). Nor were the levy rates known, as they would be set by the levying bodies on the third Tuesday in April of 2009. See W. Va. Code § 11-8-10a (county commissions); § 11-8-12a (county boards of education); §11-8-14a (municipal governing bodies). To complete the process, the levies must then be applied to the assessed value of the property by the county assessor. W. Va. Code § 11-3-19 reads, in pertinent part:

“The assessor shall, as soon as practicable after the levy is laid, extend the levies on the land and personal property books, and shall forthwith make three copies of the land books and two copies of the personal property books with the levies extended. One of the copies of the land books shall be delivered to the sheriff not later than June 7; one copy shall be delivered to the clerk of the county commission not later than July 1; and one copy shall be sent to the State Auditor not later than July 1. One of the copies of the personal property books shall be delivered to the sheriff and one copy shall be delivered to the clerk of the county commission on or before the same date fixed above for the delivery of the land books. The copies shall be official records of the respective officers.”

Until this process was completed, the tax liens at issue were “imperfect; partial; unfinished; begun but not completed” and thus, inchoate, as their value was unknown and they could not be sold. The State’s purchase of the properties at issue rendered the properties exempt from taxation, and as the properties were not subject to taxation, no saleable lien could be perfected through the taxation process. Therefore, the attempted sale of such a lien was void as a matter of law.

As noted above, the cases cited by this Respondent in relation to the doctrine of merger, *Armstrong* and *Locke*, show that this Court had long ago recognized and applied the doctrine of merger as a valid legal principle and further show that the rationale discussed in *Locke* is applicable here. In its attempts to distinguish these cases, the Petitioner ignores their relevance and emphasizes distinctions that make no difference. Petitioner’s discussion of *State v. Salt Lake County*, 85 P.2d 851 (Utah 1938) presents a similar problem for the Petitioner.

As the particulars of Utah's tax statutes in the 1930's are not discussed in *Salt Lake County*, there is no way to be certain that the statutes at issue in the mid-1930's were not distinguishable from the current West Virginia tax statutes in some relevant way. Regardless, however, the *per curiam* case does not relate to property owned or purchased by the State for public use as is the case here, but to property conveyed to the State in satisfaction of a loan from a State agency to the landowner. 85 P.2d at 852. There is no indication as to what entity owned, as a matter of Utah law, the tax liens at issue, although there is an indication as to how the taxes would be distributed. *Id.* To the extent that the case is cited in opposition to the application of the merger doctrine, however, it relies upon certain constitutional principles that the Utah court applies to facts that are significantly different from those at issue here. The purported similarity between the Utah and West Virginia constitutions is a moot point, as the Utah court's constitutional analysis focuses on facts that are the reverse of those at issue here. The facts at issue differ so significantly, that it appears that the *Salt Lake County* decision supports the argument that the liens at issue in this case were inchoate when they attached, and never became valid and saleable liens.

The relevant difference between *Salt Lake County* case and the instant matter is one of timing. In *Salt Lake County*, the State took title to the property at issue on December 16, 1936, after every step in the tax and lien sale process was complete except for the conveyance of the tax deed. *Id.* 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. Thus, in *Salt Lake County*, the Utah court considered taxes that had been levied on property as a lien prior to the State's receipt of a deed in lieu of foreclosure. *Id.* In the course of its discussion and application of constitutional principles, the Utah court expressly states that:

the question presented is **whether the exemption** [found in the state constitution] of “state property” **can be made to cover property in private ownership that was not “state property” at the time** it was assessed for taxation, **the tax levied, the tax lien attached, or the property sold for unpaid taxes.** In this case, **the tax sale certificate was recorded January 3, 1933, and of course all the steps to levy the tax occurred before that date.** But **the State did not acquire title** thereto by deed from the tax debtor **until December 16th, 1936.**

85 P.2d at 853-54 (emphasis added). The Utah court then refers to the title acquired by the State as one “encumbered by taxes theretofore lawfully assessed **and levied, and by prior tax sales**, if any[,]” stating that the cancellation of taxes “already lawfully levied” would be abatement of taxes as opposed to exemption from taxation. *Id.* at 854 (emphasis added). The Utah court then quotes at length from a North Dakota case that also involves private property upon which taxes were assessed, levied, and the property sold for nonpayment of taxes, prior to the State acquiring title through foreclosure. *Id.* at 857-58.

It is clear that the Utah court was focusing on the issue of private property that had already been sold for taxes prior to the State’s acquisition of title, under circumstances where the property was not acquired for public use by the State, but was conveyed to the State in satisfaction of a loan after taxes were levied on the property and the property sold for taxes. That is simply not the case here. To the contrary, the facts emphasized and relied upon by the Utah court are completely absent. Equally noteworthy, however, given that the Petitioner cites *Salt Lake County* in order to show opposition to the *Locke* decision, is the fact that the Utah court, in its review of case law foreign to Utah, does not mention the doctrine of merger as discussed in *Locke*, but dismisses *Locke* as inappropriately copying its reasoning from another foreign case, *City of Laurel v. Weems*, 56 So. 451 (Miss. 1911). In its brief discussion of *Weems*, the Utah court quotes from another case, similar to *Weems* from the Utah court’s perspective, *State v. Snohomish County*, 128 P. 667 (Wash 1912).

