

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Phoenix Society of West Virginia, Inc.,
formerly known as Weirton Heights
Volunteer Fire Department, Inc.,
Respondent Below, Petitioner**

FILED
November 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-1399 (Hancock County 09-C-92)

**The County Commission of
Hancock County, West Virginia,
Petitioner Below, Respondent**

MEMORANDUM DECISION

Petitioner, Phoenix Society of West Virginia, Inc., formerly known as the Weirton Heights Volunteer Fire Department, Inc.¹ (hereinafter “petitioner” or “Weirton Heights Volunteer Fire Department”), by its counsel Michael Edward Nogay, appeals from the Circuit Court of Hancock County’s “Order” entered on September 23, 2011, in this declaratory judgment action brought by respondent, The County Commission of Hancock County, West Virginia (the “County Commission”). Petitioner also appeals from the circuit court’s “Order Denying Defendant’s Motion to Reconsider and/or Stay of Execution of Order,” which was also entered on September 23, 2011. The County Commission appears by its counsel, William T. Fahey.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds that it does not disagree with the circuit court’s decision and determines that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Weirton Heights Volunteer Fire Department was incorporated in 1942. On August 23, 1985, a deed was signed reflecting the transfer of title to the subject property to the Weirton Heights Volunteer Fire Department for the sum of \$79,500. This deed was recorded in the Office

¹ The appendix record reflects that the Weirton Volunteer Fire Department, Inc., amended its articles of incorporation to change its name to the “Phoenix Society of West Virginia, Inc.,” which was certified by the West Virginia Secretary of State on October 17, 2007. The appendix record also contains a copy of a Quitclaim Deed dated May 14, 2008, wherein the subject property was transferred into the name of the Phoenix Society of West Virginia, Inc.

of the Clerk of the Hancock County Commission on September 27, 1985. Five days later, on October 2, 1985, the Weirton Heights Volunteer Fire Department entered into an Agreement with the County Commission, then known as the Board of Commissioners of Hancock County, West Virginia. This Agreement reflects that the County Commission released fire levy funds in the amount of \$79,500 to finance the purchase of the subject property. Although the deed was dated and recorded prior to the date of this Agreement, the County Commission states, and the appendix record supports, the conclusion that fire levy funds were used to finance the purchase of the subject property. The 1985 Agreement between the parties provides, as follows:

(4) The Department [the Weirton Heights Volunteer Fire Department] further agrees that the fire station will be used only for the purpose of rendering firefighting services to the residents of Hancock County, West Virginia and that the building will be used for no other purposes not specifically related to rendering firefighting protection and services to the residents of Hancock County, West Virginia.

(5) The Department further agrees that in the event that the land or building to be erected under this Agreement shall be sold, that the proceeds would be used exclusively for firefighting purposes within Hancock County, West Virginia.

Petitioner states that in July of 1986, it obtained a \$123,000 loan that was secured by a deed of trust on the subject property, and that the loan proceeds were used to construct the fire station on the property. Petitioner states that the loan was repaid through its own fundraising efforts, in addition to fire levy funds. The County Commission states, however, that the repayment of this deed of trust was largely through taxpayer installments to petitioner from both the County and the State of West Virginia. There is a paucity of evidence from either party in the appendix record concerning how much each contributed financially toward the construction of the fire station through the repayment of this loan.² The deed of trust was released in 1997.

On May 13, 2002, the Weirton City Council passed a resolution reorganizing fire service in the city to create a single combination fire department, which would consist of both paid and volunteer fire fighters. Petitioner declined the City's invitation to join that combined department. Thus, in 2002, the State Fire Commission withdrew its certification of the Weirton Heights Volunteer Fire Department. In *Weirton Heights Volunteer Fire Dept., Inc. v. State Fire Comm'n*, 218 W.Va. 668, 628 S.E.2d 98 (2005), this Court reversed the State Fire Commission's withdrawal of petitioner's certification due to the Commission's lack of published rules and regulations. In 2007, the State Fire Commission again withdrew its certification of the Weirton Heights Volunteer Fire Department and that decision was not appealed. Consequently, petitioner has not been providing fire fighting services for many years.

In 2009, the County Commission filed a declaratory judgment action in the circuit court seeking a determination of its interest in the subject property. The County Commission stated in

² Information submitted by the amicus curiae below was somewhat helpful in this regard.

its complaint that the subject property and the structure thereon were no longer being used for fire fighting purposes in Hancock County.

By letter dated August 14, 2009, the circuit court set the matter for “full argument” with “findings of fact and conclusions of law” to be submitted by the parties, which they did. Petitioner states that the circuit court issued an oral ruling from the bench at the final hearing held on August 26, 2011, ordering that the subject property be conveyed to the County Commission, which ruling is reflected in the circuit court’s order entered on September 23, 2011. The circuit court found that “the purpose of the building for fire fighting on behalf of the citizens of Hancock County, West Virginia no longer exists and therefore, the property should revert for public purposes in Hancock County, West Virginia.” The action was brought to determine the interest of the County Commission in the real and personal property associated with the former Weirton Heights Volunteer Fire Department. The circuit court’s order directed the Clerk of the County Commission to record a conveyance of the subject real property to the County Commission as if it were an act and deed of, and as if endorsed by, petitioner, and to note thereon that the conveyance was upon order of the circuit court. The circuit court denied petitioner’s “Motion to Reconsider and/or Stay Execution of Order.”

