Business Court

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

LEE TRACE, LLC,

Petitioner,

VS. **Civil Action No.: 12-AA-4**

BERKELEY COUNTY COUNCIL AS BOARD OF REVIEW AND EQUALIZATION, et al.,

Respondents.

FINAL ORDER

Initially, Petitioner represented that it would be appealing the November 20, 2015 Order, issued by the Supreme Court of Appeals of West Virginia, to the Supreme Court of the United States in the related, but separate civil actions 11-AA-2 and 14-AA-1. Accordingly, this Court stayed the above captioned cases. After the expiration of the deadline to file an appeal, the Court inquired and was informed that Petitioner no longer sought to appeal the matter. The case was set for briefing wherein parties were permitted to submit written agreement. Upon the Petitioner's request, the matter was set for oral argument. On September 9, 2016, the Court heard final arguments for civil action 13-AA-4 and the above-captioned case. Parties then submitted proposed findings of fact and conclusions of law. Accordingly, the matter is ripe for adjudication.

I. Background

Lee Trace owns real property at 15000 Hood Circle, Martinsburg, Berkeley County, 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 231 (the "Property"). The Property includes an Apartment Complex that was begun in 2008 and was completed in the spring of 2009.

On January 18, 2012 Lee Trace received a Notice of Increase in Assessment (the "Notice") from the Berkeley County Assessor (the "Assessor") with respect to the Property, which stated that the assessed value of the Property (the "Assessment") had been increased from the $6,400,690.00 figure set by the Berkeley County Council sitting as a Board of Review and Equalization (the "Board") in 2011 to $7,381,920.00. The Assessor's Assessment for the previous year, Tax Year 2011, for the subject Apartment Complex, had been compromised downward by the Board of Review and Equalization (the Board) during its deliberations in February, 2011, and was set at $6,400,690.00 by the Board. The Notice to Lee Trace of the increased Assessment further stated:

> If you are in disagreement with the current market value, please feel free to contact my appraisal personnel at 304-267-5072 within five (5) days of receipt of this notice for a petition for review. After meeting with me or my staff, if you remain unsatisfied you may appeal through the county board of equalization which convenes in February of 2012.

Under West Virginia law and procedure, an Application for Review of Property Assessment is directed to both the Assessor and the Board. Under West Virginia Code §11-3-15c and West Virginia Code §11-3-24, Lee Trace is entitled to a review by the Assessor and subsequent review and equalization by the Board. On January 20, 2012, Lee Trace requested an

expedited review of the 2012 Assessment by the Assessor. On January 23, 2012, per instruction from the Assessor, and prior to any action by the Assessor on its request for review, Lee Trace filed its formal "Application for Review of Property Assessment" ("Application for Review") with the Assessor, also asking for the review to be expedited.

Notwithstanding the filing of the Application for Review of Property Assessment and multiple letters, Lee Trace was not contacted by either the Assessor or the Board. On February 15, 2012, counsel for Lee Trace contacted the Assessor's office to determine the status of the requested review. He was informed that a hearing had been set for the following day, February 16, 2012, with the Board, of which Lee Trace had never been given notice.

After informing the Assessor's office that counsel for Lee Trace was not available on February 16, 2012, and asking that the matter be rescheduled to a mutually agreeable time, the Assessor's office stated that Lee Trace would be allowed to present its evidence on February 17, 2012, and that "nothing would be done on February 16, 2012."

However, the Board did hear the Assessor's case on the 16th. Nevertheless, the Board provided the Petitioner with an electronic recording of that hearing on February 17, 2012, and set a second date to continue the hearing in order to accommodate the Petitioner. The second day of the hearing was held February 24, 2012, whereat the Petitioner appeared, by counsel and was given the opportunity to present its evidence; hear, in person, the Assessor's case; cross-examine the Assessor's witnesses; and make argument in support of its case. Petitioner presented documentary evidence to the Board and argued its case but, chose not to present live witness testimony or hear the live, direct testimony of the Assessor's witnesses, or cross-examine those

witnesses.

During the February 16, 2012 hearing, Ms. Edgar, the Assessor's appraiser, testified that the Assessor used the cost approach to value the Property. Edgar testified, and the record reflects, that there were no sales of comparable properties in Berkeley County during the period leading up to the effective date of assessment of the Apartment Complex for Tax Year 2012.

The Berkeley County Council, sitting as the Board of Review and Equalization affirmed the Berkeley County's 2012 Property Assessment of an apartment complex owned by Lee Trace, LLC on February 24, 2012. Lee Trace comes before this Court as Petitioner to appeal the Boards decision.

