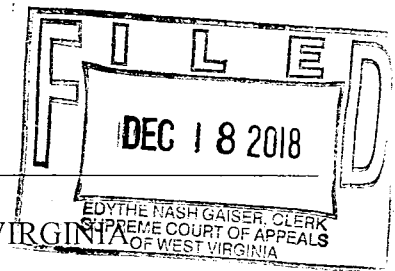


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Docket No. 18-0704



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

PATRICK ELZA
Petitioner (Defendant Below)

v.

CITY OF ELKINS
Respondent (Plaintiff Below)

FROM THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA
THE HONORABLE DAVID H. WILMOTH

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE¹

1. City of Elkins Ordinances 178 and 195.

Before the fiscal year beginning on July 1, 2015, the City of Elkins (hereinafter “the Respondent”), had been charging fire fees to those who lived within the Respondent’s municipal limits. (Appendix Record Volume 3 [hereinafter “A.R.3.”] at p. 16). However, fire services were also available to those outside of municipal limits to the First Due area even though those individuals and property owners did not pay into the fire fee. (A.R.3., at p. 17). The First Due area spans over 150 square miles and contains a total population of approximately 15,000. (A.R.3., at p. 34).

Over time, it became apparent that the fire fees generated by those within the municipality were not enough to cover the budget of the Elkins Fire Department and, therefore, optimal fire and emergency response services were not being provided to its users. *Id.* For instance, when there was a call outside of municipal limits, the Elkins Fire Department was forced to attempt to provide service with only one truck and twelve firefighters to cut down on expenses. (A.R.3., at p. 33). To make up for shortfalls in the budget, money had to be taken out of the Respondent’s general fund. (A.R.3., at p. 32).

Due to these concerns, the Respondent set forth to begin charging fire fees to the First Due area, which had previously been receiving fire services at no cost. (A.R.3., at p. 102). Before implementing this fire fee to the First Due area, the Respondent’s City Council convened and reviewed expenses that these new fire fees were to cover. (A.R.3., at pp. 103-108). The City Counsel came to the conclusion that reasonable expenses for both the current fire services to all

¹ Pursuant to Rule 10(d) of the Rules of Appellate Procedure, the Respondent, the City of Elkins (hereinafter “the Respondent”), provides the following “Statement of the Case” to the extent necessary to correct inaccuracies and omissions in Petitioner’s brief and provide the Court with a more thorough understanding of the factual and procedural background of this dispute.

areas and for improvement to provide optimal fire services would total approximately \$881,016. (Appendix Record Volume 1 [hereinafter “A.R.1.”] at p. 125. These expenses included, but were not limited to, worker’s compensation insurance, office supplies, training and education, pension funds and salaries for hiring new employees, and new equipment and uniforms. *Id.* The Respondent made the decision that the expenditures could be covered by imposing fire fees on the First Due area using the same criteria as for properties within municipal limits, which was a \$100.00 flat fee per year for residential property and \$0.05 per square foot for commercial space with a minimum of \$100.00 per year. (A.R.1., at pp. 132-137).

In 2015, after passing these fire fees on to the First Due area as encapsulated by City of Elkins Ordinance 178, and later modified by City of Elkins Ordinance 195, the Elkins Fire Department saw improvements which lead to better service for all of its users. (A.R.3., at p. 38). Furthermore, the Elkins Fire Department was able to go from an ISO rating of 5 to an ISO rating of three, which would lower insurance rates for all users of the Elkins Fire Department services inside and outside municipal limits. (A.R.3., at p. 48). This decrease in ISO rating was made possible through the additional fire fees from the First Due area. (A.R.3., at pp. 49-50).

2. Patrick Elza Property and Magistrate Court Suit.

On August 28, 2018, the Respondent filed a Complaint against Patrick Elza (hereinafter “the Petitioner”) in the Magistrate Court of Randolph County, West Virginia, for failure to pay \$363.02 in First Due fire fees for his commercial property in the First Due area.² (A.R.1., at p. 1). On September 5, the Petitioner filed his Answer asserting, in part, that the First Due fire fees were illegal and should be voided. (A.R.1., at p. 3).

² The Petitioner also owns his residence which is located within the municipal limits of the Respondent. (A.R.2., at p. 15).

The Petitioner also filed a discovery motion requesting a multitude of documents relating to the Elkins Fire Department. (A.R.1., at pp. 6-7). The Respondent responded by stating that none of the requested documents were in its custody, control, or possession and that the Petitioner had previously filed FOIA requests that would have provided him with the information that he was requesting. (A.R.1., at pp. 8-10). The Petitioner again filed a discovery motion requesting that the Respondent provide him with information relating to the Elkins Fire Department and the Elkins Volunteer Fire Department. (A.R.1., at pp. 13-14). The Respondent then moved to remove the action to the Circuit Court of Randolph County, West Virginia, which was granted on November 16, 2017. (A.R.1., at pp. 15-17).