On appeal, petitioner asserts that the circuit court ruled precipitously. The appendix record demonstrates to the contrary. The circuit court extended multiple invitations to the parties to submit argument and evidence, which they did. The circuit court directed the parties to submit proposed findings of fact and conclusions of law, which they did. The circuit court sent a letter dated July 11, 2011, to the parties’ respective counsel that advised that a final hearing would be held in the matter on August 26, 2011, “as a prelude to a Final Order.” Clearly, the parties were on notice that a dispositive ruling on the matter was impending. While the parties have not provided this Court with any transcripts of any of the hearings held in this matter, it would appear that petitioner did not make any procedural objection either prior to or during the August 26, 2011, final hearing. Had petitioner done so, then surely it would have stated the same in its appellate brief and would have included a hearing transcript or other document in the appendix record to support its position. Regarding petitioner’s claim that it was denied due process in this matter, we concur with the circuit court’s statement that the touchstone of due process is an opportunity to be heard. *Anderson v. George*, 160 W.Va. 76, 233 S.E.2d 407 (1977). Our review of the appendix record supports the conclusion that petitioner clearly had an opportunity to be heard in this matter.

Petitioner also argues that the circuit court erred in relying upon West Virginia Code § 7-3-3 in reaching its decision. This statute provides, in part, “[t]hat all real property conveyed or sold by a county commission to a volunteer fire department or volunteer ambulance service under this provision shall revert back to the county commission if the volunteer fire department or volunteer ambulance service ceases to use it for the purpose for which the real property was conveyed or sold.” Petitioner argues that the relevant portion of this statute does not apply to the facts of the case at bar because the County Commission never held deeded title to the real estate at issue, thus, it could never have “conveyed or sold” the property to petitioner. While we agree that the facts that we have been presented do not fit squarely within the cited statutory language, the County Commission argues and the appendix record supports the conclusion that the County

Commission funded the purchase of the subject property, even though it never held actual title to the property.

Petitioner relies upon a similar agreement between the County Commission and a different fire company, the New Cumberland Fire Company, dated January 11, 1985, which contains a reverter clause. Petitioner asserts that the parties' Agreement herein does not contain a reverter clause, yet the circuit court has essentially ordered a reverter of the subject property. Both agreements, however, reflect that taxpayer monies were being used to acquire the respective properties for the purpose of increasing the fire protection services for the citizens of Hancock County. The agreements also reflect that the parties thereto clearly understood that the respective properties were to be used *solely* for fire fighting purposes. It cannot be said that petitioner should be allowed to retain the subject property, which was purchased with taxpayer dollars and which was to be used solely for fire fighting purposes, when petitioner is no longer providing fire fighting services, simply because the parties' agreement did not contain a reverter clause. Any other conclusion would penalize the public for the County Commission's expenditure of taxpayer dollars to ensure the provision of fire fighting services to the citizens of Hancock County.³ While West Virginia Code § 7-3-3 may not be directly on point, we are persuaded by our law regarding constructive or resulting trusts—wherein one party pays for property but title to the property is taken in the name of another—in concluding that we do not disagree with the circuit court's decision to order the transfer of the subject property to the County Commission.

Lastly, petitioner asserts that the circuit court erred by failing to address its argument that it had acquired an equitable ownership interest in the subject property through its fundraising efforts over the years. Petitioner does not cite to any evidence in the appendix record that documents these years of fundraising events, such as when they were held, how much money was raised, how that money was spent, etc. We also note that petitioner did not raise this point in its "Motion to Reconsider and/or Stay Execution of Order." Further, the only law cited by petitioner in its appellate brief to support its claim of equitable ownership is *Foster v. Frampton-Foster Lumber Co.*, 96 W.Va. 325, 123 S.E. 50 (1924). There is nothing in *Foster*, which involved a dispute between private entities, that would lead this Court to conclude that a private entity can acquire an equitable ownership interest in public or government property.⁴ Any ruling favorable to petitioner in this regard would arguably mean that any time fundraising efforts were made by private individuals, organizations, or clubs for the benefit of either public or

³ We also note that the agreement between the New Cumberland Fire Company and the County Commission provided that the Fire Company could retain the property housing its fire station if it reimbursed the County Commission for the funds it gave for the purchase of the property. Although petitioner wants to retain the subject property, either as a fire fighting museum or for some other non-fire fighting purpose, it has not indicated whether it ever offered to reimburse the County Commission for the taxpayer monies expended in the purchase of the subject property and the construction of the fire station thereon, so as to retain the property.

⁴ We are also mindful of our prior case law wherein this Court held in equity that there can be no adverse possession of land owned by a county and used for a public purpose. *See* Syl. Pt. 2, *Foley v. County Court*, 54 W.Va. 16, 46 S.E. 246 (1903).

government property, those individuals, organization, or clubs could claim an equitable ownership interest in that public or government property. Such a proposition is untenable.

“A circuit court's entry of a declaratory judgment is reviewed *de novo*.’ Syllabus Point 3, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995).” Syl. Pt. 1, *Estate of Fussell v. Fortney*, ___ W.Va. ___, 730 S.E.2d 405 (2012). Having considered the parties’ arguments as set forth in their respective briefs, and having reviewed the appendix record and the circuit court’s orders being appealed, we find no basis to reverse the circuit court’s disposition under the facts and circumstances of this case. For these reasons, we affirm.

Affirmed.

ISSUED: November 26, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh