

**IN THE CIRCUIT COURT OF BARBOUR COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

CNX GAS COMPANY, LLC,

Petitioner,

v.

**Civil Action No. 16-AA-4
Honorable Christopher C. Wilkes**

**THE HONORABLE DALE W. STEAGER,
West Virginia State Tax Commissioner,
THE HONORABLE JOHN M. CUTRIGHT,
Assessor of Barbour County, and
THE COUNTY COMMISSION OF BARBOUR COUNTY,
Sitting as Board of Assessment Appeals,**

Respondents.

**FINAL ORDER GRANTING MOTION TO DISMISS
FOR FAILURE TO TIMELY PERFECT APPEAL**

This matter comes before the Court pursuant to the Motion of the West Virginia State Tax Department and Assessor J. Cutright to Dismiss for Failure to Timely Perfect Appeal. The Court has reviewed the motion to dismiss filed by the Tax Department and Assessor Cutright, the pleadings as filed with the Clerk of the Circuit Court, the memorandum of law opposing the motion to dismiss filed by CNX Gas, and the reply brief filed by the Tax Department. The Court grants the *Motion to Dismiss for Failure to Timely Perfect Appeal* based upon the record and the laws of this State.

PROCEDURAL BACKGROUND

1. CNX Gas protested the valuation of its property interest in gas wells for the 2016 TY before the Barbour County Commission sitting as a Board of Assessment Appeals in October 2016. See Complaint at Paragraphs 6, 13, 15, 18, & 27.

2. The Barbour County Commission sitting as a Board of Assessment Appeals affirmed the valuation of Assessor Cutright and the Tax Department for the 2016 TY. *See Complaint* at Paragraphs 6 & 19.

3. CNX filed the instant appeal on or about November 23, 2016, in the Circuit Court of Barbour County seeking judicial review of the ad valorem property tax assessment for the 2016 tax year (TY).

4. The Tax Department and Assessor Cutright filed the Motion to Dismiss for Failure to Timely Perfect Appeal (hereinafter, Tax Department's Motion to Dismiss) in this matter with the Circuit Court of Barbour County on May 26, 2017.

5. The WV Supreme Court of Appeals granted the motion filed by CNX Gas to refer this case to the Business Court Division on July 31, 2017. Subsequently, Judge Wilkes was assigned as the Presiding Judge in this case.

FACTS SUPPORTING DISMISSAL

6. The jurisdictional basis cited in the *Complaint* by CNX Gas for the appeal to Circuit Court is W. Va. Code § 11-3-25. *See Complaint* at Paragraph 19. Any taxpayer may seek judicial review of a decision of the Board of Assessment Appeals under the same statutory provision. *See* W. Va. Code § 11-3-24b(g).

7. The applicable statutory provision states in pertinent part:

(b) The right of appeal from any assessment by the Board of Equalization and Review or order of the Board of Assessment Appeals as provided in this section may be taken either by the applicant or by the state, and in case the applicant, by his or her attorney, or in the case of the state, by its prosecuting attorney or other attorney representing the Tax Commissioner. **The party desiring to take an appeal from the decision of either board shall have the evidence taken at the hearing of the application before either board, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the board, certified by the county clerk and transmitted to the circuit court as provided in section four, article three, chapter fifty-eight of this**

code, except that, any other provision of this code notwithstanding, the evidence shall be certified and transmitted **within thirty days after the petition for appeal is filed** with the court or judge, in vacation.

W. Va. Code § 11-3-25(b) (2014) (emphasis added).

8. The appeal provisions of the statute expressly reference W. Va. Code § 58-3-4 (emphasis added) which states:

In any case in which an appeal lies under section one of this article on behalf of a party to a controversy in a county court, such party may present to the circuit court of the county in which the judgment, order or proceeding complained of was rendered, made or had, or in the vacation of such court, to the judge of such court, the petition of such party for an appeal. Such petition shall be presented within four months after such judgment, order or proceeding was rendered, had or made, and shall assign errors. **It shall be accompanied by the original record of the proceeding in lieu of a transcript thereof.** Such original record shall be understood as including all papers filed in the proceeding, certified copies of all orders entered in the proceeding, copies of which are not in the files, and all matters included in bills of exceptions, or certificates in lieu thereof, as provided in section three of this article. The record may likewise include and the court may consider an agreed statement of facts, and, in case the testimony in the proceeding below was not stenographically reported and preserved, a certificate of facts made by such commissioners, or a majority of them.