3. Circuit Court Proceedings and Bench Trial.

Once removed to Circuit Court, the Respondent responded to the Petitioner's second discovery motion which filed in Magistrate Court, providing as much responsive information as possible. (A.R.1., at pp. 20-23). On February 6, 2018, the Petitioner served another set of discovery requests upon the Respondent. (A.R.1., at pp. 24-26). In these additional discovery requests, the Petitioner made the following discovery request:

6. Itemization of all expenses incurred by the Elkins Fire Department from providing fire protective services outside City limits (First Response Area) and an itemization of all expenses incurred from providing fire protective services within the City limits for fiscal years 2015 (before fire fee was assessed) 2016 and 2017 and all reports of fire and non-fire incidents filed with the West Virginia State Fire Marshall's Office (pursuant to the West Virginia State Fire Commission Requirements for West Virginia Fire Departments, Section 6.02 National Fire Incident Reporting System.

(A.R.1., at p. 25). The Respondent provided documentation responsive to this discovery request in the form of total expenditures for the Elkins Fire Department because the Respondent did not keep itemized information regarding specific expenses of the Elkins Fire Department on record. (A.R.1., at p. 29).

The Petitioner then filed on May 1, 2018, a motion to compel discovery requesting, in pertinent part, that the Respondent itemize expenses for the Elkins Fire Department based on where its services took place. (A.R.1., at p. 33). In response, on May 21, 2018, the Respondent filed its motion for summary judgment with affidavits affirming that the Petitioner owed the delinquent fire fees assessed against him. (A.R.1., at pp. 39-50). On May 25, the Respondent filed a response to the Petitioner's motion to compel, once again informing the Circuit Court that it had provided all responsive information to the Petitioner. (A.R.1., at pp. 50-51).

On May 29, 2018, a hearing was held in the matter before Randolph County Circuit Court Judge David Wilmoth. (Appendix Record Volume 2 [hereinafter "A.R.2.," at p. 2). The Petitioner voiced his concerns regarding discovery that he argued was due to him regarding the itemization of expenses for the Elkins Fire Department. (A.R.2., at p. 5). The Petitioner informed the Circuit Court that he had received the expenses as a total from the Respondent, but still requested that they be itemized for him. (A.R.2., at p. 6). The Circuit Court ruled that the Respondent was not obligated to provide the information to the Petitioner in the exact way the Petitioner wanted it if the Respondent was unable to ascertain the expense distribution itself. (A.R.2., at pp. 18-19). The Circuit Court specifically stated that the information requested by the Petitioner "may not be worded out exactly the way or informed the way that [the Petitioner] requested but it is available to [the Petitioner][.]" (A.R.2., at p. 29). The Circuit Court declined to rule on the Respondent's motion for summary judgment until after the bench trial in the matter set for June 8. (A.R.2., at p. 32).

At the bench trial of this matter, the Respondent called its witnesses, which included the Petitioner, Elkins Mayor Van Broughton, Elkins Fire Department Chief Thomas Meader, and City of Elkins Treasurer Tracy Judy. The Petitioner did not call any witnesses. During the Petitioner's

testimony, he stated that he had no problem with the fire fee being charged to his home within city limits but not to his business located in the First Due area. (A.R.2., at pp. 8-9).

Mr. Broughton then testified regarding the adoption and amendment of the fire fee ordinances at issue. (A.R.3., at pp. 18-23). Chief Meader then testified concerning the operations and expenses of the Elkins Fire Department. (A.R.3., at pp. 24-69). Specifically, Chief Meader testified that the Respondent would have been able to charge one and a half times the current amount in fire fees to those residing and owning property in the First Due area but chose not to. (A.R.3., at p. 33). He also testified at length regarding how the addition of First Due fire fees have helped the Elkins Fire Department in performing its duties in both fire suppression and other emergency services. (A.R.3., at pp. 34-52).

Ms. Judy testified regarding the First Due fire fee generally. (A.R.3., at pp. 69-110). She first stated that all fire fees collected can only be used by the Elkins Fire Department and cannot be used for any other department in the general fund. (A.R.3., at p. 81). Furthermore, no county fire fees could be charged to any resident or property owner paying fire fees in the First Due area. (A.R.3., at p. 93). To speak to the reasons for the amount of the First Due fire fee, Mrs. Judy then testified regarding the City Council's deliberations regarding the amount charged for fire fees and the expenses of the Elkins Fire Department that lead to the final numbers for the fire fee's implementation. (A.R.3., at pp. 102-108). Finally, Ms. Judy testified that the Petitioner owed \$1,275.13 in unpaid First Due fire fees when accounting for penalties and other fees. (A.R.3., at p. 98).

