

WEST VIRGINIA:

IN THE CIRCUIT COURT OF BERKELEY COUNTY

LEE TRACE LLC,

Petitioner,

v.

BERKELEY COUNTY COUNCIL AS
BOARD OF REVIEW AND
EQUALIZATION,

SERVE: Douglas E. Copenhaver, Jr., President
Berkeley County Council
400 West Stephen Street
Suite 201
Martinsburg, WV 25401
(City of Martinsburg),

SERVE: Norwood Bentley, Legal Director
Berkeley County Council
400 West Stephen Street
Suite 201
Martinsburg, WV 25401
(City of Martinsburg),

SERVE: Pamela Jean Games-Neely,
Prosecuting Attorney
Berkeley County, West Virginia
380 West South Street
Suite 1100
Martinsburg, WV 25401
(City of Martinsburg),

and

BERKELEY COUNTY COUNCIL,

SERVE: Douglas E. Copenhaver, Jr., President
Berkeley County Council
400 West Stephen Street
Suite 201
Martinsburg, WV 25401
(City of Martinsburg),

Case No. 15-AA-5

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SERVE: Norwood Bentley, Legal Director
Berkeley County Council
400 West Stephen Street
Suite 201
Martinsburg, WV 25401
(City of Martinsburg),

SERVE: Pamela Jean Games-Neely,
Prosecuting Attorney
Berkeley County, West Virginia
380 West South Street
Suite 1100
Martinsburg, WV 25401
(City of Martinsburg),

and

LARRY HESS, AS ASSESSOR FOR
BERKELEY COUNTY, WEST VIRGINIA

SERVE: Larry Hess, Assessor
Berkeley County Assessor's Office
400 W. Stephen Street, Suite 208
Martinsburg, WV 25401
(City of Martinsburg)

Respondents.

PETITION FOR APPEAL
AND COMPLAINT FOR WRIT OF CERTIORARI AND/OR MANDAMUS

COMES NOW Petitioner Lee Trace LLC ("Lee Trace"), by counsel, and alleges as follows:

I. Factual Background and Procedural Posture

1. Lee Trace owns real property at 15000 Hood Circle, Martinsburg, West Virginia 25403, consisting of approximately 17.02 acres, identified as Berkeley County, West Virginia

Tax Map 36 / 0010 0000 0000 and by deed recorded in the Office of the County Clerk of Berkeley County, West Virginia in Deed Book 838, at Page 231¹ (the "Property").

2. This is an appeal of the 2015 real property tax assessment of the Property ("2015 Assessment") pursuant to West Virginia law, including, but not limited to, West Virginia Code § 11-3-25. Based upon recent admissions by the Berkeley County Assessor ("Assessor"),² Lee Trace also requests a Writ of Certiorari to correct the clerical errors in the 2010 through 2014 Assessments or, alternatively, a Writ of Mandamus commanding the Assessor to apply for correction of the admitted clerical errors in the 2010 – 2014 Assessments pursuant to West Virginia Code § 11-3-27.

3. This is the sixth consecutive appeal of the Assessor's real property tax assessments on the Property. The appeal of the 2010 Assessment is pending before the West Virginia Supreme Court of Appeals (Docket No. 14-0962, appeal from Civil Action Nos. 11-AA-2 and 14-AA-1), and the appeals of the assessments for 2011, 2012, 2013, and 2014 (Civil Action Nos. 11-AA-2 insofar as it concerns the 2011 Assessment, 12-AA-4, 13-AA-4, and 14-AA-2, respectively) remain in the Business Court Division pending the decision of the Supreme Court of Appeals. The Assessor has committed the same or similar errors in all of these assessments, including, but not limited to, failure to give proper notice, failure to consider information required by the Code of State Rules, and failure to equalize the Property with comparable properties.

4. The Property is similar in characteristics to many other apartment properties in Berkeley County and Martinsburg.

¹ The Assessor incorrectly listed the deed as recorded in Deed Book 849 at Page 244 on the 2015 Commercial/Industrial Review Document.

² Unless otherwise indicated, the term "Assessor" shall include the Assessor as well as any employees in the Assessor's office, including, but not limited to, deputy assessors and commercial appraisers.

5. Pursuant to West Virginia Code §11-3-23a(d), Lee Trace timely informed the Berkeley County Council Sitting as the Berkeley County Board of Review and Equalization ("Board of Review and Equalization") of its desire to appeal the 2015 Assessment by letter and Application for Review hand-delivered to the Clerk of the County Commission, on January 27, 2015.

