

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**ANTERO RESOURCES CORPORATION,**

**Petitioner,**

**vs.**

**//**

**Tyler County Circuit Court**

**//**

**Civil Action No. 18-AA-1**

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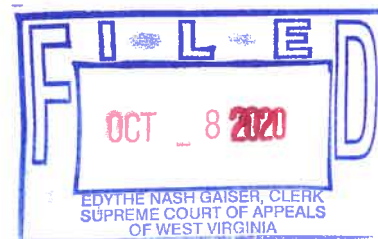
**Judge Jeffrey D. Cramer**

**THE HONORABLE DALE STEAGER,  
West Virginia State Tax Commissioner,**

**THE HONORABLE LISA JACKSON,  
Assessor of Tyler County, and**

**THE COUNTY COMMISSION OF TYLER COUNTY,  
Sitting as the Board of Assessment Appeals,**

**Respondents.**



**TYLER COUNTY COMMISSION'S REPLY MEMORANDUM IN OPPOSITION TO  
PETITIONER ANTERO RESOURCES CORPORATION'S MOTION TO REFER CASE  
TO BUSINESS COURT DIVISION**

**TO THE HONORABLE TIM ARMSTEAD, CHIEF JUSTICE:**

Comes now the Respondent, County Commission of Tyler County, by and through D. Luke Furbee, Prosecuting Attorney for Tyler County, West Virginia, pursuant to W.Va. T.C.R. 29.06(a)(4), who has for its reply in opposition to the Petitioner's *Motion to Refer Case to Business Court Division* the following arguments.

**I. STATEMENT OF CASE AND POSITION**

Petitioner, Antero Resources Corporation, seeks to have this appeal of property tax assessments for tax year 2018 referred to the Business Court Division. The County Commission of Tyler County, sitting as a Board of Assessment Appeals, (*hereinafter*, "*Commission*" or "*Tyler County Commission*") was joined as a party to the appeal with

service of summons upon it. The Commission objects to the motion to refer the case to the Business Court Division because:<sup>1</sup>

-- The Business Court Division is an unconstitutional court because its creation by W.Va. Code § 51-2-15 and W.Va. T.C.R. 29 violate the division of powers clause set forth by Article V, Section 1 of the Constitution of West Virginia.

-- Similarly, the Business Court Division lacks jurisdiction under Article VIII, Sections 1, 5 and 6 of the Constitution of West Virginia, because it will unconstitutionally divest the elected circuit judge of Tyler County of jurisdiction.

-- The Business Court Division lacks jurisdiction over this tax appeal because W.Va. Code § 11-3-25 requires the appeal to be heard in the “circuit court of the county in which the property books are made out[.]”

-- The Business Court Division will unconstitutionally disenfranchise the voters of Tyler County, because it exists in contravention of the process of election of circuit judges set forth in Article VIII, Sections 5 and 6 of the Constitution of West Virginia.

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<sup>1</sup> The substantive arguments herein are adapted with permission by the undersigned counsel from an *amicus* brief authored by Mr. Timothy E. Haught, Esq., Prosecuting Attorney for Wetzel County, and filed in the case reported as Steager v. CONSOL Energy, et al., 242 W.Va. 209, 832 S.E.2d 135 (2019). Their presentation here is necessarily condensed to conform to the page limitation of W.Va. R.A.P. 38.

## II. ARGUMENT

**A. The Business Court Division is an unconstitutional court because its creation by W.Va. Code § 51-2-15 and W.Va. T.C.R. 29 violate the division of powers set forth by Article V, Section 1 of the West Virginia Constitution.**

Article V, Section 1 of the Constitution of West Virginia (*hereinafter, "Constitution"*) provides as follows:

"The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature."

The language of this article is clear and free from ambiguity and its requirement of the separation of powers of government must be strictly enforced. State ex rel. State Bldg. Comm'n v. Bailey, 151 W.Va. 79, 150 S.E.2d 449 (1966). This section is part of the fundamental law of the State and must be strictly construed and closely followed. State ex rel. Barker v. Manchin, 167 W.Va. 155, 279 S.E.2d 622 (1981); State ex rel. Steele v. Kopp, 172 W.Va. 329, 305 S.E.2d 285 (1983); State ex rel. Quelch v. Daugherty, 172 W.Va. 422, 306 S.E.2d 233 (1983). The Court has further stated that the language of Article V, Section 1 calls not for construction, but only obedience. State ex rel. Richardson v. County Court, 138 W.Va. 885, 78 S.E.2d 569 (1953)(quoting Hodges v. Public Service Commission, 110 W.Va. 649, 159 S.E. 834, 836.