Throughout the course of the trial, the Respondent introduced nine exhibits while the Petitioner introduced one. (A.R.1., at pp. 70-126). At the end of the proceedings, the Petitioner attempted to admit into evidence a document that supposedly itemized the amount of calls made

from the Elkins Fire Department to the First Due area, but the Circuit Court sustained the Respondent's objection to the admission of the document into evidence for lack of foundation. (A.R.3., at p. 139). After hearing the arguments of counsel, the Circuit Court declined to offer the Petitioner relief on the basis of the invalidity of the fire fee and granted judgment to the Respondent. (A.R.1., at pp. 127-131).

SUMMARY OF THE ARGUMENT

Municipalities are empowered by the legislature under West Virginia Code § 8-13-13 to charge for any essential or municipal service it provides to those outside of municipal limits. This is allowable if the charge for the service is a fee and not a tax. If the charge is implemented for the purpose of generating revenue, then it is considered a tax, which is impermissible to impose on those outside of municipal limits. However, if the charge is implemented for the purpose of defraying the expense of service or the supervision or supervision of activities relating to the service, then that charge is a permissible fee and may be imposed in that instance.

Once it is determined that the fee is not a tax, then it must be determined whether the fee is reasonable. To determine whether a fee is reasonable, it must be considered whether it is sufficiently related to the use of the special service for which the fee is imposed. When an ordinance involving a fee is passed by a municipality, it is presumptively reasonable and will stand unless it is clearly proven that it is unreasonable.

In the case at hand, the issue in contention is whether the fire fee charged to the First Due area is a reasonable fee and not a tax or an unreasonable fee. The Respondent argues that the lower court ruled correctly when it held that the fire fee was a reasonable fee and, therefore, could continue to be implemented upon those living in or owning property in the First Due area.

The fire fees imposed upon the First Due area are not and should not be considered a tax as opposed to a fee. The entirety of the money generated from these additional fire fees went to

the Elkins Fire Department to cover expenses, some related to necessary improvements, so that it could provide the best fire service possible to those within the city limits and the First Due area. The Elkins Fire Department was in dire need of capital to cover its expenses and had been relying on the Respondent's general fund for years, which drained money from other worthwhile projects and services provided by the Respondent. The fire fee for the First Due area did not generate any revenue for the Respondent, all proceeds from the fire fee and its enforcement went back to the Elkins Fire Department to provide for and supervise the service of firefighting and emergency services for those inside and outside city limits.

Likewise, the fire fees imposed upon the First Due area were reasonable and thus permissible. For years, the First Due area did not pay any fire fees and were still provided with the same fire services and as those within city limits who were paying their fire fees. The Elkins Fire Department was suffering from lack of funding and could not provide several key services to its users such as updated fire trucks, more staff, or other equipment. Therefore, these fire fees to the First Due area were imposed to help provide for the Elkins Fire Department and defray the expenses it would incur in providing services to its users. The decision was reasonably calculated as a means to reach its end. Furthermore, the Respondent chose to fairly charge those in the First Due area the same amount for fire fees as those within city limits, even though it could have charged the First Due area more. Taking all the above into consideration, there is no question that the fire fee to the First Due area is reasonable.

Finally, the Petitioner makes the claim that he was denied the ability to engage in discovery after he requested information relating to fire service expenses for properties inside the city limits and in the First Due area. The Respondent produced the total expenses for the Elkins Fire Department but does not keep record of how the expenses are broken down between the two areas.

The Respondent is not in possession of this information and is only responsible for turning over documents or information in discovery that it is in possession of. To comport with the Petitioner's requests, the Respondent would have to generate new documentation solely for the purpose of providing the Petitioner the information in the exact way that he would prefer it. The lower court correctly ruled that the Petitioner is not entitled to discovery that is not within the possession, custody, or control of the person the discovery requests were served upon.

The Respondent requests that this Honorable Court affirm the decision of the Circuit Court below in its determination that the fire fees imposed upon the First Due area are not a tax but rather a reasonable fee. Furthermore, the Respondent requests this Honorable Court affirm the Circuit Court's decision that the Petitioner was not entitled to the information that he requested but was not in the possession, custody, or control of the Respondent.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The case at hand involves claims of unsustainable exercise of discretion where the law governing that discretion is settled and claims of insufficient evidence or as a result against the weight of the evidence. Pursuant to Rule 18(a) of the Rules of Appellate Procedure for the West Virginia Supreme Court of Appeals, the Respondent's counsel does not believe oral argument will be necessary as it is anticipated that the facts and legal arguments have been adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

STANDARD OF REVIEW

In the case at hand, there are two different standards of review as the Petitioner has brought forth two different claims of error. First, regarding the standard of review for a bench trial, this Court has held the following:

In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. A circuit court's finding is clearly erroneous when

“although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”

Pub. Citizen, Inc. v. First Nat. Bank in Fairmont, 198 W. Va. 329, 334, 480 S.E.2d 538, 543 (1996). However, questions of law are subject to a *de novo* review. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

Second, regarding the Petitioner’s assignment of error alleged against the trial court’s discovery order, this Court has applied the following standard:

A circuit court’s ruling on discovery requests is reviewed for an abuse of discretion standard; but, where a circuit court’s ruling turns on a misinterpretation of the West Virginia Rules of Civil Procedure, our review is plenary. The discretion that is normally given to a trial court’s procedural decisions does not apply where the trial court makes no findings or applies the wrong legal standard.