II. Standard for Appeal

Assessments are afforded a presumption of correctness and accordingly, the appealing taxpayer, Lee Trace, must prove by clear and convincing evidence that the Assessment was erroneous. Syllabus point 2, in part, *Western Pocahontas Properties Ltd. v. County Commission of Wetzel County,* 189 W.Va. 322, 431 S.E.2d 661 (1993).

Here, Petitioner alleges that the Assessment is erroneous because (A.) the Assessor violated Lee Trace's due process rights, (B.) the Assessor used an illegal valuation method for Lee Trace's competitors, and (C.) the Assessor failed to consider required statutory factors.

A. Due Process (Notice of Hearing)

Lee Trace's first assignment of error points to the inadequate notice provided to Petitioner when it attempted to appeal the Assessment to the Board. Notwithstanding Petitioner's filing of the Application for Review, as requested by the Assessor, Lee Trace was not contacted by the

Assessor or the Board regarding the appeal. On February 14, 2012, counsel for Petitioner contacted the Assessor's office and was informed that a hearing had been set for February 16, 2012. Petitioner was unable to attend on this date due to a scheduling conflict, so the Board scheduled a two day hearing. The Assessor proffered evidence on February 16 and, on the next day, the Board provided Petitioner's counsel with the electronic recording of the evidence presented. The continuation of the hearing was scheduled for February 24, 2016, whereat the Petitioner appeared and was given the opportunity to present evidence and conduct cross examination of the witnesses who testified on the first day of the hearing.

Petitioner cites §§ 11-3-24(d), (e), and (f) which states that a taxpayer who receives a notice of increase must be given at least 5 days written notice before the hearing by the Board.

> If the board determines that any property or interest is assessed at more or less than sixty percent of its true and actual value as determined under this chapter, it shall fix it at sixty percent of its true and actual value: *Provided,* That no assessment shall be increased without giving the taxpayer at least five days' notice, in writing, of the intention to make the increase …
> … After hearing the board's reason or reasons for the proposed increase, the taxpayer may present his or her objection or objections to the increase and the reason or reasons for the objections and may either orally or in writing advise the board that the taxpayer elects for the matter to be heard in the fall of the tax year when the county commission meets as a board of assessment appeals…

W. Va. Code §11-3-24(d)-(f). Petitioner argues that this set of facts constitutes a violation of said section of the code and Lee Trace's due process rights. Indeed, in *Lee Trace, LLC v Raynes*, 232 W. Va. 183 (2013), the West Virginia Supreme Court of Appeals held that a defective notice that failed to advise Lee Trace of its appeal rights violated Lee Trace's

constitutional and statutory due process rights. However, unlike *Raynes,* here the Petitioner was afforded 8 days' notice and full opportunity to present its appeal due to the two-day hearing that was scheduled to remedy the Respondents' failure to alert the Petitioner.

In *Rawl Sales & Processing Co. v. Cty. Comm'n of Mingo Cty.,* the taxpayers received defective notice in a newspaper but received actual notice and made an appearance before the Board. On appeal, the Supreme Court of Appeals of West Virginia held that any defect was waived or cured by the taxpayers' appearance before the Board. 191 W. Va. 127, 130 (1994).

> [T]he taxpayers admitted that they were informed of the actual assessments that were applicable to their properties prior to their appearance before the Board. Thus, the taxpayers had ample opportunity to argue against the final assessments before the Board of Equalization and Review. In *In re Tax Assessments Against Pocahontas Land Co.,* 172 W.Va. 53, 303 S.E.2d 691, 697 (1983), this Court recognized that a notice that is defective as to either date or content may be cured by the taxpayer's appearance before the board. "Even though W.Va.Code, 11-3-24, provides for newspaper publication where a general increase in property valuations is proposed by the Board, defective newspaper publication can be cured by adequate notice by mail or by the appearance of the affected taxpayer at a protest hearing." Syl. pt. 6, *In re Tax Assessments Against Pocahontas Land Co.,* 172 W.Va. 53, 303 S.E.2d 691 (1983). Consequently, we find no prejudicial error with respect to the notice that was published in this instance.

Id.

Rawls examined the sufficiency of notice for a newspaper publication. The taxpayers conceded that the notice itself was proper, and disputed only the sufficiency of its contents. In the instant case, the taxpayers were arguably entitled to personal notice for increase to their property assessment individually. While the form is somewhat different in the case at hand, the reasoning is the same. Here, Petitioners received late notice to the first half of the hearing, but received 8

days notice before the second half of the hearing, wherein they appeared and had ample opportunity to present evidence and cross examine all witnesses. Just as in *Rawls*, here there is no prejudicial error with respect to the notice.