The court has warned that both legislative encroachment into the power of the judiciary, as well as legislative relinquishment of power to the judicial branch are vices to be condemned in violation of both the letter and the spirit of the doctrine of separation. In re Dailey, 195 W.Va. 330, 465 S.E.2d 601 (1995). Moreover, the court has specifically held that courts may not undertake the exercise of primarily legislative powers. The court has emphatically stated that the courts of this State are forbidden by this article to exercise

legislative authority of any kind. State ex rel. County Court of Marion County v. Demus, 148 W.Va. 398, 135 S.E.2d 352 (1964).

The Business Court Division was unconstitutionally created because the Legislature did not explicitly create it consistent with Article VIII, Sections 1, 5 and 6 of the Constitution, and to the extent the opportunity to bring it into existence was created by statute, the Legislature impermissibly delegated its authority to the Supreme Court of Appeals to actually create it by judicial rule. The Supreme Court of Appeals then unconstitutionally created the Business Court Division by W.Va. T.C.R. 29, which is the only source of authority defining the scope of the subject matter jurisdiction of the Business Court Division. These acts of the Legislature and the Supreme Court of Appeals violated the division of powers clause and therefore, the Business Court Division is a nullity.

Article VIII, Section 1 of the Constitution, provides as follows:

The judicial power of the State shall be vested solely in a supreme court of appeals and in the circuit courts, and in such intermediate appellate courts and magistrate courts as shall be hereafter established by the legislature, and in the justices, judges and magistrates of such courts. (Emphasis added)

There is no mention of The Business Court Division in this section. If the Legislature desires that appeals of tax assessments be heard in a special appellate court, it must explicitly create one, which it did not. Instead, it purported to authorize the Supreme Court of Appeals create a special division of the circuit courts “in West Virginia’s most populated circuit court districts with specific jurisdiction over actions involving such commercial issues and disputes between businesses.” W.Va. Code § 51-2-15(a)(Emphasis added). The undersigned is not aware of any statute wherein the

Legislature has ever designated “circuit court districts.” On the contrary, Article VIII, Section 5 states “[t]he judicial circuits in existence on the effective date of this article shall remain as so constituted until changed by the law, and the legislature . . . may rearrange the circuits and may increase or diminish the number of circuits.” (Emphasis added). However, § 15-2-15(b) purports to authorize the Supreme Court of Appeals to designate “a business court division within the circuit court of any judicial district with a population in excess of sixty thousand according to the 2000 Federal Decennial Census.” (Emphasis added). The Commission argues the language regarding “most populated circuit court districts” necessarily means that there were places in this State the Legislature did not intend authorize a Business Court Division, yet W.Va. T.C.R. 29.04(b) includes all 55 counties in assignment regions to the Business Court Division. The Legislature could not delegate to the Supreme Court of Appeals the formulation of “circuit court districts.”

Perhaps more notably, the statute does not confer any subject matter jurisdiction to the Business Court Division other than to say this docket shall be comprised of “commercial issues and disputes.” § 51-2-15(c) purports to authorize the Supreme Court of Appeals to “promulgate rules for the establishment and jurisdiction of the business court divisions[.]” As such, the only source of authority as to the subject matter jurisdiction of the Business Court Division was created by the Supreme Court of Appeals in W.Va. T.C.R. 29(a), which creation was a legislative function and not a judicial one. The Legislature could not delegate that authority to the Court without violating Article V, Section 1 of the Constitution. The Legislature never debated, adopted, approved or ratified W.Va. T.C.R. 29.

Even if this delegation of legislative power to the judiciary was permissible, the rule promulgated by the Supreme Court of Appeals giving the Business Court Division to take subject matter jurisdiction over “complex tax appeals” does not comply with the language of § 51-2-15(a). As stated previously, that statute speaks of “specific jurisdiction over actions involving such commercial issues and disputes between businesses.” (Emphasis added). The respondents herein are not business entities, and the *ad valorem* property tax regime is not a function of private business. The respondents herein are government officials of the State and the political subdivision of Tyler County, carrying out the will of the sovereign in assessing, levying and collecting these property taxes. The Supreme Court of Appeals could not submit these officers and the tax regime they are required to administer to the jurisdiction of a Business Court Division.