9. Petitioner CNX Gas filed the instant appeal with the Circuit Court of Barbour County on or about November 23, 2016.

10. Thirty days from November 23, 2016, would be December 23, 2016.

11. The record filed with the Clerk of the Circuit Court was not certified by the County Clerk of Barbour County prior to the deadline to perfect the appeal on December 23, 2016.

12. The docket sheet for Civil Action No. 16-AA-4 does not include any indication that the County Clerk had certified the record from the Board of Assessment Appeals to the Circuit Court prior to the deadline of December 23, 2016. *See Tax Department's Motion to Dismiss at Exhibit 1.*

13. CNX Gas has provided no evidence or submitted any information to indicate that CNX Gas attempted to have the record certified by the County Clerk to the Circuit Court on or before December 23, 2016.

14. CNX Gas filed a *Notice of Filing* in this case on June 21, 2017. The *Notice of Filing* includes a certification from the Clerk of the Barbour County Commission (county clerk) dated June 16, 2017, regarding the record from the Board of Assessment Appeals and the Board of Equalization and Review. See *Notice of Filing* at Exhibit A. The Tax Department filed an objection to this Notice of Filing in the Circuit Court.

DISCUSSION

Under West Virginia law, the requirements to perfect an appeal are jurisdictional and must be strictly construed. In 1963, prior to any statutory requirement to certify the record with the county clerk, the West Virginia Supreme Court determined that the original record from the county court, now the county commission, must be timely filed with the Circuit Court in order to perfect the appeal.

The provisions of Section 25, Article 3, Chapter 11, Code, 1931, as amended, governing appeals from the county court to the circuit court of the county from an assessment made by the county court, in which there was a hearing and an appearance by the property owner, and requiring that the application for an appeal be represented in the circuit court within thirty days from the adjournment of the county court by which the order complained of was rendered, and the provisions of Section 4, Article 3, Chapter 58, Code, 1931, requiring that the petition be accompanied by the original record of the proceeding in the county court in lieu of a transcript of such proceeding, are mandatory and will be read and considered together; and when it appears upon review in this Court that the petition, though presented within the thirty day period, **was not accompanied by the original record of the proceeding in the county court** and that no record of such proceeding was filed in the circuit court within the limitation of thirty days prescribed by Section 25 of the statute, **the appeal applied for must be refused by the circuit court and the writ of error awarded by this Court to the judgment of the circuit court refusing such appeal will be dismissed.**

In re Tax Assessment Against O.V. Stonestreet, 147 W. Va. 719, 131 S.E. 2d 52 at Syl. Pt. 1

(emphasis added). The Supreme Court observed in *Stonestreet* that W. Va. Code §§ 11-3-25 and 58-3-4 must be read *in pari materia*. In *Stonestreet*, the Petitioners argued that the original record was not necessary until the Circuit Court had set a date for a hearing the merits of the appeal. See *Stonestreet* at 722, 54. However, the Supreme Court rejected this argument and reaffirmed that statutorily required materials must be filed timely. See *Stonestreet* at 725, 56.

The Supreme Court reaffirmed and expanded on the *Stonestreet* decision in the case of *Rawl Sales & Processing Company, Inc., v. County Commission of Mingo County*, 191 W. Va. 127, 443 S.E. 2d 595 (1994) at Syll. Pts. 3 & 4 (1994)(citing *In re Stonestreet*). The Supreme Court stated that the procedures to appeal as set forth in W. Va. Code §§ 11-3-25 and 58-3-4 are mandatory jurisdictional requirements. See *Rawl Sales* at 131-132, 599-600.

Some guidance regarding the necessity of completing jurisdictional requirements are found in the 2014 West Virginia Supreme Court of Appeals memorandum decision, *RMLL Enterprises, Inc. v. Matkovich*, No. 13-c-1275, 2014 WL 5311444 (W. Va. Oct. 17, 2014), wherein the Court decided, "the failure to post an appeal bond as required by law is a jurisdictional bar to an appeal."

In *RMLL*, the Court explained, "[j]urisdiction is the inherent power of a court to decide a case. See Syl. Pt. 2, *Vanover v. Stonewall Cas. Co.*, 169 W.Va. 759, 289 S.E.2d 505 (1982)." *Id.* In other words, this Court may not hear the appeal if it has not gained jurisdiction, which would be conferred through §11-3-25 in the case at bar. If the appeal was not perfected as required, this Court holds no inherent power to decide the case.