The Utah court distinguishes both *Weems* and *Snohomish County* on the grounds that their facts do not match the facts of the *Salt Lake County* case. The facts of both *Weems* and *Snohomish County* do, however, match the facts of the instant case. In each case, a governmental entity, a city and a state respectively, purchased property for public use after the tax assessment date, at which time the taxes became a lien or attached as a lien, but before the tax levy was completed. 56 So. at 452; 128 P. at 668. Each case expressly or implicitly holds that the lien was inchoate at the time of attachment and that, as the property was rendered exempt from taxation before a tax was calculated or levied, no valid tax or tax levy was possible, as a matter of law.

While the state has power, for the purposes of the lien, to treat the entire proceeding as having been taken at any given time, that fact does not do away with the necessity of any step in the proceeding. **It seems self-evident that there can be no valid or effective lien for a tax until there is a valid tax in some specific amount.**

Snohomish County, 128 P. at 669 (emphasis added).

It seems equally plain that the creation of a valid tax implies the existence of a susceptible subject of taxation at every stage of the process of such creation. Since, on general principles of public policy and by both constitutional declaration and statutory enactment, lands while held in public ownership are exempt from taxation, the land here in question was not, during any step in the proceedings creating the tax after August 9, 1907, when it passed to the state, a susceptible subject of taxation. It follows that at that time the developing process of imposing the tax as a valid creation was arrested.

Id.

[I]t cannot be supposed that the Legislature intended that any further steps should be taken looking to the enforcement of the state's lien for taxes against property acquired by one of its own governmental agents, after the property is purchased by such agent. **Such proceedings would not aid the effectuation of any governmental purpose, but would impair it.** After the municipality purchased this lot, the taxing officers could not take any further steps looking to the collection of the tax, and the subsequent sale of the land for the taxes was a nullity. The purchaser at the sale got no title, because it was beyond the power of the officers to sell.

Weems, 56 So. at 453 (emphasis added).

The Utah court, in the *Salt Lake County* case, quotes the *Snohomish County* case with approval to show that the material facts of the *Weems* and *Snohomish County* cases are easily distinguished from the relevant facts of the *Salt Lake County* case. “[T]he ‘**developing process of taxation . . . was arrested’ by the state’s purchase, so that the tax claim and lien never matured or came into existence.** No such situation is presented at bar.” 85 P.2d at 858 (emphasis added) (quoting *State v. Snohomish County*, 128 P. at 669). Thus, the Utah court in *Salt Lake County* would itself reject the Petitioner’s attempt to apply the reasoning in the Utah case to the circumstances at issue here, and would instead conclude that the liens at issue here were inchoate, as they “never matured or came into existence.” Petitioner’s reliance on the constitutional analysis employed by the court in *Salt Lake County* is therefore misplaced and unsupportable.

West Virginia’s statutory procedure relating to the attachment and, ultimately, the sale of tax liens simply presumes the existence of a valid tax lien, and does not anticipate the questions at issue here. Petitioner argues for a mindlessly robotic application of the statutory procedure relating to tax lien sales as if no other considerations could be deemed relevant, and the legal principles and public policy issues raised by the courts need not be contemplated. Although the courts in both the *Weems* and *Snohomish County* cases apply the concept of an inchoate lien, neither refers to statutory language but to recognized legal principles. Each of these cases discusses the point that was also made in the merger case, *Locke*, that it makes no sense to impose a tax on governmental or public property in order to obtain revenue to further the governmental or public interest. Unlike the Petitioner, a private holding company, the two courts

make no fine distinction between the interest of one governmental entity and another, but see all of them as acting in the public interest for public purposes.

C. Consideration of public policy and Legislative intent does not support the Petitioner's position.

To the extent that EBD Holdings appears to indicate concern for the financial well-being of various tax levying bodies, that concern would appear to be inconsistent with its insistence that over Five Million Dollars' worth of State property be transferred to it in return for the payment of an amount representing a vanishingly small fraction of that property's fair market value. If the Legislature cannot have intended the law to deprive taxing bodies of needed funds, neither can the Legislature have intended that State property be sold off for one one-hundredth of its value in order to supply those funds. The declaration of legislative purpose found in the initial Code section of the article relating to the sale of tax liens certainly suggests no such intention, but rather states that the sale of tax liens has been provided for . . .

[i]n view of the paramount necessity of providing regular tax income **for the state, county and municipal governments**, . . . and in view of the further fact 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**[.]

W. Va. Code § 11A-3-1 (West 2010) (Emphasis added). Clearly, the State-owned property at issue does not exhibit the characteristics that concerned the Legislature, as the properties at issue are not public liabilities, but public property in use by a public agency for the benefit of the public. The cost of government would be increased, to the detriment of the public, were the properties at issue conveyed to EBD Holding. In recent years, the Legislature has demonstrated its intention to protect the public purse by doubling the amount of time allotted to a government agency to serve an answer to a complaint, and by all but prohibiting a default judgment against a government agency unless the agency expressly consents to such judgment. *See* W. Va. Code §

55-17-4 (WestLaw 2013). Nevertheless, the Petitioner contends that this same Legislature would implicitly approve the transfer of State property into private hands in return for payment of 1% of its value.