**B. Similarly, the Business Court Division lacks jurisdiction under Article VIII, Sections 1, 5 and 6 of the Constitution of West Virginia, because it will unconstitutionally divest the elected circuit judge of Tyler County of jurisdiction.**

Article VIII, Section 5 provides for the election of judges to the circuit courts from within their respective circuit and that all cases arising in that circuit shall be heard by a judge from that circuit, unless disqualified or unable to serve. It explicitly states that “[t]he judge or judges of each circuit shall be elected by the circuit for a term of eight years, unless sooner removed or retired as authorized in this article.” This section signifies that the judges of a circuit court shall serve the judicial business of such court unless disqualified or unable to serve. It provides for the promulgation of rules for the selection of the chief judge of the circuit court (in circuit courts with two or more judges), and further states “[i]f the chief judge is temporarily disqualified or unable to serve, one of the judges of the circuit court designated in accordance with the rules of such court shall serve

temporarily in his stead.” Moreover, this section only authorizes the Supreme Court of Appeals to “provide for dividing the business of those circuits in which there shall be more than one judge between the judges thereof so as to promote and secure the convenient and expeditious transaction of such business.” (Emphasis added). Article VIII, Section 3 of the Constitution gives the Chief Justice the authority to “assign a judge ... from one circuit to another, ... for temporary service.” It does not authorize the appointment of a Business Court Division Judge. Therefore, the appointment of Business Court Division Judges from outside the circuit is precluded.

Moreover, Article VIII, Section 6 gives appellate jurisdiction to the constitutionally-created circuit courts and not The Business Court Division, which was established by Rule 29. It specifically states that the “[c]ircuit court shall have such jurisdiction, authority or power, original or appellate or concurrent, as may be prescribed by law.” That is precisely what the Legislature did in the enactment of W.Va. Code § 11-3-25, wherein it gave appellate jurisdiction to a decision rendered by a Board of Assessment Appeals to the “circuit court of the county in which the property books are made out[.]”

**C. The Business Court Division lacks jurisdiction over this tax appeal because W.Va. Code § 11-3-25 requires the appeal to be heard in the “circuit court of the county in which the property books are made out[.]”**

Neither the Legislature nor the Constitution grant jurisdiction to the Business Court Division to hear this case. The language of West Virginia Code § 11-3-25 is plain, unambiguous and specific in terms of the court in which relief may be sought in this case. Not only does it mandate that the appeal be filed in circuit court but it specifically states that it shall be filed in the “circuit court of the county in which the property books are made out.” It does not provide for jurisdiction in The Business Court Division. West Virginia

Code § 11-3-25 specifically provides that both the taxpayer and the taxing authority have a right to have their case heard by the elected judge of the “circuit court of the county in which the property books are made out”. This specific grant of statutory jurisdiction by the Legislature cannot be altered by the subsequent adoption of W.Va. T.C.R. 29 by the Supreme Court of Appeals, which established the Business Court Division and the rules for transfer to the same. W.Va. T.C.R. 29 was not debated, adopted, approved, enacted or ratified by the legislative process and, therefore, cannot alter a specific and prior grant of appellate jurisdiction by the Legislature. Any interpretation to the contrary violates both the plain meaning of West Virginia Code § 11-3-25 and our basic constitutional scheme, which provides for the exercise of judicial power and separation of powers.

The specific grant of jurisdiction for appeal provided in § 11-3-25 clearly and unambiguously requires this case to be heard in the Circuit Court of Tyler County by an elected judge for said County, which is the court in the county in which the “property books are made out.” The Business Court Division is not the Circuit Court of Tyler County as established by West Virginia Constitution Article VIII, Sections 5 and 6 because the judges of the Business Court Division were not elected from within the Second Judicial Circuit and the Chief Judge of the Second Judicial Circuit was not disqualified according to Article VIII, Section 5. Administrative Order, Entered October 9, 2019.

Pursuant to the longstanding rule of construction, *expression unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, and applies to the interpretation of the statute and constitutional provisions giving exclusive jurisdiction to the elected circuit judge of Tyler County. Both the statute and the constitutional provisions must be interpreted according to this maxim to preclude the Business Court



Division from having jurisdiction over the appeal in this case. See Phillips v. Larry's Drive-In Pharmacy, Inc., 220 W.Va. 484, 647 S.E. 2d 920 (2007), for application of the maxim *expressio unius est exclusio alterius*. See also Manchin v. Dunfee, 174 W.Va. 532, 327 S.E. 2d 710 (1984).