Syl. Pt. 5, *State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht*, 213 W. Va. 457, 461, 583 S.E.2d 80, 84 (2003); *see also State Farm Mut. Auto Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992) (holding that the standard of review regarding discovery orders is clear error resulting from substantial abuse of discretion).

ARGUMENT

1. The Circuit Court Correctly Ruled That the First Due Fire Fee Promulgated by City of Elkins Ordinances 178 and 195 Does Not Call for the Implantation of a Tax or An Unreasonable Fee.

The Petitioner actually makes two assignments of error in his first assignment of error. First, the Petitioner argues that the fire fee is not a fee at all, but rather an impermissible tax. Pet’r Br. at p. 9. Second, the Petitioner argues in the alternative that if the Court were to find that the fire fee is not a tax, then the fire fee is still impermissible because it is not a reasonable fee. *Id.* at p. 11.

However, the Petitioner is incorrect on both assertions. First, the fire fee is a permissible fee and not a tax because the primary purpose of the fire fee is to cover the expenses that come

with providing fire services to the City of Elkins and the First Due Area. Second, the fire fee is a reasonable fee because it equitably serves the purpose for which it was enacted. The Respondent addresses each of the Petitioner's arguments in kind *infra*.

a. The First Due Fire Fee Promulgated by City of Elkins Ordinances 178 and 195 is Not a Tax Because the Primary Purpose of the Fire Fee is to Cover the Expense of Providing the Fire Services to the First Due Area and Regulation and Supervision of Improvements to the Elkins Fire Department that Would Serve the First Due Area.

The introduction of a fire fee for an area not within the limits of a municipality derives from the authority granted to municipalities in West Virginia Code § 8-13-13(a). West Virginia Code § 8-13-13 states that “a municipality which furnishes any essential or special municipal service, including . . . fire protection . . . has plenary power and authority to . . . impose by ordinance upon the users of the service reasonable rates, fees and charges to be collected in the manner specified in the ordinance.” *See also* Syl. Pt. 3, *City of Huntington v. Bacon*, 196 W. Va. 457, 473 S.E.2d 743 (1996) (“Municipalities have no inherent power with regard to the exercise of the functions of their government. Such power depends solely upon grants of power by Acts of Legislature[.].”). “Plenary power” is commonly defined as: “Authority and power as broad as is required in a given case.” *Ellison v. City of Parkersburg*, 168 W. Va. 468, 472, 284 S.E.2d 903, 905–06 (1981).

However, it is important that a fire fee must remain a fee and not a tax, as to impose a tax upon those dwelling or owning property outside the limits of a municipality would subject them to taxation without representation. *Davisson v. City of Bridgeport*, No. 13-0378, at *3 (W. Va. Jan. 15, 2014). This Court has held that “[t]he primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities.” *Cooper v. City of Charleston*, 218 W. Va. 279,

285, 624 S.E.2d 716, 722 (2005); *see also* *Bacon*, 196 W. Va. at 466, 473 S.E.2d at 752. Though case law “reveals a somewhat convoluted history in the area of taxes and fees, this Court has generally operated on the premise that charges for services rendered by a municipality are user fees and not taxes.” *Bacon*, 196 W. Va. at 473 S.E.2d at 752; *see also* *City of Charleston v. Board of Education*, 158 W. Va. 141, 145, 209 S.E.2d 55, 57 (1974) (the charge for fire protection is a fee and not a tax); *City of Moundsville v. Steele*, 152 W. Va. 465, 164 S.E.2d 430 (1968) (charge of \$0.25 per front foot for street improvement is a fee and not a tax); *Duling Bros. Co. v. City of Huntington*, 120 W. Va. 85, 89–90, 196 S.E. 552, 554–55 (1938) (charges for a flood control program are not subject to ordinary taxing regulations).