6. On February 12, 2015, the Board of Review and Equalization held a hearing regarding the 2015 Assessment. Lee Trace appeared by counsel and presented the testimony of Mr. L. Steven Noble, MAI, SRA, ASA, ABAR, an expert appraiser, and Mr. Robert Cocker, an owner of the Property. As part of its evidence, Lee Trace submitted a letter to the Board dated February 12, 2015 which incorporated by reference a written statement of Mr. Noble regarding the 2015 Assessment, and exhibits comparing the assessments for the Property with those of comparable properties as well as information and documents presented to the Board in prior years.

7. Using the appraisal by Mr. Noble and comparison to assessed values for similar properties, Lee Trace presented evidence that the cost approach utilized for the 2015 Assessment was done incorrectly. Mr. Noble's appraisal was the only appraisal submitted to the Board of Review and Equalization, and as a result, it was un rebutted evidence of the value of the Property. Mr. Noble testified that the true and actual value of the Property using a properly conducted appraisal and equalized with comparable properties is \$7,000,000.00, resulting in an assessed value of \$4,200,000.00. The Assessor also presented testimony through himself and Commercial Appraiser and employee of the Assessor's office, Tamera Edgar. A transcript of the hearing is attached hereto and incorporated herein as "Exhibit A."

8. The Board of Review and Equalization subsequently met on February 19, 2015 to deliberate the 2015 Assessment and decided to adopt the Assessor's valuation. A transcript of the portion of that meeting relating to Lee Trace is attached hereto and incorporated herein as "Exhibit B."

9. On February 26, 2015, the Board of Review and Equalization entered an "Order" in the form attached hereto and incorporated herein as "Exhibit C" denying Lee Trace's appeal. Counsel for Lee Trace received the Order on March 9, 2015.

10. Lee Trace is now timely appealing the Board of Review and Equalization's decision pursuant to West Virginia law, including, but not limited to, West Virginia Code § 11-3-25.

II. The Assessor Erred in Conducting the 2015 Assessment

11. The Assessor has committed the same or similar errors in all of the Assessments beginning with the 2010 Assessment. These errors include:

A. Failure to Give Required Notice of Increase

12. The West Virginia Supreme Court of Appeals determined that the notice given by the Assessor for the increase in the assessed value of Property for the 2010 Assessment ("2010 Notice") was invalid and violated West Virginia Code §11-3-2a and Lee Trace's statutory and constitutional due process rights. Lee Trace LLC v. Raynes, 232 W. Va. 183, 191, 751 S.E.2d 701, 711 (2013).

13. As a result, the Assessor had no authority to increase the 2010 Assessment from the assessed value of the Property in 2009. Since that time, the Assessor has not given the required statutory notice to Lee Trace of any increase (proposed or otherwise) of its assessed value. Therefore, all of the increased assessments since 2009 are invalid and improper,

including, specifically, the 2015 Assessment, and the County is without jurisdiction to increase the 2015 Assessment from the amount of the 2009 Assessment.

14. Since no required statutory notice was given, the 2015 Assessment must be set at the same amount as the 2009 Assessment, which is \$677,050.00.

B. Failure to Consider Required Factors such as Income, Physical Deterioration, and Functional and Economic Obsolescence

15. The Assessor failed to consider the income of the Property as required by Code of State Rules § 110-1P-3.1.1.9 (the appraisal “shall consider the following factors: . . . The income, if any, which the property actually produces and has produced within the preceding three (3) years.”). This violates West Virginia law, including, but not limited to, the West Virginia Constitution, statutory law, regulatory law, and the Assessor’s internal procedures.

16. The Assessor admitted that Lee Trace provided its income and expense information, and he had not considered it as required by the Code of State Rules.

17. The Assessor also did not consider physical deterioration, economic obsolescence, or functional obsolescence as required by the West Virginia Code of State Rules when assessing the Property.

C. Failure to Equalize the Property with Comparable Properties

18. Article X, §1 of the Constitution of West Virginia states: “[t]axation 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.” A core principle in the application of this requirement of “equal and uniform” taxation is “that tax rates, although different for different classes, must be equal and uniform within the individual class.” Town of Burnsville v. Cline, 188 W. Va. 510, 512, 425 S.E.2d 186, 188 (1992); see also Citizens Bank of Weston, Inc. v. City of Weston, 209 W. Va. 145, 151, 544 S.E.2d 72, 78 (2001).

19. Similarly, West Virginia Code §11-1C-1(a) requires that “all property in this state should be fairly and equitably valued wherever it is situated so that all citizens will be treated fairly...”

20. The Equal Protection Clause of the Fourteenth Amendment applies “to taxation which in fact bears unequally on persons or property of the same class.” Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia, 488 U.S. 336, 343, 109 S. Ct. 633, 637 – 638 (1989). In that case, the United States Supreme Court held that “the equal protection clause protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.” Id. at 345, 639.