**D. The Business Court Division will unconstitutionally disenfranchise the voters of Tyler County, because it exists in contravention of the process of election of circuit judges set forth in Article VIII, Sections 5 and 6 of the Constitution of West Virginia.**

Article VIII, Section 5 of the Constitution establishes the requirement that circuit judges be elected within their respective circuits. It further provides for all cases arising within those circuits to be heard by the circuit judge of the circuit unless the chief judge is disqualified or unable to serve. It does not authorize a Business Court Division within the circuit courts in which a judge not elected from within the circuit is assigned to hear a case. It does not allow a party to remove a case from an elected circuit judge. Article VIII, Section 5 clearly contemplates that circuit judges answer to the electorate within their circuit as part of the democratic process. Circuit judges are subject to the checks and balances of the electoral process and to remove a case from the elected circuit judge contrary to Article VIII, Section 5 defeats that purpose and disenfranchises the voters of that circuit.

In the present case, the voters of Tyler County will be disenfranchised by W.Va. T.C.R. 29 if the motion is granted because a case which would otherwise be heard before their elected Circuit Judge will be unconstitutionally removed from their elected Circuit Judge and given to a judge who is not subject to the democratic process in their county and circuit. This completely defeats the purpose of the democratic election of circuit

judges as provided for in Article VIII, Section 5. Surely, The Business Court Division was not created for the purpose of removing cases from the elected circuit judge that would otherwise have jurisdiction to decide the same. That not only frustrates the democratic process and the system of checks and balances, but may tend to erode public confidence in our judicial system by removing the accountability of judges to the people in their respective circuits. It may also promote forum shopping by business entities contrary to the West Virginia Constitution and West Virginia Code § 11-3-25.

The judges of the Circuit Court of Tyler County have certainly been occupied with a multitude of cases for many years now involving oil, gas, partition, and other litigation arising from the operations of such industry participants as the petitioner in this case. There is no reason to presume that they are not worthy and well-qualified to hear and determine the issues presented by these contested tax assessments. And that is precisely what W.Va. T.C.R. 29.04(a)(3) presumes without any articulated standard as to what constitutes “complex tax appeals,” or without any standard as to what a movant has to show to establish that the tax matter is beyond the qualifications and expertise of the circuit judges to handle.

### **III. CONCLUSION AND PRAYER FOR RELIEF**

For the reasons discussed above, petitioner’s motion to refer Tyler County Circuit Court Civil Action No. 18-AA-1 should be denied. The Business Court Division is not a constitutional court, nor does it have any lawful subject matter jurisdiction over this tax appeal. The Circuit Court of Tyler County is the only court with jurisdiction over this matter pursuant to the Constitution and W.Va. Code § 11-3-25, and its elected circuit judges are the only judicial officers with the constitutional right and duty to hear it. The voters of Tyler

County are entitled to same, and any argument to the contrary as to the salutary nature of the Business Court Division where judicial efficiency and technical expertise is concerned should have been addressed to them in the form of a constitutional amendment for their consideration. Wherefore, the respondent Tyler County Commission respectfully prays that the motion be denied.

Respectfully submitted this 8th day of October, 2020:

COUNTY COMMISSION OF TYLER COUNTY

Respondent

*By Counsel:*

A handwritten signature in black ink, appearing to read "D. Luke Furbree", is written over a horizontal line.

D. LUKE FURBEE

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## **CERTIFICATE OF SERVICE**

I, D. Luke Furbee, Prosecuting Attorney for Tyler County, West Virginia, and counsel for the Respondent County Commission of Tyler County, do hereby certify that this 8<sup>th</sup> day of October, 2020, I have made service of a true copy of the foregoing TYLER COUNTY COMMISSION'S REPLY MEMORANDUM IN OPPOSITION TO PETITIONER ANTERO RESOURCES CORPORATION'S MOTION TO REFER CASE TO BUSINESS COURT DIVISION upon all parties, by their counsel, the Honorable Jeffrey D. Cramer, Judge, the Circuit Clerk of Tyler County, and the Business Court Division Central Office, via U.S. Mail or hand delivery, as indicated below:

### ***By Hand Delivery:***

Hon. Candy L. Warner, Clerk  
Circuit Court of Tyler County

### ***By U.S. Mail, First Class, Postage Prepaid:***

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