The Assessor's presentation of its evidence on February 16, 2012, was made absent the Petitioner. However, the Board offered to Petitioner the opportunity to have the Assessor's evidence presented, again, and the opportunity for cross-examination, at hearing on February 24, 2012. Petitioner waived this opportunity, having availed itself of the benefits of an electronic recording of the Assessor's evidence and the questions posed by members of the Board.

While the scheduling of Petitioner's hearing by the Board was less than optimal, the fact remains that this Taxpayer was accorded its day in court for the purpose of making its case with regard to its Tax Year 2012 Assessment. As the West Virginia Supreme Court has opined many times, "courts do not demand that a hearing before a board be surrounded by extensive clue process procedures. The formal rules of evidence are not applicable." *in re Tax Assessments Against Pocahontas Land Corp.*, 172 W.Va. 53, 303 S.E.2d 691 (1983). Additionally, that court has taken the position that a taxpayer's appearance before a Board of Equalization and Review cured any defect that may have existed in the notice because the taxpayer had the opportunity to present their arguments to the Board. *Rawl Sales & Processing Co. v. County Commission*, 191 W.Va. 127, 443 S.E.2d 595 (1994).

The Petitioner was accommodated and appeared for the February 24 hearing wherein the Board took proffered evidence. Actual appearance at the hearing's second day cured any defect under Rawls Sales & Processing Co. v. Cty. Comm'n of Mingo Cty., 191 W. Va. 127, 130

(1994). The Court finds no prejudice was placed upon the Petitioner by the actions of the Board in setting and hearing the Petitioner's ease.

B. Equalization

Lee Trace's second assignment of error complains that competitors received favorable treatment under the hybrid income assessment when Lee Trace's assessment, using the same valuation method, was overturned by the Supreme Court of Appeals of West Virginia. Petitioner argues that this disparity between assessed values constitutes a failure to equalize the property at issue by the Assessor and that Lee Trace's assessment should be reduced. Petitioner cites the Assessor's "duty to examine and revise the lists of property taken by his deputies to see that the assessment is equal and uniform throughout his county..." W. Va. Code §11-2-6, as well as the West Virginia Constitution and Equal Protection Clause of the United States Constitution which requires equal and uniform taxation within the same class of property. Petitioner argues that these differences over multiple tax assessments establish an intentional and systematic undervaluing of other properties relative to the Lee Trace property.

"Title 110, Series I P of the West Virginia Code of State Rules confers upon the State Tax Commissioner (and county assessors) discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion." Syl. Pt. 5, *In re Tax Assessment Against Bituminous. Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000). Accordingly, this Court does not agree with Petitioner's argument that the Assessor is required to perform an income approach to value the subject property. The Assessor explained

his decision to utilize the cost approach in making the 2012 Assessment. There were no comparable sales of property in Berkeley County during the pertinent time period from which the Assessor could have developed the required capitalization rate, and as such, the Assessor was precluded from using the income approach.[1]

Lee Trace argues that the Assessor did have sufficient information to develop a cap rate based on sales outside Berkeley County. On February 24, 2012, during the second day of hearing before the Board, Lee Trace presented evidence and proffered testimony from M. L. Steven Noble, a licensed certified real estate appraiser, that the assessed value of the Property for the 2012 Tax Assessment should be no more than $4,000,000,00. Certified Record No. 6. However Mr. Noble's assessment was based on comparable properties *outside* the locality of Berkeley County. Petitioner argues that, despite the lack of any comparable sales during the pertinent time period, in Berkeley County, the Assessor could have and should have performed the income approach by utilizing sales of similar properties outside of this jurisdiction and from years ranging from 2007 to 2011. Petitioner offered a report using sales from outside the state, but the Assessor is not required to use data outside its established locality. *Lee Trace v. Hess*, a non-binding but useful memorandum decision, clarifies that an Assessor has the authority under the Code to choose the "locality," which can be within a state's borders.

> Any evidence produced by petitioner's expert witness and purporting to show a comparable sale involved a sale that originated outside of West Virginia. Petitioner's argument on this

1"The selection of an overall capitalization rate will be derived from current available market data by dividing annual net income by the current selling price of comparable properties. The present fair market value of the property shall then be determined by dividing the annual economic rent by the capitalization rate." W.Va. C.S.R. § I 10-IP-2.2,1.2 (1991).