21. West Virginia Code § 11-1C-7 requires that the Assessor “appraise all real and personal property in [his] jurisdiction at fair market value.” West Virginia Code §11-1A-3(a) requires that the assessed value be “sixty percent of the market value of such item of property regardless of its class or species.”

22. Despite these clear requirements to equalize the Property’s taxes with those of comparable properties and ensure that tax rates are “equal and uniform” within properties of the same class, the Assessor admits that the Property’s taxes are not equalized with those of comparable properties on the basis of income or per unit. Exhibit A, February 12, 2015 transcript at p. 108.

23. The Board made no reference to equalization in its Order dated February 26, 2015, and presented no evidence that the Property’s taxes were equalized with those of comparable properties. See Exhibit B, February 19, 2015 transcript and Exhibit C, Order entered February 26, 2015.

III. Lee Trace's Unrebutted Evidence of the Property's True and Actual Value

24. Lee Trace presented unrebutted expert testimony by Mr. Noble that the 2015 Assessment is incorrect and that the true and actual value of the Property as of the July 1, 2014 assessment date is \$7,000,000.00, resulting in an assessed value of \$4,200,000.00. This unrebutted expert testimony was ignored by the Board of Review and Equalization. See Exhibit B, February 19, 2015 transcript at p. 2.

25. The Board of Review and Equalization also ignored the evidence submitted by Lee Trace of comparable properties that were purportedly assessed using the same cost approach assessment by the Assessor but which were assessed at far lower per unit values than the Property, even though the units were similar or higher quality than Lee Trace's units. See Exhibit B, February 19, 2015 transcript at p. 1.

26. Mr. Noble conducted a proper cost approach analysis and considered the required depreciation factors. Exhibit A, February 12, 2015 transcript at pp. 31 – 33, 39 – 46.

27. Mr. Noble conducted an income approach valuation of the Property to check the results of his cost approach valuation. Exhibit A, February 12, 2015 transcript at pp. 22 – 23, 27 – 29 (describing the Property's rent and tax load).

28. Mr. Noble also testified that the Property's taxes were not equalized with those of comparable properties in Berkeley County and Martinsburg.

29. Mr. Noble concluded that the "real estate tax payments for Lee Trace are far higher than national trends and far exceed competing local" apartments and that "the Property's tax load (real estate tax payments as percentage of gross apartment rent) is (and has been) a much higher rate compared to other similar properties in Martinsburg" and the surrounding county.

30. For example, Mr. Noble explained that Lee Trace's taxes on the improvements constituted nearly 12% of its gross income, whereas Pheasant Run—which receives 15% higher rents—only paid 10% of its gross income in taxes.

31. In addition, Lee Trace's valuation is 7% higher than that for Stony Pointe, but Stony Pointe should be 7% greater than Lee Trace just accounting for construction costs of its brick veneer and not including amenities or the fact that Stony Pointe charges higher rents. Exhibit A, February 12, 2015 transcript at pp. 31, 38 – 39, 58 – 59. Stony Pointe's taxes as a percentage of gross income are only 8%, compared to nearly 12% for Lee Trace.

IV. Complaint for Certiorari and/or Mandamus to Correct Clerical Errors in the 2010 – 2014 Assessments

32. West Virginia Code § 11-3-27(a) provides that, “upon the discovery of any such clerical error or mistake [occasioned by an unintentional or inadvertent act] by the sheriff or assessor . . . the sheriff or assessor shall initiate an application for relief from the erroneous assessment [to the county commission] on behalf of the taxpayer or cause notice to be sent to any taxpayer affected by the clerical error or mistake by first-class United States mail advising the taxpayer of the right to make application for relief from the erroneous assessment.” (emphasis added). The statute further provides for the county commission (i.e., the Berkeley County Council Sitting as Board of Review and Equalization) to correct the clerical errors in the assessments and refund any excess taxes.³ West Virginia Code § 11-3-27(a), (b), and (c).

33. The Assessor admitted during the February 12, 2015 hearing that the prior assessments of the Property were incorrect. Specifically, Tamera Edgar testified that the land assessment “was calculated too high the first time” and adjustments were required for the land

³ To the extent notice to the county prosecuting attorney is required under this statute or for a Writ of Certiorari or Writ of Mandamus, Lee Trace has served a true and accurate copy of this Petition and Complaint upon Pamela Jean Games-Neely, Prosecuting Attorney of Berkeley County, West Virginia.

“based upon the footprint of the buildings for the prime site” and the “footprint of the paving [and] sidewalks for the secondary site.” Exhibit A, February 12, 2015 transcript at pp. 106 – 107.

34. As of the date of filing, the Assessor has not initiated such an application for relief or advised Lee Trace of the right to make application for relief.