In the instances where this Court has found that a service fee is actually a tax, the fee was actually an *ad valorem* tax which was levied according to the value of the property. *City of Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 172 W. Va. 505, 507, 308 S.E.2d 527, 529 (1983). In *Pitrolo Pontiac-Cadillac Co.*, two companies sought to defeat the collection of fire services fees by the City of Fairmont by claiming that the fire service charge was an *ad valorem* tax. *Id.* at 506, 308 S.E.2d at 528. In its holding that the tax rendered the collection of fire fees invalid, this Court stated that such *ad valorem* tax cannot be read to be a permissible fire fee under W. Va. Code § 8-13-13. *Id.* at 511, 308 S.E.2d at 533.

The issue of taxes possibly disguised as fire fees was revisited by this Court in *Davisson*. In *Davisson*, the City of Bridgeport adopted an amendment to one of its existing ordinances to assess a fire service fee on “users and beneficiaries” of services provided by the City who reside outside the corporate limits of the City of Bridgeport, but who are within what was referred to as a “First Due Area.” *Davisson*, No. 13-0378, at *1. The Court held that the fire fee was a fee and

not a tax because its primary purpose was to cover the expenses that had been undertaken in providing fire services to citizens who owned property outside Bridgeport city limits. *Id.*

In the case at hand, there is no question that the fire fee charged to those property owners in the First Due area is a fee and not a tax. First, the fire fee is not an *ad valorem* tax as prohibited by *Pitrolo Pontiac-Cadillac Co.* The fire fee assessed in this matter is not based upon the value of property outside of the City of Elkins. Rather, the fire fee is assessed based on residential homes being charged equally and commercial properties being charged by the square foot. (A.R.1., at p. 135). It is not a tax based on the value of property, which is prohibited, but rather a fee assessed consistently against all property in the First Due area.

Second, a tax would obtain revenue for the government while a fee would cover expenses for providing a service. *Cooper*, 218 W. Va. at 285, 624 S.E.2d at 722. City of Elkins Treasurer Tracy Judy confirmed that the money obtained from the fire fee at issue in this case is used solely for the fire department which would service the First Due area as well as the City of Elkins, and for no other purpose. (A.R.3., at p. 81). The Respondent is not “generating revenue” for the city government but restricting that income solely for the maintenance and improvement of the fire department which serves the First Due area. This income was also desperately needed by the Elkins Fire Department to provide fire services to the First Due area, as explained by the Elkins Fire Department Chief Thomas Meader:

CHIEF MEADER: Determination on how to expand our services outside the city and the money we was needing to that, that what we come up – the figure that was fair and justified in order to operate outside the city limits which we’d been doing already. And like I said, the funding coming in would not sustain that, you know, to run outside the City. We was on a limited basis running outside the City. Excuse me. When we first – we were operating outside the City, we was only allowed to take one truck and 12 guys. Okay. Which is a little scary sometimes. But we didn’t have an option. And that was funded through the volunteers. ***The volunteers responded to them incidents as far as going outside our city limits but in our first***

new area – and it got to a – an expense that was really depleting the volunteers of the Elkins Fire Department.

(A.R.3., at pp. 33-34) (emphasis added). It is clear that the Elkins Fire Department was operating at a loss to provide service to the First Due area. Therefore, it was within the plenary powers of the Respondent to attempt to cover this cost with a fire fee. No revenue for the spending on any other source was generated.

Third, the increase in income due to the fire fees has allowed the Respondent to improve its fire house, which would be considered “maintenance or improvement of the service” of fire protection under W. Va. Code § 8-13-13. The Petitioner makes the claim that the fire fee generated revenue for the Respondent because the revenues and expenditures increased during the time it was implemented. Pet’r Br. at p. 11. The Petitioner bases this claim on the fact that expenditures have grown since the implementation of the fire fee without any new area for which to provide fire coverage. (A.R.1., at p. 113). However, the Petitioner ignores that these increased expenditures are the result of improvements and changes made to the Elkins Fire Department to provide better service to the First Due area and the fire fee is necessary to defray the costs of these expenditures. For example, the Elkins Fire Department has been able to hire four additional paid firefighters which work variations of 24-hour shifts. (A.R.3., at pp. 43-44). The plan is to continue hiring a total of six more firefighters to provide the best service to both the Respondent and the First Due area. (A.R.3., at p. 46). Additionally, the fire fees have allowed the Elkins Fire Department to purchase a new fire truck to better serve those who live within its jurisdiction. (A.R.3., at pp. 50-51). Finally, the Elkins Fire Department building itself had several expenses that were paid by the First Due area fire fees where the previous fire fees alone would not cover, such as a new roof, low cost LED lighting, and other general expenses of the building. (A.R.3., at p. 51).

City of Elkins Treasurer Tracy Judy runs through the process undertaken by the Elkins City Council to account for expenses and improvements for the Elkins Fire Department that eventually totals \$881,016.00, which is more than the amount collected in fire fees since they were expanded to the First Due area. (A.R.3., p. 103-108). In conclusion, Ms. Judy testified as follows:

ATTORNEY ROBERTS: So that number, \$881,016, was the projection to what it would cost in order to provide the services for the City residents inside the limits and the first new area, correct?