In 2009, the Supreme Court affirmed once again that the record must be filed timely as statutorily prescribed in order to perfect the appeal. In the case *In re Tax Assessment Against Purple Turtle, LLC*, 223 W. Va. 755, 679 S.E.2d 587 at Syl. Pts. 4 & 5 (2009), the Supreme

Court noted the overlap between W. Va. Code §§ 11-3-25 and 58-3-4, and explained:

5. "The proper procedures for appeal from a county court [county commission] decision are outlined in West Virginia Code § 58-3-1 *et seq.* The provisions of this article are to be read *in pari materia* with § 11-3-25, which specifically addresses the appeal process for property tax assessments that are made pursuant to the property revaluation set forth in W. Va. Code § 11-1C-1 *et seq.*" Syl. Pt. 4, *Rawl Sales and Processing Co. v. County Comm'n*, 191 W.Va. 127, 443 S.E.2d 595 (1994).

Purple Turtle at Syllabus Point 5 (emphasis added). Because the Tax Department is required to value all natural resource property for ad valorem tax purposes pursuant to W. Va. Code § 11-1C-10(d), Antero Resources must comply with the procedures set forth in W. Va. Code § 11-3-25 in order to seek judicial review of the same.

While *In Re Purple Turtle* was decided by the Supreme Court in 2009, the West Virginia Legislature amended §11-3-25 in both 2010 and 2014, adding another requirement to accomplish perfection of ad valorem tax assessments appeals. The current statute states:

(b) The right of appeal from any assessment by the Board of Equalization and Review or order of the Board of Assessment Appeals as provided in this section may be taken either by the applicant or by the state, and in case the applicant, by his or her attorney, or in the case of the state, by its prosecuting attorney or other attorney representing the Tax Commissioner. **The party desiring to take an appeal from the decision of either board shall have the evidence taken at the hearing of the application before either board, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the board, certified by the county clerk and transmitted to the circuit court as provided in section four, article three, chapter fifty-eight of this code, except that, any other provision of this code notwithstanding, the evidence shall be certified and transmitted within thirty days after the petition for appeal is filed with the court or judge, in vacation.**

W. Va. Code § 11-3-25(b) (2014) (emphasis added). The Legislature has very clearly stated that a party appealing a decision of the Board of Equalization and Review or an order of the Board of Assessment Appeals must have the record certified by the county clerk and transmitted to the circuit court within thirty days after the petition for appeal was filed in the circuit court.

This requirement is not negated by §58-3-4 as asserted by the Petitioner. Antero argues that §58-3-4 allows a petitioner to choose whether to submit the original record or a transcript.

In any case in which an appeal lies under section one of this article on behalf of a party to a controversy in a county court, such party may present to the circuit court of the county in which the judgment, order or proceeding complained of was rendered, made or had, or in the vacation of such court, to the judge of such court, the petition of such party for an appeal. Such petition shall be presented within four months after such judgment, order or proceeding was rendered, had or made, and shall assign errors. **It shall be accompanied by the original record of the proceeding in lieu of a transcript thereof.** Such original record shall be understood as including all papers filed in the proceeding, certified copies of all orders entered in the proceeding, copies of which are not in the files, and all in section three of this article. The record may likewise include and the court may consider an agreed statement of facts, and, in case the testimony in the proceeding below was not stenographically reported and preserved, a certificate of facts made by such commissioners, or a majority of them.

W. Va. Code §58-3-4.

§11-3-25(b) clearly does not permit a petitioner to choose its own desired record. §11-3-25(b) specifically includes “a transcript of all the testimony” *as part of* the required “evidence taken at the hearing” that is required to be certified and transmitted by the county clerk. Further, even if §58-3-4 and §11-3-25(b) do conflict, statutory history requires this Court to follow §11-3-25.

Again, the Supreme Court of Appeals of West Virginia has clearly explained, where there is a conflict between statutes, we “resolve such tension in favor of the more recent and specific statute.” *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 125 n. 4, 464 S.E.2d 763, 767 n. 4 (1995); quoted by *RMLL Enterprises, Inc. v. Matkovich*, No. 13-c-1275, 2014 WL 5311444 (W. Va. Oct. 17, 2014) (memorandum decision).