35. Lee Trace raised this issue for the Board to correct these clerical errors at the hearing on February 12, 2015. Exhibit A, February 12, 2015 transcript at p. 11. However, the Board’s Order dated February 26, 2015 does not correct any of the admitted clerical errors in the 2010 through 2014 Assessments. Exhibit C, Order dated February 26, 2015.

36. A county commission’s decision under West Virginia Code § 11-3-27 is reviewed in circuit court through a writ of certiorari. See, e.g., State of West Virginia ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corporation, 223 W. Va. 146, 152 (2008); see also West Virginia Code § 53-3-2 (providing for writ of certiorari generally).

37. This Court’s review of a county commission’s decision under West Virginia Code § 11-3-27 is de novo, and this Court is empowered to “determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require.” See, e.g., State of West Virginia ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corporation, 223 W. Va. 146, 153 – 154 (2008)(quoting West Virginia Code § 53-3-3).⁴

38. The Assessor’s own admissions establish that there are clerical errors in the 2010 through 2014 Assessments which the Board should have corrected under West Virginia Code § 11-3-27. This Court should accordingly issue a Writ of Certiorari to review the Board’s failure

⁴ To the extent West Virginia Code § 53-3-3 requires the Board to “certify the evidence, if any, which may have been heard” to the Circuit Court, a Certified Record of the evidence before the Board will be submitted to the Circuit Court pursuant to the appeal of the 2015 Assessment pursuant to West Virginia Code § 11-3-25.

to correct these admitted clerical errors and render a judgment to correct the same. See State of West Virginia ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corporation, 223 W. Va. 146, 155 (2008).

39. Alternatively, this Court should issue a Writ of Mandamus to compel the Assessor to apply for correction of the admitted clerical errors pursuant to West Virginia Code § 11-3-27. Mandamus “lies to require the discharge by a public officer of a nondiscretionary duty.” Harrison County Commission v. Harrison County Assessor, 222 W. Va. 25, 28 (2008). Mandamus is a proper remedy when there is “(1) a clear right to the relief sought; (2) a legal duty on the part of the respondent to do the thing relator seeks; and (3) the absence of another adequate remedy.” Id. (internal citations omitted).

40. Lee Trace has a clear right to the relief sought, and the Assessor has a legal duty to make the application for correction that Lee Trace seeks. West Virginia Code § 11-3-27 provides that the Assessor “shall initiate an application for relief from the erroneous assessment.”

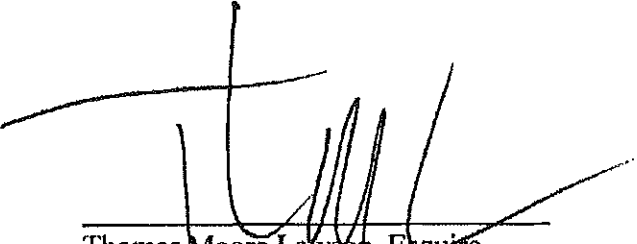
41. Lee Trace has no other remedy that is “equally as beneficial, convenient, [or] effective” as compelling the Assessor to apply for the correction of the clerical errors as required by West Virginia Code § 11-3-27. State ex rel. West Virginia Parkways Authority v. Barr, 228 W. Va. 27, 32 (2011)(internal citations omitted).

V. Conclusion and Relief Sought

WHEREFORE, Petitioner Lee Trace LLC respectfully requests this Honorable Court: grant its Petition for Appeal; issue a Writ of Certiorari to correct the clerical errors in the 2010 through 2014 Assessments or, in the alternative, issue a Writ of Mandamus compelling the Assessor to make the appropriate application for the correction of the clerical errors in the Assessments for 2010 through 2014; correct and fix the assessment of the Property for the 2015

Tax Year at \$677,050.00, or alternatively, at \$4,200,000.00; order the Assessor to refund to Lee Trace all amounts overpaid, plus interest; and provide such other relief as appropriate.

Respectfully submitted,
LEE TRACE LLC
By Counsel



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Counsel for Lee Trace LLC

The aforementioned allegations set forth in the Petition for Appeal and Complaint for Writ of Certiorari and/or Mandamus are true and accurate to the best of the undersigned's knowledge, information, and belief.

COMMONWEALTH OF VIRGINIA
COUNTY OF FREDERICK; to wit:

Robert A. Cocker

LEE TRACE LLC

By: Robert A. Cocker

Its: Manager

Subscribed and sworn to before me this 19th day of March, 2015 by Robert A. Cocker, Manager for and on behalf of LEE TRACE LLC.

Heather E. Snapp
NOTARY PUBLIC

My commission expires 12-31-16.
My Registration No.: 296105.

