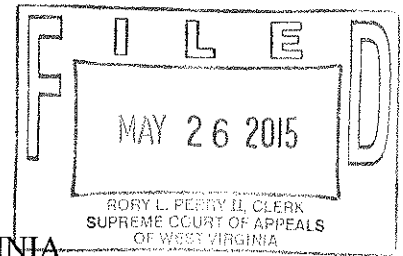


WEST VIRGINIA:

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



LEE TRACE LLC,

Petitioner,

v.

BERKELEY COUNTY COUNCIL AS
BOARD OF REVIEW AND
EQUALIZATION,

and

BERKELEY COUNTY COUNCIL,

and

LARRY HESS, AS ASSESSOR FOR
BERKELEY COUNTY, WEST VIRGINIA,

Respondents.

Berkeley County Circuit Court
Case No. 15-AA-5

Supreme Court No. 15-BCD-09

**PETITIONER LEE TRACE LLC'S RESPONSE IN OPPOSITION TO RESPONDENTS'
MOTION TO REFER CASE TO BUSINESS COURT DIVISION**

COMES NOW Petitioner Lee Trace LLC ("Lee Trace"), by counsel, and pursuant to this Court's Notice of Filing of Motion to Refer to the Business Court Division, states its opposition to Respondents' Motion to Refer to Business Court Division ("Motion") as follows:

I. Summary

1. The Motion should be denied because this case does not require specialized treatment to improve the expectation of a fair and reasonable resolution of the controversy. This case is about straightforward factual questions to determine the true and actual value of a property and features only one appraisal and one expert. In addition, this Court's prior decisions

establish that the pending consideration of a related matter by this Court warrants a denial of the Motion.

II. Factual and Procedural Background

2. 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 (the "Property").

3. This case is an appeal of the 2015 real property tax assessment of the Property ("2015 Assessment") completed by the Berkeley County Assessor and affirmed by the Berkeley County Council sitting as the Board of Review and Equalization ("Board"). The factual background of this appeal is set forth in Lee Trace's Petition for Appeal and Complaint for Writ of Certiorari and/or Mandamus, a copy of which was attached to Respondents' Motion to Refer Case to the Business Court Division and is incorporated herein by reference.

4. Unlike prior appeals of the tax assessments for the Property, this case concerns only one year's assessment and does not involve multiple appraisal methods over multiple years.

5. This case presents straightforward factual issues that do not require specialized treatment. For example, the Assessor has admitted to making errors in the calculation of the land area:

MR. BENTLEY: Was there some adjustment made?

MS. EDGAR: There was an adjustment made to land. We did a study of all of the apartments. And we adjusted the land based upon the footprint of the buildings for the prime site. The, footprint of the paving, the sidewalks for the secondary site. And we adjusted that for Lee Trace.

MR. BENTLEY: Because it had been calculated too high to start with?

MS. EDGAR: Evidently, it was calculated too high the first time.

Transcript of Board hearing on February 12, 2015, p. 107.

6. In addition, the Assessor has previously argued that he could not develop a capitalization rate to conduct an income approach assessment of the Property because of a lack of apartment sales, and that he could not conduct an income approach assessment of the Property for the 2015 Assessment for the same reason. However, the Assessor admitted there has been at least one sale of a similar property within the 2015 Assessment period:

MS. EDGAR: It is our belief upon closer examination of legislative rule 110-1P that we need to develop our own cap rate, that we are not allowed to use a national source to develop a cap rate. We have to be able to do that ourselves. I would point out that there was a large apartment complex that did sell within the last -- during the time period that we're required to look at for 2015. That was The Cottages of Martinsburg. The Cottages of Martinsburg is an apartment complex in the county that has 120 units.

Transcript of Board hearing on February 12, 2015, p. 93.

7. This testimony presents a simple factual question: the Assessor failed to develop a capitalization rate and conduct an income approach even though the information was available to do so. This is not a complex technical question about appraisal methodology.

8. Unlike prior years, there is only one appraisal report regarding the 2015 Assessment, and only one expert, Mr. L. Steven Noble, testified about the Property's true and actual value. There are no "battles of the experts" or competing appraisals that would require specialized consideration unavailable in the Circuit Court.

III. Argument

A. The Motion should be denied because this case does not require specialized treatment.

9. The core purpose of the Business Court Division is to address "complex . . . litigation involving highly technical commercial issues." West Virginia Code § 51-2-15(a).