§58-3-4 was written in 1882, formerly known as Code 1923, c. 112, §14. §11-3-25(b), on the other hand, was revised in 2010 and again in 2014, adding the certification requirement at the

heart of this motion. Further, §58-3-4 governs appeals from county commissions generally, whereas §11-3-25 specifically addresses appeals from property tax assessments. Accordingly, just as the appeal bond statute in *RMLL*, §11-3-25 “is both more recent and more specific” and accordingly controls. *RMLL v. Matkovich*, No. 13-c-1275, 2014 WL 5311444 (W. Va. Oct. 17, 2014) (memorandum decision).

The Legislature clearly intended that petitioners seeking judicial review of ad valorem tax assessments must perfect their appeals by having the evidence taken at the hearing (including a transcript, inter alia) certified by the county clerk and transmitted to the circuit court.

In *Purple Turtle*, the Supreme Court noted that the filing requirements to appeal decisions of the boards of equalization and review are clear and mandatory.

Indeed, as this Court stated in *Helton v. Reed*, 219 W.Va. 557, 638 S.E.2d 160 (2006), “filing requirements established by statute ... are not readily susceptible to equitable modification or tempering.” 219 W.Va. at 561, 638 S.E.2d at 164; see also *Concept Mining, Inc. v. Helton*, 217 W.Va. 298, 617 S.E.2d 845 (2005) (Tax Commissioner’s intent was irrelevant and procedural error prohibited consideration of Commissioner’s appeal); *Solution One Mortg., LLC v. Helton*, 216 W.Va. 740, 613 S.E.2d 601 (2005) (tax statutes requiring bond as prerequisite to prosecution of appeal are strictly construed); *State ex rel. Clark v. Blue Cross Blue Shield of W. Va., Inc.*, 195 W.Va. 537, 466 S.E.2d 388 (1995) (strict deadlines in insurance insolvency cases); *Bradley v. Williams*, 195 W.Va. 180, 465 S.E.2d 180 (1995) (taxpayer’s failure to abide by express procedures established for challenging decision of Tax Commissioner precludes taxpayer’s claim for refund or credit).

Purple Turtle at 761-762, 593-594. Based upon the critical importance of perfecting the appeal from the Boards of Equalization and Review, the Supreme Court refused to deviate from the appeal methodology set forth in *Rawl Sales* and *In re Stonestreet*. See *Purple Turtle* at 762, 594.

The methodology to appeal property tax assessments to the circuit courts is clearly established by statutes. The West Virginia Supreme Court has consistently held that the express statutory procedures to appeal property tax assessments are mandatory and constitute a

jurisdictional requirement. The failure to timely perfect an appeal as expressly required by W. Va. Code § 11-3-25(b) creates a jurisdictional bar and prevents the Circuit Court from acquiring jurisdiction.

CONCLUSION

For the reasons discussed above, the Court draws the following conclusions of law based upon the decisions of the West Virginia Supreme Court and the statutory framework regarding ad valorem property taxation in this State.

The procedures to seek judicial review of ad valorem property tax assessments are expressly set forth by statute. The Supreme Court has specifically stated that the procedures to appeal as set forth in W. Va. Code §§ 11-3-25 and 58-3-4 are mandatory jurisdictional requirements. *See Rawl Sales* at 131-132, 599-600.

The failure to have the record certified by the county clerk and filed with the clerk of the circuit court timely as required by W. Va. Code § 11-3-25(b) constitutes a jurisdictional bar to prosecuting the tax appeal much the same as a failure to timely file an appeal with the court constitutes a jurisdictional bar. *See, e.g., Helton v. Reed*, 219 W.Va. 557, 638 S.E.2d 160 (2006) and *Bradley v. Williams*, 195 W.Va. 180, 465 S.E.2d 180 (1995) (both cited with approval above in *In Re Purple Turtle*). Based upon the record as filed with the Court by December 23, 2016, CNX Gas failed to do so in the case *sub judice*.

ACCORDINGLY, the Court hereby **GRANTS** the *Motion to Dismiss for Failure to Timely Perfect Appeal* filed by Dale W. Steager, State Tax Commissioner of the State of West Virginia, and the Honorable John M. Cutright, Assessor of Barbour County. The instant appeal is **DISMISSED** with prejudice. The objections of all parties are noted for the record and preserved.

The Clerk of the Circuit Court is directed to transmit attested copies of this *Final Order* to the Business Court Division at the Berkeley County Judicial Center, Suite 2100, 380 W. South Street, Martinsburg, WV 25401, and all counsel of record, addresses listed below.

ENTER this 28th day of September, 2017.

CHRISTOPHER C. WILKES, JUDGE
Business Court Division

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BARBOUR COUNTY CIRCUIT CLERK
By: [Signature]
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