TRACY JUDY: Yes.

ATTORNEY ROBERTS: Could you – do you still have Exhibit 4 in front of you? It's the four-page document with the collections?

TRACY JUDY: Yes.

ATTORNEY ROBERTS: Would you mind turning to the very last page of that document which represents I believe this fiscal year up through the end of May?

TRACY JUDY: Yes.

ATTORNEY ROBERTS: Which is not quite the full fiscal year, correct?

TRACY JUDY: That's correct.

ATTORNEY ROBERTS: What was the number that was collected in fire fees for both the first year and the City area for this year so far?

TRACY JUDY: \$827,945.93.

ATTORNEY ROBERTS: And would you agree with me that it's actually less than the projected amount that was in the calculation when council was looking at this fire fee imposition in the first new area?

TRACY JUDY: Yes.

(A.R.3., at pp. 108-109).

In short, just because the Elkins Fire Department did not have any new area to cover did not mean that it did not have dire improvement expenses which, if met, would keep the department serving the citizens of the First Due area as optimally as possible. Before the First Due area fire

fees were implemented, the Elkins Fire Department was not providing the best service possible to the First Due area as it had several improvements to make such as additional hiring and additional equipment. (A.R.3., at pp. 33-34). Also, the department was consistently relying on the Respondent's general fund to cover its expenses for the fiscal year that it was not able to cover due to lack of cash. (A.R.1., at p. 113). The Petitioner makes the accusation that the First Due fire fees provided a boon to the Respondent's revenue because it allowed for money in the general fund to be used for additional expenses. Pet'r Br. at p. 11. However, the Petitioner ignores that the general fund was never meant to be used to prop up the Elkins Fire Department year after year. The Elkins Fire Department was to rely on the fire fund, which was solely lacking in its ability to cover the department's expenses until the First Due area fire fees were promulgated.

In conclusion, the First Due area fire fees are a fee and not a tax because they are being collected equally for all commercial buildings in the First Due area, the money is being used only for the benefit of the Elkins Fire Department, and the amount collected is being used to defray the costs of providing adequate service to the First Due area through additional manpower and equipment.

b. The First Due Fire Fee Promulgated by City of Elkins Ordinances 178 and 195 is Not an Unreasonable Fee Because the Amount of Fees Imposed by the Respondent Bear a Direct and Reasonable Relationship to the Actual Services Provided in Exchange for the Fee.

Even if a fee implemented by a municipality upon those not within its limits is not technically a tax, the fee must be considered "reasonable" to be valid under W. Va. Code § 8-13-13. *Davisson*, No. 13-0378, at *3. The determination of whether an ordinance reasonably serves the purpose for which it was enacted is initially made by the municipal authorities. *Ellison*, 168 W. Va. at 472, 284 S.E.2d at 906. Therefore, "[t]heir passage of the ordinance gives it a presumptive validity and a court should not hold the ordinance to be invalid unless it is clear that

the ordinance is unreasonable.” *Id.* (citing *Henderson v. Bluefield*, 98 W. Va. 640, 127 S.E. 492 (1925)). The burden of proof rests with the Petitioner to “prove that the user fee is clearly unreasonable and that it clearly fails to reasonably serve the purpose for which it was enacted.” *Cooper*, 218 W. Va. at 287, 624 S.E.2d at 724.

In attempting to prove a fee is unreasonable, this Court has noted that “perfect equity is impossible to achieve in any tax scheme, but perfect equity is not the test.” *Clay County Citizens for Fair Taxation v. Clay County Commission*, 192 W. Va. 408, 411, 452 S.E.2d 724, 727 (1994). To that end, it is well-founded that “charges for services provided by municipalities cannot always be equally achieved upon all users. This Court will uphold the fee if it is sufficiently related to the use of the special service for which the fee is imposed.” *Cooper*, 218 W. Va. at 287, 624 S.E.2d at 724. The Court will not “invalidate a fee merely because a litigant is able to suggest other possible ways of taxation and opine that such examples are more equitable.” *Id.*

In *Davisson*, the Court discussed the reasonableness of its fire fee for property owners that lived outside the limits of the City of Bridgeport. *Davisson*, No. 13-0378, at *4. This Court noted that “the amount of the fee is reasonable because it equitably serves the purpose for which it was enacted.” *Id.* This decision was reached after reviewing the City of Bridgeport’s calculations that the amount charged would cover the expenses for providing fire service outside the city limits. *Id.* However, it is important to keep in mind that this is merely one way to determine if a fee is reasonable and not the only way.