10. In contrast, this case presents a simple tax dispute between a county and a commercial landowner for a single tax year. As explained above, this case is unlike the prior cases cited by Respondents which raised complex technical issues of commercial property valuation and other intricacies of the valuation process for multiple tax years and multiple methods of valuation.¹

11. This case also does not meet the criteria established by West Virginia Trial Court Rule 29.04(a)(2), which defines Business Litigation as a:

[D]ispute [that] presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable.

West Virginia Trial Court Rule 29.04(a)(2).

12. This matter does not require specialized treatment or specialized knowledge to achieve a fair and reasonable resolution, and the Motion should therefore be denied. See, e.g., Administrative Order denying motion to refer in W. Harley Miller Contractors, Inc. v. Jefferson County Board of Education et al. (Jefferson County Circuit Court No. 15-C-62).

13. In addition, this matter is currently pending before Judge Lorensen in the Berkeley County Circuit Court. Judge Lorensen promptly addressed preliminary issues in this matter and there is no indication that “specialized treatment” from the Business Court will “improve the expectation of a fair and reasonable resolution of the controversy.”

14. In fact, Respondents were given an opportunity to voice any concerns with Judge Lorensen presiding in this matter, but they did not file any objection to his continued role in this

¹ As a practical matter, all of these cases in the Business Court referenced by Respondents are effectively stayed until this Court decides Lee Trace, LLC v. Larry Hess, as Assessor for Berkeley County, West Virginia et al. (Docket Number 14-0962). It would be premature to transfer this case to the Business Court Division at this time.

case. See Order Directing Consent or Motion to Disqualify dated March 25, 2015 (Berkeley County Circuit Court, Civil Action No. 15-AA-5).

B. The Motion should be denied because of the pending related appeal.

15. The Motion should also be denied because a related case, Lee Trace, LLC v. Larry Hess, as Assessor for Berkeley County, West Virginia et al. (Docket Number 14-0962) is currently awaiting decision by this Court. That case raises similar questions of law and involves the same parties and Property as the case that is the subject of the Motion.

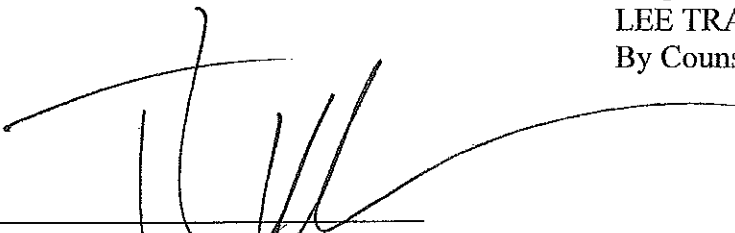
16. As this Court determined when denying a motion to refer in Joe Holland Chevrolet, Inc. v. Liberty Mutual Insurance Company and Greg Chandler's Frame & Body, LLC (Kanawha County Circuit Court No. 13-C-978), a motion to refer should be denied when this Court is preparing to decide "a case that involves the same defendants and presents identical issues as the present matter [the case that is the subject of the motion to refer]."

17. Accordingly, given the procedural posture of this matter and the related case on appeal to this Court, the Motion should be denied.

IV. Conclusion

WHEREFORE, Petitioner Lee Trace LLC respectfully requests that this Honorable Court deny the Respondents' Motion to Refer Case to the Business Court Division, retain this matter on the docket of the Berkeley County Circuit Court before Judge Lorensen, and grant such other and further relief as this Honorable Court may deem appropriate.

Respectfully submitted,
LEE TRACE LLC
By Counsel



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Counsel for Lee Trace LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of May, 2015, a true copy of the foregoing Petitioner Lee Trace LLC's Response in Opposition to Respondents' Motion to Refer Case to Business Court Division was sent by first-class mail, postage prepaid to the following parties as required by West Virginia Trial Court Rule 29.06(a)(3) and (a)(4):

Norwood Bentley, Legal Director
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Martinsburg, WV 25401

Counsel for Respondents Berkeley County Council, Berkeley County Council as Board of Review and Equalization, and Larry Hess, as Assessor for Berkeley County, West Virginia

The Honorable Michael D. Lorensen
Berkeley County Judicial Center
380 West South Street, Suite 3411
Martinsburg, WV 25401

Judge for Berkeley County Circuit Court Case No. 15-AA-5

The Honorable Virginia Sine
Berkeley County Circuit Clerk
Berkeley County Judicial Center
380 West South Street
Martinsburg, WV 25401

Carol Miller, Executive Director
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Thomas Moore Lawson, Esquire