Regardless of the Petitioner's hypothetical concerns for the funding of local public agencies such as a county board of education, the resolution that the Petitioner actually seeks is the acquisition of Five Million Dollars' worth of public property in return for the payment of a tiny fraction of its actual value. The Petitioner here has no interest in whether the 2009 property taxes were due, paid, or delinquent. The Petitioner's interest is in determining whether it holds a winning lottery ticket, or at least whether it can get its money back. While ignoring the harm of losing millions of dollars' worth of public property, Petitioner attempts to fabricate an interest in delinquent taxes by presenting a hypothetical where the State is cast as a predatory land speculator with a bargaining advantage over private entities such as EBD Holding, tempting sellers with the promise of a de facto tax waiver functioning like a kickback scheme.

To the extent the Petitioner might attempt to paint a picture of a neglectful State agency, that could have paid off a tax lien at any time once the taxes were declared delinquent by the County, that view should be tempered by the understanding that such a characterization begs all the questions raised in the legal proceedings below and in this appeal, e.g., whether the lien retained its legal existence or was extinguished by merger after the property at issue was purchased by a State agency, and whether the County was correct to even attempt to go forward with the calculation and sale of the State's tax lien, thus assuming that the lien was not inchoate but had matured into a saleable lien even though the State had purchased the property, thus rendering it exempt from taxation, well before the value of the lien was calculated or the taxes levied. From the State agency's perspective, 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, thus 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.

Finally, the title of the State in these properties cannot be defeated by selling tax liens on property owned by the State. 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. The exclusive process by which property belonging to the State can be sold is set forth in article 11, chapter 5A of the Code. *See, e.g.,* W. Va. Code § 5A-11-4 (West Supp. 2013).

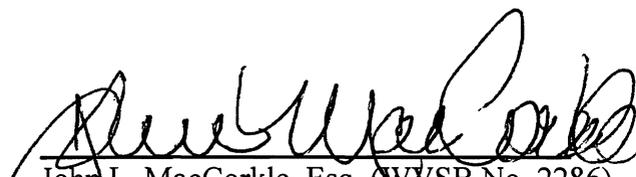
CONCLUSION

Although there is no question that no viable tax lien existed, since, as a matter of law, it was extinguished by merger, or never perfected as a saleable lien due to the State's purchase of the properties at issue in August and September of 2008, the Circuit Court may have erred to the extent that its Order suggests or holds that the 2009 property taxes are not recoverable from the parties who owned the property on July 1, 2008. As the tax statutes expressly state that property taxes are deemed to be a liability of the taxpayer from the date of assessment, and are recoverable by means other than the sale of tax liens, issues relating to liability for the 2009 property taxes may require further development in order to be resolved by the court below. However, it must be emphasized that the payment of delinquent 2009 taxes, if any are deemed to exist, is a distinct question that has no relevance to the issue of the validity and sale of tax liens under the circumstances at issue here.

Therefore, for the foregoing reasons, the Circuit Court's Order of July 11, 2013, should be affirmed or, alternatively, should be affirmed in all respects relevant to the issue of the validity and sale of tax liens, and remanded for further development as may be necessary in relation to the issue of whether 2009 property taxes were due and delinquent, and, as a liability of the taxpayers who owned the property on July 1, 2008, are recoverable by means other than the sale of tax liens.

WEST VIRGINIA DEPARTMENT
OF ADMINISTRATION,
REAL ESTATE DIVISION,

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EB DOREV HOLDINGS, INC.,

Petitioner,

v.

No. 13-0886

WEST VIRGINIA DEPARTMENT OF
ADMINISTRATION, REAL ESTATE
DIVISION,

Respondent.

CERTIFICATE OF SERVICE

I, John L. MacCorkle, counsel for Respondent, West Virginia Department of Administration, Real Estate Division, do hereby certify that on December 27, 2013, I served a true and correct copy of the foregoing **BRIEF OF RESPONDENT** upon all counsel/parties of record, by depositing the same in the regular United States mail, postage prepaid, sealed in an envelope, and addressed as follows:

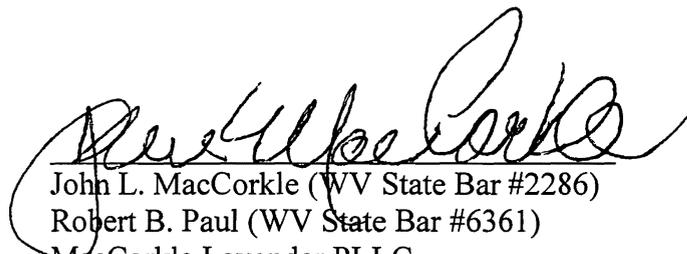
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A handwritten signature in black ink, appearing to read "John L. MacCorkle", written over a horizontal line.

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