In the case at hand, the fire fee is a reasonable expense because it was sufficiently related to the special service for which the fee is imposed. First, the fire fee was contemplated carefully by the Respondent before its implementation. The Elkins City Council met and reviewed the budget for the Elkins Fire Department for the upcoming fiscal years. (A.R.3., p. 103-108). It also

documented these anticipated expenses for reference in implementing the fire fee to the First Due area. (A.R.1., at p. 125). Taking these anticipated expenses into account, the fire fees for the First Due area clearly serve the purpose for which they were put in place.

Second, the fire fees for the First Due area should be seen as reasonable because they are assessed based on the exact same criteria in the First Due area as they are for those who have property within city limits.³ (A.R.3, at p. 74). Those within the city limits had already been paying these fees for years before those owning property in the First Due area were required to pay them. It is not unreasonable to charge those outside the city limits the same as those inside the city limits when both grounds will receive the exact same benefits of the Elkins Fire Department. That is especially true when, in reality, it is a bigger expense for the Elkins Fire Department to respond to an incident in the First Due area due to its distance away from the department and its lack of fire hydrants which necessitates the use of an additional truck to provide a water source. Furthermore, the Petitioner does not claim that the fire fees assessed against his house within city limits are unreasonable, but then curiously claims it is unreasonable to apply the exact same fire fee to his business outside the city when the Elkins Fire Department would appear at each building in the same capacity if needed. (A.R.3., at 8-9).

Third, it is true that true that those owning property in the First Due area pay 40% of the fire fees. (A.R.3., at pp. 112-114). However, the method used to assess payment is the same for those who own property in the city. (A.R.3, at p. 74). It is reasonable to apply the same calculations to all properties that benefit from the services of the Elkins Fire Department. The Petitioner seems

³ It should be mentioned here that the Respondent was within its legal capability to charge those owning property in the First Due area more than it charged those living within city limits. *See Davisson*, No. 13-0378, at *4 (“There is no statutory impediment to charging a higher rate for those who live outside the city limits and enjoy the benefit of fire protection services.”). However, the Respondent chose not to do this because such a higher amount would not be necessary to accomplish its goal of defraying future expenses for the Elkins Fire Department. (A.R.3., at p. 75).

to believe that the fire fees should be apportioned to the First Due area based on how much service the department renders to that area. Pet'r Br. at p. 12. However, simply proposing an alternate fire fee plan is not enough to show that the current fire fee plan is unreasonable. *Cooper*, 218 W. Va. at 287, 624 S.E.2d at 724. Besides, the Petitioner's plan is unworkable in the long run. For example, from year to year, the amount of Elkins Fire Department services to the First Due area and to property within the city limits will change. Under the Petitioner's idea of how the fire fee should be implemented, the Respondent would have to reassess the fire fees every year for the First Due district based on the amount of firefighting services that take place there. It is more reasonable to make each area pay the same amount for fire services because the Elkins Fire Department equally serves those areas.

Finally, from a policy perspective, it is necessary to require those living outside city limits to pay the same amount or more than those living in the city limits for the services that both groups enjoy. "The money to pay for municipal services will need to come from somewhere and the alternatives to the fire service fee are not overwhelmingly attractive." *Pitrolo Pontiac-Cadillac Co.*, 172 W. Va. at 514, 308 S.E.2d at 536 (Neely, J., dissenting). Fire departments do not only fight fires. They also are present at roadside accidents, participate in the search for missing persons, and deal with various aspects of emergency response. An emergency is not more likely to occur outside city limits than inside city limits, so it would be inequitable to make one group pay less for emergency responders than the other group.

In conclusion, the burden is on the Petitioner to prove that the First Due area fire fees are unreasonable. The Petitioner is unable to show that the implementation of the fire fee for the First Due area does not serve its intended purposes and, therefore, the fire fee should be considered reasonable as passed by the Respondent.

2. The Circuit Court Correctly Ruled in Denying the Petitioner's Motion to Compel Because the Respondent was Not in Possession of the Information that the Petitioner was Requesting and is Under No Obligation to Produce to the Petitioner Documents or Information that it Does Not Have and Could Not Reasonably Obtain.

The scope of discovery for West Virginia litigants is encapsulated in Rule 26(b) of the West Virginia Rules of Civil Procedure, which states the following in pertinent part:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

W. Va. R. Civ. P. 26(b). However, the scope of discovery is not limitless and the party serving discovery requests is not able to ask the party served for discovery that is not within that party's possession. According to Rule 33 of the West Virginia Rules of Civil Procedure, which governs interrogatories, a party served with interrogatories is only responsible for "furnish[ing] such information *as is available* to the party." W. Va. R. Civ. P. 33(a) (emphasis added). Likewise, Rule 34 of the West Virginia Rules of Civil Procedure governing requests for production states that a party is only obligated to produce documents which are in its "possession, custody or control." W. Va. R. Civ. P. 34(a).