> point is made in a single sentence, and it offers no authority requiring an assessor to look outside state borders to obtain evidence of comparable sales. We agree with respondents that "[i]n determining appraised value, primary consideration shall be given to the trends of price paid for like or similar property in the area or locality in which the property is situated." W.Va. C.S.R. § 110-1P-3.1.1 (emphasis supplied).

Lee Trace v. Hess, No. 14-0962 (W. Va. Supreme Court, November 20, 2015) (Memorandum Decision). [2]

West Virginia Code of State Rules § 110-1P-2.2.1 (1991), in effect for the Tax Year 2012 Assessment, provides three different appraisal methods for determining the fair market value of commercial properties such as the subject apartment complex. This subsection provides "... the Tax Commissioner will consider and use, where applicable, three generally accepted approaches to value: (A) cost, (B) income, and (c) market data." The Code of St ate Rules, also, provides specific instruction as to how to apply the income approach: "The selection of an overall capitalization rate will be derived from current available market data by dividing annual net income by the current selling price of comparable properties. The present fair market value of the property shall then be determined by dividing the annual economic rent by the capitalization rate." W.Va. C.S.R. § 110-IP-2.2,1.2 (1991). If, then, there is no "comparable sale", there can be no development of the required capitalization rate and, thus, the Assessor cannot use the income approach to value the property.

Our Supreme Court has ruled that it is "an abuse of discretion for the Board to utilize a

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2 Furthermore, this Court recognizes that commercial property values may be assessed differently across state lines based on various factors including differing tax schemes, zoning, infrastructure, and regulations. These differences are especially evident in the Eastern Panhandle of West Virginia, where property values can vary wildly within a few miles between Pennsylvania, Maryland, Virginia, and West Virginia. Presumably for this reason, the legislature

'hybrid' income approach value that did not comport with the requirements of W.Va. Code of State Rules § 110-1P-2.2.1.2 and § 10-1P-2.3.6." *Lee Trace LLC v. Raynes, et al*, 232 W.Va. 183, 751 S.E.2cl 703 (2013). The method proposed by Lee Trace here would likely fall within that abuse of discretion once again.

Throughout this appeal, Respondent has also promoted the testimonial evidence of Record which indicates that the Assessor uses a "county modifier," a required annual study of costs of construction for the purpose of correlating costs of new construction to the state's charts of current costs, under the Fair and Equitable Property Valuation Act. Respondent cites §11-1C-1 and the objectives of the Act.

> (a) The Legislature hereby finds and declares that all property in this state should be fairly and equitably valued wherever it is situated so that all citizens will be treated fairly and no individual species or class of property will be overvalued or undervalued in relation to all other similar property within each county and throughout the state.
>
> (b) The Legislature by this article seeks to create a method to establish and maintain fair and equitable values for all property. The Legislature does not intend by this article to implement the reappraisal as conducted under articles one-a and one-b of this chapter nor does it intend to affect tax revenue in any manner.
>
> (c) The Legislature finds that requiring the valuation of property to occur in three-year cycles with an annual adjustment of assessments as to those properties for which a change in value is discovered shall not violate the equal and uniform provision of section one, article ten of the West Virginia Constitution, the Legislature further finding that such three-year cycle and annual adjustment are an integral and indispensable part of a systematic review of all properties in

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bestowed upon Assessor the discretion to determine the bounds of their county's "locality."

> order to achieve equality of assessed valuation within and among the counties of this state.

W. Va. Code §11-1C-1.

Though it is not apparent that this county modifier system was the cause of the rise in appraised value, §11-1C-1 is illustrative of the purpose of the mechanisms the Assessor may use to determine the fair and equitable assessment of properties in Berkeley County.

Furthermore, Petitioner cannot succeed on its constitutional claim that the Assessor failed to equalize the assessment in Tax Year 2012.

> [V]iolation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires `intentional, systematic undervaluation by state officials of other taxable property in the same class[,:]' and occasional errors of law or mistake in judgment are not alone sufficient to implicate the clause.

Allegheny Pittsburgh Coal Ca. v. Cty, Comm 'n of Webster Cty., W. Va., 488 U.S. 336, 343 (1989). Similarly, our Court has announced that

> The Equal and uniform clause of Section 1 of Article X of the West Virginia Constitution, requires a taxpayer whose property is assessed at true and actual value to show more than the fact that other property is valued at less than true and actual value. To obtain relief he must prove that the under valuation was intentional and systematic. Syl. Pt. 1, *Kline v. McCloud*, 174 W.Va. 369, 326 S.E.2d 715 (1984).