In this case, it is unclear from the Petitioner's brief exactly which of the Petitioner's discovery requests were not adequately answered. (A.R.1., at pp. 4-7, 24-26). The Petitioner claims that he was not given a breakdown of expenses for the Elkins Fire Department in responding to the properties within city limits compared to properties outside of city limits. Pet'r Br. at p. 13. Therefore, the Respondent can only assume that the Petitioner is referring to his discovery request No. 6 in "Defendants [sic] Second Request Motion to Produce Documents." (A.R.1., at 25). The

Respondent answered and produced documents responsive to this request in “Plaintiff’s Responses to Defendant’s Second Request for Discovery.” (A.R.1., at pp. 27-30). Furthermore, through FOIA requests to the Respondent, the Petitioner was provided “[t]he Elkins Fire Department budgets, revenues, and expenditures, for fiscal years 2015, 2016, and 2017.” (A.R.1., at p. 54).

At the May 29, 2018, pretrial hearing in this matter, the Petitioner brought his concerns to the Circuit Court regarding his discovery requests. (A.R.2., at p. 5). However, the Petitioner admitted that he received expenses for the Elkins Fire Department, but they were “all together” and it would be more convenient if these expenses were “broke up.” *Id.* The Respondent truthfully informed the Court that it was not in possession of a breakdown of expenses for property in the city limits and property in the First Due area. (A.R.2., at pp. 6-8). Furthermore, even if the information was available, it was not kept in the manner asked for by the Petitioner and the Respondent is under no obligation to generate a new document that provides the information to the Petitioner in the way that the Petitioner likes. (A.R.2., at p. 8).

In short, the Respondent is only obligated by the West Virginia Rules of Civil Procedure to produce documents that are in its possession and provide answers with information that it has. If such documents or information are not within the control or knowledge of the Respondent, the Respondent is not obligated to put the pieces together for the Petitioner. The Respondent did not have access to the exact itemizations of expenses that the Petitioner was asking for, as that is not how the records were kept by the Respondent. The Respondent, therefore, is not mandated to generate new records solely to comport with the Petitioner’s desires.

The Petitioner was aware that there was some documentation that was in the custody of the Elkins Fire Department and not the Respondent. (A.R.1., at p. 55). He had the ability to send FOIA requests to the Elkins Fire Department to ascertain this information but failed to do so.

Furthermore, the Petitioner also had the opportunity to conduct depositions of Elkins Fire Department officials, or anyone else for that matter, and chose not to do so. He could have also called witnesses at the bench trial of this matter, but only presented himself as a witness. The Petitioner was willing to travel to Charleston, West Virginia, to attain information regarding the amount of calls made to the First Due area, so it is clear that the new the information that he wanted existed. (A.R.3., at p. 126). However, the Petitioner did next to nothing to find that information aside from demanding that they Respondent provide him with information that it did not have.

The Petitioner would also make the argument that the reasonableness of the fee would be called into question if it is known how much the Elkins Fire Department is spending on providing services to the First Due area. Pet'r Br. at p. 14. According to the Petitioner, the only thing that could undermine his defense is "[i]f the First Due area is paying an amount roughly proportional to the amounts expended on it" or a lower amount. *Id.*

Assuming *arguendo* that the Respondent was somehow in possession of the information that the Petitioner requires, the Petitioner is misguided in his evaluation of his defense. As stated above, the standard for reasonableness for a municipal fee is not proportionality to expenses occurred outside the municipal limits, but whether the fee "is sufficiently related to the use of the special service for which the fee is imposed" which it is in this case. *Cooper*, 218 W. Va. at 287, 624 S.E.2d at 724. In fact, the Respondent would have been well within its rights to follow the footsteps of the City of Bridgeport in *Davisson* and charge those in the First Due area a *higher* fee than the fee paid by those in city limits, although the Respondent chose not to do so. *See Davisson*, No. 13-0378, at *4 ("There is no statutory impediment to charging a higher rate for those who live outside the city limits and enjoy the benefit of fire protection services.").

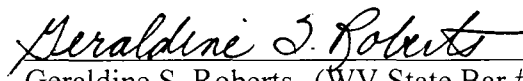
In conclusion, the lower court did not err in denying the Petitioner's motion to compel discovery because the Petitioner was requesting information not within the Respondent's possession and that the Petitioner could have attempted to ascertain elsewhere. Furthermore, the Petitioner is incorrect in his assertion that knowledge of expenses for fire services in the first due area would have been enough to have an effect on the outcome of the case at hand.

CONCLUSION

For the foregoing reasons, the Respondent, the City of Elkins, respectfully requests that this Honorable Court affirm the opinion of the Circuit Court below and award such other relief as this Honorable Court deems just and proper.

Respectfully submitted the 18th day of December, 2018.

**Respondent,
THE CITY OF ELKINS,
By Counsel:**



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