Syl. Pt. 11, *Mountain Am., LLC v. Huffman*, 224 W.Va. 669, 687 S.E.2d 768, 772 (2009). Here, there is no evidence of any intentional and systematic under valuation of other properties.

Even if the Assessor did use the non-compliant hybrid method for the other properties, it was performed prior to the *Lee Trace* Decision of 2013. During the February 16, 2016 hearing,

Ms. Edgar testified for the Assessor's office that she used the cost approach, not the income approach, because the Property "was a newer complex as opposed to an older complex which has more depreciation and, therefore, the income might support a different value." The West Virginia Supreme Court of Appeals has specifically instructed that an Assessor has no duty to perform the useless task of considering appraisal methods with insufficient data for that method and Edgar testified that there were no sales of comparable properties during the year preceding the effective date of the assessment in order to develop a cap rate. *Lee Trace, LLC v Raynes*, 232 W. Va. 183 (2013). Through Ms. Edgar's testimony, the Assessor has articulated a reasonable justification for employment of the cost approach.

The Court here agrees. The decision of the Supreme Court of Appeals of West Virginia corrected a misapplication of the law and certainly set the standard for ongoing assessments. However, the Petitioner's undesired correction does not trigger a requirement that the Assessor return to all previous assessment and reevaluate the properties by other means or return the Petitioner's assessment to the hybrid amount struck down in the name of equalization.

This Court must agree with the Respondent and concludes that the Assessor has presented substantial evidence with regard to his assessment of the subject property. The Petitioner has failed to present the "clear and convincing" evidence necessary to prove that the Tax Year 2012 Assessment is erroneous and has failed to show intentional and systematic under valuation for competitors necessary to prove a claim of discrimination.

C. Statutory factors- income, depreciation

Lee Trace's third and final assignment of error asserts that the Assessor failed to consider

the required factors of physical deterioration, functional obsolescence, and economic obsolescence when applying the cost approach to determine the Property's value. However, the record shows that Ms. Edgar testified to both physical and functional depreciation and pointed them out on the property cards. There is no evidence that the Assessor failed to think about economical obsolescence and there is no suggestion in the record that economic obsolescence could have applied to the building in issue.

Economic obsolescence is defined as "a loss in value of property arising from outside forces such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships." W. Va. Code R. 110-1P-2. There is nothing in the record to reflect that any outside force impacted the property and Petitioner fails to rebut this argument.

Furthermore, based upon the testimony of Ms. Tamara Edgar on October 24, 2013, the record, and apparent from the pleadings, this Court finds that the Assessor considered all the factors listed in the 1991 version of §110-1P-2.1.1 through 2.1.4 as required by statute and case law. "When a circuit court reviews an appraisal of commercial real property made for ad valorem taxation purposes, the court shall, in its final order, make findings of fact and conclusions of law addressing the assessing officer's consideration of the required appraisal factors set forth in W.Va.C.S.R. §§ 110–1P–2.1.1. to 2.1.4. (1991)." Syl. pt. 7, *Stone Brooke Limited Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009).

III. Conclusion

In conclusion, Petitioner has not passed the heavy burden of proving, by clear and convincing evidence, that the Assessment was erroneous, discriminatory, or that the Board erred

by affirming the Assessment.[3] Furthermore, the Court finds that the Petitioner did not suffer any prejudice by way of the Board's setting and hearing of the Petitioner's case.

THEREFORE, upon the record and pertinent legal authorities, the Court DENIES the Petition for Appeal and AFFIRMS the February 24, 2012 decision of the Berkeley County Council as Board of Review and Equalization. The Court notes the objections and exceptions of the parties to any adverse ruling herein. This being a FINAL ORDER, the Court directs the Circuit Clerk to retire this matter from the active docket and place it among causes ended, and to distribute attested copies of this Order to the Business Court Division Central Office at the Berkeley County Judicial Center, 380 W. South Street, Suite 2100, Martinsburg, West Virginia, 25401; and all counsel of record.

ENTER this 14 day of November 2016.

CHRISTOPHER C. WILKES, JUDGE

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Virginia M. Sine
Clerk Circuit Court
By: Martha Mehrl
Deputy Clerk

3 Respondents also filed Supplemental Proposed Findings of Facts and Conclusions of Law. However, due to the Petitioner's objection and because the Court's briefing schedule did not provide for a supplemental memorandum, the Court did not consider the Respondents' Supplement Proposed Findings of Fact and Conclusions of Law in its preparation of this Order.